

1 **FOR PUBLICATION**

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

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MASARU FURUOKA, a.k.a. )  
LEE KONGOK, )

**Civil Action No. 96-0978**

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Plaintiff, )

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v. )

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DAI-ICHI HOTEL (SAIPAN), INC.; )  
JAPAN TRAVEL BUREAU; )  
TOKIO MARINE INSURANCE COMPANY; )  
and DOES 1-5, )

**ORDER GRANTING PLAINTIFF’S  
MOTION TO STRIKE DEFENDANT  
JTB’S AFFIRMATIVE DEFENSE OF  
CONTRIBUTORY NEGLIGENCE**

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Defendants. )

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**I. INTRODUCTION**

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**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.

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**II. FACTS**

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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



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

4 Section 3401 provides, in pertinent part, that:

5 [i]n all proceedings, the rules of the common law, as expressed in the  
6 restatements of the law approved by the American Law Institute and,  
7 to the extent not so expressed as generally understood and applied in  
8 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 . . . .

9 7 CMC § 3401.

10 Defendant counters that the CNMI Legislature’s adoption of the Uniform Comparative Fault  
11 Act on October 19, 2000, precludes the application of comparative negligence to the case at issue.  
12 “[T]he legislature finds that it is in the best interest of the people to apportion damages on the basis  
13 of an individual’s degree of fault.” PL 12-26, § 2. Public Law 12-26 specifically states: “[t]his Act  
14 applies to all causes of action accruing *after* its effective date.” PL 12-26, § 10 (emphasis added).  
15 Generally, unless otherwise indicated, statutes are interpreted and applied prospectively. *See*  
16 *Nobrega v. Edison Glenn Assocs.*, 772 A.2d 368, 377-78 (N.J. 2001); *Gibbons v. Gibbons*, 432 A.2d  
17 80, 84-85 (N.J. 1981); *see generally Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 946,  
18 117 S. Ct. 1871, 1876, 138 L. Ed. 2d 135, 143 (1997) (*quoting Landgraf v. USI Film Products*, 511  
19 U.S. 244, 265, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)) (“there is a ‘presumption against  
20 retroactive legislation’”). The Court agrees that Public Law 12-26 does not allow for retrospective  
21 effect of the statutory provisions and thus cannot be applied to this action, which occurred prior to  
22 the enactment of the Uniform Comparative Fault Act.<sup>2</sup> There is nothing, however, to indicate that  
23 Public Law 12-26 *forbids* the application of the doctrine of comparative negligence through  
24 application of the common law as required by 7 CMC § 3401.

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27 <sup>2</sup> Even Plaintiff agrees that Public Law 12-26 only applies to actions accruing after the date of its enactment  
28 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.

1 In promulgating Public Law 12-26, the CNMI Legislature specifically stated it was adopting  
2 the Uniform Comparative Fault Act because of the unfair and harsh treatment resulting from “[t]he  
3 harsh all-or-nothing rule of contributory negligence at common law *which is the rule of the CNMI*  
4 . . . .” PL 12-26, § 2. This statement indicates that the Legislature erroneously recognized  
5 contributory negligence as the “rule of the CNMI” prior to enacting Public Law 12-26 (in October  
6 2000), when the American Law Institute had already in fact adopted and promulgated the  
7 Restatement Third and replaced the doctrine of contributory negligence with the doctrine of pure  
8 comparative negligence in May 1999.<sup>3</sup> See Restatement Third § 3 cmt. a. Pursuant to 7 CMC §  
9 3401, the doctrine of comparative negligence was therefore the current “rule of decision” in the  
10 Commonwealth at the time the Legislature enacted Public Law 12-26. Furthermore, the situation  
11 Public Law 12-26 was to remedy (that of replacing the harsh contributory negligence doctrine with  
12 comparative fault) was already “remedied” by the adoption and promulgation of the Restatement  
13 Third.

