

#62(L)

8/3/66

Memorandum 66-47

Subject: Study 62(L) - Vehicle Code Section 17150 and Related Statutes

The attached recommendation is presented for your approval prior to printing. The recommended legislation was approved at the last meeting for printing. We have revised the recommendation and comments to reflect changes suggested by members of the Commission.

We hope that you will have time to read the recommendation prior to the meeting so that this matter can be handled expeditiously.

We plan to have the pamphlet printed after the August meeting and we hope to have the printed pamphlet available late in September. The research study will be photo-offset in the pamphlet from the article printed in the Stanford Law Review.

Respectfully submitted,

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Assistant Executive Secretary

Revised August 2, 1966

STATE OF CALIFORNIA

CALIFORNIA LAW
REVISION COMMISSION

RECOMMENDATION

relating to

VEHICLE CODE SECTION 17150 AND RELATED SECTIONS

September 1, 1966

California Law Revision Commission
School of Law
Stanford University
Stanford, California

RECOMMENDATION
of the
CALIFORNIA LAW REVISION COMMISSION
relating to
VEHICLE CODE SECTION 17150 AND RELATED SECTIONS

BACKGROUND

In 1957, the Legislature directed the Law Revision Commission to make a study to determine whether damages awarded to a married person for personal injuries should be separate or community property. The underlying reason for the study was that under the then existing law the right of a married person to recover damages when the other spouse was also negligent turned in large part on the nature of the property interests in the award. Prior to the enactment of Civil Code Section 163.5 in 1957, damages awarded for a personal injury to a married person were community property. Therefore, if an injury to a married person resulted from the concurrent negligence of that person's spouse and a third party, the injured person was not permitted to recover damages; for to allow recovery would permit the negligent spouse, in effect, to recover for his own negligent act. Section 163.5 of the Civil Code provides that damages awarded to a married person for personal injuries are the separate property of the injured spouse, thereby preventing any imputation of the contributory negligence of one spouse to the other based on the property interests in the award. Section 163.5 has created other problems, however, which required the Commission to proceed with the study directed by the Legislature. See Recommendation and Study Relating to Whether Damages for Personal Injury to a Married Person Should be Separate or Community Property, 8 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES _____ (1966-67).

During the course of its study, the Commission realized that any recommendation it might make concerning the nature of the property interests in a personal injury damage award to a married person would not solve the problem that existed, for many if not most actions for damages in which the contributory negligence of a spouse is a factor arise out of vehicle accidents. Under Vehicle Code Section 17150, the contributory negligence of a person operating a vehicle with the permission of the owner is imputed to the owner, with the result that the nature of the property interests in the vehicle involved in an accident causing personal injuries can be determinative on the issue of imputed contributory negligence between spouses regardless of their interests in any damages awarded. Therefore, the Commission sought and was granted authority in 1962 to study whether Vehicle Code Section 17150 should be revised or repealed insofar as it imputes the contributory negligence of the driver of a vehicle to its owner.

The Commission's study of imputed negligence under Vehicle Code Section 17150 revealed other sections involving the same problem. Moreover, the study revealed important defects in these and other sections involving related problems, for consideration of the policies underlying imputed contributory negligence necessarily involved consideration of the extent to which a vehicle owner should be responsible for damages resulting from the operation of the vehicle by another. The 1965 Legislature, therefore, extended the Commission's authority to consider all relevant aspects of Vehicle Code Section 17150 and related sections.

RECOMMENDATIONS

Vicarious liability of vehicle owners, bailees, and estate representatives

Vehicle Code Section 17150 now provides that a vehicle owner is liable for the damages caused by the "negligence" of a person operating his vehicle with his permission. Vehicle bailees and estate representatives are subjected to similar liability by Sections 17154 and 17159. Section 17150

(that is, the statute that is now codified as Section 17150) was enacted to provide the public with protection against the "growing menace of death or injury in the operation of motor vehicles" by the "financially irresponsible." See Bayless v. Mull, 50 Cal. App.2d 66, 69-71, 122 P.2d 608 (1942). The section was based on the view that an automobile is "a dangerous instrumentality . . . in the hands of an incompetent or irresponsible driver." Ibid.

