PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 6 | Issue 1 Article 3

12-15-1978

Allocation of Responsibility After American Motorcycle Association v. Superior Court

Erwin E. Adler

Allocation of Responsibility After *American Motorcycle Association v. Superior Court*

ERWIN E. ADLER*

In its landmark case of *Li v. Yellow Cab Co.*,[1] the California Supreme Court judicially adopted the doctrine of comparative negligence in an action involving a plaintiff and a single defendant. The court in *Li* specifically avoided making any decision concerning the numerous issues which would be involved in a multiparty action: the relationship of multiple defendants with one another, the right of one defendant to join others for the purpose of sharing payment of the judgment, the respective responsibilities of such parties for the judgment (including those insolvent, partially solvent or possessing an immunity), and the procedure for the settlement of cases. In addition to resolving these important substantive issues in the *American Motorcycle*[2] decision, the court adopted a philosophical ranking of values which will inevi-

* B.A. University of Michigan, 1963; J.D. Harvard University School of Law, 1966; L.L.M. University of Michigan, 1967. The author represented the Petitioner, American Motorcycle Association in American Motorcycle Assn. v. Superior Court, and the respondent in Safeway Stores Inc. v. Nest-Kart. Mr. Adler is a partner in the Los Angeles firm of Lawler, Felix & Hall and is engaged in civil litigation.

1. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

2. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

tably effect and guide resolution of the numerous problems in the context of comparative negligence which have not yet been litigated.

Comparison of *Li* with *American Motorcycle* reveals a substantial modification by the court of its previous articulation of judicial philosophy and policy objectives.[3] In *Li*, the California Supreme Court adopted the basic philosophy that liability would be determined in accordance with an allocation of fault; in the court's words, the resulting judgment assured that "liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault."[4] The court in *Li* also adopted a philisophical bias against the moral absolutes involved in identifying who was a "wrong" doer. Accordingly, the court rejected the "all or nothing" approach implicit in the doctrine of contributory negligence which had previously acted as a complete bar to recovery by a plaintiff only partially responsible for an incident. In doing so, the court indicated its reliance upon the "utilization of special verdicts or jury interrogatories [which] can be of invaluable assistance in assuring that the jury has approached its sensitive and often complex task with proper standards and appropriate reverence."[5]

In *American Motorcycle*, the fundamental premise of *Li*, that liability follows an allocation of responsibility, was modified. Instead, allocation of responsibility (and ensuing liability) was subordinated to a judicial solicitude for the recovery of damage by injured plaintiffs. The court would not, it said, "work a serious and unwarranted deleterious effect on the practical ability of negligently injured persons to receive adequate compensation for their injuries."[6] Its next priority was to establish a procedure which would, in its view, encourage settlements. Only *after* having satisfied these goals of establishing full recovery for the plaintiff and a settlement procedure did the court consider the importance of imposing liability upon a tortfeasor in accordance with the jury's determination of responsibility. Finally, a comparison of the supreme court's decision with that of the court of appeal indicates that a fourth policy objective, reducing the transactional costs involved in implementing a system of compar-

3. The initial evaluation of the supreme court's decision as embodying a hierachy of values was made by Justice Thompson who presided at a seminar on comparative negligence at which the author also spoke. *See* Report of Seventeenth Annual Seminar, Association of Southern California Defense Counsel pp. 117-21 (1978). Justice Thompson has refined this analysis in *Sears, Roebuck & Co. v. International Harvester Co.*, 82 Cal. App. 3d 492, 147 Cal. Rptr. 262 (1978).

4. 13 Cal. 3d at 813, 532 P.2d at 1232, 119 Cal. Rptr. at 864.

5. *Id.* at 824, 532 P.2d at 1240, 119 Cal. Rptr. at 864.

6. 20 Cal. 3d at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189.

ative negligence, carried little, if any, weight with the court.[7]

This article will first review the *American Motorcycle* decision in terms of express and implicit holdings, its policy objectives, and its impact upon the development of a new body of tort law. Second, the paper will review the consequences, legal and practical, of utilizing the doctrine of joint and several liability in the context of a comprehensive system of comparative responsibility. Finally, we will review the potential problems arising in the context of settling, in essence, a claim based upon a percentage allocation for a fixed dollar amount.

I. Implementation of a System of Comparative Responsibility—Substantive Aspects

A. Allocation of Responsibility Among Defendants

The first and perhaps most easily recognized of the supreme court's goals is found in that portion of the court's opinion dealing with allocation of responsibility among multiple defendants. Here, the court found no difficulty in requiring an allocation of liability to be made upon the basis of each party's allocable responsibility for an incident. The goal of achieving an equitable distribution of responsibility could not, by hypothesis, conflict with any perceived policy of favoring the plaintiff or affecting the ability to settle his claim. Accordingly, the court implemented the goal of allocating liability in proportion to fault.

In approving the use of such an allocation, the court was confronted with the problem of resolving the potential conflict of two related provisions of the California Code of Civil Procedure. While section 875(b) requires that principles of contribution "shall be administered in accordance with the principles of equity,"[8] the Legislature has also provided that only when one tortfeasor has "discharged the joint judgment or has paid more than *his pro rata share*," is he entitled to contribution.[9] As pointed out by the petitioner, American Motorcycle Association, those principles are not necessarily in conflict.[10] Assuming that the jury has,

7. *Compare* the decision and philosophy of the court of appeal in American Motorcycle Ass'n v. Superior Court, 65 Cal. App. 3d 694, 135 Cal. Rptr 497 (1977) *with* the Supreme Court decision in American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

8. Cal. Civ. Proc. Code §875(b) (West Supp. 1978).

9. Cal. Civ. Proc. Code §875(c) (West Supp. 1978).

10. Supplemental Brief of American Motorcycle Ass'n at 33-34, American Mo-

by special verdict, allocated responsibility among various defendants for an accident, it would be inequitable to refuse to enter judgment based upon such an allocation of responsibility. That has been the view taken by numerous other comparative negligence states.[11] Even prior to *Li*, one California appellate decision had recognized that, historically, the contribution statute "incorporated the concept of apportionment measured by the comparative fault of the several tortfeasors."[12] Presumably because of the historical bias of California courts against jury interrogatories and special verdicts regarding allocating responsibility, discussed below, the equitable apportionment provisions of the statute had never been implemented in California.[13]

