ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8672

3339 HJUD HB 368

215

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02-519 (REV 8/78)

HB

368

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

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May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

House Judiciary	10-25-85	10:00 AM
" "	2-18-86	1:30 PM
" "	4-8-86	1:30 pm
" "	4-25-86	8:00 AM

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : HB 368
Title : An Act Adopting Uniform Comparative Fault Act
Sponsor : Gruenberg & Pignalberi
Requestor : _____
Date of Request : _____

FISCAL DETAIL

Agency Affected : Alaska Court System
BRU : Trial Courts
Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS :

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

No Fiscal Impact

Prepared by : Robert G. Fisher
Division : Alaska Court System
Phone : 204-8215
Date : 2/3/86

Approved by Commissioner : Arthur H. Snowden, II
Agency : Alaska Court System
Date : 2/3/86

Distribution (by Agency preparing fiscal note) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

10/25/85

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M October 4, 1985

SUBJECT: Uniform Comparative Fault Act - HB 368

TO: Representative M.M. Miller
House Judiciary Committee

FROM: Michael F. Ford M.F.
Legislative Counsel

The above referenced bill adds a new chapter to title 9, known as the Uniform Comparative Fault Act. The Uniform Act establishes by statute that form of comparative fault which has already been established by judicial decision in Alaska. See Katz v. State, 540 P2d 1037 (Alaska 1975). This form is known as "pure" comparative fault, in that in recovering damages for injury or death, contributory fault of the claimant diminishes recovery proportionately but does not bar recovery. This is in contrast to some other states that have adopted a modified comparative fault rule, in which contributory fault of the claimant may bar recovery of damages. The Uniform Act is designed to replace AS 09.16, the Contribution Among Joint Tortfeasors Act. The Uniform Act changes the existing system of pro rata allocation of fault among defendants, to one of allocation by percentage of fault. This system has been acknowledged as more compatible with the concept of comparative fault. See Artic Structures, Inc. v. Wedmore, 605 P2d 426 (Alaska 1979).

The following is an analysis of each section of the legislation:

Section 1 - 09.17.010 - This states the general principle, that a claimant's contributory fault does not bar recovery but rather apportions damages according to the proportionate fault of the parties.

09.17.020 - Requires the jury to apportion the damages each claimant is entitled to recover. The concept of fault raises several implications that this section is intended to resolve. The jury, or the court, is required to make

findings allocating a percentage of the total fault to each party. The common law rule of joint and several liability for each party is maintained. Contributory fault, if any, of the claimant is disregarded. The court also determines equitable shares for purposes of contribution. As a part of the judgment, this makes the information available to the parties thereby avoiding need for further court order. If a party has an uncollectable judgment, then reallocation of the equitable shares takes place, among all parties at fault.

09.17.030 - Allows resolution of a claim and counterclaim by set-off. Unless agreed to by the parties, set-off occurs only if a claim is likely to be uncollectable. In cases of multiple defendants, set-off issues are treated separately for each defendant.

09.17.040 - This section changes the existing test for measuring contribution from one based on pro rata shares, to one based on proportionate fault. This is consistent with the concept of comparative fault. A plaintiff who is contributorily at fault also shares in the proportionate responsibility. The rule of joint and several liability of each defendant is unchanged. Between defendants themselves, contribution is determined by equitable share according to 09.17.020.

09.17.050 - Establishes the rules by which a party paying more than his equitable share can recover judgment for contribution. Recovery can be by motion or by separate action. Also establishes time limits within which an action must be brought.

09.17.060 - Continues the statutory provision that release of one person does not discharge others unless provided for in the release. This section changes the existing law concerning contribution of a defendant against another defendant who obtains a release from liability. Under existing law, if a defendant settles, this discharges him from liability for contribution to other defendants. Under this section, a plaintiff's total claim is reduced by the proportionate share of the defendant who settles.

09.17.070 - Uniform application and construction section.

09.17.080 - Definition of "fault", that includes both conduct of a plaintiff as well as a defendant. The term

includes assumption of risk, and misuse of product, but limits their scope.

09.17.090 - Only actions accruing after the effective date of the chapter are subject to this Act.

09.17.100 - Citation of Act.

Section 2 - Repeals the Uniform Contribution among Tortfeasors Act.

Section 3 - Amends Rule of Civil Procedure 7 to require that a motion be filed within one year under 09.17.020(d).

Section 4 - Amends Rule of Civil Procedure 49 to require special interrogatories be answered by the jury.

Section 5 - Amends Rule of Civil Procedure 52 to require the court to make specific findings regarding damages and percentage of fault.

Section 6 - Amends Rule of Civil Procedure 58 to require the court to include specific fault determination in its judgment.

MFF:mkr
M1:027

LAW OFFICES
BERNARD P. KELLY & ASSOCIATES
A PROFESSIONAL CORPORATION
310 K STREET, SUITE 506
ANCHORAGE, ALASKA 99501-2040
(907) 276-3188

BERNARD P. KELLY
PAUL COSSMAN

February 21, 1986

House Judiciary Committee
Room 124, Capitol
Juneau, Alaska 99811

ATT: M. Mike Miller, Chairman
Max Gruenberg and other members

Gentlemen:

I promised to write a letter reciting some of my views upon House Bill 368 entitled "An Act Adopting the Uniform Comparative Fault Act."

As you know, Av Gross talked about this bill at the time of the hearing on February 18, 1986, and recited our general views. Av's speech as terminated left the impression that perhaps innocent accident victims, who themselves contributed no fault to the cause of the accident, would always recover under that bill. However, by virtue of the release provisions of that bill, if the release could be renegotiated after a settlement was made between one of the tortfeasors and the plaintiff, the plaintiff stands to lose by having the money he received from the releasor readjusted and he would have money deducted from his share dependent upon greater fault being found against the releasor. In my judgment, this would completely be unjust and negate possible settlements.

It seems to me that a release should never be able to be set aside, absence a showing of fraud, and if we could get the Court's approval upon a release and settlement during the course of the litigation, this should be conclusive against a claim of fraud.

As I pointed out, a release entered into should be valid under almost every circumstance. It would encourage other defendants to be looking for settlements as well. It will reduce litigation; it will achieve those very things that the tort reformers claim they want to achieve. Conversely, not

allowing settlements and requiring litigation because of one's fear and uncertainty about a release being set aside, would foster litigation and increase insurance expense. Therefore, I don't believe that passage of the above legislation in its present form would be in the public interest.

Robin Taylor asked a question about what about the effect of a Mary Carter agreement. That was a good question and I don't think Av knew what Robin meant when he said Mary Carter agreement. My understanding is this is talking to such arrangements as a covenant not to execute but staying in the litigation. These kinds of arrangements are always a little bit difficult it seems to me for a plaintiff because they should be revealed to the Court. There is always a danger of a claim of fraud and deceit entering into them. I point this out because I don't think that that necessarily makes the arrangement invalid and there may be good and just reasons for entering into the arrangement. I think the same general rules that apply to releases generally should apply that would only be on a showing of fraud and deceit that they could be set aside.

The reason that the innocent person's rights can be affected by the release are shown by page four, lines 19 through 22 of the document speaking about the effect of the release where it says that the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation determined in accordance with the provisions of AS 09.17.020. This would clearly allow in my mind the renegotiation of the innocent person's share downward. In my judgment, because the person getting the release is not present in Court with an attorney defending himself, it almost would be axiomatic that the plaintiff would lose money in such an arrangement, or he would have to fight a vigorous battle, expending money defending the relative, non-involvement of the party giving the release.

I wanted to call your attention also to the language of page two at the top of the bill, lines 3 and 4, where it says, "For this purpose, the Court may determine that two or more persons are to be treated as a single party." The word "may" means that it is discretionary with the Court. I do not believe that a corporate employer, for example, should at the discretion of the Court be treated as a separate entity from his employee. Corporations can only act through their employees, and such a potential result would do violence to the law of respondeat superior and the idea that business should pay for the acts of its agents and actors. This would allow for a way of watering down and affecting seriously the existent law. I also believe that principal, agent, and enterprise li- ability actors under

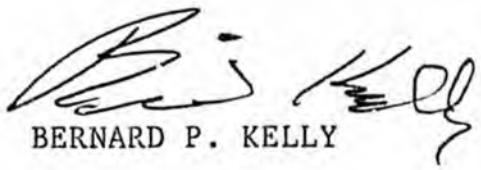
Alaska's enterprise liability law should be treated as a single entity for the purpose of tort law. This could be examples thrown into the bill but leave the Court discretion to apply the same unity of interest determination to other persons who might be treated as a single party.

As we indicated the other day at the hearing, the Alaska Academy, by the majority of its members, is not in disagreement with some sort of equitable allocation where an insolvent or partly insolvent defendant's share is to be made up by others. In that case, we agree that it would not be inequitable to provide that the injured party, himself at fault, share pro rata in the loss of funds due to insolvency of one of the other parties at fault. We do, however, want to make sure that in no case does a completely blameless plaintiff have his right of recovery reduced under any circumstances, including that recited in the Act of giving a release.

There are other possible things that we may see wrong with this bill and our membership would like to continue looking at this bill with the idea of rendering constructive commentary. Thank you for your consideration to this matter.

Sincerely yours,

BERNARD P. KELLY & ASSOCIATES



BERNARD P. KELLY

BPK:amm

cc: Av Gross
2274A

Alaska State Legislature

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4931

DISTRICT 10
BOX 111038
ANCHORAGE, ALASKA 99511
(907) 349-2192

CHAIRMAN
Special Committee on
Telecommunications

MEMBER
Labor and Commerce
State Affairs
Finance—Subcommittee Administration

Representative H. A. "Red" Boucher

M E M O R A N D U M

DATE: January 27, 1986

TO: Representative H.A. "Red" Boucher

FROM: Dave Donley, Attorney at Law

SUBJECT: HB 466 (a bill creating an Alaskan worker employment preference) and the effect of the recent Alaska Supreme Court decision on Alaska Hire (Francis v. Robinson)

GENERAL COMMENTS

Alaskans have been forced to wait almost two years for our Supreme Court to decide the constitutionality of AS 36.10.010 which provided a preference to Alaska residents on 95% of the jobs on public works projects.

Unfortunately, the Supreme Court's decision in Francis v. Robison finding AS 36.10.010 unconstitutional provided almost nothing new in the form of guidance to lawmakers. The court ignored both legislators' request for advice and last year's legislative action (HB 294) without explanation.

SSHB 466 addresses virtually every concern identified by the court's majority decision in Francis.

Nothing in this area of constitutional law is an absolute but these proposals are the best yet and are clearly legally superior to any resident hire law that has ever been tested or for that matter, even adopted, in the nation.

ANALYSIS OF THE IMPACT OF FRANCIS v. ROBISON ON HB 466

I. The Supreme Court accepted without comment the Superior Court's findings of fact.

A. Testimony on HB 294 (1985) and HCR 20 (1985) clearly contridicts these 1984 findings by the Superior Court.

B. The decision ingores existence of HB 294 -- makes no comment at all on its significance and effect or lack of it.

C. HB 294's backup and the recent DOL study appear to provide part of the factual basis the court says is necessary in the Francis decision. Additional findings based on evidence of social ills caused by resident unemployment need to be included in HB 466.

D. Additionally HB 466 adds new findings (page 1, sec. 2) which are designed to assist and guide the Commissioner of Labor and reviewing courts in making future fact findings.

E. Sec. 2 of HB 466 also helps identify the special employment problems of rural Alaska.

II. Resident preference law must have a substantial reason which justifies it.

A. Reason for any state mandated employment preference for residents can not be only to provide an economic advantage for residents over non-residents. Reason must be to correct a social ill or ills that result from resident unemployment.

B. The Francis decision requires "some showing that nonresidents are 'a peculiar source of evil' which state action is meant to remedy," and the Supreme Court finds this evidence lacking in the Superior Court's findings of fact.

C. The Supreme Court used the "clearly erroneous" standard for review of facts established by Superior Court. This very high standard of review prevented modification of these fact findings which, given newly available data, appear very erroneous.

D. HB 466 incorporates the "peculiar source of evil" standard as a threshold finding that must be made by Commissioner of Labor before any preference for residents goes into effect.

E. The new DOL study, HB 294 (1985), new findings of fact in HB 466 (sec.2), together with evidence of resulting social ills from resident unemployment, will create a new constitutional fact basis for the resident employment preference in HB 466.

F. Legislative public hearings are needed to carefully document evidence by testimony of specific examples of non-residents displacing residents and resulting social ills.

III. The means employed by the challenged statute must be closely related to the interests served by the statute.

A. In deciding whether discrimination bears a close or substantial relationship to the state's objective . . . the availability of less restrictive means is relevant.

B. This means the justification for legislation must not be just to give Alaskans jobs before outsiders. The reason for legislation

must be something else other than to benefit residents economically.

C. The U.S. Supreme Court, in it's Camden decision recognized one possible justification for resident employment preference is to stave off grave economic and social ills.

D. High unemployment alone is not enough: HB 466 answers this issue through findings of fact (sec. 2) but possibly needs strenthening to address the strong emphasis on this concern by the court by making clear that the purpose of the legislation is to address articulated economic or social ill(s).

E. "Closely related" means the State needs to limit preference to those Alaskans who really need it.

F. HB 466 limits the preferences by requiring those Alaskans who desire a preference to register as unemployed, underemployed or as recently completing job training. HB 466 also adopts a method to target unemployment preference to those geographical areas and social groups who need it the most: preference for residents of economically distressed areas; and preference for economically disadvantaged minority residents.

IV. Market Regulator vs. Market Participant Distinction

A. More leeway is granted states in their perception of "local evils and in prescribing appropriate cures" when they are acting in a proprietary capacity, where they are merely setting conditions on the expenditures of funds they control.

B. The Alaska Supreme Court in Francis adopts a sliding scale as to amount of deference appropriate to the state as a market participant. Little deference is appropriate when state action (discrimination against non-residents) is far reaching and greater deference is appropriate when state action is narrow in focus.

C. This implies that percentages or the scope of preferences may be important. HB 466 handles this by incorporating Rep. Gruenberg's proposal for a "judical decisions effect" savings clause.

D. This distinction also implies that it is important to separate contracts where the state is a signatory vs. others. HB 466 does this by including separate severable sections to cover expenditures by grantees and subcontractors.

V. Level of Scrutiny: "Low, intermediate and high"

An "intermediate level" of scrutiny is adopted under the facts found by the Superior Court in Francis. At this intermediate level of scrutiny classification/discrimination in favor of residents may be made only for "important" purposes and the

means used to accomplish them must be "fairly and substantially related" to achievement of those purposes.

VI. Miscellaneous

A. Distinguishes the U.S. Supreme Court's Camden decision -- Alaska economy growing while New Jersey's was not.

B. Disagrees with Wyoming's Supreme Court's Antonich decision reasoning which upheld Wyoming's resident preference law.

C. The Court says Alaskan unemployment is a rural and not an urban problem (HB 466 takes this into account in economic distressed area preference and disadvantaged minority preference.)

VII. The Concurring Opinion by Justice Burke

A. Justice Burke's solo concurring opinion cites the Alaska Constitution, Art. I, Sec. 1: "that all persons are equal and entitled to equal rights, opportunities, and protection under the law" as prohibiting a resident employment preference.

B. If necessary an amendment to the Alaskan Constitution can be designed to answer this concern.

CONCLUSIONS

1) The Francis case decision offers some guidance to preparation of a new Alaska Hire law but not directly -- it must be carefully extracted from implication, logic and reasoning.

2) HB 466 already directly addresses almost every fault the court found with the old law. With some careful fine tuning, HB 466 can cover every concern of the court except that raised by the concurring opinion regarding the Alaska Constitution.

3) A careful legislative process is needed to do this form of legislation correctly. Findings of fact must be substantiated on the record by testimony and/or evidence.

4) Additional severable sections may be added to HB 466 to cover jobs on state-owned lands based on the courts reasoning.

UNIFORM COMPARATIVE FAULT ACT

Historical Note

The Uniform Comparative Fault Act was approved by the National Conference of Commissioners on Uniform State Laws in 1977. Section 3 of the Act was amended by the National Conference in 1979.

Commissioners' Prefatory Note

Plaintiff's Fault. The harsh all-or-nothing rule of contributory negligence at common law has not been properly ameliorated by the several exceptions also developed at common law. Whether the general rule or an exception applies, one party or the other is always treated unfairly. This has been widely recognized and, at the present time (1977), the Federal Government and two-thirds of the States (33) have adopted some form of comparative fault. This is usually by statute but also by judicial decision.

The language of the statutes varies considerably, and the form adopted often comes about as a result of a political compromise and without adequate consideration of the practical implications. This Uniform Act has been worked on for five years by a special committee, which has had the benefit of comments from many sources. Careful consideration has been given to all potential problems, and specific provisions are made for most of them. This Act therefore serves two important purposes: (1) it addresses the problems and provides what are regarded as the best solutions for them, and (2) it provides the opportunity for creating a desirable uniformity throughout the country.

A very important question arises in the very beginning: What type of comparative fault should be adopted? The "pure type" is presently followed by the Federal Government, nine states and almost all common law jurisdictions outside the United States. Many states, however, have adopted a modified type, which takes one of two forms, providing that a plaintiff who is at fault can recover diminished damages but that he cannot recover if his negligence either (1) "is equal to," or (2) "is greater than," that of the defendant.

The modified type has several serious logical and practical disadvantages:

1. If both parties have been injured, the modified type forces one party to bear all of his own loss, together with the greater part of the other party's loss, in addition. This result is therefore worse than that of the common law contributory negligence rule. A slight alleviation under the not-greater-than form, which allows recovery when the parties are each 50% at fault, forces a cognizant jury always to find for 50% negligence if it wants to reach a fair result.

2. If there are several defendants at fault, the modified type produces a confused jumble. The plaintiff's fault may be less than that of some defendants and greater than that of others. If defendants having to pay seek contribution from those not under obligation to the plaintiff, the answer is uncertain; and when counterclaims arise, no solution seems available. The problem is avoided in some modified-type states by providing that the plaintiff's negligence bars recovery only if it is greater than the combined negligence of all the defendants. Although this is a helpful provision, it is essentially adopting the pure form in this situation.

3. If the plaintiff's fault is greater than that of the defendant, he cannot recover under the modified type. Yet, if, as a result of this, the statute leaves him under the common law, including its exceptions (such as last clear chance, or ordinary contributory negligence in an action based on strict liability) he can nevertheless recover full damages, if he comes within an exception. The anomaly therefore arises that he may be better off if his negligence is found to be greater than that of the defendant and he thus recovers full damages, than if his negligence is found to be less than that of the defendant and his damages are diminished.

4. A difference of a single point in the percentage of fault allocated to the claimant may determine whether he can recover anything at all—not just how much. It is quite unrealistic to expect a jury to reach a decision this precise and then require the whole issue of liability to depend upon it. An arbitrary decision of this nature is very conducive to appeals and the development of highly technical distinctions by the appellate court.

The single disadvantage urged against the pure type is that it fails to prevent the bringing of "nuisance suits." Yet the cure of the modified form is [illegible]

tinctly an overcure, and therefore worse than the disease. How many more times is the plaintiff's negligence likely to be from 51% to 99% of the total than it is to be 90 to 100% of the total? And when it approximates 100%—the true nuisance claim—the trial court may be expected to control the matter.

The innate fairness of the pure type contrasts with the nondiscriminating rough justice of the modified type, which casts out many justified claims in order to be sure to eliminate a few unjustified ones, and impels the decision for the pure form. It is significant that when the courts, as distinguished from the legislatures have adopted a form of comparative fault, the great majority of them have selected the pure type, and that England, Ireland, the Canadian provinces and Australian states have all adopted the pure form.

Contribution. The original common law rule was that there is no contribution among joint tortfeasors, no matter what the nature of the tort. Some states, however, have judicially modified this rule, especially in the case of negligence. Many more states have passed statutes of various kinds providing for contribution, with the result that a substantial majority of the states now have contribution in some form and the Restatement (Second) of Torts § 886A, now provides for it.

The NCCUSL has promulgated two uniform contribution Acts—the first in 1939, superseded by a revised act in 1955. Both of these Acts provide for pro rata contribution, which may be suitable in a state not applying the principle of comparative fault, but is inappropriate in a comparative-fault state apportioning ultimate responsibility on the basis of the proportionate fault of the parties involved.

It has therefore been decided not to amend the separate Uniform Contribution Among Tortfeasors Act, 1955, but to leave that Act for possible use by states not adopting the principle of comparative fault. Instead, the present Act contains appropriate sections covering the rights existing between the parties who are jointly and severally liable in tort. The 1955 Act should be replaced by this Act in any state that adopts the comparative fault principle, and would be eventually replaced.