But the section's limitation of the owner's vicarious liability to cases involving "negligence" and the narrow construction by the courts of the term "negligence" have made the section inapplicable in cases where the reason that gave rise to its enactment is of greatest force. Under existing law, the section is inapplicable when the operator is guilty of wilful misconduct or drives while intoxicated. Weber v. Pinyan, 9 Cal.2d 226, 70 P.2d 183 (1937) (intoxication and wilful misconduct in attempting to embrace passenger); Jones v. Ayers, 212 Cal. App.2d 646, 28 Cal. Rptr. 223 (1962) (wilful misconduct in disregarding boulevard stop sign and entering intersection at high speed); Stober v. Halsey, 88 Cal. App.2d 660, 199 P.2d 318 (1948) (intoxication and wilful misconduct in driving at high speed and removing hands from steering wheel). In rare cases, a person injured as a result of the operator's wilful misconduct or intoxication can recover from the owner on the theory that the owner negligently entrusted the operator with the vehicle. Benton v. Sloss, 38 Cal.2d 399, 240 P.2d 575 (1952). But in the absence of such proof, the owner is immune from liability for injuries caused by the wilful misconduct or intoxication of the operator.

Thus, an owner may be held liable under Section 17150 for the simple negligence of an operator, but, incongruously, he is immune from liability for the wilful misconduct or intoxication of an operator. The more irresponsible

the operator, the more difficult it is to impose liability on the person who provided the operator with the vehicle and the less financial protection the public has against injuries caused by the operator.

The courts have reached the results indicated above by construing the word "negligence" narrowly to exclude "wilful misconduct." Weber v. Pinyan, 9 Cal.2d 226, 70 P.2d 183 (1937). The term "wilful misconduct" does not appear in Section 17150. The term is used in Section 17158 to describe the kind of conduct for which an operator is liable to his guest. Nevertheless, the courts have held that the terms are mutually exclusive and that an owner cannot be held liable under Section 17150 for an operator's conduct that constitutes "wilful misconduct" under Section 17158. Benton v. Sloss, 38 Cal.2d 399, 240 P.2d 575; Weber v. Pinyan, 9 Cal.2d 226, 70 P.2d 183 (1937); Jones v. Ayers, 212 Cal. App.2d 646, 28 Cal. Rptr. 223 (1963); Stober v. Halsey, 88 Cal. App.2d 660, 199 P.2d 318 (1948).

To treat the terms as mutually exclusive disregards the diverse purposes underlying the two sections. Section 17158 is designed to prevent collusive or fraudulent suits. Emery v. Emery, 45 Cal.2d 421, 289 P.2d 218 (1955); Ahlgren v. Ahlgren, 185 Cal. App.2d 216, 8 Cal. Rptr. 218 (1960). Section 17150 is designed to protect third persons against the improper use of automobiles by financially irresponsible persons. Bayless v. Kull, 50 Cal. App.2d 66, 122 P.2d 608 (1942). To shield himself from liability, the owner must either make sure that his driver is financially responsible or obtain insurance against his own potential liability. The exclusion of "wilful misconduct" from Section 17150 tends to defeat the purpose for which the section was enacted, for the innocent third person in a "wilful misconduct" case cannot look to the owner for relief, and it may be that the operator's

conduct cannot be covered by insurance because of the restrictions of Insurance Code Section 533. See Escobedo v. Travelers Ins. Co., 227 Cal. App.2d 353, 38 Cal. Rptr. 645 (1964); Escobedo v. Travelers Ins. Co., 197 Cal. App.2d 118, 17 Cal. Rptr. 219 (1961). Thus, third persons are provided by Section 17150 with the least protection against financial loss in the very cases where danger of death or injury is greatest.

