Volume 28, Number 3
March, 1974

WASHINGTON STATE BAR NEWS

"Oh! . . . . excuse me." — A CASE FOR COMPARATIVE NEGLIGENCE?

MEMORANDUM

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Fairview Avenue N. & Valley, Seattle, Washington 98109

(paid advertisement)

Published by
WASHINGTON STATE BAR ASSOCIATION
505 Madison Street Seattle, Washington 98104

Hugh R. McGough, *Editor*
Edward W. Huneke, *Associate Editor*

Material, including editorial comment, appearing herein represents the views of the respective authors and does not necessarily carry the endorsement of the Association or of the Board of Governors. Direct all copy to Bar News, State Bar Office, 505 Madison, Seattle 98104.

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Published monthly, except August-September combined. Subscription price is $5.00 a year, 50¢ a copy. Subscription included with active membership. Back issues $1 per issue.

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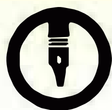
Cover: By Honore Daumier, 19th century political satirist and recognized for works relating to the legal profession.



Letters

Editor:

Here is a thought-provoking recipe, written by that prolific Anon., making the rounds in Seattle:

RECIPE FOR LEGAL SECRETARY

Stir together until well blended:

- 10 fast fingers;
- 1 nimble brain;
- 1 even temper with equal parts of tact, diplomacy and common sense;
- 1 large size heart;
- 1 broad mind;
- 1 infallible memory;
- 1 lifetime of loyalty.

Add a touch of tenderness and season to suit individual taste of employer. Bake approx. 8 hours in moderate law office. Serve garnished with one large paycheck and a few words of thanks.

JOHN W. RILEY
Seattle

Specialties Not To Be Listed

Dear Mr. Reynolds:

A copy of your letter of December 21, 1973 directed to the Board of Governors on the subject of certification of specialists has been given to me in my capacity as Chairman of that state bar committee. Your letter was read to the Committee at one of our meetings and I was directed to reply to your comments about the fact that our Plan would place limitations on advertising by an attorney of his field of specialization.

The 1972-1973 Washington State Bar Association Committee on Certification of Specialists which drafted the Plan that was then subsequently adopted after some changes by the Board of Governors, was somewhat divided on the point of whether lawyers who were certified as specialists should be able to advertise that fact in the yellow pages of the telephone directory. In fact, in my opinion as a member of that Committee, it was the one point that would have possibly caused the Committee in a majority report to oppose the adoption of a plan for certification of specialists. With the prohibition against such advertising, there was unanimous consent within the Committee to the recommendation that a Plan be adopted. It was, and is, my opinion that even those who might have favored the allowance of such advertising, felt that the other values to be gained from recognizing specialists far outweighed not having any plan at all.

The reasoning behind the Committee's decision should be interesting to you and is contained in the enclosed excerpt from its Report to the Board of Governors in June, 1973. To me personally the most compelling reason put forth is contained in the statement that "the public may unjustifiably consider a lawyer's lack of certification to be the equivalent of noncompetence". This example might illustrate that point. A lawyer has been servicing the general problems of a corporation for a number of years. In doing this he has from time to time delved into a number of substantive areas of law besides corporate statutory law. However, that lawyer has developed an expertise in the fields of, let's say, federal taxation, securities and anti-trust law; and for one reason or another, chooses to become certified as a specialist in those areas and not as a specialist in "corporation law".

The lawyer's client becomes aware of the yellow page listings and wonders why his longtime "corporate lawyer" is not certified as a specialist in that area.

No matter what the client is told, some of the members of our Committee thought that the lawyer's relationship with his client, under those circumstances, could begin to erode. It is true that even without a listing of specialization in the yellow pages, a client could and possibly will learn of the areas in which his lawyer has become certified. However, rightly or wrongly, the majority of the Committee thought that a listing in the yellow pages gave a certain credence which would make it harder to convince the client, under circumstances as set forth in my example, that a lawyer is competent in a certain field even though not certified as a specialist in that field.

As a final comment, I might add that it is my opinion that the question of public listing of specialists will periodically reoccur for discussion.

DONALD A. CABLE
Seattle

[Excerpt from Committee's Report:

The proposed plan does not permit public listing of specialties—in the yellow pages of the telephone book, on letterheads, on business cards, or on a lawyer's door.

It has been argued that public listing is necessary in order to provide the public means of identifying specialists. However, it is from the public listing aspects

of certification some of the most thorny problems of certification arise. The experience of the lawyer referral committees is that most laymen are not able to identify the field of the law in which their problem lies, except in such fields as divorce, real estate or probate. Selection of a specialist from the yellow pages may be the consequence of alphabetical standing, or the "ring" of a name. The public may unjustifiably consider a lawyer's lack of certification to be the equivalent of non-competence.

The Committee believes that the benefits of certification can be preserved while avoiding a number of the problems mentioned if listing of certification is limited to law directories and lists circulated among the state's lawyers, and most importantly, lawyer referral committees. It would be the Committee's hope that certification would give substantial impetus to the growth and public visibility of Bar-sponsored and regulated lawyer referral services, and greater reliance by the public upon such services.

The referral services are able to correctly diagnose a client's problem and match that problem to requisite skill. Further, lists of certified specialists in the hands of lawyers would preserve the benefit of certification in encouraging lawyers' referral of problems outside their areas of competence to other lawyers.

If experience with certification later suggested the desirability of public listing of specialists, this could be accomplished by a simple amendment to the plan. The Committee's discussions would suggest that public listing may be desirable only for certain specialties, such as divorce, estate planning, probate, or real estate, where the layman could be expected to adequately determine the field of law in which his problem lies.]

Judicial System Satisfactory

Editor:

Judge Willard J. Roe's article in the February, 1974 issue of the Bar News is a very articulate and well-reasoned statement in favor of maintaining our present judicial system, with some changes. Not surprisingly, I agree with Judge Roe's observations and conclusions, however, I would add some of my own.

1. The present system providing for two levels of trial court should be maintained. The Justice or District Courts provide a speedy and relatively inexpensive way for the majority of litigants to resolve their disputes. It would appear to me that the main argument for disposing of the two-level trial court system is that de novo appeals are provided for causing delays and more expense in the handling of mainly traffic appeals. It seems to me that resolving this fairly isolated problem by changing the whole system is akin to throwing out the baby with the bath water.

2. We should adapt a judicial selection plan similar to the one used in Nebraska or Missouri. To require a judge to solicit campaign funds, with all of the vices inherent therein, and take time from his job to campaign, makes no sense to me. The people can still be involved in the selection of judges by voting their approval or disapproval at the end of a term.

3. The compensation of judges should be increased. A lawyer who has the qualifications necessary to be a good judge should not be forced to sacrifice the well-being of his family to accept a judicial appointment.

4. A system of judicial discipline should be established. I have always wondered how we would get rid of a judge who was, for example, found guilty of income tax evasion, since it is my understanding that a judge is not subject to the disciplinary proceedings of the Bar Association.

It is interesting to note that few, if any, lawyers who are engaged in an extensive amount of litigation over a wide variety of subjects are in favor of changing the judicial article. It is my feeling that the present judicial system works quite satisfactorily and, with a few modifications, as noted above, the few existing problems would be resolved.

FREDERICK B. HAYES
Tacoma

Opposing Views Welcomed, Sought

Editor:

May I make an after-the-fact suggestion concerning the publication of Judge Roe's article in the February Bar News?

Given the fact that Judge Roe's views, though well-considered, are not necessarily unanimous, wouldn't it have been more conducive to the development of a reasonable position by members of the bar to have an article of the opposite persuasion in juxtaposition to Judge Roe's?

My point may not be appropriate since I am unaware of the possible efforts the Bar News may have taken to accomplish this end. I seem to recall that Mr. Billington's views have been

previously published in the Bar News. Nevertheless, the simultaneous publication would lend itself to a well reasoned position by the individual reader.

The legislature is about to take what appears to be a final position on the amendment of the judicial article. The bar's opinion would no doubt be well considered. The timing of the one-sided view of Judge Roe could be critical to the outcome.

GEORGE T. MATTSON
Renton

Ethics, Education And Awareness

Dear Dean Ehrlich:

As a graduate of the University of California Law School (Boalt), an inactive member of the California Bar, and an active member of the Washington Bar, I would like to comment on the article "Ethics, Lawyers, and Education in the Law" published in our February Washington State Bar News.

I believe that you have missed the point of what the public feels about lawyers and Watergate. In my opinion, what the public is saying is, "We do not trust lawyers as people any more than we trust other people. In fact, because of their legal training, we distrust lawyers more." To me this is true. A bright psychopath who has received excellent legal training is more clever in using the law to his or his client's advantage or in a legal but unjust way than an uneducated psychopath. I am not saying that the lawyers involved in Watergate would be classified as psychopathic personalities. I am saying, though, that many people and lawyers have behavior patterns in which they do not learn from experience, and under special types of stressful situations will do illegal acts.

To me the public is saying that the legal training has not changed the basic behavior patterns of the individuals attending law school. Graduates of law schools are not more honest than other people—some may be more dishonest with their newly-acquired knowledge of the law. In our country the changing of the behavior patterns has been mainly left to the home and the religious organizations. These areas have failed. Of course, you and I know that medical schools, colleges, and most educational institutions have not been able to change the basic behavior patterns of the individual attending nor was that the purpose of those schools.

The question now is should law schools, because of the type of work a lawyer will be doing as "an officer of the court", attempt to find ways of changing the behavior patterns of their students or be selective of the type of students admitted?

From my experience most educators of whatever type—legal, medical, or graduate educators, and also lawyers and judges—are not interested in exploring new forms of education—such as the experiential type—to discover if we can develop or evolve a more ethical, honest individual. Most professional schools feel they have too great of a burden now to train their students technically with no time to take on the most difficult burden to change—their students' behavior patterns. Nor do most professional schools in the people-helper classification know how or want to eliminate from their student body those individuals with poor behavior patterns. The educators seem to be more interested in the student with high grades, high intelligence and disregard whether or not the individual has any awareness. A highly-educated, intelligent individual without awareness has very little and in fact may become a dangerous individual in my opinion.

Since I doubt that you are interested in how you may select individuals with greater awareness or how you may develop or evolve law students to have a greater awareness, I will only mention that there are trained individuals who can read a person's body and determine whether or not he or she is a psychopath or can determine somewhat accurately the degree of awareness that the person may have. These same individuals can also guide those who want to evolve to a more mature type of personality. These trained individuals are known as bioenergetic therapists. There are many in the Bay Area. One of the noted ones in the United States, and a friend of mine, is Doctor Al Lowen of New York, who is also a lawyer and a doctor. He devotes most of his time to training therapists and writing. There are many other disciplines which are making headway on changing behavior patterns. Since I assume you believe the law school curriculum is already too crowded with law school courses, I will not explain further unless you request such information. In the last five years I have explored and experienced almost every type of the new experiential types of education. I believe in time some educational institutions will adopt or teach the new type of education.

At present all I can say is making new rules on ethics and law schools teaching such rules will do little to change the behavior patterns of their students or

future lawyers. Are the law schools only interested in developing highly trained robots who are out to win instead of developing men and women with greater awareness for all aspects of justice and life as well as being trained technically in a legal way?

JOHN E. SNODDY
Spokane

Alleged Apologist . . .

Dean Ehrlich:

I have just finished reading the portion of your article, "Ethics, Lawyers, and Education in the Law," reprinted in the February, 1974 issue of the Washington State Bar News.

Having served as Co-Chairman of the Washington state committee to review the ABA Code of Professional Responsibility which led to its adoption here with some changes, I have a familiarity with the subject. I anticipated an innovative approach to the methods by which law schools could assume greater responsibility for instilling in students "a punctilio of honor the most sensitive" toward the profession which underlies every ethical consideration.

The first thing I gathered from reading your comments was that lawyers need hold themselves to no higher standards than the business world unless, of course, they are absolutely required to do so by law. Second, there is really no reason for the legal profession to accept responsibility for Watergate crimes and ethical violations committed by lawyers. You assay a brief summary of Watergate scandals involving attorneys but do not feel constrained to note that two members of our profession (President Nixon and John Ehrlichman) have committed perhaps the most outrageous breach of ethics of which a lawyer is capable: undercutting the integrity of a legal proceeding by holding out blandishments to the presiding judge.

Your article adds to my sense of shame stemming from Watergate. Now it appears that our brothers in the profession who transgressed both the letter and spirit of ethical conduct have a highly-placed apologist.

HOWARD P. PRUZAN
Seattle

. . . And Reply

Mr. Pruzan:

Your letter saddens me because the points that I was trying to make obviously did not come through to you.

A good deal is now going on in law schools in the field of professional responsibility. In my view, even more can and should be going on. Much of my own time is devoted to that end.

It is my view that "lawyers are subject to no higher ethical code than other mortals except in regard to moral standards that are embodied in law." But the exception is an important one, and it underscores the tragedy of Watergate. As I also wrote in the article, we must have "lawyers at the head of the legal system who, by their own examples, set the highest standards in all aspects of their behavior." We are far from the mark in meeting this requirement. "Recently, many lawyers at the top of the national legal order—far from being role models—seem to have violated the law. One of the multiple ironies of the Watergate affair is that so many 'law and order' advocates within the federal government apparently violated the law and practiced disorder."

The basic purpose of the article was to give a broad overview to laymen of a wide range of issues in the area of legal ethics. It was certainly not intended to lessen your sense of shame, or mine, as a result of Watergate.

THOMAS EHRLICH
Stanford, CA

Indian Law Reporter

The American Indian Lawyer Training Program has published the initial issue of the *Indian Law Reporter*, serving practitioners of Indian law by compiling and editing on a monthly basis all current developments in the field of Indian law. Inquiries may be directed to Alan Parker, Esq., Editor, *Indian Law Reporter*, 1035-30th Street, N.W., Washington, D. C., 20007.

New "Volunteers" Aide

Sadie M. Lee has succeeded Trisha Streff as Bar Association coordinator in the office of Lawyer Volunteers in Corrections, with quarters at 918 Smith Tower, Seattle.