UNIFORM COMPARATIVE FAULT ACT

Law Review Commentaries

Assumption of risk and misuse in strict tort liability; prelude to comparative fault. James H. Sales. 11 Texas Tech L.Rev. 729 (1980).

Comparative contribution. 14 John Marshall L.Rev. 173 (1980).

Comparative negligence collides with strict liability. 19 Washburn L.J. 76 (1979).

Comparative negligence: Development in the United States and status in Louisiana. John W. Wade. 40 La.L.Rev. 299 (1980).

Contribution among antitrust violators. 29 Catholic U.L.Rev. 669 (1980).

Extending fairness principle of Li and American motorcycle: Adoption of the Uniform Comparative Fault Act. H. Anthony Miller. 14 Pacific L.J. 835 (1983).

Judicial adoption of comparative fault in South Carolina. Jerry J. Phillips. 32 S.C.L.Rev. 295 (1980).

Uniform Comparative Fault Act: What should it provide? John W. Wade. 10 U.Mich.J.L.Ref. 220 (1977).

Section 1. [Effect of Contributory Fault]

(a) In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

(b) "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable

express consent, misuse of a p
be liable, and unreasonable fa
Legal requirements of causal
liability and to contributory

Com

This Section states the gener
ciple, that a plaintiff's cont
fault does not bar his recov
instead apportions damages a
to the proportionate fault of t
ties.

Harms Covered. The specif
cation of that principle, as
for in this Act, is confined to
harm to person or property,
necessarily includes consequent
ages deriving from the physic
such as doctor's bills, loss o
or costs of repair or repla
property. It does not include
like economic loss resulting
tort such as negligent misrep
tion, or interference with con
relations or injurious falseh
harm to reputation resultin
defamation. But failure to
these harms specifically in th
not intended to preclude appli
the general principle to the
court determines that the com
of the state would make the
tion.

Conduct Covered. (a) Def
Conduct. The Act applies
or omissions that are in any
negligent or reckless toward
son or property . . . of
This includes the traditional a
negligence but covers all negli
duct, whether it comes within
ditional negligence action or
includes negligence as a matter
arising from court decision
inal statute. "In any measure
tended to cover all degrees
of negligent conduct without
of listing them specifically.

In some states reckless cond
by a different name, such as
or wanton misconduct. The
must be made in the particul
whether the language used i
ciently broad for the purpos
additional language is needed.

Although strict liability is so
called absolute liability or
without fault, it is still includ
liability for both abnormally
ous activities and for products
strong similarity to negligen
matter of law (negligence for
the factfinder should have
difficulty in setting percent
fault. Putting out a product

express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Commissioners' Comment

This Section states the general principle, that a plaintiff's contributory fault does not bar his recovery but instead apportions damages according to the proportionate fault of the parties.

Harms Covered. The specific application of that principle as provided for in this Act, is confined to physical harm to person or property. But it necessarily includes consequential damages deriving from the physical harm, such as doctor's bills, loss of wages or costs of repair or replacement of property. It does not include matters like economic loss resulting from a tort such as negligent misrepresentation, or interference with contractual relations or injurious falsehood, or harm to reputation resulting from defamation. But failure to include these harms specifically in the Act is not intended to preclude application of the general principle to them if a court determines that the common law of the state would make the application.

Conduct Covered. (a) Defendant's Conduct. The Act applies to "acts or omissions that are in any measure negligent or reckless toward the person or property . . . of others." This includes the traditional action for negligence but covers all negligent conduct, whether it comes within the traditional negligence action or not. It includes negligence as a matter of law, arising from court decision or criminal statute. "In any measure" is intended to cover all degrees and kinds of negligent conduct without the need of listing them specifically.

In some states reckless conduct goes by a different name, such as willful or wanton misconduct. The decision must be made in the particular state whether the language used is sufficiently broad for the purpose or if additional language is needed.

Although strict liability is sometimes called absolute liability or liability without fault, it is still included. Strict liability for both abnormally dangerous activities and for products bears a strong similarity to negligence as a matter of law (negligence per se), and the factfinder should have no real difficulty in setting percentages of fault. Putting out a product that is dangerous to the user or the public or engaging in an activity that is dangerous to those in the vicinity involves a measure of fault that can be weighed and compared, even though it is not characterized as negligence.

An action for breach of warranty is held to sound sometimes in tort and sometimes in contract. There is no intent to include in the coverage of the Act actions that are fully contractual in their gravamen and in which the plaintiff is suing solely because he did not recover what he contracted to receive. The restriction of coverage to physical harms to person or property excludes these claims.

The Act does not include intentional torts. Statutes and decisions have not applied the comparative fault principle to them. But a court determining that the general principle should apply at common law to a case before it of an intentional tort is not precluded from that holding by the Act.

For certain types of torts, such as nuisance, the defendant's conduct may be intentional, negligent or subject to strict liability. In the latter two instances the Act would apply, but not in a case in which the defendant intentionally inflicts the injury on the plaintiff.

A tort action based on violation of a statute is within the coverage of the Act if the conduct comes within the definition of fault and unless the statute is construed as intended to provide for recovery of full damage irrespective of contributory fault.

(b) Plaintiff's Conduct. "Fault," as defined in Subsection (b), includes conduct of the plaintiff or other claimant, as well as a defendant.

"Contributory fault chargeable to the claimant" includes legally imputed fault as in the cases of principal and agent and of an action for loss of services of a spouse. It also covers a situation in which fault is not imputed but would still have barred recovery prior to passage of the Act—as, for example, a wrongful-death action in which the decedent's contributory negligence would have barred recovery even though it was not imputed to the person bringing the action.

Contributory fault diminishes recovery whether it was previously a bar

or not, as, for example, in the case of ordinary contributory negligence in an action based on strict liability or recklessness. Last clear chance is expressly included with its variations.

"Assumption of risk" is a term with a number of different meanings—only one of which is "fault" within the meaning of this Act. This is the case of unreasonable assumption of risk, which might be likened to deliberate contributory negligence and means that the conduct must have been voluntary and with knowledge of the danger. As used in this Act, the term does not include the meanings (1) of a valid and enforceable consent (which is treated like other contracts), (2) of a lack of violation of duty by the defendant (as in the failure of a landowner to warn a licensee of a patent danger on the premises), or (3) of a reasonable assumption of risk (which is not fault and should not have the effect of barring recovery).

"Misuse of a product" is a term also with several meanings. The meaning in this Section is confined to a misuse giving rise to a danger that could have been reasonably anticipated and guarded against. The Act does not apply to a misuse giving rise to a danger that could not reasonably have been anticipated and guarded against by the manufacturer, so that the product was therefore not defective or unreasonably dangerous.

The doctrine of avoidable consequences is expressly included in the coverage.

Causation. For the conduct stigmatized as fault to have any effect under the provisions of this Act it must have had an adequate causal relation to the claimant's damage. This includes the rules of both cause in fact and proximate cause.

"Injury attributable to the claimant's contributory fault" refers to the requirement of a causal relation for the particular damage. Thus, negligent failure to fasten a seat belt would diminish recovery only for damages in which the lack of a seat-belt restraint played a part, and not, for example, to the damage to the car. A similar rule applies to a defendant's fault: a physician, for example, negligently setting a broken arm, is not liable for other injuries received in an automobile accident.

1979 Addition to Comment: *Adaptation of the Act to Modified Form of Comparative Negligence.* If a state now using the modified form of comparative negligence should decide that in the light of its experience it is wedded to that form and not willing to change to the pure form, the Act may be adapted for this purpose, as indicated below, by adding the words in italics:

Section 1. [Effect of Contributory Fault]

(a) In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant, *if not greater than the combined fault of all other parties to the claim, including third-party defendants and persons released under Section 6,* diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

(b) *Whenever both parties to a claim and counterclaim have sustained damage caused by fault or both, each party can recover from the other in proportion to their relative fault in accordance with Section 3, regardless of whose fault is the greater.*

(c) "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting and enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Law Review Commentaries

Complexities of Oklahoma's proportionate several liability doctrine of comparative negligence—is products liability next? William J. McNichols. 35 Okl. L.Rev. 195 (1982).

Contribution among tort-feasors in Washington: 1981 Tort Reform Act. 57 Wn. L.R. 179.

Library References

Negligence ⇐97 to 101. C.J.S. Negligence §§ 131, 169 et seq.

Section 2. [Apportionment

(a) In all actions involv
including third-party defer
Section 6, the court, unless
jury to answer special in
findings, indicating:

(1) the amount of
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(2) the percentage
claim that is allocated
and person who has b
this purpose the court
treated as a single part

(b) In determining the pe
both the nature of the con
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(c) The court shall deter
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(d) Upo motion made not
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suit to which he is not a party
nor be binding on him. Both p
and defendants will have
incentive for joining available
ants who may be liable. Th
parties joined whose fault con
to the injury, the smaller the
age of fault allocated to ea
other parties, whether plaintiff
fendant.

Section 2. [Apportionment of Damages]

(a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under Section 6, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating:

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under Section 6. For this purpose the court may determine that two or more persons are to be treated as a single party.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under Section 6, and enter judgment against each party liable on the basis of rules of joint-and-several liability. For purposes of contribution under Sections 4 and 5, the court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(d) Upon motion made not later than [one year] after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

Commissioners' Comment

Parties. It is assumed that the state procedure provides for bringing in third-party defendants as parties. If not, the procedural statutes or rules may need to be amended to permit it, at least for purposes of contribution.

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. It cannot be told with certainty 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 is not a party would not be binding on him. Both plaintiff and defendants will have significant incentive for joining available defendants who may be liable. The more parties joined whose fault contributed to the injury, the smaller the percentage of fault allocated to each of the other parties, whether plaintiff or defendant.

In situations such as that of principal and agent, driver and owner of a car, or manufacturer and retailer of a product, the court may under appropriate circumstances find that the two persons should be treated as a single party for purposes of allocating fault.

Percentages of fault. In comparing the fault of the several parties for the purpose of obtaining percentages there are a number of implications arising from the concept of fault. The conduct of the claimant or of any defendant may be more or less at fault, depending upon all the circumstances including such matters as (1) whether the conduct was mere inadvertence or engaged in with an awareness of the danger involved, (2) the magnitude of the risk created by the conduct, including the number of persons endangered and the potential seriousness of the injury, (3) the significance of what the actor was seeking to attain by his conduct, (4) the actor's superior or inferior capacities, and (5) the particular circumstances, such as the existence of an emergency requiring a hasty decision.

A 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) or that no negligence is required (as in the case of conducting blasting operations in an urban area) is important in determining whether he is liable at all. If the liability has been established, however, the rule itself does not play a part in determining the relative proportion of fault of this party in comparison with the others. But the policy behind the rule may be quite important. An error in driving on the part of a bus driver with a load of passengers may properly produce an evaluation of greater fault than the same error on the part of a housewife gratuitously giving her neighbor a ride to the shopping center; and an automobile manufacturer putting out a car with a cracked brake cylinder may, even in the absence of proof of negligence in failing to discover the crack, properly be held to a greater measure of fault than another manufacturer producing a mechanical pencil with a defective clasp that due care would have discovered.

In determining the relative fault of the parties, the fact-finder will also give consideration to the relative closeness of the causal relationship of the negligent conduct of the defendants and the harm to the plaintiff. Degrees of fault and proximity of causation are inextricably mixed, as a study of last clear chance indicates, and that common law doctrine has been absorbed in this Act. This position has been followed under statutes making no specific provision for it.

Joint and Several Liability and Equitable Shares of the Obligation. The common law rule of joint-and-several liability of joint tortfeasors continues to apply under this Act. This is true whether the claimant was contributorily negligent or not. The plaintiff can recover the total amount of his judgment against any defendant who is liable.

The judgment for each claimant also sets forth, however, the equitable share of the total obligation to the claimant for each party, based on his established percentage of fault. This indicates the amount that each party should eventually be responsible for as a result of the rules of contribution. Stated in the judgment itself, it makes the information available to the parties and will normally be a basis for contribution without the need for a court order arising from motion or separate action.

Reallocation. Reallocation of the equitable share of the obligation of a party takes place when his share is uncollectible.

Reallocation takes place among all parties at fault. This includes a claimant who is contributorily at fault. It avoids the unfairness both of the common law rule of joint-and-several liability, which would cast the total risk of uncollectibility upon the solvent defendants, and of a rule abolishing joint-and-several liability, which would cast the total risk of uncollectibility upon the claimant.

Control by the court. The total of the several percentages of fault for the plaintiff and all defendants, as found in the special interrogatories, should add up to 100%. Whether the court will inform the jury of this will depend upon the local practice.

The court should be able to exercise any usual powers under existing law 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.

Illustration No. 1. (Simple 2-party situation).

A sues B. A's damages are $10,000.
A is found 40% at fault.
B is found 60% at fault.
A recovers judgment for $6,000.

Illustration No. 2. (Multiple-party situation).

A sues B, C and D. A's damages are $10,000.
A is found 40% at fault.
B is found 30% at fault.
C is found 30% at fault.
D is found 0% at fault.

A is awarded judgment jointly and severally against B & C for $6,000. The court also states in the judgment the equitable share of the obligation of each party:

A's equitable share is $4,000 (40% of $10,000).

B's equitable share is $3,000 (30% of $10,000).

C's equitable share is $3,000 (30% of $10,000).

Illustration No. 3. (Reallocation computation under Subsection (d)).

Same facts as in Illustration No. 2.

On proper motion to the court, C shows that B's share is uncollectible.

The court orders that B's share be reallocated between A's equitable share is increased $1,714 (4/7 of $3,000).

Law

Apportionment of losses under comparative fault laws. Richardson. 10 La.L.Rev. 343 (1950).

Complexities of Oklahoma's tionate several liability doctrine parative negligence—is products next? William J. McNichols. L.Rev. 195 (1992).

Negligence ⇨97.

Section 3. [Set-off]

A claim and counterclaim s agreement of both parties. O obligation of either party is parties make payment into co the funds received and declar court by either party had bee bution of those funds back to to him by the other party.

Section amended in 1979. As ly approved in 1977, section read "A claim and counterclaim set off, and only the difference them is recoverable in the However, if either or both of the are covered by liability insura an insurance carrier's liability u policy is reduced by reason of

Com

A set-off involves a single cl counterclaim. If there are mult fendants, separate set-off issu aris between a claimant and several defendants, but each would be a separate issue, dete independently of the others. Th principle applies in case of a claim subject to a counterclaim.

Whether the rule is for or set-off, if it should be applie gorically to all situations it wou duce unfair results in some of In attaining a fair application to ticular factual situation, consid needs to be given to the circum of whether each party is able to obligation and whether the m comes from his own pocket or fr bility insurance covering him. Th visions of this Section provide solution to each situation, as illu below.

Illustration No. 1. (Parties fu ered by liability insurance.) A s B counterclaims. Each is fou have suffered $100,000 in d Each is fully covered by liability

The court orders that B's equitable share be reallocated between A and C. A's equitable share is increased by $1,714 (⅓ of $3,000). C's equitable share is increased by $1,286 (⅓ of $3,000).

Law Review Commentaries

Apportionment of losses under comparative fault laws. Richard N. Pearson. 40 La.L.Rev. 343 (1980).

Complexities of Oklahoma's proportionate several liability doctrine of comparative negligence—is products liability next? William J. McNichols. 35 Okl. L.Rev. 195 (1982).

Extending fairness principle of Li and American motorcycle: Adoption of the Uniform Comparative Fault Act. H. Anthony Miller. 14 Pacific L.J. 835 (1983).

Library References

Negligence ⇨97. C.J.S. Negligence §§ 169, 170.

Section 3. [Set-off]

A claim and counterclaim shall not be set off against each other, except by agreement of both parties. On motion, however, the court, if it finds that the obligation of either party is likely to be uncollectible, may order that both parties make payment into court for distribution. The court shall distribute the funds received and declare obligations discharged as if the payment into court by either party had been a payment to the other party and any distribution of those funds back to the party making payment had been a payment to him by the other party.

Amendments

Section amended in 1979. As originally approved in 1977, section read:

"A claim and counterclaim shall be set off, and only the difference between them is recoverable in the judgment. However, if either or both of the claims are covered by liability insurance and an insurance carrier's liability under its policy is reduced by reason of the set-off, the insured is entitled to recover from the carrier the amount of the reduction. Amounts so recovered shall be credited against pertinent liability policy limits. For purposes of uninsured-motorist and similar coverages, the amounts so recovered shall be treated as payment of those amounts to the insured by the party liable."

Commissioners' Comment

A set-off involves a single claim and counterclaim. If there are multiple defendants, separate set-off issues may arise between a claimant and each of several defendants, but each set-off would be a separate issue, determined independently of the others. The same principle applies in case of a cross-claim subject to a counterclaim.

Whether the rule is for or against set-off, if it should be applied categorically to all situations it would produce unfair results in some of them. In attaining a fair application to a particular factual situation, consideration needs to be given to the circumstances of whether each party is able to pay his obligation and whether the payment comes from his own pocket or from liability insurance covering him. The provisions of this Section provide a fair solution to each situation, as illustrated below.

Illustration No. 4. (Parties fully covered by liability insurance.) A sues B. B counterclaims. Each is found to have suffered $100,000 in damage. Each is fully covered by liability insurance. A is found 30% at fault. B is found 70% at fault. Under the statutory provision there is no set-off except by agreement of the parties, and it would not be in their best interests here to agree to a set-off. A recovers $70,000 from B, and B recovers $30,000 from A.

Illustration No. 5. (No insurance but both parties able to pay judgments.) The same facts as in Illustration 4, but there is no liability insurance. Each is able to pay the judgment against him. If the parties do not agree to a set-off, A receives $70,000 from B, and B receives $30,000 from A. For their own convenience they may find it simpler to agree on a set-off, with A receiving $40,000 from B.

Illustration No. 6. (No insurance; B is able to pay and A is not.) As in Illustration 4, each party has $100,000 damages, A is 30% at fault and B is 70% at fault. Neither party has liability insurance coverage. B moves the court to require both parties to make payment into court for distribution. Finding it likely that A's obligation will

be uncollectible the court issues the order. B pays into court $70,000; A can pay nothing. The court distributes $40,000 to A and $30,000 back to B. This is treated as if B had directly paid A $70,000 and A had directly paid B $30,000 and the obligations of both parties are extinguished.

Illustration No. 7. (A has insurance; B does not and is unable to pay.) The same facts as in Illustration 6, but B has no insurance and cannot pay, while A has full liability insurance. A's motion that both parties pay into court is granted. A's insurance company pays $30,000. A pays nothing. The court distributes the $30,000 to A. This extinguishes the liability of A and his insurance company under the liability coverage, and B's liability to A reduced from $70,000 to $40,000. For application of any uninsured-motorist coverage contained in A's insurance policy, the court's delivery of the $30,000 to A is treated as a direct payment by B to A.

Illustration No. 8. (Both parties have inadequate insurance coverage and no other available funds.)

A is 30% negligent, has damages of $70,000 and carries liability insurance of $20,000. B is 70% negligent, has damages of $100,000 and carries liability insurance of $30,000.

A therefore owes B $30,000 and has a claim against B of $35,000; and B owes A $35,000 and has a claim against A of $30,000.

On granting of a motion to pay into court, A's carrier pays $20,000 which is initially allocated to B as payment to him of $20,000 and reduces A's debt to B to $10,000 and

B's carrier pays $30,000, which is initially allocated to A as payment to him of $30,000 and reduces B's debt to A to $5,000.

The court now reallocates to B $10,000 from A's initial allocation of $30,000, leaving $20,000 for A. It also reallocates to A $5,000 from B's initial allocation of $20,000, leaving $15,000 for B.

A is thus entitled to the $20,000 remaining in the initial allocation, plus $5,000 from the subsequent allocation, making a total of $25,000; and

B is entitled to the $15,000 remaining in the initial allocation, plus $10,000 from the subsequent allocation, making a total of $25,000.

Of the $50,000 paid in, A receives $25,000 and B receives $25,000. All obligations are discharged.

For a complex illustration like No. 8, the process of tracking literally the language of the Section is somewhat laborious and difficult to work out. Fortunately, it is possible to reach exactly the same result much more simply and easily by using the formula, D=C−O+P to determine the amount each claimant is entitled to receive. D signifies the amount to be distributed to the particular claimant from the funds paid into court; C signifies the amount of his claim after it has been reduced by the court because of his own negligence; O signifies the amount that he is found by the court to owe to the other party; and P signifies the amount that he has paid into court.

Use of this formula in each of Illustrations above will reach exactly the same result as that which is stated in the Illustration. Thus, in Illustration 8, the formula D=C−O+P operates like this: For A: $35,000−$30,000+$20,000 = $25,000. For B: $30,000−$35,000+ $30,000 = $25,000.

