FOR PUBLICATION

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

MASARU FURUOKA, a.k.a. LEE KONGOK, Plaintiff, v. DAI-ICHI HOTEL (SAIPAN), INC.; JAPAN TRAVEL BUREAU; TOKIO MARINE INSURANCE COMPANY; and DOES 1-5, Defendants.	**Civil Action No. 96-0978** **ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE DEFENDANT JTB'S AFFIRMATIVE DEFENSE OF CONTRIBUTORY NEGLIGENCE**

I. INTRODUCTION

THIS MATTER came before the Court on June 23, 2003, in Courtroom 202, at 9:00 a.m. on Plaintiff's Motion to Strike Defendant JTB's Affirmative Defense of Contributory Negligence (Apr. 21, 2003). William M. Fitzgerald, Esq. appeared on behalf of Masaru Furuoka ("Plaintiff"). John D. Osborn, Esq. appeared on behalf of Defendant Japan Travel Bureau ("JTB"). The Court, having reviewed the briefs, and having heard and considered the arguments of counsel, now renders its written decision.

II. FACTS

On August 30, 1996, Plaintiff filed a complaint for negligence for injuries resulting from diving into Dai Ichi Hotel (Saipan) Inc.'s pool while on a trip organized by JTB. At the time of Plaintiff's injury, the RESTATEMENT (SECOND) OF TORTS (1965) ("Restatement Second"), which set forth the doctrine of contributory negligence, was the judicial rule in the CNMI. Contributory negligence is defined as "conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating

with the negligence of the defendant in bringing about the plaintiff's harm." Restatement Second § 463. Generally, under the doctrine of contributory negligence, a plaintiff's contributory negligence bars recovery against a defendant whose negligent conduct would otherwise make him liable for the harm sustained by the plaintiff. *See id*. § 467. On May 18, 1999, the American Law Institute adopted and promulgated the RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY ("Restatement Third"),[1] which replaced the contributory negligence rule with the basic principle of comparative negligence. *See* Restatement Third § 3, cmt. a. The doctrine of comparative negligence assigns any recovery directly in proportion to the defendant's fault. *Id*. § 7. The Alaska Supreme Court succinctly summarized the difference between the two doctrines:

> Contributory negligence is an "all-or-nothing" doctrine. When it is operative it is a total bar to recovery by an injured plaintiff. A comparative negligence rule, on the other hand, seeks to apportion damages, i.e., distribute responsibility, in proportion to the degree of fault attributable to the parties who have negligently caused an injury.

Kaatz v. Alaska, 540 P.2d 1037, 1047 (Alaska 1975). On October 19, 2000, the CNMI Legislature enacted the Uniform Comparative Fault Act, PL 12-26, a statutory law adopting comparative fault for all causes of action accruing after the statute's enactment.

III. ISSUE

Whether the Court should grant Plaintiff's motion to strike Defendant JTB's defense of contributory negligence.

IV. ANALYSIS

Plaintiff contends that the adoption and promulgation of the Restatement Third in 1999 subsequently replaced the doctrine of contributory negligence in the CNMI with comparative fault. Pursuant to 7 CMC § 3401, Commonwealth Courts must follow the common law as expressed in the Restatements of the Law if no relevant written or customary law exists. *See Castro v. Hotel Nikko Saipan, Inc.*, 4 N.M.I. 268, 275 (1995) ("[o]ur ability to formulate the common law of this jurisdiction is constrained by the statutory mandate to apply the common law as enunciated in the

[1] The Court notes that the RESTATEMENT (THIRD) OF TORTS has not been promulgated in its entirety and the Restatement Second is still valid and subsisting law for general principles of tort law not yet replaced by the published portions of the Restatement Third. For convenience, however, the Court will refer to the RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY as the "Restatement Third."

Restatements"); *see also Ito v. Macro Energy, Inc.*, 4 N.M.I. 46, 56 (1993) ("[o]ur jurisdiction is not vested with a similar degree of freedom in formulating our own common law as that exercised by courts in other jurisdictions, because of the statutory dictate that we apply the Restatement"). Section 3401 provides, in pertinent part, that:

> [i]n all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary . . . .

