THE EXTRAPOLATION OF DEFENDANTS' LIABILITIES UNDER CPLR ARTICLE 16 WHERE THE PLAINTIFF IS CONTRIBUTORILY NEGLIGENT: AN UPDATE TOWARD RESOLVING A PERCEIVED AMBIGUITY OF CPLR 1601

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Imagine the following scenario under New York Civil Practice Law and Rules ("CPLR") Article 16: A plaintiff is attacked and stabbed by two patrons outside of a saloon and is caused to incur injuries. The plaintiff commences an action against the patrons and against the saloon, seeking damages for personal injuries sustained as a result of, inter alia, the saloon's negligence and violation of the Dram Shop Act.[1] At trial, a jury renders a verdict finding the saloon 50% at fault, the patrons 45% at fault, and the plaintiff 5% contributorily negligent. Under CPLR 1601, the saloon's liability would appear on the face of the statute to be capped at its 50% share of total liability assigned to all persons liable, insulating the defendant saloon from joint and several liability for any greater portion of damages.[2] Further imagine the plaintiff arguing that his 5% contributory negligence should not be included within the computations of CPLR 1601, so that upon extrapolating the defendants' collective liability from 95% to 100%, the saloon's proportionate share rises from 50% to 52.63%. Under these circumstances, the plaintiff argues, the defendant saloon does not qualify for the limitations on its liability under CPLR 1601, and the entire judgment could be enforced against the "deep pocket" saloon by virtue of joint and several liability. Should the saloon's liability be capped at its 50% equitable share of liability as assessed by the jury pursuant to the protections afforded by CPLR 1601, or

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[1] N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 2001).

[2] N.Y. C.P.L.R. 1601(1) (McKinney 1997).

alternatively, should the plaintiff's contributory negligence be deducted from the jury's total and render the saloon ineligible for the protective benefits of CPLR 1601 based upon its 52.63% share of extrapolated liability?

The foregoing set of facts requires no imagination. They arose in the case of *Robinson v. June*.[3] The conflicting arguments presented in *Robinson* on behalf of the plaintiff and the defendant saloon exposed, in a practical way that affected the interests of the parties, an arguable shortcoming of CPLR Article 16; namely whether, in performing the calculus of CPLR 1601, the percentage of contributory negligence assessed against the plaintiff is to be included within, or deducted from, the total assigned liability in cases such as *Robinson*, where the application of Article 16 limitations of liability hang in the balance. This question of CPLR 1601, as will be shown below, yields no easy answer.

Before addressing the analysis and determination of the court in *Robinson*, as well as subsequent discussions of the same or similar issues by other courts and by academia, a discussion is in order summarizing CPLR Article 16 and its culmination of an almost forty-year evolution of New York law regarding the state's allocation of fault and losses between parties.

I. THE BACKGROUND OF CPLR ARTICLE 16—THE DIVISION OF NEGLIGENCE AS BETWEEN PLAINTIFFS AND DEFENDANTS

The law in New York traditionally prohibited plaintiffs from recovering civil damages in instances where the plaintiffs were contributorily negligent to any degree.[4] The rule was based upon the legal theory that plaintiffs' negligence constituted an intervening cause breaking the connection between the defendants' negligence and the plaintiffs' injuries.[5] Thus, a plaintiff found contributorily negligent for an occurrence, for as little as 1% of the total culpability, was barred from receiving any monetary award.[6] Uncertainty over a plaintiff's potential contributory negligence was undoubtedly a factor leading to the settlement of cases prior to trial, as plaintiffs might otherwise risk receipt of any monetary compensation for claimed losses absent a solid case of liability in their favor. However onerous the contributory negligence bar may

[3] 637 N.Y.S.2d 1018 (Sup. Ct. 1996).
[4] *See, e.g.*, Fitzpatrick v. Int'l Ry. Co., 169 N.E. 112, 115–16 (N.Y. 1929).
[5] S*ee* Dowd v. The N.Y., Ont. & W. Ry. Co., 63 N.E. 541, 543–44 (N.Y. 1902).
[6] *See* Abbate v. Big V Supermarkets, Inc., 407 N.Y.S.2d 821, 822 (Sup. Ct. 1978).

seem to New York plaintiffs and practitioners today, it remains the rule in four states and the District of Columbia,[7] and in a modified form in twelve states where recovery is barred if the plaintiff's contributory negligence is 50% or more,[8] and in another twenty-one states if the plaintiff's contributory negligence eclipses 50%.[9]

The contributory negligence bar was eliminated in New York in 1975 with the enactment of CPLR Article 14-A, and specifically, CPLR 1411. The statute expressly abolished the rule that plaintiffs' contributory negligence or assumption of risk acts as a complete bar to recovery.[10] The statute was made applicable to any cause of action accruing after September 1, 1975.[11] In the former rule's stead, CPLR 1411 permits plaintiffs to recover damages in amounts that are diminished in the same proportion that their own culpable conduct bears to the culpable conduct of all parties in the action.[12] It remains the law today and is sometimes referred to in decisional authority as the doctrine of pure comparative negligence.[13]

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[7] Alabama (*see* Ala. Power Co. v. Scholz, 215 So. 2d 447, 452 (Ala. 1968)); the District of Columbia (*see* Wingfield v. Peoples Drug Store, Inc., 379 A.2d 685, 687 (D.C. 1977)); Maryland (*see* Bd. of County Comm'rs. v. Bell Atlantic-Md., Inc., 695 A.2d 171, 181 (Md. 1997)); North Carolina (*see* N.C. GEN. STAT. § 99B-4 (2007) (as to products liability, and as of this writing, bills are pending in the North Carolina Legislature to move toward a 50% bar generally); and Virginia (*see* Baskett v. Banks, 45 S.E.2d 173, 177 (Va. 1947)).

[8] Arkansas (*see* ARK. CODE ANN. § 16-64-122 (2005)); Colorado (*see* COLO. REV. STAT. § 13-21-111 (2008)); Georgia (*see* GA. CODE ANN. § 51-11-7 (2000)); Idaho (*see* IDAHO CODE ANN. § 6-801 (2004)); Kansas (see KAN. STAT. ANN. § 60-258a(a) (2005)); Maine (*see* ME. REV. STAT. ANN. tit. 14, § 156 (2003)); Nebraska (*see* NEB. REV. STAT. § 25-21, 185.09 (2008)); North Dakota (*see* N.D. CENT. CODE § 32-03.2-02 (1996)); Oklahoma (*see* OKLA. STAT. tit. 23, § 13 (2008)); Tennessee (*see* McIntyre v. Balentine, 833 S.W.2d 52, 58 (Tenn. 1992)); Utah (*see* UTAH CODE ANN. § 78B-5-818 (2008)); West Virginia (*see* Bradley v. Appalachian Power Co., 256 S.E.2d 879, 890 (W. Va. 1979)).