ETHICS, LAWYERS, AND EDUCATION IN THE LAW

by Thomas Ehrlich
Dean of Law
Stanford University

Part Two

At least three clusters of serious problems involving legal ethics face the organized bar today. The first is the one discussed in the first part of the article [February, 1974] — the ambiguity of the rules on many complex points, particularly those involving conflicts of interests.

A second, even more severe problem is the lack of adequate enforcement mechanisms to ensure that the rules are followed. In most states, unless a lawyer is engaged in the worst kind of misconduct, chances are that he will receive no more than a slap on the wrist. If a lawyer had his hand in a client's pocket and was caught, he will usually be punished—though often with a surprisingly light sanction. But negligence and incompetence are too often ignored.

"We must not make a scarecrow of the law," says Shakespeare in *Measure for Measure*, "setting it up to fear the birds of prey, and let it keep one shape till custom make it their perch and not their terror." Today, for too many lawyers, the rules of legal ethics are a scarecrow.

A third, and no less serious set of problems concerns the lack of standards for ensuring that individual lawyers will, in fact, represent those needing legal services.

Currently, as I mentioned, the codes of ethics are written in terms of lawyers' individual responsibilities to individual clients—not lawyers' social responsibilities, and particularly their social responsibilities to ensure adequate legal services for all persons. Yet ways should be found to identify the individual lawyer's share of the collective obligation if society is to receive those legal services.

What can law schools do in regard to these problems? Let me deal with that issue on two levels. First, in terms of existing standards of professional responsibility, most law schools offer one or several courses and seminars that review the canons of ethics in general and deal with difficult, borderline questions in detail.

Thomas Ehrlich, Dean and professor at Stanford Law School since 1971, professor since 1968, and associate professor from 1965 to 1968, graduated magna cum laude from Harvard Law School in 1959. He was law clerk to Judge Learned Hand, Second Circuit Court of Appeals from 1959 to 1960, followed by an association with the firm of Foley, Sammond & Lardner, Milwaukee, for two years. From 1962 to 1964 he was special assistant to the Legal Advisor for the Department of State, and thereafter, until 1966, was special assistant to the Under Secretary of State in Washington, D. C. He has co-authored books on international legal process and on legal education, and has authored a book to be published on international affairs concerning Cyprus. Dean Ehrlich has written a number of articles which have been published in the Michigan, Virginia and Stanford Law Reviews, the American Bar Journal and the Journal of Legal Education.

This year at Stanford Law School, for example, Professor Howard Williams is teaching a seminar on the legal profession in the fall term; Professors Barbara Babcock and Michael Wald are offering a course in professional responsibility in the spring term. Like law school courses generally, tough questions are used as the focal points for analysis. Most important, these offerings make students aware of possible ethical issues before they come face-to-face with those issues in actual law practice.

Significant as these offerings are, it is equally important that substantive law courses in such fields as civil procedure, evidence, family law, and estate planning raise ethical issues facing lawyers in those areas.

The Stanford course that Professor Williams teaches in estates and trusts is an example. He wrote the book used in the course, and entitled it, "Cases, Materials, and Problems of Professional Responsibility in Decedents' Estates and Trusts." It contains a substantial amount of material on questions of legal ethics.

The American Bar Association recently adopted a new rule for accredited law schools—they must offer "instruction in professional responsibility." All law schools, including ours, can certainly do more to provide such training. The new move toward so-called clinical training in law schools can be a major way to meet this need.

There is another and deeper level on which the issues of legal ethics arise in law schools, one raised by the *Milwaukee Journal* excerpt I quoted. To what extent can law schools inculcate morality or at least encourage it in their students?

Until recently, I have argued that if law students do not gain sound moral values from their family, church, and prior schooling, there is little chance that their law-school education can provide it.

That is still my general judgment, but I have been moved to further consideration by recent suggestions from several people whom I respect that many students experience a profound reexamination of their moral values both in the first year of college and also in the first year of professional school.

As a result, I am far less concerned than before whether law students will reject as preaching their teachers' call for integrity in professional practice. The call is right, however viewed, and it may have an impact. It is even more important that law teachers act as models of professional behavior and that they expose their students to the range of tough ethical issues that are faced in practice.

As an alternative or supplementary means to promote legal ethics, what about character tests to screen out unethical applicants before they begin law practice? In fact, the organized bar in each state does try to pass on the character and fitness of prospective members. But with rare exceptions, the screening process seems of relative little utility, and it can be a dangerous inhibitor of unpopular views.

Recently, an American Bar Association special committee proposed that law schools administer character tests to first-year students, and that the schools turn over test results to state bar authorities. The proposal raised the specter that the bar might exclude certain character types as "too risky." Fortunately, the scheme was squelched by various pressures—including many law school deans.

I personally believe that the current character investigations in most states should probably

meet a similar fate. The matter could then be left to the criminal law; only those applicants would be excluded who have been convicted of a crime that precludes fitness for law practice. I doubt that the likelihood of identifying other potentially unethical lawyers is sufficiently high to offset the dangers.

Rather, it seems to me ethical standards should be more strictly enforced for those who are in law practice. Fortunately, the State Supreme Court in California has narrowly defined the grounds on which an applicant for admission to the bar may be excluded on grounds of character.

Though I know of no litmus-paper test of the character of potential lawyers, except the operation of the criminal laws, there are troublesome problems of morality throughout the legal profession. They are rooted, at least partially, in the secularization of law in this century.

In shorthand terms: At one time, most people thought that law came, directly or indirectly, from God; then law was seen as rooted in a natural—though not necessarily divine—order; then, though law was understood as subject to human weaknesses, there was still a mystical aura surrounding it; now, however, law is viewed as just human judgments.

One consequence is that lawyers cannot picture themselves at the right hand of God in working out the sublime order of things. Laymen probably never saw lawyers in that position—but the profession as a whole did, and those coming into it did as well. This meant, I think, that enforcement mechanisms were far less important than they are now—God would do the enforcing, now or in the hereafter.

Currently, however, too many lawyers see their work as just another job like plumbing—though perhaps not as lucrative.

There is a character in Graham Greene's latest novel who captures the point:

> **There were no detective stories in the age of faith—an interesting point when you think of it. God used to be the only detective when people believed in him. He was law. He was order. He was good. Like your Sherlock Holmes. It was He who pursued the wicked man for punishment and discovered all. But now people like the General make law and order.**

Given this new secularism in the legal system, what is required to ensure the maintenance of legal ethics? At least two key features: First, persuasive arguments for being ethical; second, lawyers at the head of the legal system who, by their own examples, set the highest standards in all aspects of their behavior.

As to the first point, if the rationale for legal ethics is not divine, presumably it must be utilitarian. Society is better off if lawyers behave ethically; it is better for each lawyer to behave ethically. Unless a lawyer can be trusted to act with integrity, present and potential clients will lose faith in the lawyer, and he will lose faith in himself as well.

That is, in my view, a wholly sound argument. But since God will not strike the unethical lawyers down, many mortals must see a strong likelihood of enforcement by men if they deviate from established ethical standards.

Sadly, there is too little likelihood these days that standards of legal ethics will be enforced in any particular case.

The legislative body of the American Bar Association adopted a resolution last summer stating that "those lawyers whose conduct contravenes the Code of Professional Responsibility should be subjected to prompt and vigorous disciplinary investigation and appropriate action should be taken forthwith. . . ." And last winter the ABA established a National Center for Professional Discipline. Neither action, however, appears likely to have substantial impact, at least in the short run.

It is not even clear whether most lawyers are seriously concerned about the matter. According to a newspaper account, a recent survey asked California lawyers to list their preferences among 81 possible programs of continuing legal education. "How to prove damages" was at the top. In last place was "The legal profession after Watergate."

We are even further from the mark in meeting the second requirement. Recently, many lawyers at the top of the national legal order—far from being role models—seem to have violated the law. One of the multiple ironies of the Watergate affair is that so many "law and order" advocates within the federal government apparently violated the law and practiced disorder.

I am an optimist, a law teacher and administrator dedicated to the proposition that there are vital roles for lawyers in the future—just as in the past. We will do more than just survive the problems I have been discussing. Whether we will have the wisdom and courage to overcome them remains to be seen. ☐

TAXES...

by Gerhardt Morrison

"Every tax ought to be levied at the time, or in the manner, in which it is most likely to be convenient for the contributor to pay it."[1]

January fifteenth having come and gone and fourth quarter estimates for 1973 personal income tax having been paid or now being delinquent, United States taxpayers look forward to the most inconvenient day of the year, April 15. It would seem that to expect our self assessing income tax system[2] to work is a little like expecting a ten year old to voluntarily give one-half of his allowance to his younger sister each week. Yet the system does work a surprisingly high percentage of the time.

Nevertheless, a number of things recently have occurred that discourage a self assessment tax system. The unfavorable publicity concerning the alleged attempt by the President's staff to cause the Internal Revenue Service to audit the returns of selected "enemy" taxpayers and the questions raised about the President's own tax return are two. More close to home, are the recent criminal indictments and convictions of members of our bar for failure to file their income tax returns. There may be little that we can do in Washington, D. C., particularly as they relate to our income tax system, but we certainly can take a long look at ourselves in relation to our income tax system. The Council of the Section of Taxation of the Washington State Bar is concerned that if we who make a living in the law do not scrupulously apply it to ourselves, we can only expect non-lawyers to follow our example. It therefore commissioned the following brief review of the income tax reporting and paying requirements, methods for obtaining extention of time within which to meet them and penalties for failure to meet them with the hope that each of us would conclude to timely file his income tax return.

With some exceptions for those with no or low incomes, which hopefully are not applicable to many lawyers, all of us must prepare and file an individual federal income tax return for each year and pay the tax reported thereon by April 15 of the following year. Likewise, all self-employed lawyers must prepare and file a declaration of estimated income tax for each year and pay one-quarter of the tax on April 15. They must pay the remaining three quarters of the estimated tax in three equal installments on the following June 15, September 15 and January 15. Those lawyers who are employed by others generally must file a declaration of and pay estimated tax only if their tax liability for the year will not be satisfied by withholding. There are, of course, a number of other returns that lawyers may be required to file, such as corporate income tax returns for those whose practice has been incorporated, fiduciary income tax returns, gift tax returns, estate tax returns, employment tax returns and information returns, but I am mainly concerned here with individual income tax returns and declarations of estimated income tax.

These return requirements and filing dates are generally known to all. What is more, the Internal Revenue Service takes pains to remind us of them by mailing to each of us in early January a booklet including income tax return forms and

instructions for their use. The Service quickly follows this mailing with another which is a booklet containing forms for declarations of estimated income tax. Thus, if one is on the Service's mailing list, and few are not, he is twice reminded of his responsibilities.

Not all know what steps are available to one who is unable to meet the deadlines, nor what penalties are imposed on one who does not meet them or take the available steps.

If an individual is unable to file his income tax return on its due date, he may apply for an extention of time within which to file. The director of the regional service center where the individual files his return is authorized to extend the time within which to file any return, but except for individuals who are abroad, no extention may be for more than six months.[3] The extention is automatic for two months if on or before the due date for the return the individual files an application on Form 4868 and pays the tax estimated to be then due. If more than the automatic two months is necessary the individual must file an additional application with the director of the regional service center. It can be made on Form 2688 or in a letter. In either case, the application must state whether timely returns have been filed for the three preceding years, whether timely estimated payments were made for the year for which the extention is requested and a "full recital of the reasons for requesting the application."[4] If the application is denied, the individual must file the return on the later of the due date or ten days after the denial. I think the experience of most tax practitioners here in the Northwest is that the director traditionally has been reasonably liberal in granting extentions of time within which to file returns.

An extention for filing a return does not extend the time for paying the tax. Thus, the tax payable with the late return bears interest at six percent per annum from its original due date.[5] To avoid a penalty on the tax payable with the late return, the aggregate payments of tax on or before the original due date of the return must equal at least ninety percent of the total tax reported on the late return.[6]

If an individual cannot pay the tax due with his return or with his application for an extention of time within which to file his return, he must separately apply for an extention of time within which to pay the tax. The district director of the district within which the individual resides is authorized to extend the time for the payment of income tax or an installment thereof, but except for individuals who are abroad, no extention may be for more than six months.[7] The application will not be granted unless accompanied by evidence showing that without the extention undue hardship will result to the individual. The term "undue hardship" means more than inconvenience; the individual must show that he will suffer substantial financial loss if the extention is not granted. A loss due to the sale at a sacrifice price qualifies as undue hardship.[8] The individual must make the application for this extention on or before the due date for the tax on Form 1127 and evidence showing of undue hardship, a financial statement and statement of the individual's cash receipts and disbursements for the immediately preceding three months must accompany it. As a condition to granting the extention the individual may be required to submit a bond or other security for eventual payment of the tax. Even though the time for payment of income tax may be extended the unpaid portion of the tax will bear interest at six percent per annum from the original due date.

Neither of the application for extention of time within which to file the return nor to pay the tax for any year operates to extend the time within which to file the declaration of estimated tax for the following year. A separate application for an extention within which to file the declaration must be made on or before its due date to the director of the service center where the declaration is required to be filed. The application can take the form of a letter, but must include a full recital of causes for the delay.[9] If granted, the extention applies also to the payment of the installment of estimated tax then due, but does not relieve the individual from penalty for late payment of the installment.

The failure to timely file income tax returns and to pay income tax, unless "due to reasonable cause and not due to willful neglect" will result

Gerhardt Morrison is a partner in the Seattle law firm of Bogle, Gates, Dobrin, Wakefield & Long. He is a graduate of the University of Washington and Stanford University Law School. He has practiced in Seattle for the past ten years, principally in the federal income tax area. He has been a lecturer at the Tax Executives Institute, University of Montana Institute on Tax and Estate Planning, the University of Washington School of Law, and at the Seattle Estate Planning Seminar.

in the imposition of civil penalties and can result in the imposition of criminal penalties as well.

