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Contribution and Indemnity Collide with Comparative Negligence - The New Doctrine of Equitable Indemnity

John J. Cheap Jr.

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CONTRIBUTION AND INDEMNITY COLLIDE WITH COMPARATIVE NEGLIGENCE—THE NEW DOCTRINE OF EQUITY INDEMNITY

INTRODUCTION

Within the last three years California tort law has undergone a profound change brought about by the switch from contributory negligence to comparative negligence. As the dust settled around the new system it became increasingly apparent that the switch to comparative negligence encompassed much more than merely allowing plaintiffs who are partially at fault to recover part of their damages. To the contrary, the adoption of comparative negligence in Li v. Yellow Cab Co.,1 to the dismay of many practicing attorneys, raised more questions than it answered, leaving their solutions to the trial and appellate courts.2 One of the unanswered questions referred to in the Li decision was what effect comparative fault has upon California’s existing methods of allocating tort loss among multiple defendants. The purpose of this comment is to focus on the systems of contribution and indemnity and to explain the problems they exhibit in a comparative negligence context.

This comment shall first examine the historical development of the parallel doctrines of contribution and indemnity. Then it will demonstrate how the recently adopted comparative negligence system challenges the underlying basis of the two doctrines. It will then set forth the solutions proposed in three recent California appellate decisions. Finally, it will discuss and criticize the California Supreme Court’s solution propounded in American Motorcycle Ass’n v. Superior Court,3 and suggest some alternatives to be considered in the future.

DEVELOPMENT OF INDEMNITY AND CONTRIBUTION

Joint Tortfeasors at Common Law

At common law there existed no right to allocation or apportionment of damages among concurrent tortfeasors.4 Since

2. Id. at 823, 532 P.2d at 1239-40, 119 Cal. Rptr. at 871-72.
joinder of defendants as joint tortfeasors was strictly limited to cases in which each tortfeasor was said to be acting in concert with a common purpose to produce a single injury, a situation closely resembling criminal conspiracy, the rule arose that the courts would refuse to allow contribution among tortfeasors because they were wrongdoers. Each tortfeasor was liable for the entire sum of the judgment and the release of one joint tortfeasor effected the release of all others.

Over the years the term "joint tortfeasor" was expanded to include not only intentional wrongdoers, but also persons whose conduct or product combined to cause damage. To temper the harsh common law rule precluding any allocation of damages among joint tortfeasors, courts and legislatures developed the doctrines of contribution and indemnity.

**Contribution in California**

Before the enactment of its contribution statute in 1957,

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(a) Where a money judgment has been rendered jointly against two or more defendants in a tort action there shall be a right of contribution among them as hereinafter provided.
(b) Such right of contribution shall be administered in accordance with the principles of equity.
(c) Such right of contribution may be enforced only after one tortfeasor has, by payment, discharged the joint judgment or has paid more than his pro-rata share thereof. It shall be limited to the excess so paid over the pro-rata share of the person so paying and in no event shall any tortfeasor be compelled to make contribution beyond his own pro-rata share of the entire judgment.
(d) There shall be no right of contribution in favor of any tortfeasor who has intentionally injured the injured person.
(e) A liability insurer who by payment has discharged the liability of a tortfeasor judgment debtor shall be subrogated to his right of contribution.
(f) This title shall not impair any right of indemnity under existing law, and where one tortfeasor judgment debtor is entitled to indemnity from another there shall be no right of contribution between them.
(g) This title shall not impair the right of a plaintiff to satisfy a judgment in full as against any tortfeasor judgment debtor.

Section 876 provides:
California followed the common law rule against allocation. The courts and a number of commentators recognized the inequities in the existing rule which allowed a plaintiff to receive a joint judgment against one of a number of defendants, irrespective of the degree of that defendant's fault, intent, or causation, and which then barred any attempt on the part of the judgment debtor to secure even partial compensation from other possibly more culpable persons.

To alleviate these inequities, the California legislature adopted the concept of contribution to promote the equitable sharing of costs among liable parties and to encourage settlements by eliminating the harsh rule against allocation. The statute provides that the right to contribution arises only when

(a) The pro rata share of each tortfeasor judgment debtor shall be determined by dividing the entire judgment equally among all of them.

(b) Where one or more persons are held liable solely for the tort of one of them or of another, as in the case of the liability of a master for the tort of his servant, they shall contribute a single pro rata share, as to which there may be indemnity between them.

Section 877 provides:

Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort—

(a) It shall not discharge any other such tortfeasor from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater; and

(b) It shall discharge the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors.


The ancient basis of the rigid rule against contribution in this type of case is the policy that the law should deny assistance to tortfeasors in adjusting losses among themselves because they are wrongdoers and the law should not aid wrongdoers. But this overemphasized the supposed penal character of liability in tort; it ignores the general aim of the law for equal distribution of common burdens and of the right of recovery of contribution in various situations, e.g., among cosureties. It ignores also the fact that most tort liability results from inadvertently caused damage and leads to the punishment of one wrongdoer by permitting another wrongdoer to profit at his expense.

Id. at 993 n.5, 103 Cal. Rptr. at 503 n.5 (quoting 1 Journal of the Senate app., at 130 (1957)).
a joint money judgment has been rendered against more than one defendant.\textsuperscript{14} The right to contribution may be enforced only after one defendant has paid the entire joint judgment or has paid more than his prorata share of the judgment.\textsuperscript{15} A prorata share is defined as an equal share.\textsuperscript{16} Thus, if there are two joint judgment debtors, they each pay half of the judgment; if there are three, they each pay one-third. For the purposes of contribution, the share of a party held vicariously liable for the acts of another, such as a master's liability for the acts of his servant, is considered to be one share.\textsuperscript{17} Additionally, the common law bar to contribution among intentional wrongdoers is retained.\textsuperscript{18} In sum, the statute appears to stand for the proposition that there shall be an equal sharing of liability among unintentional joint tortfeasors without regard to their relative fault.\textsuperscript{19}

\textit{Indemnity in California}

Indemnity is another doctrine which has evolved to temper the often harsh results of the common law bar to allocation of liability among tortfeasors. Essentially an all-or-nothing proposition, it traditionally operated to shift the entire burden of loss from one party to another.\textsuperscript{20} Indemnity may be contractual, implied from a contract, or implied from the nature of the conduct of the respective parties.\textsuperscript{21}

Contractual indemnity arises in those situations where an express agreement exists between two or more parties under which one party bears any burden of loss arising from the tortious conduct of the parties.\textsuperscript{22} Implied contractual indemnity arises in those circumstances where a contract exists between two parties to perform services.\textsuperscript{23} Under this doctrine, the legal contractual relationship itself gives rise to a duty on the part

\begin{thebibliography}{99}
\bibitem{14} CAL. CIV. PROC. CODE § 875(a) (West Supp. 1978); Barth v. B.F. Goodrich, 15 Cal. App. 3d 137, 145, 92 Cal. Rptr. 809, 814 (1971).
\bibitem{15} E.B. Willis Co. v. Superior Court, 56 Cal. App. 3d 650, 653, 128 Cal. Rptr. 541, 544 (1976); CAL. CIV. PROC. CODE § 875(a) & (c) (West Supp. 1978).
\bibitem{16} \textit{See} CAL. CIV. PROC. CODE § 876(a) (West Supp. 1978).
\bibitem{17} \textit{CAL. CIV. PROC. CODE} § 876(b) (West Supp. 1978).
\bibitem{18} \textit{See} CAL. CIV. PROC. CODE § 875(d) (West Supp. 1978).
\bibitem{19} \textit{See}, e.g., River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 993, 103 Cal. Rptr. 498, 503 (1972).
\bibitem{20} W. PROSSER, \textit{supra} note 5, § 51.
\bibitem{21} \textit{See} Molinari, \textit{Tort Indemnity in California}, 8 SANTA CLARA LAW., 159 (1968).
\bibitem{22} \textit{Id.} at 159-60.
\end{thebibliography}
of the obligor to perform the contract without negligently in-
flicting damage upon a third person or his property. Accordingly, if the obligor negligently damaged a third party in the course of performing and the third party sued the obligee, the latter was entitled to indemnity so long as he was not a contrib-
uting cause of the damage.

