

2/20/67

Memorandum 67-12

Subjects: Senate Bill No. 245 - Personal Injury Damages  
Senate Bill No. 244 - Vehicle Code Section 17150 and Related Statutes

Attached to this Memorandum (Exhibit I - pink) is a copy of some comments by CAJ on the Commission's recommendations relating to Personal Injury Damages and Vehicle Code Section 17150.

CAJ opposes the special contribution statutes because it is in the process of formulating a general contribution statute. You will note from the second page of the exhibit, however, that a draft of CAJ's proposed general statute received partial study in the south on January 9, 1967, and the hope was expressed that the study would be completed on January 23, 1967. Thus, it is evident that CAJ's general contribution statute will not be ready for this session of the Legislature. (We have been advised that the Senate Judiciary Committee chairman has indicated that a general revision of the contribution statute will not be enacted at the current session.) Accordingly, we believe that we should go forward with our recommendations because there will be no general statute duplicating their provisions for the foreseeable future.

CAJ has some specific criticisms which the Commission should consider. These are discussed below.

Right of cross-defendant to contest merits of damages judgment

The most important matter raised by CAJ relates to the effect to be given the first judgment (the damages judgment against the defendant) in the cross-action for contribution in the event that the principal action and the cross-action are severed. The Commission's comment to proposed Section 901 points out that the basis for contribution liability under

Section 901 is merely the judgment against the defendant and the cross-defendant's fault. Accordingly, the comment concludes that no contest of the first judgment is permitted in the contribution action in the event the principal action and the cross-action are severed. CAJ suggests that this is unfair to the cross-defendant when he has had no opportunity to participate in the first action. The amount of the damages and the culpability of the plaintiff (contributory negligence) may not have been seriously litigated in the expectation that the cross-defendant would be forced to pay half of the judgment. Where the original defendant is the spouse of the original plaintiff, this can be a serious danger.

I believe that the Commission originally approved this scheme when we contemplated contribution only in the event that a married person sued a third party for damages. In such a case, the case law establishes that the first judgment would be binding on the other spouse anyway because of the privity of interest in the damages sought. Zaragosa v. Craven, 33 Cal.2d 315, 202 P.2d 73 (1949). In the vehicle liability recommendation, we then contemplated that contribution could be sought only from an operator and only in an action originally brought by an owner (or some similar principal) against a third party. But both statutes now contemplate that the principal action may be brought against the other spouse or against the operator and that the contribution may be sought from the third party. Thus, the danger suggested by CAJ now has some basis.

CAJ's criticism seems well taken. We suggest, therefore, that Section 905 be amended to spell out specifically the effect of the first judgment upon the cross-action in the event that the actions are severed. Attached to this Memorandum as Exhibit II (yellow) is a proposed amendment to

Senate Bill No. 245 to effect this change. You will note from the proposed amendment that the first judgment is not binding in the cross-action if the cross-defendant did not have an opportunity to litigate the issues determined therein during the first action. However, the cross-defendant is not permitted to assert that the original defendant was not really a tortfeasor. As pointed out by the Wisconsin Supreme Court:

If a wrongdoer who has paid a claim may recover half the payment from another who ought in fairness to pay part of it, surely one who is found not to have been guilty of any wrong should not be denied a like recovery from one who ought in equity and fairness to pay the whole claim. [Rusch v. Korth, 2 Wis.2d 321, 86 N.W.2d 464, 468 (1957).]

If Section 905 is amended as suggested, some of the comments will also need revision. We have appended as Exhibit III (green) the amendments to the comments to Senate Bill No. 245 that we believe are necessary. Note particularly the proposed comment to revised Section 905.

Exhibit IV (buff) contains comparable amendments to Senate Bill No. 244 (Vehicle Code Section 17150 and Related Statutes) and Exhibit V (blue) contains the revised comments to Senate Bill No. 244. The amendments and revisions of the comments are the same as for Senate Bill No. 245.

Section 908--reference to any other "right to contribution"

The comment to Section 908 points out that this reference is intended to preserve a party's right to rely on Code of Civil Procedure Sections 875-880 to obtain contribution even if he fails to cross-complain for contribution under this statute. CAJ suggests that a specific reference to Sections 875-880 be included in the section. CAJ suggests that "it would lead to confusion to have two similar but varying procedures in the law" if a general contribution statute were passed. Also, CAJ suggests that Section 908's broad wording may constitute an invitation to the courts

to declare a right of contribution without further legislative authority.

It seems to us that any adjustments that are needed to dovetail the procedure in this statute with that of a general contribution statute should be made when such a general statute is proposed. Any careful job of draftsmanship on a general statute ought to involve repeal of the existing statute (Sections 875-880) and, if necessary, amendment or repeal of these sections as well. But it seems unwise to amend these sections now to provide against a possibility that may never occur.

So far as a judicial creation of a right to contribution is concerned, we see nothing in the language that would justify such a creation. The comment makes the purpose of Section 908 quite clear. There is in existing law far more explicit statutory authority for contribution if the courts are disposed to look for such authority. Civil Code Section 1432 provides:

A party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him. [Emphasis added.]