B. Joinder of Parties for Purpose of Allocation

The supreme court approved the filing of declaratory relief actions against parties alleged to be responsible in part for an incident for purposes of sharing the judgment. The basic theory advanced was that of equitable indemnification. Previous cases had permitted joinder only where the indemnitee (defendant) sought *total* indemnity from the indemnitor (cross-defendant). This "all or nothing" form of indemnification had been predicated upon the following philosophy:

> The difference between primary and secondary *liability is not based on a difference in degrees of negligence or on any doctrine of comparative negligence*—a doctrine which, indeed, is not recognized by the common law; . . . It depends on a difference in the character or kind of the wrongs which cause the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured person. . . . But the important point to be noted in all the cases is that secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties, or arising from some positive rule of common or statutory law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by

---

torcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

11. *See* Lacewell v. Griffin, 214 Ark. 909, 219 S.W.2d 227 (1949); COLO. RULES OF CIV. PRO. Rule 22 (1973); CONN. GEN. STAT. §52-104 (1958); Stuart v. Hertz Corp. 302 So.2d 187 (Fla. Dist. Ct. App. 1974); IDAHO CODE §6-803(4) (Supp. 1978); KANSAS STAT. ANN. §60-258(a) (1964); HAW. REV. STAT. §§663-17(a), 663-31 (Supp. 1975); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1978); N.J. STAT. ANN. §§ 2A-53A-1 to 2A-53A-5 (West 1952); MISS. CODE ANN. §85-5-5 (1972); NEV. REV. STAT. §§17.215-17.325 (1973); N.Y. CIV. PRAC. §§1401-1403 (McKinney 1976); N.D. CENT. CODE §§32-38-01 to 32-38-04 (1976); S.D. COMPILED LAWS ANN. §§15-8-11 to 15-8-22 (1967); TEX. REV. CIV. STAT. ANN. art. 2212a, §2(b) (Vernon Supp. 1978); UTAH CODE ANN. §78-27-40 (1977); WYO. STAT. §1.7.3(d) (Supp. 1975); Packard v. Whitten, 274 A.2d 169, 174 (Me. 1971). *Contra*, Howard v. Spafford, 132 Vt. 434, 321 A.2d 74 (1974).

12. Rollins v. State of California, 14 Cal. App. 3d 160, 165 n.8, 92 Cal. Rptr. 251, 254 n.8 (1971).

13. *See* text at notes 46-54 *infra*.

> the act of the one primarily responsible.[14]

American Motorcycle Association contended that the fundamental rationale of such cases, that the common law does not recognize degrees of fault, was eviscerated by *Li*. In *American Motorcycle* the supreme court agreed and permitted joinder of such cross-defendants for the purpose of making an allocable determination, stating:

> . . . California decisions have long invoked the equitable indemnity doctrine in numerous situations to permit a "passively" or "secondarily" negligent tortfeasor to shift his liability completely to a more directly culpable party. . . . [T]he rule has fallen short of its equitable heritage because, like the discarded contributory negligence doctrine, it has worked in an "all-or-nothing" fashion, imposing liability on the more culpable tortfeasor only at the price of removing liability altogether from another responsible, albeit less culpable, party.
>
> . . . [W]e think that the long-recognized common law equitable indemnity doctrine should be modified to permit, in appropriate cases, a right of partial indemnity, under which liability among multiple tortfeasors may be apportioned on a comparative negligence basis.[15]

Such an allocation neither disturbs the plaintiff's ability to collect a full judgment nor impairs, in the court's view, his ability to obtain a settlement.

C. Active v. Passive Indemnification (Non-Contractual)

Based upon the court's approval of a system of equitable indemnification administered on a comparative basis, it is doubtful that the *active-passive* indemnification doctrine remains viable. Although the court has not yet addressed this matter, it did specifically reject the primary-secondary distinction as a basis for indemnification.[16] Much like the approach rejected for indemnification, the active-passive distinction justifies the shifting of the *entire burden* of paying a money judgment from one who is "less" responsible to one who is "more" responsible. The essential predicate for liability of the "passive tortfeasor," however, is that he is *in some measure* responsible for the injury. Nevertheless, on the basis of an "all-or-nothing" doctrine, he may shift the entire burden of paying the judgment to the indemnitor who is "actively" responsible for the incident.

If the court's rejection of the primary-secondary distinction did

14. Ford Motor Co. v. Robert J. Poeschl, Inc., 21 Cal. App. 3d 694, 696-97, 98 Cal. Rptr. 702, 704 (1971) (emphasis added), citing Builders Supply Co. v. McCabe, 366 Pa. 322, 325-26, 77 A.3d 368, 370-71 (1951).

15. 20 Cal. 3d at 583, 578 P.2d at 902, 146 Cal. Rptr. at 185.

16. *See* text at notes 12 & 14 *supra*.

not foreshadow the demise of this doctrine, the court's heavy reliance upon *Dole v. Dow Chemical Company*,[17] a decision in which New York rejected the doctrine,[18] should forecast the end of its application. The issue has not yet been directly addressed by any appellate decision since *American Motorcycle*.

The fundamental postulate, that the "active" and the "passive" tortfeasor are both responsible for the incident, was not discussed in either of the only two post-*Li* appellate decisions to consider such requests for indemnification.[19] The practical difficulties of applying this doctrine to concrete factual situations are as well known as the inconsistencies in result.[20] Similarly, the cases outside of California are sparse and inconsistent on this issue.[21] Should the doctrine be continued, it must be recognized that its rationale is completely inconsistent with the basic philosophy of imposing liability in accordance with fault.

D. Active v. Passive Indemnification (Contractual Provision)

Although the supreme court could have reviewed the doctrine of active-passive contractual indemnification in a contract with typically vague language, it did not discuss the issue in the first such post-*American Motorcycle* decision before it.[22] Rather, it ap-

17. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S. 2d 382 (1972).

18. *Id.* at 149-51, 282 N.E.2d at 292-93, 331 N.Y.S.2d at 388-89.