7 CMC § 3401.

Defendant counters that the CNMI Legislature's adoption of the Uniform Comparative Fault Act on October 19, 2000, precludes the application of comparative negligence to the case at issue. "[T]he legislature finds that it is in the best interest of the people to apportion damages on the basis of an individual's degree of fault." PL 12-26, § 2. Public Law 12-26 specifically states: "[t]his Act applies to all causes of action accruing *after* its effective date." PL 12-26, § 10 (emphasis added). Generally, unless otherwise indicated, statutes are interpreted and applied prospectively. *See Nobrega v. Edison Glenn Assocs.*, 772 A.2d 368, 377-78 (N.J. 2001); *Gibbons v. Gibbons*, 432 A.2d 80, 84-85 (N.J. 1981); *see generally Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 946, 117 S. Ct. 1871, 1876, 138 L. Ed. 2d 135, 143 (1997) (*quoting Landgraf v. USI Film Products*, 511 U.S. 244, 265, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)) ("there is a 'presumption against retroactive legislation'"). The Court agrees that Public Law 12-26 does not allow for retrospective effect of the statutory provisions and thus cannot be applied to this action, which occurred prior to the enactment of the Uniform Comparative Fault Act.[2] There is nothing, however, to indicate that Public Law 12-26 *forbids* the application of the doctrine of comparative negligence through application of the common law as required by 7 CMC § 3401.

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[2] Even Plaintiff agrees that Public Law 12-26 only applies to actions accruing after the date of its enactment and because this action accrued prior to that date, the statute does not apply to the case at issue. *See* Pl.'s Reply in Supp. of Mot. to Strike Affirmative Defense of Contributory Negligence (June 10, 2003) at 1.

In promulgating Public Law 12-26, the CNMI Legislature specifically stated it was adopting the Uniform Comparative Fault Act because of the unfair and harsh treatment resulting from "[t]he harsh all-or-nothing rule of contributory negligence at common law *which is the rule of the CNMI* . . . ." PL 12-26, § 2. This statement indicates that the Legislature erroneously recognized contributory negligence as the "rule of the CNMI" prior to enacting Public Law 12-26 (in October 2000), when the American Law Institute had already in fact adopted and promulgated the Restatement Third and replaced the doctrine of contributory negligence with the doctrine of pure comparative negligence in May 1999.[3] *See* Restatement Third § 3 cmt. a. Pursuant to 7 CMC § 3401, the doctrine of comparative negligence was therefore the current "rule of decision" in the Commonwealth at the time the Legislature enacted Public Law 12-26. Furthermore, the situation Public Law 12-26 was to remedy (that of replacing the harsh contributory negligence doctrine with comparative fault) was already "remedied" by the adoption and promulgation of the Restatement Third.

Finding that the Uniform Comparative Fault Act, PL 12-26, does not specifically prohibit the application of comparative negligence, pursuant to 7 CMC § 3401, prior to its enactment, the Court must now examine whether it should apply contributory negligence as prescribed in the Restatement Second at the time of the Plaintiff's accident or the comparative negligence doctrine, which later replaced this rule through the American Law Institute's adoption of the Restatement Third. Because there is no relevant statutory law applicable to events occurring before the enactment of Public Law 12-26, the Court must look to the common law as expressed in the Restatements to determine which rule to follow in this action. Numerous courts have judicially declared and adopted a comparative negligence scheme in place of the harsh contributory negligence doctrine. *See, e.g., Kaatz v. Alaska*, 540 P.2d 1037, 1049 (Alaska 1975) ("[T]he contributory negligence rule yields unfair results which can no longer be justified . . . [thus] the doctrine of contributory negligence shall no longer be

[3] Section 7 of the Restatement Third sets forth the comparative negligence doctrine, stating:

> Plaintiff's negligence (or the negligence of another person for whose negligence the plaintiff is responsible) that is a legal cause of an indivisible injury to the plaintiff reduces the plaintiff's recovery in proportion to the share of responsibility the factfinder assigns to the plaintiff (or other person for whose negligence the plaintiff is responsible).

Restatement Third § 7.

applicable in Alaska, and in its stead the principle of comparative negligence must be applied."). Moreover, the majority of the jurisdictions which judicially abolished contributory negligence and adopted comparative negligence by judicial decision have permitted the retroactive application of the comparative negligence doctrine. *See Nga Li v. Yellow Cab Co. of Cal.*, 532 P.2d 1226, 1244-46 (Cal. 1975); *Kaatz*, 540 P.2d at 1050-51; *Placek v. City of Sterling Heights*, 275 N.W.2d 511 (Mich. 1979); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 890 (W. Va. 1979); *Scott v. Rizzo*, 634 P.2d 1234, 1242 (N.M. 1981); *Goetzman v. Wichern*, 327 N.W.2d 742, 754 (Iowa 1982); *Hilen v. Hays*, 673 S.W.2d 713, 720 (Ky. 1984); *Alvis v. Ribar*, 421 N.E.2d 886, 898 (Ill. 1981) *superseded by statute as stated in Stenger v. Germanos*, 639 N.E.2d 179, 186 (Ill. App. Ct. 1994). Courts justify replacing the contributory negligence scheme with that of comparative negligence and applying the new doctrine retroactively by finding that the contributory negligence doctrine is "inequitable in its operation," "fundamentally unfair," and "yields results which are not justified." *See Ngu Li*, 532 P.2d at 1230, 1232; *Kaatz*, 540 P.2d at 1049. Even the CNMI Legislature has recognized the harshness of the comparative negligence doctrine in its promulgation of Public Law 12-26. *See* PL 12-26, § 2 (stating that the Legislature found the rule of contributory negligence too harsh and unfair in its implementation). Similarly, due to the harsh, outdated principles of contributory negligence, this Court is inclined to follow the majority of jurisdictions by replacing the doctrine of contributory negligence with comparative negligence and making the decision retroactive.