[9] Connecticut (*see* CONN. GEN. STAT. § 52-572(h) (2005)); Delaware (*see* DEL. CODE ANN. tit. 10, § 8132 (1999)); Hawaii (*see* HAW. REV. STAT. § 663-31 (1993)); Illinois (*see* 735 ILL. COMP. STAT. 5/2-1116 (2003)); Indiana (*see* IND. CODE § 34-51-2-6 (2008)); Iowa (*see* IOWA CODE § 668.3(1) (1998)); Massachusetts (*see* MASS. GEN. LAWS ch. 231, § 85 (2000)); Michigan (*see* MICH. COMP. LAWS § 600.2959 (2004)); Minnesota (*see* MINN. STAT. § 604.01(1) (2000)); Montana (*see* MONT. CODE ANN. § 27-1-702 (2007)); Nevada (*see* NEV. REV. STAT. § 41.141 (2006)); New Hampshire (*see* N.H. REV. STAT. ANN. § 507:7-d (1997)); New Jersey (*see* N.J. STAT. ANN. § 2A:15-5.1 (West 2000); Ohio (*see* OHIO REV. CODE ANN. § 2315.33 (West 2005)); Oregon (*see* OR. REV. STAT. § 31.600 (2007)); Pennsylvania (*see* 42 PA. CONS. STAT. § 7102 (2007)); South Carolina (*see* Nelson v. Concrete Supply Co., 399 S.E.2d 783, 784 (S.C. 1991)); Texas (*see* TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (Vernon 2008)); Vermont (*see* VT. STAT. ANN. tit. 12, § 1036 (2003)); Wisconsin (*see* WIS. STAT. § 895.045(1) (2006)); Wyoming (*see* WYO. STAT. ANN. § 1-1-109(b) (2009)).

[10] *See* N.Y. C.P.L.R. 1411 (McKinney 1997); Arbegast v. Bd. of Educ., 480 N.E.2d 365, 368 (N.Y. 1985); Lamphear v. State, 458 N.Y.S.2d 71, 72 (App. Div. 1982).

[11] *See* N.Y. C.P.L.R. 1413 (McKinney 1997).

[12] *See* N.Y. C.P.L.R. 1411; Robinson v. United States, 330 F. Supp. 2d 261, 289 (W.D.N.Y. 2004); Duffy v. United States, 49 F. Supp. 2d 658, 662 (S.D.N.Y. 1999); Whalen v. Kawasaki Motors Corp., 703 N.E.2d 246, 248 (N.Y. 1998).

[13] *See* Jarrett v. Madifari, 415 N.Y.S.2d 644, 648 (App. Div. 1979); Shanahan v. Orenstein,

Plaintiffs subject to the earlier contributory negligence rule were placed by the law in a precarious "all or nothing" position during trials against single and multiple defendant tortfeasors. The prior law must have challenged the best of trial attorneys to soberly assess the odds of a plaintiff's verdict at trial and to advise clients of those odds. It must have also heightened the pressure upon trial attorneys to be prepared with all necessary witnesses, subpoenas, documents, research, arguments and nuances, lest a single trial misstep affect the likelihood of a finding of contributory negligence that would make or break the case.

New York has been, and continues to be, a state that recognizes the joint and several liability of defendants.[14] In actions involving two or more defendants that are found liable, joint and several liability permits plaintiffs to enforce the entirety of a judgment against one select defendant in the action.[15] Typically, plaintiffs would elect to enforce their entire judgments against the defendant in an action that is most solvent or known to have the "deepest pockets."[16] Thus, in pre-1975 trials where the contributory negligence bar was successfully hurdled and two or more defendants were found liable, plaintiffs were blessed with the unfettered right to enforce their judgments against the defendant of their choice based on the ease with which the judgment could be satisfied against the chosen defendant. Joint and several liability provided plaintiffs with the easiest pot to reach at the end of the trial rainbow. Any loss incurred by the payor defendant, by paying more than its equitable share of fault absent contribution from jointly and severally liable co-defendants, was a loss that public policy placed upon the shoulders of that defendant found liable to at

383 N.Y.S.2d 327, 330–31 (App. Div. 1976); Olmoz v. Wal-Mart Stores, Inc., No. 1538/03, 2006 WL 1061784, at *6 (N.Y. Sup Ct. Apr. 19, 2006); Moon v. Plymouth Rock Corp., 693 N.Y.S.2d 809, 811 (Sup. Ct. 1999); Karczmit v. State, 588 N.Y.S.2d 963, 970 (Ct. Cl. 1992); Koehler v. City of New York, 423 N.Y.S.2d 431, 434 (Sup. Ct. 1979); Meyer v. State, 403 N.Y.S.2d 420, 427 (Ct. Cl. 1978); Yun Jeong Koo v. St. Bernard, 392 N.Y.S.2d 815, 817 (Sup. Ct. 1977); DAVID D. SIEGEL, NEW YORK PRACTICE § 168E (4th ed. 2005).

[14] *See* Ravo v. Rogatnick, 514 N.E.2d 1104, 1106 (N.Y. 1987); Sweet v. Perkins, 90 N.E. 50, 51 (N.Y. 1909).

[15] *See* Rangolan v. County of Nassau, 749 N.E.2d 178, 181 (N.Y. 2001); Sommer v. Fed. Signal Corp., 593 N.E.2d 1365, 1372 (N.Y. 1992); Sexter v. Kimmelman, 844 N.Y.S.2d 183, 188 (App. Div. 2007).

[16] *See* Chianese v. Meier, 774 N.E.2d 722, 724 (N.Y. 2002); *Rangolan*, 749 N.E.2d at 182; Cooney v. Osgood Mach., Inc., 612 N.E.2d 277, 283 (N.Y. 1993); *Sommer*, 593 N.E.2d at 1372; Concepcion v. N.Y. City Health & Hosps. Corp., 729 N.Y.S.2d 478, 480 (App. Div. 2001); Siler v. 146 Montague Assoc., 652 N.Y.S.2d 315, 319 (App. Div. 1997); Marsala v. Weinraub, 617 N.Y.S.2d 809, 813 (App. Div. 1994); Vincent C. Alexander, *Practice Commentaries*, *in* N.Y. C.P.L.R. § 1601:2 (McKinney Supp. 2009).

least some degree, rather than placing the inability to fully collect a judgment upon the shoulders of the innocent plaintiff.[17]