In this day of computers and cross-checking of data, it is virtually impossible for an individual's failure to go undetected for long. The penalty for an individuals' failure to file an income tax return is an amount equal to five percent of the net amount of the tax payable on the return date for each month or fraction thereof until the return is filed, but not exceeding twenty-five percent of such tax in the aggregate.[10] The penalty for an individual's failure to pay income tax when due is an amount equal to one-half of one percent of the net amount of the tax payable on the return date for each month or fraction thereof until paid, but not exceeding twenty-five percent of such tax in the aggregate.[11] If an individual fails both to file and pay, the penalties are not duplicated, but they are in addition to interest at six percent per annum which applies to any due but unpaid tax and the six percently penalty which applies to unpaid estimated tax.

If an individual's failure to file an income tax return other than a declaration of estimated income tax or to pay an income tax is "willful" he is guilty of a misdemeanor and upon conviction can be fined up to $10,000 and imprisoned up to one year.[12] Whether or not an individual's failure to file or pay was "willful" is obviously a question of fact. Although there are many more prosecutions under evasion statutes,[13] where the crime is a felony, an alarming number of the members of our bar can personally attest that prosecutions under the failure to file statute occur with regularity. Although the Internal Revenue Service has long since abandoned its policy of assuring immunity from prosecution for taxpayers who voluntarily disclose their past failure to file or pay, I know of no prosecutions for failure to file in this district in those circumstances.

On top of the Internal Revenue Service penalties, a lawyer may face censure, reprimand, suspension or even disbarment as a result of being convicted for failure to file his income tax returns. In the last decade there have been four reported cases where lawyers have been either reprimanded or suspended for such a conviction. In one of those cases, *In re Daniel A. English*, 64 Wn 2d 129 (1964) at page 132, the Washington Supreme Court stated:

> "Willful failure by a member of the legal profession to file income tax returns as required by law is an offense which warrants and justifies professional disciplinary action.
>
> "The discipline imposed, be it censure, reprimand, suspension or disbarment, rests within the sound discretion of this court."

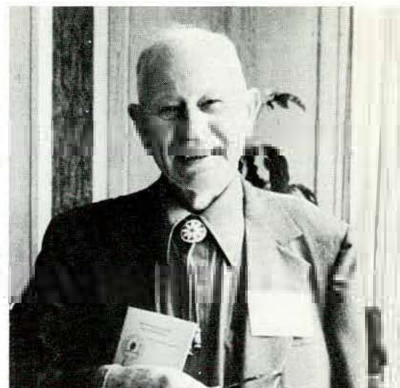
Because an insolvent individual's failure to pay his income tax can seldom be termed "willful," there have been very few prosecutions for failure to pay where a return was timely filed.

Thus, inconvenient as April 15 or an extention date may be, timely file your income tax return and declaration of estimated income tax. File them even if you cannot then pay the tax.

1. Adam SMITH. "THE WEALTH OF NATIONS."
2. A self assessment system of taxation is not our invention. A similar system was described in Book XII of Plato's "Laws."
3. §6081 Internal Revenue Code of 1954 (the "Code").
4. Treas. Reg. §1.6081-1(b).
5. Treas. Reg. §1.6081-4.
6. Treas. Reg. §301.6651-1(c)(3).
7. §6161 the Code.
8. Treas. Reg. §1.6161-1(b).
9. Treas. Reg. §1.6073-4.
10. §6651(a)(1) the Code.
11. §6651(a)(2) the Code.
12. §7203 the Code.
13. §7201 the Code.

McLauchlan at Large

Paul Houser



Vern Stoneman

John Moberg, James Danielson

Carl Skoog

Donald Voorhees

Amnesty for Vietnam Resisters

by John Huneke

The President

Under the United States Constitution, Article II, Sec. 2, the President of the United States has power to grant amnesty to law violators. George Washington granted general amnesty to participants in the Whiskey Rebellion. Presidents Adams, Jefferson, Madison, Lincoln, McKinley, Andrew Johnson, Wilson, Coolidge and Truman have used this power in a similar way. Lincoln issued two amnesty proclamations following the Civil War granting general amnesty on conditions that the individual take an oath to support the United States, and this extended to officers in the Southern Army. Truman set up an Amnesty Board after World War II, that considered some 15,000 cases.

President Nixon, on March 2, 1973, indicated that he at that time would not grant amnesty to Vietnam resisters, saying, "I would say I can think of no greater insult to the memories of those who fought and died, to the memories of those who have served, and also to our POW's, to say to them that we are now going to provide amnesty for those who deserted the country or refused to serve. We are not going to do so, and I do not intend to change my position."

The Congress

Other than by presidential proclamation, Congress can pass amnesty laws and in 1872 did pass a general Amnesty Act. Currently, Senator Robert Taft has introduced a bill in Congress to permit draft evaders to return to the country without penalty, on condition that they perform two years alternate civilian service at minimum pay. Representative Bella Abzug, D., N.Y., has introduced a bill providing blanket amnesty for Selective Service evaders, military A.W.O.L.'s, and others receiving undesirable, bad conduct or dishonorable discharges from the military.

Grant Amnesty?

Whether by presidential proclamation, or congressional action, should amnesty be considered at this time for those evaders, resisters, rioters, protesters and deserters of the Vietnam confiict? I believe we should grant amnesty. When all emotion is taken out of such consideration (and the passage of time gradually accomplishes this), when we take a cold, hard look at the present situation, when we consider that the war in Vietnam is presumably over, when there are no more inductions, it is high time to overlook indiscretions of the past, or violations of the law no longer applicable. It is now time to stop pursuit of non-violent, non-criminals, who took a sincere and often moral stand at the time of the violations.

Definition

"Amnesty" comes from the Greek—to forget or to overlook. Amnesty does not mean forgiveness, it does not mean that what the individual did was not wrong, but that the act is now past and should be forgotten.

There are and have been many arguments about the legality or morality of our involvement in Vietnam. This is not my concern. It doesn't matter now. There have also been changing interpretations of the Selective Service definition of conscientious objector by our United States Supreme Court, that differently affected individuals, depending on the timing of their claim of conscientious objection. But all of this can be laid to one side, and we can ignore such arguments, in the granting of amnesty on the basis of overlooking, not condoning or excusing, but forgetting such violations if based on a sincere individual conscientious objection to the war in Vietnam.

How Many?

The problem is not simple and is complicated by the numbers and classifications involved. These are not just those who left the country for Canada or Sweden. Generally, there were the draft evaders. Some of these failed to report for induction and of that group, some were arrested, tried, convicted and sentenced. Others did leave

the country for Canada or Sweden or went underground either in this country or abroad. Some of these are presently under indictment and awaiting trial, or are avoiding apprehension and arrest. Others are in jail, some are out and on probation or parole, and some have fully served their sentences. There are many others who were involved in riots, protest marches, breaking into Draft Offices and burning draft cards. Then there is another major group who were in the military service but went A.W.O.L., or who may have received dishonorable discharges in various categories. There is, of course, a great discrepancy in the number of individuals involved, depending on who compiles the statistics. Very generally, however, the guesses as to the number in exile, outside the United States, run from 70,000 to 130,000. The deserters and draft evaders presently in Canada run from between a low of 7 to 10,000 to a high of 40,000. We do know that the military has classified, since 1965, as deserters, those A.W.O.L. for over 30 days, 420,000. Of these, 29,300 are currently at large, 2,000 are known to be in foreign countries, 1,800 in Canada and 600 in Sweden. We also know that since 1965, 8,000 have been tried in the courts and convicted on draft charges, 3,600 have been imprisoned, and currently 240 are still serving terms in penitentiaries. 5,600 more are under indictment. 4,600 are considered fugitives. An additional 10,000 individuals are under criminal investigation, and there are 6,000 cases pending at the present time.

Procedure

My suggestion is to grant amnesty to all those in whom the principal, over-riding, compelling and motivating factor was the sincere objection to participation in the Vietnam War. This would require setting up another Amnesty Board. It would require that an application be made by the individual to the Board (thereby eliminating many ex-patriots who fled the country and have no intention of coming back), it would require a hearing, a study of the personal record, and a determination of sincerity. The results might not be 100% foolproof, but they would be far superior to the present uneven enforcement, prosecution and punishment throughout the country, in the various F.B.I. districts, offices of the District Attorneys, and the Federal Judges who still impose sentences running from probation to five years. Also, I would suggest that all cases now only in the investigative stages be closed and eliminated. For the rest, the determination of sincerity would have to be made and this might not be as tremendous a job as it would otherwise appear. For instance, it is estimated that only 4% of the A.W.O.L. military desertion cases were principally motivated by anti-Vietnam War beliefs. If the others are determined to be sincere, then it is high time to grant amnesty and clear the records. I hold no brief for the insincere, the violent, the cowardly, and others who should not meet my test. Also, I am not impressed by the argument that the law, right or wrong, must be enforced to preserve the country. I say that while generally laws should be enforced, times have now changed, and this particular law is no longer applicable, and hence we had best solve the problem by uniform application of amnesty to those entitled to have their records cleared.

There are, of course, many groups other than legislators favoring and promoting amnesty. In the religious groups, the National Conference of Churches has supported total amnesty except for convinctions involving violence. The Catholic Bishops of the United States adopted a resolution for amnesty in their 1972 conference. The United Presbyterian Church, the American Baptist Convention, and the American Jewish Congress have also supported amnesty.

The Spokane County Democratic Central Committee passed a resolution in favor of unconditional Veitnam amnesty, and there are many other groups, including representatives of the A.C.L.U. and Vietnam Veterans Against War.

It is also obvious that there are many people in the country, and perhaps a few attorneys, who are opposed to amnesty, but I suspect that this number is dwindling; and it appears to me that we had better tackle this problem at the present time and clear the decks before we become embroiled in the Middle East, with the possibility of greater and more urgent problems being thrust upon us in this same area.

Conclusion

This perhaps, may be summed up by a quotation from Dr. Robert McAfee Brown, a Stanford Professor, who said, We have passed the time in our national history when anything can be gained by punishing people for taking a stand against the War. It is time for all the [so-called] prisoners of war to be released, so that they and we can begin afresh. The books are not closed as long as a sizeable fraction of our youth are being hunted and haunted by their government." □

Extracts from the minutes of the meeting of the Board of Governors January 18-19, 1973, at the Greenwood Inn, Olympia:

Petition for Re-instatement

The petition of Arthur S. W. Chantry for re-instatement as a member of the Washington State Bar Association was approved for recommendation to the Supreme Court.

Environmental Law Section

Upon recommendation of the majority of the Board of the Section of Environmental Law, it was voted that a certain amendment to the State Environmental Policy Act (RCW 43.21 C) be given a "do pass" recommendation to the Legislative Committee, provided: (1) that in a poll being taken of its members of the Section, a majority of those responding approve the recommendation, and (2) that the recommendation is subject to reconsideration by the Board of Governors if the Legislative Committee should disagree with the Board "do pass" recommendation; the amendment in question is one designed to give the Department of Ecology rule-making authority in accordance with the Administrative Procedures Act (RCW 34.04) for issuing guidelines for the implementation of SEPA. It was further agreed the Legislative Committee's legislative representative should provide all possible assistance toward passage of the proposed amendment if it obtains approval of the Legislative Committee and a majority of members participating in the Environmental Law Section poll.

Law School Curricula—The Arizona Resolution

It was agreed that the Board approves in concept and principle and adopts the following Resolution which was to be presented to the ABA House of Delegates at its mid-year meeting in Houston:

Resolution

"WHEREAS the survival of the legal profession and the communities and clients it serves is directly affected by the maintenance of the highest possible professional standards, and

WHEREAS, the training in the area of professional standards, responsibilities and conduct is an integral and indispensable part of the quality legal education; now, therefore, be it

RESOLVED, that all Colleges of Law which are duly accredited by the American Bar Association shall provide in their curricula a course for credit required for graduation on the subject of the Legal Profession, covering its history and traditions, its future potential, ethics, professional conduct and attorney-client relations."

Proposed New Criminal Code

Christopher T. Bayley, the King County Prosecuting Attorney, and two members of his staff appeared before the Board to discuss the proposed new Criminal Code. Thereafter, it was moved, seconded and carried that the President of the Bar Association be authorized to appoint a Task Force to submit recommendations to assist the Board in arriving at a decision concerning the proposed Code. This vote on this motion was 7 to 1. It also was carried that the Board of Governors prefers that no action be taken at this session of the Legislature on the adoption of the proposed new Criminal Code pending further study and the recommendation of the Task Force.

Legislative Session—Status Report

Edward N. Lange, Chairman of the Legislative Committee, and William L. Stephens the Legislative Committee's representative at the Legislature, appeared before the Board and gave a status report on pending legislation of interest to the Bar Association.

Court Rules and Procedures Committee

Dean C. Smith, Chairman of the Court Rules and Procedures Committee appeared to discuss with the Board the work and the program of that committee.

Prepaid Legal Services Committee

Charles I. Stone, Chairman of the Prepaid Legal Services Committee, appeared before the Board to discuss the work of that committee and the proposed introduction of legislation on the subject. □

The Courts

SUPREME COURT PRACTICE

By **WILLIAM M. LOWRY**
Supreme Court Clerk

The Ancient Writ

Article IV, Section 3 of the State Constitution provides:

> The supreme court shall have original jurisdiction in habeas corpus proceedings . . .

Traditionally this right has been constantly exercised by five or more petitioners appearing on each Supreme Court motion calendar with an original application for a writ of habeas corpus.

Is it possible for such a well exercised right to atrophy? Some hold such a prognosis for habeas corpus.

Recently a resident of the State Penitentiary following the usual and customary approach to obtain a solution to his problem, filed a petition for a writ of habeas in the Supreme Court. It was set for hearing on February 15, 1974. Prior to the hearing respondent interposed an old hurdle on new grounds; a motion to dismiss on the theory that a petition for a writ of habeas corpus is premature until the remedy provided by CrR 7.7 is exhausted.

CrR 7.7 is a part of the new "Criminal Rules for Superior Court" which became effective July 1, 1973. The rule entitled "Post Conviction Relief" is modeled after the ABA "Standards Relating to Post-Conviction Remedies" and provides in part:

> A petition for post-conviction relief . . . shall be directed to the chief judge of the court of appeals . . .

If the chief judge finds that the petition has any merit, he transmits the cause to the superior court in which the petitioner was tried for a prompt hearing on the merits. Either party may appeal the ruling of the superior court.