Observe that if use of the formula produces a negative number for one of the two parties, it corresponds with a number larger by that figure than the amount of deposit with the court and indicates that the party with the negative figure continues to owe that amount to the other party. This occurs, for example, in Illustration No. 7.

The system for distributing the funds outlined by the section is not the only one that could be utilized but it appears to be the fairest and most equitable. It gives due consideration to the relative amounts owed by each party and the relative amounts paid by each; and their relative fault is of course already taken into consideration in determining the amounts of their enforceable claims.

Library References

Set-Off and Counterclaim ⇨22 et seq.

C.J.S. Set-Off and Counterclaim § 23 et seq.

Section 4. [Right of Contribution]

(a) A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death, or harm, whether or not judgment has been recovered against all or any of them, or by a separate action by [illegible] is each person's equitable share of a claimant at fault of Section 2.

(b) Contribution is availal a claimant only (1) if the l is sought has been extingui in settlement was reasonabl

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Sections 4, 5 and 6 are ex replace the Uniform Cor Among Tortfeasors Act (19 state following the principle parative fault. The three however, apply whether the is contributorily at fault or

Section 4 is in general acc the provisions of the 1955 Act, but the test for determi measure of contribution and tablishing the ultimate respons no longer on a pro rata ba stead, it is on a basis of propo fault determined in accordan the provisions of Section 2. tiff who is contributorily at shares in the proportionate bility.

Law

Apportionment of losses and parative fault laws. Richard son. 40 La.L.Rev. 342 (19

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Contribution ⇨5.

Section 5. [Enforcement of C

(a) If the proportionate fau has been established previous party paying more than his may recover judgment for con

(b) If the proportionate fau has not been established by a separate action, whether or not the person seeking contributio being sought.

(c) If a judgment has been commenced within [one year] a ment has been rendered, the either must have (1) discharg the period of the statute of of action against him and c [one year] after payment, or (2 the common liability and, with the liability and commenced an

against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution is each person's equitable share of the obligation, including the equitable share of a claimant at fault, as determined in accordance with the provisions of Section 2.

(b) Contribution is available to a person who enters into a settlement with a claimant only (1) if the liability of the person against whom contribution is sought has been extinguished and (2) to the extent that the amount paid in settlement was reasonable.

Commissioners' Comment

Sections 4, 5 and 6 are expected to replace the Uniform Contribution Among Tortfeasors Act (1955) in a state following the principle of comparative fault. The three sections, however, apply whether the plaintiff was contributorily at fault or not.

Section 4 is in general accord with the provisions of the 1955 Uniform Act, but the test for determining the measure of contribution and thus establishing the ultimate responsibility is no longer on a pro rata basis. Instead, it is on a basis of proportionate fault determined in accordance with the provisions of Section 2. A plaintiff who is contributorily at fault also shares in the proportionate responsibility.

Joint-and-several liability under the common law means that each defendant contributing to the same harm 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 equitable shares of the obligation, as established under Section 2.

If the defendants cause separate harms or if the harm is found to be divisible on a reasonable basis, however, the liability may become several for a particular harm, and contribution is not appropriate. See Restatement (Second) of Torts § 433A (1965).

Law Review Commentaries

Apportionment of losses under comparative fault laws. Richard N. Pearson, 40 La.L.Rev. 343 (1980).

Contribution among tort-feasors in Washington: 1981 Tort Reform Act. 57 Wn. L.R. 479.

Library References

Contribution ⇨5. C.J.S. Contribution § 11.

Section 5. [Enforcement of Contribution]

(a) If the proportionate fault of the parties to a claim for contribution has been established previously by the court, as provided by Section 2, a party paying more than his equitable share of the obligation, upon motion, may recover judgment for contribution.

(b) If the proportionate fault of the parties to the claim for contribution has not been established by the court, contribution may be enforced in a separate action, whether or not a judgment has been rendered against either the person seeking contribution or the person from whom contribution is being sought.

(c) If a judgment has been rendered, the action for contribution must be commenced within [one year] after the judgment becomes final. If no judgment has been rendered, the person bringing the action for contribution either must have (1) discharged by payment the common liability within the period of the statute of limitations applicable to the claimant's right of action against him and commenced the action for contribution within [one year] after payment, or (2) agreed while action was pending to discharge the common liability and, within [one year] after the agreement, have paid the liability and commenced an action for contribution.

Commissioners' Comment

Illustration No. 9. (Equitable shares previously established by court).

A sues B and C. His damages are $20,000.

A is found 40% at fault.

B is found 30% at fault.

C is found 30% at fault.

A, with a joint-and-several judgment for $6,000 against B and C, collects the whole amount from B.

On proper motion to the court, B is entitled to contribution from C in the amount of $3,000.

Illustration No. 10. (Equitable shares not established)

A sues B. His damages are $20,000.

A is found 40% at fault.

B is found 60% at fault.

Judgment for A for $12,000 is paid by B.

B then brings a separate action seeking contribution from C, who was not a party to the original action.

C is found to be liable for the same injury, and as between B and C, C is found to be 50% at fault.

Judgment for contribution for $6,000 is awarded to B.

If A had voluntarily joined or been brought in as a party to this second action, proportionate fault would have been determined for all parties, including A and B, and contribution against C would have been awarded on that basis.

Law Review Commentaries

Contribution among tort-feasors in Washington: 1981 Tort Reform Act. 57 Wn. L.R. 479.

Library References

Contribution ⇨5. C.J.S. Contribution § 11.

Section 6. [Effect of Release]

A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of Section 2.

Commissioners' Comment

Effect of release on liability of other tortfeasors. The provision that release of one tortfeasor does not release the others unless the release so provides is taken from the Uniform Contribution Among Tortfeasors Act (1955). It is a common statutory provision.

Effect of release on right of contribution. The question of the contribution rights of tortfeasors A and B against tortfeasor C, who settled and obtained a release or covenant not to sue admits of three answers: (1) A and B are still able to obtain contribution against C, despite the release, (2) A and B are not entitled to contribution unless the release was given not in good faith but by way of collusion, and (3) the plaintiff's total claim is reduced by the proportionate share of C. Each of the three solutions has substantial disadvantages, yet each has been adopted in one of the uniform acts. The first solution was adopted by the 1939 Uniform Contribution Act. Its disadvantage is that it discourages settlements: a tortfeasor has no incentive to settle if he remains liable for contribution. The second solution was adopted by the 1955 Contribution Act. While it theoretically encourages settlements, it may be unfair to the other defendants and if the good-faith requirement is conscientiously enforced settlements may be discouraged.

The third solution is adopted in this Section. Although it may have some tendency to discourage a claimant from entering into a settlement, this solution is fairly based on the proportionate-fault principle.

"*Discharges . . . from all liability for contribution.*" A reallocated share of contribution, as provided in Section 2(d), comes within the meaning of this phrase, and the discharge of the released person under this Section applies to that liability

as well. Since the claim is r
by the amount of the released p
equitable share, the increased
of that share as a result of r
allocation is charged against r
leasing person.

Illustration No. 11. (Effect
lease).

A was injured through the c
rent negligence of B, C and D.
damages are $20,000. A settle
B for $2,000.

The trial produces the follow
sults:

A, 40% at fault (equitable
$8,000)

B, 30% at fault (equitable
$6,000)

C, 20% at fault (equitable
$4,000)

D, 10% at fault (equitable
$2,000)

A's claim is reduced by B's eq
share ($6,000). He is award
judgment against C and D, m
them jointly and severally liabl
$6,000.

Their equitable shares of the o
tion are $4,000 and $2,000 respec

Illustration No. 12. Release r
tortfeasor; another's share is u
lectible).

Same facts as in Illustration N
It is now found that D's sha
$2,000 is uncollectible. Upon p
motion to the court that sha
reallocated as follows:

A's equitable share is increased
(his own proportionate fault), pl
(B's proportionate fault), or $1,5

C's equitable share is increased b
or $444.

Immunities. The problem o
wrongdoer who is entitled to a
immunity could be treated like a
leased tortfeasor in this Section—
him to the action to determine
equitable share of the obligation
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Section 7. [Uniformity of Applic

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as well. Since the claim is reduced by the amount of the released person's equitable share, the increased amount of that share as a result of the reallocation is charged against the releasing person.

Illustration No. 11. (Effect of release).

A was injured through the concurrent negligence of B, C and D. His damages are $20,000. A settles with B for $2,000.

The trial produces the following results:

A, 40% at fault (equitable share, $8,000)

B, 30% at fault (equitable share, $6,000)

C, 20% at fault (equitable share, $4,000)

D, 10% at fault (equitable share, $2,000)

A's claim is reduced by B's equitable share ($6,000). He is awarded a judgment against C and D, making them jointly and severally liable for $6,000.

Their equitable shares of the obligation are $4,000 and $2,000 respectively.

Illustration No. 12. Release to one tortfeasor; another's share is uncollectible).

Same facts as in Illustration No. *11*. It is now found that D's share of $2,000 is uncollectible. Upon proper motion to the court that share is reallocated as follows:

A's equitable share is increased by ⅔ (his own proportionate fault), plus ⅗ (B's proportionate fault), or $1,556.

C's equitable share is increased by ⅑, or $444.

Immunities. The problem of a wrongdoer who is entitled to a legal immunity could be treated like a released tortfeasor in this Section—join him to the action to determine his equitable share of the obligation and subtract it from the amount of the claimant's recovery. But this would unfairly cast the whole loss on the claimant. This might be adjusted by spreading the immune party's obligation among all of the parties at fault, including the claimant, as in Subsection 2(d). But this same result is also accomplished by leaving the immune party out of the action altogether: a far easier and simpler solution. This Act therefore makes no provision for immunities. It must be borne in mind, however, that some states treat some immunities as not applying to a suit for contribution. This raises different problems, which can be handled under third-party practice.

Worker's compensation. An injured employee who has received or is entitled to worker's compensation benefits from his employer may ordinarily bring a tort action against a third party, such as the manufacturer of the machine that injured him, and recover for his injury in full. Under the rule in most states, the defendant is not entitled to contribution from the employer, even though the employer was negligent in maintaining the machine or instructing the employee in its use. This casting of the whole loss on the tort defendant may be unfair and greatly in need of legislative adjustment. It is so affected by the policies underlying the worker's compensation systems, however, and these policies vary so substantially in the several states that it was felt inappropriate to include a section on the problem in a uniform act.

Several solutions are possible. Thus, contribution against the employer may be provided for. Or the recovery by the employee may be reduced by the proportionate share of the employer. Or the amount of that proportionate share may be divided evenly between the employer and employee, so that the compensation system bears responsibility for it. Provision also needs to be made for the relation of the tort defendant to the compensation benefits. In any event, contributory negligence on the part of the employee will come within the scope of this Act and will affect the amount of recovery.

Law Review Commentaries

Complexities of Oklahoma's proportionate several liability doctrine of comparative negligence—is products liability next? William J. McNichols. 35 Okl. L.Rev. 195 (1982).

Contribution among tort-feasors in Washington: 1981 Tort Reform Act. 57 Wn. L.R. 179.

Library References

Release ⊂⊃29. C.J.S. Release § 50.

Section 7. [Uniformity of Application and Construction]

This Act shall be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.

Section 8. [Short Title]

This Act may be cited as the Uniform Comparative Fault Act.

Section 9. [Severability]

If any provision of this Act or application of it to any person or circumstances 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.

Section 10. [Prospective Effect of Act]

This Act applies to all [claims for relief] [causes of action] accruing after its effective date.

Section 11. [Repeal]

The following acts and parts of acts are repealed:

Commissioners' Comment

A state that has adopted either of the two Uniform Contribution Among Tortfeasors Acts will of course plan to repeal it. This is also true of other statutory provisions on contribution for tortfeasors.

This Act does not necessitate any changes in the statutory language of Article 2 of the Uniform Commercial Code, but it may have the effect of slightly modifying some of the Comments to §§ 2-314 to 2-316 and 2-715 on proximate cause and the effect of contributory fault.

UNIFORM CONFLICT

Table of Jurisdictio

Jurisdiction	Laws
Washington	L.1933, c. 152

The Uniform Conflict of Laws-tations Act was approved by the tional Conference of Commissione Uniform State Laws in 1982. It wa signed to replace the Uniform Stat Limitations on Foreign Claims

Commissi

Traditionally, statutes of limita laws, for conflict of laws purpos the forum state's laws were appli stantive effect of determining whe delay-prone plaintiffs, or by their limitation periods, inevitably occurre

One consequence was that the t tions" to the "general rule." The any limitation period that was "ba death act, that created the cause of ty test" that treated a limitations s cifically to the sort of claim sued ployed. See Grossman, Statutes of ern Analysis, 1980 Ariz.St.L.J. 1.

Another consequence was that a called "borrowing statutes" which f cation of a limitation period other of the cause of action occurred in borrowing statutes are often diffic the source of considerable judicial co

In 1957 the Conference promulgate eign Claims Act which was designed achieved no general adoption, and w difficulty with it was its abrupt bars providing simply that the governing s state "where the claim accrued," sim period—"whichever bars the claim." present committee was set up to du ute." The consensus was that limit character, like other laws that affe serted.

UNIFORM CONFLICT O

Sec.
1. Definitions.
2. Conflict of Laws; Limitation Pe riods.
3. Rules Applicable to Computation Limitation Period.
4. Unfairness.
5. Existing and Future Claims.

§ 1. Definitions

As used in this [Act]:

(1) "Claim" means a right of actio or proceeding and includes a right of

(2) "State" means a state, commo United States, the District of Colum foreign country, or a political subdiv

MEMORANDUM

Memo: November 14, 1985
To: Hayden Kayden
From: Representative Max Gruenberg
Re: David S. Carter's letter on HB 368, the Uniform Comparative Fault Act

Enclosed please find a letter from Anchorage attorney David S. Carter on HB 368, the Uniform Comparative Fault Act. Please place it in the official committee file.

Also enclosed are seven copies of his letter. Please place them in each committee member's file.

Thank you.

State of Alaska

COMMITTEES

HOUSE HEALTH, EDUCATION
AND SOCIAL SERVICES
(Co-Chairman)
HOUSE JUDICIARY
HOUSE COMMUNITY AND
REGIONAL AFFAIRS

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4968

914 CLAY COURT
ANCHORAGE, ALASKA 99503
(907) 276-6844

Representative Max F. Gruenberg, Jr.
District 11
Spenard, Upper Midtown Anchorage

November 5, 1985

David S. Carter
420 East 56th Avenue, A
Anchorage, Alaska 99518

Re: HB 368

Dear David:

Many thanks for your thoughtful and well researched letter of October 30 concerning the Uniform Comparative Fault Act. I very much appreciated your clearing up whether non-parties would have their fault adjudicated.

Your letter definitely sets the issue to rest and is an important addition to the record.

I sent a copy of your October 30 letter to each committee member personally and also have sent the original to the House Judiciary Committee staff counsel, Hayden Kayden, to put with the other official committee file. I have also asked him to put an additional copy of your letter in each committee members' bill file--it is that important. I want to be sure that each committee member understands what you are saying.

Please keep in touch. You probably have received my letter sent to all interested parties after the hearing. I think a lot of work needs to be done on this legislation and am willing to talk with you and other interested attorneys so that we can iron out the kinks and see if there is sufficient interest from a broad-based section of the bar for us to adopt this legislation.

Please get in touch with me at your earliest convenience.

Cordially,

Max F. Gruenberg, Jr.

David S. Carter
420 E. 56th Avenue, A
Anchorage, AK 99518

October 30, 1985

House Judiciary Committee
Attn: Representative Max Gruenberg
1024 W. Sixth Avenue
Anchorage, AK 99501

Dear Representative Gruenberg:

During my testimony before the Judiciary Committee here in Anchorage on October 25, 1985, I indicated to the Committee that I would look into the question of whose fault would be apportioned under House Bill 368, the Uniform Comparative Fault Act. While I spoke with you on the phone after my testimony on the 25th, I wanted to put my comments down in writing for the benefit of other Committee members and the Legislature. It is my hope that you can include this letter in the record so that there will not be any confusion as to whose fault is apportioned under the Uniform Comparative Fault Act.

Pursuant to §09.17.020(a)(2), as contained in House Bill 368, the total fault of all of the parties to each claim is allocated amongst each claimant, defendant, third-party defendant, and persons who have been released from liability under §09.17.060. The National Conference of Commissioners Comment on this section states the following:

> 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. It cannot be told with certainty 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 is not a party would not be binding on him. Both

> plaintiff and defendants will have significant incentive for joining available defendants who may be liable. The more parties joined whose fault contributed to the injury, the smaller the percentage of fault allocated to each of the other parties, whether plaintiff or defendant.

I trust that this language responds to your question as raised during my testimony concerning the allocation of fault under House Bill 368. I appreciate having had the opportunity to speak before the Committee on October 25th and I hope that proposed legislation will be given serious consideration as its enactment is long overdue.

Very truly yours,

HUGHES, THORSNESS, GANTZ,
POWELL & BRUNDIN

David S. Carter

By:
David S. Carter

DSC:mak

ALASKA BAR ASSOCIATION
P.O. BOX 100279
ANCHORAGE, ALASKA 99510
AREA CODE 907/272-7469

DEBORAH O'REGAN, EXECUTIVE DIRECTOR
STEPHEN J. VAN GOOR, DISCIPLINE COUNSEL · TERESA E. WILLIAMS, DISCIPLINE COUNSEL

M E M O R A N D U M

TO: Members, Torts, Tax and Probate Sections

FROM: Deborah O'Regan, Executive Director DOR

RE: Hearings on House Bills in Anchorage

DATE: October 22, 1985

Representative Max Gruenberg has informed us that there will be hearings on Friday, October 25 at the Legislative Information Office, 6th and "K" Streets, at 10:00 a.m. on the following bills:

HB 368 - Uniform Comparative Fault Act

HB 408 - Uniform Simultaneous Death Act

HB 356 - Assignment of Group Life Insurance Policies

HB 358 - Non-Probate Transfers

If you are interested in testifying or would like more information, contact Max Gruenberg at 276-6844 or his legislative assistant, Chris Clark at 276-3240.

CITIZENS COALITION ON TORT REFORM, INC.

One of the gravest problems facing individuals, governments and businesses in Alaska today is the dramatic rise in liability premiums. At the present time the problem is compounded by a variety of factors. While insurance premiums are being increased, many insurance companies are pulling back from servicing policies in Alaska. The risks, especially in the Bush, are too great. Legislative remedies are needed. Following is a summary of proposals from the CITIZENS COALITION ON TORT REFORM INC.

1. CAP NON-ECONOMIC AWARDS

Non-economic awards compensate a victim for pain and suffering, loss of consortium and other intangible losses. A cap will establish consistency and result in predictable insurance programs. We suggest a maximum award of $250,000.

A recent United States Supreme Court decision allowed California to impose a limit of $250,000.

2. MANDATE STRUCTURED SETTLEMENTS

Structured settlements provide future payments to the victim equal to the total award. The future payments are consistent with the victim's loss.

3. DISCLOSE COLLATERAL INCOME SOURCES

Juries currently are not allowed to know when a victim has insurance coverage and has already been compensated. Accordingly that coverage is ignored in jury awards.

4. SET A SLIDING SCALE OF ATTORNEY'S CONTINGENT FEES

A sliding scale will increase the proportion to the victim as the amount of the award increases. Current practice allows an attorney a set percentage irrespective of the amount of the award.

The California sliding scale has been upheld as constitutional.

5. MODIFY JOINT AND SEVERAL LIABILITY

Several liability will apportion responsibility in accordance with degree of fault. Under current practice of Joint and Several liability, anyone at fault may be subject to the total liability.

6. REQUIRE ITEMIZATION OF ALL JURY AWARDS

The jury should make its award for damages with specific amounts. Damages will be itemized so as to reflect the monetary distribution among economic losses, non-economic loss, future losses, past expenses and other losses as applicable.

Similar legislation has been adopted by the State of Illinois in May of 1985.

7. ABOLISH RULE 82

This eliminates an additional expense. Current practice allows juries to make an award for damages which includes attorney's fees. Under Rule 82, the court can add up to 10% of the award for attorney's fees. (An attorney can claim and receive up to 10% of the settlement even if the case does not go to court.)

8. MODIFY PREJUDGEMENT INTEREST

Interest should accrue from the time of award or first offer of settlement. Current practice allows for interest to accrue from time of occurance. This will eliminate an unreasonable expense.

9. REVISE WRONGFUL DEATH STATUTE

A cap on wrongful death awards where here are no legal dependents will eliminate unreasonable expenses. The maximum benefit payable for wrongful death, in instances of no surviving dependents, should be limited to $25,000.