The context of the section makes it clear that the section is not dealing with contractual obligations only, it is dealing with obligations of any sort. Inasmuch as the obligations of joint tortfeasors are joint and several, Section 1432 provides as much excuse as a court may need to create a right of contribution in the absence of further legislative authority. A court need not rely on a fairly dubious implication from Section 908 in light of the fairly clear language of Section 1432. Moreover, even if the courts do create a right to contribution by judicial authority only, we see no reason to provide in our statute that the procedures specified there should bar a person from relying on the court-created law if he can bring himself within its terms. Simply because we have created a law and a procedure is no reason to compel persons to use it to the

exclusion of whatever other rights they may have.

Severability clause

CAJ is concerned that Code of Civil Procedure Section 417 may be unconstitutional in part. This would result in the unconstitutionality of Section 906 under certain circumstances because Section 906 refers to Section 417. Hence, CAJ suggests a severability clause.

Amendment of guest statute

CAJ points out that the Commission's proposed statute removes from a vehicle operator or owner some of the immunity now provided by the guest statute, Vehicle Code Section 17158. CAJ thus raises the question whether there should be an amendment to Section 17158 to reflect this limitation on the immunity provided therein.

There is no inconsistency in the sections involved. Section 17158 does not speak in terms of an immunity for the operator or owner. It provides simply that the injured guest cannot recover damages from the operator or owner. We believe that we should let sleeping dogs lie and, accordingly, that we should leave the guest statute alone.

Respectfully submitted,

Joseph B. Harvey  
Assistant Executive Secretary

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January 27, 1967

John H. DeMouilly, Esq.  
Law Revision Commission  
Crothers Hall  
Stanford, California

Dear John:

The special contribution statutes are still under consideration by the CAJ.

The enclosed minutes of the Northern Section of January 12, 1967 are not necessarily final, even as to the Northern Section. They may however, give you one or two ideas as to the general status and also as to certain minor and one major problem as to form. See pages 7 - 8.

Yours very truly,

G. H. Elmore

GHE/s  
encl.

*Revised*

(NO. 500. 1/22, ..)

AGENDA NOS. 25, 26 and 85 - IMPUTED NEGLIGENCE  
(These items were considered together)

AGENDA NO. 25. Spouse's Personal Injury Recovery.

ACTION TAKEN: On the limited question of whether any objections should be offered to the form of the Commission proposal, a resolution was adopted that, on general review, the Northern Section finds nothing objectionable in the form, but this action is not to be interpreted as approval of the "special" statute on contribution.

AGENDA NO. 26. Vehicle Code 17150.

ACTION TAKEN: A resolution was adopted that the Northern Section approves the principle of abrogating imputed negligence to the owner, in an action against a third person, where the driver of the owner's car is also negligent, but in view of the CAJ position taken in the 1966 Report, the matter should be dealt with as a whole, and the Section disapproves the Commission's proposal on contribution in this special situation.

AGENDA NO. 85. Vehicle Code 17150

ACTION TAKEN: A resolution was adopted that the Northern Section approves the principle of abrogating the rule of imputed negligence based on ownership, drafting of legislation to be deferred until Board policy is determined.

DISCUSSION - NOS. 25 and 26. Mr. Abramson made an oral report which was supplemented by Mr. Larson's oral report.

Mr. Abramson reviewed the recommendations of the 1966 CAJ report on these measures, first, recommending (by majority) against changing the status of the wife's recovery to community property, second, recommending against special contribution statutes (as here proposed by the Law Revision Commission (41 S. B. Jnl. p.741)).

It was his view, concurred in by Mr. Larson, that the CAJ's general contribution law will solve most of the problems at which these specialized statutes are directed, and that specialized statutes should be disapproved.

Inquiry was made of the staff as to the status of the general CAJ measure on Contribution (Agenda 65 - 30). It was noted that a text prepared by Mr. Hufstедler had received partial study in the South on January 9, 1967; that it was hoped to complete the South's study on January 23.

The precise matter at this time is the informal request of Mr. DeMouilly, made after his receipt of the 1966 CAJ report, for any specific comments, other than opposition to special statutes. It is the view of the two reviewing section members that the special contribution statutes prepared by the Commission are not objectionable as to form. Note was made of the difficulty arising from the use of "defendant", in the sense it might include the "plaintiff" in the main action. It was also noted there is the right in the trial court to sever the trial; that a jury trial may be had on the contribution issue. However, the texts were not reviewed in detail, nor has there been a chance to compare procedural details with the proposed general text of CAJ. (See Staff Notes below)

After discussion, the resolution stated in "Action Taken" under Item 25 (above) was adopted.

In reference to Item 26, the Section re-affirmed its approval of the Commission's proposed extension of "vicarious liability" (see 41 S. B. Jnl. p. 743).

Also, it expressed the view that the present statutory and case law on "imputed" liability of the owner should be changed, thus agreeing with Commission's position, in this regard. But the members believe that the Commission's statute should be opposed, and the matter left to a general contribution law plus specific statutory amendments (see under No.85).

After discussion, the resolution stated in "Action Taken" under Item 26 (above) was adopted.

DISCUSSION - NO. 85. Recent statutory changes do not sufficiently solve the problem of the Cooke case. The Conference resolution and the prior CAJ bill were confined to the "husband-wife" situation. The Section favors abrogating imputed negligence, but defers drafting until policy is determined.

STAFF NOTES: The following points as to "form" of the Commission statutes may merit consideration:

First, new Sec. 901 and 902, together with new Sec. 907 (---, trial), make plaintiff's recovery in the main trial binding upon "contribution cross defendants" (when there are split trials). This is a problem now under study by the South under Item 65 - 30. It has not yet been resolved. Under both Law Revision Commission proposals (there being a common procedure), the contribution cross defendant is entitled to a trial by court or jury on the question whether his negligence or wrongful conduct was a proximate cause of the injury (but not as to amount of recovery, contributory negligence or other matters, Item 25, p. 18, 23.