Recent cases interpreting "wilful misconduct" under Section 17158 will accentuate the problem if there continues to be an immunity from liability under Section 17150 for such conduct. The term "wilful misconduct" as used in the guest statute has been interpreted as including conduct virtually indistinguishable from negligence. For example, in Reuther v. Viall, 62 Cal.2d 470, 42 Cal. Rptr. 456, 398 P.2d 792 (1965), the conduct described hereafter was held to be "wilful misconduct": The Reuthers and the Vialls were neighbors and friends. The Viall automobile was being used after a joint outing to return the Reuther's baby sitter to her home. Two small children of the Reuthers were in the car as well as the defendant's small daughter. The heat element of the cigaret lighter fell to the floor of the automobile, and Mrs. Viall, the driver, took her eyes off the road for a brief time and bent down to pick up the lighter. The car crossed the center line and collided with another automobile.

Of course, Mrs. Viall's action was misconduct--she should not have taken her eyes off the road. And, of course, her misconduct was wilful. But if this is wilful misconduct, much of what has been considered negligence can be characterized as wilful misconduct. Negligence frequently involves the wilful doing of some act when a reasonable person should be able to foresee that some harm will result therefrom. A person may wilfully drive too fast, roll through a stop sign, look away from the road, etc. Such misconduct is usually wilful and, under the Reuther case, may subject a driver to liability to a guest. Such an interpretation of the guest statute

seems to reflect a judicial propensity to construe it as being inapplicable whenever possible in order that a guest injured by the misconduct of another might be compensated. But to carry over such an interpretation of "wilful misconduct" to Section 17150 and deny an owner's vicarious liability when the driver's conduct is of a similar character would virtually nullify the section.

Sections 17707 and 17708 of the Vehicle Code make certain persons (parents and signatories to drivers license applications) liable for damages caused by minors in the operation of vehicles. As originally enacted, these sections created vicarious liability only for negligence. Gimenez v. Rissen, 12 Cal. App.2d 152, 55 P.2d 292 (1936). When it became apparent that the sections provided no vicarious responsibility for the kinds of irresponsible driving that minors are apt to engage in, the sections were amended to provide for vicarious liability for wilful misconduct as well as negligence. See Gimenez v. Rissen, supra.

The Commission recommends a similar revision of the ownership liability provisions of the Vehicle Code.

Imputed contributory negligence

Vehicle Code Section 17150 provides that the owner of a vehicle who permits it to be operated by another is liable for any injury caused by the negligence of the operator. Moreover, the negligence of the operator is imputed to the owner for all purposes of civil damages, thus barring the owner from recovering damages from a negligent third party if the operator was also negligent. Similar imputation provisions appear in Sections 17154, 17159, and 17708 of the Vehicle Code.

The provision of Vehicle Code Section 17150 that imputes the contributory negligence of a driver to the owner of the vehicle was added to the California

law in 1937. Cal. Stats. 1937, Ch. 840, § 1. From that time until Vehicle Code Section 17158¹ (the guest statute) was amended in 1961, this provision merely prohibited the owner from recovering from the negligent third party. It did not affect his remedy against the negligent operator. Thus, in effect, it forced an owner who was injured by the concurring negligence of his driver and a third party to obtain his relief in damages from his driver alone. At a time when contribution between tortfeasors was unknown to the law, the choice thus forced upon an owner of a vehicle was not an unreasonable one. If the owner were not forced to recover his damages from the driver whom he selected, he probably would look only to the third party for relief regardless of the relative fault of the parties. By barring the remedy against the third party, the law prevented the owner from showing such favoritism. Since he selected the driver, the law required him to bear the risk of the driver's negligence and ability to respond in damages.

An amendment to the guest statute in 1961, however, has deprived an owner of his right to recover from his driver damages for personal injuries caused while the owner is riding as a guest in his own car. The policy underlying the guest statute--to prevent collusive suits--is undoubtedly as applicable to owners riding as guests as it is to others riding as guests; but the amendment has deprived the innocent owner of his only remedy for personal injuries caused by the concurring negligence of his driver and a third party.

¹Section 17158 provides:

17158. No person riding in or occupying a vehicle owned by him and driven by another person with his permission and no person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of the vehicle or against any other person legally liable for the conduct of the driver on account of personal injury to or the death of the guest during the ride, unless the plaintiff in any such action establishes that the injury or death proximately resulted from the intoxication or wilful misconduct of the driver.

Repeal of the provision of Section 17150 that imputes contributory negligence from operator to owner would restore the owner's right to recover from the negligent third party. This, however, would force the third party to bear the whole loss that his negligence caused only in part.