19. *Compare* Sanders v. Atchison, T. & S.F.Ry. Co., 65 Cal. App. 3d 630, 640-41, 654-55, 135 Cal. Rptr. 555, 560-61, 569-70 (1977) *with* Link-Belt Co. v. Star Iron & Steel Co., 65 Cal. App. 3d 24, 30, 135 Cal. Rptr. 134, 137-38 (1976). The court in *Link-Belt* refused to apply comparative apportionment of fault on the basis that indemnity is an all or nothing remedy. The court did not interpret *Li* as overruling prior indemnity law. In *Sanders* the trial court apportioned the damages between defendants on the basis of *Li*. The appellate court was receptive to the trial court's approach but declined to apply *Li* since the trial court judgment was given before the *Li* decision became effective.

20. A defendant can actively and affirmatively cause harm yet be only passively negligent; moreover, the determination of "active" may be a fortuitous result based upon the parties sued and their role in the litigation. *Compare* Ford Motor Co. v. Poeschl, Inc., 21 Cal. App. 3d 694, 98 Cal. Rptr. 202 (1971) *with* Barth v. B.F. Goodrich Tire Co., 15 Cal. App. 3d 137, 92 Cal. Rptr. 809 (1971).

21. *Compare* Gies v. Nissen Corp., 57 Wis. 2d 371, 386-87, 204 N.W. 2d 519, 527 (1973) (rejecting active-passive indemnification) *with* Bjorklund v. Hantz, 296 Minn. 298, 302, 208 N.W.2d 722, 724 (1973) (approving active passive indemnification).

22. Gonzales v. R. J. Novick Co., Inc., 20 Cal. 3d 798, 675 P.2d 1190, 144 Cal. Rptr. 408, (1978). The clause reads:

> SUB-CONTRACTOR FURTHER AGREES AS FOLLOWS: . . . 23. INSURANCE—To indemnify and save Owner, Architect, and Contractor harmless against all claims for damages to persons or to property growing out of the execution of the work, and at his own expense to defend any suit or action brought against Owner, Architect, or Contractor founded upon the claim of such damage. To procure and maintain during the entire progress of the work, full and unlimited Workmen's Compensation and Employer's Liability Insurance, Public Liability and Property Damage

plied the distinction so as to impose upon the employer-indemnitor the total amount of the judgment.

In its second decision dealing with written indemification, however, it touched upon the issue. The court held that to the extent that indemnification is not compelled by the plain written language of an agreement, the trial court should utilize the equitable indemnification doctrine to allocate responsibility for an incident between the indemnitor and the indemnitee. Following *American Motorcycle*, the court held that where "the duty [of indemnification] established by contract is by the terms and conditions of its creation inapplicable to the particular factual settting before the court, the equitable principles of implied indemnity may indeed come into play."[23] The court remanded for a determination in accordance with *American Motorcycle*.[24] Since the contractual provision before it did not contemplate the adjudged active negligence of the indemnitee, the court held the indemnitor could obtain such indemnification. In doing so, the court thereby permitted a contractual indemnitor to become a common law indemnitee.

Despite the court's application of the doctrine, there is little to commend the retention of the active-passive distinction. Assuming that the purported indemnitor and indemnitee are before the court, there probably will be a determination of their respective responsibilities for an incident. If such an allocation is made, even the "passively" negligent tortfeasor will receive an allocation of responsibility; for example, a failure to warn the plaintiff of a risk may constitute negligence. Should he be determined to be ten percent responsible for the incident, there appears to be no policy justification for labeling him "passive" and allowing him to exculpate himself of all responsibility for the incident. On the contrary, since the tortfeasor has been found responsible, he

---

Insurance in limits and with a carrier or carriers satisfactory to Contractor; to furnish Contractor with certificates of said insurance before commencing work hereunder, which shall provide that the policy shall not be cancelled or reduced in coverage until ten (10) days after written notice shall be given to Contractor of such cancellation or reduction in coverage. To insure his interest from loss to the premises resulting from fire, earth settlement, earthquake, theft, embezzlement, riot or any other cause whatsoever, and neither the Owner nor the Contractor will, under any circumstances, be liable or accountable to the Sub-Contractor for such loss. *Id.* at 807, 575 P.2d at 1195, 144 Cal. Rptr. at 413.

23. E.L. White, Inc. v. The City of Huntington Beach, 21 Cal. 3d 497, 508, 579 P.2d 505, 511-12, 146 Cal. Rptr. 614, 620-21 (1978).

24. *Id.* at 510, 579 P.2d at 513, 146 Cal. Rptr. at 622.

should be barred from recovering that ten percent of the judgment.

The use of the allocation procedure raises a question as to whether the announced policy against indemnifying a person against his own "active" negligence continues to make good sense in the context of written agreements. The usual parties to such an indemnification agreement are solvent defendants who have, as part of the contract, allocated the cost and responsibility of obtaining insurance.[25] While the insurance company issuing the policy will determine whether or not contractual indemnification exists, it will rarely review the specific language of the indemnity agreement.

There is little justification for continuing to eviscerate contractual language so that an indemnity governing "all claims," for example, is interpreted to mean all claims except for those arising out of active negligence. The result achieved by the courts in "interpreting" contractual language appears to be directly contrary to the language of the agreements and the common understanding of the businessmen who negotiated them. The requirement of "magic language" to achieve indemnification appears contrary to the philosophy of such recent legislation as the Uniform Commercial Code which was intended to simplify the drafting of commercial agreements. It appears that, as a result of this practice, little has been accomplished in terms of reaching some policy objective. Moreover, the court in *American Motorcycle* and *Li* rejected the notion that any person involved in a tort has committed a reprehensible "wrong." Rather, the court realistically concluded that such persons are only wrongdoers in the sense that they have committed a tort which requires compensation. To permit businessmen to allocate risks (and the payment of insurance) by contract would appear to be consistent with that objective. In any event, even if the contracts are not enforced so as to meet their intended objective, the continued fiction of applying the active-passive distinction should be abandoned in favor of allocation.