It is said in the Commission Report (p. 18) that under Zaragosa v. Craven, 33 Cal. 2d 315, there is privity of interest between a party-spouse and a non joining spouse, so the latter is bound by the judgment.

But factually the Commission's proposals go beyond this limited situation. In the contribution procedure of Item 25, a spouse when sued by the plaintiff may bring in a third party contribution cross defendant who is a stranger. Commission Report, p. 17 - 18. The latter has no opportunity to offer evidence in the main case on such matters as contributory negligence, damages, etc., when there is a split trial. He is to be bound by the judgment if his negligence is found to have been a proximate cause. Is this due process?

Should there be a right to intervene? The South tentatively rejected this solution.

In Item 26, the problem posed will often not involve inter spousal relationships. It could involve parent and child or owner and stranger.

Second, in new Sec. 908, it is provided that the right to contribution does not impair "any right to contribution that may otherwise exist." It is explained (Commission Report, Item 25, p.24)



that this is intended to refer to present law (CCP 875-880). Should it not be so limited? If, for example, a general contribution law should be passed, it would lead to confusion to have two similar but varying procedures in the law. Also, the broader wording, despite the Commission explanation, could be a "springboard" for a right of contribution declared by the courts only.

Third, new Sec. 906 contains provisions proper in concept, to preserve jurisdiction for service of summons outside the state (by referring to CCP 417). However, both CCP 417 and Sec. 906 may be unconstitutional in some applications, in referring to residence within this state at the time the cause of action arose. See Owens v. Superior Court, 52 Cal. 2d 822, 829. This suggests a severability section in the Act.

Fourth, the question is raised whether there should be a conforming amendment in Veh. Code 17158 (Guest Law) or an adjoining section, to reflect the proposed new procedure, i.e., to make reference to the right of a defendant or contribution cross defendant to seek contribution from one who may not be "directly liable" to the plaintiff "guest" by reason of the Guest Law. It clearly is the purpose of the Commission proposals to modify the Guest Law in the specific situations covered. See Item 25 Report, p. 19; Sec. 901 - "a contribution cross defendant, whether or not liable to the plaintiff, shall be deemed a joint tortfeasor judgment debtor and liable to make contribution if..."; Item 26 Report, p. 26, 27; Sec. 901, Sec. 903 (whether or not liable to the plaintiff..").

Because the Guest Law involves "public policy" no comment is here offered on the obvious fact that the present proposals would leave the Guest Law (and rights of third party wrongdoers) unchanged in some situations, but changed in other situations. Perhaps the distinctions can be justified.

Likewise, it may be noted for information that proposed Civil Code 164.7 gives Legislative acceptance to the majority (5 to 2) opinion in the 1962 case of Klein v. Klein, 58 Cal. 2d 692, holding that one spouse may sue another for a negligent tort.

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It seems probable, on the "CAJ" approach of a general contribution law plus amendments abrogating imputed negligence, that some special provision would have to be made one way or the other, for the Guest Law situation dealt with in the Commission proposals. The ordinary concept of contribution is that one party has paid more than his just share of a "common obligation". This is not true under the Commission draft however, a short section in any general act seemingly would be sufficient, with a cross reference in or near the Guest Law to let the Bench and Bar know of its "modifications" in principle.

(No. Sec. 1/12/67 -  
Agenda 1966-7 -  
Imputed Negligence)

END OF STAFF NOTE

SENATE BILL

No. 245

Introduced by Senator Bradley

February 6, 1967

REFERRED TO COMMITTEE ON JUDICIARY

*An act to amend Sections 163.5 and 171a of, and to add Sections 164.6 and 164.7 to, the Civil Code, and to add a chapter heading immediately preceding Section 875, in Title 11 of Part 2, of, and to add Chapter 2 (commencing with Section 900) to Title 11 of Part 2 of, the Code of Civil Procedure, relating to married persons, including their community property and tort liability.*

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

- 1 SECTION 1. Section 163.5 of the Civil Code is amended to
- 2 read:
- 3 163.5. All damages, special and general, awarded a mar-
- 4 ried person in a civil action for personal injuries, are the sep-
- 5 arate property of such married person. All money or other
- 6 property paid by or on behalf of a married person to his spouse
- 7 in satisfaction of a judgment for damages for personal injuries
- 8 to the spouse or pursuant to an agreement for the settlement

LEGISLATIVE COUNSEL'S DIGEST

SB 245, as introduced, Bradley (Jud.). Married persons.

Married persons.

Amends Secs. 163.5 and 171a, adds Secs. 164.6 and 164.7, Civ.C., adds ch. heading and ch., C.C.P.

Provides that personal injury damages paid to married persons are community property, except where paid by one spouse to other spouse.

Provides where married person is injured by negligence or wrongful act of person other than spouse, contributory negligence of other spouse is no defense in action brought by injured spouse unless defense in case of no marriage.

Establishes rules governing the use of community property to discharge liability of tortfeasor spouse to injured spouse or his liability to make contribution to any joint tortfeasor.

Establishes rules relating to contribution by spouse in case of judgment against third person for tortious injuries on other spouse.

Makes various related changes.

