2/21/69

First Supplement to Memorandum 69-43

Subject: New Topics

The staff has examined the report prepared for the Assembly Committee on Judiciary by Ronald L. Goldfarb on "Problems in the Administration of Justice in California." We regret we could not obtain a copy of the report for each commissioner; we were forturate to obtain one copy.

In reviewing the report, the possible topics that might be studied by the Commission are indicated in Exhibit I attached. These topics are:

(1) Comparative negligence. The staff does not recommend that the Commission undertake a study of this problem.

(2) Liability of community property for the torts of the wife. The staff believes that a study should be undertaken either of community property generally or, and this is the better choice, of this relatively narrow and simple problem.

(3) Contribution between joint tortfeasors. The staff recommends against a study of this problem. Our experience on two attempts to adopt the change suggested by Professor Fleming indicates that no one wants the change.

(4) Jury trials in personal injury cases. The elimination of jury trials in personal injury cases involves a policy question the solution to which would not be particularly aided by the type of research and analysis the Commission undertakes to provide. The staff recommends against a study of this problem.

(5) Manufacturers' liability for injuries caused by defective products. This might be a topic that is suitable for study.

Respectfully submitted,

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Executive Secretary

If it is thought that an immediate change to such a system of compensation in California would be too drastic for public acceptance, there are intermediate steps that could be considered.

One would be the adoption of a comparative negligence statute. Under the present law, the plaintiff's action for compensation may be completely barred if the defendant can prove that the plaintiff's negligence contributed to the accident. In fact, juries may balk at such an unjust result and make some reduction in the plaintiff's recovery to account for his own negligence. There is no way for judges to police the computation of damages by the jury when no standards for reduction in damages exist.

This practice increases the uncertainty of an already uncertain system. Since neither party can guess what a jury will do in a particular case, both sides are encouraged to gamble on a jury trial instead of settling a claim. When the parties do settle, insurance companies have been charged with reducing claims to account for this possibility that plaintiffs' entire claims might be defeated if they went to trial.

Under a system of comparative negligence, the jury is instructed that it should reduce the size of the plaintiff's recovery by the proportion which his negligence bears to the defendant's. The jury's computations are shown to the judge so that he may check their accuracy.

Wisconsin and Arkansas now have comparative negligence statutes. The rule of comparative negligence has also been adopted in Great Britain. In addition, the Federal Employment Liability Act and the Jones Act use comparative negligence standards. Figures from New South Wales, where a comparative negligence statute was adopted 18 months ago, might be instructive on the subject of the cost to insurance companies of such a system.

Berkeley Professor John Fleming has suggested some other ways in which the present California statues related to tort damages could be changed. First, the rule, developed by the courts, that if a husband commits a tort the community property is liable, while if the wife commits a tort the community property is not liable, should be changed. The theory behind the present rule is that the husband controls the community property. The rule makes little sense, however, since it may allow a wife to escape from paying for her torts and may discourage a family from keeping adequate insurance on the wife's car. According to Professor Fleming, no other community-property state has such a rule. The community property should be liable no matter which owner commits the tort.

An additional change suggested by Professor Fleming is to modify the statute dealing with contribution by joint tortfeasors. The present statute only goes half way toward a solution. It provides that one defendant can get contribution from another who is responsible for the tort only if there has been a joint judgment against both of them. This is a good rule, since a separate action by one defendant against the other for contribution would necessitate a relitigation of the question, who was negligent. At present, however, there is no way for a defendant to force a joint tortfeasor to come into the original action by the plaintiff unless the plaintiff himself has chosen to sue the joint tortfeasor. Consequently, it is left to the plaintiff to determine whether one defendant may get contribution from the other.

Yale Law Professor Fleming James has criticized all systems that provide for contribution, since he feels that the system enables a corporate defendant with a "deep pocket" to pass part of the loss among

to an individual defendant who is less able to bear it. The question of who should bear losses from accidents is one of policy and should be carefully considered. But once a state has made up its mind to establish a system of contribution, Professor John Fleming feels that it should not be left to the plaintiff to decide when contribution may occur.

Judge George Brunn of the Berkeley Municipal Court has suggested a further procedural change for accident cases. He feels that jury trials in personal injury cases should be eliminated. He thinks that most jury trials are requested by defendants or their insurance companies for the purposes of delaying the trial. (Judge Brunn points out that it presently takes about two years to get a trial by jury in Berkeley.) A person who has been injured and needs money quickly may be pressured into a quick and disadvantageous settlement.

In Great Britain, although a trial by jury is theoretically available in personal injury cases, juries have not been demanded in automobile accident cases for many years. British commentators have concluded that a jury has no place in automobile cases.

In the area of manufacturers' liability for injuries caused by defective products, the California Supreme Court has replaced the requirement of negligence by the manufacturer with a system of strict liability. Although the Court's approach has gone far to compensate injured consumers, some commentators have noted that present tort law places the entire liability for compensation on the manufacturer. They suggest that members of the distributive chain should be able to allocate the risk of defective products by contract. Slight modifications of the warranty provisions of the Uniform Commercial Code would enable a contractual approach to the problem. Kenneth R. Weaver of

the Small Business Administration has enumerated some recommended changes in an article appearing in the October 1966 issue of the Virginia Law Review. While this is not a subject related only to automobiles, it is an area that might warrant statutory treatment.