Non-contractual implied indemnity has been the most troublesome development in the indemnity area. Traditionally, some legal relationship, such as a contract, was required before any right of indemnity was recognized. With time, however, courts tempered that requirement, so that in the absence of a contract, a party seeking indemnity could rely upon the equitable principles of unjust enrichment and restitution. It was generally held that non-contractual implied indemnity shifted the entire burden of loss to the joint tortfeasor who was adjudged more culpable. For purposes of determining the more culpable party, the courts developed several tests to as-
certain the relative negligence of each party. These included characterizing the negligence of the concurrent tortfeasors as "active" or "passive", "primary" or "secondary", and several other similarly imprecise formulations. The courts were not able to reach a consensus on the correct test.

Contributions and Indemnity Compared

Since the concepts of contribution and implied indemnity share certain characteristics and are therefore often confused, it is important to note some key distinctions. While contribution in California apportions loss among joint judgment debt-
ors in equal shares, indemnity traditionally shifted the entire

24. See, e.g., San Francisco Unified School Dist. v. California Bldg. Maintai-
25. Id. at 442, 328 P.2d at 792.
27. See United Air Lines, Inc. v. Weiner, 335 F.2d 379 (9th Cir. 1964).
28. See id. at 399.
burden of loss from one defendant to another or to a third party.\textsuperscript{31} Contribution exists by statute whereas indemnity is a judicially created common law doctrine.\textsuperscript{32} Additionally, the rights of indemnity and contribution among the same parties are mutually exclusive: if a person is entitled to indemnity, the right to contribution does not exist.\textsuperscript{33} Further, the right to contribution presupposes that joint tortfeasors are \textit{in pari delicto}, or equally at fault,\textsuperscript{34} while non-contractual implied indemnity shifts the burden of liability to the party found to have the greater fault.\textsuperscript{35}

As the foregoing analysis indicates, in determining whether there is a right to contribution, a court ignores the relative fault of the judgment debtors as among themselves and simply allocates the burden of loss in equal shares to each one. However, in determining whether a right to non-contractual implied indemnity exists, a court must scrutinize the relative fault of the parties. This "fault assessment" is perhaps the most dramatic difference between the two concepts, and played a key role in two cases which relaxed the total loss-shifting principle that ruled the common law approach to indemnity.

\textbf{Non-Contractual Implied Indemnity Revisited}

In 1964, a California court of appeal added an interesting variation to the doctrine of non-contractual implied indemnity. In \textit{Herrero v. Atkinson},\textsuperscript{36} a woman was negligently injured in an automobile accident. She died a year and a half later as a result of a negligently administered blood transfusion in the course of an operation necessitated by the auto accident. There was no legal relationship between the defendant driver and the medical defendants, save that both sides contributed to the death.

Both parties were actively negligent in their separate acts.

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\item \textsuperscript{31} W. \textsc{Prosser}, \textit{supra} note 5, § 51.
\item \textsuperscript{32} United Air Lines, Inc. v. Weiner, 335 F.2d 379, 398 (9th Cir. 1964). For an excellent discussion of the judicial development of indemnity, see Molinari, \textit{supra} note 21.
\item \textsuperscript{34} Herrero v. Atkinson, 227 Cal. App. 2d 69, 73, 38 Cal. Rptr. 490, 492 (1964).
\item \textsuperscript{36} 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (1964).
\end{itemize}
Nevertheless, the court allowed indemnity in favor of the negligent driver and against the doctors and hospital for "that portion of the damages caused by their own negligent conduct." In support of its conclusion the court cited Ash v. Mortensen, which stands for the proposition that an initial tortfeasor is a proximate cause of damages resulting from subsequent medical malpractice, and is liable for the doctor's negligence as well as his own. However, the court went on to say that "[t]here is no reason why the ultimate burden of damages should not be distributed among the various defendants, and each be made to bear that portion of the judgment which in equity and good conscience should be borne by him."

Thus, under an indemnity theory, the court of appeal approved the apportionment of damages between tortfeasors performing separate acts of negligence that combined to produce a single injury. Contrary to the traditional distinction drawn in non-contractual implied indemnity cases between "active" and "passive" tortfeasors, the court did not find one party more "actively" negligent than the other, but held that each should be liable for damages caused by his own negligence. Recently, a California court of appeal reached a similar result in Niles v. San Rafael.

In 1972, the New York Court of Appeals, in Dole v. Dow Chemical Co., propounded an equally interesting variation to the doctrine of non-contractual implied indemnity. Dow was charged with negligently labeling a poisonous fumigant which caused the death of plaintiff's decedent. Dow filed a third-party complaint for indemnity against decedent's employer alleging active and primary negligence in failing to follow instructions on the label, for allowing an untrained worker to perform the fumigation, and for failing to ventilate and test the enclosure after fumigation. The court reversed the dismissal of the third-party complaint and rejected the traditional "active-passive" test.

In rejecting the traditional test, the court went on to say that while indemnity was traditionally an all-or-nothing rule,

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37. Id. at 75, 38 Cal. Rptr. at 493 (emphasis added).
39. 227 Cal. App. 2d at 75, 38 Cal. Rptr. at 493.
42. Id. at 146, 282 N.E.2d at 290, 331 N.Y.S.2d at 385.
43. Id.
44. Id. at 147, 153, 282 N.E.2d at 291, 295, 331 N.Y.S.2d at 386, 392.
“[t]here are circumstances which would justify apportionment of responsibility between third-party plaintiff and third-party defendant, in effect a partial indemnification.”45 The court reasoned that since the all-or-nothing rule of indemnity often achieves as equally unfair a result as the strict common law rule, indemnity itself should be tempered to achieve a more equitable result.46

Since the courts provided no guidelines except general equitable considerations for allowing partial indemnity, most of them, even after *Herrero* and *Dole*, refrained from apportioning loss under an indemnity theory.47

Thus, in *General Electric Co. v. Department of Public Works*,48 the court refused to modify the all-or-nothing rule of indemnity. In this case, General Electric’s (G.E.) employee negligently collided with one plaintiff’s automobile, sending it across an island and into a head-on collision with an oncoming vehicle. G.E. cross-complained against the county and state for maintaining a dangerous and defective condition and asserted causes of action for partial indemnity, contribution and “equitable apportionment.”49

In sustaining demurrers to all three theories articulated in the cross-complaint, the court distinguished *Herrero* as a case involving two separate accidents. The court concluded that the facts in the present case were “but one continuous chain of events proximately resulting from the active and primary negligence of cross-complainant’s driver . . . .”50 In support of this determination, the court cited *Builders Supply Co. v. McCable*,51 which set forth the rule that a party may be indemnified if, and only if, his fault is imputed or constructive.52 This rule is clearly inconsistent with the results reached in cases such as *Herrero*, *Dole*, and *Niles*, where active tortfeasors were partially indemnified.