Vote—Majority; Appropriation—No; State Expense—No.

1 *or compromise of a claim for such damages is the separate*  
 2 *property of the injured spouse.*

3 Sec. 2. Section 164.6 is added to the Civil Code, to read:

4 164.6. If a married person is injured by the negligent or  
 5 wrongful act or omission of a person other than his spouse,  
 6 the fact that the negligent or wrongful act or omission of the  
 7 spouse of the injured person was a concurring cause of the  
 8 injury is not a defense in any action brought by the injured  
 9 person to recover damages for such injury except in cases  
 10 where such concurring negligent or wrongful act or omission  
 11 would be a defense if the marriage did not exist.

12 Sec. 3. Section 164.7 is added to the Civil Code, to read:

13 164.7. (a) Where an injury to a married person is caused  
 14 in whole or in part by the negligent or wrongful act or omis-  
 15 sion of his spouse, the community property may not be used  
 16 to discharge the liability of the tortfeasor spouse to the in-  
 17 jured spouse or his liability to make contribution to any joint  
 18 tortfeasor until the separate property of the tortfeasor spouse,  
 19 not exempt from execution, is exhausted.

20 (b) This section does not prevent the use of community  
 21 property to discharge a liability referred to in subdivision (a)  
 22 if the injured spouse gives written consent thereto after the  
 23 occurrence of the injury.

24 (c) This section does not affect the right to indemnity pro-  
 25 vided by any insurance or other contract to discharge the tort-  
 26 feasor spouse's liability, whether or not the consideration given  
 27 for such contract consisted of community property, if such  
 28 contract was entered into prior to the injury.

29 Sec. 4. Section 171a of the Civil Code is amended to read:

30 171a. (a) For civil injuries committed by a married wom-  
 31 an, damages may be recovered from her alone, and her husband  
 32 shall not be liable therefor. A married person is not liable for  
 33 any injury or damage caused by the other spouse except in  
 34 cases where he would be jointly liable with her therefor if the  
 35 marriage did not exist.

36 (b) The liability of a married person for death or injury to  
 37 person or property may be satisfied only from the separate  
 38 property of such married person and the community property  
 39 of which he has the management and control.

40 Sec. 5. A chapter heading is added immediately preceding  
 41 Section 875 of the Code of Civil Procedure, in Title 11 of Part  
 42 2, to read:

43  
 44 CHAPTER 1. CONTRIBUTION AMONG JOINT  
 45 JUDGMENT TORTFEASORS

46  
 47 Sec. 6. Chapter 2 (commencing with Section 900) is added  
 48 to Title 11 of Part 2 of the Code of Civil Procedure, to read:

49  
 50 CHAPTER 2. CONTRIBUTION IN PARTICULAR CASES

51 900. As used in this chapter:  
 52

1 (a) "Plaintiff" means a person who recovers or seeks to re-  
2 cover a money judgment in a tort action for death or injury  
3 to person or property.

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

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

10 901. If a money judgment is rendered against a defendant  
11 in a tort action, a contribution cross-defendant, whether or not  
12 liable to the plaintiff, shall be deemed to be a joint tortfeasor  
13 judgment debtor and liable to make contribution to the defend-  
14 ant in accordance with Title 11 (commencing with Section  
15 875) of Part 2 of the Code of Civil Procedure where:

16 (a) The defendant or the contribution cross-defendant is  
17 the spouse of the plaintiff; and

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

(a) 21 905. A defendant's right to contribution under this chapter  
22 must be claimed, if at all, by cross-complaint in the action  
23 brought by the plaintiff. The defendant may file a cross-com-  
24 plaint for contribution at the same time as his answer or within  
25 100 days after the service of the plaintiff's complaint upon the  
26 defendant, whichever is later. The defendant may file a cross-  
27 complaint thereafter by permission of the court.

for contribution

(b) If the cross-action for contribution is severed from the  
principal action for damages and the contribution cross-defendant is  
not given notice of and an opportunity to participate in the trial of  
the principal action, the judgment against the defendant is not con-  
clusive of any matter determined therein as between the defendant and the  
contribution cross-defendant; but it is not a defense to the claim for  
contribution that the defendant was not guilty of the negligent or  
wrongful act or omission for which he was held liable in the principal  
action.

(c) If the cross-action for contribution is not severed from the  
principal action for damages, or if the contribution cross-defendant is  
given notice of and an opportunity to participate in the trial of the  
principal action, the judgment against the defendant is conclusive of  
the matters determined therein as between the defendant and the contribution  
cross-defendant.

28 906. For the purpose of service under Section 417 of a  
29 cross-complaint for contribution under this chapter, the cause  
30 of action against the contribution cross-defendant is deemed  
31 to have arisen at the same time that the plaintiff's cause of  
32 action arose.

33 907. Each party to the cross-action for contribution under  
34 this chapter has a right to a jury trial on the question whether  
35 a negligent or wrongful act or omission of the contribution  
36 cross-defendant was a proximate cause of the injury or damage  
37 to the plaintiff.

38 908. Failure of a defendant to claim contribution in accord-  
39 ance with this chapter does not impair any right to contribu-  
40 tion that may otherwise exist.

41 909. Subdivision (b) of Section 877 of the Code of Civil  
42 Procedure does not apply to the right to obtain contribution  
43 under this chapter.

44 910. There is no right to contribution under this chapter in  
45 favor of any person who intentionally injured the person killed  
46 or injured or intentionally damaged the property that was  
47 damaged.