E. Vicarious Liability

The entire doctrine of respondeat superior rests upon the basis that the master will be compelled to assume the entire liability created by the agent; it would therefore appear that, under a doctrine of comparative negligence, there would similarly be no need for allocation between the two parties. Under the contribution statute, for example, the Legislature has indicated that the master

25. This is typical commercial practice. *See, e.g.*, CAL. COMM. CODE §2320 (West 1964).

and the servant shall contribute a single pro rata share.[26] That also appears to be the rule in other jurisdictions, irrespective of whether they have adopted comparative negligence.[27] In one recent appellate decision, however, the court allocated the responsibility between a principal and its agent on the basis of the allocation principles of *American Motorcycle*. In substance, the principal sought indemnity against the agent and the trial court held that such an action should be tried on the basis of allocation principles. In affirming the judgment, the court held that it was proper to allow the jury to apportion the relative negligence of the principal, an insurance company, and its agent which had led to liability on the insurance policy. In doing so, the court indicated that such a holding was consistent with the doctrine of implied comparative indemnity adopted by the supreme court in *American Motorcycle*.[28]

II. Implementation of Comparative Negligence—Procedural Aspects

A. Allocation of Responsibility to Defendants

In *Li*, the supreme court concluded that comparative negligence required a jury finding by interrogatory or special verdict in order to allocate responsibility for an incident between a plaintiff and a single defendant. In *American Motorcyle*, that logic was extended: "it is logically essential that the plaintiff's negligence be weighed against the *combined total* of all other causative negligence."[29] The court indicated that the plaintiff may compare his negligence against the class of *all* defendants, whether or not served by the plaintiff. Conversely, the court did not articulate any need for allocating the individual responsibilities of the various defendants at the time of this comparison with the plaintiff. There is, of course, no stated policy favoring the plaintiff's ability to demand such an allocation between the defendants, as compared with his right to do so against the class of all defendants.

No institutional justification permits the plaintiff to demand that an allocation be made among the defendants at the time of

26. Cal. Civ. Proc. Code §876(b) (West Supp. 1978).
27. *See* Judson v. Peoples Bank & Trust Co., 25 N.J. 17, 37, 134 A.2d 761, 771 (1957).
28. New Hampshire Ins. Co. v. Sauer, 83 Cal. App. 3d 454, 460, 147 Cal. Rptr. 879, 882 (1978).
29. 20 Cal. 3d at 590 n.2, 578 P.2d at 906, 146 Cal. Rptr. at 189.

trial. Consistent with the practice generally prevailing in indemnity actions, issues having to do with indemnification and allocation may be delayed until the plaintiff has proven his case. Should defendants be required to try their respective cases against each other, evidence may be introduced which will be extraneous to the plaintiff's case. If the plaintiff loses, numerous additional days of trial time would have been consumed by the courts and the attorneys in litigating matters having no bearing on the ultimate outcome. Moreover, in some cases, the determination of such allocations will unnecessarily serve to confuse the jury.

Some plaintiffs' attorneys have expressed a desire to require the jury to make such an allocation between the defendants *at the same time* that it makes an allocation between the plaintiff and the class of defendants. That desire is apparently predicated upon the tactical consideration that this allocation might cause a disruption of a common defense between certain defendants. This is, however, an insufficient justification for introducing additional time and issues into a lawsuit. Such a common defense may involve defendants whose interests are similar in comparison with those of the plaintiff. In a products liability action, for example, a manufacturer of an allegedly defective product and a retailer have a common interest in defeating a plaintiff's claim. Similarly, a hospital and medical personnel using its facilities may have a common interest in meeting a claim of medical malpractice.

Should the *defendants desire* such an allocation, a set of special interrogatories or verdicts may be supplied to the jury after it has determined the responsibility of the *class* of defendants for the incident. The resolution of the indemnification problems in *American Motorcycle* is consistent with the typical pre-*Li* indemnity case. Nothing herein, however, should be read as implying that, in appropriate circumstances, the jury should not make an allocation of individual defendants' responsibility at the same time that it determines the responsibility of the class of defendants. Control over trial procedure, as indicated by the court in *American Motorcycle*, will remain subject to the discretion of the trial court.[30]

B. Necessity for Filing a Cross-Complaint to Obtain an Allocation

Although the court approved allocation between defendants, the language of the court's opinion did not discuss whether a

30. 20 Cal. 2d at 606-07, 578 P.2d at 917, 146 Cal. Rptr. at 200; CAL. CIV. PROC. CODE §1048 (West Supp. 1978).

cross-complaint is required to obtain such an adjudication or whether an affirmative defense requesting such allocation is sufficient. In its petition, American Motorcycle Association only requested the court to permit the filing of its cross-complaint to join additional defendants. Nevertheless, there is nothing illogical about permitting such an allocation to be predicated upon the pleading of an affirmative defense by a party requesting such allocation.

Upon this point, practice has differed in northern and southern California. Analogizing to the affirmative defense which raised the issue of the employer's negligence in *Witt v. Jackson*,[31] many attorneys in northern California have relied upon the pleading of comparative contribution as an affirmative defense.[32] On the other hand, the more common practice in southern California appears to be that this issue is placed in controversy by a cross-complaint. There is nothing in the language of the *American Motorcycle* decision which compels either practice. As a strategic consideration, it would probably be more helpful to raise the allocation issue by way of cross-complaint thereby permitting the pleader to define the issues he desires to be tried, particularly if they differ from the plaintiff's theories.

C. Plaintiff as a Necessary Part to the Cross-Complaint

Assuming that a cross-complaint is filed, the plaintiff should be joined as a cross-defendant. Otherwise, an adjudication of responsibility as to the cross-defendants would not be binding upon him.[33]

D. Declaratory Relief as the Remedy

Claims for equitable indemnification must be predicated on the basis of declaratory relief. As properly held in numerous decisions prior to *American Motorcycle*, a request for contribution

31. 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961).

32. *See, e.g.*, Tate v. Superior Court, 213 Cal. App. 2d 238, 28 Cal. Rptr. 548 (1963) (permitting employee's negligence issue to be raised by affirmative defense).

33. *See* Stambaugh v. Superior Court, 62 Cal. App. 3d 231, 236-37, 132 Cal. Rptr. 843, 846 (1976). (The court refused to decide the issue "that each of several contributing joint tortfeasors . . . 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" since the plaintiff was not made a party. *Id.*).

may not properly be made prior to judgment.[34] On the other hand, a request for declaratory relief permits all such claims to be tried in one action and avoids the requirement of a pre-existing judgment.[35] Accordingly, a request for declaration of rights and duties as between the parties is required so that, upon entry of the judgment in favor of plaintiff, the court may simultaneously enter its determinations as to the allocable responsibility of each of the other parties for the incident.