Based on the preceding cases, it seems fair to conclude that the pre-*Li v. Yellow Cab Co.*53 law governing implied in-
demnity was anything but settled. Cases like *Herrero* and *Niles*, which allowed partial indemnity, were distinguishable from those that did not on the grounds that in the former, the harms suffered by the injured parties were disparate in time and the damages caused by each tortfeasor were separate and identifiable.\(^54\) The lack of definiteness in these distinctions left courts free to abandon the strict all-or-nothing rule whenever a situation somehow appeared to lend itself more easily to allocation of loss among different causes. However, it was virtually impossible to predict whether or not a court would cross the line and allow partial indemnity in a particular case.

Both loss allocation systems, indemnity and contribution, produced inequitable results by virtue of their rigid and sometimes unpredictable applications. Neither system based a tortfeasor's liability for damages on the degree of his fault. Nevertheless, the absence of equitable loss sharing was not glaring in a contributory negligence system that also emphasized an "all-or-nothing" approach. However, both concepts would be called into question when the California Supreme Court issued its landmark decision in *Li v. Yellow Cab Co.*

**Comparative Negligence and Loss Allocation**

*Li v. Yellow Cab Co.*

In 1975, the California Supreme Court decided the case of *Li v. Yellow Cab Co.*\(^55\) disposing of the all-or-nothing rule of contributory negligence\(^56\) and replacing it with "pure" comparative negligence.\(^57\) The switch to comparative negligence brings up a number of issues in various areas of tort law.\(^58\) In its

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54. These are the considerations set forth in *Restatement (Second) of Torts* § 433A (1966):

   | Apportionment of harm to causes:
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<tr>
<td>(1) Damages for harm are to be apportioned among causes where</td>
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<tr>
<td>(a) there are distinct harms, or</td>
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<td>(b) there is a reasonable basis for determining the contribution</td>
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<td>of each cause to a single harm.</td>
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<tr>
<td>(2) Damage for any other harm cannot be apportioned among two or</td>
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<td>more causes.</td>
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Most courts have limited application of this doctrine to nuisance actions where the sources of pollution were fixed and measurable.


56. Before *Li*, any negligence on the part of the plaintiff barred recovery. *Id.* at 809-10, 532 P.2d at 1230, 119 Cal. Rptr. at 862.

57. *Id.* at 808, 532 P.2d at 1229, 119 Cal. Rptr. at 861. See V. SCHWARTZ, *supra* note 8, at 1-5, Special California Supp., at 1-5.

58. 13 Cal. 3d at 823-26, 532 P.2d at 1232-43, 119 Cal. Rptr. at 871-73.
judicial enactment of the new system, the court resolved some, but not nearly all, of the issues associated with such a radical change. One such problem, which the court mentioned without resolving, is how to reconcile the principles of comparative negligence with the existing methods of dealing with multiple tortfeasors.59

The doctrine of pure comparative negligence was chosen by the court over any modified system of comparative negligence because it is more equitable. It allocates loss between a plaintiff and a defendant purely on the basis of relative fault.60 Another reason which the court enumerated for choosing "pure" comparative negligence over any modified system was that it is easier to administer because it avoids the difficulty of requiring a jury to determine whether the plaintiff was more at fault than the defendant.61 Thus, by specifically rejecting any modified system of comparative negligence, the court emphasized that its decision is founded upon the proposition that liability should be charged in direct proportion to fault.

In the aftermath of Li, a question naturally arose concerning whether or not its principle of liability charged in proportion to fault could be squared with the two systems that allocated loss among multiple defendants.

Impact of Li on Contribution

When the California legislature enacted the contribution statute it expressed an intent to promote the equitable sharing of costs and facilitate settlement of litigation.62 The former goal is accomplished by dividing the judgment debt equally among

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59. One of the issues which the California Supreme Court recently addressed was the applicability of comparative negligence to strict liability actions. Among other things, the court held that a plaintiff's fault should offset his recovery against a strict liability defendant. Daly v. General Motors Corp., 144 Cal. Rptr. 380 (Sup. Ct. 1978).
60. "The fundamental purpose of [pure comparative negligence] shall be to assign responsibility and liability for damage in direct proportion to the amount of negligence of each of the parties." Id. at 829, 532 P.2d 1243, 119 Cal. Rptr. at 875. See generally V. Schwartz, supra note 8, Special California Supp., at 2.
61. One of the modified systems mentioned by the court was the 50% system. Under this system, a plaintiff whose negligence exceeds 50% is barred from recovery. The court emphatically disposed of this alternative, saying: "Numerous reversals have resulted on this point, leading to the development of arcane classifications of negligence according to quality and category." 13 Cal. 3d at 828, 532 P.2d at 1243, 119 Cal. Rptr. at 875 (1978).
all the defendants joined in the lawsuit regardless of fault. The latter goal is attained by allowing a defendant who settles in "good faith" to obtain a complete release from further liability.

However, after Li, the statutory methods utilized in accomplishing both legislative goals were open to attack based on the theoretical foundation of that case. Thus, if a jury made a special finding that defendant A was 99% at fault and defendant B was 1% at fault, under the contribution statute, each defendant was obliged to pay half of the judgment. In contrast, a special finding that the plaintiff was 99% at fault and defendant was 1% at fault would, under the doctrine of Li, result in each bearing a corresponding share of the liability. The plaintiff would recover 1% of the total damages.

Under the foregoing analysis, a plaintiff who is perhaps more at fault than each of several defendants may recover that portion of damages which he did not cause, while a defendant guilty of minimal fault must pay a share equal to that of all other defendants. That a defendant should bear responsibility for damages in excess of the proportion of his fault seems to run counter to the basic principle of Li. In cases where the conduct of both the plaintiffs and defendants combines to cause injury and a culpable plaintiff is permitted to recover, there seems to be no compelling reason to apply different standards of loss allocation. Yet, the contribution statute would appear to demand this result.

Similarly, the principle of Li seems to pose problems with respect to the contribution statute's settlement procedure. According to section 877(a) of the Code of Civil Procedure, a settlement of one tortfeasor "shall reduce the claims against the others in the amount stipulated in the release ...." Clearly a settlement need not correspond to the degree of fault of the settling tortfeasor. Thus, it is quite conceivable that a

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63. CAL. CIV. PROC. CODE § 876(a) (West Supp. 1978).
64. See CAL. CIV. PROC. CODE § 877 (West Supp. 1978).
65. See CAL. CIV. PROC. CODE § 625 (West 1976).
non-settling defendant could end up paying a far greater share of the damages than he would if the other defendants had not been released. Again, this result seems to run counter to the message of Li that liability be assessed in direct proportion to fault.

In addition to the procedure for loss sharing and settlement, the theoretical foundation of Li potentially conflicted with other aspects of the contribution statute as well. As noted earlier, the statute requires first, that there be a joint money judgment, and second, that one joint tortfeasor pay more than a pro rata share of the judgment before any right to contribution arises. Consequently, the statutory remedy of contribution is not available to a judgment debtor as against a third person who, for one reason or another, could not be joined in the lawsuit. Contribution may only be asserted against a co-defendant. Therefore, unless the named defendant could join the third-party tortfeasor in the lawsuit under the California compulsory joinder statute or by the cross-complaint provisions of the Code of Civil Procedure, his only recourse would be to sue the third party in a separate action for indemnity.