48 Sec. 7. This act does not confer or impair any right or de-  
49 fense arising out of any death or injury to person or property  
50 occurring prior to the effective date of this act.

## REVISION OF COMMENTS TO SENATE BILL 245

## (Personal Injury Damages)

Section 901

**Comment.** Sections 900-910 provide a means for requiring a spouse to contribute to any judgment against a third party for tortious injuries, caused by their concurring negligence or wrongdoing, that were inflicted on the other spouse.

Until 1957, the doctrine of imputed contributory negligence forced an injured spouse to bear the entire loss caused by the concurring negligence of the other spouse and a third party tortfeasor. The 1957 enactment of Civil Code Section 163.5 permitted the injured spouse to place the entire tort liability burden upon the third party tortfeasor by suing him alone, thus in practical effect exonerating the other spouse whose actions also contributed to the injury. A fairer way to allocate the burdens of liability while protecting the innocent spouse is to require contribution between the joint tortfeasors. Sections 900-910 provide a means for doing so.

Section 901 establishes the right of the third party tortfeasor to obtain contribution from the plaintiff's spouse. To give a negligent spouse an equivalent right of contribution, Section 901 also permits a defendant spouse to obtain contribution from a third party tortfeasor.

Before the right to contribution can arise, Section 901 requires an adjudication that the negligence or misconduct of the defendant's joint tortfeasor was a proximate cause of the injury. To obtain an adjudication that is personally binding on the joint tortfeasor, the defendant must proceed against him 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 contribution cross-defendant will be determined at the same time by the same judgment. If, however, the defendant's cross-action is severed and tried separately, the contribution cross-defendant will be adjudged to be a joint tortfeasor within the meaning of Section 901 if the judgment against the defendant and the concurring fault of the contribution cross-defendant are shown. Section 901 does not permit a contest of the merits of the judgment against the defendant in the trial of the cross action. Cf. *Zaragoza v. Craven*, 33 Cal.2d 815, 202 P.2d 73 (1949) (nonparty spouse bound by judgment in action for personal injuries brought by other spouse because of privity of interest in the damages sought).~~

to be  
deleted

After the defendant has obtained a judgment establishing that the contribution cross-defendant is a joint tortfeasor, his right to contribution is governed by Code of Civil Procedure Sections 875-880 relating to contribution among joint tortfeasors. Thus, for example, the right of contribution may be enforced only after the defendant 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. The enforcement procedure specified in Code of Civil Procedure Section 878 is applicable.

Under Section 901, the defendant may be entitled to contribution even though the person from whom contribution is sought might not be independently liable for the damage involved. For example, even if the contribution cross-defendant has a good defense based on Vehicle Code Section 17158 (the guest statute) as against the plaintiff, he may still be held liable for contribution under Section 901.

## Section 905

**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, 11, 368 P.2d 535, 539 (1962).

Under Code of Civil Procedure Section 442, a cross-complaint must be filed with the answer unless the court grants permission to file the cross-complaint subsequently. 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. 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. Thus, a plaintiff's failure to file his complaint for damages until just prior to the expiration of the applicable statute of limitations will have no effect on the defendant's right to file a cross-complaint for contribution within the time limits prescribed here.

Subdivisions (b) and (c) describe the effect of the judgment in the principal action upon the determination of the issues in the cross-action for contribution. If the actions are not severed, or if the contribution cross-defendant has notice of and an opportunity to be heard in the principal action, the judgment in the principal action is conclusive upon all matters determined therein such as the amount of damages suffered by the plaintiff, the plaintiff's freedom from contributory fault, etc. But if the principal action and the cross-action are severed and the contribution cross-defendant is not given an opportunity to participate in the trial of the principal action, the judgment is not conclusive of the matters determined therein insofar as the contribution cross-defendant is concerned. It is, however, admissible as evidence of such matters under Evidence Code Section 1301. Thus, the contribution cross-defendant can contest the determination of damages and assert that the plaintiff's damages were lower than found in the judgment. The contribution cross-defendant can also defend on the ground that the plaintiff was contributively negligent so that no liability ever arose. However, the contribution cross-defendant is not permitted to defend on the ground that the original defendant was not guilty of a negligent or wrongful act or omission. It would be unjust to permit the contribution cross-defendant to escape contribution by proving that he, the cross-defendant, was in fact solely responsible for the plaintiff's injury.

Subdivision (b) describes the circumstances under which the judgment in the principal action is not conclusive in the cross-action under this statute. Subdivision (b) is not intended to have any effect on any other body of law requiring a judgment to be given conclusive effect in the light of additional circumstances. For example, if the cross-defendant were the spouse of the plaintiff in the principal action and the damages sought were community property, the privity of interest of the cross-defendant spouse in the damages sought by the plaintiff would require the judgment in the principal action to be given conclusive effect in the cross-action even though the actions were severed. Cf. Zaragosa v. Craven, 33 Cal.2d 315, 202 P.2d 73 (1949).