The Chief Justice considered the question raised by the motion to be of sufficient importance to warrant continuing the hearing for consideration by the full court on the appeal calendar. The motion will be set on a date to be determined, during the May, 1974 Session. The question will probably be decided by an opinion.

If it is held that a petitioner challenging a criminal conviction must exhaust his remedy under CrR 7.7, there is, of course, another interesting question probably beyond the present case, but certainly lurking in the wings. What effect is to be given the decision obtained through the CrR 7.7 procedure? Does it become in some respects like an issue adjudicated on appeal, that is res adjudicata of the same question raised by a subsequent petition for writ of habeas corpus? If so, habeas corpus as a challenge to criminal convictions is about to undergo some dramatic changes.

SUPERIOR COURT NEWS

By **ROBERT M. ELSTON**, *Judge*
King County Superior Court

Governor Dan Evans has appointed Seattle attorney **Herbert M. Stephens** to the King County Superior Court judgeship vacated by Cornelius Chavelle who resigned January 15.

* * *

King County Superior Court committees will be chaired by the following judges (terms until February 1, 1975): Executive, **Stanley C. Soderland**; Budget, **Warren Chan**; Courthouse Facilities, **James A. Noe**; Criminal Justice System, **Janice B. Niemi**; Human Relations, **Solie M. Ringold**; Jail Inspection, **Edward E. Henry**; Jury, **Howard J. Thompson**; Legislation, **Norman B. Ackley**; Orientation, Education/Ceremonies, **Peter K. Steere**; Pretrial and Settlement, **James J. Dore**; Probate, **Horton Smith**; Public Relations/News Media, **Francis E. Holman**; Rules, **David C. Hunter**; and Family Law, Juvenile and Mental Illness, **Nancy Ann Holman** and **James A. Noe.**

* * *

Wenatchee World publisher Hu Blonk has reported that in a survey of students in 133 law schools and 41 journalism schools throughout the country, 66% (362) of law students and 42% (230) of journalism students feel that there should be court-imposed punishment of reporters who publish what a trial judge orders not to be published regarding matters occurring in open court during the absence of the jury. Fifty-four percent (300) of journalism students and 82% (464) of law students believe photography should not be allowed in courtrooms during a trial.

* * *

Judge **Frank D. Howard** (King) has been re-elected inquiry judge for King County. ☐

ISLAND REPORT

By TED D. ZYLSTRA

The Island County Bar Association has formed a non-profit corporation known as Island County Defenders Association, which corporation is authorized to contract with the county and the municipalities for the furnishing of legal services to indigent persons who have been charged with a crime. We are attempting to pattern the organization after the successful model of the Skagit County Bar. We are greatly indebted to our neighbor lawyers for their help in this new field.

Marvin C. Buchanan has been appointed judge of the Island County District Justice Court. He replaces **Clarence L. Wright** who retired at the mandatory retirement age.

The City of Langley is most fortunate in now having **George Kachlein** as its municipal judge.

SNOHOMISH REPORT

By JAMES A. SIMONTON

The Snohomish County Bar is to be heard from again.

Recently elected officers of the Snohomish County Bar Association for 1974 are: **Henry Newton,** President; **Bill Baker,** Vice President; **Herman Michelson,** Secretary; **Stuart French,** Treasurer.

Outgoing President **Bob Bibb,** of Arlington, was commended for doing an outstanding job in 1973.

Tom Kelly was recently appointed District Court Judge to fill the unexpired term of **Faye Collier Kennedy,** who resigned as another victim of Initiative 276.

Lew Bell is proud to have his son, **Doug Bell,** as a new member of the Bar and associated with his firm, as is **Stan Conroy** who has his son, **Stephen Conroy,** with him in Lynnwood.

A real disaster with high water in Stanwood almost put **Ed Jones** into hip boots for greeting clients.

Noticed where **Dan Griffin** has a new associate in **Don Cramer** who comes by way of Franklin H. S., U of Wash., Vietnam and Oregon Law School.

Arnold Young is now with **Mike Jones** in Lynnwood.

Michael Moore has opened his office in the First National Bank Building in Everett and **Parker Williams** now has his son-in-law with him, **Doug Marsh.**

To report a very sad happening: —

As many state bar members are aware, Sheriff Don Jennings, a member of the Snohomish County Bar, was murdered in Mexico on January 15th while on vacation. Memorial services will be conducted by Judge Phil Sheridan, an opportunity for all of us to pay our last respects to a long time associate and friend.

EAST KING REPORT

By Barbara E. Reardon

The noon meeting of the East King County Bar took place at our customary site, the Thunderbird Restaurant in Bellevue with our newly elected President, **Jim Dailey,** in command. The Association normally meets the third Monday of each month and any attorneys, who happen to be in the vicinity on the designated Mondays are invited to join us (*no host*, of course).

Pursuant to our President's stated intent to increase the participation of the East King County Bar in matters of significance to all lawyers in general, and in particular, matters presently under consideration by the Washington State Bar, one of our guests was **Llewelyn G. Pritchard,** the King County at Large member of the Washington State Bar Board of Governors. Mr. Pritchard reviewed the various areas of concern to lawyers, which are presently under study or before the Washington State Bar Board of Governors, briefly recorded as follows:

1. An expansion of Continuing Legal Education with compulsory Continuing Legal Education being seriously considered and a system, perhaps similiar to that adopted by the CPA's, instituted.
2. Specialization, accreditation in certain fields of law.
3. Group Legal Services: the open vs. the closed panels, with the Washington State Bar presently inclined to the open panel approach; the underlying motivation being to make necessary legal services more readily obtainable by middle income groups. Any step in this direction would have great impact on the legal profession.
4. Credit card use for legal services.
5. Need to meet the impact of new lawyers in the state; 185 registered for the February 1974 bar examination and approximately 450 for the July 1974 examination.
6. Added service of the Washington State Bar of sending section newsletters to its members.

Mr. Bruce Wilson, Chief Administrator of the King County Public Defender Com-

mittee, discussed programs under consideration for handling legal representation of the indigent misdemeanor offender. The hope is that in 1974, more East-side lawyers will undertake to assist in meeting the evident need, for as Mr. Wilson stated there are approximately 200 cases estimated for 1974 as qualified under the law to representation.

The following lawyers have incorporated for the practice of law at 15606 N.E. 8th, Crossroads Shopping Center: **Jay Nuxoll, Hugh Stroh, Hartly Newsum, Steve Funk, Vic Sampson, Lewis Hutchison.**

Ed Hutto has been practicing law at 10306 N.E. 10th in Bellevue, with **Charles L. Hamley** and **Allen Hamley; Charles Diesen** is now at 16275 N.E. 85th, Redmond, Washington.

SEATTLE-KING REPORT

By **GERALD G. TUTTLE**

Robert C. Wetherholt, formerly chairman of the State Board of Industrial Insurance Appeals, has returned to private practice at 1224 Denny Building. Mr. Wetherholt is sharing office space with **James A. Holman** and **Donald A. Dawson.**

Aiken, St. Louis & Siljeg announce that **George S. Martin** has become a partner of that firm.

Daniel R. Nolan announces the opening of his office for the practice of law at 1008 Olympic National Building.

Stanley H. Barer, formerly Administrative Assistant to Senator Warren G. Magnuson and Acting General Counsel to the U.S. Senate Committee on Commerce, has joined **Houger, Garvey, Schubert and Barnes.**

Richard P. Matthews has joined **LeSourd, Patten, Fleming & Hartung** as an associate.

Ogden, Ogden & Murphy announce that **Douglas E. Albright** has become an associate of that firm.

SKAGIT REPORT

By **DAVID A. WELTS**

Of local interest, if not international, are the following tidbits:

Ken St. Clair got married on February 2nd at 5:05 p.m. Had something to do with one of those trick clocks for your bar with nothing but fives. Marrying one as lovely as Ken found was some trick, too.

Coming back from Friday Harbor, I paid **Gene Anderson**'s office a social visit and found one **William McRostie**, a Minnesota lawyer, reading Washington Law. Bill is taking the February exam and was trying to keep a low profile. We blew his cover. Good luck, Bill.

Speaking of low profiles, **Jack Ketcham** (FBI-Retired) has passed the Washington Bar and been in Concrete since last Fall, but doesn't practice law. He's smart, he teaches school.

Peggy Decker won a plaintiff's verdict in an intersection case with the plaintiff instructed negligent as a matter of law. Wanton misconduct of the defendant was the sole issue. Watch out for those women!

A Skagit County jury actually acquitted a criminal defendant. Goes to show that sooner or later even one of those verdict forms can be confusing.

In a case of first impression anywhere, **Alfred McBee,** sitting pro-tem, found that a car dealer had been defrauded by an owner selling a used car to the dealer.

Yours truly became a viable economic force in San Juan County by leaving behind $175,000.00 in settlement funds.

Gary Jones has a new practice in Mount Vernon—Suite 5, Old National Bank Building.

Paul Luvera had an office party that was great for the first half. No one seems to be reporting on or admitting to the second half.

I hunted up our pal and former Skagit member, **Warren Russell,** over in Friday Harbor and he looks absolutely GREAT! Must be a fountain of youth over there.

Have you noticed that daylight saving time is adjusting to the ways of the sun, or vise-versa. It sure seemed like overwork there for a while, going to the office, court and what not in the middle of the night.

SPOKANE REPORT

By **MICHAEL DONOHUE**

Ah, Babylon. The **John Heath Players** have done it to Spokane again. Heath and his merry band of conscripted thespians recently performed at the Spokane Bar Auxiliary's annual bacchanalian beanfeast and fandango. Among those mummers who have been foolish enough to refuse to buy my silence are **Joe Ganz** (I wouldn't gargle with a voice like that), **Sue Etter** (who could have a whole new career as an exotic dancer if her husband, Max, wasn't such a hard-nose), **Larry Smith** (Old Honey Tonsils), **Jean and Bob Beschel** (Beauty and the Beast), **Jane Symmes** (Who got into her part—a pregnant Billie Jean King—so well that she sent out for pickles

and ice cream during the show), and a cast of thousands. I was going to say something about the chorus line, but it would probably be censored anyway. . . .

There have been so many moves, shifts, and office shuffles in Spokane in the last few months, whoever it is you're looking for, he has either moved to the Washington Mutual Building or has gone into hiding in an owl sanctuary near Colville.

BENTON-FRANKLIN REPORT

By **NEAL J. SHULMAN**

Mr. John Brimhall, president of the Rattlesnake Mountain section of the Sierra Club, was the guest speaker at the January 22 meeting of the Benton-Franklin Bar Association held at the Rivershore Inn, Richland. Mr. Brimhall presented an informative talk on the environmental impact of proposed interstate highways 82 and 182.

Roger Olson, president of the Benton-Franklin Bar Association re-activated a committee concerned with the drafting of local court rules for proposal to the Superior Court. **John Schultz,** Pasco, was named to chair the committee and members of the association are anxiously looking forward to the first draft which is anticipated in the near future.

Besides his many and varied activities as Superior Court Administrator, **Jim Boldt** has been named as a state consultant to study systems information and court management, reporting directly to the Court Administrator in Olympia. Jim will be studying the feasibility of computerized reporting systems for all 39 counties. The study, funded by a state grant, will examine the types of information to be submitted to a centralized body and will attempt to examine and employ management techniques to court administration. The thrust of the study is to develop a timely systematic gathering and reporting method with the long range goal of implementing such a program in the State of Washington.

The Benton-Franklin Superior Court has embarked on a student visitation program designed to promote student awareness of the judicial processes. Plans are currently in operation to promote the program throughout the Benton-Franklin schools so that more young people will have a first hand opportunity to gain a better appreciation of the operation of the judicial system.

PIERCE REPORT

By **KENYON E. LUCE**

Manza, Moceri, Gustafson, Narigi and Messina have two new associates: **Edward L. Calleran** and **James G. Manza,** both graduates of Gonzaga class of '73.

Campbell, Dille & Barnett announce that **Kenneth W. McCarthy, Jr.** has become a partner in the firm and that the firm name is now **Campbell, Dille, Barnett & McCarthy**.

The law firm of **Metzler and Sauriol** announces that **Christopher Sutton** has become an associate of the firm.

Roger J. Miener has joined the Pierce County Prosecuting Attorney's staff. He is a 1972 graduate of the UW, and was formerly employed with Amtrak in Washington, D.C. **Philip H. Brandt** is a 1972 graduate of the UW, formerly with the U. S. Department of Justice in the Federal Trade Commission in Washington, D.C.

The Lincoln Day Banquet will be held on February 22, 1974, which is really Washington's Birthday, but isn't this year because Washington's Birthday has been changed to February 18th, which doesn't matter as Lincoln seldom gets mentioned anyway.

The Lawyer Referral Service has completed its first year very successfully.

The annual meeting of the Pierce County Bar Association in January featured talks on "Career Developments and Promotion of Lawyers" and "Partnership and Professional Service Corporations" by **Warren Peterson** of Tacoma and **Donald Dahlgren** of Seattle.

The law firm of Bonneville, Viert & Morton announces that **David McGoldrick** is now a partner, and **Kenneth Fielding** is now an associate of the firm, 816 Washington Building, Tacoma.

Kane, Vandeberg & Hartinger has announced that **Charles E. Jett** has become a partner, and **Michael E. Stevenson** an associate at 2100 Washington Plaza Building in Tacoma.

YAKIMA REPORT

By **RANDY MARQUIS**

Adam Moore, formerly Deputy Prosecuting Attorney of Yakima County, has become associated with the law firm of Dobbs and Van Diest, with offices at 516 Miller Building, Yakima, Washington.

Rick Kimbrough, also an alumnus of the Prosecuting Attorney's office, has become associated with Phillip M. Noon, Grandview attorney and

police judge. Phil and Rick have their offices at 109 West Second, Grandview, Washington.

Benjamin N. Brunner announces relocation of his law office to 325 East "A" Street, Yakima, Washington.