E. Costs

The issue of who is to pay for costs after entry of judgment has not yet been conclusively determined by the appellate courts. Although it would appear that allocation principles, as between the plaintiff and defendant, should require the allocation of such costs on an equitable basis, at least one appellate court appears to have reached a contrary result.[36] Although the court in that decision recognized that the policy underlying recovery of costs is unquestionably intertwined with consideration of fault, it concluded that it was statutorily required to grant all such costs to the plaintiff who was "the prevailing party" under section 1032 of the Code of Civil Procedure. While determining that the plaintiff was forty percent responsible for his own injury, the court focused upon the jury's finding of "a verdict in favor of the plaintiff."

The absolute and unqualified allowance of costs is inconsistent with the allocation principles mandated by *Li*. Even assuming that the court's interpretation of section 1032 is correct, it is clear that when there is a cross-complaint and the plaintiff is not found free of all negligence, there is not one but *two* prevailing parties. Even if one ignores the allocation principles in a case without a cross-complaint, it is apparent that the decision is not applicable to the situation where there are cross-complaints and the court has been required to enter judgments on both the complaint and cross-complaint.

F. Retroactivity

The court in *American Motorcycle* did not specifically indicate

---

34. CAL. CIV. PROC. CODE §875(a) (West Supp. 1978) (Section 875(a) requires, as the predicate for a contribution action, that there be "a money judgment [which] has been rendered against two or more defendants in a tort action.").

35. The substantive pleading requirements are described in a number of tort cases involving similar requests for declaratory relief. *See* Jefferson Incorporated v. City of Torrance, 266 Cal. App. 2d 300, 302, 72 Cal. Rptr. 85, 86 (1968); Lewis Avenue Parent Teachers' Assn. v. Hussey, 250 Cal. App. 2d 232, 235-36, 58 Cal. Rptr. 499, 501-02 (1967).

36. Hyatt v. Sierra Boat Co., 79 Cal. App. 3d 325, 145 Cal. Rptr. 47 (1978).

whether the decision was to be retroactive and if so, whether in whole or in part. Appellate decisions after *American Motorcycle* have not been consistent.[37]

In *Li*, the court specifically indicated that "the present opinion shall be applicable to all cases in which trial has not begun before the date this decision becomes final in this court."[38] In the related context of applying comparative negligence principles to strict liability in tort, the court adopted a similar approach.[39]

When the court was confronted with this issue in *Safeway Stores*,[40] a subsequent case with a similar situation in which the trial court had ordered the jury to make such an allocation, it indicated that a greater retroactivity should be granted. Thus the court held that "when—as in the instance case—the issue of comparative contribution or indemnity has been properly preserved below, no undue surprise or unfairness will result in applying the *American Motorcycle* decision in cases presently pending upon appeal."[41] As noted by the court, substantial questions had been raised after *Li* with regard to continued application of California pro rata contribution rules. Numerous trial courts, moreover, had exercised their discretion to direct the jury to prepare special verdicts or jury interrogatories. Accordingly, there would be relatively few cases which would require retrial on this issue.[42]

On the other hand, if a defendant had filed such a cross-complaint initially and had been unsuccessful in doing so, the dismissal of this cross-complaint would have been *res judicata* and would have required application of California pro rata contribution rules. The cross-complainant would have had to appeal the

37. County of Ventura v. City of Camarillo, 80 Cal. App. 3d 1019, 1024, 144 Cal. Rptr. 296, 299 (1978); Sears, Roebuck & Co. v. International Harvester Co., 82 Cal. App. 3d 492, 495 n.1, 147 Cal. Rptr. 262, 263 n.1 (1978); Lemos v. Eichel, 83 Cal. App. 3d 110, 119, 147 Cal. Rptr. 603, 607 (1978).

38. 13 Cal. 3d at 829, 532 P.2d at 1244, 119 Cal. Rptr. at 876.

39. Daly v. General Motors Corp., 20 Cal. 3d 725, 743-44, 575 P.2d 1162, 1173, 144 Cal. Rptr. 380, 391 (1978).

40. Safeway Stores v. Nest-Kart, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978).

41. *Id.* at 333, 579 P.2d at 447, 146 Cal. Rptr. at 556.

42. The issue of retroactivity in *Safeway* was not initially briefed by the parties. By letter dated August 4, 1977, from the Clerk of the Supreme Court to the parties, the court requested special argument on two points, one of which was: "If the court should adopt a comparatve indemnity or comparative contribution doctrine, what, if any, retroactive effect should such a decision be given?" The other issue concerned the incorporation of strict liability in tort into a system of comparative negligence.

adverse and erroneous decision, since a second attempt to file such a pleading would have been improper although there had been a change in the law.[43]

III. Joint and Several Liability

The Supreme Court, in its treatment of joint and several liability in *American Motorcycle* concluded that although the jury may allocate responsibility as between defendants (and cross-defendants), the court would retain the doctrine of joint and several liability for tort actions generally. The court held: "[A]fter *Li*, a concurrent tortfeasor whose negligence is a proximate cause of an indivisible injury remains liable for the total amount of the damages, diminished only 'in proportion to the amount of negligence attributable to the person recovering.' "[44] With those words, the supreme court attempted to resolve one of the most significant and troubling issues underlying the law of tort: When is it justifiable for one person to be called upon to pay money to another for injury occurring to the latter? A concrete example may help to illustrate the problem. Assume a drunken driver, bereft of assets or insurance, drives his vehicle in excess of the speed limit and hits a car going through an intersection. In such a situation, the plaintiff or his heirs recover nothing as a practical matter. Should the result change if the defendant drunk claims that a stop sign was partially obscurred by the leaves of a neighboring tree and the jury determines that these leaves proximately (two percent) caused the accident? Should the result change if the plaintiff was also drunk and traveling faster than the speed limit?

As illustrated above, in a multi-defendant action, various parties, including the plaintiff, may have contributed to an injury. On this issue, the court indicated that its primary concern was with protecting the interest of the plaintiff by assuring him a total recovery rather than being concerned with the equity or fairness of calling upon a defendant to pay for more than his allocable share of responsibility for causing the incident.