In the likely event that the judgment debtor is unable to fulfill the traditionally rigorous requirements of asserting a cause of action for implied indemnity, he would apparently be without a remedy. Thus, the judgment debtor would again be forced to pay not only his own share of the liability, but the shares of all parties who could not be joined in the suit.

A similar problem arises when a tortfeasor is insolvent. If a joint judgment is rendered against a tortfeasor and he is unable to secure some form of allocation of the loss, either by implied indemnity or by contribution, against an insolvent co-

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68. See text accompanying notes 14 and 15, supra.
69. See also V. Schwartz, supra note 8, at § 16.2.
71. See generally note 132, infra.
tortfeasor, the joint judgment debtor under the doctrine of joint and several liability would be forced to pay the insolvent party's share of the liability.

Impact of Li on Indemnity

The traditional all-or-nothing rule of implied indemnity also presented problems when contrasted with Li's liability apportioning principle. For example, suppose that a speeding motorist injured a pedestrian in an intersection crosswalk where the traffic light malfunctioned for lack of proper maintenance. Assume that both the malfunction and the speeding were proximate causes of the injury. Suppose further that plaintiff sued only the city and that the city was unable, for one reason or another, to procure joinder of the motorist in the main action, thus barring the city's right to seek contribution. After paying the judgment, the city commences a separate action for indemnity against the motorist. If the city convinces the court that it was only passively or secondarily negligent under the traditional rule, it is entitled to indemnity for the entire sum of the judgment regardless of its share of the fault. Conversely, if the court finds the city actively or primarily negligent, it gets nothing, again regardless of its actual proportion of fault. Either result seems to contradict Li's "notion of fairness" since it requires a joint tortfeasor to bear a greater or lesser portion of a judgment debt than his own negligence actually occasioned.

In operation, the loss allocation rules of both the California contribution statute and the traditional doctrine of implied indemnity seemed to contravene Li's principle of pure comparative negligence. Shortly after Li, three California courts of appeal wrestled with the difficulties presented by both loss-sharing systems. Each of the decisions proposed a different solution based on different considerations. While none of the decisions reached the solution drawn by the California Supreme Court in American Motorcycle, the divergent views they represent demonstrate the multitude of considerations faced by the high court. For this reason, the following section shall analyze those decisions.

**Attempts to Reconcile Comparative Negligence With Contribution and Indemnity**

**Stambaugh v. Superior Court**

The first major case which attempted to reconcile Califor-
nia's loss allocation systems with the doctrine of comparative negligence was *Stambaugh v. Superior Court*. Stambaugh involved a wrongful death action arising out of an auto accident in which a corporate defendant cross-complained against the plaintiff. Stambaugh had settled with the plaintiff prior to the lawsuit in an amount equal to the full extent of his insurance coverage. The corporate defendant sought to have the "court determine the extent to which Stambaugh's negligence proximately contributed to the death... and that judgment against said cross-defendant be entered accordingly." After the trial court denied Stambaugh's motion for summary judgment or a judgment on the pleadings, Stambaugh sought a writ of mandate in the court of appeals to effectuate his motion.

Two main issues relevant to loss allocation were presented on appeal. The first was whether a defendant could join a settling co-tortfeasor in a lawsuit as an "indispensable party" under section 389 of the Code of Civil Procedure for the purpose of determining to what degree his negligence contributed to the damage. In response, the court concluded that section 877 of the Code of Civil Procedure controls when a joint tortfeasor settles a lawsuit discharging him "from all liability for any contribution to any other tortfeasors." Although the cross-complaint expressly denied that it was seeking indemnity or contribution, the court nevertheless reasoned that Stambaugh was forever discharged from any obligation arising from the lawsuit. The court acknowledged that this result might impose a disproportionate share of the damages upon a non-settling tortfeasor, but then pointed out that the policy favoring settlements was the overriding consideration.

The second issue, closely related to the first, involved an

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73. The court maintained that such settlement constituted a good faith settlement as a matter of law. Id. at 238-39, 132 Cal. Rptr. at 848.
74. Id. at 234, 132 Cal. Rptr. at 845.
75. Id.
76. Id. at 234-35, 132 Cal. Rptr. at 845.
77. Id. at 235, 132 Cal. Rptr. at 845-46. Such a settlement provision is not part of the traditional indemnity doctrine. Arguably, a non-settling defendant was able to seek indemnity from a settling tortfeasor before the California Supreme Court incorporated the settlement provision into the doctrine of equitable indemnity. See text accompanying notes 129-31, infra.
78. 62 Cal. App. 3d at 235 n.1, 132 Cal. Rptr. at 845 n.1.
79. Id. at 235, 132 Cal. Rptr. at 846.
80. Id. at 235-36, 132 Cal. Rptr. at 846. Contra, V. Schwartz, supra note 8, § 16.5.
apparent attempt by the corporate defendant to persuade the appellate court to abandon the rule of joint and several liability among joint tortfeasors. Thus framed, it concerned whether *Li* should be interpreted "as holding that each of several contributing joint tortfeasors, whether or not joined as a defendant, is liable to the plaintiff in damages, but only in the proportion that his negligence bears to the total negligence (i.e., that of all contributing joint tortfeasors and plaintiff) which proximately caused plaintiff's damages."81

The court declined to resolve the second issue since it found that it affected the rights of parties not involved in the mandamus proceedings and that the resolution of the joinder issue was dispositive of the appeal.82 Interestingly, however, the court added a conclusory statement upon which it did not elaborate: "Our close analysis of *Li* discloses no purpose to modify the rule so clearly announced by section 877."83

*Safeway Stores, Inc. v. Nest-Kart, Inc.*

*Safeway Stores, Inc. v. Nest-Kart, Inc.*84 marked a second attempt to deal with the loss allocation difficulties, squarely facing the issue of reconciling *Li* and the contribution statute. In *Safeway*, the plaintiff brought suit against Safeway and Nest-Kart for injuries she sustained when a shopping cart allegedly broke and fell on her foot. The jury found both Safeway and Nest-Kart liable and rendered a special finding that Safeway was 80% at fault and Nest-Kart 20% at fault.85

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81. 62 Cal. App. 3d at 234, 132 Cal. Rptr. at 845 (emphasis supplied).
82.  Id. at 236-37, 132 Cal. Rptr. at 846.
83.  Id. at 236, 132 Cal. Rptr. at 846. In addition to the questionable validity of the settlement provisions after *Li*, there are other problems. It was recognized before *Li* that settlements in multi-party actions were subject to abuse and collusion among parties. The court of appeal in a 1972 decision put it bluntly: "The California legislation empowers a plaintiff, armed with a strong and lucrative claim, to settle with his antagonists one by one, preserving for the jury the opponent with the most money and least sympathy." River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 994, 103 Cal. Rptr. 498, 503 (1972). Even the drafters recognized the problem by adding the good faith settlement requirement. *Id.* at 995, 103 Cal. Rptr. at 504. However, it would be very difficult for a non-settling defendant to show bad faith, since it is highly unlikely that he participated in the settlement negotiations between the plaintiff and the settling defendant. In this regard, another court of appeal observed: "Except in rare cases of collusion or bad faith . . . a joint tortfeasor should be permitted to negotiate settlement . . . to his own best interests." Stambaugh v. Superior Court, 62 Cal. App. 3d 231, 238, 132 Cal. Rptr. 843, 847 (1976).
85.  Id. at 151.
was found to be liable on theories of negligence and strict liability while Nest-Kart was held liable only in strict liability. The judgment was satisfied by Nest-Kart and Safeway according to the proportions specified in the special findings. Safeway then moved to increase Nest-Kart's share to 50%. After the motion was granted, Nest-Kart appealed.

