Lecture Two:

Basic Civil Law

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1) Civil Law and Common Law

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Civil Law and Common Law

George P. Fletcher
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The core of every legal system is its "positive law," namely the law made binding by the legislatures and the courts. As HLA Hart would say, each legal system has within it a "rule of recognition" that defines the organs capable of making, repealing and interpreting the law applicable within that particular system. Yet each legal system is part of a broader culture of shared principles, historical influences, and linguistic roots. In this respects, legal systems are like languages. Each language is unique but at the same time part of a family of languages, such as the Romance, Slavic or Semitic groups.

The leading legal families under discussion in the last century have been the common law, the civil law, Soviet law, and the religious systems, primarily Catholic, Jewish and Islamic law. This article will address the well-recognized distinction between the common law and civil law. This distinction is of pervasive influence in international commerce as well as in the burgeoning field of international criminal law, in contrast to the limited application of the other legal systems. The distinction between common law and civil law remains of enduring importance, regardless of the rise and fall of political and religious legal cultures. It should be conceded, however, the term "civil law" typically refers to private law – the rules governing transactions between private legal entities. The central book of the civil law tradition is the French Code civil enacted in 1804.

Neighboring states and countries such as England and France, Ontario and Quebec, find themselves separated by a different legal identities, some being of the common law and the others of the civil law tradition. Those that call themselves civil law recognize the influence of the French civil code but they often mean much more by locating themselves in the civil law tradition.

Defining exactly what the differences are between the common law and the civil law is a challenging task because there many there are many misleading opinions published in this area. The most typical of these is that the common law is case law and the civil law is codified. This is a popular falsehood, good for cocktail party conversation but not much more. All legal systems today are based on a mixture of three sources of law – legislation, case law, and professional commentary. In order to under the difference between the two grand systems under inquiry we will have to dig more deeply.

1. The Meaning of "Common Law."

The term "common law" derives from the middle ages in England when a single law – the common law – was thought to underlie the distinctive legal cultures of the numerous counties of the king's realm. In the age of colonization, the common law followed the British flag and the English language. With very few exceptions in the modern word, all countries that speak English and only those countries employ the common law. Generally, all others in Europe, Asia, and Latin American, rely upon the civil law.

One reason for the disproportionate influence of the civil law is that the common law does not translate well. As a technical matter, you can say "due process," "fair trial" and "proof beyond a reasonable doubt" in other languages, but there is an aversion about doing so. A good example is the widespread reliance on the word "reasonable" in the common law. You can translate the words easily into other languages but for some reason the word has no caché in translation. An example of another kind of difficulty is adapting the word fairness in other languages. The term is central to common law concept of procedural justice but in translation "fair trial" typically comes out as the same as "just trial." Everyone knows the difference between the two (the defendant wants a fair trial' the victim and the prosecutor, a just outcome) and yet the difference is not retained in translation.

It seems to be the case that English is a necessary and sufficient condition to employ the legal ideas born in the land of Shakespeare. For reasons beyond my ken, however, the codes and commentaries of the civil law world do translate and appear in dozens of languages.

The common law itself was subdivided into the law surrounding the various writs issued by the Exchequer Chamber, writs such as trespass, trespass on the case, assumpsit, trover, and ejectment. These writs covered the fields of law known today as torts, contracts, and real property. The distinctions among the writs were abolished in the middle of the 19th century but their contours still guide the thinking of lawyers: As one historian wrote, they "rule us from the grave." The common law was further subdivided, as of the time of King James in the early 17th century, between law and equity. Law resulted in remedies of damages while equity issued in personal orders to the defendant to comply with the order of the court. The distinction is preserved in Article Three of United States Constitution, which defines the judicial power to include both law and equity. Jury trials, a distinguishing feature of the American constitutional system, are available only in cases of law – not of equity.

This accidental feature of Anglo-American law has become a critical instrument of judicial power in the 20th century. It has given birth to the personal injunction, which is the means by which courts control the executive branch in matters such as prison reform, school integration, and electoral redistricting. Earlier, the distinction provided the foundation for the distinction between legal and equitable property, thus enabling 17th century lawyers to create the trust and then the mortgage. In the trust, the trustor conveys the legal property to the trustee and the beneficial use to a third party. In the case of the mortgage, the trustor and the beneficial owner are the same, the legal title going to a bank or other intermediate interest. The trustor retains an "equity" in the house – namely the part that belongs to him.

The "equities" market in corporate securities has a similar origin. The equity – as opposed to the debt – of the corporation is the part that is owned by the shareholders. Courts of equity (the Delaware Court of Equity being primary) have retained a unique, managerial function in corporate law. These consequences of the distinction between law and equity are the envy of civil law systems, which because the French Civil Code of 1804 (Code civil) insisted on a single concept of property have had to struggle to create the equivalents of common law institutions. There is no intention here to claim that either the common law or civil law is superior to the other. The more important point is that historical institutions once considered an unnecessary complication and a residue of feudalism have turned turn out to have useful applications.

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Another characteristic of the common law as contrasted with the civil law was the system of estates in land, i.e. the division of ownership in real property according to rank in the feudal system. All land was ultimately owned by the king, who granted status to the lords in return for service and rent; the lords could further vest the land in a variety of ways including life estates and leaseholds (the latter considered property in the common law but contracts in civil law systems). Those who lived on or worked the land stood at the bottom of a long chain of feudal lords who received rents and service by virtue of their status in the hierarchy.
The modern common law has abolished the writ system but it has retained estates in land. This is a surprising historical phenomenon. Sound economic reasoning supports the idea that a unified concept of property, as found in the Code civil, would render trade easier and therefore support a modern, more efficient market in land. Thus the alienability of land (being able to sell the whole thing to the person willing to pay the highest price) should have been a necessary condition for efficient development. Paradoxically, the leading economy in the world retains a feudal conception of property.

In fact, the early common law was less interested in market efficiency than it was concerned about family control over potentially irresponsible offspring. If the children or grandchildren could sell the land and waste the proceeds on diversions, the family would lose its historical standing. Perhaps the genius of any legal systems consists in adapting old institutions to new purposes.

2. The Varieties of Civil Law

The term "civil law" is fundamentally ambiguous. Some scholars, such as the distinguished Alan Watson, refer to the Continental legal culture prior to codification as the "civil law." Accordingly, codification in the 19th century destroyed the pre-existing unity of the Continental civil law tradition, a tradition generally supposed to be based on Roman law. Other scholars take the French Code civil to be emblematic of the civil law. A third group takes a more expansive view of the civil law and includes the scholarly developments in Germany in the 19th century and the intellectual achievements of the BGB (German Civil Code) effective in the year 1900.