A. Moral, Ethical and Social Considerations Underlying Joint and Several Liability

In this final quarter of the twentieth century, it seems startling to find that plaintiffs, as a class, have a greater claim upon the court's sympathy than defendants. In contrast, the court in *Li* had mandated that each person's allocable responsibility for an

43. Harland v. State of California, 75 Cal. App. 3d 475, 487-88, 142 Cal. Rtpr. 201, 209 (1977).

44. 20 Cal. 3d at 590, 578 P.2d at 906-07, 146 Cal. Rptr. at 189-90.

incident would be determined by the finder of fact, whether that tortfeasor is labeled a "plaintiff" or a "defendant."

Participants in an accident contribute to its occurrence in various ways. The consequences of their negligence intertwine. Their moral blameworthiness as actors in the drama, however, is not predicated upon their respective roles in subsequent litigation as "plaintiffs" or "defendants." Irrespective of the amount of injury, the first to sue becomes "the plaintiff." Those initially hailed into the action are called "defendants." Frequently, a "defendant" becomes a "plaintiff" by way of cross-complaint. The fact-finding process by jury use of a special verdict or interrogatory to allocate responsibility strips the judicial process to its foundation—the transfer of money from one person caused by *his wrongdoing* to pay for the loss *he has caused* another. Before and after *Li*, a plaintiff injured by an insolvent defendant could recover nothing regardless of the latter's blameworthiness. That fundamental reality has not been changed by either *Li* or *American Motorcycle*. Similarly, the respective *blameworthiness* of two (or more) defendants concurrently causing an accident is unchanged by *Li* and *American Motorcycle*. The supreme court, in simultaneously approving a joint and several verdict and the allocation procedure, has indicated that it will predicate liability for a defendant upon the solvency of his co-defendant, not upon blameworthiness.

That the judicial system could sanction such a result in certain cases prior to *Li* was due to a lack of proper basic principles and an inadequate procedure. Prior to *Li*, the courts would not allocate responsibility between defendants; moreover, the doctrine of contributory negligence cast a moral stone against the "guilty" tortfeasor by the completely "innocent" plaintiff.[45] Today there is no such justification for laying the entire burden of an accident caused by one tortfeasor labelled as "defendant," whether or not served, upon another "defendant." Fairness dictates that the blameworthiness of all actors in an incident be treated on a consistent basis.

In attempting to shift the loss caused by one "defendant" onto another "defendant," there must be some rationale justifying the transfer. Labeling a party as a "plaintiff" rather than "defendant" affords only illusory justification. Unfortunately, the general ef-

45. See text at notes 51-53 *infra*.

fect of permitting joint and several liability is to cast upon a marginal defendant who may be a local governmental agency or some other target defendant, the burden of paying a judgment caused by another.

Two recent trial court decisions illustrate the lack of an ethical basis for applying a joint and several liability rule in a system of comparative responsibility. In *Holdsberg v. Schwab, Kabaz* dba *Le Lycee Francais de Los Angeles*,[46] the jury found one defendant to be ninety-eight percent responsible for the incident and the other defendant two percent responsible. The plaintiff sought to hold the marginal defendant for the entire judgment. Similarly, in *Spivey v. General Motors Corp.*,[47] the plaintiff was found one percent negligent, General Motors found one percent negligent and the plaintiff's employer found ninety-eight percent negligent. Under the *American Motorcycle* rules, the marginal target defendant, General Motors, was required to pay ninety-nine percent of the judgment less the workman's compensation benefits.

Although the court has determined that assisting the plaintiff to obtain a full judgment is of greater value than equitable allocation, it suggests no cogent reason why one class of litigants should be favored over others. Had there been only one defendant, though insolvent, the plaintiff would have recovered nothing. By permitting an increase in the number of defendants (or litigants) in the action, there is no increased justification for requiring a marginal defendant to pay for more than his allocable share.

B. Precedential Underpinnings Rejected by the Court in American Motorcycle

The court rejected established rules in California concerning the basis for a several judgment in the context of tort actions. These rules had been well settled for more than a half century. In the landmark decision of *California O. Co. v. Riverside P. C. Co.*,[48] the court allocated responsibility to the defendant cement company for *its portion* of the dust generated by two competing cement producers. While the dust from both plants had caused injury to plaintiff's orchard, the court held:

> The California Portland Cement Company and defendant were not joint tortfeasors. Their respective torts—wrongfully operating their respective cement plants in such manner that deposits of cement dust, blown from the plants toward plaintiff's orange grove, were incrusted upon the leaves of plaintiff's trees—were several when committed, and did not become joint merely because of a commingling of the dust from the respective

46. Los Angeles Superior Court No. WEC 26332.
47. Los Angeles Superior Court No. NWC 39967.
48. 50 Cal. App. 522, 195 P. 694 (1920).

> plants and a union of the consequences proceeding from the several and independent tortious acts.[49]

The court accordingly concluded that: "Defendant is liable only for such proportion of the total damage resulting from the commingled dust emitted into the atmosphere from the plants of the two cement companies as was caused by its own plant."[50] That principle has been recognized for many years in personal injury and property damage actions and has often compelled the entry of a several judgment when an allocation was obtained.[51] It has also been recognized in numerous other jurisdictions.[52]

---

49. *Id.* at 524, 195 P. at 695.

50. *Id.*

51. *See, e.g.*, Connor v. Grosso, 41 Cal. 2d 229, 232, 259 P.2d 435, 437 (1953), (property damage—nuisance allocated as to source); Duprey v. Shane, 39 Cal. 2d 781, 795, 249 P.2d 8, 16 (1952) (personal injury-medical malpractice allocable based upon cause); Slater v. Pacific American Oil Co., 212 Cal. 648, 654, 300 P. 31, 33-34 (1931) (property damage—oil well residues—allocable by cause); Carolotto Ltd. v. County of Ventura, 47 Cal. App. 3d 931, 936-37, 121 Cal. Rptr. 171, 174-75 (1975) (property damage from flooding allocable as to cause); Griffith v. Kerrigan, 109 Cal. App. 2d 637, 639-40, 241 P.2d 296, 298 (1952) (sources of sewage causing property damage allocable); DeCorsey v. Purex Corporation, 92 Cal. App. 2d 669, 676, 207 P.2d 616, 620 (1949) (personal injury damages allocable based upon cause of injury); and Katenkamp v. Union Realty Co., 36 Cal. App. 2d 602, 618, 98 P.2d 239, 247 (1940) (portion of property damage allocated to defendant). All of these decisions appear to be predicated upon the notion that a several judgment should be entered once an allocation can be provided.