GOVERNMENTAL LAWYERS

By **JOHN A. HOGLUND**

The new year has brought new opportunities and rejuvenated involvement by governmental attorneys. Close on the heels of the very successful Christmas cocktail party at the "Empty Arms" in Olympia, President **Bob Wallis** called an emergency luncheon to consider the recent decision to establish the non-lawyer position of Hearing Officer (to determine probable cause for revocations) for the Parole Board. This discussion has precipitated a broader inquiry into the role of Hearing Examiners and Hearing Officers in matters of state government. The inquiry is being coordinated by an Ad Hoc Committee headed by **Charlie Murphy** (AG, L&I) and composed of **Terry Bernard** (Hearing Ex., DSHS), **David Wilson** (Hearing Ex., EmSEC), **Bill Rosado** (AG, AGRI), and **Ed Mackie** (AG, Central).

On January 18, over seventy governmental and private lawyers attended the joint luncheon of the Government Lawyers-Thurston Mason County Bars-Board of Governors. The meeting featured a brief talk and incisive question-response by Bar President **Cleary Cone**. Other noteworthy items include the appointment of AG **Maxine Thomas** (Human Rts. Comm'n) as chairperson of the Young Lawyers Committee of the GLA; AG **Dick Mattsen** (Chief Counsel, DSHS) is heading the Employment & Compensation Committee which is examining the comparative financial position of the government lawyer *vis.* private practitioners. Preparations are presently underway for GLA's Law Day activities under the capable leadership of AG **Jim Farris** (Central). Superior Court Judge **Gerry Alexander** is charing the joint Thurston-Mason County Bars-Governmental Lawyers Committee for the selection of the Law Day ABA Liberty Bell recipient.

The shifting sands of time and opportunity have also brought personnel additions and changes. GLA President **Bob Wallis** recently resigned his Supreme Court Clerkship (J. Hale) to become a Hearings Examiner for Dep't of Employment Security. **Lee Brooke** has been appointed as replacement law clerk with Chief Justice Hale. In addition, **Kevin Ryan** has joined the AG Central Office Staff; AG **Leroy Dreisbach** has transferred from the staff of the Dep't of Revenue to join the AG's staff of Revenue; AG **Dan Rooney** has departed to work for the Washington Public Power Supply System in Richland; AG **Diane Geiger** has left Olympia to serve the King County Prosecutor's Office; AG **Michael Stevensen** has departed government service to join the firm of **Kane, Vanderberg & Hartinger** in Tacoma.

LAWYER PLACEMENT SERVICE

By **DAVID L. BROOM**

The files of both application and job openings are kept in duplicate, one copy being located at the Washington State Bar Association office, 505 Madison Avenue, in Seattle, and the other at the Spokane County Law Library, Paulsen Building, Spokane. There are a large number of applications of job seekers, including a full range of qualifications and backgrounds. However, since the demand for legal positions in the state of Washington apparently outstrips the supply, the emphasis in this column will continue to be on job openings rather than job seekers. Some of the new applications and openings on file include:

1. Young Texas attorney with specialized tax and estate planning training seeks to relocate in Washington.
2. Seven-man Seattle firm seeking associate with background in taxation.
3. Small but well-known Seattle firm seeks one or more attorneys who have already developed their own personal injury, securities or taxation practices.
4. Columbia Basin attorney has opening in his office for young lawyer to combine private practice and City Attorney position.
5. Title company home office wants attorney with at least one year experience in real estate law. A background in mortgage foreclosure work would be an asset.
6. Western Washington county has Deputy Prosecutor position open. At least $11,000.00 to begin.
7. Teachers' organization in Wisconsin seeking attorney preferably with background in municipal, labor and school law.

Notice

The Judges of the United States District Court of the Western District of Washington have resolved to establish a federal public defender office for the representation of indigent defendants in accordance with 18 U.S.C. §3006A.

Accordingly, a Federal Public Defender for the Western District of Washington, whose duties and compensation are outlined in 18 U.S.C. §3006A(h)(2)(A), will be appointed.

Lawyers interested in applying for the position of Federal Public Defender should prior to April 1, 1974 submit a resume to Edgar Scofield, Clerk, United States District Court for the Western District of Washington, 1010 U.S. Courthouse, Fifth and Madison Street, Seattle, Washington 98104.

Young Lawyers Elect

Frederick L. Noland of Seattle has been elected chairperson of the new Young Lawyers Section of the State Bar. Chairperson-elect is Edward F. Shea of Pasco.

The Young Lawyers, last of the State Bar's dozen newly established sections to select its "charter" leaders (officers of the other sections were reported earlier in the *Bar News*), chose J. Kevin Downes of Bellingham secretary-treasurer, and these members of the Board of Trustees:

Lawrence B. Bailey, Robert L. Burnham, Gregory R. Dallaire, Susan F. French and William H. Neukom, all Seattle; H. John Hall, Chehalis; David A. Thorner, Yakima; John Lindsay, Spokane, and Hugh Ellis, Tacoma.

Board Elections Due

Lawyers residing in the Second, fourth and Seventh Districts, please note:

Members of the Board of Governors of the State Bar to represent those three Congressional districts are due to be elected this year. Expiring in September are the three-year Board terms of Edward J. Novack, Second District; Robert S. Day, Fourth District, and James P. Curran, Seventh District.

The State Bar Association Bylaws (Article III) provide: Any active member may be nominated for the office of governor upon petition signed by at least twenty but not more than thirty active members residing in the district. Nominating petitions may be obtained from the Bar Office (505 Madison, Seattle 98104).

The petitions must be filed in the Bar Office by 5 p.m. May 31.

U.S. Supreme Court Members

The Office of the Clerk, Supreme Court of the United States, is at present experimenting with automation. Much of the material in the office will be reduced to machine-readable form.

It is part of our project to list all accredited attorneys on machine-readable tape. All attorneys who are members of the Bar of the Supreme Court of the United States should fill out the form, returning it to the Clerk, Supreme Court of the United States, Washington, D. C. 20543, and marking it for the attention of BAR PROJ.

SUPREME COURT OF THE UNITED STATES

Information Form For Attorneys Admitted to Practice Before The Court

NAME ______________________ DATE ADMITTED ______________

BUSINESS ADDRESS: ______________________

Street ______________________

City & State ______________________ ZIP ______________

RESIDENCE ADDRESS: Street ______________________

City & State ______________________ ZIP ______________

SOCIAL SECURITY ACCOUNT NUMBER: ______________________

Editor's Notes

The State Legislature is becoming adept at impressing upon the Bar Association the need for an increasing number of CLE programs. The February, 1974 session is noted in three respects: (1) The probate code has been comprehensively reformed by a fifty page bill. Not adopting the Uniform Probate Code but making amendments to our current code, the changes include: a presumption of non-intervention powers in testate matters unless specifically declined in the will; some non-intervention powers in intestate estates; certain changes in intestate distribution aiming toward more distribution in the surviving spouse; and provisions to eliminate proceedings and avoiding probate in small estates. **Bob Beschel** (Spokane) among others, contributed substantial effort toward obtaining the results. The act is effective October 1, 1974. (2) The host-guest act has been repealed, an act which supplements certain recent superior court rulings in the state. (3) Attempts to modify the 1973 Comparative Negligence Act were unsuccessful, thus the pure form of comparative negligence goes into effect April 1, 1974.

E. Huneke

Office Practice Tips

Corporation Interview Sheet

I have recently received a note of appreciation from Don Curran, who practices in the Paulsen Building in Spokane, saying that he appreciated the probate check sheet and enclosing several of their schedules. I will publish them at intervals since they are very excellent forms. Their Corporation Interview Sheet is on the following pages.

Harry E. Hennessey

Prepared by the Committee on Law Office Economics and Management, Raymond D. Torbenson, Seattle, Chairman, Harry E. Hennessey, Spokane, Editor.

This column is a clearing house for better ways to run the law office. Contributions are solicited from all members of the Bar and should be sent to the editor at Post Office Box 324, Spokane, Washington 99210.

UPS Law School Appointment

Robert S. Snyder, a 1969 cum laude graduate of Harvard Law School has been named assistant dean and assistant professor of law at the University of Puget Sound School of Law.

The new dean received his undergraduate degree in political science from Yale College where he also was awarded cum laude honors. While at Harvard Law School Snyder served as editor-in-chief of the Harvard International Law Journal. A Fulbright-Hayes Scholar and an American-Scandinavian Foundation Fellow, the 29-year-old was awarded a diploma of comparative law in 1970 from the University of Stockholm Faculty of Law.

Snyder's duties as dean include general administrative affairs. He is also teaching a constitutional law class during his first semester with the law school.

Prior to his appointment at UPS, the Seattle native was an associate with Davis, Polk and Wardwell, a New York law firm, and has served as assistant counsel to the State of New York Court of the Judiciary. Most recently Snyder was a special assistant attorney general in the office of the New York State Special Prosecutor.

Date__________________

CORPORATION INTERVIEW SHEET

INCORPORATORS:

Name	Address (including zip)	Phone No.

NAME OF CORPORATION:

/ / Yes / / No Reserve Name R.C.W. 23A.08.060 $__________

/ / Yes / / No Assumed Business Name__________________

REGISTERED OFFICE: ______________________________
(Not Post Office Box)

PURPOSE: ______________________________

____

Qualify in Foreign States: / / Yes / / No ______________

____

OFFICERS and DIRECTORS: Social Security No.

President:______________________ ____________

Vice-President:__________________ ____________

Secretary:______________________ ____________

Treasurer:______________________ ____________

DIRECTORS: (If different than officers above)

Name	Address	Zip	Social Security No.
Name	Address	Zip	Social Security No.
Name	Address	Zip	Social Security No.
Name	Address	Zip	Social Security No.

CAPITALIZATION

Aggregate capitalization of $____________ Divided into__________

common shares of $____________. Par Value______________

Restrictions on transfer: / / Yes / / No

Amount to be paid in before beginning business: $__________

Date of Annual Meeting: ______________________________

Fiscal Year: ______________________________

Open Bank Account with: ______________________________

Name and Address of Accountant: ______________________________

____

Par stock: / / Yes / / No (PREPARE AFFIDAVIT IF NON PAR STOCK)

Consideration for Shares

Cash:______________________________

Services:______________________________

Other:______________________________

____

TAX CONSIDERATIONS

Sub-Chapter S: /_7 Yes /_7 No
Section 1244 Stock: /_7 Yes /_7 No

Attorney Fees: ______________________________

____

Costs: State Filing Fee: $________ State Recording Fee: $________
List of Officers and Directors filed with State: $________
List of Officers and Directors filed with County: $________
Corporate Seal: $________
Other: ______________________________

CHECK LIST

	Yes	No	Completion Date
1. Reserve Corporate Name	____	____	________
2. Articles of Incorporation			
Signed by Incorporators	____	____	________
Filed with Secretary of State	____	____	________
Filed with County Auditor	____	____	________
3. First Meeting of Directors and Officers	____	____	________
Date: ________			
Place: ________			
Should Accountant be present?	____	____	
4. List of Officers and Directors			
Filed with Secretary of State	____	____	________
Filed with County Auditor	____	____	________
5. Will Accountant or Attorney secure Tax Identification Number?	____	____	________
6. Sub-Chapter S qualification:			
Approved by Accountant	____	____	________
Prepare, execute and mail consent and execution forms	____	____	________
7. Section 1244 qualification:			
Approved by Accountant	____	____	________
Prepare and execute resolutions and minutes	____	____	________
8. Certificate of Stocks with transfer restriction	____	____	________
9. Assemble:			
(a) Original corporate minute book			________
(b) Copies of minute book mailed to client and accountant			________
10. Procure Corporate Seal			________

COMPARATIVE NEGLIGENCE: A PRELIMINARY VIEW

by Hugh R. McGough

In 1973, nine state legislatures passed comparative negligence statutes. (Conn., Nev., N.J., N.D., Okla., Tex., Utah, Wash. and Wyo.) In July of 1973, the Florida Supreme Court adopted comparative negligence as a common law principle. *Hoffman v. Jones*, 280 So.2d 431 (Fla., 1973).

At least four state legislatures adopted a general comparative negligence rule in 1971 (Colo., Idaho, Ore., R.I.), two in 1970 (N.H. and Vt.) and four in 1969 (Hawaii, Maine, Mass., Minn.). These relative newcomers joined the small bastion of states where comparative negligence has been a long-established doctrine (Ark., Georgia, Miss., Neb., S.D., Tenn., Wis.), and makes comparative negligence the general rule in the *majority* of states.

Most of the recent legislative enactments have adopted a modified form of comparative negligence modeled on the Wisconsin statute adopted in 1931. Under the original Wisconsin statute, the defense of contributory negligence was abolished only "if such negligence was *not as great as* the negligence of the person against whom recovery is sought." In other words, if contributory negligence of a plaintiff equaled that of any one of the defendants against whom he sought recovery, his recovery would be barred.

In 1971, Wisconsin modified its statute to strike the words "*as great as*" and substitute "*not greater than*." After the modification, a 50-50 push between plaintiff and a single defendant would result in a verdict for the plaintiff for half his damages, rather than a verdict for defendant. Since 1969, the *old* Wisconsin rule, favoring the defendant on an even split, has been adopted by Colorado, Hawaii, Idaho, Massachusetts, North Dakota, Oregon, Utah and Wyoming. The "new" Wisconsin statute has been adopted by Connecticut, Nevada, New Hampshire, New Jersey, Texas and Vermont.

In contrast with the Wisconsin statute, *pure* comparative negligence statutes, as adopted in Washington, abolish the defense of contributory negligence unconditionally. Under the usual interpretation of a Wisconsin statute, a jury must determine that a plaintiff's contributory negligence was *not greater than* (or not as great as) the negligence of any one of the persons against whom recovery is sought before plaintiff can be allowed recovery against that person. For example, if plaintiff's negligence is 20%, and that of three joint tort-feasors is 50%, 20% and 10% respectively, the "old" Wisconsin statute would allow plaintiff to recover 80% of his damages against the first defendant only, and the new Wisconsin statute would allow him to recover 80% of his damages jointly from the first and second defendants, but not from the third defendant whose negligence was less than his. Under the Wisconsin statute, therefore, the jury is put through a convoluted process in which it must first find as to which defendants the defense

Hugh R. McGough is a 1954 graduate of the U. of W. School of Law, where he was editor of the Washington Law Review. He is Assistant General Counsel for the Unigard Insurance Group in Seattle, and editor of the Bar News.

of contributory negligence has been abolished, and then diminish damages. In Washington, the first step is not necessary. The only impact of plaintiff's contributory negligence is to reduce his damages. Some of the mind-boggling special verdicts and instructions used in Wisconsin in multi-defendant suits, therefore, can be considerably simplified in Washington.