Similar legislation exists in Montana.

10. PUNITIVE DAMAGES

Awards for punitive damages should accrue to the benefit of society as a whole, ie., the State of Alaska.

11. Statute of Limitations

The current statutes of limitation should be modified to insure that they are applicable to a reasonable time certain. Recent interpretations open the individual to liability to an indefinite time future. The result is total unpredictability and unlimited exposure is an uninsurable risk.

12. REQUIRE AN AFFIDAVIT OF MERIT

As a condition of filing a complaint, the plantiff's attorney must certify there is reasonable and meritorious cause of filing the action. The plantiff's attorney must certify that he has consulted and reviewed the facts with a competent authority and has determined there is reasobnable and meritorious cause for filing the action.

Similar action has been adopted by the State of Illinois in May of 1985.

13. SPECIAL DAMAGES IN COUNTERCLAIMS

Eliminate the requirement to show special damages. This will require the plantiff's attorney to be held to the same standard of care principles required of other professionals.

14. EXPERT WITNESSES

Strict guidelines must be established for expert witness standards including current experience, substantial portion of his or her time currently involved in the practice and demonstration of a knowledge of the state of the art. Currently there are some expert witnesses whose sole practice is being an expert witness.

15. UNTRUE ALLEGATIONS

Legislation is needed to permit award of attorney's fees and payment of reasonable expenses from parties making untrue allegations without reasonable cause.

Currently there is no prohibition to plantiffs making allegations which are untrue. Similar legislation has been adopted by the State of Illinois in May of 1985.

16. MANDATORY ARBITRATION

Contracts shall provide for mandatory arbitration. The law should provide for judicial review of the arbitration hearings. In the event the mandatory arbitration is substantially upheld, the party requesting the judicial review shall assume all costs and fees related to the appeal.

OTHER SIGNIFICANT ISSUES

Provision for early dismissal of uninvolved parties by filing an Affidavit of Non-Involvement.

Require release of records prior to the institution of a suit.

Mandate advance notice of at least 60 days prior to the cancellation of insurance and provide for a timely return of unearned premiums.

Require disclosure of settlement information to licensing authority.

Provide reasonable immunity in anti-trust suits, except in the instance of malice and provide penalities for frivolous suits.

Make provision for review of professional activities by professional society.

Require all disciplinary actions by any professional group duly consistituted to be reported to licensing authority.

Limit application of strict liability.

David S. Carter
420 E. 56th Avenue A
Anchorage, AK 99502

February 19, 1985

Representative Max Gruenberg
Pouch V
Juneau, AK 99811

Dear Representative Gruenberg:

You may recall that I spoke with you several months ago regarding the current laws on contribution among joint tortfeasors. In a nutshell, we discussed how the current statutes, which provide for pro rata contribution among joint tortfeasors, are outdated in light of Alaska's judicial adoption of pure comparative negligence in Kaatz v. State, 540 P.2d 1037 (Alaska 1975). During our conversation, you asked me to check to see if there were any updated versions of contribution statutes developed by the National Conference of Commissioners on Uniform State Laws. Enclosed please find a copy of the "Uniform Comparative Fault Act" approved by the National Conference of Commissioners on Uniform State Laws in 1977.

When we last spoke, which was shortly before you left for Juneau, you mentioned that you had been appointed to the Judiciary Committee. Since any legislation to amend Alaska's contribution statutes would necessarily pass through your committee, I would request that you keep a copy of the enclosed materials before, pursuant to general protocol, sending this correspondence to my representative, whom I believe is Representative Boucher. I would be pleased to see you both take an active role in introducing legislation directed towards abolishing the inequity which presently exists due to Alaska's judicial adoption of comparative negligence but its failure to judicially or legislatively adopt contribution statutes patterned for comparative negligence jurisdictions.

Basically I am in favor of adopting the Uniform Comparative Fault Act in its entirety. Naturally, there may well be portions of

the Act which would generate debate. For instance, §2(d) calls for the reallocation of any amount uncollectible from one party among the other parties, including a claimant at fault, according to their respective percentages of fault. I suspect that the plaintiff's bar, and a number of other individuals, will feel that it is inequitable to require an injured plaintiff to share the burden of an insolvent defendant with the other defendants to the action.

Clearly, there is room for disagreement here. My own personal opinion is that the Act's treatment of this situation is the most equitable. If a plaintiff is not at fault, he or she will not be affected by the redistribution of an insolvent joint tortfeasor's obligations. Where a plaintiff has been found to have been contributorily negligent, he or she will only be required to bear the burden of a defendant's insolvency proportionately to the plaintiff's own fault. The same, of course, is true of the remaining solvent defendants. The key word regarding the Uniform Comparative Fault Act is "equity."

In sum, it is my hope that the Legislature will be able to amend Alaska's Contribution statutes to ameliorate the current inequity during this session. The Act is prospective and would not affect causes of action accruing prior to the date of the Act's implementation. I would also like to refer you to the primary case in Alaska which discusses the current situation regarding comparative negligence and pro rata contribution. Arctic Structures, Inc. v. Wedmore, 605 P.2d 426 (Alaska 1979) should be read in its entirety. The court in Arctic Structures deferred to the Legislature the responsibility of adopting contribution statutes consistent with the application of comparative negligence. I would also direct your attention to Chief Justice Boochever's (now Ninth Circuit Judge) dissenting opinion in the Arctic Structures case and the American Motorcycle Association case cited therein.

I wish that I could have provided a more complete briefing for you at this time but my workload has prevented that development. I should note that these materials are not being sent on behalf of my employer, Hughes, Thorsness, Gantz, Powell & Brundin, nor do I purport to represent anyone's opinion other than my own. However, I am clearly not alone in recognizing that our contribution statutes, found at A.S. 09.[illegible].010, et seq., need updating to reflect Alaska's adoption of comparative negligence. If you, or anyone else in the Legislature have any questions regarding this matter, please feel free to call on me. I will do my best to address such inquiries. Once again, I would hope that we can get something passed this session since there is a two-year statute of limitations on tort actions and therefore any Legislation passed this year would not take full effect until 1987, unless of course we look into making the statutory revisions effective sooner.

Thank you for your attention to this matter.

Yours very truly,

David S. Carter

Enclosure

LAW OFFICES

LYNCH, FARNEY AND CROSBY

A PROFESSIONAL CORPORATION

ALASKA MUTUAL BANK BLDG.

601 WEST FIFTH AVENUE, SUITE 820

ANCHORAGE, ALASKA 99501

TELEPHONE

AREA CODE 907

276-3222

ARONA S. BLACHMAN
PETER J. CROSBY
BRIAN J. FARNEY
MARYANN E. FOLEY
ALAN HIGBIE
TIMOTHY M. LYNCH
MARY LOUISE MOLENDA
ROD SISSON
JAMES B. WRIGHT

February 28, 1985

Representative Max Gruenberg
State Capitol, Pouch V
Juneau, AK 99811

Attn: Dave Donley

Dear Max:

Enclosed you will find material on the Uniform Comparative Fault Act. I spoke with Dave regarding this. I am requesting your support for the introduction of this measure in this session of the Legislature.

I am writing you on behalf of a subcommittee of the Alaska Defense Counsel. On several prior occasions, when the Alaska Supreme Court was confronted with the question of the allocation of damages among defendants in a comparative negligence case by using their comparative fault, they referred the matter to the Legislature. This is a situation which is particularly unfair in those circumstances where one of two or more defendants is insolvent. The Uniform Comparative Fault Act would, I believe, correct this situation. While on the one hand it preserves to the plaintiff the right of joint and several liability, i.e. collecting all of his or her judgment from one defendant, it permits reapportionment of the insolvent defendant's portion of the liability as between negligent defendants and comparatively negligent plaintiffs, thereby causing all to bear their fair share.

On behalf of the Alaska Defense counsel, I would like to recommend this Act in its present form as a solution to a very unfair situation. I have enclosed a copy of the Act and some background material.

If it is possible to have this act introduced this year and acted upon in this session, I believe that I can generate sufficient support to speak in favor of it. If necessary, I believe that we can obtain testimony and/or written support from the Commissioners on Uniform Laws.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

LYNCH, FARNEY and CROSBY

Timothy M. Lynch

TML/vmd/7
Enclosures

The Law Firm of
Schaible, Staley, DeLisio & Cook, Inc.

Anchorage Office
Stephen S. DeLisio
Alan Sherry
Joseph M. Moran
Michael C. Geraghty
Patricia L. Zobel
Allan J. Olson
Gregory L. Youngman
Timothy J. Lamb

Fairbanks Office
Grace Berg Schaible
Howard Staley
Dennis E. Cook
Barbara L. Schuhmann
Robert B. Groseclose
Charles D. Silvey, Jr.

Of Counsel:
William V. Boggess

May 1, 1985

Representative Max F. Gruenberg, Jr.
State of Alaska
Pouch V
Juneau, AK 99811

Re: Uniform Comparative Fault Act

Dear Representative Gruenberg:

Thank you for your letter of April 18, 1985, along with the enclosed copy of the introduced legislation.

I agree with your observation that the chances of legislation being enacted are better if the bill remains unchanged. On that note, I thought you might be interested in the enclosed editorial from the April 12, 1985 edition of the Los Angeles Times. I believe California has passed the Uniform Comparative Fault Act, but I am not certain. Perhaps one of your aides might wish to obtain a copy of the referenced SB 75. This is only a suggestion, since I know you and your staff are very heavily preoccupied with end of the session matters, and other constituent concerns.

Thank you very much for your attention.

Sincerely,

SCHAIBLE, STALEY, DeLISIO & COOK, INC.

By: Michael C. Geraghty

MCG/slb
Encl.

THE CASE FOR JUDICIAL ADOPTION OF COMPARATIVE FAULT IN SOUTH CAROLINA

JERRY J. PHILLIPS*

I. INTRODUCTION

A review of the reasons why a comparative-fault doctrine should be adopted in South Carolina has been ably done elsewhere.[1] The pressing issue in South Carolina is whether this doctrine should be adopted judicially or legislatively. It is clear that the judiciary, as well as the legislature, has the power to adopt a comparative-fault rule.[2] The real question is whether, as a matter of policy, the courts should defer to the legislature in this area. The thesis of this article is that the courts should take the initiative in view of the complexity of the problems associated with such a change in the law. These problems call for the kind of fine-tuning that is more a characteristic of judicial decision making than of legislative enactment.

Moreover, prior holdings of the South Carolina Supreme Court mandate that some action be taken in this area. This court has held that a comparative-fault doctrine that applies to only one class of individuals is unconstitutional as violative of

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* Professor of Law, University of Tennessee School of Law. A.B., Yale University, 1956; J.D., Yale Law College, 1961; M.A., Cambridge University, 1964.

This article is an outgrowth of a CLE speech the author delivered to the bench and bar of South Carolina at Columbia in March of this year under the joint auspices of the South Carolina Bar and University of South Carolina School of Law. The author gratefully acknowledges the helpful suggestions of Professor David G. Owen of the University of South Carolina School of Law.

1. *See generally Symposium: Comparative Negligence in Louisiana*, 40 LA. L. REV. 289 (1980); Commentary, *A Call for the Adoption of Comparative Negligence in South Carolina*, 31 S.C.L. REV. 757 (1980).

2. Several states have adopted judicially a comparative-fault doctrine. *See, e.g.*, Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1974); Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979); Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979). *See generally Comments on* Maki v. Frelk—*Comparative v. Contributory Negligence: Should the Court or Legislature Decide?* 21 VAND. L. REV. 889 (1968).

equal protection of the law.[3] Yet, South Carolina has some comparative-fault rules that apply to only a part of the field of torts law. Under the South Carolina court's interpretation of equal protection, these rules either should be struck down as unconstitutional or extended to the entire field of tort law. Since these rules are longstanding and fundamental to tort law, their extension rather than expungement is the desirable alternative.

II. THE SCOPE OF THE DOCTRINE

A. *Forms of the Doctrine*

Numerous decisions must be made about the scope of the comparative-fault doctrine. Among the most important is the appropriate form to adopt, "partial" (or "modified") and "pure" being the usual choices.[4] Under a partial system, a plaintiff may recover only as long as his fault is not as great as—or, some courts say, not greater than—that of the defendant. The pure system allows a plaintiff to recover against a defendant who is proximately at fault to any degree. A minority of jurisdictions, mostly by judicial decision, have adopted the pure form as the most equitable.[5] The majority, however, have adopted one of the partial forms in the belief that it is unfair to allow a plaintiff to recover when he is either equally at fault, or more at fault, than the defendant.[6]

The partial form has some unfortunate attributes. For ex-

3. Marley v. Kirby, 271 S.C. 122, 245 S.E.2d 604 (1978). *See* text accompanying notes 44-46 *infra*.

4. *See* Commentary, *supra* note 1, at 776-77.

In a recent article the proposition is persuasively advanced that, under a state constitutional "intermediate" (as opposed to either a "strict" or a "rational-basis") standard of review, a "modified" comparative-fault system is unconstitutional under the equal protection clause. *See* Sowle & Conkle, *Comparative Negligence Versus the Constitutional Guaranty of Equal Protection: A Hypothetical Judicial Decision*, 1979 DUKE L.J. 1083. The constitutional reasoning is the same as that of the South Carolina Supreme Court in Marley v. Kirby, 271 S.C. 122, 245 S.E.2d 604 (1978), and indicates that South Carolina is constitutionally required to adopt a "pure" rather than a "modified" form of comparative fault. The article also presents a thorough and well-reasoned analysis of the disadvantages of modified comparative fault and the superior features of a pure system of comparison. *See* Sowle & Conkle, *supra*.

5. *See* Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1974); Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979).

6. *See, e.g.*, Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979).

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ample, while the doctrine of last clear chance is usually abolished under a system of comparative fault, it would presumably become applicable again under the partial form once the plaintiff's fault equaled or was greater than that of the defendant.[7] This application could result in a plaintiff, barred from partial recovery because of the degree of his fault, nevertheless recovering his entire damages by virtue of the last clear chance doctrine. This doctrine is widely recognized as unsound and merely an intermediate step between the harsh common-law rule of contributory negligence and the more equitable rule of comparative fault.[8]

The better view is that under a partial system the jury should be instructed on the effect of its verdict, *i.e.*, that a finding of 50% fault—or 51% under some systems—of plaintiff will bar his recovery entirely.[9] The need for this practical instruction indicates another deficiency of the partial system: the jury's opportunity to twist or bend its basic factual determinations in order to achieve the result it desires. It seems better to allow the jury to reach its factual determination untrammeled by such considerations. In addition, it is difficult to see why a single degree change in the middle range of fault should have the drastic effect of barring recovery.

B. Areas of Application

Comparative fault reduces rather than precludes recovery when plaintiff is contributorily negligent. Courts also usually apply the doctrine when plaintiff is charged with impliedly assum-

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7. "Of course, when a state has modified comparative negligence a strong argument could be made that last clear chance should still apply when negligence is not compared." V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 7.2, at 139 (1974). Last clear chance may be retained as an exception to comparative fault, but the trend is to abolish it as a general exception. *Id.*

8. *See* James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704 (1938). The doctrine does, however, serve the useful purpose of mitigating the harshness of the all-or-nothing rule in a contributory negligence jurisdiction.

9. Thomas v. Salem Township Bd. of Trustees, 224 Kan. 539, 548-52, 582 P.2d 271, 278-80 (1978).

The 51%-49% rule is preferable to a 50%-50% bar if the jury is not instructed on the effect of its verdict, "because a 50-50 apportionment is a very comfortable one for juries." W. PROSSER, J. WADE, & V. SCHWARTZ, TORTS CASES AND MATERIALS 610 (6th ed. 1976). The jury's intent to so apportion would be frustrated by a 50%-50% cutoff rule of which it was unaware.

ing a known risk in a voluntary and unreasonable manner[10] and when plaintiff is charged with foreseeable misuse of a product.[11] There may be some areas when plaintiff's fault will not be used to reduce recovery even under a comparative-fault rule. Traditionally, contributory negligence has been no defense to a charge of willful misconduct[12] and the same rule may apply to comparative fault.[13] Similarly, contributory negligence (and perhaps comparative fault) is inapplicable when defendant has violated a statute enacted to protect the plaintiff against his own fault.[14] If plaintiff were injured because of the failure of defendant to provide a safety device whose purpose is to guard against the very conduct of plaintiff that caused the injury, contributory negligence (and arguably comparative fault) may not be applied.[15] Similarly, contributory negligence (and perhaps comparative fault) may not be applied to workplace injuries when plaintiff is required to work near a dangerous condition created by defendant.[16]

All of these no-contributory-fault rules should probably be eliminated under comparative fault, however, since they are in conflict with the basic policies underlying its adoption. The rules probably originated in part to alleviate the harshness of the contributory negligence rule and, with the adoption of comparative fault, this reason for the rules disappears. Also, leaving arguably arbitrary exceptions to the basic doctrine of comparative fault

10. *See, e.g.*, Sunday v. Stratton Corp., 136 Vt. 293, 390 A.2d 398 (1978).

11. *See, e.g.*, Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977). *Hopkins* has been overruled with respect to its definition of an "unreasonably dangerous" product in strict liability design defect cases. Turner v. General Motors Corp., 584 S.W.2d 844, 847 (Tex. 1979). *Hopkins* still stands for the proposition that comparative fault applies in products liability "foreseeable misuse" cases. *See also* Fischer, *Products Liability—Applicability of Comparative Negligence to Misuse and Assumption of the Risk*, 43 Mo. L. REV. 431 (1978).

12. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 65, at 426 (4th ed. 1971).

13. *See generally* Owen, *The Highly Blameworthy Manufacturer: Implications on Rules of Liability and Defense in Products Liability Actions*, 10 IND. L. REV. 769 (1977).

14. *See* W. PROSSER, *supra* note 12, at 425-26.

15. Bexiga v. Havir Mfg. Co., 60 N.J. 402, 412, 290 A.2d 281, 285 (1972). The defense of contributory negligence is especially weak when defendant has represented his product to be safe and plaintiff relies, perhaps imprudently, on the representation. *See* Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797, 802-04 (1977).

16. D. NOEL & J. PHILLIPS, PRODUCTS LIABILITY IN A NUTSHELL 242-43 (1974)(charge of assumption of the risk).

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Rptr. 132, 145 (1980).

22. *See* Twerski, *supra*

may well conflict with the South Carolina Supreme Court's conceptual view of equal protection.[17] There is, however, no reason why the policy underlying these various rules may not be taken into consideration as a relevant factor in assessing comparative fault.

A growing number of jurisdictions have applied comparative-fault principles to strict products liability litigation.[18] Some courts have been unwilling to do so because of the conceptual difficulty of comparing fault with no-fault and because of a belief that the policies underlying strict liability militate against considering plaintiff's misconduct as being relevant to liability.[19] The policy argument seems weak. Plaintiff's fault in the form of assumption of the risk and unforeseeable misuse is treated as a bar to recovery in strict liability. If some types of plaintiff misconduct are relevant to strict liability, it is difficult to see why contributory negligence is not also relevant—particularly in view of the fact that the defenses of contributory negligence, assumption of risk, and misuse often overlap.[20]

The doctrinal problem in comparing fault with no-fault is more difficult. Some courts treat the issue as one of comparing degrees of causation[21] rather than of fault, although the results may be very different if a cause rather than fault comparison is used.[22] The Uniform Comparative Fault Act allows considera-

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17. *See* Marley v. Kirby, 271 S.C. 122, 245 S.E.2d 604 (1978). *See* text accompanying notes 45-51 *infra*.

18. *See* Fischer, *supra* note 11, at 431; Case Comment, *Comparative Negligence and Strict Products Liability*, 38 OHIO ST. L.J. 883 (1977). Some courts compare assumption of the risk, but not contributory negligence, in strict products liability actions. *See, e.g.*, Holdsclaw v. Warren & Brewster, ___ Or. App. ___, 607 P.2d 1208 (1980).

19. *See, e.g.*, Kinard v. The Coats Co., 37 Colo. App. 555, 557, 553 P.2d 835, 837 (1976); Seay v. Chrysler Corp., ___ Wash. 2d ___, 609 P.2d 1382 (1980). *But see* Comment, *Comparative Contribution and Strict Tort Liability: A Proposed Reconciliation*, 13 CREIGHTON L. REV. 889 (1980)(suggesting equal division of liability, between or among at-fault and strictly liable cotortfeasors, as the most equitable system).

20. *See* D. NOEL & J. PHILLIPS, *supra* note 16, at 219-22.

21. *See, e.g.*, Murray v. Fairbanks Morse, Beloit Power Syss., Inc., 610 F.2d 149 (3d Cir. 1979). The California Supreme Court recently held that any manufacturer of a "substantial percentage" of the market of the drug DES could be held liable to an injured plaintiff "for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries." Sindell v. Abbott Laboratories, ___ Cal. 3d ___, ___, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145 (1980).