In the 90 plus years that separated the Code civil from the German BGB, enormous strides took place in the theories of private law and of codification. The civil law today consists of two seemingly disparate spheres of influence – the French Code civil, which has served as the model for civil codes in the entire civil law world and the scholarly theories developed by German scholars in the 19th century, incorporated in the BGB and since then elaborated in the German and literature, which is followed in translation all over the world (with the exception of the French and English speaking regions).

The unifying theme of the French Code civil was how property could be transferred from one person to another. There was no recognition of inchoate legal relationships, such as the status of being bound but not having performed one's duty. In the five books constituting the German BGB, we find a diverse view of legal relationships. The first book defines legal personality and the basic unilateral legal transaction of making a declaration of the will to be legally bound (Willenserklärung), as developed in the subsequent books. The second part is devoted to the law

of obligations, which includes contracts, torts, and unjust enrichment. The third book takes up the law of real and personal property, thus realizing in these two books the Roman distinction between rights in personam and rights in rem. The fourth and fifth books deal with matters handled by separate courts in the common law world, namely marital relations and family succession.

3. Substantive Differences

In comparing the differences among the systems of the common law and civil law, one must be attentive to nominal differences and real differences. For example, in the field of contract formation, there is a nominal difference in the element required in addition to an offer and an acceptance. The common law requires consideration (a quid pro quo, something given for something) for a valid contract. In place of this thing given, French law requires cause (something like "motivation") and German law is satisfied with the parties' intent to be legally bound. The latter is required in all legal systems, but the Germans mean a bit more by this requirement; the point is to exclude, for example, a social agreement to meet for a game of tennis or a cup of coffee.

It sometimes thought that a promise to make a gift is enforceable in civil law but not in common law, e.g. I promise to give you ten thousand dollars on your birthday. In the common law, there is no consideration and therefore the contract would not be binding. In practice, however, the contract would be problematic in the civil law countries as well. Their textbooks might say that in theory the contract is binding, but further research reveals that these promises to make a gift must be declared formally before a notary – a legal official more important than an American notary public and less important than a judge. The notary and his responsibilities are in fact characteristic of the civil law system.

Both civil law systems recognize a sharp line between tort and contract, though the line that remains vague in the common law systems. For example, warranties accompanying the sale of goods in the common law occupy an ambiguous legal status. They are clearly contract in the civil law. The necessity of sharp distinctions of this sort is one of the consequences of codification. The analogy under the early common law was trying to classify causes of action as falling under one writ or another, e.g. trespass or trespass on the case.

On the surface of things, it appears that the civil law takes personal responsibility more seriously than does the common law. For example, contractual breach in the civil law supposedly requires personal fault. Fault is not required for breach in the common law. A closer look at the details of the law reveal, however, that the fault required is often nominal or purely formal. A more striking feature of German law is the possibility of disproving liability for absence of fault in cases of respondeat superior, e.g. when an employee negligently causes an accident, the French and common law employers is automatically liable. Under the BGB Art. 831, however, a German employer can avoid liability by proving that he was free of fault in hiring and supervising the employee.

For this reason as well as others, there is a push in German law toward classifying cases as contract when they might be treated as tort in other systems. For example, if a potential

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For this reason as well as others, there is a push in German law toward classifying cases as contract when they might be treated as tort in other systems. For example, if a potential

customer slips on a wet floor upon entering a bank, that will be treat as a case of culpa in contrahendo – fault in the process of contracting. Rudolph von Jhering invented the concept in the middle of the 19th century. It was not included in the original BGB but added in the 21st century.

On the level of substantive law, there are very few differences between the common law and civil law. In order to understand why this distinction retains its force, we need to look at the influence of language, religion, history, and procedure.

4. Language and religion.

We have noted the role of the English language in the common law. Yet we should question whether the real influence behind the spread of the common law is language or religion. The common law countries are virtually all Protestant, the civil law countries, generally Catholic. Germany is a borderline case, being divided between the two religions. There are, of course, other Protestant countries in Northern Europe. It is not entirely clear how we should classify the Netherlands and the Scandinavian countries. They may belong to neither of the two orbits we are discussing. The Ottoman empire imposed the Millett system, which meant that each religious group would be governed by its own law.

There are certain features of Catholic countries that make them receptive to civil law thinking. First, they obviously have no problem with the translation of their holy books. The Bible is, of course, translated as a matter of course. But it is also fair to consider their codes as holy books in a secular sense. They too are translated, unproblematically, from country to country. The leading German commentaries can appear in Spanish with almost the same authority as in the original. Translation is endemic to the Protestant world. The favored translations are the Luther and King James' version of the Bible. Secondly, the local leadership of the Church expresses the Protestant sprit of deferring to community authority.

The anti-hierarchial Protestant mentality correlates well with the decentralization of the common law. Mirjan Damaska made the latter point well in drawing the distinction between coordinate and heirarchial systems of law. Every system of criminal law in the civil law world has a system of internal administrative review to ensure that all legal disputes are resolved with a single binding answer. That is, prosecutorial decisions taken in Germany are subject to internal review to the chief prosecutor of the country. In the American system, the administrative control over prosecution typically stops at the county level (each state consists of a dozen or more counties). There is no appeal from the country district attorney to the state attorney general. (The federal system in more like the civil law model – with internal review in the Attorney General's office. Whether this is an important in practice is another matter.) In Damaska's view, in any event, this procedural preference for coordinate bodies of law suggest a fundamental feature of the common law. In my view the coordinate tolerance for many right answers is a primary feature of the Protestant ethic that marks an important difference between the common law and civil law cultures.

5. History and Procedure.

It is impossible to discuss the tolerance for many right answers without introducing the jury system, one of the systematic procedural differences between the common law and the civil law. The process of the jury system dovetails well with relinquishing the necessity of a single right answer. Any reasonable answer by a jury is acceptable. The wide swath of acceptability enjoyed by reasonableness is wanting in the civil law world oriented toward one right answer.

The jury system not only generates diverse answers, depending on the personal constituency of the jury, but the very institution of lay persons deciding questions of law encourages a wider tolerate of acceptable answers. In addition, Americans employ institutions such as punitive damages, which exaggerate the subjective component of common law verdicts, particularly in torts cases.

Beyond the jury, there are characteristic procedural features of civil law systems. They started out as inquisitorial systems of trial and have gradually evolved toward the adversary trial of the common law. Still, some institutions of the civil law are peculiar. Here are two examples. The civil law prosecutor conducts his own hearing on the guilt or innocence of the suspect and therefore goes to trial more in the posture of American court seeking validation of a judgment already made rather than petitioning the resolution of an open question. This difference in posture has generated endless debates about whether there really is a presumption of innocence in these civil law systems. After all, the prosecutor would not prosecute if he were not convinced of the defendant's guilt. This was a critical political issue in the Soviet Union of the 1970's – attracting the attention of leading politicians.