The problems and solutions found in the many cases interpreting modified or Wisconsin type comparative negligence statutes cannot uncritically be accepted in Washington, therefore. Our statute is relatively unique.

The Washington Statute — Pure Comparative Negligence

Chapter 138 of the Laws of 1973 (1st Ex. Sess.) now codified at RCW 4.22.010, reads in part:

> "AN ACT Relating to civil procedure. . . .
> "Section 1. Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages caused by negligence resulting in death or in injury to person or property,* but any damages allowed shall be diminished in proportion to the percentage of negligence attributable to the party recovering."

The asterisk does not appear in the statute. At this point, in the bill as it was originally introduced in the Senate, appeared the phrase: *if such contributory negligence was no greater than the negligence of the person or other entity against whom recovery is sought.* The original bill was a "new" Wisconsin type, therefore. By amendment, the phrase was eliminated, however, and Washington joins Mississippi and Rhode Island as the only three states with statutory "pure" comparative negligence.

The three state statutes are virtually identical with the pure comparative negligence rule incorporated in the Federal Employers Liability Act since 1908. 45 USCA §53. The Jones Act has made the comparative negligence provisions of FELA applicable to an action against an employer by a seaman injured in the course of his employment. 46 USCA §688. Much of the practice and procedure in these suits seems applicable to Washington's new statute. See generally, 32 Am.Jur. 2d 246, 331, *Federal Employers' Liability and Compensation Acts*, §§7, 76.

The Mississippi statute has been in effect since 1910, and most of the cases can be found at 2 Mississippi Code Annotated (1942) 301, §1454. The Rhode Island statute did not take effect until July of 1972.

All the Canadian provinces utilize a form of pure comparative negligence. Quebec does so by virtue of its civil law tradition. Ontario adopted the first statute in 1924, and similar statutes were rapidly adopted by the other provinces.

When the legal history of the State is written, Judge Edward E. Henry of the King County Superior Court will deservedly be named the Father of Pure Comparative Negligence in Washington. His own persuasiveness played no small part in adoption of the concept advocated in his seminal article: Henry, *Why Not Comparative Negligence in Washington?*, 5 Gonzaga L. Rev. 1 (1969). For a more detailed history of the development of the rule, the reader is referred to that article.

Is The Statute Retroactive?

By its terms, the Act takes effect as of 12:01 a.m. on April 1, 1974. Without the special section delaying the effective date of the law, the statute would have become effective on July 16, 1973. The Legislature could have made the statute effective immediately upon approval by the Governor, or April 23, 1973. The mandate of a delayed effective date is inconsistent with any legislative intent that the statute have other than prospective operation.

A statute ordinarily operates prospectively *unless it is remedial in nature* or the Legislature indicates that it is to operate retrospectively. A statute is remedial and has a retroactive application when it relates to practice, procedure, or remedies, and does not affect a substantive or vested right. See *Yellam v. Woerner*, 77 Wn.2d 604, 464 P.2d 947 (1970).

When the host-guest statute was liberalized in 1957 to allow recovery for gross negligence, the court held that to interpret the statute to create retroactive liability would be an impairment of a vested right. *Nogosek v. Truedner*, 54 Wn.2d 906, 344 P.2d 1028 (1959).

In its title, the statute refers to itself simply as "An Act Relating to Civil Procedure." It has been argued that this indicates an intent to bring into play the rule that a statute which relates to procedure will operate retrospectively, and that the statute is applicable to any action tried (or perhaps commenced) on or after April 1st. Use of the phrase "in *an action* by any person . . . to recover damages" gives some faint support to this argument.

Cases which have ruled on the question to date have unanimously held that when comparative negligence statutes are silent on the question, they are not to be given retroactive effect. Annotation, *Retrospective Application of State Statute Substituting Rule of Comparative Negligence for That of Contributory Negligence*, 37 ALR 3d 1438. But see the dissenting opinion in *Holzem v. Mueller*, 54 Wis. 2d 388, 195 N.W. 2d 635 (1972).

To What Actions Does the Statute Apply? Wanton Misconduct.

By terms of the statute, contributory negligence is no longer a defense, and applies only to diminution of damages, "in an action . . . to recover damages *caused by negligence*. . . ."

Contributory negligence of a plaintiff has never been a defense to an *intentional* tort. In extending this principle to willful and wanton misconduct, the court has attempted, rather unsuccessfully, to limit the extension to conduct similar to intentional causing of harm. As stated in *Adkisson v. Seattle*, 42 Wn.2d 676 at 682, 258 P.2d 461 (1963):

> "Negligence and wilfulness imply radically different mental states. Negligence conveys the idea of neglect or inadvertence, as distinguished from premeditation or formed intention."

The opinion in the *Adkisson* case sounded a warning which the court sometimes seems to have ignored:

> However, with regard to wanton misconduct, some discernment must be exercised by the courts or the defense of contributory negligence will be barred by the artifice of describing the conduct of the defendant as wanton." 42 Wn.2d 676 at 683.

The doctrine of wanton misconduct has been used as a method to circumvent the harsh common law rule of contributory negligence in aggravated negligence cases. For example, see *Liebhart v. Calahan*, 72 Wn.2d 620, 434 P.2d 605 (1967). Since the use of the artificial category of wanton misconduct is no longer necessary for this purpose, the court should consider it abolished, and reduce damages resulting from what previously has been regarded as either wanton misconduct or gross negligence.

In Wisconsin, the appellation "gross negligence" is applied to our "wanton misconduct." The Wisconsin Supreme Court finally ruled in 1962 that doctrines such as wanton misconduct no longer fulfill a purpose after passage of a comparative negligence statute. *Bielski v. Schulze*, 16 Wis.2d 1, 114 N.W.2d 105 (1962).

Strict Products Liability

Our court has adopted the rule of Restatement of Torts §402A, which creates a tort liability of one who sells any product in a defective condition unreasonably dangerous to the user. *Ulmer v. Ford Motor Co*, 75 Wn.2d 522, 452 P.2d 729 (1969). According to the Restatement rule, liability attaches even though ". . . the seller has exercised all possible care in the preparation and sale of his product. . . ."

Is a person seeking recovery on a strict products liability theory seeking "to recover damages *caused by negligence*" within the meaning of the comparative negligence statute? Is the case any different than that of a plaintiff who seeks to recover for damages resulting from a statutory violation, which our court regards as negligence *per se*, and where the fact the defendant has exercised all possible care is equally irrelevant?

The Wisconsin court has decided that the comparative negligence statute applies to strict tort liability cases:

> "Strict liability in tort for the sale of a defective product unreasonably dangerous to an intended user or consumer now arises in this state by virtue of a decision of this court. If this same liability were imposed for violation of a statute it is difficult to perceive why we would not consider it negligence per se for the purpose of applying the comparative negligence statute just as we have done so many times in other cases involving the so-called 'safety statutes.' . . .
>
> "The violation of a safety statute can create a condition that constitutes an unreasonable risk of harm to others. Likewise, a defective product can constitute or create an unreasonable risk of harm to others. If this unreasonable danger is a cause, a substantial factor, in producing the injury complained of, it can be compared with the causal contributory negligence of the plaintiff." *Dippel v. Sciano*, 37 Wis.2d 443, 155 N.W.2d 55 at 65 (1967.)"

Treating strict products liability cases as negligence per se cases, and therefore within the comparative negligence statute, seems desirable for purposes of establishing some symmetry in tort law.

For similar construction of New Hampshire's comparative negligence by a federal court, see *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676 (USDC, D.N.H., 1972).

Last Clear Chance

Last clear chance is a doctrine used to eliminate plaintiff's contributory negligence *for the purpose of determining a defendant's liability*. The statute has now completely eliminated contributory negligence as a factor in determining defendant's liability. The only remaining significance of plaintiff's own negligence which contributed to his injuries is in the diminution of damages.

Conceivably, a defendant's conduct could be such so as to break the chain of causation between any negligence of which plaintiff is guilty and his injury. This situation can be handled by proper instructions on proximate causation, however, and does not require retention of the last clear chance rule.

No reason exists for retention of the doctrine of last clear chance in Washington. See Prosser, Law of Torts 438 (4th Ed. 1971); 2 Am.Jur. 866, Negligence §440.

What Liability Defenses are Available? Assumption of Risk.

In *Lyons v. Redding Construction Co.*, 83 Wn. 2d 86, 515 P.2d 821 (1973), in announcing that the doctrine of *volenti non fit injuria* and assumption of the risk will henceforth be regarded as a single concept, Justice Finley announced the following dictum:

> "The decision reached here today has been long-aborning. Somewhat ironically, its effects will be short-lived. The assumption of risk in special and limited situations or contributory negligence on the part of a plaintiff has the effect of denying all recovery regardless of degree of fault. But this all or nothing result will be abandoned or changed on April 1, 1974, because the Washington state legislature has recently enacted a comparative negligence statute . . .
>
> "Our limited retention of the doctrine of assumption of risk is, of course, a form of contributory negligence. Adoption of the standard of comparative negligence is necessarily accompanied by a more flexible weighing of the relative fault attributable to each party. A concomitant effect of this more delicate apportionment of damages will be the elimination of the need for the assumption of the risk doctrine. Thus, the calculus of balancing the relative measurements of fault inevitably incorporates the degree to which the plaintiff assumed the risk. Accordingly, it has been held the effect of the comparative negligence standard shall be to completely abrogate the assumption of risk doctrine as known and applied heretofore." 83 Wn.2d at page 95-6.

Judge Finley's opinion is sound, and doubtless will become the law of this state. He cites Wisconsin cases in support of the conclusion that assumption of the risk is no longer a viable defense in negligence cases, but does not cite cases from the several states which have held to the contrary; for example, Mississippi. *Saxton v. Rose*, 201 Miss. 814, 29 So.2d 646 (1947).

In a sense, assumption of the risk by a plaintiff is equivalent to wanton misconduct on the part of a defendant. The argument given above that wanton misconduct by a defendant should be considered "negligence" to bring the cause of action within the comparative negligence statute applies with equal force to assumption of risk on the part of a plaintiff.

If comparative negligence is to be applied to strict product liability cases, assumption of the risk will probably no longer be a complete defense in that category of cases either.

Generally, see 57 Am.Jur.2d 868, Negligence §441; Prosser, *op. cit.*, 456.

Wanton Misconduct by Plaintiff

By terms of the statute, damages are to be diminished in proportion to the *negligence* attributable to the party recovering. It can be argued that wanton misconduct by a plaintiff is not "negligence," and is therefore a complete defense. For the same reasons that wanton misconduct by a defendant should be considered "negligence" for bringing the action within the comparative negligence statute, wanton misconduct by a plaintiff which contributes to his injury should also be treated as "negligence" which is not a defense, but only reduces damages.

Seat Belt Defense

Durheim v. N. Fiorito Co., 80 Wn.2d 161 at 171-2, 492 P.2d 1030 (1972), held that failure of the plaintiff to wear seat belts which caused injury in an auto accident could not be used to mitigate damages. In doing so, the court pointed out,

among other things, that admission of evidence on the 'seat belt defense' issue would be tantamount to adopting the rule of comparative negligence which posed a question of a change in public policy not properly before it.

This is an indication that, though not a defense, failure to wear seat belts may be considered "negligence" for purposes of diminishing damages under the comparative negligence statute. This is the rule in Wisconsin. *Bentzler v. Braun*, 34 Wis.2d 362, 149 N.W.2d 626 (1967).

Plaintiff's Damages Are Diminished In Proportion To What?

By terms of the statute, damages are to be diminished "in proportion to the percentage of negligence attributable to the party recovering."

Is claimant's negligence to be compared with negligence only of those from whom he seeks recovery and who are determined to be liable to him? Or is it to be determined in proportion to negligence of all parties in the suit, regardless of whether he seeks recovery from them? Or is it to be determined in proportion to the negligence of all persons which contributed to his injury, regardless of whether they are parties to the suit or not?

Assume a hypothetical: After closing the local tavern at 2:00 a.m., A and B are on the freeway in a car. Through a mild alcoholic haze, A fails to observe C signaling to pull into his lane. C negligently turns into A, striking his car. The collision causes a malfunction in the steering gear of A's recently purchased car, causing a temporary loss of control. A's car collides with a concrete bridge abutment negligently placed immediately next to the lane of travel. A and B are injured. C disappears down the freeway, becoming a "phantom car."

After the wires are removed from his jaw, B describes the incident to his attorney. Being versed in the comparative negligence law, the attorney makes the following determination: negligence causing B's injuries (as distinguished from negligence causing the accident) was as follows:

A	(B's Host Driver)	15%
B	(No seat belt, riding with intoxicated person, failure to warn driver of impending doom)	10%
C	(The phantom car)	25%
D	(The auto manufacturer for the steering defect)	20%
E	(The state for negligent highway design)	30%

Because A had a .18 breathalyzer, has high insurance limits with the Pushover Insurance Group, and is generally disliked throughout the county, B's lawyer sues only A.

B pleads contributory negligence. Through procedural and evidentiary lapses not explainable in this short hypothetical, the jury is convinced by a preponderance of the evidence and beyond speculation and conjecture that the true proportions of negligence causing B's injury were as shown above. The proportion of B's negligence to A, the only defendant in the suit, is 10/15, or 67%. Is this the proportion by which damages should be reduced? The few courts who have adopted this method of proportioning damage quickly rejected it.

A's negligence in proportion to the combined negligence of himself and the only other person whose negligence is described in any pleading in the suit, and the only party against whom he seeks recovery, is 10/10 + 15 = 40%. *Should plaintiff's damages then be reduced by 40%?* Many cases reach this result.