## SENATE BILL

No. 244

Introduced by Senator Bradley

February 6, 1967

REFERRED TO COMMITTEE ON JUDICIARY

*An act to amend Sections 17150, 17151, 17152, 17153, 17154, 17155, 17156, 17159, 17707, 17708, 17709, 17710, and 17714 of the Vehicle Code, and to add a chapter heading immediately preceding Section 875, in Title 11 of Part 2, 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:*

- 1 SECTION 1. Section 17150 of the Vehicle Code is amended
- 2 to read:
- 3 17150. Every owner of a motor vehicle is liable and respon-
- 4 sible for the death of or injury to person or property resulting
- 5 from ~~negligence~~ a negligent or wrongful act or omission in the

## LEGISLATIVE COUNSEL'S DIGEST

SB 244, as introduced, Bradley (Jud.). Motor vehicle operation liability.

Amends various secs., Veh.C., adds ch. heading and ch., C.C.P.

Bases vicarious liability of vehicle owners, bailees, estate representatives, and signers of minors' drivers' license applications for injury or death resulting from operation of motor vehicle by certain specified persons on negligent or wrongful acts or omissions of such persons, rather than on negligence or wilful misconduct of such persons.

Eliminates imputation for all purposes of civil damages of negligence of such specified persons to vehicle owners, bailees, estate representatives, and the signers of minors' drivers' license applications.

Permits defendant held liable to owner of vehicle, or to some person made statutorily liable for conduct of vehicle's operation, to obtain contribution from operator on showing that injury was caused by operator's concurring negligence or wrongdoing.

Makes various related changes.

Vote—Majority; Appropriation—No; State Expense—No.



1 operation of the motor vehicle, in the business of the owner or  
2 otherwise, by any person using or operating the same with the  
3 permission, express or implied, of the owner; and the negli-  
4 gence of such person shall be imputed to the owner for all pur-  
5 poses of civil damages.

6 Sec. 2. Section 17151 of the Vehicle Code is amended to  
7 read:

8 17151. The liability of an owner, bailee of an owner, or  
9 personal representative of a decedent ~~for imputed negligence~~  
10 imposed by this chapter and not arising through the relation-  
11 ship of principal and agent or master and servant is limited  
12 to the amount of ten thousand dollars (\$10,000) for the death  
13 of or injury to one person in any one accident and, subject to  
14 the limit as to one person, is limited to the amount of twenty  
15 thousand dollars (\$20,000) for the death of or injury to more  
16 than one person in any one accident and is limited to the  
17 amount of five thousand dollars (\$5,000) for damage to prop-  
18 erty of others in any one accident.

19 Sec. 3. Section 17152 of the Vehicle Code is amended to  
20 read:

21 17152. In any action against an owner, bailee of an owner,  
22 or personal representative of a decedent on account of ~~imputed~~  
23 ~~negligence as liability~~ imposed by Sections 17150, 17154, or  
24 ~~17159 for the negligent or wrongful act or omission of the oper-~~  
25 ~~ator of the a vehicle whose negligence is imputed to the owner,~~  
26 ~~bailee of an owner, or personal representative of a decedent,~~  
27 ~~the operator~~ shall be made a party defendant if personal serv-  
28 ice of process can be had upon the operator within this State  
29 ~~made in a manner sufficient to secure personal jurisdiction over~~  
30 ~~the operator~~. Upon recovery of judgment, recourse shall first  
31 be had against the property of the operator so served.

32 Sec. 4. Section 17153 of the Vehicle Code is amended to  
33 read:

34 17153. If there is recovery under this chapter against an  
35 owner, bailee of an owner, or personal representative of a de-  
36 cedent based on ~~imputed negligence~~, the owner, bailee of an  
37 owner, or personal representative of a decedent is subrogated  
38 to all the rights of the person injured or whose property has  
39 been injured and may recover from the operator the total  
40 amount of any judgment and costs recovered against the owner,  
41 bailee of an owner, or personal representative of a decedent.

42 Sec. 5. Section 17154 of the Vehicle Code is amended to  
43 read:

44 17154. If the bailee of an owner with the permission, ex-  
45 press or implied, of the owner permits another to operate the  
46 motor vehicle of the owner, then the bailee and the driver shall  
47 both be deemed operators of the vehicle of the owner within  
48 the meaning of Sections 17152 and 17153.

49 Every bailee of a motor vehicle is liable and responsible for  
50 the death of or injury to person or property resulting from  
51 ~~negligence a negligent or wrongful act or omission~~ in the op-  
52 eration of the motor vehicle, in the business of the bailee or

1 otherwise, by any person using or operating the same with the  
2 permission, express or implied, of the bailee; and the negli-  
3 gence of such person shall be imputed to the bailee for all pur-  
4 poses of civil damages.

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

7 17155. Where two or more persons are injured or killed in  
8 one accident, the owner, bailee of an owner, or personal rep-  
9 resentative of a decedent may settle and pay any bona fide  
10 claims for damages arising out of personal injuries or death,  
11 whether reduced to judgment or not, and the payments shall  
12 diminish to the extent thereof such person's total liability on  
13 account of the accident. Payments aggregating the full sum of  
14 twenty thousand dollars (\$20,000) shall extinguish all liability  
15 of the owner, bailee of an owner, or personal representative of  
16 a decedent for death or personal injury arising out of the acci-  
17 dent which exists by reason of imputed negligence, pursuant  
18 to this chapter, and did not arise through the negligence *negli-*  
19 *gent or wrongful act or omission* of the owner, bailee of an  
20 owner, or personal representative of a decedent nor through  
21 the relationship of principal and agent or master and servant.