II. THE DIVISION OF NEGLIGENCE AS BETWEEN CO-DEFENDANTS

The enactment of CPLR 1411 was not the only significant change in New York law in the early-to-mid 1970s with respect to the apportionment of fault. Prior to 1972, the common law had allowed any plaintiff to enforce a judgment in its entirety against any named defendant of the plaintiff's choosing subject to the judgment, and in such circumstances, the payor defendant had no redress against a co-tortfeasor for contribution, whether the co-tortfeasor was a party to the action or not.[18] Contribution between co-tortfeasors was prohibited on public policy grounds: that courts should not involve themselves in settling disputes between wrongdoers.[19]

A piece of the common law prohibition against contribution was chipped away in 1928 with the enactment of Civil Practice Act 211-a ("CPA 211-a").[20] The statute permitted contribution claims by one defendant against another defendant where a joint and several judgment had been rendered against both but paid by one.[21] CPA 211-a and its successor statute, the 1962 version of CPLR 1401, contained an important "catch 22," however. As noted by the Court of Appeals in *Putvin v. Buffalo Elec. Co.*, the right of a defendant to obtain contribution from a co-tortfeasor was dependent upon there being, inter alia, a finding of joint and several liability against both tortfeasors in the first instance.[22] If a plaintiff sued some but not all of the potentially-liable tortfeasors, the defendants that had been sued still had no recourse for contribution against the tortfeasors that the plaintiff had not sued, since non-party tortfeasors were not

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[17] *See* Paul F. Kirgis, *Apportioning Tort Damages in New York: A Method to the Madness*, 75 ST. JOHN'S L. REV. 427, 436–37 (2001).

[18] *See Sommer*, 593 N.E.2d at 1372.

[19] *See* D'Ambrosio v. City of New York, 435 N.E.2d 366, 368 (N.Y. 1982); Dole v. Dow Chem. Co., 282 N.E.2d 288, 291 (N.Y. 1972); Gilbert v. Finch, 66 N.E. 133, 134 (N.Y. 1903); Green Bus Lines, Inc. v. Consol. Mut. Ins. Co., 426 N.Y.S.2d 981, 989–90 (App. Div. 1980); *see also* Case Notes, *Negligence—Apportionment of Damages Among Joint Tortfeasors—Right of a Party Actively Negligent to Implead a Co-Wrongdoer*, 41 FORDHAM L. REV. 167, 167 (1972).

[20] *See* 1928 N.Y. Laws 1549 (repealed 1962).

[21] *See id.*; *D'Ambrosio*, 435 N.E.2d at 368; *see also* Isidor M. Tobias, Comment, *Practice: Parties: Contribution Between Joint Tortfeasors: N.Y. C.P.A. § 211-a*, 16 CORNELL L. Q. 246, 246 (1931).

[22] *See* Putvin v. Buffalo Elec. Co., 158 N.E.2d 691, 694 (N.Y. 1959); Winter v. Roadking, Inc., 427 N.Y.S.2d 555, 557 (Civ. Ct. 1980) (quoting N.Y. C.P.L.R. § 1401 (McKinney 1962)).

by definition jointly and severally liable in damages.[23] Recourse for such tortfeasors was limited to claims sounding in indemnification, where a wholly "passive" tortfeasor held vicariously liable for the negligence of an "active" tortfeasor was permitted to seek indemnification from the actively-negligent party.[24] Common law indemnity did not, and does not, involve the apportionment of liability, but is instead an award of "all or nothing."[25] As a result, where co-tortfeasors shared fault for a plaintiff's damages but at least one co-tortfeasor was not sued by the plaintiff, the sued defendant's right to be indemnified for the payment of a judgment proved to be illusory.[26]

The law changed significantly in 1972 with *Dole v. Dow Chemical Co.*[27] In *Dole*, the Court of Appeals recognized the right of a sued tortfeasor to interpose a claim for contribution against any other potential tortfeasor and, if necessary, to join other tortfeasors as parties in the action.[28] Liability between defendant tortfeasors was to be apportioned based upon their relative culpability as to be determined in any action by the trier of fact.[29] A defendant paying more than its equitable share of a judgment under joint and several liability could, under *Dole*, thereby recover the difference from its co-defendants,[30] resulting ultimately in an equitable sharing of losses amongst civil wrongdoers.[31]

The rule set forth in *Dole* was codified in 1974 by the enactment of CPLR Article 14.[32] Specifically, CPLR 1401 recognized

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[23] *See Dole*, 282 N.E.2d at 291; *Putvin*, 158 N.E.2d at 694.

[24] *See D'Ambrosio*, 435 N.E.2d at 369; Bush Terminal Bldgs. Co. v. Luckenbach S.S. Co., 174 N.E.2d 516, 518 (N.Y. 1961); Schwartz v. Merola Bros. Constr. Corp., 48 N.E.2d 299, 303 (N.Y. 1943); Westchester Lighting Co. v. Westchester County Small Estates Corp., 15 N.E.2d 567, 568–69 (N.Y. 1938); Dunn v. Uvalde Asphalt Paving Co., 67 N.E. 439, 439 (N.Y. 1903); Oceanic Steam Navigation Co. v. Compania Transatlantica Espanola, 31 N.E. 987, 989 (N.Y. 1892); *see also* Comments, *Indemnity Among Joint Tort-Feasors in New York: Active and Passive Negligence and Impleader*, 28 FORDHAM L. REV. 782, 782 (1956–60).

[25] Green Bus Lines, Inc. v. Consol. Mut. Ins. Co., 426 N.Y.S.2d 981, 990 (App. Div. 1980).

[26] *Id.*

[27] 282 N.E.2d 288 (N.Y. 1972).

[28] *Id.* at 292; *see also* Bd. of Educ. v. Sargent, 517 N.E.2d 1360, 1363 (N.Y. 1987); *D'Ambrosio*, 435 N.E.2d at 369; Majewski v. Broadalbin-Perth Cent. Sch. Dist., 661 N.Y.S.2d 293, 295 (App. Div. 1997); Note, *The New Right of Relative Contribution: Dole v. Dow Chemical Co.*, 37 ALB. L. REV. 154, 165 (1972).

[29] *Dole*, 282 N.E.2d at 292.

[30] *Id.*; *see also* Cooney v. Osgood Mach., Inc., 612 N.E.2d 277, 283 (N.Y. 1993).

[31] *See* Williams v. Niske, 615 N.E.2d 1003, 1006 (N.Y. 1993).