On appeal, Nest-Kart argued that the literal, equal share rule of the contribution statute was incompatible with \textit{Li} and that it should be abandoned in favor of a system requiring contribution in proportion to fault. The court noted that despite its argument for comparative contribution, Nest-Kart did not contend that \textit{Li} also demanded the abrogation of the rule of joint and several liability, though it makes each tortfeasor liable for the entire judgment regardless of his percentage of fault. In response to Nest-Kart's push for comparative contribution, the appellate court concluded that \textit{Li} did not require alteration of the statutory rule of contribution.

The court began its analysis by observing that \textit{Li} had expressly refrained from resolving the conceptual problems that the adoption of a system of pure comparative negligence posed in regards to the loss allocation principles of contribution and indemnity.

After noting that no post-\textit{Li} case had squarely confronted the issue before it, the court turned to an examination of the law regarding comparative contribution as it developed in other jurisdictions. This examination disclosed two jurisdictions that had adopted comparative contribution by judicial fiat, but both had common law, non-statutory rules of contribution. The court found difficulty in judicially enacting such a system in California when faced with the clearly defined language of the California contribution statute.

In addition to the difficulty inherent in circumventing a legislative command, the court enumerated two other problems that would have to be dealt with if comparative contribution were declared to be the law. First, the court reasoned that if comparative contribution were the rule, equity would demand that the named defendant be permitted to bring unnamed de-

\hspace{1cm} 86. \textit{Id.}, see note 94, \textit{infra}.
\hspace{1cm} 87. 134 Cal. Rptr. at 151.
\hspace{1cm} 88. \textit{Id.} at 152.
\hspace{1cm} 89. \textit{Id.} at 154.
\hspace{1cm} 90. \textit{Id.} at 152.
\hspace{1cm} 91. \textit{Id.} at 153.
fendants into the lawsuit to pick up their share of the judgment.\textsuperscript{92} The court was quick to note, however, that the California statutory law did not allow the named defendant to join unnamed parties as of right. Similarly, the court observed that the statutory provisions governing settlement and release would have to be modified if comparative contribution became the rule.\textsuperscript{93} The court could not conceive that a good faith settlement would permit the settling defendant to escape paying his fair share of the judgment.

In sum, although the court seemed to intimate that comparative contribution was a more equitable rule, like the Stambaugh court, it refrained from directly challenging the contribution statute.\textsuperscript{94}

\textit{American Motorcycle Ass’n v. Superior Court}

The third appellate decision to confront the loss allocation problems raised by \textit{Li} was \textit{American Motorcycle Ass’n v. Superior Court}.\textsuperscript{95} It should be noted that the California Supreme Court specifically overruled the decision reached by the court of appeal,\textsuperscript{96} and analysis of the appellate opinion is included only to illustrate the conceptual difficulties \textit{Li} posed in the area of loss allocation.

\begin{itemize}
  \item \textsuperscript{92} \textit{Id.} at 154. See generally V. \textsc{Schwartz}, \textit{ supra} note 8, § 16.5.
  \item \textsuperscript{93} 134 Cal. Rptr. at 154.
  \item \textsuperscript{94} Nest-Kart raised a very interesting issue when it argued that Safeway was not entitled to contribution because the defendants had not acted \textit{in pari delicto}. This argument was based on the jury’s finding that Nest-Kart was liable on only a strict liability theory while Safeway was found liable in negligence and strict liability. The court concluded that the controlling case was Barth v. B.F. Goodrich, 15 Cal. App. 3d 137, 92 Cal. Rptr. 809 (1971). 134 Cal. Rptr. at 154. That \textit{pre-Li} case held that statutory contribution was the proper method of loss allocation between a strictly liable tire manufacturer and a dealer who had negligently installed it.
  \item Exactly how that issue would be handled now is in some doubt because of the new doctrine of equitable indemnity announced in \textit{American Motorcycle Ass’n v. Superior Court}, 20 Cal. 3d 578, 574 P.2d 763, 143 Cal. Rptr. 692 (1978). The very recent case of Daly v. General Motors, 144 Cal. Rptr. 380 (Sup. Ct. 1978) held that a plaintiff’s fault may be weighed by a jury to reduce the amount of damages assessed against a strict liability defendant. While that rule has not yet been applied in the multiple tortfeasor context, it would be consistent to require that a negligent defendant’s fault be weighed against the “fault” of a strict liability defendant. Such an application of the rule would be no more inscrutable to a jury than requiring it to compare a plaintiff’s fault against that of a strictly liable defendant. See generally Fleming, \textit{Foreword: Comparative Negligence at Last—by Judicial Choice}, 64 \textsc{Calif. L. Rev.} 239, 242 (1976); Note, \textit{Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants}, 50 \textsc{S. Cal. L. Rev.} 73 (1976).
  \item \textsuperscript{95} 135 Cal. Rptr. 497 (1977), \textit{rev’d}, 20 Cal. 3d 578, 574 P.2d 763, 143 Cal. Rptr. 692 (1978).
  \item \textsuperscript{96} 20 Cal. 3d 578, 574 P.2d 763, 143 Cal. Rptr. 692 (1978).
\end{itemize}
In *American Motorcycle*, a minor, who injured his back while competing in an amateur motorcycle race, filed an action through a guardian ad litem against several defendants, including the American Motorcycle Association (AMA). The complaint charged the defendants with negligence, fraud, and conspiracy in connection with the handling of the race.

AMA answered the complaint and attempted to cross-complain against the Viking Motorcycle Club and the parents of the injured plaintiff on theories of indemnity and comparative negligence. After the trial court denied the motion, AMA filed a second motion for leave to file a cross-complaint against only the parents, one of whom was guardian ad litem. The cross-complaint was drawn in two counts. The first alleged that the parents negligently failed to supervise their son in consenting to his participation in the race and, further, that such negligence was active, while any negligence on the part of AMA was passive. Thus the count sought indemnity from the parents in the event that AMA was found liable to their son.

The second cause of action sought a declaration that the negligence of all parties contributing to the injury, including the parents, be considered in apportioning the liability. Accordingly, the cross-complaint urged that *Li* be interpreted as requiring the adoption of comparative contribution. The trial court again denied the motion, and AMA then sought a writ of mandate in the court of appeal to effectuate its cross-complaint.

The issue, as formulated by the appellate court, was whether "a named defendant [has a right] to bring persons not named as defendants into the action by a cross-complaint alleging the negligence of those persons and its proximate causation of the injury for which the complaint seeks to hold the defendant-cross-complainant liable."