22. *See* Twerski, *supra* note 15, at 821-22.

tion of both fault and causation in apportioning liability.[23] Others have urged that marketing a defective product may be viewed as blameworthy for purposes of fault comparison even though the defective condition was latent and not reasonably discoverable.[24]

South Carolina has a special problem in judicially adopting comparative fault for strict tort liability since the General Assembly has adopted the Restatement (Second) of Torts Section 402A,[25] including the comment that makes assumption of the risk a complete defense and abolishes contributory negligence as a defense.[26] In order to integrate strict tort liability into comparative fault, certain portions of these enactments would have to be repealed. Alternatively, they may be declared unconstitutional under the equal protection rationale discussed below.[27] In any event, there is no legislation to prevent the South Carolina judiciary from applying comparative fault to all negligence actions and to strict liability actions based on breach of express or implied warranties.[28]

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23. UNIFORM COMPARATIVE FAULT ACT § 2(b), *reprinted in* 40 LA. L. REV. 403, 419 (1980).

24. *See* Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 331 (1977), Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 377 (1978).

25. *See* S.C. CODE ANN. § 15-73-10 (1976). *See generally* Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803 (1976).

26. *See* S.C. CODE ANN. § 15-73-20 (codifying the last sentence of RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965)). The legislature has incorporated by reference all comments to § 402A as the legislative intent. *See* S.C. CODE ANN. § 15-73-30 (1976).

27. *See* text accompanying notes 45-47 *infra*.

28. An action for breach of express or implied warranty is a form of strict liability. D. NOEL & J. PHILLIPS, *supra* note 16, at 13. Privity of contract is not required in an action for breach of express or implied warranty in South Carolina. JKT Co. v. Hardwick, ___ S.C. ___, 265 S.E.2d 510 (1980); Gasque v. Eagle Mach. Co., 270 S.C. 499, 502-03, 243 S.E.2d 831, 832 (1978).

The inspection language of U.C.C. § 2-316(3)(b) and the proximate cause language of U.C.C. § 2-715(2)(b) can be read as introducing to some extent a contributory negligence defense into warranty law. *See also* U.C.C. § 2-314, Comment 13; *id.* § 2-715, Comment 5. These Code sections may, however, be glossed to allow application of a comparative fault standard and the comments are not binding on the courts.

C. *Multiple Defendants*

When there is more than one defendant, a number of problems arise in applying comparative fault. Of fundamental importance is the issue of whether the concept of joint and several liability should be retained. A number of jurisdictions retain the concept,[29] while a few provide for apportionment of liability between or among defendants.[30] Under the apportionment approach, if plaintiff were 20% at fault and each of two defendants were 40% at fault, plaintiff could recover only 40% of his damages from any one of the defendants. Under traditional principles of joint and several liability, he could obtain a judgment for 80% of his damages against either or both defendants, although he could only collect the 80% once—in whole from one defendant or in part from each.

Apportioning liability between or among defendants when all parties are at fault seems more sensible than joint and several liability. There is no good reason why one at-fault defendant should be responsible for the fault of another solvent defendant. Let the burden of seeking recovery from the other defendant lie with the culpable plaintiff who invokes the court's aid. If plaintiff is without fault, a culpable defendant should probably bear the loss of another defendant who is unable to pay. If plaintiff is not at fault and all defendants are solvent and before the court, the question of whether or not to apportion seems academic. If a solvent defendant is not before the court, however, the innocent plaintiff probably should have a joint and several judgment and the culpable defendant or defendants should then have the burden of seeking contribution. An innocent plaintiff should not be penalized to the advantage of an at-fault defendant.

When a claim cannot be collected against one of the defendants and plaintiff is partly at fault, the approach of the Uniform Comparative Fault Act is to apportion the uncollectible liability between the at-fault plaintiff and the other defendant or defendants who can pay, on the basis of their relative degrees of

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29. *See* Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

30. *See* Wilson v. Probst, 224 Kan. 459, 581 P.2d 380 (1978); Ohio River Pipeline Corp. v. Landrum, 580 S.W.2d 713 (Ky. 1979)(permissive several liability).

fault. Thus, if plaintiff *A* is 20% at fault and defendants *B* and *C* are each 40% at fault, but *C* is unable to pay, *A* will bear two-sixths of *C*'s responsibility and *B* the remaining four-sixths. If *A* is without fault, then *B* would bear the entire responsibility for *C*'s fault.[31]

A related problem arises when one defendant settles with the plaintiff, who then sues a cotortfeasor. The cotortfeasor should receive a credit against his liability at least equal to the settlement amount. The approach of the Uniform Act is to grant a credit equal to the full amount for which the settlor would have been liable had the plaintiff taken judgment against him.[32] This approach will tend to discourage settlements, but its virtue is that the remaining defendant is not prejudiced by the conduct of others over whom he has no control. It may be necessary to retain the settlor as a party in the litigation between plaintiff and the nonsettling defendant in order to get a fair determination of the degrees of fault.

A final major issue is how to determine relative degrees of fault when a partial comparative-fault rule is applied. Specifically, should plaintiff's fault be compared with all defendants together or with each defendant separately for purposes of determining the apportionment cutoff point? Plaintiff may be able to recover under the former approach even though he could not under the latter. For example, suppose plaintiff *A* is 30% at fault, defendant *B* is 50% at fault, and defendant *C* is 20% at fault. In a partial comparative-fault jurisdiction, *A* would be un-

31. *See* UNIFORM COMPARATIVE FAULT ACT § 2(d). This Act thus partially dispenses with joint liability when plaintiff is at fault and his claim against another defendant is uncollectable. The author's proposal would go further and place the onus on the culpable plaintiff, rather than on the culpable defendant, to seek contribution from another defendant; if this contribution is not available, that liability should then be shared among the remaining parties at fault as described in the Uniform Act. On the other hand, the burden of establishing the proper apportionment of damages should be placed on the defendants. *See* text accompanying notes 84-86 *infra*. If this burden is not carried, either liability would remain joint and several or the factfinder would be permitted to make a rough apportionment. *See* Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C.L. REV. 663, 667-68 (1978).

32. UNIFORM COMPARATIVE FAULT ACT § 6. The two possibilities discussed in the text contemplate releasing the settlor from liability for contribution. A third possibility is to allow the nonsettling tortfeasor to seek contribution against the settlor. This was the solution of the 1939 UNIFORM CONTRIBUTION ACT and it has a substantial deterrent effect on settlements. The three methods of treating settlements are discussed in the comment to § 6 of the Uniform Comparative Fault Act.

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The better rule seems to be to combine the defendants' fault for purposes of comparison. To do otherwise may result in a culpable defendant not being liable to plaintiff at all. Moreover, in the event of such nonliability, thorny questions arise concerning how that liability should be allocated between or among plaintiff and the remaining defendant or defendants. If a remaining defendant bears any portion of that liability, further complications arise regarding possible claims for contribution by that defendant against the defendant who is not liable to plaintiff.[34] There is also the undesirable possibility that in the contribution action the degrees of fault would be determined in differing proportions than they were in the original suit.

Combining the defendants' fault for purposes of comparison in a partial comparative-fault system normally will avoid the problems discussed in the preceding paragraph, since either all guilty defendants in a single suit should be liable or none should be.[35] This combining of fault argues for a pure rather than a partial comparative negligence approach, since the combination may result in a plaintiff recovering against a defendant who is less at fault than plaintiff. Under a pure comparative-fault ap-

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33. *Compare* Graci v. Damon, ___ Mass. ___, 383 N.E.2d 842 (1978)(plaintiff's fault measured against all defendants' combined liability) *with* Cartel Capital Corp. v. Fireco, 161 N.J. Super. 301, 391 A.2d 928 (1978)(plaintiff's fault measured against that of each defendant).

34. That one tortfeasor is immune from liability to plaintiff does not mean that he is immune from a claim for contribution by a cotortfeasor. The authorities are divided. *Compare* Chamberlain v. McCleary, 217 F. Supp. 591 (E.D. Tenn. 1963) (no contribution) *with* Nolechek v. Gesaule, 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978)(contribution allowed).

35. If several suits are involved, however, there may be conflicting results as to percentages of fault. As Dean Wade observes, "[b]oth plaintiffs and defendants have sufficient incentives to join other negligent persons, since this will have the effect of reducing their percentages of responsibility." Wade, *Comparative Negligence—Its Development in the United States and its Present Status in Louisiana*, 40 LA. L. REV. 299, 311 (1980). Not all parties may be suable in a single jurisdiction, however, if they lack minimal contacts with that jurisdiction. After World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559 (1980), the mere occurrence of a tort within a jurisdiction is not a sufficient basis for asserting long-arm jurisdiction over a tortfeasor.

proach, it makes no difference whether the defendants' degrees of fault are combined or not for purposes of relative comparison, since plaintiff's relative degree of fault will not bar recovery as long as any defendant is also at fault in any degree.

D. Setoff

A limited but important problem exists for jurisdictions that adopt either a pure comparative-fault rule or one that allows partial recovery as long as plaintiff's fault is not greater than that of defendant. The problem is whether or not setoff should be allowed when both parties have a claim against each other.[36] Suppose, for example, under a "not-greater-than" rule, that *A* and *B* are both injured in an accident in which each is equally at fault and that each suffers $10,000 damages. Shall each be required to pay the other $10,000 or shall the claims be set off against each other with no actual payment at all?

If either *A* or *B* is insured, the insurer benefits from a setoff to the detriment of the insured or the claimant, probably contrary to the expectations of the insured. If the attorney for *A* or *B* is hired on a contingency fee basis, he or she may also suffer by setoff through diminution of the *res* out of which his or her fee is to be paid. Both of these considerations militate against the use of setoff.

Other considerations arise if one of the claimants is judgment-proof. Suppose *A* is insured and has a claim for $10,000 against *B*, who is judgment-proof and has a claim for $15,000 against *A*. It would seem equitable that *A*'s claim be satisfied out of his own insurance before any payment is made to *B*. Suppose the same facts, except that *A* is solvent but uninsured. In this situation, equitable considerations favor allowing *A* to set off *B*'s liability against *A*'s own liability.[37] These dispositions

36. A claim for set-off can arise only in a pure comparative-fault jurisdiction or in a not-greater-than-partial-fault jurisdiction where each party's fault is the same. In all other situations, one party's fault will be greater than that of the other and he, therefore, will be barred from any recovery.

Some jurisdictions allow setoff. *See* V. SCHWARTZ, *supra* note 7, § 19.3. The Rhode Island comparative-fault statute expressly prohibits setoff. R.I. GEN. LAWS § 9-20-4.1 (Cum. Supp. 1979).

37. The Uniform Comparative Fault Act provides:

> A claim and counterclaim shall not be set off against each other, except by agreement of both parties. On motion, however, the court, if it finds that the

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E. Contribution

While adoption of comparative fault does not compel adoption of a rule of contribution among cotortfeasors,[38] logic and sound policy suggest that both be adopted. When fault is divided between cotortfeasors on a degree-of-fault basis,[39] no tortfeasor is immune from contribution because his or her fault is less than that of the other; by analogy, a pure comparative fault standard should be used in determining a plaintiff's claim against a defendant. Adoption of this kind of comparative contribution rule may be particularly necessary in South Carolina as a result of the state's crashworthiness doctrine discussed below.[40]

When joint and several liability is not retained with comparative fault, the need for contribution is eliminated, at least when all parties are joined in a single suit. In that situation, a defendant would never be required to pay more than his equita-

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obligation of either party is likely to be uncollectible, may order that both parties make payment into court for distribution. The court shall distribute the funds received and declare obligations discharged as if the payment into court by either party had been a payment to the other party and any distribution of those funds back to the party making payment had been a payment by him to the other party.

UNIFORM COMPARATIVE FAULT ACT § 3.

38. The Washington Supreme Court refused to adopt contribution merely because the state had a rule of comparative fault. Wenatchee Wenoka Growers Ass'n v. Krack Corp., 89 Wash. 2d 847, 576 P.2d 288 (1978). The Connecticut Supreme Court found that the legislature's adoption of comparative fault did not evidence a legislative intent to abolish that state's no-contribution rule. Gomeau v. Forrest, 176 Conn. 523, 409 A.2d 1006 (1979).

South Carolina presently does not allow a claim for contribution. Adcox v. American Home Assur. Co., 258 S.C. 331, 188 S.E.2d 785 (1972).

39. While some jurisdictions allow contribution on an equal basis, *see, e.g.*, TENN. CODE ANN. § 23-3102(b) (Supp. 1979), others divide liability based on degree of fault. *See* Phillips, *Contribution and Indemnity in Products Liability*, 42 TENN. L. REV. 85 (1974). The latter approach is the one adopted by the Uniform Comparative Fault Act, §§ 2, 4.

Some jurisdictions allow complete recovery by a "passively" negligent tortfeasor against a cotortfeasor who is "actively" negligent, although this rule has been severely criticized and rejected by other jurisdictions. *See* Missouri Pac. R.R. v. Whitehead & Kales Co., 566 S.W.2d 466 (Mo. 1978). The actively negligent tortfeasor under this rule, like the more-at-fault plaintiff in a partial comparative-fault jurisdiction, would be barred from seeking contribution.

40. *See* text accompanying notes 80-82 *infra*.

ble share. If all matters are not litigated in a single lawsuit, difficult problems of loss apportionment arise. The litigant's self-interest normally should be a strong incentive to join all likely parties whenever possible.[41]

F. Recapitulation

Thus, there are a number of difficult problems and policy choices connected with the adoption of comparative fault and the previous discussion highlights rather than exhausts the list of such considerations.[42] It seems eminently appropriate for the South Carolina Supreme Court to adopt comparative fault, instead of treating the subject solely as a matter for the legislature. The nature of the problems and policies to be considered are more suitable to judicial analysis than to a legislative resolution made in response to political concerns and special-interest group pressures. Even if a comparative-fault statute were adopted, it is likely that many major issues would be left open for resolution by the courts.[43] If the judiciary is suited to resolve some of these issues, it is suited to resolve them all. There should be little question of legislative opposition to comparative fault, since the General Assembly has already shown its approval of the doctrine in principle by passing comparative-fault statutes of limited application.[44] Moreover, as indicated in the following section, South Carolina may be required under its interpretation of constitutional law either to extend comparative fault throughout the law of torts, or to strike down those limited comparative-fault doctrines that already exist in the state.

III. THE CONSTITUTIONAL IMPLICATIONS OF APPLYING COMPARATIVE FAULT ON A LIMITED BASIS

A. Equal Protection Under State Law

In 1974, the South Carolina General Assembly passed a

41. *See* note 35 *supra*.

42. For a more extensive catalog of the issues involved, *see generally* V. SCHWARTZ, *supra* note 7; Wade, *supra* note 35.

43. For example, South Carolina's automobile comparative-fault statute seems to address only the issue of partial comparative fault vis-à-vis a single plaintiff and a single defendant. See S.C. CODE ANN. § 15-1-300 (1976).

44. These comparative-fault statutes are the railroad employee statutes, S.C. CODE ANN. §§ 58-17-3730, -3740 (1976) and the automobile statute, *id.* § 15-1-300.

statute providing for the application of comparative fault to automobile accident litigation.[45] The supreme court, in *Marley v. Kirby*,[46] struck down this statute under the equal protection clauses of the state and federal constitutions. While recognizing "the validity of comparative negligence statutes of general application," the court saw "no rational basis for separating injuries from motor vehicle accidents from injuries from other torts."[47] In reaching this result, the *Marley* court relied upon its earlier decision of *Broome v. Truluck*,[48] which struck down as unconstitutional a special tort statute of repose, or outer-cutoff statute of limitations, for architects, engineers, and contractors. There, the court stated as the rationale for its holding: " '[A]rchitects, engineers, and contractors are not the only persons whose negligence in the improvement of real property may cause damage or injury to others.' "[49]

In all probability these decisions are not compelled by federal constitutional law.[50] They are, however, based on state constitutional standards and nothing in federal law prohibits states from imposing a stricter standard of equal protection than that required by the federal constitution.[51] The decisions represent a clear statement of a quite restrictive constitutional review of state statutes on equal protection grounds and, therefore, directly apply to any comparative-fault rules presently in effect in South Carolina.

The Federal Employers' Liability Act, 45 U.S.C. §53 (1976),

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45. 1974 S.C. Acts 2718, No. 1177 (presently codified at S.C. CODE ANN. § 15-1-300 (1976)) provided:

> In any motor vehicle accident, contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for negligence resulting in death or in injury to person or property, if such contributory negligence was equal to or less than the negligence which must be established in order to recover from the party against whom recovery is sought.

46. 271 S.C. 122, 245 S.E.2d 604 (1978).

47. *Id.* at 124-25, 245 S.E.2d at 606.

48. 270 S.C. 227, 241 S.E.2d 739 (1978).

49. 271 S.C. at 125, 245 S.E.2d at 606 (quoting 270 S.C. at 230-31, 241 S.E.2d at 740).

50. *See* Silver v. Silver, 280 U.S. 117 (1929)(upholding guest statute against constitutional attack). "Contrary to the position of those courts which hold that the repose statutes for architects and builders are based on irrational classifications, a legislature would seem entitled to make such a judgment." 5 Research Group, Inc., Final Report of the Legal Study 10-11 (1977)(prepared for Interagency Task Force on Product Liability).

51. *See* Sowle & Conkle, *supra* note 4, at 1102.

establishes a pure comparative-fault rule for tort claims brought under that Act. That statute cannot be invalidated on state constitutional grounds because of the federal supremacy clause, Article VI of the United States Constitution, and the statute is in all probability constitutional under the relatively lax standards of federal constitutional review. Thus, the FELA comparative-fault rule must be applied in South Carolina, and accordingly that rule must be extended to all areas of tort law in this state in order to comply with the constitutional mandate of *Broome* and *Truluck*.

It is possible that the state supreme court would not consider the *Broome-Truluck* doctrine binding in a situation where the application of that doctrine is triggered by a mandatory federal, as opposed to a state, standard. Avoidance of the state doctrine, however, because of its relation to federal law would seem unduly insular and not logically defensible.

There are other areas of tort law in South Carolina, discussed hereafter, where in reality a comparative-fault rule is now being applied as a matter of state law. In these areas, the supreme court of the state has a choice. It can either strike down the application of a comparative-fault rule in such limited areas, or else it can extend that rule to the entire field of tort law, to comply with the constitutional demands of *Broome* and *Truluck*.

B. The Present Status of Comparative Fault in South Carolina

1. The Railroad Statute.—The South Carolina Code provides that contributory negligence and assumption of the risk are not defenses in a suit by railroad employees against a railroad for injuries which result from a statutory violation; in all other such suits not alleging statutory violation, recovery is apportioned according to the degree of fault of the employee.[52]

52. *See* S.C. CODE ANN. § 58-17-3730 (1976), which provides:

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this article to recover damages for personal injuries to any employee or when such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. But no such employee who may be injured or killed shall be held to have been

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54. *Id.* at 187-88.

This is a pure comparative-fault statute, limited to suits by railroad employees against their employers. It would seem inevitable that the statute be struck down if challenged on the authority of the *Marley* and *Broome* decisions.

2. The Avoidable Consequences Doctrine.—Professor Dobbs states the avoidable consequences doctrine in its traditional form:

> The plaintiff who is injured by actionable conduct of the defendant, is ordinarily denied recovery for any item of special damages he could have avoided by reasonable acts, including reasonable expenditures, after the actionable conduct takes place. . . .
>
> . . . .
>
> The affirmative side of the rule is that the plaintiff is entitled to recover for expenditures reasonably made in an effort to avoid or minimize damages caused by the defendant's conduct.
>
> The avoidable consequences rule in its negative form is not the same as the contributory negligence defense. For one thing, the contributory negligence defense looks to the plaintiff's pre-tort conduct, while the avoidable consequences defense looks to his post-tort conduct.[53]

Other differences between contributory negligence and avoidable consequences suggested by Professor Dobbs are: (1) the former applies only to negligence actions, while the latter applies to contract cases as well; (2) there is no duty of reasonable care to avoid damages if defendant's conduct is reckless or intentional; (3) avoidable consequences, like comparative fault, merely reduces damages, while contributory negligence bars recovery entirely; and (4) the contributory negligence standard "may be an objective one," while the "avoidable consequences rule probably takes the individual problems of the plaintiff into account somewhat more readily, though it is hard to be very sure about this."[54]

Most, if not all, of these asserted differences between the contributory negligence and avoidable consequences doctrines

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guilty of contributory negligence when the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

53. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.7, at 186-87 (1973).