The way in which one becomes convinced of a defendant's guilt is another special feature of the civil law systems, which have rejected the common law style of legal proofs, based on presumptions, probabilities, and rules of evidence. The civil law approach is to insist that the fact-finder, the judge or lay assessor, come to an intime conviction – an intimate internal persuasion – of the defendant's guilt. This way of judging facts is more personal and romantic than the common law's preference for scientific fact-finding. It would be unfair to say, however, that this or any other single feature provides a characterization of the civil law. All the perspectives we have considered – history, substantive differences, language, religion, and procedure – all contribute to our understanding of the difference between common law and civil law.

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American Law in a Global Context

Contract as Justice

TWENTY

Contract as Justice

Culpa in Contrahendo

For the time being at least, contracts are alive and well. They testify to an important liberal principle, namely, that people can come together as strangers and voluntarily commit themselves to an agreement that takes the place of the law between them. The final contract, whether it is written or spoken, is not the only manner in which the law acknowledges voluntary actions that give rise to commitments a stranger may enforce. In the common law, such commitments may arise through conduct on which another person has a right to rely, or act in detrimental reliance. This right of reliance may occur as a result not just of the making of a contract but also of the negotiation and conduct prior to a contract. In the process of negotiating a contract, the negotiators establish a relationship, and they come to expect certain behavior of their negotiating partners. This relationship is particularly important in the civil law, and we will illustrate the common law aspect of it through its civilian counterpart.

The nineteenth-century German legal philosopher Rudolf von Jhering and his followers have referred to this relationship as one of reciprocal trust (*Vertrauensverhälnis*). Trust breeds duties. And if you negligently

breach the trust of another, you should pay compensation. They captured this idea in the doctrine of *culpa in contrahendo*.

With the emphasis on trust and reciprocity, the contract is converted from a competitive institution determining who gets the best deal into a potentially cooperative enterprise. The idea behind Jhering's emphasis on the contracting relationship is that duties arise, and they are not necessarily duties of performance. They might be duties of concern, of reciprocal attention to the interests of the other, and to the success of the venture as a whole. In the common law world, these precontractual duties would be hard to ground because there would be no consideration to support them. They are, by definition, precontractual.[1]

The importance of *culpa in contrahendo* is the shift in political theory it represents. Contracts cease being the instrument of the liberal individualist and become the expression of a communal philosophy of reciprocal caring.

The difficulty with this high-flying language is that it lacks clear paradigms of application. What are the cases that really concern Jhering and his followers? The commentators often mention rather trivial cases of people being injured when they enter a store for the purpose of doing business. These "slip-and-fall" cases are well known in the common law of torts, and they offer little theoretical interest. The potential patron is called a "business invitee" in the store, and the owner and possessor of the property owes the invitee duties of care under the general principles of tort law.

The more interesting cases would be those of bad faith or malicious conduct in the course of contract negotiations. Suppose a law firm in Hong Kong is courting you for a job. The partner plans to fly in from Hong Kong to take you to dinner and convince you to join his firm. Before the partner leaves for the airport, you accept a competing offer from a midtown New York firm. You have the partner's cell phone number, but you do not bother to call. The partner arrives in New York and is furious that you did not let him know sooner. Does he have a right to recover at least his airfare and compensation for the loss of his time?

If there is any case that should be covered by *culpa in contrahendo*, this

[1] See Rudolf von Jhering, "Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfektion gelangen Verträgen," 4 *Jherings Jahrbücher für die Dogmatik des Bürgerlichen Rechts* 1–112 (1861).

should be it, but it is difficult to know whether it is in fact covered by Jhering's doctrine. It is relatively sure, however, that there would be no recovery under the common law of contracts. There is no promise, no consideration, and no basis for contractual liability.

Significantly, the BGB did not initially endorse Jhering's theory. Nonetheless, the doctrine, developed in an article in 1861, remained binding in German customary law. (The Germans never claimed that their code was exhaustive of all the relevant doctrines of private law.) Sometimes it is treated as an aspect of the general provision in the BGB requiring that all contracts be performed in good faith (*Treu und Glauben*), § 242. Others treated *culpa in contrahendo* as an aspect of the principle of fault or as a principle lying at the foundation of liability. Common lawyers would probably think of this doctrine as something like a tort of "abuse of trust" committed in the course of negotiations. However it is grounded, Jhering's general principle of precontractual liability became part of German law. Yet apart from the negligent injuries to invitees—those that would be treated as torts under the common law—it is difficult to assess how far the doctrine extends in practice.

The BGB formally absorbed the principle of *culpa in contrahendo* in 2001 as part of a general reform of the code. By examining two of these amendments, we can get a better picture of what *culpa in contrahendo* should imply in practice.

BGB § 241 defines the basic commitments that arise in a relationship of obligation. The old definition was simply that in a relationship of obligation each side has the right to demand a performance from the other side. The 2001 amendment expands the conception of obligatory relationship to include a relationship in which, according to its terms, each side is bound to pay attention (*Rücksicht*) to the rights, goods, and legal interests of the other. This is § 241(2).

To explain how these new kinds of relationships could arise, BGB § 311 was also amended. The basic rule of this provision is that obligatory relationships arise only through contract. An amendment of (1) added the phrase "unless the law otherwise provides" to the exclusivity of contract, and then (2) explains what this means:

> § 311(2): A relationship of obligation in the sense of § 241(2) might arise
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> A. from taking up contract negotiations

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Significantly, the BGB did not initially endorse Jhering's theory. Nonetheless, the doctrine, developed in an article in 1861, remained binding in German customary law. (The Germans never claimed that their code was exhaustive of all the relevant doctrines of private law.) Sometimes it is treated as an aspect of the general provision in the BGB requiring that all contracts be performed in good faith (*Treu und Glauben*), § 242. Others treated *culpa in contrahendo* as an aspect of the principle of fault or as a principle lying at the foundation of liability. Common lawyers would probably think of this doctrine as something like a tort of "abuse of trust" committed in the course of negotiations. However it is grounded, Jhering's general principle of precontractual liability became part of German law. Yet apart from the negligent injuries to invitees—those that would be treated as torts under the common law—it is difficult to assess how far the doctrine extends in practice.

The BGB formally absorbed the principle of *culpa in contrahendo* in 2001 as part of a general reform of the code. By examining two of these amendments, we can get a better picture of what *culpa in contrahendo* should imply in practice.

BGB § 241 defines the basic commitments that arise in a relationship of obligation. The old definition was simply that in a relationship of obligation each side has the right to demand a performance from the other side. The 2001 amendment expands the conception of obligatory relationship to include a relationship in which, according to its terms, each side is bound to pay attention (*Rücksicht*) to the rights, goods, and legal interests of the other. This is § 241(2).