Within recent years California has abandoned the traditional common law view that there is no contribution between tortfeasors. The contribution principle seems to be a fairer one than to require one tortfeasor to bear the entire loss caused only partially by his fault. Applied to the case where an owner is injured by the concurring negligence of his driver and a third party, the principle of contribution offers a means for providing the owner with relief, preventing collusive suits between owners and operators, and requiring both the negligent third party and the driver to share the burden of liability arising from their concurrent wrongful actions.

Accordingly, the Commission recommends the repeal of the provisions of the Vehicle Code that permit a third party tortfeasor to escape liability to an innocent owner because of the contributory negligence of the owner's driver. Instead, the third party tortfeasor, when sued by the owner, should have the right to join the operator as a party to the litigation, and if both are found guilty of misconduct contributing to the injury, the third party should have a right to contribution from the operator in accordance with the existing statute providing for contribution between tortfeasors. See CODE CIV. PROC. §§ 875-880.

It is recommended that an operator be required to contribute when he is guilty of any negligent or wrongful act or omission in the operation of the vehicle. The third party tortfeasor, however, as under the existing contribution statute, should not be permitted to obtain contribution if he intentionally caused the injury or damage.

RECOMMENDED LEGISLATION

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to amend Sections 17150, 17151, 17152, 17153, 17154, 17155, 17156, 17159, 17707, 17708, 17709, 17710, and 17714 of the Vehicle Code, to add a new chapter heading immediately preceding Section 875 of, and to add Chapter 2 (commencing with Section 900) to Title 11 of Part 2 of, the Code of Civil Procedure, relating to liability arising out of the operation of vehicles.

The people of the State of California do enact as follows:

SECTION 1. Section 17150 of the Vehicle Code is amended to read:

17150. Every owner of a motor vehicle is liable and responsible for the death ~~of~~ or injury to person or property resulting from ~~negligence~~ a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner ~~,-and-the-negligence-of-such-person-shall-be imputed-to-the-owner-for-all-purposes-of-civil-damages..~~

Comment. Under the prior language of Section 17150, a vehicle owner was not liable for injuries caused by the wilful misconduct or intoxication of the operator. Weber v. Pinyan, 9 Cal.2d 226, 70 P.2d 183 (1937); Jones v. Ayers, 212 Cal. App.2d 646, 28 Cal. Rptr. 223 (1963); Stober v. Halsey, 88 Cal. App.2d 660, 199 P.2d 318 (1948). Under Section 17150 as amended, a vehicle owner will be liable (within the statutory limits prescribed by Section 17151) for the damages caused by the wilful misconduct or intoxication of an operator using the vehicle with the owner's permission.

The last clause of Section 17150 has been deleted because it, together with Section 17158, prevents an innocent vehicle owner from recovering any

damages for a personal injury caused by the concurring negligence of his driver and a third party. Instead of barring an owner's cause of action in such a case, he is permitted to recover his damages from the negligent third party who, in turn, can obtain contribution from the negligent operator under Sections 900-910 of the Code of Civil Procedure.

SEC. 2. Section 17151 of the Vehicle Code is amended to read:

17151. The liability of an owner, bailee of an owner, or personal representative of a decedent ~~for-imputed-negligence~~ imposed by this chapter and not arising through the relationship of principal and agent or master and servant is limited to the amount of ten thousand dollars (\$10,000) for the death of or injury to one person in any one accident and, subject to the limit as to one person, is limited to the amount of twenty thousand dollars (\$20,000) for the death of or injury to more than one person in any one accident and is limited to the amount of five thousand dollars (\$5,000) for damage to property of others in any one accident.

Comment. This amendment merely conforms the section to Section 17150 as amended.

SEC. 3. Section 17152 of the Vehicle Code is amended to read:

17152. In any action against an owner, bailee of any owner, or personal representative of a decedent on account of ~~imputed negligence-as~~ liability imposed by Sections 17150, 17154, or 17159 for the negligent or wrongful act or omission of the operator of the a vehicle whose negligence-is-imputed-to-the-owner,-bailee-of an-owner,-or-personal-representative-of-a-decedent , the operator shall be made a party defendant if ~~personal~~ service of process can be ~~had-upon-the-operator-within-this-State~~ made in a manner sufficient to secure personal jurisdiction over the operator . Upon recovery of judgment, recourse shall first be had against the property of the operator so served.