54. *Id.* at 187-88.

disappear on closer analysis. Contributory negligence has been held in some jurisdictions to bar warranty claims that are contractual in nature.[55] The defense of contributory negligence is no bar if defendant's conduct is reckless or willful.[56] To state that unreasonable failure to avoid consequences reduces recovery, while contributory negligence bars recovery entirely, is only to assert a legal conclusion about the differences between the two doctrines without offering any reason why that difference should exist. There is no basis for concluding that one doctrine is any more or any less objective or subjective in its application than the other.[57]

The "affirmative side," as labeled by Professor Dobbs, of the avoidable-consequences rule has its counterpart in the contributory-negligence doctrine. If a claimant is injured in a reasonable attempt to avoid the occurrence of defendant's tort, he may recover for those injuries.[58] Rarely does the claimant incur out-of-pocket expenses to avoid a tort, but if he did so reasonably, these expenses should be recoverable. If *A* paid *B* a reasonable sum of money to induce *B* to help *A* out of the path of *C*'s tortiously approaching instrumentality, *A* should be able to recover this sum from *C*.

The one remaining difference between contributory negligence and unreasonable failure to avoid consequences is that of the timing of the claimant's conduct. As Professor Dobbs says, contributory negligence occurs prior to defendant's commission of the tort, while unreasonable failure to avoid consequences occurs after commission of the tort. This temporal distinction is often cited as the primary reason for the difference between the

55. *See* Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93, 111-14 (1972).

56. *See* W. PROSSER, *supra* note 12.

57. In explanation of the supposed subjective standard for determining avoidable consequences, Professor Dobbs notes that "some courts have recognized that the bank balance of the individual plaintiff should govern on the question what expenditures might reasonably be expected of him in minimizing his damages." D. DOBBS, *supra* note 53, at 188. This distinction seems no different from the general negligence rule which "must make proper allowance for the risk apparent to the actor, for his capacity to meet it, and for the circumstances under which he must act." W. PROSSER, *supra* note 12, § 32, at 150.

58. *See, e.g.*, Rossman v. La Grega, 28 N.Y.2d 300, 270 N.E.2d 313, 321 N.Y.S.2d 588 (1971).

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two doctrines.[59] Yet, the following close examination of the cases, including those in South Carolina, shows that the purported distinction is not, and cannot, always be maintained. Moreover, even if the distinction could be drawn clearly in all cases, it nevertheless seems to be one without a difference. Under any analysis, contributory negligence and avoidable consequences cannot be distinguished in logic or in policy. The result is that one part of contributory negligence (avoidable consequences) is being compared with defendant's negligence, while the remaining portion of contributory negligence is not being compared, even though there is no rational basis under *Marley* and *Broome* for drawing this distinction. The constitutional requirement of rational classification applies to court decisions as well as to statutes.[60] Thus, either the avoidable consequences doctrine under the constitutional compulsion of these decisions must be expunged from the law of South Carolina—a result neither likely nor desirable—or sound reason and policy demand that the doctrine be extended to establish a comprehensive doctrine of comparative fault in the state.

The traditional distinction between the two doctrines is stated in *Seay v. Southern Railway-Carolina Division*[61] and *Sullivan v. City of Anderson.*[62] In *Seay*, the court described contributory negligence as follows:

> " '[W]hen the carelessness of the person inflicting the injury is antecedent to the negligence of the person injured, and the latter might, by ordinary care, have discovered the failure of the former to use such care in time to avoid the injury, there can be no recovery, because the intervening negligence of the injured person is the direct and proximate cause of the injury.' "[63]

In *Sullivan*, the court stated the traditional avoidable consequences rule: "The rule is well established that it is the duty of

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59. *See* W. PROSSER, *supra* note 12, at 423.

60. The equal protection clause of the federal constitution applies to judicial decisions as well as to legislative enactments, since both constitute state action. Virginia v. Rives, 100 U.S. 313, 318 (1880).

61. 205 S.C. 162, 31 S.E.2d 133 (1944).

62. 81 S.C. 478, 62 S.E. 862 (1908).

63. 205 S.C. at 174, 31 S.E.2d at 138 (quoting Bodie v. Charleston & W.C. Ry., 61 S.C. 468, 486, 39 S.E. 715, 721 (1901)) (quoting 7 ENCY. LAW 383-85 (2d ed.)).

the owner of property, injured by the negligence of another, to use all reasonable effort to minimize the damage."[64] As the following examination indicates, however, the distinction is not maintained in the cases, primarily because of the confusion created by continuing torts.

An early telegraph case illustrates the problem. In *Willis v. Western Union Telegraph Co.*,[65] plaintiff claimed damages for mental distress suffered as the result of the alleged negligent delay of defendant in transmitting a reply to plaintiff's inquiry regarding his mother's health. Damages were recoverable from the time when plaintiff should have received the telegram to the time when he received positive information regarding his mother's health. The delay was obviously a continuing tortious failure of defendant to act, not a completed act. Yet the court held that "the jury might consider in mitigation of damages the failure of plaintiff to use other means of communication within his reach during that period of time."[66] The mitigation of damages or avoidable consequences rule should have been applied however, only if the tortious act had been completed.

The clearest case of ongoing tort is the repeated or continuing nuisance. In these situations a duty reasonably to avoid consequences has been imposed, even though the tort has not been completed.[67]

A bizarre train case illustrates the court's uncertainty in distinguishing avoidable consequences from contributory negligence. In *Currie v. Davis*,[68] plaintiff bought a train ticket, but was forcefully prevented from entering the train by the railroad's gatekeeper. Repeated attempts to enter resulted in repeated gatekeeper rejections accompanied by abusive language. Plaintiff left the gate to complain to the ticket agent, who suggested that plaintiff try to enter the train by a nonpassenger entrance. Plaintiff then returned to the passenger gate and was again forcefully and abusively rejected by the gatekeeper. No explanation is given in the opinion for the gatekeeper's actions or for the ticket agent's failure to intervene. Plaintiff claimed dam-

64. 81 S.C. at 480, 62 S.E. at 863.
65. 69 S.C. 531, 48 S.E. 538 (1904).
66. *Id.* at 539, 48 S.E. at 541.
67. *See* Fewell v. Catawba Power Co., 102 S.C. 452, 86 S.E. 947 (1915).
68. 130 S.C. 408, 126 S.E. 119 (1923), *appeal dismissed*, 266 U.S. 182 (1924).

ages for loss of business from the four-day delay in reaching his destination and for mental anguish. A judgment for plaintiff was upheld on appeal. Defendant railroad contended on appeal that

> under the facts of this case the law imposed upon the plaintiff the duty to minimize his damages, in so far as they were due to humiliation resulting from the gatekeeper's first rejection, by not thereafter subjecting himself to affront by repeatedly approaching the Cerberus at the gate, or by accepting the ticket agent's kindly suggestion that he try a flanking movement. We think the law applicable in that aspect of the case was the rule of contributory negligence or willfulness rather than the principle as to mitigation or reduction of damages. But, if the latter principle were applicable, the avoidable consequential damages which the defendant was entitled to have eliminated from the consideration of the jury were only such as could have been avoided by the injured party in the exercise of proper care.[69]

The temporal distinction between contributory negligence and unreasonable failure to avoid consequences is so ephemeral and unjustified that the courts occasionally have rejected it. In *Lipman v. Atlantic Coast Line Railroad*,[70] for example, plaintiff sued defendant for mental anguish caused by the abusive language of defendant's conductor. Defendant's defense was that the conductor's actions were provoked by plaintiff's wrongful conduct in tendering cash instead of a ticket—conduct clearly preceding defendant's actions and, therefore, traditionally described as contributory negligence. The court stated: "If that be true [defendant's claim of provocation], it is a matter of defense, and in mitigation of damages, even if [plaintiff's] technical rights as a passenger were violated."[71]

In *Gardner v. Q.H.S., Inc.*,[72] fire damage to plaintiff's premises allegedly resulted from defendant-product supplier's failure to provide an adequate warning. The Court of Appeals for the Fourth Circuit stated that the "contributory negligence of

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69. 130 S.C. at 422, 126 S.E. at 124.

70. 108 S.C. 151, 93 S.E. 714 (1917).

71. *Id.* at 154, 93 S.E. at 715.

If defendant's misconduct were willful and plaintiff's merely negligent, plaintiff's misconduct should be irrelevant whether it be deemed contributory negligence or unreasonable failure to mitigate damages. *See* note 56 and accompanying text *supra*.

72. 448 F.2d 238 (4th Cir. 1971)(applying South Carolina law).

[plaintiff's] employees . . . in failing to respond promptly"[73] when they discovered the fire might be a defense if, on remand, the trial court found that "contributory negligence is a defense in a suit for breach of implied warranty . . . ."[74] The employees' conduct here, characterized as "contributory negligence," clearly followed defendant's commission of the tort.

In *Spier v. Barker*,[75] the New York Court of Appeals recognized that plaintiff's failure to wear a seat belt is conduct that precedes an automobile accident and that "[t]raditionally" the doctrine of avoidable consequences has been applied "only to postaccident conduct."[76] The court nevertheless chose to treat plaintiff's failure to wear her seat belt as an unreasonable failure to avoid consequences, apparently in order to avoid the harsh consequences of the all-or-nothing contributory negligence rule.[77]

Dean Prosser candidly admits that "the doctrines of contributory negligence and avoidable consequences are in reality the same . . . ."[78] The Uniform Comparative Fault Act includes within the definition of comparative fault the failure to avoid or mitigate damages.[79]

Thus, both case law and commentators make clear that the doctrines of contributory negligence and unreasonable failure to avoid consequences cannot be distinguished effectively. South Carolina, therefore, already has a limited rule of comparative fault in its avoidable consequences doctrine, which is not rationally distinguishable from contributory negligence. The only question is whether the courts will acknowledge this fact and take appropriate steps to extend the avoidable consequences principle of comparative fault and to eliminate the defense of

73. *Id.* at 245.

74. *Id. See* note 55 and accompanying text *supra*.

75. 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974).

76. *Id.* at 451, 323 N.E.2d at 168, 363 N.Y.S.2d at 921.

77. In *Jones v. Dague*, the court rejected "the view that the mere failure to use a seat belt constitutes negligence or a failure to minimize damages" because defendant failed to prove what portion of plaintiff's injuries were due to her failure to use a seat belt. 252 S.C. 261, 271, 166 S.E.2d 99, 103-04 (1969). *See* TENN. CODE ANN. § 59-930 (1980), which provides: "[I]n no event shall failure to wear seat belts be considered as contributory negligence, nor shall such failure to wear said seat belt be considered in mitigation of damages on the trial of any civil action."

78. W. PROSSER, *supra* note 12, at 424.

79. UNIFORM COMPARATIVE FAULT ACT § 1(b).

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contributory negligence. The alternative is to bar recovery entirely for unreasonable failure to avoid consequences so as to conform this principle to the present rule of contributory negligence in South Carolina for equal protection purposes. This alternative would be unfair to a plaintiff who unreasonably fails to avoid consequences and it demonstrates the basic unfairness of the contributory negligence rule.

3. Crashworthiness.—The South Carolina Supreme Court, in *Mickle v. Blackmon,*[80] apportioned a judgment between cotortfeasors, a construction company and an automobile manufacturer, for injuries plaintiff received when she was impaled on an allegedly defectively designed stick shift lever. The accident was caused by the construction company's negligent removal of road signs and the injuries were aggravated by Ford's defective design.

Cases of this type are often described as second-collision or crashworthiness cases.[81] The distinguishing feature is considered to be that the conduct of one of the defendants does not cause the accident, but only increases the injuries. This distinction is not maintained consistently in the cases, however. For example, if plaintiff is negligently injured by the operator of a lawn mower and the injury could have been prevented had the manufacturer of the mower installed an inexpensive safety guard or shield, the operator and manufacturer are both generally held to be the cause of the entire injury. But for the negligent operation of the mower, the injury would never have happened. Yet, had the mower been "crashworthy" (had it been equipped with an adequate guard), the injury likewise would not have occurred. Nevertheless, in *Harrison v. McDonough Power Equipment, Inc.,*[82] this factual situation was treated as a crashworthiness case.

That the injuries caused by each defendant often occur at slightly different times, rather than simultaneously, seems to be immaterial. The use of this temporal difference for the purpose of differentiating these cases from other cotortfeasor cases in

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80. 252 S.C. 202, 166 S.E.2d 173 (1969).

81. *See* D. NOEL & J. PHILLIPS, CASES AND MATERIALS ON PRODUCTS LIABILITY 417-45 (1976).

82. 381 F. Supp. 926 (S.D. Fla. 1974). *Compare id. with* the theoretically comparable case of Carpini v. Pittsburgh and Weirton Bus Co., 216 F.2d 404 (3d Cir. 1954)(defendants apparently were held jointly and severally liable).

which joint and several liability is imposed, resembles the use of the artificial distinction traditionally employed to distinguish contributory negligence from avoidable consequences.[83]

In the *Mickle* situation, the construction company usually should be liable for the entire damages if the aggravating conduct is reasonably foreseeable.[84] Some courts place the burden of making any required apportionment on the plaintiff.[85] The better rule is to place this burden on the defendant, as is done with contributory negligence, avoidable consequences, and comparative fault.[86]

The *Mickle* apportionment rule embodies a doctrine of comparative contribution between or among cotortfeasors with no joint and several liability to the plaintiff. If the rule cannot be logically restricted to successive, as opposed to concurrent, injuries—as it cannot be—the same compulsion that dictates extension of the avoidable consequences damages reduction approach to include contributory negligence also dictates extension of the crashworthiness damages reduction approach to establish a broad principle of comparative contribution in South Carolina.

IV. CONCLUSION

Justice Holmes once said that "[t]he life of the law has not been logic. It has been experience."[87] There is, however, no necessary conflict between logic and experience. Indeed, the one should lend support to the other. The essence of good judicial decision-making is reasoned analysis and when such analysis commands a particular course courts should not hesitate to proceed.

The South Carolina Supreme Court has imposed a heavy

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83. *See* W. PROSSER, *supra* note 12, at 423-24 (aggravation of damages by plaintiff); Phillips, *In Tribute: Arno Cumming Becht*, 1979 WASH. U.L.Q. 661, 664-65 (aggravation of damages by defendant).

84. Thus, when a treating doctor foreseeably aggravates injuries caused by a tortfeasor, the latter is liable for all damages. *See, e.g.*, Gertz v. Campbell, 55 Ill. 2d 84, 302 N.E.2d 40 (1973).

85. *E.g.*, Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976).

86. *See* Zimmerman v. Ausland, 266 Or. 427, 513 P.2d 1167 (1973)(avoidable consequences); Chrysler Corp. v. Todorovich, 580 P.2d 1123 (Wyo. 1978)(crashworthiness); W. PROSSER, *supra* note 12, at 416 (contributory negligence); V. SCHWARTZ, *supra* note 7, § 17.2 (comparative fault).

87. O. HOLMES, THE COMMON LAW 1 (1881).

duty on the state's lawmaking bodies, both legislative and judicial, to justify their actions on especially strict constitutional principles of rational classification and equal protection. That duty fairly demands that the court deal with its avoidable consequences and crashworthiness doctrines either by their elimination or by their logical extension to the full-blown doctrines of comparative fault and comparative contribution. Moreover, the federally required application in South Carolina of a pure comparative-fault rule under the Federal Employers' Liability Act mandates the extension of that rule to all areas of tort law in this state, in order to comply with the state constitutional requirements of rational classification and equal protection.

The Law Firm of
Schaible, Staley, DeLisio & Cook, Inc.

Anchorage Office
Stephen S. DeLisio
Alan Sherry
Joseph M. Moran
Michael C. Geraghty
Patricia L. Zobel
Walter J. Sczudlo
Allan J. Olson
Gregory L. Youngman
Timothy J. Lamb

Fairbanks Office
Grace Berg Schaible
Howard Staley
Dennis E. Cook
Barbara L. Schuhmann
Robert B. Groseclose
Charles D. Silvey, Jr.

Of Counsel:
William V. Boggess

March 18, 1985

Senator Joe P. Josephson
Alaska State Legislature
Pouch V (MS 3100)
Juneau, AK 99811

Re: Uniform Comparative Fault Act

Dear Senator Josephson:

I enjoyed meeting you at the Juneau airport with Dan Gerety a couple of weeks ago. If you recall, I mentioned that the Defense Counsel of Alaska were attempting to have introduced the above referenced legislation in lieu of our presently existing Uniform Contribution Among Joint Tortfeasors Act, A.S. 09.16 et. seq. I was not anticipating meeting you, and I am afraid that what little I did get to say about the legislation may have been inartful. In any event, we were interrupted by the arrival of our luggage, and the conversation did not progress very far. I am taking this opportunity to send you a copy of the proposed legislation for your consideration.

Specifically, I am enclosing a copy of the Uniform Comparative Fault Act, along with the comments of the drafters, and a law review article by H. Anthony Miller entitled "Extending the Fairness Principle of Li and American Motorcycle: Adoption of the Uniform Comparative Fault Act" 14 Pac. Law J. 835, which analyzes the evolution of the law in this area, and concludes by endorsing the passage of the subject legislation.

I recall that you asked me specifically how many states have passed the Uniform Act; I am afraid I cannot find a quick answer to that, though I would note that in the Prefatory Note, the commissioners observed that "the Federal government and two-thirds of the states (33) have adopted some sort of comparative fault. This is usually by statute but also by

judicial decision." On page 36 of the Uniform Act, they note the National Conference of Commissioners on Uniform State Laws have promulgated two Uniform Contribution Acts, one of which we have here in Alaska. "Both of these Acts provide for pro rata contribution, which may be suitable in a state not applying the principle of comparative fault, but it is inappropriate in a comparative fault state apportioning ultimate responsibility on the basis of the proportionate fault of the parties involved. . . . and the 1955 Act should be replaced by this Act in any state that adopts a comparative fault principle. . . ."

This would also seem to be the view of our own Supreme Court:

> The Act provides that in determining the pro rata shares of tortfeasors "their relative degrees of fault shall not be considered." A.S. 09.16.020(1). We question whether the rule "distribute[s] the responsibility equitably among those who are jointly liable." Arctic Structures, Inc. v. Wedmore, 605 P.2d 426, 430 n. 8 (Alaska 1979). . . . While the question of whether the Act should be amended is a matter committed to the judgment of the legislature, it is our view that where one joint tortfeasor seeks contribution from another, the tortfeasor's "pro rata share" should mean a share proportionate to his comparative fault. We add that such a rule would not undermine the rule of joint and several liability announced in Arctic Structures, Inc. v. Wedmore. We invite legislative consideration of this aspect of the Act.

Criterion Insurance Co. v. Laitala, 658 P.2d 112, 118, n. 11 (Alaska 1983) (J. Rabinowitz concurring).

I think it is important to emphasis that the above referenced proposed in legislation retains joint and several liability. In the case of an insolvent defendant, the proposed Act does reallocate the uncollectable amount among all of the parties, including a claimant at fault. See Section 2 [Apportionment of Damages] (d). This particular aspect may be of some concern to the plaintiffs bar. There may be others as well. We think it is important, however, that the proposed Act see the

legislative light of day, where it can be scrutinized and discussed in committee hearings and so on. Towards that end, I would respectfully request that you consider introducing the legislation, either by yourself or in conjunction with other co-sponsors. We are attempting to contact various key members of the legislature besides yourself in this regard.

Thank you for your attention. If I can answer any questions, or be of any further assistance in this matter, please do not hesitate to have yourself or your staff contact me.

Sincerely,

SCHAIBLE, STALEY, DeLISIO & COOK, INC.

By: Michael C. Geraghty

MCG/slb
cc: David Thorsness, Esq.
Representative John Sund
Representative Robin Taylor
Representattive Don Clocksin
Representative Max Gruenberg, Jr.
Representative Fritz Pettyjohn
Senator Patrick Rodey
Senator Robert H. Ziegler, Sr.

Extending the Fairness Principle of *Li* and *American Motorcycle*: Adoption of the Uniform Comparative Fault Act

H. ANTHONY MILLER*

INTRODUCTION

The trend in California has been to make the tort system conform to the basic principle of fairness enunciated in *Li v. Yellow Cab Company*;[1] "liability for damages must be borne by those whose negligence caused it in direct proportion to their respective fault."[2] However, at present because of the traditional doctrine of joint and several liability[3] one tortfeasor may have to bear a disproportionate share of plaintiff's loss when another tortfeasor is insolvent or has settled for an amount

* Associate Professor of Law, Pepperdine University School of Law, Malibu, Cal.,

1. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

2. *Id.* at 813, 532 P.2d at 1232, 119 Cal. Rptr. at 864.