[32] *See* Mowczan v. Bacon, 703 N.E.2d 242, 244 (N.Y. 1998); *Cooney*, 612 N.E.2d at 283; Sommer v. Fed. Signal Corp., 593 N.E.2d 1365, 1372 (N.Y. 1992); Glaser v. M. Fortunoff of Westbury Corp., 524 N.E.2d 413, 414 (N.Y. 1988); Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp., 523 N.E.2d 803, 804–05 (N.Y. 1988); Guzman v. Haven Plaza Hous. Dev. Fund Co., 509 N.E.2d 51, 54 (N.Y. 1987); Riviello v. Waldron, 391 N.E.2d 1278, 1283

defendants' right to claim contribution from co-tortfeasors for damages arising out of the same injury. CPLR 1402 provides that "equitable shares shall be determined in accordance with the relative culpability of each person liable for contribution," consistent with the holding of *Dole*.[33]

The relatedness of CPLR Articles 14 and 14-A is self-evident. While CPLR Article 14-A modified loss allocation between plaintiffs and defendants by permitting the assessment of contributory negligence against plaintiffs,[34] *Dole* and CPLR Article 14 modified loss allocation between co-defendants by broadly permitting contribution from one to another, to align defendants' payments with their equitable shares of liability.[35] Both articles of the CPLR achieve the same over-arching result of apportioning fault between parties to the extent that their own culpability bears in relation to the total culpability assessed, and of apportioning the financial responsibilities that go with it. The enactment of CPLR Article 14-A relieved plaintiffs of the uncertainty and burden of needing to be free from their own negligence in order to be entitled to recover monetary damages in at least some apportioned amount. Moreover, under *Dole* and CPLR Article 14, plaintiffs continued to enjoy the right, in cases involving multiple defendant tortfeasors, of enforcing the totality of their judgments against the most monied defendant, subject to that defendant's right and burden under CPLR 1401, 1402, and 1403 to seek contribution against co-tortfeasors for any amount paid in excess of the payor defendant's equitable share of liability.[36]

The defendant paying the judgment bears the burden of collecting from other jointly and severally liable co-defendants any amount paid in satisfaction of a judgment that is in excess of the payor defendant's equitable share.[37] Contribution and indemnification work fine when a co-defendant from whom payment is sought is insured for the claim or is sufficiently solvent, but prove problematic when the indemnitor party is absent from the jurisdiction[38] or is possessed of insufficient funds to pay its own

(N.Y. 1979); Rock v. Reed-Prentice Div. of Package Mach. Co., 346 N.E.2d 520, 523 (N.Y. 1976); *Majewski*, 661 N.Y.S.2d at 295.

[33] 1974 N.Y. Laws 1915; *see Dole*, 282 N.E.2d at 292.

[34] *See* N.Y. C.P.L.R. 1411 (McKinney 1997).

[35] *Dole*, 282 N.E.2d at 292.

[36] *See Sommer*, 593 N.E.2d at 1372.

[37] *See* N.Y. C.P.L.R. 1403 (McKinney 1997).

[38] *See* Parshelsky v. Palley, 152 N.Y.S. 351, 352 (App. Div. 1915); Manning v. Campbell, 204 N.Y.S.2d 718, 741 (Sup. Ct. 1960); Jewett v. Maytham, 118 N.Y.S. 635, 637–38 (Sup. Ct.

share of a judgment.[39]

With the benefit of hindsight, 1972, 1974, and 1975 were good years for plaintiffs. To the extent that prior common law rules had been onerous to plaintiffs in denying them monetary damages if contributorily negligent for as little as 1% of the total liability, the law after 1975 remained equally onerous to co-tortfeasor defendants subject to joint and several liability, as defendants found to be at fault for only a minor portion of joint tortfeasors' negligence could still be required to satisfy 100% of the judgments to which plaintiffs were entitled, and subject only to the payors' uncertain right to receive post-payment contribution from other co-tortfeasors. Put another way, the effect of *Dole* and CPLR Articles 14 and 14-A was to eliminate circumstances that were potentially unfair to plaintiffs, but did nothing to alleviate all of the potentially unjust results to co-tortfeasor defendants that continued unrestricted under common law joint and several liability.

III. THE PARTICULARS OF CPLR ARTICLE 16

CPLR Article 16 was the device that nudged the loss allocation pendulum to a middle ground between plaintiffs and defendants. The Article was enacted in its original form in 1986.[40] *Dole* and CPLR Article 14 remained unchallenged, to the extent that plaintiffs could still recover monetary damages from defendants even if partially at fault. The purpose and intent of CPLR Article 16 was to reign in unjust circumstances where "minor" deep-pocket defendants were required to satisfy entire judgments, including the portions of those judgments attributable to the fault of "major" co-defendants.[41] CPLR Article 16 is in derogation of the common law rule of unrestricted joint and several liability.[42]

CPLR 1601(1) reads, in pertinent part, that when a:

> claim for personal injury is determined in favor of a claimant in an action involving two or more tortfeasors jointly liable or

1909).

[39] *See* Easterly v. Barber, 66 N.Y. 433, 439 (1876); *In re* N.Y. City Asbestos Litig., 572 N.Y.S.2d 1006, 1010 (Sup. Ct. 1991).

[40] *See* 1986 N.Y. Laws 2841.

[41] *See* Chianese v. Meier, 774 N.E.2d 722, 724 (N.Y. 2002); Rangolan v. County of Nassau, 749 N.E.2d 178, 181–82 (N.Y. 2001); Boyd v. Trent, 746 N.Y.S.2d 191, 193–94 (App. Div. 2002); Concepcion v. N.Y. City Health & Hosps. Corp., 729 N.Y.S.2d 478, 480 (App. Div. 2001); Siler v. 146 Montague Assocs., 652 N.Y.S.2d 315, 320 (App. Div. 1997); Robinson v. June, 637 N.Y.S.2d 1018, 1022 (Sup. Ct. 1996).

[42] *See* N.Y. STAT. LAW § 301(a) (McKinney 1971); *Siler*, 652 N.Y.S.2d at 320; *Robinson*, 637 N.Y.S.2d at 1022.

> in a claim against the state and the liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant to the claimant for non-economic loss shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss . . . .[43]

Accordingly, while a joint tortfeasor jointly and severally liable for more than 50% of total liability may still be required to pay the entirety of a judgment, the joint tortfeasor that is assessed 50% or less of the total liability may only be required to pay damages toward satisfaction of a judgment for non-economic loss to the extent of its own equitable share.[44] The selection by the legislature of 50% as a statutory dividing line is as good as any. The "major" joint tortfeasors may still be required to pay judgments in full, subject to the payor's continuing right of contribution.[45] The "minor" joint tortfeasors are the ones protected by CPLR 1601.

Article 16 contains several qualifications and exceptions, however. One qualification is that the limitations of liability under CPLR Article 16 apply only to the portion of judgments that compensate plaintiffs for non-economic loss,[46] such as past and future pain and suffering, the loss of enjoyment of life, mental anguish, and loss of consortium.[47] Conversely, the limitations under CPLR Article 16 do not apply to economic loss such as past and future hospital, medical, therapeutic or pharmaceutical expenses, and past and future lost earnings.[48] As a further qualification to the statute, the liability of any tortfeasor over whom jurisdiction cannot be obtained despite plaintiffs' due diligence is not factored into the equation of CPLR 1601(1).[49] Under the

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[43] N.Y. C.P.L.R. 1601(1) (McKinney 1997).