Comment. This amendment conforms the section to Section 17150 as amended. It also requires that the operator be made a party if ~~personal~~ jurisdiction over him can be obtained in any manner. Code of Civil Procedure Section 417 and Vehicle Code Sections 17450-17463 prescribe various ways in which ~~personal~~ jurisdiction can be secured other than by ~~personal~~ service within the state.

SEC. 4. Section 17153 of the Vehicle Code is amended to read:

17153. If there is recovery under this chapter against an owner, bailee of an owner, or personal representative of a decedent ~~based-on-imputed negligence~~, the owner, bailee of an owner, or personal representative of a decedent is subrogated to all the rights of the person injured or whose property has been injured and may recover from the operator the total amount of any judgment and costs recovered against the owner, bailee of an owner or personal representative of a decedent. /

Comment. This amendment merely conforms the section to Section 17150 as amended.

SEC. 5. Section 17154 of the Vehicle Code is amended to read:

17154. If the bailee of an owner with the permission, express or implied, of the owner permits another to operate the motor vehicle of the owner, then the bailee and the driver shall both be deemed operators of the vehicle of the owner within the meaning of Sections 17152 and 17153.

Every bailee of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the bailee or otherwise, by any person using or operating the same with the permission, express or implied of the bailee, ~~and the negligence of such person shall be imputed to the bailee for all purposes of civil damages .~~

Comment. This amendment to Section 17154 is in substance the same as the amendment to Section 17150. See the Comment to Section 17150.

SEC. 6. Section 17155 of the Vehicle Code is amended to read:

17155. Where two or more persons are injured or killed in one accident, the owner, bailee of an owner, or personal representative of a decedent may settle and pay any bona fide claims for damages arising out of personal injuries or death, whether reduced to judgment or not, and the payments shall diminish to the extent thereof such person's total liability on account of the accident. Payments aggregating the full sum of twenty thousand dollars (\$20,000) shall extinguish all liability of the owner, bailee of an owner, or personal representative of a decedent for death or personal injury arising out of the accident which exists ~~by-reason-of imputed-negligence,~~ pursuant to this chapter, and did not arise through the negligence negligent or wrongful act or omission of the owner, bailee of an owner, or personal representative of a decedent nor through the relationship of principal and agent or master and servant.

Comment. This amendment merely conforms the section to Section 17150 as amended.

SEC. 7. Section 17156 of the Vehicle Code is amended to read:

17156. If a motor vehicle is sold under a contract of conditional sale whereby the title to such motor vehicle remains in the vendor, such vendor or his assignee shall not be deemed an owner within the provisions of this chapter ~~relating-to-imputed-negligence~~, but the vendee or his assignee shall be deemed the owner notwithstanding the terms of such contract, until the vendor or his assignee retake possession of the motor vehicle. A chattel mortgagee of a motor vehicle out of possession is not an owner within the provisions of this chapter ~~relating-to-imputed-negligence~~.

Comment. This amendment merely conforms the section to Section 17150 as amended.

SEC. 8. Section 17159 of the Vehicle Code is amended to read:

17159. Every person who is a personal representative of a decedent who has control or possession of a motor vehicle subject to administration for the purpose of administration of an estate is, during the period of such administration, or until the vehicle has been distributed under order of the court or he has complied with the requirements of subdivision (a) or (b) of Section 5602, liable and responsible for the death of or injury to person or property resulting from ~~negligence~~ a negligent or wrongful act or omission in the operation of the motor vehicle by any person using or operating the same with the permission, express or implied, of the personal representative, ~~and the negligence of such person shall be imputed to the personal representative for all purposes of civil damages.~~

Comment. This amendment to Section 17159 is in substance the same as the amendment to Section 17150. See the Comment to Section 17150.