3. The original meaning for a "joint tort" was the concept of vicarious liability for concerted action. All parties who acted in concert to commit a tort, in pursuance of a common plan or design, were held liable for the entire result. Each party was liable for the sum of the entire damage done, although his part in the plan may have only contributed to a fraction of the loss sustained. Under the modern liberal American Rule as to joinder, defendants whose negligence has concurred to produce a single loss to the plaintiff have been joined to one action, and under a standard which Dean Prosser refers to as a "careless usage," have been called joint tort-feasors. Once labeled as joint tort-feasors, each defendant is held jointly and severally liable for the entire loss. W. PROSSER, THE LAW OF TORTS §§46-47 (4th Ed. 1971). *See infra* notes 19-36 and accompanying text.

less than his proportional share. Prior to *Li*, fairness was not the prime concern in determining liability. A plaintiff who was found to be contributorily negligent could not recover from the defendant even if the defendant was overwhelmingly more negligent than the pl... ...ff.[4] The plaintiff was forced to bear the burden of the defendant's wrongful conduct. There were other areas in which it was necessary for one party to bear the burden of another's wrongful conduct. Assumption of risk was also a complete bar to recovery.[5] By statute, contribution among tortfeasors was on a pro rata basis regardless of the proportion of the damages which could be attributed to each defendant.[6] Equitable indemnity was awarded on an all-or-nothing basis; the tortfeasor who was found to be primarily liable would have to bear the burden of the entire loss in spite of a significant contribution by the secondary tortfeasor to the plaintiff's injuries.[7]

Because of *Li* and the cases which have followed it, these inequities have been resolved and the principle of fairness is firmly entrenched in the California tort system. *Li*, of course, established comparative negligence abolishing the all-or-nothing contributory negligence.[8] *Li* merged that form of assumption of risk which is also negligence into the comparative negligence doctrine.[9] *American Motorcycle Association v. Superior Court* circumvented the contribution statute and established what might be called comparative partial indemnity which apportions the payment of damages among the defendants.[10]

4. Baltimore & P.R. Co. v. Jones, 95 U.S. 439 (1877); Buckley v. Chadwick, 45 Cal. 2d 183, 288 P.2d 12 (1955). The rule was rooted in the long-standing principle that one should not recover from another for damages brought upon oneself. *See generally* RESTATEMENT (SECOND) OF TORTS §467 (1977).

5. The theory behind the defense was that the defendant's conduct involves certain dangers or risks, which the plaintiff voluntarily accepts. *See* Morton v. California Sports Car Club, 163 Cal. App. 2d 685, 329 P.2d 967 (1958); RESTATEMENT (SECOND) OF TORTS §496A (1977).

6. Contribution was "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." CAL. CIV. PROC. CODE §875(c). The pro rata share of each defendant was determined by "dividing the entire judgment equally among all of them." *Id.* §876(a); *see* Rollins v. California, 14 Cal. App. 3d 160, 92 Cal. Rptr. 251 (1971).

7. The rationale underlying the principle of indemnity was that "everyone is responsible for the consequences of his own wrong, and if others have been compelled to pay damages which ought to have been paid by the wrongdoer, they may recover from him." Herrero v. Atkinson, 227 Cal. App. 2d 69, 74, 38 Cal. Rptr. 490, 493 (1964).

8. In abolishing contributory negligence, the court noted that "this reexamination leads us to the conclusion that the 'all-or-nothing' rule of contributory negligence can be and ought to be superseded by a rule which assesses liability in proportion to fault." *Li*, 13 Cal. 3d at 810, 532 P.2d at 1230, 119 Cal. Rptr. at 862 (the court went on to adopt "pure" comparative negligence as the law to be applied in California).

9. "[T]he defense of assumption of risk is also abolished to the extent that it is merely a variant of the former doctrine of contributory negligence; [and is] to be subsumed under the general process of assessing liability in proportion to negligence." 13 Cal. 3d at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875; Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

10. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978). The court held that the common law doctrine should be modified to permit partial indemnity among concurrent tort-feasors on a

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16. *Id.*

17. *Id.* at 438-39 (unpublished o

The only vestige of the pre-*Li* period is the doctrine of joint and several liability and the effect that doctrine has upon situations involving multiple defendants. The doctrine requires that a solvent tortfeasor pay the entire judgment even though his proportional share of the fault was far less than that of an insolvent defendant or one who had settled earlier with the plaintiff. Contribution and indemnity, which normally protect one tortfeasor from bearing the burden of another's liability, do not work against an insolvent tortfeasor or against a solvent one who has settled with plaintiff and is therefore protected by the laws governing release. The solvent tortfeasor is required to bear the burden of the insolvent or settling tortfeasor even if the plaintiff has contributed to his own injuries in a greater proportion than the solvent tortfeasor.[11]

The inequity of the law as it stands is shown in a recent case which reached the appellate court level.[12] Although this case was subsequently "unpublished" by the California Supreme Court,[13] the facts are still significant. Following a somewhat routine automobile "fender bender," plaintiff settled with defendant A for $4000 and continued to prosecute his suit against B who in turn cross-complained against A for contribution and indemnity. At trial, the jury by special verdict set defendant A's share of the fault at eighty percent and defendant B's share at twenty percent. The total amount of damages was found to be $19,700.[14] The trial court continued to hear the case without the jury. The court found the settlement between plaintiff and A to have been made in good faith, and so the court deducted the amount of the settlement from plaintiff's damages[15] and ordered B to pay the remaining amount of $15,700.[16] Because Code of Civil Procedure section 877(b) bars contribution from a settling tortfeasor, defendant B had to bear the burden of the entire judgment less the amount of settlement.[17] Thus a defendant who was twenty percent liable had to pay eighty percent of the damages. The inequity of the result was amplified in this particular case because defendant A was the wife of the plaintiff and would share in his recovery against defendant B. However, the unfair-

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comparative fault basis. *See, e.g.*, United States v. Reliable Transfer Co., 421 U.S. 397 (1975); Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974); Gomes J. Brodhurst, 344 F.2d 465 (3rd Cir. 1967); *cf.* Lindenberg v. Issen, 318 So. 2d 386 (Fla. 1975).

11. *See infra* note 173.

12. Baget v. Shepard, 128 Cal. App. 3d 433 (1982) Reporter of Decisions directed not to publish this opinion in the Official Reports, by the authority of the CAL. CONST. art. VI, §14; CAL. R. CT. Div. III Rule 976. The opinion of such a case shall not be cited by a court or a party to an action or preceding, except in very limited circumstances. *See* CAL. R. CT. DIV. III Rule 977.

13. *See supra* note 12.

14. 128 Cal. App. 3d at 436 (unpublished opinion).

15. *Id.* at 438 (unpublished opinion).

16. *Id.*

17. *Id.* at 438-39 (unpublished opinion).

ness in this situation does not rest upon the quirk of fate that plaintiff and defendant A were married; rather there is an inherent injustice in one defendant having to pay damages far in excess of his proportional liability.

In one sense, the injustice is even greater in situations involving insolvent defendants. For if defendant A, who is insolvent, is eighty percent at fault and defendant B is twenty percent at fault, defendant B, under the present rule of joint and several liability, will have to pay one hundred percent of the damages despite having been found liable for 1/5 that amount. The unfairness created by joint and several liability takes other forms as well. Two examples, the second more unfair than the first, involving an insolvent defendant, are appropriate here. In the first, plaintiff is ten percent at fault, defendant A, who is insolvent, seventy percent, and defendant B twenty percent. Defendant B pays ninety percent of the damages. In the second, plaintiff is twenty percent at fault, defendant A, who is again insolvent, seventy percent, and defendant B ten percent. Defendant B is liable for eighty percent of the damages. Although in these two hypotheticals the solvent defendant will pay less out of pocket than he would if plaintiff were not liable, the injustice still seems greater than when plaintiff is not at fault. It can at least be said that between an innocent plaintiff and a culpable defendant, the defendant should bear the risk of an insolvent co-defendant.[18] But when plaintiff is also at fault, and especially when plaintiff is more at fault than the solvent defendant, this rationale loses all meaning. A defendant should not have to bear the entire risk of an insolvent co-defendant when plaintiff is also culpable.

The thesis of the present article is that the harsh and unfair effect of the doctrine of joint and several liability should be judicially or legislatively modified by the adoption of the Uniform Comparative Fault Act. The sections which follow will examine: (1) the nature and origins of the present law; (2) the fairness principle of *Li* and *American Motorcycle* and why it dictates modification; (3) the arguments raised in *American Motorcycle* for not abolishing the doctrine to the point of showing that these arguments should not govern the issue of modification; (4) the case law and legislation of other jurisdictions; and (5) the ways in which modification can be made.

18. The reason for imposing liability on each for the entire consequence is that there exists no basis for dividing damages and the law is loath to permit an innocent plaintiff to suffer as against a wrongful defendant.
20 Cal. 3d at 588, 578 P.2d at 905, 146 Cal. Rptr. at 188.

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22. 20 Cal. 3d at 590, 578 P.2d
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I. BACKGROUND

In order to resolve the problems created by the continuing existence of the doctrine of joint and several liability, it will be necessary to examine not only the doctrine itself but also the laws which govern contribution and release. Indeed, as will be discussed later, one of the ways to ameliorate the unfair effect of joint and several liability is to modify the law governing contribution.

A. *Joint and Several Liability*

Perhaps a better name for the doctrine of joint and several liability is "entire liability" because under the doctrine each tortfeasor is "liable for the entire loss sustained by the plaintiff."[19] In multi-defendant cases, the practical effect of this rule is that if one tortfeasor is insolvent or cannot be levied upon, or even if the plaintiff merely chooses not to execute a judgment against one defendant, another tortfeasor can be called upon to satisfy the entire judgment.[20] If one tortfeasor has settled, another may be called upon to pay the entire judgment less the amount of settlement.[21] The solvent or non-settling tortfeasor is liable without regard to the proportional share of the injury which he caused.[22]

Originally the rule of entire liability was applied only to those tortfeasors who had acted in concert, true joint tortfeasors.[23] But over the centuries, it has come to be applied to tortfeasors who possessed a common duty to the plaintiff; to tortfeasors who have a relationship which causes one of them to be vicariously liable for the other's conduct; and to tortfeasors who act concurrently to cause a single, indivisi-

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19. Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413, 418 (1937); 1 F. HARPER & F. JAMES, LAW OF TORTS § 10.1, at 692 (1956); Browne v. McDonnell Douglas Corp., 504 F. Supp. 514 (N.D. Cal. 1980).

20. *American Motorcycle Ass'n.*, 20 Cal. 3d at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189. The court stated that

> one of the principal by-products of the joint and several liability rule is that it frequently permits an injured person to obtain full recovery for his injuries even when one or more of the responsible parties do not have the financial resources to cover their liability.

Id.

21. Wouldridge v. Zimmerman, 21 Cal. App. 3d 656, 98 Cal. Rptr. 778 (1971) ("[t]he purpose of the rule requiring such reduction is to avoid double recovery and unjust enrichment which a plaintiff would enjoy if he were able to collect part of his total claim from one, and all from another . . ."); CAL. CIV. PROC. CODE §877 (release of one tortfeasor "shall not discharge any other such tortfeasor from liability unless its terms so provide, but it shall reduce the claim against others . . . in the amount of the consideration paid for it. . . .").

22. 20 Cal. 3d at 590, 578 P.2d at 906-07, 146 Cal. Rptr. at 189-90.

23. Prosser, *supra* note 19, at 418; HARPER AND JAMES, *supra* note 19, at 692; Alexander v. Hammarberg, 103 Cal. App. 2d 872, 230 P.2d 399 (1951). The former belief was that, to constitute joint tort-feasors, there must be a concert of action, a unity of purpose or design, and two or more defendants working separately but to a common purpose; each acting with the other's knowledge and consent.

ble injury.[24]

Tortfeasors are said to act in concert when they "act in pursuance of a common plan or design."[25] It is not necessary for both tortfeasors to actually commit the act that directly injures the plaintiff.[26] Prosser stated that concerted action includes all those who "actively participate in the wrongful act, by cooperation or request, or who lend aid, encouragement or countenance to a wrongdoer, or approval to the acts for their benefit . . . ."[27] The rationale for entire liability in this situation has always been that, when defendants act in concert, the act of one will be considered the act of all.[28] Tortfeasors who do not act out a common plan may still be considered joint if they have a common duty toward the plaintiff imposed upon them by law. Most cases in this category involve co-owners of property who negligently maintain some aspect of the property—e.g., a building,[29] a party wall,[30] or even a flowerpot.[31]

Joint and several liability is also imposed upon multiple-tortfeasors when an agent or principal is held vicariously liable for the acts of a

24. Harper and James point out that these last two categories are not joint torts within the true meaning of the words.

> Strictly speaking, the words 'joint-tort' should be used only where the behavior of two or more tort-feasors is such as to make it proper to treat the conduct of each as the conduct of the others as well. In effect this requires the existence of a concert of action or the breach of a joint duty.

HARPER AND JAMES, *supra* note 19, at 692. Prosser divides the joint torts into several more categories which are also encompassed in Harper and James' four: (1) concert of action; (2) vicarious liability; (3) common duty; (4) concurrent causation of a single, indivisible result, which would have caused alone; (5) successive injuries; (6) damages of the same kind, which it is difficult to apportion; (7) acts innocent in themselves which together cause damage; and (8) alternate liability. Prosser, *supra* note 19, at 429-43; *see* Southland Mechanical Constructors Corp. v. Nixen, 119 Cal. App. 3d 417, 173 Cal. Rptr. 917 (1981) (multiple parties under a common duty).

25. HARPER AND JAMES, *supra* note 19, at 698 (1956); *see* Davis v. Hearst, 160 Cal. 143, 116 P. 530 (1911) (newspaper proprietor gave his subordinates carte blanche to do anything to make the paper a success); *see also* RESTATEMENT (SECOND) OF TORTS §876 (1977).

26. HARPER AND JAMES, *supra* note 19, at 698; RESTATEMENT (SECOND) OF TORTS §876(a) (1977); Tide Water Associated Oil Co. v. Superior Court of Los Angeles County, 43 Cal. 2d 815, 279 P.2d 35 (1955); *see also* Wetherton v. Growers Farm Labor Ass'n., 275 Cal. App. 2d 168, 79 Cal. Rptr. 543 (1969). The court, in distinguishing tort and criminal conspiracy, stated that in tort

> the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tort-feasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity.

Id. at 176, 79 Cal. Rptr. at 548.

27. "Express agreement is not necessary; all that is required is that there shall be a common design or understanding." Prosser, *supra* note 19, at 429-30; *cf.* Schaefer v. Berinstein, 140 Cal. App. 2d 278, 295 P.2d 113 (1956) (each participant in the wrongful act is responsible for all damages ensuing from the wrong regardless of the degree of his activity).

28. HARPER AND JAMES, *supra* note 19, at 692; Heydon's Case, 11 Co. Rep. 5, 77 Eng. Rep. 1150 (1613) ("[w]ith all coming to do an unlawful act, and of one party, the act of one is the act of all . . . ."). The origins of this view appear to be the same as those of the rationale for modern criminal conspiracy. *See* Smithson v. Garth, 3 Lev. 324, 83 Eng. Rep. 711 (1691); *see also* Mox Incorporated v. Woods, 202 Cal. 675, 262 P. 302 (1927).

29. Johnson v. Chapman, 43 W. Va. 639, 28 S.E. 744 (1897).

30. Simmons v. Everson, 124 N.Y. 319, 26 N.E. 911 (1891).

31. World v. Grozalsky, 277 N.Y. 364, 14 N.E.2d 437 (1938).

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35. 20 Cal. 3d at 586, 578

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servant or agent. Strictly speaking vicarious liability stems from the agency doctrine of respondeat superior. However, although the agent and principal have not committed a joint tort,[32] both can be joined in the same suit and both are subject to entire liability. Of course the practical effect is that the master or principal usually must pay for the full amount of the damages.[33]

In terms of the thesis of this article, the most important application of joint and several liability is to tortfeasors who concurrently cause an indivisible injury to the plaintiff.[34] The rationale for applying entire liability to concurrent tortfeasors is largely a matter of causation. The court stated in *American Motorcycle*, "the principle that each tortfeasor is personally liable for any indivisible injury of which his negligence is the proximate cause has commonly been expressed in terms of joint and several liability."[35] Concurrent tortfeasors are especially susceptible to unequal apportionment of responsibility. It is possible that one tortfeasor's act alone would not have caused any harm to the plaintiff, or that alone it might have caused the entire injury, or that it would have caused a lesser injury.[36]

For most of the time that joint and several liability was developing, the law was far more defendant oriented than it is today. Contributory negligence and assumption of risk were absolute. There were no long arm statutes to aid plaintiff in gaining jurisdiction. The practical problems related to slower communication and transportation could also work to protect defendants. Although the doctrine did not mitigate the harsh effects of contributory negligence and assumption of the risk, it did help plaintiff when he or she could not gain jurisdiction or when other practical problems prevented him or her from recovering from one tortfeasor. The doctrine, of course, helped the plaintiff when one defendant was insolvent. It should also be noted that during the development of joint and several liability all plaintiffs who received a judgment in their favor were entirely innocent in the eyes of the law. Moreover, the concept of apportioning liability according to fault was

32. HARPER AND JAMES, *supra* note 19, at 700 (1956). *See generally* W. SEAVEY, STUDIES IN AGENCY 65-105, 129-53, 220-79 (1949).

33. HARPER AND JAMES, *supra* note 19, at 700. Obviously the servant or agent is not liable for the tortious acts of the master or principal, unless other principles of joint tort liability would make him so. The failure to impose any liability where the tort is the master's alone indicates that the liability relationships are not truly joint torts.

34. There may have been a safety valve in the English system. Since under English law there was no joinder of defendants unless there was concerted action, concurrent tortfeasors were tried separately. Thus, the jury could apportion the damages to the portion of the injury the defendant caused. More liberal American rules allowed joinder of concurrent tortfeasors, and this meant that "a verdict for one sum [was] returned against all those found liable, without regard to the fact that the juries in separate actions would not be so bound." *Prosser*, *supra* note 19, at 420.

35. 20 Cal. 3d at 586, 578 P.2d at 904, 146 Cal. Rptr. at 187.

36. HARPER AND JAMES, *supra* note 19, at 702.

non-existent or at least unaccepted. When judges were confronted with the issue of who should bear the burden of the damages caused by an insolvent tortfeasor, they had no means to apportion the loss. Therefore, if the choice was between the totally innocent plaintiff and the culpable solvent defendant, the answer was easy: the culpable defendant should bear the burden and pay the whole judgment. This view is expressed in a leading California case supporting the doctrine:

> Even though persons are not acting in concert, if the result(s) produced by their acts are indivisible, each person is held liable for the whole . . . . The reason for imposing liability on each for the entire consequence is that there exists no basis for dividing damages and the law is loath to permit an innocent plaintiff to suffer as against a wrongdoing defendant.[37]

B. *Contribution*

Contribution is a method of allocating the loss among concurrent tortfeasors. Since the doctrine of joint and several liability will make each of them liable for the entire judgment, the one who satisfies the entire judgment or a disproportionate share may seek contribution against the others. It is often stated that there was no common law right to contribution.[38] However, this statement is not historically accurate. The original rule against contribution was stated in a conversion case,[39] and the rationale was that "plaintiff's claim rested upon what was, in the eyes of the law, entirely his own deliberate wrong."[40] Following this case, contribution was sometimes applied in negligence cases in both England and the United States on the grounds that the rule against contribution applied only to intentional torts. It was not until "the door was thrown open to joinder" that the American courts began to apply widely the rule against contribution.[41] Yet, according to Prosser, eight states still allowed contribution in negligence cases without the aid of a statute.[42]

Despite this common law authority for contribution, most states have

37. Finnegan v. Royal Realty Co., 35 Cal. 2d 409, 433-34, 218 P.2d 17, 32 (1950).

38. "Although early common law decisions established the broad rule that a tortfeasor was never entitled to contribution. . . ." American Motorcycle Association v. Superior Court, 20 Cal. 3d 578, 592, 578 P.2d 899, 908, 146 Cal. Rptr. 182, 191 (1978). "At common law there is no right of contribution between persons jointly or severally liable in tort. . . ." 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW 2344 (8th ed. 1979).

39. Merryweather v. Nixan, 8 Term. Rep. 186, 101 Eng. Rep. 1337 (1799).

40. PROSSER, *supra* note 3, at 305.

41. *Id.* at 306.