[44] *See generally* Bifaro v. Rockwell Automation, 269 F. Supp. 2d 143, 146 (W.D.N.Y. 2003); Zollinger v. Owens-Brockway Glass Container, Inc., 233 F. Supp. 2d 349, 359 (N.D.N.Y. 2002); Ortiz v. N.Y. City Hous. Auth., 22 F. Supp. 2d 15, 27 (E.D.N.Y. 1998), *aff'd*, 198 F.3d 234 (2d Cir. 1999); *Rangolan*, 749 N.E.2d at 182; Morales v. County of Nassau, 724 N.E.2d 756, 758 (N.Y. 1999); Cole v. Mandell Food Stores, Inc., 662 N.Y.S.2d 89, 90 (App. Div. 1997), *aff'd*, 710 N.E.2d 244, 244–245 (N.Y. 1999).

[45] *See* N.Y. C.P.L.R. 1401 (McKinney 1997).

[46] *See* N.Y. C.P.L.R. 1601(1).

[47] *See* Sommer v. Fed. Signal Corp., 593 N.E.2d 1365, 1372 n.6 (N.Y. 1992); Marsala v. Weinraub, 617 N.Y.S.2d 809, 811 (App. Div. 1994); Detrinca v. De Fillippo, 568 N.Y.S.2d 586, 587 (App. Div. 1991); Chang v. Stile, 552 N.Y.S.2d 830, 830 (Sup. Ct. 1990).

[48] *See* N.Y. INS. LAW § 5102(a)(1)–(2) (McKinney 2009); N.Y. C.P.L.R. 4545(c) (McKinney 2007).

[49] N.Y. C.P.L.R. 1601(1).

exceptions to CPLR Article 16, the limitations of liability do not apply at all to inter alia claims sounding in contractual indemnification,[50] intentional torts,[51] negligence in the "use, operation, or ownership" of motor vehicles,[52] recklessness,[53] products liability where the manufacturer of the product subject to strict liability is not a party to the action despite the plaintiffs' due diligence in attempting to obtain personal jurisdiction over it,[54] and defined environmental and public health hazards.[55]

The operative language of CPLR 1601(1), which is the subject of this article, is that a defendant's liability "for non-economic loss shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss."[56] Is the phrase "each person causing or contributing to the total liability"[57] intended to apply to all parties, including contributorily negligent plaintiffs, or only to liable defendants that are otherwise jointly and severally responsible for the judgment? With this question, we return to the decision of the Supreme Court, Tompkins County, in *Robinson v. June*.

IV. *ROBINSON V. JUNE*

In *Robinson*, two saloon patrons, defendants June and Norman, were found liable for civil assault and battery of the plaintiff while acting in concert.[58] The liability of the defendant, Via Mora, Inc.,

[50] *See* N.Y. C.P.L.R. 1602(1)(a) (McKinney 1997).

[51] *See* N.Y. C.P.L.R. 1602(5) (McKinney 1997); *see generally* Chianese v. Meier, 774 N.E.2d 722, 725 (N.Y. 2002).

[52] *See* N.Y. C.P.L.R. 1602(6) (McKinney 1997); *compare* Boyce v. Vazquez, 671 N.Y.S.2d 815, 818 (App. Div. 1998) (refusing to limit liability since there was a triable issue of fact as to whether the vehicle in question was in "use" within the meaning of the statute), *with* Massey v. City of New York, 589 N.Y.S.2d 145, 147 (Sup. Ct. 1992) (finding that a school crossing guard was eligible for limitation of liability since the crossing guard did not "use" or "operate" any motor vehicle).

[53] *See* N.Y. C.P.L.R. 1602(7) (McKinney 1997); Spatz v. Riverdale Greentree Rest., Inc., 682 N.Y.S.2d 370, 371 (App. Div. 1998); Detrinca v. De Fillippo, 568 N.Y.S.2d 586, 588 (App. Div. 1991).

[54] *See* N.Y. C.P.L.R. 1602(10) (McKinney 1997); *In re* N.Y. City Asbestos Litig., 750 N.Y.S.2d 469, 479 (Sup. Ct. 2002), *aff'd*, 775 N.Y.S.2d 520 (App. Div. 2004).

[55] *See* N.Y. C.P.L.R. 1602(9) (McKinney 1997). Other exceptions to the limitations of liability under CPLR Article 16 are set forth in CPLR 1602. *See* N.Y. C.P.L.R. 1602(1)(b), (2)–(4), (8), (11), (12) (McKinney 1997).

[56] N.Y. C.P.L.R. 1601(1) (McKinney 1997).

[57] *Id.*

[58] *See* Robinson v. June, 637 N.Y.S.2d 1018, 1020 (Sup. Ct. 1996).

d/b/a Poor Richard's Saloon ("the saloon"),[59] was based upon negligence and a violation of New York's Dram Shop Act.[60] As noted above, the jury found the saloon 50% liable, the individual defendants 45% liable without apportioning liability between them, and the plaintiff 5% contributorily negligent.[61]

The Supreme Court noted as a threshold matter that even though the individual defendants and the saloon were found liable under different legal theories, their liability was nevertheless "joint."[62] CPLR 1401 permits contribution between defendants liable on different theories so long as their conduct is proximately related to the same injuries, as here.[63] Accordingly, the defendants were correctly deemed to be joint tortfeasors for purposes of CPLR 1601(1). The Supreme Court also noted that inasmuch as defendants June and Norman were liable to the plaintiff for intentional torts, the limitations of liability were not available to them under CPLR Article 16.[64]

The court then addressed the issue in *Robinson* of whether to deduct the plaintiff's 5% contributory negligence from the calculus of CPLR 1601, raise the defendants' collective negligence from 95% to 100%, and extrapolate the saloon's percentage of negligence from amongst all defendants from 50% to 52.63%.[65] It determined that the extrapolation should occur for three reasons.[66]

First, the court noted that CPLR 1603 places the burden upon the party asserting the benefit of CPLR 16 limitations of liability to prove by a preponderance of the evidence its equitable share of total liability.[67] In doing so, the court ignored the equation of CPLR 1603 that places the same burden of proof upon parties asserting that one or more of the exceptions to the statute applies.[68] On this point, *Robinson's* analysis is not particularly persuasive. The jury's assessment that the saloon was 50% liable for the plaintiff's damages was already known and not contested, and jury

[59] *Id.*

[60] *Id.*

[61] *Id.* at 1022.