14 Finding that the Uniform Comparative Fault Act, PL 12-26, does not specifically prohibit the  
15 application of comparative negligence, pursuant to 7 CMC § 3401, prior to its enactment, the Court  
16 must now examine whether it should apply contributory negligence as prescribed in the Restatement  
17 Second at the time of the Plaintiff’s accident or the comparative negligence doctrine, which later  
18 replaced this rule through the American Law Institute’s adoption of the Restatement Third. Because  
19 there is no relevant statutory law applicable to events occurring before the enactment of Public Law  
20 12-26, the Court must look to the common law as expressed in the Restatements to determine which  
21 rule to follow in this action. Numerous courts have judicially declared and adopted a comparative  
22 negligence scheme in place of the harsh contributory negligence doctrine. See, e.g., *Kaatz v. Alaska*,  
23 540 P.2d 1037, 1049 (Alaska 1975) (“[T]he contributory negligence rule yields unfair results which  
24 can no longer be justified . . . [thus] the doctrine of contributory negligence shall no longer be

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25 <sup>3</sup> Section 7 of the Restatement Third sets forth the comparative negligence doctrine, stating:  
26 Plaintiff’s negligence (or the negligence of another person for whose negligence the  
27 plaintiff is responsible) that is a legal cause of an indivisible injury to the plaintiff  
28 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.

1 applicable in Alaska, and in its stead the principle of comparative negligence must be applied.”).  
2 Moreover, the majority of the jurisdictions which judicially abolished contributory negligence and  
3 adopted comparative negligence by judicial decision have permitted the retroactive application of  
4 the comparative negligence doctrine. *See Nga Li v. Yellow Cab Co. of Cal.*, 532 P.2d 1226, 1244-46  
5 (Cal. 1975); *Kaatz*, 540 P.2d at 1050-51; *Placek v. City of Sterling Heights*, 275 N.W.2d 511 (Mich.  
6 1979); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 890 (W. Va. 1979); *Scott v. Rizzo*, 634  
7 P.2d 1234, 1242 (N.M. 1981); *Goetzman v. Wichern*, 327 N.W.2d 742, 754 (Iowa 1982); *Hilen v.*  
8 *Hays*, 673 S.W.2d 713, 720 (Ky. 1984); *Alvis v. Ribar*, 421 N.E.2d 886, 898 (Ill. 1981) *superseded*  
9 *by statute as stated in Stenger v. Germanos*, 639 N.E.2d 179, 186 (Ill. App. Ct. 1994). Courts justify  
10 replacing the contributory negligence scheme with that of comparative negligence and applying the  
11 new doctrine retroactively by finding that the contributory negligence doctrine is “inequitable in its  
12 operation,” “fundamentally unfair,” and “yields results which are not justified.” *See Nga Li*, 532  
13 P.2d at 1230, 1232; *Kaatz*, 540 P.2d at 1049. Even the CNMI Legislature has recognized the  
14 harshness of the comparative negligence doctrine in its promulgation of Public Law 12-26. *See PL*  
15 *12-26*, § 2 (stating that the Legislature found the rule of contributory negligence too harsh and unfair  
16 in its implementation). Similarly, due to the harsh, outdated principles of contributory negligence,  
17 this Court is inclined to follow the majority of jurisdictions by replacing the doctrine of contributory  
18 negligence with comparative negligence and making the decision retroactive.

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

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

7 Defendant further maintains that its right to assert contributory negligence "vested" on the  
8 date that the suit was filed. Thus, after the vesting of this right, any rejection of the right to raise  
9 contributory negligence as a defense could constitute a violation of constitutional due process rights.  
10 The Court finds, however, that there is no vested common law right to a common law bar to recovery  
11 provided by the affirmative defense of contributory negligence. Finding no vested right to assert a  
12 contributory negligence defense in *Godfrey v. Washington*, the Supreme Court of Washington stated  
13 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.

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

1 Restatement Third, Defendant had more than sufficient notice that the defense of contributory  
2 negligence was no longer available in the CNMI.<sup>4</sup>

3 **V. CONCLUSION**

4 Based on the foregoing, the Court hereby GRANTS Plaintiff's Motion to Strike Defendant  
5 JTB's Affirmative Defense of Contributory Negligence.<sup>5</sup>

6 SO ORDERED this 10th day of July 2003.

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9 /s/  
ROBERT C. NARAJA, Presiding Judge

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<sup>4</sup> 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.

<sup>5</sup> 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.