42. *Id.*; *see* Knell v. Feltman, 85 App. D.C. 22, 174 F.2d 662 (1949); Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23 (1956); Quatray v. Wicker, 178 La. 289 (1933); Bedell v. Reagan, 159 Me. 292, 192 A.2d 24 (1963); Ankeny v. Moffett, 37 Minn. 109, 33 N.W. 320 (1887); Goldman v. Mitchell-Fletcher Co., 292 Pa. 354, 141 A. 231 (1928); Davis v. Broad St. Garage, 19 Tenn. 320, 232 S.W.2d 355 (1950); Ellis v. Chicago and N.W.R. Co., 167 N.W. 1048 (1918).

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established contribution by statute.[43] One of the strongest forces in bringing about statutory change was the Uniform Contribution Acts of 1939[44] and 1955.[45] Both of the Acts recommended a pro rata division of the loss: each defendant's share is determined by dividing the number of defendants who have been found liable into the amount of the judgment.[46] Thus each defendant's share was equal, and no attempt was made to apportion liability according to fault. California adopted a contribution statute allowing for pro rata shares,[47] and it was this statute that the court circumvented in *American Motorcycle* by establishing comparative partial indemnity, which allowed the courts to apportion the contribution share according to the fault.[48] If the statute had not stood as a road block, the Supreme Court would not have had to use the common law doctrine of indemnity, which traditionally did not allow any sharing of the liability among tortfeasors, as a vehicle to apportion liability among tortfeasors.[49]

C. *Release*

Release is simply the "surrender of a cause of action, which may be gratuitous or for inadequate consideration."[50] A problem developed early on because release was confused with satisfaction, which is the

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43. Prosser stated that there were 23 states which had adopted a contribution statute in 1971. PROSSER, *supra* note 3, at 307.

44. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1939).

45. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 63 (1975) (1955 version).

46. One of the major differences between the two uniform acts is the manner in which they treat the settling tortfeasor. Under the 1939 act there was no release granted to the settling tortfeasor who would still be liable for contribution. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT §2 (1939). *See infra* note 144. This provision, because it discouraged settlement, was unpopular and lead to the enactment of the 1955 act which allowed for the full release of the settling tortfeasor as a means of encouraging settlement. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT 4b, 12 U.L.A. 99 (1975).

47. CAL. CIV. PROC. CODE §877(a).

48. American Motorcycle Association v. Superior Court, 20 Cal. 3d 578, 591, 578 P.2d 899, 912, 146 Cal. Rptr. 182, 196 (1978).

> In order to attain such a system, in which liability for an indivisible injury caused by concurrent tortfeasors will be borne by each individual tortfeasor 'indirect proportion to [his] respective fault,' we conclude that the current equitable indemnity rule should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis.

Id. The Supreme Court held that the contribution statute did not prevent modification of the common law doctrine of equitable indemnity because "in enacting the 1957 contribution legislation the Legislature did not intend to prevent the judiciary from expanding the common law equitable indemnity doctrine. . . ." *Id.* at 603, 578 P.2d at 915, 146 Cal. Rptr. at 198.

49. A suit for contribution is brought for the recovery of a proportionate part of the sum paid by the plaintiff, on the ground that the parties were both equally guilty of negligence and should share the cost. . . . A suit for indemnity is brought to recover the total amount of the payment by the plaintiff, on the ground that the plaintiff's conduct was not as blameworthy as the defendant's. . . .

RESTATEMENT (SECOND) OF TORT, §886b comment a.

50. PROSSER, *supra* note 3, at 301.

"acceptance of full compensation for the injury."[51] Courts held that the release of one tortfeasor was the release of all.[52] This problem was circumvented with the development of the "covenant not to sue" which by definition released only the tortfeasor who was a party to the covenant.[53] Ultimately the most sensible approach prevailed: a release of one tortfeasor would not discharge any other tortfeasors. This position was adopted by the Uniform Contribution Act of 1955,[54] by California in 1957[55] and by the Second Restatement.[56]

It is important to note the effect of release on contribution. If a settlement is made in return for a release, the general view is that the released party is free from any further contribution and the amount of the settlement is deducted from the amount of the judgment which the remaining tortfeasors must pay.[57] The Uniform Contribution Among Tortfeasors Act of 1939 took the opposite view, that the released tortfeasor could still be liable for contribution in the amount that his pro rata share exceeds his settlement.[58] Although at least five states accepted this view at one time,[59] it is now widely disfavored. However, as will be discussed below, this position may provide one solution to the problem this article addresses.[60]

II. The Fairness Doctrine: The Case for Modification

The fundamental reason for the modification of joint and several liability is that the present system unfairly favors plaintiffs over defend-

51. *Id.*

52. "Until quite recent years, most of the courts have continued to hold that a release to one of two concurrent tortfeasors is a complete surrender of any cause of action against the other, and a bar to any suit against him, without regard to the sufficiency of the compensation actually received." In California the rule was well settled that the release of one joint tortfeasor discharged them all. *E.g.*, Markwell v. Swift & Co., 126 Cal. App. 2d 245, 272 P.2d 47 (1954); Flynn v. Manson, 19 Cal. App. 400, 126 P. 181 (1912). There were cases which applied this rule to concurrent tortfeasors. *E.g.*, Hadden v. Moran, 104 Cal. App. 2d 777, 232 P.2d 544 (1951). Hawber v. Raley, 92 Cal. App. 701, 268 P. 943 (1928). However, the California cases use the joint liability so loosely ("making no distinction between strict joint tortfeasors and other jointly and se erally liable") that one commentator has stated the the Supreme Court had still left "open the question as to concurrent tortfeasors." 4 Witkin, *supra* note 38, at 2336.

53. Holtz v. United Plumbing Co., 49 Cal. 2d 501, 319 P.2d 617 (1957); Kincheloe v. Retail Credit Co., 4 Cal. 2d 21, 46 P.2d 971 (1935); Beck v. Bel Air Properties, 134 Cal. App. 2d 834, 286 P.2d 503 (1955); Abbott v. Goodyear Rubber Co., 116 Cal. App. 665, 3 P.2d 56 (1931).

54. Unif. Contribution Among Tortfeasors Act §4(a), 12 U.L.A. 98 (1975).

55. Cal. Civ. Proc. Code §877(a).

56. Restatement (Second) of Torts §886A.

57. If it is clear that the satisfaction received was understood to be only partial, it should not discharge the claim against a second tortfeasor. All courts are agreed, however, that it must be credited pro tanto to diminish the amount of damages recoverable against him. . . .

Prosser, *supra* note 3, at 304-05; accord. Cal. Civ. Proc. Code §877(a).

58. Unif. Contribution Among Tortfeasors Act §2 (1939).

59. Delaware, Maryland, New Mexico, Pennsylvania, and Rhode Island. Adams, *Settlements After Li: But Is It Fair*, 10 Pac. L.J. 729, 744, n.104.

60. *See infra* text accompanying notes 147-174.

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119 Cal. Rptr. at 862-63.

64. 13 Cal. 3d at 811, 532

65. *Id.* at 812, 532 P.2d a

66. *Id.* at 812-13, 532 P.2

ants. The fairness principle requires that loss should be apportioned according to the percentage of fault.[61] However, because of joint and several liability, a defendant's liability may be based not on proportional fault but rather on the solvency of codefendants[62] or on the willingness of the plaintiff to settle with another defendant. *Li*, *American Motorcycle*, and the cases which follow them firmly establish the fairness principle in California tort law. Although none of these cases, except *American Motorcycle* which refused to abolish the doctrine, have discussed changing the law to negate the harsh effect of joint and several liability, these cases form the foundation for the argument that this change must be made.

A. Li v. Yellow Cab Co.

The concept of fairness is the guiding principle of *Li*: fairness is the foundation for comparative negligence, and it plays an important role in the resolution of other issues. When the California Supreme Court established comparative negligence, it used strong language. The court was critical of contributory negligence because "the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault."[63] The court noted that juries often try to correct the unfairness of contributory negligence in the jury room[64] and that this unfairness undermines confidence in the legal system.[65] The court's actual holding is couched in terms of fundamental fairness:

> We are likewise persuaded that logic, practical experience, and fundamental justice counsel against the retention of the doctrine rendering contributory negligence as a complete bar to recovery—and that it should be replaced *in this state by a system under which liability for damages will be borne by those whose negligence caused it in direct proportion to their respective fault*.[66]

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61. *See infra* notes 36-42 and accompanying text.

62. *See* Adler, *Allocation of Responsibility After* American Motorcycle Association v. Superior Court, 6 PEPPERDINE L. REV. 1 (1978).

63. 13 Cal. 3d at 810, 532 P.2d at 1230, 119 Cal. Rptr. at 862. Dean Prosser states the kernel of critical comment in these terms: "It [the rule] places upon one party the entire burden of a loss for which two are, by hypothesis, responsible." PROSSER, *supra* note 3, §67, at 433. Harper and James express the same basic idea:

> [T]here is no justification—in either policy or doctrine—for the rule of contributory negligence, except for the feeling that if one man is to be held liable because of his fault, then the fault of him who seeks to enforce that liability should also be considered. But this notion does not require the all-or-nothing rule, which would exonerate a very negligent defendant for even the slight fault of his victim. The logical corollary of the fault principle would be a rule of comparative or proportional negligence, not the present rule.

2 HARPER AND JAMES, *supra* note 19, §22.3 at 1207; 13 Cal. 3d at 810-11 n.3, 532 P.2d at 1230-31, 119 Cal. Rptr. at 862-63.

64. 13 Cal. 3d at 811, 532 P.2d at 1231, 119 Cal. Rptr. at 863.

65. *Id.* at 812, 532 P.2d at 1231, 119 Cal. Rptr. at 863.

66. *Id.* at 812-13, 532 P.2d at 1232, 119 Cal. Rptr. at 864 (emphasis added).

The court's view that fairness should govern the tort system was so strong that it ignored a century-old interpretation of Civil Code section 1714 which established contributory negligence in California.[67] Moreover, the court chose the pure form of comparative negligence which "apportioned liability in direct proportion to fault in all cases"[68] because the other form "also distorts the very principle it recognizes, i.e., that persons are responsible for their acts to the extent their faults contribute to the injurious results."[69] The court even allows a limited form of retroactivity because of "considerations of fairness. . . ."[70]

B. American Motorcycle

Although the Supreme Court in *American Motorcycle Association v. Superior Court* refused to abolish the doctrine of joint and several liability, this case is a major application of the fairness principle.[71] Because *Li* involved only one plaintiff and one defendant, the court reserved the issue of the application of comparative negligence to cases involving multiple tortfeasors until such a case was actually before the court.[72] *American Motorcycle Association* presented the facts which allowed the court to resolve the issues connected with multiple parties.[73] In *American Motorcycle* a minor received serious injury in a motorcycle race sponsored by the Association. The minor sued the Association which filed an answer and sought to file a cross-complaint against the minor's parents.[74] The Association argued that it should only be responsible for its proportional share of the damages on two grounds: first, that joint and several liability should be abolished and, second, that there should be contribution or indemnity in proportion to fault.[75] Although the Supreme Court refused to abrogate joint and several liability, the Court, in order to further establish the system of tort liability envisioned in *Li* in which liability is allocated in direct proportion to fault,[76] modified its traditional, all-or-nothing aspect of equitable in-

67. California Civil Code section 1714 states in part that:
Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the Title on Compensatory Relief.

68. 13 Cal. 3d at 827, 532 P.2d at 1242, 119 Cal. Rptr. at 874.

69. *Id.* at 828, 532 P.2d at 1243, 119 Cal. Rptr. at 875.

70. *Id.* at 830, 532 P.2d at 1244, 119 Cal. Rptr. 876.

71. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182.

72. Justice Sullivan noted that "[p]roblems of contribution and indemnity among joint tortfeasors lurk in the background." 13 Cal. 3d at 823, 532 P.2d at 1240, 119 Cal. Rptr. at 872.

73. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182

74. *Id.* at 585, 578 P.2d at 903, 146 Cal. Rptr. at 186.

75. *Id.*

76. *Li*, 13 Cal. 3d at 813, 532 P.2d at 1232, 119 Cal. Rptr. at 864.

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84. *Id.* at §875(b) (quo
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demnity and established what might be called comparative partial indemnity allowing "a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis."[77]

The Supreme Court made it clear that the reason for establishing comparative partial indemnity was the fairness principle. The Court noted that the courts in general have abandoned traditional grounds for the application of equitable indemnity,[78] basing further applications of the doctrine on the grounds of equity and good conscience.[79] The language of the court leaves no doubt that the principle of fairness is the basis for the court's action:

> [T]he all-or-nothing aspect of the doctrine has precluded courts from reaching a just solution in the great majority of cases in which equity and fairness call for apportionment of loss between wrongdoers in proportion to their relative culpability, rather than the imposition of the entire loss upon one or the other tortfeasor.[80]

The Court not only established comparative partial indemnity, it also circumvented the legislatively mandated contribution statute[81] which limits contribution to those against whom there is a joint judgment[82] and which requires that contribution be made on a pro rata basis.[83] Evidently the court felt comfortable in circumventing this legislation because the statute itself states that "the right of contribution shall be administered in accordance with principles of equity."[84] The Court in-

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77. 20 Cal. 3d at 598, 578 P.2d at 912, 146 Cal. Rptr. at 195.

78. *Id.* at 591-98, 578 P.2d at 907-12, 146 Cal. Rptr. 190-95. The formulations for determining the proper applications of equitable indemnity were vague. Some authorities characterized the negligence on the part of the indemnitor as "active," "primary," or "positive," and the negligence of the indemnitee as "passive," "secondary," or "negative." These formulations were criticized as artificial and "lacking the objective criteria desirable for predictability in the law." *Id.* at 594, 578 P.2d at 909, 146 Cal. Rptr. at 192; *see* Atchison T. & S.F. Ry. Co. v. LanCranco, 267 Cal. App. 2d 881, 886, 73 Cal. Rptr. 660, 664 (1968).

79. Some courts have abandoned the welter of inconsistent standards and have turned to equity:

> The duty to indemnify may arise, and indemnity may be allowed in those fact situations *where in equity and good conscience the burden of the judgment should be shifted from the shoulders of the person seeking indemnity to the one from whom indemnity is sought.* The right depends upon the principle that everyone is responsible for the consequences of his own wrong, and if others have been compelled to pay damages which ought to have been paid by the wrongdoer, they may recover from him. Thus the determination of whether or not indemnity should be allowed must of necessity depend upon the facts of each case.

20 Cal. 3d at 595, 578 P.2d at 909-10, 146 Cal. Rptr. at 192-93 (quoting from Herrero v. Atkinson, 227 Cal. App. 2d 69, 74, 38 Cal. Rptr. 490, 493 (1964).

80. 20 Cal. 3d at 595, 578 P.2d at 910, 146 Cal. Rptr. at 193.

81. CAL. CIV. PROC. CODE §§875-79.

82. *Id.* §875(c). The section provides in part that liability "shall be limited to the excess 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." *Id.*

83. "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." CAL. CIV. PROC. CODE §875(c).

84. *Id.* at §875(b) (quoted in *American Motorcycle*, 20 Cal. 3d at 602, 578 P.2d at 915, 146 Cal. Rptr. at 198).

terpreted this provision to mean that the legislature intended the courts to elaborate on these principles.[85] By this interpretation the Court is placing the principles of equity and fairness in almost a supreme position: not only do these principles justify comparative partial indemnity but they show that the legislature also seeks to embody these principles in the ultimate tort system which results after judicial interpretation.

C. *Cases following* Li *and* American Motorcycle

The importance attached to the fairness principle by the Supreme Court of California and the courts of appeal, can be seen in the expansion of comparative partial indemnity to situations not discussed in *American Motorcycle*. The first step in this expansion occurred several months after *American Motorcycle*. In *Safeway Stores v. Nest-Kart*,[86] the Supreme Court held that comparative partial indemnity justified the apportionment of damages between a negligent tortfeasor and one who was strictly liable. The court used language which makes clear the reason for applying comparative partial indemnity to this situation: "even when an injury was in part caused by a defective product, fairness and good social policy . . . dictated a sharing or apportionment of liability."[87]

Perhaps the most important expansion of *American Motorcycle* is the application of comparative partial indemnity to a settling tortfeasor. In *Sears, Roebuck, and Co. v. International Harvester Co.*,[88] the court of appeal held that a settling tortfeasor could seek indemnification for a portion of the settlement from a cross-defendant. Comparative indemnity has also been applied to governmental entities,[89] to employees in

85. 20 Cal. 3d at 603, 578 P.2d at 915, 146 Cal. Rptr. at 198.

86. 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978).

87. *Id.* at 329, 579 P.2d at 444, 146 Cal. Rptr. at 553 (emphasis added). The court proceeded to quote from Ford Motor Co. v. Robert J. Poeschl, Inc., 21 Cal. App. 3d 694, 98 Cal. Rptr. 702 (1971), in which the court expressed discontent with traditional equitable indemnity doctrines which would permit the dealer and leasing agency to escape any liability whatsoever surrounding an accident relating to a defective automobile. The *Poeschl* court noted:

> The dealer and the leasing agency shared Ford's ability to reach the customer before the accident occurred . . . on the assumption that they did nothing, their escape from financial responsibility is troublesome. Judicially favored objective of deterrence and accident prevention would be promoted by imposing some liability on a dealer who knew of a danger and did nothing. To shift the entire loss to him would not serve these objectives, for then the manufacturer would escape scot-free. *A wise rule of law—one designed to stimulate responsible conduct throughout the merchandising chain—would require both parties to share the loss. . . . 'e of . . . partial indemnification would permit that result.*

21 Cal. 3d at 330, 579 P.2d at 445, 14 Cal. Rptr. at 554.

88. 82 Cal. App. 3d 492, 147 C. Rptr. 262 (1978).

89. Wagner v. State of Californ a. 86 Cal. App. 3d 922, 150 Cal. Rptr. 489 (1978) (holding a governmental entity liable for injur caused by a dangerous condition of its property). The court allowed a cross complaint by a defendant against the state seeking contribution in proportion to the state's fault.

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III. THE CONCER

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94. Fleming, *Report to the the Problems Associated with A* 1464, 1484 (1979).

95. 65 Cal. App. 3d 694, 1

96. 20 Cal. 3d 578, 578 P.2

97. 65 Cal. App. 3d 694, 1

workers' compensation cases,[90] and to contractual indemnity.[91]

III. The Concerns of *American Motorcycle Association*

In *American Motorcycle*, the California Supreme Court upheld the doctrine of joint and several liability.[92] The court is forthright and unequivocal on this matter, and indeed, the fact that the court chose to "unpublish" the appellate court decision in *Baget v. Shepard*[93] shows that the court is firm in its resolve to maintain the doctrine. However, the court limits its discussion to the subject of abrogation of the doctrine; no mention is made of the possibility that joint and several liability could be modified to remove the inequity which presently exists. The reasons which justify the court's refusal to abolish joint and several liability are not entirely satisfactory. As one commentator has noted, the court "got lost in a maze of conceptualism. . . ."[94] Even if the court's rationale for not abrogating joint and several liability are valid, they do not justify a refusal to modify the inequitable effect of the doctrine.

This failure to discuss modification can, of course, be attributed to the failure of counsel to seek modification. However, a more plausible explanation is that the court of appeal chose to abolish the doctrine,[95] and the Supreme Court seems to be reacting to the appellate court. Therefore the appellate court decision in *American Motorcycle* is important background for understanding the view of the Supreme Court and the need for further action on this issue.

A. The Appellate Court Decision

Although the Supreme Court overruled[96] the court of appeal,[97] the goals of the two courts were similar. Both sought to mitigate the harsh effects on defendants imposed by the "limited" forms of contribution

90. Associated Const. & Eng'r Co. v. Workers' Compensation, 22 Cal. 3d 829, 587 P.2d 684, 150 Cal. Rptr. 888 (1978) (held that a concurrently negligent employer was entitled to a credit against workers' compensation obligations to the extent which exceeds the proportional liability that the employer would incur for indemnification of a third party tort-feasor under a comparative system of tort responsibility allocated among multiple wrongdoers); *accord* Aceves v. Regal Pale Brew. Co., 24 Cal. 3d 502, 595 P.2d 619, 156 Cal. Rptr. 41 (1979).

91. Kramer v. Cedu Foundation, Inc., 93 Cal. App. 3d 1, 155 Cal. Rptr. 552 (1979) (indemnity may arise by virtue of express contractural language and such a right may also be found in equitable considerations brought into play by constructual language not expressly dealing with indemnification or by the equities involved in a particular case).

92. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

93. Baget v. Shepard, 128 Cal. App. 3d 433 (1982) (unpublished opinion, *see supra* note 12).

94. Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Association v. Superior Court*, 30 Hast. L.J. 1464, 1484 (1979).

95. 65 Cal. App. 3d 694, 135 Cal. Rptr. 497 (1977).

96. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182.

97. 65 Cal. App. 3d 694, 135 Cal. Rptr. 497.