To explain how these new kinds of relationships could arise, BGB § 311 was also amended. The basic rule of this provision is that obligatory relationships arise only through contract. An amendment of (1) added the phrase "unless the law otherwise provides" to the exclusivity of contract, and then (2) explains what this means:

§ 311(2): A relationship of obligation in the sense of § 241(2) might arise

A. from taking up contract negotiations

B. from initiating a contractual relationship [thus the relevance of § 241(2)]

C. from similar commercial contacts.

The implication is that the mere process of beginning negotiations could entail a relationship in which each side is "bound to pay attention to the rights, goods, and legal interests of the other." Contracts as the bastion of self-seeking individuals is thus transformed into an arena of solidarity and mutual respect. One wonders whether a single institution can both be the crown jewel of liberal individualism and represent a commitment to reciprocal caring.

In a classic article highlighting the conflicting ambitions of contract, Duncan Kennedy elicited this contradiction between individualism and altruism even in the common law theory of contracts.[2] This is a seminal article in the Critical Legal Studies movement. The "critical" dimension of the article lies in the emphasis on the irresolvable contradiction between individualism (liberalism) and altruism (communitarianism) in contract theory.

The amendment of the BGB brings Jhering's thesis within the statutory law, but it hardly clarifies the reach of the principle. All we can say, in theory, is that German law has led the way to establishing the principle of reciprocal caring in contract negotiations and, further, that faultfully injuring another in negotiations should be a basis for liability. The element of fault, or *culpa*, is critical to Jhering's doctrine. The faultful breach of trust is the foundation of the duty to compensate for harm done.

One of the challenges of comparative law is coping with nominal differences of legal doctrine. How do we know when the verbal differences point to an operative difference in the lives of people affected by the law? In the following case, the court claims that Puerto Rican law recognizes *culpa in contrahendo* in § 1802 of its civil code. In its text, though, the provision merely recognizes the general tort of negligently causing harm to another.

[2] See Duncan Kennedy, "Form and Substance in Private Law Adjudication," 89 *Harv. L. Rev.* 1685 (1976).

Shelley v. Trafalgar House Public Ltd. Co.

United States District Court for the District of Puerto Rico
977 F. Supp. 95 (1997).

DOMINGUEZ, J.:

. . . [In 1988, Shelley was planning a marina village in Fajardo, when Trafalgar House Public expressed interest in the project. The parties negotiated until October 24, 1989, when they entered a nonbinding "Joint Venture in Puerto Rico," which planned development, construction, and equity participation. Shelley made investments and forwent other development opportunities during the negotiations, but in the end, Trafalgar House rejected the joint venture.]

In the March 11, 1996, Opinion and Order,[3] the Court determined that although there was a contractual choice of law clause in favor of New York law, Puerto Rico law was applicable to the culpa in contrahendo tort claim. The mere determination that there is no contract does not absolve the withdrawing party from all liability. Although there is the dissolution of contractual liability, in a civil code system there is the possibility of extra contractual liability. Puerto Rico recognizes the duty to continue negotiations in good faith. The unjust withdrawal of said negotiations is recognized as the tort doctrine of culpa in contrahendo.[4] "Preliminary negotiations . . . generate a social relationship that imposes on the parties a duty to act in good faith."

. . . Parties have a right to withdraw from negotiations, but the civil code system recognizes that the exercise of said right "is not devoid of liability when it is carried out in an abusive manner." The court provided further guidance by enumerating six factors that should be considered in determining the existence of culpa in contrahendo . . . : (1) the development of the negotiations; (2) the commencement of the negotiations; (3) the direction of the negotiations; (4) the conduct of the parties throughout this time; (5) the stage at which the negotiations

[3] *Trafalgar House*, 918 F. Supp. at 522.

[4] See Civil Code Art. 1802, P.R. Laws Ann. tit. 31 § 5141 (1990) ("[a] person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done").

ended; and (6) the reasonable expectations of the parties in the consummation of the contract.

IV. Damages

The following damages are the subject of the motion to dismiss: Loss of revenues and operating loss at the marina, $12,233,000; Loss of proceeds from sale of 60% of the project to Trafalgar House, $14,040,000; Lost profits from the Shelleys' share of the project, $40,000,000. Defendants urge that the aforementioned damages be quashed. . . .

As conceded by Defendants, Plaintiffs are entitled to out-of-pocket expenses. In fact, Defendants argue that Plaintiffs are entitled to reliance damages. Reliance damages are defined as those remedies necessary to place the injured party, who in relying on negotiations to consummate a contract changed his position, in the same position as he was prior to relying on said negotiations. But reliance damages are more than merely out-of-pocket expenses. Reliance damages also include damages for lost opportunities, specifically in the context of culpa in contrahendo. . . .

The civil code treatise writers provide a further independent basis for awarding lost opportunity costs. Nevertheless, there are treatise writers who believe that culpa in contrahendo should not include compensation for foregone opportunities. This Court, faced with two opposing views, must decide which path to follow. The Court finds the reasoning of the former treatise writers more compatible with the interpretation of article 1802. In Puerto Rico, under article 1802, the doctrine of extra contractual liability is very broad. In 1994, the Puerto Rico supreme court defined the scope of this liability. " 'Injury is any material or moral loss suffered by a person, either in its natural rights or in its property or patrimony, brought about by violation of a legal provision and which is chargeable on another party.' " As a result, the damages for lost opportunities shall be authorized if they are not speculative in nature.

Plaintiffs argue that they are entitled to expectation damages otherwise known as benefit-of-the-bargain damages. The Court refuses to extend the doctrine of culpa in contrahendo to those reaches. A final agreement was never reached; Plaintiffs are then not to receive the benefit of the bargain. . . .

In sum, under culpa in contrahendo, the lost profits included within subparagraph e must be dismissed because they fall outside the scope of reliance damages and all expectation damages are clearly unwarranted under the culpa in contrahendo theory. . . .

QUESTIONS AND COMMENTS

1. One of the interesting side issues in the *Trafalgar House* litigation was whether the plaintiff had a right to a jury trial to determine whether the defendant was liable for *culpa in contrahendo*. The Seventh Amendment to the U.S. Constitution, guaranteeing a jury trial in all "suits at common law" over a certain amount, applies in Puerto Rico. The problem was whether *culpa in contrahendo* should be classified as "legal" or "equitable." If the latter, the plaintiff would not have a right to a jury trial. There was an argument for saying that it was equitable because the closest doctrine in Anglo-American law is "promissory estoppel," which prevents the defendant from denying the existence of a contract under certain circumstances. Promissory estoppel is treated as a principle in equity. Yet, because the court considered the doctrine as arising under a code provision on tort law, it held that the action was in tort and that the plaintiff Shelley was entitled to a jury trial. Though we do not know the final outcome of this dispute, one could imagine that the jury trial was helpful to the local investors.
2. Without going into the facts in greater detail, there is no way of knowing whether in this case the plaintiff had a sound legal claim based on *culpa in contrahendo*. Therefore, it is difficult to find guidance in this case on the question whether the law student who lets the partner fly in from Hong Kong is liable in *culpa in contrahendo*. Is the student negligent, malicious, an intentional wrongdoer, or just careless and selfish?