52. *See, e.g.*, Higgenbotham v. Ford Motor Co., 540 F.2d 762, 773-74 (5th Cir. 1976). (If a rational basis exists for the apportionment of damages then the defendants are not jointly liable. Ford Motor Co., through product design, may have enhanced the injury but was not the proximate cause of the auto accident itself. The court applied Georgia law); Key v. Armour Fertilizer Works 18 Ga. App. 472, 89 S.E. 593 (1916). (Two fertilizer plants owned by separate corporations contributed to nuisance caused by gas fumes. The court held that the corporations did not act in concert and hence cannot be found to be jointly liable for the damages); NEV. REV. STAT. §41.141(3) (1973):

> 3. Where recovery is allowed against more than one defendant in such an actioh [*i.e.* Tort];
>
> (a) The defendants are severally liable to the plaintiff.
>
> (b) Each defendant's liability shall be in proportion to his negligence as determined by the jury, or judge if there is no jury. The jury or judge shall apportion the recoverable damages among the defendants in accordance with the negligence determined. *Id.*;

N.H. REV. STAT. ANN. §507:7-a (1977) (Comparative negligence); VT. STAT. ANN. tit. 12 §1036 (1973) (comparative negligence); Bermeister v. Youngstrom, 81 S.D. 578, 139 N.W.2d 226 (1965); Howard v. Spafford, 132 Vt. 434, 321 A.2d 74 (1974). (Defendants are liable severally but not jointly, so each defendant is only liable for his proportion of harm. The court interpreted defendant to mean the party actually sued by the plaintiff. The court would not allow damages to be allocated to a non-party *defendant* or to give contribution to the defendant from the non-party *defendant.*); Goodyear Tire & Rubber Co. v. Edwards, 512 S.W.2d 748, 751-52 (Tex. Ct. App. 1974) (Where a joint judgment is properly entered, certain states will re-

Prior to the decision in *Li*, California trial procedure virtually precluded a defendant from obtaining a measurement and an allocation of his responsibility. If he could obtain such an allocation, however, a several judgment would result.[53] Some decisions denied the tortfeasor an allocation because his proportional contribution to the result could not be accurately measured; other decisions held that degrees of negligence could not be measured.[54] Such decisions, resting upon a legal fiction, were superseded by the approval of the supreme court in *Li* of special verdicts and jury interrogatories measuring each party's allocable responsibility for an incident.

Moreover, the courts disfavored the entry of several judgments on the very basis condemned by the court in *Li*. That is, before *Li*, only a morally blameless plaintiff could recover and "wrongdoing" defendants could not complain if the jury was not permitted to allocate responsibility. The allocation could not be made, since courts would not "permit an innocent plaintiff to suffer as against a wrongdoing defendant."[55] Since *Li*, however, plaintiff need not be "innocent" of all wrongdoing to recover damages. With the implementation of a system of comparative negligence, even a plaintiff who is "guilty" of wrongdoing (in the sense that he has contributed to his own injury) may recover damages.

Under pre-*Li* cases "each person is held for the entire damages *unless segregation* as to causation can be established."[56] After *Li* such a determination and segregation of causation is made daily by juries throughout California by use of the special verdict and jury interrogatory procedure.

The court's resolution of the problem in *American Motorcycle* focused upon the fact that the jury had concluded that the tort-

---

fuse to require the defendant who has been less negligent than the plaintiff to be burdened with the cost of the insolvent tortfeasors.) *See* TEX. REV. CIV. STAT. ANN. art. 2212a §2(e) (Vernon Supp. 1978) and OR. REV. STAT. §18.485 (1977). Minnesota has retained the traditional common law notion of limiting joint and several liability to preclude impositon of such liability unless the defendants were acting in concert. *See* Marier v. Memorial Rescue Service, Inc., 296 Minn. 242, 207 N.W.2d 706; moreover, the rule of joint and several liability is applied only when the plaintiff is free from all negligence. (*See* Kowalske v. Armour and Co., 300 Minn. 301, 220 N.W.2d 268, (1974). A number of justices on the California Supreme Court appeared interested in the Minnesota approach during argument in the *American Motorcycle* and *Nest-Kart* cases; the language of the opinion indicates the court ultimately rejected that concept.)

53. *See* cases cited note 51 *supra*. Those appear to be consistent with non-California authority. *See* note 52 *supra*.

54. *See, e.g.*, Reilly v. California Street Cable Railroad Co., 76 Cal. App. 2d 620, 623, 173 P.2d 872, 874 (1946).

55. Finnegan v. Royal Realty Co., 35 Cal. 2d 409, 434, 218 P.2d 17, 32 (1950).

56. *Id.* at 433, 218 P.2d at 32.

feasor's negligence was "a proximate cause" of the incident.[57] The court's conclusion, however, that "a concurrent tortfeasor is liable for the whole of an indivisible injury whenever his negligence is a proximate cause of that injury"[58] does not resolve the problem. The very question before the court was whether, after the jury has allocated responsibility for injury, such a divided injury is "indivisible." Present day jury verdicts demonstrate that such injury is divisible. Except for protecting the plaintiff, the court articulated no basis for rejecting those cases which had held that an injury capable of being divided was divisible and therefore, judgment should be entered on a several basis.

C. Socio-Economic Considerations

The court's decision indicated that "from a realistic standpoint"[59] the rules governing allocation were subordinate to the ability of a plaintiff to obtain full recovery for his injury. Necessarily, the court also rejected the considerations raised by the court of appeal that the transactional costs involved in continuing to impose joint and several liability outweighed the continued utility of that doctrine after allocation. As noted by the court of appeal,[60] among the social costs involved are an ingrained system of contingent fees, claims administration costs, and expenses incident to the present system. These related expenses compel between two and three dollars in cost to be paid, and therefore socialized, to cover one dollar of loss shifted from one individual to another. The appellate court, in contrast to the decision of the supreme court, found that the transactional costs incident to the transfer of money from a defendant to a plaintiff were too great to justify the continued retention of joint and several liability within the comparative negligence context.