[62] *Id.* at 1021.

[63] *Id.* (citing Bd. of Educ. v. Sargent, 517 N.E.2d 1360, 1363 (N.Y. 1987) and Cresswell v. Warden, 559 N.Y.S.2d 361, 362 (App. Div. 1990)).

[64] *See* N.Y. C.P.L.R. 1602(5), (11) (McKinney 1997); *Robinson*, 637 N.Y.S.2d at 1021; *see generally* Chianese v. Meier, 774 N.E.2d 722, 726 (N.Y. 2002).

[65] *Robinson*, 637 N.Y.S.2d at 1022.

[66] *Id.*

[67] *See* N.Y. C.P.L.R. 1603 (McKinney 1997); *Robinson*, 637 N.Y.S.2d at 1022.

[68] *See* N.Y. C.P.L.R. 1603; Miller v. Staples the Office Superstore E., Inc., 860 N.Y.S.2d 51, 54 (App. Div. 2008).

assessments will not be contested for Article 16 purposes in any action where a verdict has already been rendered by the trier of fact. The burden of proof language contained in CPLR 1603 appears to have more practicable applicability to pre-trial pleading requirements intended to place adverse parties on notice of Article 16 claims and exceptions, and to the adequacy of trial proof that follows.[69]

Second though, the court noted that Article 16 was enacted in derogation of common law, and should therefore be narrowly construed.[70] This reasoning appears to provide sound support for the court's conclusion in favor of extrapolation. Joint and several liability of co-tortfeasors remains the norm underlying New York law on loss allocation. Article 16, with its various qualifications and permutations, is an exception to the common law norm. Thus, construing Article 16 strictly,[71] as we must, an interpretation of the statute's meaning regarding the debatable treatment of a plaintiff's contributory negligence militates in favor of the common law rule that would not limit liability of a defendant found 50% at fault for damages.

The third and most important reason cited by the court in *Robinson* in favor of extrapolation involves basic constructs of statutory interpretation. Statutes are to be interpreted according to the meaning expressed in their plain language, since the statutory text is the clearest indicator of legislative intent.[72] When a statute is ambiguous, courts will examine the legislative history underlying the statute for evidence of the legislature's intent.[73] In *Robinson*, the court examined the purpose of Article 16, which was to prevent injustice when a party liable for a minor degree of fault would incur

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[69] *E.g.*, Cole v. Mandell Food Stores, Inc., 710 N.E.2d 244, 246 (N.Y. 1999); *Miller*, 860 N.Y.S.2d at 54; Rafaelova v. City of New York, 810 N.Y.S.2d 123, 123 (App. Div. 2006).

[70] *See Robinson*, 637 N.Y.S.2d at 1022; *see also* N.Y. STAT. LAW § 301(a) (McKinney 1971); Siler v. 146 Montague Assocs., 652 N.Y.S.2d 315, 320 (App. Div. 1997); David D. Siegel, *Under Article 16, Defendants' Share of Fault are Extrapolated to 100% After Plaintiff's Contributory Share Comes Off the Top*, 40 SIEGEL PRAC. REV. 1, 1 (Jan. 1996).

[71] *See* N.Y. STAT. LAW § 301(a).

[72] N.Y. STAT. LAW § 94 (McKinney 1971); *see also* Jones v. Bill, 890 N.E.2d 884, 887 (N.Y. 2008); Bluebird Partners v. First Fid. Bank, 767 N.E.2d 672, 675 (N.Y. 2002); Yong-Myun Rho v. Ambach, 546 N.E.2d 188, 190 (N.Y. 1989); Sutka v. Conners, 538 N.E.2d 1012, 1015 (N.Y. 1989); Janssen v. Incorporated Vill. of Rockville Ctr., 869 N.Y.S.2d 572, 581–82 (App. Div. 2008) (citing Ragucci v. Prof'l Constr. Servs., 803 N.Y.S.2d 139, 142 (App. Div. 2005)).

[73] *See* N.Y. STAT. LAW § 94; Action Elec. Contractors Co., v. Goldin, 474 N.E.2d 601, 604 (N.Y. 1984); *see also* Ferres v. City of New Rochelle, 502 N.E.2d 972, 975 (N.Y. 1986); Unif. Firefighters Ass'n, Local 94 v. Beekman, 420 N.E.2d 938, 941 (N.Y. 1981) (quoting N.Y. State Bankers Ass'n v. Albright, 343 N.E.2d 735, 737 (N.Y. 1975)); Tutunjian v. Conroy, 865 N.Y.S.2d 768, 770 (App. Div. 2008); Kearns v. Piatt, 716 N.Y.S.2d 418, 419 (App. Div. 2000).

a major financial punishment by virtue of joint and several liability.[74] Applying that purpose to the facts of the case, the court reasoned that the saloon's 50% share of liability did not represent a "minor" degree of fault, and that accordingly, the saloon did not qualify for the intended protections of CPLR Article 16 upon factoring in the plaintiff's contributory negligence.[75]

V. HAVE APPELLATE COURTS SPOKEN ON THE ISSUE?

Robinson was never appealed to the Appellate Division, Third Department. Indeed, from the enactment of Article 16 in 1986 until May 15, 2007, none of the four appellate divisions had occasion to address whether the computation of Article 16 limitations should include or exclude a plaintiff's percentage of contributory negligence. This was probably so because in many cases the issue does not make a mathematical difference to the parties' obligations, and if cases have arisen where a difference is noted, those cases have not for whatever reason percolated to the appellate divisions for specific consideration of the issue.

The issue appears to have been addressed for the first time on appeal on May 15, 2007 by the First Department in *Risko v. Alliance Builders Corp*.[76] *Risko* was a personal injury action wherein the plaintiff was knocked from a scaffold when a vehicle owned and operated by defendant Gary Peters ("Peters") contacted nearby utility wires, at a project site where defendant Alliance Builders Corp. ("Alliance") was the general contractor.[77] Alliance was found statutorily liable to the plaintiff pursuant to the absolute liability provisions of Labor Law § 240(1).[78] Alliance then reached a settlement with the plaintiff.[79] The jury, in considering the extent to which Alliance's liability should pass through to the active co-defendant Peters, apportioned the liability 10% to Peters and 90%

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[74] *See Robinson*, 637 N.Y.S.2d at 1022; *see also* Rangolan v. County of Nassau, 749 N.E.2d 178, 182 (N.Y. 2001); *Siler*, 652 N.Y.S.2d at 320.

[75] *See Robinson*, 637 N.Y.S.2d at 1022; *see also Rangolan*, 749 N.E.2d at 182; *Siler*, 652 N.Y.S.2d at 321.