Plaintiff is then faced with the realization, however, that if he had added the auto manufacturer (20% negligence) and the state (30% negligence), his damages would have been diminished only by 10/10 + 15 + 20 + 30, or 13.3%. If he could have tracked down the phantom car and added him as a defendant, his damages would have been reduced by only 10%.

Parenthetically, given the latter situation, would B be entitled to recover the difference between 13.3% of his damages and 10% from his uninsured motorist carrier?

In *Walker v. Kroger Grocery & Baking Co.*, 214 Wis. 519, 252 N.W. 721 (1934) the court points out that the statute defines the numerator in the diminution equation, but not the denominator, and finally concludes that: ". . . the causal negligence of all the other participants in the transaction must be deemed to constitute the other term of the proposition."

Wisconsin, therefore, has held that in cases dealing with the comparison of negligence between a plaintiff and a defendant which involves the negligence of a nonparty that it was error not to include in the apportionment question submitted to the jury the causal negligence of the nonparty in order to determine the percentage

of negligence of the plaintiff. A defendant is not harmed by such error, however. The addition of negligence of nonparties to the equation reduces the percentage of plaintiff's negligence—and increases his recovery. E.g., *Hardware Mutual Casualty Co. v. Harry Crow & Son, Inc.*, 6 Wis.2d 396, 94 N.W.2d 577 (1959).

If plaintiff's negligence is to be compared with the total combined negligence involved, some obvious problems of pleading are raised. A party should be required to plead negligence of a nonparty if he intends to prove it at trial. Apparently, this is the Wisconsin procedure. *Pierringer v. Hoger*, 21 Wis.2d 182, 124 N.W.2d 106 (1963).

Professor Gregory in his classic work presents a powerful argument that negligence of persons not party to the action should not be considered because the rule affords a strong sanction compelling plaintiff to see that all tortfeasors are made parties. Gregory, *Legislative Loss Distribution in Negligence Actions* (U. of Chicago Press 1936), p. 87.

Counterclaims — Setoff

After two years of lack of understanding and uniformity, Arkansas' ill fated experiment with pure comparative negligence foundered on the rocks of confusion. In 1957, the legislature converted to a Wisconsin type statute. Conflicting decisions on the handling of counterclaims by two injured parties whose negligence concurred to produce each others' injuries has been given as a primary reason. Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 Mich. L. Rev. 688 at 703 (1960).

The problem is illustrated by the following quotation from Wright, *The Adequacy of the Law of Torts*, reprinted in Linden, *Studies in Canadian Tort Law* (Butterworth's 1968) 579 at 596:

> "8. On the basis of extending liability, everyone welcomed the statutory innovations of the Contributory Negligence Acts. For reasons in this and the following section I must confess that I have lost some of my original enthusiasm. It is possible that such Acts may result in a serious curtailment of insurance company liability unless attention is paid to the realities of motor-car litigation rather than the common law formalities. Assume that A's and B's cars collide, and A sustains $10,000 damage and B $4,000; in an action with counterclaim both drivers are found equally at fault, and we have a judgment of *A v. B* for $5,000 and of *B. v. A* for $2,000. If, as many Canadian courts do, we set these judgments off, one against the other, as if they were truly personal actions between A and B, it would appear that $3,000 only would be paid by B's insurance company and $11,000 absorbed individually by the parties out of an accident in which there was available insurance sufficient to cover the total loss of $14,000. It can and has been argued that if we had not 'reformed' our law, a jury might have found at least $10,000 in favor of A or $4,000 in favor of B. It is true that some courts do not set off these judgments. This is an open recognition of the fact that the true parties are not A and B but the two insurance companies. In that event, of course, B's insurance company will pay A the $5,000 and A's insurance company will pay B the $2,000. This is a desirable practice, but in view of the lack of uniformity we have another uncertainty which, in the hands of skilful insurance counsel, leads to settlements discounted by this and other uncertainties."

C.R. 13 makes a counterclaim mandatory if a defendant's injury arises out of the same transaction which is the subject matter of the opposing party's claim. Statutes which require that a judgment be entered only for the difference between the claims of the two parties apply only to contractual actions, however. RCW 4.56.060, 4.32.110. There is no reason why tort counterclaims cannot be treated as separate actions for purposes of entry of judgment. This is the practice in Ontario, as reported in a letter of February 4, 1974, from the Honourable Mr. Justice Edson Haines the Supreme Court of Ontario: ". . . our practice is to give judgment for the plaintiff for his portion of the recovery and give judgment for the defendant on his counterclaim for his portion. In that manner we avoid any question of the one insurer taking advantage of a set-off. Each insurer must pay the judgment given against its insured."

Rhode Island solved the problem by a specific provision in its comparative negligence statute negating set off.

Under a counterclaim statute more clearly requiring the result, Mississippi applies a setoff rule under its pure comparative negligence statute. *Richmond v. Van's Moving & Storage Co.*, Miss., 197 So.2d 235 (1967); *Johnson v. Richard-*

son, 234 Miss. 849, 108 So.2d 194 at 199 (1959).

In *Hoffman v. Jones*, 280 So.2d 431 at 439 (Fla., 1973), the court stated by way of dictum that when counterclaims for negligence are presented, only a net judgment should be entered ". . . in keeping with the long recognized principles of 'set off' in contract litigation."

The leading book advocating pure comparative negligence in the United States is *Legislative Loss Distribution In Negligence Actions* by Charles O. Gregory (U. of Chicago Press 1936). He assumes verdicts on counterclaims will be set off, and judgment entered only for the difference. For example, see pages 88 through 90. For a similar assumption regarding setoff, see Aiken, *Proportioning Comparative Negligence – Problems of Theory and Special Verdict Formulation*, 53 Marquette Law Review 291 at 317-8 (1970).

Some pure comparative negligence statutes specifically require set off: for example, British Columbia and Saskatchewan.

The typical liability policy obligates an insurer only:

> "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages. . . ."

The policy will also ordinarily provide that no action will lie against the insurance company until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial (or written agreement).

Much of the controversy surrounding the setoff question is based on the assumption that the amount of judgment will determine the amount of payment by the liability insurer. In light of this assumption, the practice in British Columbia, as reported by Mr. K. J. Yule of the Vancouver Bar by letter of February 5, 1974, is instructive:

"The question of the set off which you raise is dealt with in Section 3(d) of our Act; that Section provides as follows:

> "(d) As between two persons each of whom has sustained damage or loss and is entitled to recover a percentage thereof from the other, the amounts to which they are respectively entitled shall be set off one against the other; and if either person is entitled to a greater amount than the other, he shall have judgment against that other for the excess."

"The form of Judgment which has been used in British Columbia in an action in which the Defendant has advanced a counterclaim and liability has been apportioned has been to set out the percentages of fault and the total damages assessed in favour of each party and then to provide for the Plaintiff to recover against the Defendant his proportionate damages (in your example $6,000.00) and for the Defendant to recover from the Plaintiff his proportionate damages (in your example $4,000.00) and then to further provide that the amounts which the parties are respectively entitled to recover from each other be set off and the balance be paid to the party to whom it is due.

"However, this does not mean that insurers in British Columbia pay only the amount owing after set off. In fact, the practice has been for insurers to pay the full amounts ordered recovered (in your example $6,000.00 and $4,000.00). We are not aware of any judicial decision on this point, but the analytical reason for this is presumably that an insurer is not subrogated to the personal injury claim of its insured and is not permitted to interpose its insured's personal injury judgment against the third party is declared entitled. The companies undoubtedly also have felt here that to take the position that insurers should pay only the balance remaining after set off (in your example $2,000.00) would hasten the introduction of Government operated automobile insurance."

A more rational solution than making the question of insurance coverage turn on the form of the judgment would be to consider the possibility that an insurer might be required to reimburse its insured for his personal loss credited against the judgment on some equitable theory. This suggestion has been made in an interesting article on the subject. Leflar and Wolfe, *Panel on Comparative Negligence and Liability Insurance* (Must the Insurer Reimburse the Insured for his Personal Loss Credited Against the Judgment?), 11 Arkansas Law Review 71 (Winter 1956-7)

An analogous argument has been made in cases dealing with the recoverability from a liability carrier of an insured's expenses to mitigate damages for which he would otherwise have been liable. Some cases have allowed such recovery. For example, in *Leebov v. United States Fidelity & Guaranty Co.*, 401 Pa. 477, 165 A.2d 82 (1960), the insured, a building contractor, precipitated a landslide. The insured contractor took immediate measures to prevent further loss, and sought to recover his expenses from his liability insurer. In allowing the recovery, the court stated: "It

would be a strange kind of argument and an equivocal type of justice which would hold that the defendant would be compelled to pay out, let us say, the sum of $100,000 if the plaintiff had not prevented what would have been inevitable, and yet not be called upon to pay the smaller sum which the plaintiff actually expended to avoid a foreseeable disaster. . . ."

The *Leebov* case turns partly on the language of the policy involved, and probably represents a minority rule. See Annotation, *Recoverability, Under Property Insurance or Insurance Against Liability for Property Damage, of Insured's Expenses to Prevent or Mitigate Damages*, 33 ALR3d 1262 (1970).

Joint and Several Liability

The few courts which have addressed the problem have held that, in the absence of a specific statutory provision, a comparative negligence rule does not change the rule that all tort-feasors who are liable to an injured person are liable for the entire amount recoverable. 2 Am.Jur. 860, Negligence, §435, n. 12. Annotation, *Comparative Negligence Rule Where Misconduct of Three or More Persons Is Involved*, 8 ALR3d 722.

When the plaintiff is free of negligence, there would appear to be no reason for changing the rule of joint and several liability of joint tort-feasors. The reasoning behind the rule is that a completely innocent plaintiff will not be required to share part of the loss with a guilty wrongdoer.

Does the same reasoning apply when a plaintiff is not "completely innocent?" For example, let us assume that plaintiff has suffered a $10,000 personal injury, and causal negligence is distributed as follows:

Plaintiff — 40%
Defendant A —30%
Defendant B —20%
Defendant C —10%

Each of the defendants is more of an innocent party than is the plaintiff.

Professor Gregory argues that on these facts, if one or more of the defendants were insolvent, the plaintiff should bear his pro-rata share of the insolvency. Gregory, *Legislative Loss Distribution in Negligence Actions*, (U. of Chicago Press 1936) pp. 142-148. He asks: if plaintiff has obtained a $6,000 judgment against A, B and C, but A and C prove insolvent, why should B, who is only 20% at fault for the accident, bear the entire burden of the insolvency when the plaintiff was 40% at fault. On these facts, on the insolvency of A and C, Gregory would require the plaintiff and B to share the plaintiff's loss in proportion to their negligence. Plaintiff could recover against B individually only 20/20 + 40, or one-third of his $10,000 damages, or $3,333. Likewise, if B were insolvent, he could recover from A and C only 40/40 + 30 + 10, or one-half of his total damages, or $5,000.

Professor Gregory's argument is persuasive, particularly under a pure comparative negligence statute.

The argument was presented to the Wisconsin Supreme Court, apparently without citation of Gregory, in *Chille v. Howell*, 34 Wis.2d 491, 149 N.W.2d 600 (1967). In that case, plaintiff was found 5% negligent, defendant A was found 75% negligent, and defendant B 20% negligent. Defendant A was insolvent. Defendant B argued that since the entire judgment would be recovered against him, plaintiff should not recover 95% of his damages, but rather 80%. In other words, defendant argued that since he was the only solvent defendant, plaintiff's negligence should be compared only to his own, which would reduce plaintiff's recovery by 5/20 + 5, or20%. The court rejected the argument, citing several earlier cases in which it had ". . . reaffirmed the rule based upon the ancient common-law concept of joint and several liability of joint tort-feasors." 149 N.W.2d at 605. The ancient common-law concept retains more validity under the statute in effect in Wisconsin in 1967, which was interpreted as permitting a plaintiff to make no recovery against any defendant whose individual negligence was not greater than the plaintiff's, than it does under Washington's pure comparative negligence statute.

By way of dictum, the Arkansas court has adopted the same rule:

> "We realize that where some of the tort-feasors are insolvent or unavailable our conclusion may require a single defendant to pay the entire judgment, even though his negligence was comparatively slight. . . . But this possibility of disproportionate liability always exists when some of the wrongdoers cannot be made to pay their fair share. At common law if the plaintiff was free from contributory negligence he could recover his entire damages from any defendant whose negligence, however slight, was a concur-

ring proximate cause of his injuries. We cannot adopt a narrow construction of our comparative negligence statute in the vain hope of avoiding inequitable situations due to insolvency. Obviously either the plaintiff or the solvent defendant must suffer, and the loss has traditionally fallen upon the wrongdoer." *Walton v. Tull*, 234 Ark. 882, 356 S.W.2d 20, 8 ALR3d 708 at 718 (1962).

The court overlooks the fact that a plaintiff whose negligence contributes to his own injuries is just as much a wrongdoer as is a defendant whose negligence contributes to injuries.

Indemnity — Contribution

The "all or nothing" concept of indemnity between joint tort-feasors only on an "active-passive" basis is thoroughly inconsistent with the philosophy behind a comparative negligence statute. That rule, and the rule that there is no contribution between joint tort-feasors, should both disappear. Comparative negligence recognizes that joint tortfeasors are not necessarily in *pari delicto* or equally at fault. A rule of contribution according to percentage of fault should be adopted. The two leading cases so holding are *Bielski v. Schulze*, 16 Wis.2d 1, 114 N.W.2d 105 (1962) and *Packard v. Whitten*, Maine, 274 A.2d 169 (1971). For a good discussion of the entire problem, see Annotation, *Contribution or Indemnity Between Joint Tort-Feasors on Basis of Relative Fault*, 53 ALR3d 184.

In following the rule of no contribution, lawyers have overlooked the possibility of contribution between joint *judgment* debtors under RCW 6.24.120. See *City of Fort Scott v. Kansas City, Ft. S. & M. R. Co.*, 66 Kan. 610, 72 Pac. 238 (1903); Annotation, 114 ALR 178.