Communal Judgments of Fairness

The common law of contract was wary of judging the adequacy of consideration, that is, of deciding whether the bargain was fair. The liberal view is that everyone is responsible for the choices he or she makes. The state should not interfere and judge whether the price is just. Of course,

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if there is coercion, the giving of consent is undermined. All codes contain a principle that, in cases of duress, the nominal giving of consent is not binding.[5] The principle is fundamental in the common law as well.

But what if there are no threats? What if the parties appear to consent but the terms are very onerous? This is the problem posed in the following case. The seller, Walker-Thomas Furniture Company, wrote conditions into the installment contract that appear to be unfair. If the buyer buys several items from the seller, the debt on all items must be paid in full before the buyer acquires full title to any single item. It goes without saying that the typical buyer would not understand this condition written into the standard printed sales agreement (note the legalese in which the condition is expressed). What do the courts do then? The liberal theory says: Enforce the contract. The alternative is a form of paternalism: The courts will undertake to protect the weak, the needy, and the ill informed.

The legal basis for the community's paternalistic intervention remains in doubt. The French have an explicit provision on unfair bargains with regard to the sale of land. (See § 1674: "If the seller of land is deprived of seven-twelfths of the value of the land, he or she has the right to demand the rescission of the sale. . . .") This provision seems to have different roots from our present concern with installment contracts made according to standardized forms. The French law seems to reveal a class bias. The families that owned land for many generations should not lose their wealth simply because one reckless offspring sells the land for too low a price. With regard to ordinary contracts, particularly for the sale of goods, the French code (Art. 1118) is explicit that this principle (called *lésion*) does not apply.

There are two traditional techniques for asserting judicial power in order to protect people like Ora Williams in the following case. One technique is to expand the idea of duress or undue influence to include these cases of imposing conditions on consumers of inferior bargaining power. The alternative to invoking the idea of "good morals and public order" is to read into the law certain conditions of fairness as a condition of valid contracts. For example, the German provision on "good morals," BGB § 138(II), includes a clause referring to "the exploitation of a condition of distress, inexperience, poverty, or weakness" to generate a contractual advantage disproportionate to the consideration given. Contracts that are immoral in this way are considered null and void.

[5] See *Code civil* § 1109 (no consent if extorted by violence); BGB § 123 (1) (expressions of the will voidable if given under threats).

The Uniform Commercial Code (UCC) offers the most influential response to this problem in the common law world. Recognizing the need for paternalistic intervention, the UCC established the new legal ground of "unconscionability" as a ground for attacking the validity of a contract. The following case illustrates the way the new provision works. Note that the provision actually applied is not the UCC, which is merely a model code for the states to consider, but the UCC as adopted in the District of Columbia:

Williams v. Walker-Thomas Furniture Co.

United States Court of Appeals for the District of Columbia
121 U.S. App. D.C. 315; 350 F.2d 445 (1965)

SKELLY WRIGHT, J.:

Appellee, Walker-Thomas Furniture Company, operates a retail furniture store in the District of Columbia. During the period from 1957 to 1962 each appellant in these cases purchased a number of household items from Walker-Thomas, for which payment was to be made in installments. The terms of each purchase were contained in a printed form contract which set forth the value of the purchased item and purported to lease the item to appellant for a stipulated monthly rent payment. The contract then provided, in substance, that title would remain in Walker-Thomas until the total of all the monthly payments made equaled the stated value of the item, at which time appellants could take title. In the event of a default in the payment of any monthly installment, Walker-Thomas could repossess the item.

The contract further provided that "the amount of each periodical installment payment to be made by [purchaser] to the Company under this present lease shall be inclusive of and not in addition to the amount of each installment payment to be made by [purchaser] under such prior leases, bills or accounts; and all payments now and hereafter made by [purchaser] shall be credited pro rata on all outstanding leases, bills and accounts due the Company by [purchaser] at the time each such payment is made." The effect of this rather obscure provision was to keep

a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated. As a result, the debt incurred at the time of purchase of each item was secured by the right to repossess all the items previously purchased by the same purchaser, and each new item purchased automatically became subject to a security interest arising out of the previous dealings.

On May 12, 1962, appellant Thorne purchased an item described as a Daveno, three tables, and two lamps, having total stated value of $391.10. Shortly thereafter, he defaulted on his monthly payments and appellee sought to replevy all the items purchased since the first transaction in 1958. Similarly, on April 17, 1962, appellant Williams bought a stereo set of stated value of $514.95. She too defaulted shortly thereafter, and appellee sought to replevy all the items purchased since December, 1957. The Court of General Sessions granted judgment for appellee. The District of Columbia Court of Appeals affirmed, and we granted appellants' motion for leave to appeal to this court. [At the time of this purchase her account showed a balance of $164 still owing from her prior purchases. The total of all the purchases made over the years in question came to $1,800. The total payments amounted to $1,400.] . . .

Appellants' principal contention, rejected by both the trial and the appellate courts below, is that these contracts, or at least some of them, are unconscionable and, hence, not enforceable. In other jurisdictions, it has been held as a matter of common law that unconscionable contracts are not enforceable. While no decision of this court so holding has been found, the notion that an unconscionable bargain should not be given full enforcement is by no means novel. In *Scott v. United States*, 79 U.S. (12 Wall.) 443, 445, 20 L. Ed. 438 (1870), the Supreme Court stated:

> If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to.

Since we have never adopted or rejected such a rule, the question here presented is actually one of first impression.

Congress has recently enacted the Uniform Commercial Code, which specifically provides that the court may refuse to enforce a contract which it finds to be unconscionable at the time it was made. 28 D.C.CODE § 2-302 (Supp. IV 1965). The enactment of this section, which occurred subsequent to the contracts here in suit, does not mean that the common law of the District of Columbia was otherwise at the time of enactment, nor does it preclude the court from adopting a similar rule in the exercise of its powers to develop the common law for the District of Columbia. In fact, in view of the absence of prior authority on the point, we consider the congressional adoption of § 2-302 persuasive authority for following the rationale of the cases from which the section is explicitly derived. Accordingly, we hold that where the element of unconscionability is present at the time a contract is made, the contract should not be enforced.

Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.[6]

In determining reasonableness or fairness, the primary concern

[6] See the general discussion of "Boiler-Plate Agreements" in Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* 362–371 (Boston: Little, Brown, 1960). As an expert in the law of sales, he became the leading architect of the Uniform Commercial Code.

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must be with the terms of the contract considered in light of the circumstances existing when the contract was made. The test is not simple, nor can it be mechanically applied. The terms are to be considered "in the light of the general commercial background and the commercial needs of the particular trade or case." Corbin suggests the test as being whether the terms are "so extreme as to appear unconscionable according to the mores and business practices of the time and place." [Corbin's *Treatise on Contracts* is one of the two leading treatises on the subject in English. The other is Williston, which is older and more traditional in its orientation.] We think this formulation correctly states the test to be applied in those cases where no meaningful choice was exercised upon entering the contract.