[76] 835 N.Y.S.2d 551, 552 (App. Div. 2007).

[77] *See* Brief for Defendant-Appellant at 2, Risko v. Alliance Builders Corp., 835 N.Y.S.2d 551 (App. Div. 2007) (No. 1051), 2007 WL 2983469; Brief for Defendant-Respondent at 3, *Risko*, 835 N.Y.S.2d 551 (No. 1051), 2007 WL 2983470.

[78] *Risko*, 835 N.Y.S.2d at 552; Brief for Defendant-Appellant, *supra* note 77, at 2; Brief for Defendant-Respondent, *supra* note 77, at 3.

[79] *Risko*, 835 N.Y.S.2d at 552; Brief for Defendant-Appellant, *supra* note 77, at 2; Brief for Defendant-Respondent, *supra* note 77, at 1.

to the plaintiff.[80] Alliance sought common law indemnity from Peters for 100% of its settlement with the plaintiff.[81] At first blush, Alliance might have been entitled to contribution from Peters for only 10% of its settlement amount, as Peters' percentage of fault fell within the cap of CPLR 1601.[82] In applying Article 16 limitations of liability for non-economic loss, however, the First Department determined that the plaintiff is not a "person liable" under CPLR 1601(1).[83] By eliminating the plaintiff's 90% contributory negligence from the calculus of Alliance's claim against Peters, Peters' liability grew from the 10% as assessed by the jury to 100% as determined by the court, entitling Alliance to common law indemnification from Peters for the full amount of its settlement with the plaintiff.[84]

Interestingly, CPLR 1601 was barely mentioned by Alliance in the respondent's brief[85] and was not mentioned at all by Peters in either his appellate brief or reply brief.[86] While the First Department did not directly address the question of whether the plaintiff's percentage of common law contributory fault should be deducted from the arithmetic of CPLR Article 16, its conclusion that the plaintiff was not a "person liable" under the statute has the same effect as excluding the plaintiff's fault from the statutory equation.[87] The First Department adopted reasoning consistent with that of *Robinson v. June*, without expressly saying so, by eliminating the plaintiff's negligence from the calculated limitations of CPLR Article 16 and by extrapolating the balance of Peters' liability, as determined by the jury, to 100%.[88]

While *Risko* may be viewed as persuasive, recent authority, no parallel analysis has been undertaken by the Appellate Divisions in the Second, Third, or Fourth Departments, nor has the issue been directly confronted by the Court of Appeals.

There is one curious instance, however, where the Court of Appeals may have indirectly addressed the issue in a way which

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[80] *Risko*, 835 N.Y.S.2d at 552.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *See* Brief for Defendant-Respondent, *supra* note 77.

[86] *See* Brief of Defendant-Appellant, *supra* note 77; Reply Brief for Defendant-Appellant, *Risko*, 835 N.Y.S.2d 551 (No. 1051), 2007 WL 2983471.

[87] *See Risko*, 835 N.Y.S.2d at 552.

[88] *See id.*; *see generally* Robinson v. June, 637 N.Y.S.2d 1018, 1022 (Sup. Ct. 1996) (extrapolating salon liability to 100%).

may predict how it should resolve at the appellate level if ever squarely addressed. Credit goes to Professor David D. Siegel, who noted in his Practice Review the potential significance of *Frank v. Meadowlakes Development Corp*.[89]

Frank addressed the issue of whether Article 16 limitations on liability apply in third party actions sounding in common law indemnification.[90] The plaintiff was injured in an accident and sued two defendants, property owner Meadowlakes Development Corp. ("Meadowlakes") and general contractor D.J.H. Enterprises, Inc. ("DJH") for their alleged negligence and violations of Labor Law 240(1).[91] Meadowlakes, in turn, commenced a third party action against the plaintiff's employer, Home Insulation and Supply, Inc. ("Home").[92] The accident occurred on April 12, 1991 prior to the enactment of Worker's Compensation Law sections 11 and 29(6), when plaintiffs' employers could typically be impleaded in actions without limitation.[93] A jury assessed the plaintiff 10% of the total fault, DJH 80%, and Home 10%,[94] but the trial court held both DJH and Meadowlakes liable to the plaintiff under the absolute liability provisions of Labor Law 240(1).[95] Meadowlakes settled the plaintiff's claims for $1,400,000 and, based on the jury's verdict that it was not at fault for the accident but was only liable by virtue of the Labor Law, sought indemnification of its settlement payment from Home.[96] The Court of Appeals held that while CPLR 1602(2) protects a party's right to seek indemnification from another party, the amount of indemnity is limited to the indemnitor's equitable share of total liability when that share is 50% or less.[97] Thus, under CPLR Article 16, since Home's liability was 10% of the total fault assessed by the jury, Meadowlakes could recover in the third party action only that same 10% toward its settlement amount with the

[89] 849 N.E.2d 938 (N.Y. 2006); *see also* David D. Siegel, *How Does Plaintiff's Share of Fault Figure in Determining Tortfeasors' Liabilities Under C.P.L.R. Article 16?*, 174 SIEGEL'S PRAC. REV. 1, 1 (June 2006).

[90] *Frank*, 849 N.E.2d at 939.

[91] *Id.*

[92] *Id.*

[93] *See, e.g.*, Cusick v. Lutheran Med. Ctr., 481 N.Y.S.2d 122, 123 (App. Div. 1984). The Omnibus Worker's Compensation Reform Act changed the law in 1996, providing inter alia that the receipt of worker's compensation benefits was an injured employee's exclusive remedy foreclosing any negligence action against the employer. *See* Dupkanicova v. James, 793 N.Y.S.2d 512, 513 (App. Div. 2005)).

[94] *See Frank*, 849 N.E.2d at 939.

[95] *Id.*

[96] *Id.* at 939–40.

[97] *Id.* at 940.

plaintiff.[98]

The curious language in *Frank* appears at the end of its last substantive paragraph, as highlighted by Professor Siegel.[99] The Court of Appeals calculated Home's indemnification by excluding the plaintiff's 10% negligence, and therefore deemed Home's fault as one-ninth of the non-economic loss encompassed within the settlement rather than one-tenth.[100] The calculation by the Court of Appeals is noteworthy to the extent that it appears to have extrapolated the defendants' fault within the scope of the indemnification claim from 90% of the settlement proceeds to 100%. Home's one-ninth share payable in the third-party action was necessarily greater than a one-tenth share would have been.