SEC. 9. Section 17707 of the Vehicle Code is amended to read:

17707. Any civil liability of a minor arising out of his driving a motor vehicle upon a highway during his minority is hereby imposed upon the person who signed and verified the application of the minor for a license and the person shall be jointly and severally liable with the minor for any damages proximately resulting from the ~~negligence-or-wilful-misconduct~~ negligent or wrongful act or omission of the minor in driving a motor vehicle, except that an employer signing the application shall be subject to the provisions of this section only if an unrestricted driver's license has been issued to the minor pursuant to the employer's written authorization.

Comment. This amendment to Section 17707 merely substitutes the term that has been used in Vehicle Code Section 17001 and in Sections 17150-17159 for that which now appears in Section 17707. The substitution has been made in order to make clear that the same meaning is intended. No substantive change is made by the revision.

SEC. 10. Section 17708 of the Vehicle Code is amended to read:

17708. Any civil liability negligence-or-wilful-misconduct of a minor, whether licensed or not under this code, arising out of his ~~is~~ driving a motor vehicle upon a highway with the express or implied permission of the parents or the person or guardian having custody of the minor ~~shall-be~~ ~~imputed-to.~~ is hereby imposed upon the parents, person, or guardian, ~~for-all~~ ~~purposes-of-civil-damages~~ and the parents, person, or guardian shall be jointly and severally liable with the minor for any damages proximately resulting from the ~~negligence-or-wilful-misconduct~~ negligent or wrongful act or omission of the minor in driving a motor vehicle .

Comment. The same reasons which justify the deletion of the provisions for imputed contributory negligence from Section 17150 justify the removal of the similar provisions from Section 17708. The language of the section has been revised to conform to that used in Section 17707.

SEC. 11. Section 17709 of the Vehicle Code is amended to read:

17709. No person, or group of persons collectively, ~~to whom neg-~~
~~ligence or willful misconduct is imputed~~ shall incur liability for
a minor's negligent or wrongful act or omission under Sections 17707
and 17708 in any amount exceeding ten thousand dollars (\$10,000) for
injury to or death of one person as a result of any one accident or,
subject to the limit as to one person, exceeding twenty thousand
dollars (\$20,000) for injury to or death of all persons as a result
of any one accident or exceeding five thousand dollars (\$5,000) for
damage to property of others as a result of any one accident.

Comment. This amendment merely conforms the section to Sections 17707
and 17708 as amended.

SEC. 12. Section 17710 of the Vehicle Code is amended to read:

~~17710. Negligence-or-wilful-misconduct-shall-not-be-imputed-to~~
The person signing a minor's application for a license is not liable
under this chapter for a negligent or wrongful act or omission of
the minor committed when the minor is acting as the agent or servant
of any person.

Comment. This amendment merely conforms the section to Section
17707 as amended.

SEC. 13. Section 17714 of the Vehicle Code is amended to read:

17714. In the event, in one or more actions, judgment is rendered against a defendant under this chapter based upon the negligent or wrongful act or omission of a minor in the negligent operation of a vehicle ~~by-a~~ miner, and also by reason of such act or omission ~~negligence~~ rendered against such defendant under Article 2 (commencing with Section 17150) of Chapter 1 of Division 9, then such judgment or judgments shall be cumulative but recovery shall be limited to the amount specified in Section 17709.

Comment. This amendment merely conforms the section to Sections 17707 and 17708 as amended.

SEC. 14. A new chapter heading is added immediately preceding Section 875 of the Code of Civil Procedure, to read:

CHAPTER 1. CONTRIBUTION AMONG JOINT JUDGMENT TORTFEASORS

SEC. 15. Chapter 2 (commencing with Section 900) is added to Title 11 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 2. CONTRIBUTION IN PARTICULAR CASES

900. As used in this chapter:

(a) "Plaintiff" means a person who recovers or seeks to recover a money judgment in a tort action for death or injury to person or property.

(b) "Defendant" means a person against whom a money judgment is rendered or sought in a tort action for death or injury to person or property.

(c) "Contribution cross-defendant" means a person against whom a defendant has filed a cross-complaint for contribution in accordance with this chapter.