Because the trial court and the appellate court did not feel that enforcement could be refused, no findings were made on the possible unconscionability of the contracts in these cases. Since the record is not sufficient for our deciding the issue as a matter of law, the cases must be remanded to the trial court for further proceedings.

So ordered.

DANAHER, J., DISSENTING:

The District of Columbia Court of Appeals obviously was as unhappy about the situation here presented as any of us can possibly be. Its opinion in the Williams case, quoted in the majority text, concludes: "We think Congress should consider corrective legislation to protect the public from such exploitive contracts as were utilized in the case at bar."

My view is thus summed up by an able court which made no finding that there had actually been sharp practice. Rather the appellant seems to have known precisely where she stood.

There are many aspects of public policy here involved. What is a luxury to some may seem an outright necessity to others. Is public oversight to be required of the expenditures of relief funds? A washing machine, e.g., in the hands of a relief client might become a fruitful source of income. Many relief clients may well need credit, and certain business establishments will take long chances on the sale of items, expecting their pricing policies will afford a degree of protection commensurate with the risk. Perhaps a remedy when necessary will be found within the provisions of the "Loan Shark" law, D.C.CODE §§ 26-601 et seq. (1961).

I mention such matters only to emphasize the desirability of a cautious approach to any such problem, particularly since the law for so long has allowed parties such great latitude in making their own contracts. I dare say there must annually be thousands upon thousands of installment credit transactions in this jurisdiction, and one can only speculate as to the effect the decision in these cases will have.

I join the District of Columbia Court of Appeals in its disposition of the issues.

■

QUESTIONS AND COMMENTS

1. To anticipate the economic analysis of legal relations, discussed in detail in Chapter Twenty-Three, think about the impact of this decision on future credit transactions among furniture stores and poor buyers. Will the buyers be able to obtain credit so easily? Will the prices go up to compensate the sellers for the loss sustained in this case? If the market always adjusts prices in recognition of the relative advantage of buyer and seller, is there a good reason for courts to intervene in the market in order to improve the condition of buyers like Ms. Williams?
2. What is the political philosophy reflected in the Williams case? Is it liberalism or paternalism? Is the state intervening here because it cannot trust buyers to know what they are getting into? Or is this a case of protecting one person from harm inflicted by another, namely, from a buyer suffering "exploitation" by a seller?

■

Further Reading

An important perspective on the limits of the enforceability of contracts is presented in E. Allan Farnsworth, *Changing Your Mind: The Law of Regretted Decisions* (New Haven, CT: Yale University Press, 1998).

American Law in a Global Context

Li v. Yellow Cab

Nga Li v. Yellow Cab Company of California

Supreme Court of California
13 Cal. 3d 804; 532 P.2d 1226 (1975)

SULLIVAN, J.:

In this case we address the grave and recurrent question whether we should judicially declare no longer applicable in California courts the doctrine of contributory negligence, which bars all recovery when the plaintiff's negligent conduct has contributed as a legal cause in any degree to the harm suffered by him, and hold that it must give way to a system of comparative negligence, which assesses liability in direct proportion to fault. As we explain in detail *infra*, we conclude that we should. In the course of reaching our ultimate decision we conclude that: (1) The doctrine of comparative negligence is preferable to the "all-or-nothing" doctrine of contributory negligence from the point of view of logic, practical experience, and fundamental justice; (2) judicial action in this area is not precluded by the presence of section 1714 of the Civil Code, which has been said to "codify" the "all-or-nothing" rule and to render it immune from attack in the courts except on constitutional grounds; (3) given the possibility of judicial action, certain practical difficulties attendant upon the adoption of comparative negligence should not dissuade us from charting a new course—leaving the resolution of some of these problems to future judicial or legislative action; (4) the doctrine of comparative negligence should be applied in this state in its so-called "pure" form under which the assessment of liability in proportion to fault proceeds in spite of the fact that the plaintiff is equally at fault as or more at fault than the defendant; and finally (5) this new rule should be given a limited retrospective application.

The accident here in question occurred near the intersection of Alvarado Street and Third Street in Los Angeles. . . . The court, sitting without a jury, found as facts that defendant Phillips was traveling at approximately 30 miles per hour when he entered the intersection, that

such speed was unsafe at that time and place, and that the traffic light controlling southbound traffic at the intersection was yellow when defendant Phillips drove into the intersection. It also found, however, that plaintiff's left turn across the southbound lanes of Alvarado "was made at a time when a vehicle was approaching from the opposite direction so close as to constitute an immediate hazard." The dispositive conclusion of law was as follows: "That the driving of Nga Li was negligent, that such negligence was a proximate cause of the collision, and that she is barred from recovery by reason of such contributory negligence." Judgment for defendants was entered accordingly.

I.

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

This rule, rooted in the long-standing principle that one should not recover from another for damages brought upon oneself . . . has been the law of this state from its beginning. . . . Although criticized almost from the outset for the harshness of its operation, it has weathered numerous attacks, in both the legislative and the judicial arenas, seeking its amelioration or repudiation. We have undertaken a thorough reexamination of the matter, giving particular attention to the common law and statutory sources of the subject doctrine in this state. As we have indicated, this reexamination leads us to the conclusion that the "all-or-nothing" rule of contributory negligence can be and ought to be superseded by a rule which assesses liability in proportion to fault.

It is unnecessary for us to catalogue the enormous amount of critical comment that has been directed over the years against the "all-or-nothing" approach of the doctrine of contributory negligence. The essence of that criticism has been constant and clear: the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault. Against this have been raised several arguments in justification, but none have proved even remotely adequate to the task. The basic objection to the doctrine—grounded in the primal concept that in a system in which liability is based on fault, the extent of fault should govern the extent of liability—remains irresistible to reason and all intelligent notions of fairness.

Furthermore, practical experience with the application by juries of the doctrine of contributory negligence has added its weight to analyses of its inherent shortcomings: "Every trial lawyer is well aware that juries often do in fact allow recovery in cases of contributory negligence, and that the compromise in the jury room does result in some diminution of the damages because of the plaintiff's fault. But the process is at best a haphazard and most unsatisfactory one."[3] . . .

It is in view of these theoretical and practical considerations that to this date 25 states have abrogated the "all-or-nothing" rule of contributory negligence and have enacted in its place general apportionment statutes calculated in one manner or another to assess liability in proportion to fault. . . .

II.

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

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such speed was unsafe at that time and place, and that the traffic light controlling southbound traffic at the intersection was yellow when defendant Phillips drove into the intersection. It also found, however, that plaintiff's left turn across the southbound lanes of Alvarado "was made at a time when a vehicle was approaching from the opposite direction so close as to constitute an immediate hazard." The dispositive conclusion of law was as follows: "That the driving of Nga Li was negligent, that such negligence was a proximate cause of the collision, and that she is barred from recovery by reason of such contributory negligence." Judgment for defendants was entered accordingly.