Burden of Proof of Apportionment

Each party will retain the burden of proving negligence on the part of his opponent. What if the preponderance of the evidence convinces a jury that the negligence of plaintiff and defendant concurred to produce plaintiff's injury, but the evidence provides no reasonable basis for making an allocation of percentages of negligence? Some statutes, for example Ontario's and British Columbia's, provide that if it is not practicable to determine the respective degree of fault, the parties shall be deemed to be equally at fault. Should a Washington jury be instructed that unless the defendant sustains a burden of demonstrating a reasonable basis for apportioning negligence, there shall be no diminution of plaintiff's damages? Or is the jury to be free to apportion percentages of negligence on the basis of speculation and conjecture?

The courts seem to have come no closer to grips with this problem than to instruct a jury substantially as follows:

> "You will apportion to each party that part of 100% of the negligence which caused the injury which, by the preponderance of the evidence, is shown to be attributable to such person."

Burden of proof on the question of apportionment is universally left undefined. This is, of course, a recognition of the reality that the fashioning of objective standards for apportionment of negligence is impossible, and that the jury is to be left free to apply its "seat of the pants" equity in making the apportionment.

Instructions

The professorial approach has been to instruct the jury that once proximate cause is shown, it drops out of the picture, and plaintiff's diminution of damages is to be based strictly on comparison of degrees of negligence.

> "Although there is a great deal of rather casual and careless language to the effect that the plaintiff's recovery might be diminished to the extent that his negligence has been 'causal,' or has 'contributed' to his injury, there seems to be little doubt that, once causation is found, the apportionment must be made on the basis of comparative fault rather than comparative contribution." Prosser, *Comparative Negligence*, 51 Mich. L. Rev. 465 at 481.

The sophistication of this concept has been ignored by most courts. For example, in *Kohler v. Dunke*, 13 Wis.2d 211, 108 N.W.2d 581 (1961), the court stated:

> "This court has never attempted to lay down any formula for determining how much weight is to be accorded to the element of negligence and how much to that of causation in comparing causal negligence. Neither do we think it advisable to attempt to do so. This is something that had best be left to the common sense of juries."

Typically, juries in comparative negligence states have been instructed substantially as follows:

"You must determine how much or to what extent each party is to blame for the accident in question. You will weigh the respective contributions of these parties to the accident and, considering the conduct of the parties named in the question, considered as a whole, determine whether one made a larger contribution than the other, and if so, to what extent it exceeds that of the other. In making your apportionment of negligence, you will fix the percentage of negligence attributable to each participant in proportion to how much the fault of each contributed to cause the accident."

An early draft of a proposed Washington Pattern Instruction states, in part:

"In making the comparison, you should consider the character and nature of the acts and omissions, the standard of care, *the remoteness of the effect*, and all other factors relevant to comparison."

Instructions That a Party Is Negligent As a Matter of Law

A few comparative negligence states have required that a defense of contributory negligence shall ". . . in all cases whatsoever, be a question of fact, and shall at all times be left to the jury, unless a jury is waived by the parties." (Oklahoma). In the absence of such requirement, however, instructions that a party is guilty of negligence as a matter of law have generally been upheld. Under comparative negligence laws, appellate courts have been more reluctant to find error in the failure to instruct that a party was negligent as a matter of law, however.

In Wisconsin, such an instruction is ordinarily accompanied by the following caution:

"You are not to give any greater or lesser importance or weight to the finding of the court that one of the parties was negligent as a matter of law (or that such negligence was, as a matter of law, a cause of the collision) than you would to a similar finding made by you as members of the jury."

Failure to give the instruction has been found not to be error, however. *Reyes v. Lawry*, 33 Wis.2d 112, 146 N.W.2d 510 (1966).

It is possible to imagine a situation where two parties would each be equally negligent as a matter of law. For example, an injury caused by the failure to perform a duty which was the identical responsibility of plaintiff and defendant.

No pure comparative negligence case has been found in which counsel had the temerity to argue that the negligence of one party was greater or lesser than that of another party as a matter of law, and the jury should therefore be so instructed.

Special Verdicts

In a two-party single injury case, a jury should answer two questions:

(1) What is the full amount of the damages sustained by the plaintiff?
(2) What is the amount of plaintiff's damages as diminished by reason of any negligence attributable to him?

Unless the answer to these two questions is made to the court, judicial review of the adequacy or inadequacy of damages becomes difficult, and the judicial correction of errors in admission of evidence or instructions relating to negligence becomes almost impossible. In all but the simplest cases, therefore, a jury should be required to return with the answer to these two questions. Dean Prosser suggests that only the more complicated cases require more detailed special verdicts by a jury. Prosser, *Comparative Negligence*, 51 Mich. L. Rev. 465 at 498.

If, as is possible under the language of some insurance contracts, subrogation claims are to be reduced in the same proportion as plaintiff's entire claims, plaintiff's best interests seem to require that a jury specify the amount plaintiff would have received had the verdict not been reduced.

Our present Civil Rules provide for submission to a jury of special verdicts only, or a general verdict accompanied by written interrogatories. (C.R. 49).

Contrary to Wisconsin, in Washington, when a case is submitted on special verdicts only, *any* ten jurors can agree to the answer to each special verdict. In other words, the same ten jurors need not agree to each answer. *Johnson v. Mobile Crane Co.*, 1 Wn.App. 642 at 650, 463 P.2d 250 (1969), (*Pet. for Reh. Den.*, 77 Wn.2d 963); *Bullock v. Yakima Valley Transportation Co.*, 108 Wash. 413, 184 P. 641, 187 P. 410 (1919).

Under the Washington comparative negligence statute, submission of special interrogatories to the jury remains discretionary with the court. See Annotation, *Submission of Special Interrogatories in Connection with General Verdict Under Federal Rule 49(B), and State Counterparts*, 6 ALR3d 438.

Under Wisconsin procedure, a special verdict procedure is mandatory. The jury determines damages and the percentage of negligence attributable to plaintiff. The court does the mathematics. It is error to explain to the jury the formula into which the figures they return will be inserted. This "keep the jury in the dark" rule seems thoroughly inconsistent with the expectation that a jury will apply its general sense of fairness to a particular situation. In Wisconsin, once plaintiff's negligence becomes greater than that of a particular defendant, he loses all right of recovery against that defendant; and once the plaintiff's negligence becomes greater than all the defendants, he loses all right of recovery. A desire to keep jury deliberations free from the impact of these rules has doubtless led to the Wisconsin secrecy rule. No logical reason for failure to explain to the jury the impact of their findings exists under Washington's "pure" comparative negligence rule.

As a side comment on the Wisconsin rule, a reference to *Cases Won by the Defense* at 6 Defense Law Journal 159 at 170, is instructive. After a lengthy trial in a serious injury case, the jury assessed plaintiff's damages at $124,000, and his negligence at 55%. The report on the case includes the following:

> "I understand from reports, that the jury thought perhaps the plaintiff would receive 45 per cent of $124,000 or a net amount of approximately $60,000, the amount which I had argued as a reasonable damage figure. I doubt very much if that is true, because this jury has been sitting for a period of approximately one year and has tried at least four other personal injury cases under the comparative negligence law. By reading the newspapers after their respective verdicts, the jurors must have known what the effect of their verdict would be. I believe the jury felt that they were doing the fair and right thing regardless of the legal consequences, and my faith in the jury system, though always strong, has been given renewed confidence.
>
> * * *
>
> "In reporting the final proceedings to his newspaper, a reporter commented: 'Wroblewski, with his wife at his side, appeared stunned as his attorneys explained the verdict.' "

In the multiple-party case, special verdicts become both more desirable and more complex. An initial hurdle is the determination of whether the jury will be asked to apportion negligence among defendants who are not claiming injuries among themselves. Because of potential rights of contribution, either contractual or equitable, a routine request that a jury apportion negligence among defendants found to be responsible for causal negligence is desirable. The jury should be instructed, however, that plaintiff's right to recovery against defendants whose negligence has concurred to cause his injuries would not be defeated by inability of the jury to arrive at a basis for apportioning negligence among the defendants and, in the absence of any reasonable basis for the apportionment between such defendants, they should be found equally responsible.

One complication is what the Wisconsin courts call the "passive negligence" of a guest. Passive negligence is defined as negligence which reduces the particular plaintiff's damages because it contributed to his own injuries, but would be no basis of liability on the part of the guest because it did not contribute to the accident. For example, a social guest riding with the intoxicated driver of an automobile, or a passenger whose injuries are aggravated because of his failure to fasten his seat-belt. When such "passive" negligence on the part of a particular plaintiff is involved, his percentage of negligence in a multi-party case is determined on a different scale than is the negligence of injured parties whose "active" negligence caused the accident.

The "passive negligence" concept has led to some almost unbelievably complicated special interrogatories to juries in Wisconsin. In *Theisen v. Milwaukee Automobile Mutual Ins. Co.*, 18 Wis.2d 91, 118 N.W.2d 140 (1962), the Wisconsin court approves the mathematical transposition from a jury created scale including passive negligence to a court created scale excluding it. Other Wisconsin cases, however, cast doubt on this procedure: *Vroman v. Krempke*, 34 Wis.2d 680, 150 N.W.2d 423 (1967); *Dutcher v. Phoenix Ins. Co.*, 37 Wis. 2d 591, 155 N.W.2d 609 (1968); *Callan v. Wick*, 269 Wis. 68, 68 N.W.2d 438 (1955).

Comparative Negligence Can Work

Washington's statute can work. The unanswered questions will eventually be answered—many of them doubtless in a different way than suggested here. We hope this article has served to highlight some of the problems. ☐

Notices

Wanted and Unwanted

For Sale: RCWA $900; Washington Practice $200; Washington Digest $250, all with current pocket parts and in good conditions; $1,200 takes all. Also IBM Secretarial Transcriber $250. C. James Lust, Yakima, 248-6030.

For Sale: Complete set Washington Practice, current, good condition; complete set Washington Session Laws (1885-date). James D. Kendall, P. O. Box 596, Quincy 98848, (509) 787-4545.

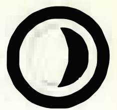
For Sale: RCW Annotated, Modern Legal Forms, Washington Digest, Washington Reports (1952 to present with Advance Sheets), and Washington Practice Series; $2,400.00 in full or $300 and take over contract at $55 per month. Ronald D. Ness, 204 Medical Dental Bldg., Bremerton, 377-5568.

For Sale: A portable IBM dictating machine, low mileage. Ronald H. Mentele, Seattle, 682-6141.

For Sale: RCWA Washington Reports through 68 Second; Washington Reporter 457 Pacific Second to date; Modern Legal Forms; full set of Washington Practice; Shepard's Washington Citator. Will accept terms. Paul M. Boyle, County City Bldg., Tacoma, 593-4316.

Estate Sale: Large variety of law books from the estate of Dale McKenzie, deceased. Call or write Mrs. Maxine McKenzie, P. O. Box 278, Grandview, Washington 98930, Area Code 509-882-3318.

Calendar



Date	Event
March 1-2, 8-9, 15-16, 22-23, 29-30	Basic Medical Seminar. WSTLA Robert J. Kroum, Seattle, Seminar Chairman. Fridays, 7:30 to 9:30 p.m.; Saturdays, 9:00 a.m. to 12:00 noon. Pigott Hall, Seattle University.
March 15	CLE Seminar, Personal Injury Practice Under the Comparative Negligence Act, sponsored by the State Bar CLE Committee and Trial Practice Section, Ridpath Hotel, Spokane, 1 to 6 p.m. F. Lee Campbell, Chmn.; Judge Edward E. Henry, Sam L. Levinson, Lawrence D. Silvernale, James D. McCutcheon, Jr.; Willard H. Walker, James M. Lindsey, and Henry Woods.
March 16	SKCBA—Federal Agency Practice. U of W HUB Auditorium, 8:30 a.m.
March 23	CLE Seminar, Personal Injury Practice Under the Comparative Negligence Act, Olympic Hotel, Seattle, 9 a.m. to 4 p.m.
March 29-30	Washington Association of Defense Counsel annual seminar at the Alderbrook Inn on Hood Canal. Open to all Association members and their guests.
March 30	CLE Seminar, Personal Injury Practice Under the Comparative Negligence Act, Greenwood Inn, Olympia, 9 a.m. to 4 p.m.
April 6	WSTLA Seminar, Divorce vs. Dissolution, Chinook Hotel, Yakima (rescheduled from March 23)
April 13	SKCBA Securities Regulations. U of W HUB Auditorium, 8:30 a.m.
April 19	CLE Seminar, on the new bankruptcy rules, for the general practitioner, sponsored by the CLE Committee and the Section of Creditor-Debtor Rights, Davenport Hotel, Spokane, 1 to 6 p.m.
April 26-28	WSTLA Seminar, Medical and Professional Malpractice, Rosario Resort, Orcas Island, Washington.
May 3	Seminar on the new bankruptcy rules, for the general practitioner, Olympic Hotel, Seattle, 1 to 6 p.m.
May 17	CLE Seminar, on developments and problems of the new Dissolution of Marriage Act and allied topics, sponsored by the CLE Committee and the Family Law Section. Olympic Hotel, Seattle, 9 a.m. to 4 p.m.
May 31	Seminar, on developments and problems of the new Dissolution of Marriage Act and allied topics, Ridpath Hotel, Spokane, 1 to 6 p.m.

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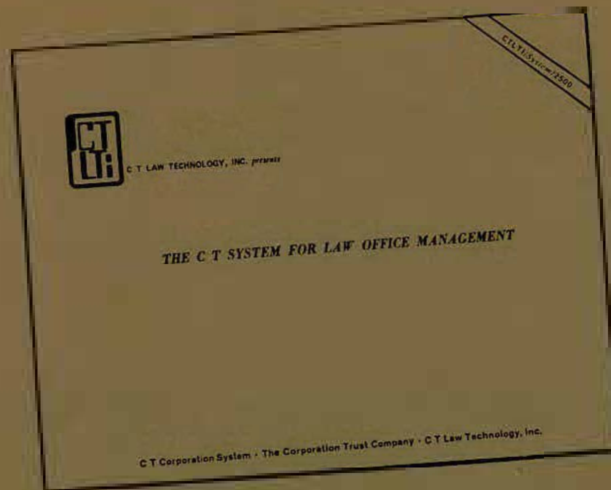

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