Comment. The definitions in Section 900 are designed to simplify reference in the remainder of the chapter. The definition of "plaintiff" includes a cross-complainant if the cross-complainant recovers or seeks tort damages upon his cross-complaint. Similarly, the defined term "defendant" includes a cross-defendant against whom a tort judgment has been rendered or is sought. The "defendant" may actually be the party who initiated the action. "Contribution cross-defendant" means anyone from whom contribution is sought by means of a cross-complaint under this chapter. The contribution cross-defendant may, but need not, be a new party to the action.

902. If a money judgment is rendered against a defendant in a tort action for death or injury to person or property arising out of the operation of a motor vehicle, a contribution cross-defendant, whether or not liable to the plaintiff, shall be deemed to be a joint tortfeasor judgment debtor and liable to make contribution in accordance with Title 11 (commencing with Section 875) of Part 2 of the Code of Civil Procedure where:

(a) The contribution cross-defendant was the operator of the vehicle;

(b) The plaintiff is a person who is made liable for the negligent or wrongful act or omission of the operator under Section 17150, 17154, 17159, 17707, or 17708 of the Vehicle Code; and

(c) A negligent or wrongful act or omission of the operator in the operation of the motor vehicle is adjudged to have been a proximate cause of the death or injury.

Comment. Sections 900-910 are added to the Code of Civil Procedure to permit a defendant who is held liable to an owner of a vehicle, or to some other person who is made statutorily liable for the conduct of the vehicle's operator, to obtain contribution from the operator if he can establish that the injury was caused by the operator's concurring negligence or wrongdoing.

Until 1961, the provision of Section 17150 that imputes an operator's negligence to the vehicle owner limited the remedies available to an owner who was injured by the concurring negligence of a third party and the vehicle operator to damages from the operator alone. The imputed contributory negligence of the operator barred the owner's remedy against the negligent third party. In 1961, Section 17158 (the guest statute) was amended to

deprive the owner of his remedy against the operator, leaving him with no remedy for his tortiously inflicted personal injuries.

A fairer way to achieve the guest statute's purpose of guarding against fraudulent claims while still providing the innocent owner with a remedy for his injuries is to require contribution between the joint tortfeasors. These sections provide a means for doing so.

Section 902 establishes the right of the third party tortfeasor to obtain contribution from the operator whose misconduct contributed to the owner-plaintiff's loss. Under Section 902, a right of contribution can arise only if the third party tortfeasor is held to be liable to the plaintiff. In those instances where the contributory negligence or contributory wrongdoing of the operator is imputed to the plaintiff--as in master-servant situations--the third party is not liable to the plaintiff and, hence, no question of contribution can arise. Thus, Section 902 can apply only where the relationship of master-servant did not exist between the plaintiff and the operator insofar as the operator's acts were concerned.

Under Section 902, if the defendant (the third party tortfeasor) is held liable, he is entitled to contribution from the operator in the event that the operator's negligence or misconduct is adjudged to have been a proximate cause of the injury involved in the case. To obtain an adjudication that is personally binding on the operator, the defendant must proceed against the operator by cross-complaint and see that he is properly served. See Section 905 and the Comment thereto. Usually the fault of the defendant and the fault of the operator will be determined at the same time and by the same judgment. But if the defendant's cross-action against the operator is severed from the plaintiff's action and tried separately, the showing required by Section 902 for an adjudication that the operator is a joint tortfeasor consists

merely of the judgment against the defendant and the fault of the operator. Section 902 does not permit a contest of the merits of the judgment against the defendant in the trial of the cross-action.

After the defendant has obtained a judgment establishing that the operator is a joint tortfeasor, his right to contribution is governed by Sections 875-880 of the Code of Civil Procedure, relating to contribution among joint tortfeasors. Thus, for example, the right of contribution may be enforced only after the tortfeasor has discharged the judgment or has paid more than his pro rata share. The pro rata share is determined by dividing the amount of the judgment among the total number of tortfeasors; but where more than one person is liable solely for the tort of one of them--as in master-servant situations--they contribute one pro rata share. Consideration received for a release given to one joint tortfeasor reduces the amount the remaining tortfeasors have to contribute. And the enforcement procedure specified in Code of Civil Procedure Section 878 is applicable.