I.

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is the law of this state and shall remain so until the Legislature directs otherwise. The fundamental constitutional doctrine of separation of powers, the argument concludes, requires judicial abstention. . . .

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

Before turning our attention to section 1714 itself we make some observations concerning the 1872 Civil Code as a whole. Professor Arvo Van Alstyne, in an excellent and instructive article entitled "The California Civil Code" which appears as the introductory commentary to West's *Annotated Civil Code* (1954), has carefully and authoritatively traced the history and examined the development of this, the first code of substantive law to be adopted in this state. Based upon the ill-fated draft Civil Code prepared under the direction and through the effort of David Dudley Field for adoption in the state of New York, the California code found acceptance for reasons largely related to the temperament and needs of an emerging frontier society. "In the young and growing commonwealth of California, the basically practical views of Field commanded wider acceptance than the more theoretic and philosophic arguments of the jurists of the historic school. In 1872, the advantages of codification of the unwritten law, as well as of a systematic revision of statute law, loomed large, since that law, drawing heavily upon the judicial traditions of the older states of the Union, was still in a formative stage. The possibility of widely dispersed popular knowledge of basic legal concepts comported well with the individualistic attitudes of the early West." (Van Alstyne, *supra*, p. 6.)

[W]e turn to a specific consideration of section 1714. . . . The present-day reader of the foregoing language is immediately struck by the fact that it seems to provide in specific terms for a rule of comparative rather than contributory negligence—i.e., for a rule whereby plaintiff's recovery is to be diminished to the extent that his own actions have been responsible for his injuries. The use of the compound

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

Our consideration of this arresting contention—and indeed of the whole question of the true meaning and intent of section 1714—cannot proceed without reference to the Code Commissioners' Note which appeared immediately following section 1714 in the 1872 code. That note provided in full as follows: "Code La., § 2295; Code Napoleon, § 1383; *Austin vs. Hudson River R.R. Co.*, 25 N.Y., p. 334; *Jones vs. Bird*, 5 B. & Ald., p. 837; *Dodd vs. Holmes*, 1 Ad. & El., p. 493. *This section modifies the law heretofore existing.*—See 20 N.Y., p. 67; 10 M. & W., p. 546; 5 C. B. (N. S.), p. 573. This class of obligations imposed by law seems to be laid down in the case of *Baxter vs. Roberts*, July Term, 1872, Sup. Ct. Cal. Roberts employed Baxter to perform a service which he (Roberts) knew to be perilous, without giving Baxter any notice of its perilous character; Baxter was injured. Held: that Roberts was responsible in damages for the injury which Baxter sustained. (See facts of case.)" (1 Annot. Civ. Code (Haymond & Burch 1874 ed.) p. 519; italics added.)

Each of the parties and amici in this case has applied himself to the task of legal cryptography which the interpretation of this note involves. The variety of answers which has resulted is not surprising. We first address ourselves to the interpretation advanced by plaintiff and the amici curiae in support of her contention set forth above, that section 1714 in fact announced a rule of comparative rather than contributory negligence.

The portion of the note which is relevant to our inquiry extends from its beginning up to the series of three cases cited following the

italicized sentence: "This section modifies the law heretofore existing." Plaintiff and her allies point out that the first authorities cited are two statutes from civil law jurisdictions, Louisiana and France; then comes the italicized sentence; finally there are cited three cases which state the common law of contributory negligence modified by the doctrine of last clear chance. The proper interpretation, they urge, is this: Civil law jurisdictions, they assert, uniformly apportion damages according to fault. The citation to statutes of such jurisdictions, followed by a sentence indicating that a change is intended, followed in turn by the citation of cases expressing the common law doctrine—these taken together, it is urged, support the clear language of section 1714 by indicating the rejection of the common law "all-or-nothing" rule and the adoption in its place of civil law principles of apportionment.

This argument fails to withstand close scrutiny. The civil law statutes cited in the note, like the common law cases cited immediately following them, deal not with "defenses" to negligence but with the basic concept of negligence itself. In fact the Code Commissioners' Note to the parallel section of the Field draft cites the very same statutes and the very same cases in direct support of its statement of the basic rule. Moreover, in 1872, when section 1714 was enacted and the Code Commissioners' Note was written, neither France nor Louisiana applied concepts of comparative negligence. The notion of "faute commune" did not become firmly rooted in French law until 1879 and was not codified until 1915. (See Turk, "Comparative Negligence on the March" (1950) 28 *Chi.-Kent L. Rev.* 189, 239–240.) Louisiana, in spite of an 1825 statute which appeared to establish comparative negligence, firmly adhered to the "all-or-nothing" common law rule in 1872 and has done so ever since. (Turk, *supra*, at pp. 318–326.) In fact, in 1872 there was no American jurisdiction applying concepts of true comparative negligence for general purposes, and the only European jurisdictions doing so were Austria and Portugal. (Turk, *supra*, at p. 241.) Among those jurisdictions applying such concepts in the limited area in which they have traditionally been applied, to wit, admiralty, was California itself: in section 973 of the very Civil Code which we are now considering (now Harb. & Nav. Code, § 292) apportionment was provided for when the negligence of the plaintiff was slight. Yet the Code Commissioners' Note did not advert to this section.

In view of all of the foregoing we think that it would indeed be

surprising if the 1872 Legislature, intending to accomplish the marked departure from common law which the adoption of comparative negligence would represent, should have chosen to do so in language which differed only slightly from that used in the Field draft to describe the common law rule. . . . It would be even more surprising if the Code Commissioners, in stating the substance of the intended change, should fail to mention the law of any jurisdiction, American or foreign, which then espoused the new doctrine in any form, and should choose to cite in their note the very statutes and decisions which the New York Code Commissioners had cited in support of their statement of the common law rule. It is in our view manifest that neither the Legislature nor the Code Commissioners harbored any such intention—and that the use of the words "except so far as" in section 1714 manifests an intention other than that of declaring comparative negligence the law of California in 1872.

That intention, we have concluded, was simply to insure that the rule of contributory negligence, as applied in this state, would not be the harsh rule then applied in New York but would be mitigated by the doctrine of last clear chance. The New York rule, which did not incorporate the latter doctrine, had been given judicial expression several years before in the case of *Johnson v. The Hudson River Railroad Company* (1859) 20 N.Y. 65. It is apparent from the Code Commissioners' Note that this rule was considered too harsh for adoption in California, and that the Legislature therefore determined to adopt a provision which would not have the effect of barring a negligent plaintiff from recovery without regard to the quantity or quality of his negligence. . . .