After discussing the common law rule of joint and several liability and summarizing the "limited" right of contribution provided by statute and the "complex system of equitable indemnity," the court turned to an analysis of the consequences of *Li*. It was pointed out that *Li* emphatically disposed

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97. 135 Cal. Rptr. at 499.
98. Id. at 499.
99. Id. at 499-500.
100. Id. at 500.
101. Id. at 498-99.
102. Id. at 500.
of the all-or-nothing rule of contributory negligence by adopting "pure" comparative negligence rather than any modified system.\textsuperscript{103} The court then applied that analysis to the rule of joint and several liability. It reasoned that just as the all-or-nothing rule was eliminated as it applies to plaintiffs, so should the all-or-nothing rule of joint and several liability be eliminated as it applies to defendants. It was noted that the underpinning of \textit{Li} was that the degree of each party's fault should determine the extent of his liability.

Concluding that the conceptual underpinning of \textit{Li} eliminated the traditional basis of joint and several liability, the court then turned to policy considerations to ascertain whether the rule should be retained or rejected. After the court found the approaches of other states to be inconsistent, it focused upon what it felt was the underlying basis of California negligence law. In the court's opinion the policy is one of "loss shifting . . . socializing the loss incident to tortious conduct."\textsuperscript{104} Under this concept, tort loss is shifted from the plaintiff to a finite social fund comprised of taxes and insurance.\textsuperscript{105} Whenever the courts and legislators choose to shift tort losses to the finite social fund, they are making a choice that the fund should be used for that purpose rather than for some other social goal.\textsuperscript{106}

The court then pointed out that \textit{Li} has shifted the tort loss previously borne by a negligent plaintiff to the social fund.\textsuperscript{107} Implying that the social fund is already overburdened, the court added that the risk of insolvency of defendants should be borne by plaintiffs instead of by the social fund.\textsuperscript{108} Since it appears that the rule of joint and several liability places the risk of insolvency of a defendant upon the social fund, the court concluded that the rule of joint and several liability is not

\textsuperscript{103} Id.; see note 61 supra. The \textit{Li} court rejected the 50\% system because it barred an injured party from recovering if he was more at fault than the defendant. In the words of the court, "such a rule distorts the very principle it recognizes, i.e., that persons are responsible for their acts to the extent their fault contributes to an injurious result." 13 Cal. 3d at 828, 532 P.2d at 1243, 119 Cal. Rptr. at 875 (quoting Juenger, Brief for Negligence Law Section of the State Bar of Michigan in Support of Comparative Negligence as Amicus Curiae, Parsenson v. Construction Equipment Co., 18 WAYNE L. REV. 3, 50 (1972).

\textsuperscript{104} 135 Cal. Rptr. at 502; see Fleming, Foreword: Comparative Negligence at Last—by Judicial Choice, 64 CALIF. L. REV. 239, 242 (1976).

\textsuperscript{105} 135 Cal. Rptr. at 502.

\textsuperscript{106} Id.

\textsuperscript{107} Id. at 502.

\textsuperscript{108} Id.
supported by policy.\textsuperscript{109}

After indicating supporting language from \textit{Li}, the court held that the rule of joint and several liability cannot be retained in a system of pure comparative negligence.\textsuperscript{110} Finally, the court criticized the holdings of \textit{Stambaugh} and \textit{Nest-Kart} as failing to consider the consequences of unequal treatment of plaintiffs and defendants in a pure fault system.\textsuperscript{111}

\textit{Appellate Response Analyzed}

The three appellate court cases demonstrate the frustrating conceptual struggle inherent in attempting to reconcile the existing methods of indemnity and contribution with \textit{Li}'s pronouncement that liability should be assessed according to fault. Based on the fact situation before it, each court offered its own rationale for solving the particular problem raised.

Thus, the \textit{Stambaugh} court concluded that a tortfeasor who settles in good faith cannot be brought into the subsequent lawsuit by any remaining defendants. The continued availability of complete discharge for a settling defendant implies that the remaining defendant(s) will be responsible for the balance of the damages regardless of the proportion of his fault in relation to that of the settling defendant. The court justified this result based on the overriding policy considerations in favor of settlement.

While the court specifically refrained from deciding whether a defendant is liable to a plaintiff only to the extent that his negligence caused the plaintiff's damages, language of the case clearly indicates that the rule of joint and several liability controls.

This holding constitutes a broad application of the contribution statute since it applied the settlement provisions to the statute to a cross-complaint that sought neither indemnity nor contribution. Instead, the motion sought a determination of the relative fault of the co-tortfeasors, and then a ruling that the non-settling defendant was liable to plaintiff only to the extent of its fault; in effect an abrogation of the rule of joint and several liability. It does not appear that the moving party was attempting to impose any additional liability on the settling defendant. The court gave no reason for applying the

\textsuperscript{109} Id.
\textsuperscript{110} Id. at 503. \textit{Contra V. Schwartz}, supra note 8, § 16.4.
\textsuperscript{111} 135 Cal. Rptr. at 504.
statutory bar to a motion that had very little, if anything, to do with contribution.

The Safeway decision, in contrast, specifically dealt with the issue raised on appeal, that is, whether Li overrides the pro rata allocation dictated by the contribution statute. While the court recognized that comparative contribution might be a more equitable system, it refrained from challenging the statute. The court's refusal to challenge the statute indicated that a judicial implementation of a system of loss allocation based on fault would have to take an alternate approach. One possibility was hinted at by the court when it acknowledged that joint and several liability was the basic concept underlying the statute. Eliminating the rule would eliminate the basis of the statute and allow the court to move in other directions. Another remaining possibility was a judicial modification of the doctrine of implied indemnity.

The Safeway court also realized that the adoption of a system of comparative contribution would have broad statutory implications beyond mere modification of loss allocation principles. To enable the system to function both equitably in regards to each defendant and consistently in regards to Li, the court reasoned that the statutory provisions governing joinder, settlement, and release would have to be reconsidered.

The court of appeal opinion in American Motorcycle, which was subsequently overruled by the California Supreme Court, rejected the rule of joint and several liability, reasoning that its all-or-nothing outcome was inconsistent with the principle of comparative fault. The court went a step further by maintaining in dicta that plaintiffs should bear the risk of insolvency of a defendant. This view was in total opposition to the policy of compensating plaintiffs.

Since each court's fact situation presented different issues, none of the decisions considered the full spectrum of complex problems posed by the conflict between the existing methods of loss allocation and the concept of pure comparative fault. To obviate the need for continued piecemeal resolution of the difficulties involved, the California Supreme Court took a broad approach in its attempt to reconcile the conflict.

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113. 135 Cal. Rptr. at 502.
The Decision

In purporting to dispose of some of the numerous multiple party issues "lurking in the background," the California Supreme Court's opinion in American Motorcycle Ass'n v. Superior Court\textsuperscript{114} marked its first major statement on the principles of comparative negligence since Li. The decision extends the rule of partial indemnity discussed earlier with respect to Herrero and Dole to all multiple tortfeasor cases involving negligence, gives defendants the right to join all potential defendants in the lawsuit, but retains the rule of joint and several liability as well as the settlement set-off provisions set forth in the contribution statute. While the decision creates some conceptual difficulties, it nevertheless resolves some of the problems described in the previous sections.

In explaining the effect of comparative negligence on principles of loss allocation among multiple defendants, the court first addressed the rule of joint and several liability. After discussing the various contexts in which the term joint and several liability has been utilized,\textsuperscript{115} the court concluded that in the concurrent tortfeasor context the rule dictates that "a negligent tortfeasor is generally liable for all damages of which his negligence is a proximate cause."\textsuperscript{116} In response to AMA's argument that Li provides a method of allocating loss on the basis of comparative fault, thus making damages divisible, the court said that "the simple feasibility of apportioning fault on a comparative negligence basis does not render an indivisible injury 'divisible' for purposes of the joint and several liability rule."\textsuperscript{117} The court further explained that "it is simply impossible to determine whether or not a particular tortfeasor's negligence, acting alone, would have caused the same injury."\textsuperscript{118} The court concluded that although a percentage of relative fault may be assigned to a particular tortfeasor, it does not render an injury divisible.