Does *Frank* foretell how the Court of Appeals would resolve the broader extrapolation issue of CPLR 1601(1), as in *Robinson v. June*? We should be careful not to read too much into the language of Frank. Upon close examination, *Frank* did not delete the plaintiff's 10% fault from the calculus of CPLR Article 16 in a way that addresses whether such fault is to be included or excluded from routine calculations under CPLR 1601(1). Rather, the Court of Appeals recognized that Meadowlakes' claim against Home was limited ipso facto to the remaining 90% of liability that was at issue solely in the third-party action. The court excluded the plaintiff's 10% fault merely because the plaintiff could not be included within the universe of disputed indemnitees in the third-party action.[101] The Court of Appeals did not quite reach or address the broader question discussed in *Robinson v. June* and *Risko v. Alliance Builders Corp*. In sum, the Court of Appeals does not appear to have directly spoken on the issue posed in *Robinson v. June* and *Risko v. Alliance Builders Corp.*, by dicta or otherwise.

VI. VIEWS FROM ACADEMIA

Justice Relihan of the Supreme Court, Tompkins County, and a panel of justices at the Appellate Division, First Department, were not the only ones to interpret the language of CPLR 1601(1) as warranting the deletion of the plaintiffs' contributory negligence

[98] *Id.* at 942.

[99] Siegel, *supra* note 89, at 1.

[100] *Frank*, 849 N.E.2d at 942.

[101] *See id.*; *see also* Risko v. Alliance Builders Corp., 835 N.Y.S.2d 551, 552 (App. Div. 2007); *cf.* McCarthy v. 390 Tower Assocs., LLC, 820 N.Y.S.2d 798, 798 (App. Div. 2006) (limiting indemnification award to defendant's share of fault).

and an extrapolation of the defendants' remaining fault. Professor Siegel of Albany Law School tilts in favor of excluding plaintiffs' contributory negligence from the calculations of CPLR 1601, finding that while "[t]here are arguable points on both sides" of the issue, exclusion of plaintiffs' fault is "[p]robably more consistent with the overall structure of Article 16."[102]

Professor Paul F. Kirgis of St. John's University Law School also appears to favor a deletion of plaintiffs' contributory negligence from CPLR 1601(1) calculations and an extrapolation of the defendants' equitable shares of remaining fault.[103] Professor Kirgis discussed the competing interactions between CPLR Article 14 and CPLR Article 16, the former permitting claims for contribution between co-tortfeasors to the extent of a party's equitable share of liability, and the latter placing a limit upon such payments where the equitable share is 50% or less.[104] Professor Kirgis summarized the reasoning set forth in *Robinson v. June*, that extrapolation serves the important purpose of striking a balance between and among the relatively liable parties, allowing contribution by a party of its equitable share of liability except in instances where a party with a minor share of fault would suffer the injustice of paying a far greater share by virtue of unrestricted common law joint and several obligations.[105] He described the rationale of *Robinson v. June* as "a strong one."[106]

Thus, the weight of judicial and academic opinion appears to unanimously favor an extrapolative interpretation of CPLR 1601(1). Is that opinion correct?

The short answer is yes.

The starting point for courts in interpreting a statute is the plain language used by the legislature, as it is the clearest indicator of statutory intent.[107] CPLR 1601(1) provides that the equitable shares of fault subject to the statutory limitation, which must be 50% or less, be measured against "the total liability assigned to all persons liable."[108] The statute also provides that a defendant's equitable share be determined by examining "the relative culpability of each person causing or contributing to the total

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[102] SIEGEL, *supra* note 13, at § 168B; Siegel, *supra* note 89, at 1.

[103] *See* Kirgis, *supra* note 17, at 436.

[104] *Compare* N.Y. C.P.L.R. 1401–02 (McKinney 1997), *with* N.Y. C.P.L.R. 1601(1) (McKinney 1997).

[105] *See* Kirgis, *supra* note 17, at 436.

[106] *Id.*

[107] *See supra* note 72 and accompanying text.

[108] N.Y. C.P.L.R. 1601(1).

liability for non-economic loss."[109] While the terms "all persons" and "each person" assigned fault might appear, at first glance, to include plaintiffs who are found contributorily negligent, the context of those terms expressly pertains to persons that are found "liable."[110]

Plaintiffs are not "liable" to themselves. Liability connotes the obligation of one party bound by law and justice to do something which may be enforced by another party.[111] Indeed, in Pattern Jury Instruction ("PJI") 2:36—the standard instruction given to New York State juries on the apportionment of fault[112]—juries are instructed to consider whether a plaintiff was "negligent" and whether such negligence contributed to an occurrence, and then apportion "fault" between the negligent parties.[113] PJI 2:36 addresses mere negligence and fault from which the liability determination is later fully and finally set forth by the court in the judgment that follows.

Accordingly, while plaintiffs may be found by a trier of fact to be contributorily negligent, their contributory negligence does not constitute an enforceable "liability" obligation to themselves. "CPLR article 16 is in derogation of the common law and thus must be strictly construed."[114] A strict construction of the terms used in CPLR 1601(1) suggests that the "persons" whose fault matters to the statute are those who are held "liable," which arguably excludes consideration of the plaintiffs' own shares of contributory fault.

VII. WHERE WE GO FROM HERE

It is only a matter of time before the issue of extrapolation is addressed by the Appellate Divisions in the Second, Third, and Fourth Departments and, perhaps eventually, by the Court of Appeals. The Court of Appeals' decision in *Frank v. Meadowlakes Development Corp.* falls short of that mark.

The issue can be fully and finally resolved one of two ways. The first way is for further development of the issue through an appeal that reaches the Court of Appeals, which would provide the added benefit of being binding throughout all judicial departments of the state.

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[109] *Id.*

[110] *Id.*

[111] *See, e.g.*, New Howard Mfg. Co., v. Cohen, 202 N.Y.S. 449, 451 (App. Div. 1924).

[112] *See* Luppino v. Busher, 500 N.Y.S.2d 557, 558 (App. Div. 1986).

[113] NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL § 2:36 (2008).

[114] Siler v. 146 Montague Assocs., 652 N.Y.S.2d 315, 320 (App. Div. 1997); *see* N.Y. STAT. LAW § 301(a) (McKinney 1971); *see also* Siegel, *supra* note 70, at 1.

The second way, which is highly unlikely, is a statutory amendment by the New York State Legislature that better clarifies the language of CPLR 1601(1). Given the legislative history, purpose, and intent of CPLR Article 16, the reasoning set forth in both *Robinson v. June* and *Risko v. Alliance Builders Corp.*—that plaintiffs' contributory negligence not be factored into determining the applicability of limitations on liability, consistent with the strict construction warranted of statutes that are in derogation of common law—is logical and sound. Legislatures, by their nature, often act reflexively, not pro-actively. It is difficult to conceive of any interest group pushing at this time for an *in futuro* clarification of CPLR 1601(1). Absent legislative action, further interpretive clarification of the issue by the courts, as predicted here, is the far more likely scenario.