Under Section 902 the defendant is entitled to contribution from the operator even though the operator might not be independently liable to the plaintiff. For example, if the operator has a good defense based on Vehicle Code Section 17158 (the guest statute) as against the owner, he may still be held liable for contribution under Section 902. The policy underlying Vehicle Code Section 17158 is to prevent collusive suits between the owner and the operator by which an insurance company can be defrauded. The reasons justifying Section 17158 are inapplicable when the operator's negligence is sought to be established by a third party who would be liable for all of the damage if the operator's concurring negligence or misconduct were not established. The third party and the operator are true adversaries and there is little possibility of collusion between them.

903. If a money judgment is rendered against a defendant in a tort action for death or injury to person or property arising out of the operation of a motor vehicle by the defendant, a contribution cross-defendant, whether or not liable to the plaintiff, shall be deemed to be a joint tortfeasor judgment debtor and liable to make contribution in accordance with Title 11 (commencing with Section 875) of Part 2 of the Code of Civil Procedure where:

(a) The plaintiff is a person who is made liable for the negligent or wrongful act or omission of the defendant in the operation of the motor vehicle under Section 17150, 17154, 17159, 17707, or 17708 of the Vehicle Code; and

(b) A negligent or wrongful act or omission of the contribution cross-defendant is adjudged to have been a proximate cause of the death or injury.

Comment. Section 902 establishes the right of a judgment tortfeasor to obtain contribution from a vehicle operator whose concurring negligence or wrongdoing was a proximate cause of the damage or injury and the plaintiff is a person who is made liable by the Vehicle Code for the conduct of the vehicle operator. Section 903 is designed to give an operator an equivalent right of contribution from a third party tortfeasor in those cases where, despite the guest statute (VEH. CODE § 17158), the operator may be held liable to a person who by statute is made vicariously liable for his misconduct. But see Section 910.

905. A defendant's right to contribution under this chapter must be claimed, if at all, by cross-complaint in the action brought by the plaintiff. The defendant may file a cross-complaint for contribution at the same time as his answer or within 100 days after the service of the plaintiff's complaint upon the defendant, whichever is later. The defendant may file a cross-complaint thereafter by permission of the court.

Comment. Section 905 provides that the right to contribution created by this chapter must be asserted by cross-complaint. If the person claiming contribution began the litigation as a plaintiff and seeks contribution for damages claimed by cross-complaint, Section 905 authorizes him to use a cross-complaint for contribution in response to the cross-complaint for damages.

The California courts previously have permitted the cross-complaint to be used as the pleading device for securing contribution. City of Sacramento v. Superior Court, 205 Cal. App.2d 398, 23 Cal. Rptr. 43 (1962). Section 905 requires the use of the cross-complaint so that all of the issues may be settled at the same time if it is possible to do so. If for some reason a joint trial would unduly delay the plaintiff's action--as, for example, if service could not be made on the contribution cross-defendant in time to permit a joint trial--or if for some other reason a joint trial would not be in the interest of justice, the court may order the actions severed. CODE CIV. PROC. § 1048. See Roylance v. Doelger, 57 Cal.2d 255, 261-262, 19 Cal. Rptr. 7, 368 P.2d 535 (1962).

Under existing law a cross-complaint must be filed with the answer unless the court grants permission to file the cross-complaint subsequently. CODE CIV. PROC. § 442. Under Section 905, however, a cross-complaint for

contribution may be filed as a matter of right within 100 days after the service of the plaintiff's complaint on the defendant even though an answer was previously filed. This additional time is provided because it may not become apparent to a defendant within the brief period for filing an answer (10-30 days) that the case is one where a claim for contribution may be asserted. As in the case of a cross-complaint filed under Section 442, Section 905 also permits a cross-complaint for contribution to be filed after the time when it can be filed as a matter of right if the court permits.

Inasmuch as no right to contribution accrues until the liability of the defendant has been adjudicated and he has paid more than his pro rata share of the judgment, there is no time limit on the right to file a cross-complaint for contribution other than the limitation prescribed in Section 905. A plaintiff's delay in filing his complaint for damages until the end of his limitations period will have no effect on the defendant's right to file a cross-complaint for contribution within the time limits prescribed here.