In opposing retention of the foregoing rule, the American Motorcycle Association (AMA) argued that after Li, plaintiffs were no longer "innocent."\textsuperscript{119} The court responded by pointing

\textsuperscript{114} 20 Cal. 3d 578, 574 P.2d 763, 143 Cal. Rptr. 692 (1978).
\textsuperscript{115} Id. at 587, 574 P.2d at 768, 143 Cal. Rptr. at 697.
\textsuperscript{116} Id. at 586, 574 P.2d at 767, 143 Cal. Rptr. at 696.
\textsuperscript{117} Id. at 589, 574 P.2d at 769, 143 Cal. Rptr. at 698.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
out that the rule protects innocent plaintiffs from having to bear the portion of loss attributable to an insolvent defendant. With regard to culpable plaintiffs, the court maintained that a plaintiff's "negligence" is distinct from that of a defendant's in that it does not create a risk of harm to others, but merely a risk of self-harm.\footnote{120}

Finally, the court, citing the famous \textit{Summers v. Tice}\footnote{121} decision, reiterated the established policy favoring full compensation to plaintiffs over the equitable allocation of loss among defendants.\footnote{122} The court then concluded that the rule of joint and several liability should be retained, adding that most jurisdictions adopting comparative negligence have retained the rule.

The next portion of the decision expanded the doctrine of equitable indemnity in multiple tortfeasor actions and specifically approved partial indemnity as a method of apportioning damages. The court began its analysis by tracing the common law development of indemnity as an all-or-nothing proposition, and the difficulties encountered by the courts in trying to arrive at a suitable test to distinguish the negligence of indemnitees and indemnitors.\footnote{123} The court believed that the primary difficulty with the doctrine was its all-or-nothing nature, which it held was inconsistent with the principles of comparative negligence. Relying on the precedent set by \textit{Dole}\footnote{124} and its progeny,\footnote{125} the court concluded "that the current equitable indemnity rule should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis."\footnote{126}

Following this discussion, the opinion focused on the relationship between the new doctrine of equitable indemnity and the contribution statute. First, the court rejected an argument that California's preexisting contribution statute precluded judicial development of comparative indemnity. The court

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\textit{id.} at 589-90, 574 P.2d at 769-70, 143 Cal. Rptr. at 698-99.
\footnote{121. 33 Cal. 2d 80, 199 P.2d 1 (1948).}
\footnote{122. One court of appeal stated: "The equities thus considered are those of the wrongdoers among themselves and at all times are subject to the greater 'equity' existing in favor of the innocent injured party." Thornton v. Luce, 209 Cal. App. 2d 542, 552, 26 Cal. Rptr. 393, 399 (1962).}
\footnote{123. 20 Cal. 3d at 595, 574 P.2d at 773, 143 Cal. Rptr. at 702.}
\footnote{124. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).}
\footnote{126. 20 Cal. 3d at 599, 574 P.2d at 776, 143 Cal. Rptr. at 705.}
pointed out that the New York Court of Appeals in *Dole*\(^{127}\) adopted partial indemnity despite the existence of a similar contribution statute in that jurisdiction. The court further reasoned that since the primary legislative purpose of the statute was to lessen the harshness of the common law bar to allocation of loss among defendants, it was free to adopt a broader common law doctrine of indemnity consistent with that goal.\(^{128}\) Additionally, the court pointed out that, unlike the New York statute, the California legislation expressly preserved the right of indemnity, and that it also required that contribution be "administered in accordance with the principles of equity."\(^{129}\) The court concluded that the statute did not preclude it from developing a parallel, albeit more expansive, common law doctrine.

The court then set forth its view of the relationship between comparative indemnity and the settlement provisions of the contribution statute. The statute embodies a strong public policy favoring settlement of litigation by providing incentives for settlement. Any defendant who settles in good faith is discharged from liability to any other defendant, and plaintiff's recovery from remaining defendants is set off by the amount of the settlement rather than by settling defendant's pro rata share. Thus, when one defendant settles there is considerable pressure placed on the remaining defendants to settle or risk paying a very large sum in the event that damages as determined during trial are high, which sum is set off by only the dollar amount of the settlement. Amici urged that these incentives would be abrogated by the adoption of comparative indemnity.\(^{130}\) The court responded by incorporating these statutory settlement provisions into its new doctrine.\(^{131}\)

The final section of the opinion discussed the right of a defendant to cross-complain against a potential co-tortfeasor who was not joined by the plaintiff. Contrary to the appellate court in *Safeway*, the supreme court found explicit statutory authority for the proposition that a defendant could cross-complain as of right against an alleged co-tortfeasor.\(^{132}\)

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\(^{127}\) *Id.* at 601 n.6, 574 P.2d at 777 n.6, 143 Cal. Rptr. at 706 n.6.

\(^{128}\) *Id.* at n.7, 574 P.2d at 777 n.7, 143 Cal. Rptr. at 706 n.7.

\(^{129}\) *Id.* at 603, 574 P.2d at 778, 143 Cal. Rptr. at 707.

\(^{130}\) See *id.* at 604, 574 P.2d at 779, 143 Cal. Rptr. at 708; text accompanying note 67 supra.

\(^{131}\) 20 Cal. 3d at 604, 574 P.2d at 779, 143 Cal. Rptr. at 702.

\(^{132}\) The court pointed out that under *Cal. Civ. Proc. Code* § 428.10, a defendant
In response to the argument that allowing such a joinder would tend to complicate the issues and deprive plaintiff of the right to control the size and scope of the litigation, the court observed that section 1048(b) of the Code of Civil Procedure empowers a trial court to bifurcate the proceeding by ordering separate trials "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." However, the court concluded that bifurcation would probably be impracticable in cases involving culpable plaintiffs.

Nonetheless, having already noted that under the comparative negligence doctrine a plaintiff's recovery should be diminished only by that proportion which the plaintiff's negligence bears to that of all tortfeasors, we think it only fair that a defendant who may be jointly and severally liable for all of plaintiff's damages be permitted to bring other concurrent tortfeasors into the suit.

Accordingly, the court determined that a defendant may file a cross-complaint against a concurrent tortfeasor for partial indemnity even if the latter has not been joined by the plaintiff. Applying this rule to the instant case, the court held that since AMA sufficiently alleged a cause of action for negligence and partial indemnity against plaintiff's parents, the trial court should have granted AMA's motion for leave to file the cross-complaint.

Impact of the Decision

The opinion in American Motorcycle takes a large stride towards clearing up the ambiguities of multiple defendant litigation which arose in the wake of Li. Adopting the doctrine of comparative partial indemnity, which additionally gives defendants the right to join other potential concurrent tortfeasors in the lawsuit, is entirely consistent with California's pure fault system, and constitutes a badly needed response to this pre-

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may file a cross-complaint setting forth . . . (b) any cause of action he has against a person alleged to be liable thereon, whether or not such person is already a party to the action, if the cause of action . . . (1) arises out of the same transaction . . . [or] occurrence . . . as the cause brought against him or (2) asserts a claim . . . in the . . . controversy which is subject of the cause brought against him.