Defendant asserts that because Public Law 12-26 is the written law of the Commonwealth and clearly prohibits retrospective application, to use 7 CMC § 3401 as a basis for retroactive application of comparative fault would be inappropriate in light of the Legislature's clearly expressed intention. The Court finds, however, that *failing* to apply the doctrine of comparative negligence to the case at issue would be contrary to the Legislature's actual intent to replace the doctrine of contributory negligence as the rule of law in the CNMI. The Legislature clearly thought that contributory negligence was the law at the time it enacted Public Law 12-26 and presumed it would implement the comparative fault doctrine by passing Public Law 12-26. *See* PL 12-26, § 2 ("Rather than retaining a legal doctrine that has been rejected by the majority of American jurisdictions, the legislature finds that it is in the best interest of the people to apportion damages on the basis of an

individual's degree of fault."). Unbeknownst to the Legislature, however, comparative fault was already in place through the adoption and promulgation of the Restatement Third pursuant to the mandate of 7 CMC § 3401. Thus, it would be counterproductive to not extend the Restatement Third's adoption of comparative negligence to this case because the Legislature subsequently adopted Public Law 12-26 with the intent to replace the doctrine of contributory negligence in the CNMI.

Defendant further maintains that its right to assert contributory negligence "vested" on the date that the suit was filed. Thus, after the vesting of this right, any rejection of the right to raise contributory negligence as a defense could constitute a violation of constitutional due process rights. The Court finds, however, that there is no vested common law right to a common law bar to recovery provided by the affirmative defense of contributory negligence. Finding no vested right to assert a contributory negligence defense in *Godfrey v. Washington*, the Supreme Court of Washington stated that:

> [no defendant] would have relied on the common-law bar to recovery provided by contributory negligence when committing the alleged tort of negligence . . . . [T]he existence or lack of such an affirmative defense has no effect on the every-day conduct of individuals. Defendants do not act less negligently or more so because of the presence or absence of an affirmative defense of contributory negligence. One cannot have a vested right in a tort defense the merits of which cannot be determined until trial and upon which he does not and cannot rely in the initial injury to a plaintiff.

Godfrey v. Washington, 530 P.2d 630, 632 (Wash. 1975). The Court agrees with Plaintiff's assertion that the retroactive application of comparative negligence does not change any duty or obligation that Defendant owed to Plaintiff, nor does it change the fact that Plaintiff will be liable for any fault for which the jury finds him responsible. Moreover, 7 CMC § 3401 is not limited to a particular cut-off date for its application of common law. Section 3401 specifically provides that "the rules of the common law, as expressed in the restatements of the law . . . shall be the rules of decision in the courts of the Commonwealth." 7 CMC § 3401. Thus, with the adoption and promulgation of the

Restatement Third, Defendant had more than sufficient notice that the defense of contributory negligence was no longer available in the CNMI.[4]

V. CONCLUSION

Based on the foregoing, the Court hereby GRANTS Plaintiff's Motion to Strike Defendant JTB's Affirmative Defense of Contributory Negligence.[5]

SO ORDERED this 10th day of July 2003.

/s/
ROBERT C. NARAJA, Presiding Judge

[4] The "nearly universal adoption of comparative responsibility by American courts and legislatures has had a dramatic impact . . . [and the] Restatement [Third] reflects changes in the law since the publication of the Restatement Second of Torts." Restatement Third § 1 cmt. a.

[5] In granting Plaintiff's motion to strike Defendant's defense of contributory negligence, the Court will not address the issue of whether Defendant's reckless disregard barred it from asserting the defense of contributory negligence or whether Defendant can assert contributory negligence as a defense against Plaintiff's breach of fiduciary relationship cause of action.