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

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

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

To reiterate the words of Professor Van Alstyne, "[the code's] incompleteness, both in scope and detail have provided ample room for judicial development of important new systems of rules, frequently built upon Code foundations." By the same token we do not believe that the general language of section 1714 dealing with defensive considerations should be construed so as to stifle the orderly evolution of such considerations in light of emerging techniques and concepts. On the contrary we conclude that the rule of liberal construction made applicable to the code by its own terms (Civ. Code, § 4), together with the code's peculiar character as a continuation of the common law (see Civ. Code, § 5) permit if not require that section 1714 be interpreted so as to give dynamic expression to the fundamental precepts which it summarizes.

The aforementioned precepts are basically two. The first is that one whose negligence has caused damage to another should be liable therefor. The second is that one whose negligence has contributed to his own injury should not be permitted to cast the burden of liability upon another. The problem facing the Legislature in 1872 was how to accommodate these twin precepts in a manner consonant with the then progress of the common law and yet allow for the incorporation of future developments. The manner chosen sought to insure that the harsh accommodation wrought by the New York rule—i.e., barring recovery to one guilty of any negligence—would not take root in this state. Rather the Legislature wished to encourage a more humane rule—one holding out the hope of recovery to the negligent plaintiff in some circumstances.

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

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

III.

. . . .

It remains to identify the precise form of comparative negligence which we now adopt for application in this state. Although there are many variants, only the two basic forms need be considered here. The first of these, the so-called "pure" form of comparative negligence, apportions liability in direct proportion to fault in all cases. . . . The second basic form of comparative negligence, of which there are several variants, applies apportionment based on fault up to the point at which the plaintiff's negligence is equal to or greater than that of the defendant—when that point is reached, plaintiff is barred from recovery. Nineteen states have adopted this form or one of its variants by statute. The principal argument advanced in its favor is moral in nature: that it is not morally right to permit one more at fault in an accident to recover from one less at fault. Other arguments assert the probability of increased insurance, administrative, and judicial costs if a "pure" rather than a "50 percent" system is adopted, but this has been seriously questioned. We have concluded that the "pure" form of comparative negligence is that which should be adopted in this state. . . .

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

tion to negligence. Pending future judicial or legislative developments, the trial courts of this state are to use broad discretion in seeking to assure that the principle stated is applied in the interest of justice and in furtherance of the purposes and objectives set forth in this opinion.

It remains for us to determine the extent to which the rule here announced shall have application to cases other than those which are commenced in the future. It is the rule in this state that determinations of this nature turn upon considerations of fairness and public policy. . . . Upon mature reflection, in view of the very substantial number of cases involving the matter here at issue which are now pending in the trial and appellate courts of this state, and with particular attention to considerations of reliance applicable to individual cases according to the stage of litigation which they have reached, we have concluded that a rule of limited retroactivity should obtain here. Accordingly we hold that the present opinion shall be applicable to all cases in which trial has not begun before the date this decision becomes final in this court, but that it shall not be applicable to any case in which trial began before that date (other than the instant case)—except that if any judgment be reversed on appeal for other reasons, this opinion shall be applicable to any retrial.

The judgment is reversed.

MOSK, J., DISSENTING (IN PART) AND CONCURRING (IN PART):

[Concerned solely about the issue of prospective overruling and agrees with the majority's principle of applying the new rule to these parties and all future cases.]

CLARK, J.:

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

First, the majority's decision deviates from settled rules of statutory construction. A cardinal rule of construction is to effect the intent of the Legislature. The majority concedes "the intention of the Legislature in enacting section 1714 of the Civil Code was to state the basic rule of negligence together with the defense of contributory negligence modified by the emerging doctrine of last clear chance." Yet the majority refuses to honor this acknowledged intention—violating established principle.

The majority decision also departs significantly from the recognized limitation upon judicial action—encroaching on the powers constitutionally entrusted to the Legislature. The power to enact and amend our statutes is vested exclusively in the Legislature. . . .

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

Further, the Legislature is the branch best able to effect transition from contributory to comparative or some other doctrine of negligence. Numerous and differing negligence systems have been urged over the years, yet there remains widespread disagreement among both the commentators and the states as to which one is best. (See Schwartz, *Comparative Negligence* (1974) Appendix A, pp. 367–369 and § 21.3, fn. 40, pp. 341–342, and authorities cited therein.) This court is not an investigatory body, and we lack the means of fairly appraising the merits of these competing systems. Constrained by settled rules of judicial review, we must consider only matters within the record or susceptible to judicial notice. That this court is inadequate to the task of carefully selecting the best replacement system is reflected in the majority's summary manner of eliminating from consideration all but two of the many competing proposals—including models adopted by some of our sister states.

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

QUESTIONS AND COMMENTS

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QUESTIONS AND COMMENTS

1. The history of contributory and comparative negligence reveals a striking diversity of positions. At the beginning of the nineteenth century, the *Code civil* totally ignored the issue of plaintiff's fault. A few years later, the common law courts devised the doctrine of contributory negligence on the basis of causation. If the plaintiff is negligent (riding her bike with her eyes closed) and this brings on the accident, it cannot be said that the defendant's negligence caused the accident. Had the plaintiff kept her eyes open, she could have avoided the accident. (Causation also explains the doctrine of "last clear chance." If the defendant could have avoided the accident despite his own negligence and the plaintiff's riding with her eyes shut, the defendant has the last clear chance and remains fully liable for the ensuing harm.) Thereafter, at the end of the century, the German BGB (§ 254) clearly accepted the general principle of comparative fault, both for torts and contracts. Finally, the French accepted the principle of comparative fault, and the Americans eventually fell into line. All of this happened, it appears, with little cross-fertilization from one legal system to another. Nonetheless, this particular opinion reveals a striking awareness of the comparative legal developments.
2. The Field Code, upon which § 1714 is based, was designed to bring to bear civilian influence to overcome certain aspects of the common law. The problem is that "civilian" in this context means French and not German. The *Code civil*, as noted, lagged in its development of tort law.
3. Is the real issue comparative blameworthiness or comparative causation? Do we really care how much at fault each side is in creating a high risk of an accident, or are we rather interested in the degree to which each negligent side contributes to the occurrence of the accident? [Note that BGB § 254 (1) provides: "If the fault of the injured party contributes to the harm suffered, then the content and degree of the duty to pay compensation depends on the circumstances; in particular, on the extent to which the harm was caused by one party or the other."] The emphasis is clearly on the relative causal contribution. This seems to us correct, but the common law systematically avoids the idea of causation as a matter of degree. Causation is either present or not present, but the fault, the courts believe, comes in degrees.
4. Would a civilian court care so much about the original intent of the legislature? Why should common lawyers interpret statutes and codes in this way?

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Further Reading

The story of the move from contributory to comparative fault is told in G. Edward White, *Tort Law in America: An Intellectual History* (expanded ed.) (New York: Oxford University Press, 2003).