133. 20 Cal. 3d at 606, 574 P.2d at 781, 143 Cal. Rptr. at 704.
134. Id.
135. Id. at 607, 574 P.2d at 781, 143 Cal. Rptr. at 710.
viously unsettled and turbulent area of law. Yet the court, held back by what it viewed as compelling policy considerations, failed to carry the concept of pure fault through to its inescapable conclusion when it incorporated both the rule of joint and several liability and the settlement provisions of the current contribution statute into the system of comparative indemnity.

In retaining the rule of joint and several liability the court reiterated a long established policy favoring the right of plaintiffs to recover the total amount of the judgment from any of several defendants, leaving the latter to divvy up the losses among themselves. The difficulty with this concept in a post- case context, as pointed out by Justice Clark in his dissent, is that it provides for distribution of loss on a basis besides pure fault. For example, recall the situation involving the pedestrian who was injured by a speeding motorist in a crosswalk where the traffic signal malfunctioned. Suppose that plaintiff failed to look at the signal before entering the intersection, and that, as a result, the plaintiff was adjudicated 20% at fault, the motorist 50% and the city 30%. If the motorist was uninsured and insolvent or not subject to the jurisdiction of the court, the joint and several liability rule would require the city to pay 80% of the damages. Under the American Motorcycle formulation, the plaintiff would not be required to share in the risk that any tortfeasor is insolvent or unavailable, even though his negligence accounted for part of the loss.

In support of its retention of the rule, the court reasoned that the plaintiff's negligence is not "negligent" in that it does not create a risk of harm to others. Presumably, this would be true even where plaintiff's fault exceeds 50%. Such a conclusion is strained for two reasons. First, a plaintiff's negligence may well cause injury to another as well as to himself, as in the case of multiple car accidents. Liability should be allocated on the basis of fault and not on the basis of whether a litigant is called a plaintiff or a cross-complainant. It is a hasty conclusion to hold as a matter of law that a plaintiff's fault is not negligent. Secondly, the system of pure comparative negligence purports to allocate loss on the basis of fault as determined by the jury. It assumes that juries are capable of making such

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137. See 20 Cal. 3d at 609, 574 P.2d at 782, 143 Cal. Rptr. 711.
138. See also id. at 610, 574 P.2d at 783, 143 Cal. Rptr. at 712.
139. See id.
140. See also id. at 610-13, 574 P.2d at 783-85, 143 Cal. Rptr. at 712-14.
decisions. By retaining the rule of joint and several liability, the *American Motorcycle* court prevents the jury from further dividing the fault in those situations where a defendant is insolvent or unavailable. Based only on the concept of proximate cause, which in itself defies simple application, the court's view deprives the jury of performing a function it is equipped to handle and concludes that an injury is not further divisible.

A better rule, more consistent with *Li*, would divide the insolvent defendant's share of damages among the remaining litigants in proportion to their relative fault. Thus, in the example of the injured pedestrian, if the motorist were insolvent the city would pay 60% of the total damages while the plaintiff would be responsible for 40% instead of the city paying the entire 80% combined fault of all defendants. Under this system an innocent plaintiff would be completely protected, since he would still recover all damages from the solvent defendant.

To add to the difficulties created by retaining joint and several liability, the court chose to incorporate the settlement provisions of California's contribution statute into its new equitable indemnity doctrine. While the court apparently adopted partial indemnity to get around the acknowledged injustice of requiring each defendant to pay a pro rata share of damages under the contribution scheme, the court has paved the way for far greater inequities.

Under the statute, a good faith settlement completely releases the settling defendant from further liability. Under the court's formulation in *American Motorcycle*, a settlement serves only to reduce the plaintiff's later recovery by the amount of the settlement figure. These factors can combine to generate a result where a nonsettling defendant is held liable for a sum well in excess of his proportion of the fault. For example, suppose A and B combine to injure C in an auto accident. Prior to trial, C settles with A for $25,000. Later, at trial, C recovers a $100,000 judgment as a result of the accident for which the jury held A 75% responsible and B 25% responsible. Despite being only 25% at fault, B must now come up with $75,000. Seemingly in direct contravention of *Li*, B is forced to pay damages in excess of his proportion of fault. Alternatively, but equally out of line with *Li*, B, faced with the foregoing possibility of being hung out to dry at trial, might well settle for a figure that is also incommensurate with his fault.

Tactically then, *American Motorcycle* has put a great weapon in the plaintiff's arsenal. One can readily conceive of a plaintiff who willingly settles for a very low sum with a rela-
tively poor defendant whose potential fault is quite high, while refusing to do the same with a corporate or insurance company defendant who the plaintiff knows will remain liable for the balance of the judgment. Again, faced with this result, the corporate defendant may be forced to settle for a figure that proportionately is well in excess of its share of the fault. A better system would require the defendants to agree to a total settlement with plaintiff. In this manner plaintiff would be unable to utilize the above described tactic, and the settlement of each defendant would more likely correspond to his share of the fault. In the event that defendants were unable to reach a satisfactory agreement among themselves or with the plaintiff, the parties would be brought into court in a single action. While it is arguable that more cases would further clog our already overcrowded dockets, the goal of allocating loss on a pure fault basis would be served.

Despite the problems that arise from the American Motorcycle decision, the court twice emphasized the evolving nature of equitable indemnity, thus leaving room for future judicial development and clarification. Some issues are far from settled; and with the continuing debate in the legislature over no-fault and other proposed tort reforms, as well as the continuing onslaught of appeals, further changes in this area may be expected.

CONCLUSION

The traditionally rigid methods of allocating tort losses among defendants embodied in the doctrines of contribution and indemnity became unworkable with the judicial adoption of comparative negligence since they did not apportion liability on the basis of fault. Additionally, both systems were flawed in other respects and seemed to invite inequitable loss allocations. As the California courts of appeal began reaching inconsistent solutions to the problems raised, it became apparent that the guidance of the California high court was needed. The California Supreme Court reconciled some of these difficulties in its recent judicial enactment of partial equitable

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141. Professor Prosser stated his view on this alternative: "The only completely satisfactory method of dealing with the [multiple party] situation is to bring all the parties into court in a single action, to determine the damages sustained by each, and to require that each bear a proportion of the loss according to his fault." Prosser, Comparative Negligence, 41 CALIF. L. REV. 1, 33 (1953).

142. 20 Cal. 3d at 597, 603, 574 P.2d at 774-75, 779, 143 Cal. Rptr. at 703-04, 707.
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indemnity. By giving named defendants the right to join third-party defendants in an action for determination of the relative fault and resultant liability of the parties, the American Motorcycle decision comports with the system of pure comparative fault.

Yet, American Motorcycle exhibits some troubling conceptual inconsistencies resulting from its retention of the rule of joint and several liability and the settlement provisions of the contribution statute. Each was incorporated into the newly announced doctrine of equitable indemnity to protect plaintiffs and to encourage settlements, yet both fail to square with the concept of pure fault. This dilemma suggests a need for further development and clarification of the problems associated with multiple defendant litigation.\(^{143}\)

John J. Cheap, Jr.

\(^{143}\) This comment was based in part on an essay which was awarded a tie for third place in June, 1977 in a national legal essay contest sponsored by the Federation of Insurance Counsel Foundation. The author gratefully acknowledges the Federation’s permission to reprint portions of the essay.