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

24 17156. If a motor vehicle is sold under a contract of con-  
25 ditional sale whereby the title to such motor vehicle remains in  
26 the vendor, such vendor or his assignee shall not be deemed  
27 an owner within the provisions of this chapter relating to im-  
28 puted negligence, but the vendee or his assignee shall be  
29 deemed the owner notwithstanding the terms of such contract,  
30 until the vendor or his assignee retake possession of the motor  
31 vehicle. A chattel mortgagee of a motor vehicle out of posses-  
32 sion is not an owner within the provisions of this chapter re-  
33 lating to imputed negligence.

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

36 17159. Every person who is a personal representative of a  
37 decedent who has control or possession of a motor vehicle sub-  
38 ject to administration for the purpose of administration of an  
39 estate is, during the period of such administration, or until  
40 the vehicle has been distributed under order of the court or  
41 he has complied with the requirements of subdivision (a) or  
42 (b) of Section 5602, liable and responsible for the death of or  
43 injury to person or property resulting from negligence a  
44 *negligent or wrongful act or omission* in the operation of the  
45 motor vehicle by any person using or operating the same with  
46 the permission, express or implied, of the personal representa-  
47 tive; and the negligence of such person shall be imputed to  
48 the personal representative for all purposes of civil damages.

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

51 17707. Any civil liability of a minor arising out of his  
52 driving a motor vehicle upon a highway during his minority is

1 hereby imposed upon the person who signed and verified the  
2 application of the minor for a license and the person shall be  
3 jointly and severally liable with the minor for any damages  
4 proximately resulting from the ~~negligence or wilful miscon-~~  
5 ~~duct negligent or wrongful act or omission~~ of the minor in  
6 driving a motor vehicle, except that an employer signing the  
7 application shall be subject to the provisions of this section  
8 only if an unrestricted driver's license has been issued to the  
9 minor pursuant to the employer's written authorization.

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

12 17708. Any ~~civil liability negligence or wilful misconduct~~  
13 of a minor, whether licensed or not under this code, ~~in arising~~  
14 ~~out of his~~ driving a motor vehicle upon a highway with the  
15 express or implied permission of the parents or the person or  
16 guardian having custody of the minor shall be imputed to is  
17 ~~hereby imposed upon~~ the parents, person, or guardian for all  
18 ~~purposes of civil damages~~ and the parents, person, or guardian  
19 shall be jointly and severally liable with the minor for any  
20 damages proximately resulting from the ~~negligence or wilful~~  
21 ~~misconduct negligent or wrongful act or omission of the minor~~  
22 ~~in driving a motor vehicle.~~

23 Sec. 11. Section 17709 of the Vehicle Code is amended to  
24 read:

25 17709. No person, or group of persons collectively, ~~to whom~~  
26 ~~negligence or wilful misconduct is imputed~~ shall incur liability  
27 ~~for a minor's negligent or wrongful act or omission~~ under Sec-  
28 tions 17707 and 17708 in any amount exceeding ten thousand  
29 dollars (\$10,000) for injury to or death of one person as a re-  
30 sult of any one accident or, subject to the limit as to one per-  
31 son, exceeding twenty thousand dollars (\$20,000) for injury  
32 to or death of all persons as a result of any one accident or ex-  
33 ceeding five thousand dollars (\$5,000) for damage to prop-  
34 erty of others as a result of any one accident.

35 Sec. 12. Section 17710 of the Vehicle Code is amended to  
36 read:

37 17710. ~~Negligence or wilful misconduct shall not be im-~~  
38 ~~puted to~~ The person signing a minor's application for a license  
39 ~~is not liable under this chapter for a negligent or wrongful act~~  
40 ~~or omission of the minor committed~~ when the minor is acting  
41 as the agent or servant of any person.

42 Sec. 13. Section 17714 of the Vehicle Code is amended to  
43 read:

44 17714. In the event, in one or more actions, judgment is  
45 rendered against a defendant under this chapter based upon  
46 the ~~negligent or wrongful act or omission of a minor in the~~  
47 ~~operation of a vehicle by a minor~~, and also by reason of such  
48 ~~act or omission negligence~~ rendered against such defendant  
49 under Article 2 (commencing with Section 17150) of Chapter  
50 1 of Division 9, then such judgment or judgments shall not be  
51 cumulative but recovery shall be limited to the amount speci-  
52 fied in Section 17709.

1 SEC. 14. A chapter heading is added immediately preceding  
2 Section 875 of the Code of Civil Procedure, in Title 11 of Part  
3 2, to read:

4  
5 CHAPTER 1. CONTRIBUTION AMONG JOINT  
6 JUDGMENT TORTFEASORS  
7

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

CHAPTER 2. CONTRIBUTION IN  
PARTICULAR CASES

( Note: Technical  
correction

11 900. As used in this chapter:

12 (a) "Plaintiff" means a person who recovers or seeks to re-  
13 cover a money judgment in a tort action for death or injury  
14 to person or property.

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

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

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

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

31 (b) The plaintiff is a person who is liable for the negligent  
32 or wrongful act or omission of the contribution cross-defendant  
33 under Section 17150, 17154, 17159, 17707, or 17708 of the Ve-  
34 hicle Code; and

35 (c) A negligent or wrongful act or omission of the contri-  
36 bution cross-defendant in the operation of the motor vehicle is  
37 adjudged to have been a proximate cause of the death or  
38 injury.

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

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

(a) 1 (b) A negligent or wrongful act or omission of the contri-  
2 bution cross-defendant is adjudged to have been a proximate  
3 cause of the death or injury.

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

for contribution

(b) If the cross-action for contribution is severed from the principal action for damages and the contribution cross-defendant is not given notice of and an opportunity to participate in the trial of the principal action, the judgment against the defendant is not conclusive of any matter determined therein as between the defendant and the contribution cross-defendant; but it

is not a defense to the claim for contribution that the defendant was not guilty of the negligent or wrongful act or omission for which he was held liable in the principal action.

(c) If the cross-action for contribution is not severed from the principal action for damages, or if the contribution cross-defendant is given notice of and an opportunity to participate in the trial of the principal action, the judgment against the defendant is conclusive of the

matters determined therein as between the defendant and the contribution cross-defendant.

11 906. For the purpose of service under Section 417 of a  
12 cross-complaint for contribution under this chapter, the cause  
13 of action against the contribution cross-defendant is deemed to  
14 have arisen at the same time that the plaintiff's cause of action  
15 arose.

16 907. Each party to the cross-action for contribution under  
17 this chapter has a right to a jury trial on the question whether  
18 a negligent or wrongful act or omission of the contribution  
19 cross-defendant was a proximate cause of the injury or damage  
20 to the plaintiff.

21 908. Failure of a defendant to claim contribution in accord-  
22 ance with this chapter does not impair any right to contribu-  
23 tion that may otherwise exist.

24 909. Subdivision (b) of Section 877 of the Code of Civil  
25 Procedure does not apply to the right to obtain contribution  
26 under this chapter.

27 910. There is no right to contribution under this chapter  
28 in favor of any person who intentionally injured the person  
29 killed or injured or intentionally damaged the property that  
30 was damaged.

31 Sec. 16. This act does not confer or impair any right or  
32 defense arising out of any death or injury to person or prop-  
33 erty occurring prior to the effective date of this act.

34 Sec. 17. If Senate Bill No. 245 is also enacted by the Leg-  
35 islatre at its 1967 Regular Session, the chapter heading added  
36 by Section 5 of that bill immediately preceding Section 875  
37 of the Code of Civil Procedure, in Title 11 of Part 2, the head-  
38 ing of Chapter 2 (commencing with Section 900) added to  
39 Title 11 of Part 2 of the Code of Civil Procedure by Section 6  
40 of that bill, and the Sections 900, 905, 906, 907, 908, 909, and  
41 910 of the Code of Civil Procedure included in that Chapter 2  
42 by Section 6 of that bill are hereby repealed.

## Section 902

*Comment.* Sections 900-910 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 Vehicle Code 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, Vehicle Code 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. Sections 900-910 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 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. If, however, the defendant's cross-action against the operator is severed from the plaintiff's action and tried separately, the contribution cross-defendant will be adjudged to be a joint tortfeasor within the meaning of Section 900 if the judgment against the defendant and the concurring fault of the contribution cross-defendant are shown. Section 902 does not permit a contest of the merits of the judgment against the defendant in the trial of the cross-action.~~

to be  
deleted

After the defendant has obtained a judgment establishing that the operator is a joint tortfeasor, his right to contribution is governed by Code of Civil Procedure Sections 875-880 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. The enforcement procedure specified in Code of Civil Procedure Section 878 is applicable.

Under Section 902, the defendant may be 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 to defraud an insurance company. 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.

## Section 905

**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, 11, 368 P.2d 535, 539 (1962).

Under Code of Civil Procedure Section 442, a cross-complaint must be filed with the answer unless the court grants permission to file the cross-complaint subsequently. 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. 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. Thus, a plaintiff's failure to file his complaint for damages until just prior to the expiration of the applicable statute of limitations will have no effect on the defendant's right to file a cross-complaint for contribution within the time limits prescribed here.

Subdivisions (b) and (c) describe the effect of the judgment in the principal action upon the determination of the issues in the cross-action for contribution. If the actions are not severed, or if the contribution cross-defendant has notice of and an opportunity to be heard in the principal action, the judgment in the principal action is conclusive upon all matters determined therein such as the amount of damages suffered by the plaintiff, the plaintiff's freedom from contributory fault, etc. But if the principal action and the cross-action are severed and the contribution cross-defendant is not given an opportunity to participate in the trial of the principal action, the judgment is not conclusive of the matters determined therein insofar as the contribution cross-defendant is concerned. It is, however, admissible as evidence of such matters under Evidence Code Section 1301. Thus, the contribution cross-defendant can contest the determination of damages and assert that the plaintiff's damages were lower than found in the judgment. The contribution cross-defendant can also defend on the ground that the plaintiff was contributively negligent so that no liability ever arose. However, the contribution cross-defendant is not permitted to defend on the ground that the original defendant was not guilty of a negligent or wrongful act or omission. It would be unjust to permit the contribution cross-defendant to escape contribution by proving that he, the cross-defendant, was in fact solely responsible for the plaintiff's injury.

Subdivision (b) describes the circumstances under which the judgment in the principal action is not conclusive in the cross-action under this statute. Subdivision (b) is not intended to have any effect on any other body of law requiring a judgment to be given conclusive effect in the light of additional circumstances. For example, if the cross-defendant were the spouse of the plaintiff in the principal action and the damages sought were community property, the privity of interest of the cross-defendant spouse in the damages sought by the plaintiff would require the judgment in the principal action to be given conclusive effect in the cross-action even though the actions were severed. Cf. Zaragoza v. Craven, 33 Cal.2d 315, 202 P.2d 73 (1949).