D. Constitutional Problems

In essence, the court's decision compels a person's liability for the judgment to be predicated upon solvency rather than responsibility for the incident. Accordingly, the imposition of such liabil-

57. 20 Cal. 3d at 586, 578 P.2d at 904, 146 Cal. Rptr. at 187.
58. *Id.* at 588, 578 P.2d at 905, 146 Cal. Rptr. at 188.
59. *Id.* at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189.
60. American Motorcycle Ass'n v. Superior Court, 65 Cal. App. 3d 694, 135 Cal. Rptr. 497 (1977); *See also* the discussion in Sears, Roebuck & Co. v. International Harvester Co., 82 Cal. App. 3d 492, 497, 147 Cal. Rptr. 262, 264-65 (1978).

ity is arguably in direct contravention of the equal protection clause of the Constitutions of the United States and of the State of California. As one case illustrating the point, the California Supreme Court has rebuffed the attempts of the state to recover the costs of institutionalizing a mother in a home for the mentally ill from the estate of the daughter. In holding that the state could not impose the payment of these costs on the daughter although she was solvent, the court declared: "It is established in this state that the mere presence of wealth or lack thereof in an individual citizen cannot be the basis for valid class discrimination."[61] Other similar decisions indicate that the obligation of one party may not constitutionally be made the responsibility of another.[62]

To require one defendant to pay the obligation of another may also constitute a taking of property without due process of law. Justice Brandeis stated this principle as follows: "[O]ne person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."[63] In California, that principle has been applied to void legislation permitting one party to have control over the property of another: "Statutes which operate in a manner to give one person power over the property of another have been declared clearly arbitrary and a denial of due process, the police power notwithstanding."[64] The thrust of these constitutional prohibitions is that there can be no valid justification for a taking of the private property of one party to pay for the debt of another.[65]

---

61. Department of Mental Hygiene v. Kirschner, 60 Cal. 2d 716, 721, 388 P.2d 720, 723, 36 Cal. Rptr. 488, 491 (1964), *cert. granted* and *vacated*, 380 U.S. 194 (1964), *on remand*, 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965).

62. Hoeper v. Tax Commission, 284 U.S. 206 (1931) (husband may not be compelled to pay income taxes imposed upon the separate property of his wife); Department of Mental Hygiene v. Bank of America, 3 Cal. App. 3d 949, 954, 83 Cal. Rptr. 559, 563, (1970) (parent's estate may not be held liable for the expenses of institutionalizing decedent's daughter, a mentally ill person).

63. Thompson v. Consolidated Gas Co., 300 U.S. 55, 80 (1936).

64. Paley v. Bank of America, 159 Cal. App. 2d 500, 511, 324 P.2d 35, 42 (1958) (citations omitted).

65. Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 430 (1934) (unconstitutional to require a railroad to subsidize truck operators by building an underpass at its expense not required by considerations of public safety); Oklahoma Natural Gas Co. v. Choctaw Gas Co., 205 Okla. 255, 260-61, 236 P.2d 970, 976-77 (1951) (unconstitutional to require a producer of natural gas to have another connect with its lines); State v. A/S Nye Kristianborg, 8 F. Supp. 775, 780 (D. Md. 1949) (unconstitutional to require owner of vessel to pay for wrongful act done by another); and Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 140-41 (Tex. 1977) (unconstitutional to take separate property of husband and transfer it to wife).

E. Application of the Joint and Several Liability Rule to Insolvent, Partially Solvent and Immune Tortfeasors

As previously discussed, it is difficult to see why the burden of paying a judgment attributable to the actions of one should, by the rule of joint and several liability, be transfered to another by virtue of his status as a "defendant." The problem is not limited to insolvent tortfeasors. Were the plaintiff to be injured by a person driving an automobile having only minimum insurance coverage, *e.g.*, $15,000, and that person were to be without any additional assets, the plaintiff could recover only $15,000. Similarly, in an action involving a person over whom the plaintiff cannot obtain jurisdiction, he is precluded from any recovery. Finally, certain rules of law establish limits of liability which preclude a plaintiff from obtaining more than a fixed amount.[66] All are subject to the rule of joint and several liability.

In respect to the limitation of liability arising under the Workers' Compensation statutes, the court specifically noted that the employer's liability would be limited to the amount paid as Workers' Compensation benefits.[67] Accordingly, any defendant joined with an employer is precluded from obtaining a contribution to the judgment in excess of the employer's obligation under the Workers' Compensation statutes.[68]

Outside of California, such limiting legislation has been declared unconstitutional by one court as a denial of equal protection to the co-defendant.[69] On the other hand, certain cases have indicated that proportional allocation should be made of the employer's responsibility for an incident and that an allocated percentage should be deducted from the plaintiff's judgment. Otherwise, a comprehensive system of comparative negligence would be upset by the mere addition of a third party.[70] Some ju-

66. *See, e.g.* CAL. CIV. CODE §§ 3333.1, 3333.2 (West Supp. 1978) (medical malpractice); Waters v. Pacific Telephone Co., 12 Cal. 3d 1, 523 P.2d 1161, 114 Cal. Rptr. 753 (1974) (telephone company tariff as a limit upon liability); Duke Power Company v. Carolina Environmental Study Group, 98 S. Ct. 2620 (1978) ($560 million limitation on liability for nuclear plants held to be constitutional).

67. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 607 n.9, 578 P.2d 899, 917, n.9, 146 Cal. Rptr. 182, 200 n.9 (1978).

68. Arbaugh v. Procter & Gamble Manufacturing Co., 80 Cal. App. 3d 500, 508-09, 145 Cal. Rptr. 608, 614-15 (1978).

69. Sunspan Eng. & Const. Co. v. Spring-Lock Scaffolding Co., 310 So. 2d 4 (Fla. 1975).

70. Connar v. West Shore Equipment of Milwaukie, Inc., 68 Wis. 2d 42, 227 N.W.2d 660 (1975). The negligence of all parties must be considered even if they

risdictions have ignored such a statute on the basis that the plaintiff has not sought recompense in excess of Workers' Compensation, holding that it is only because of an indemnity action that the employer may be compelled to pay more.[71]

In such cases, the policy question is the same as that posed in respect to insolvent tortfeasors: Should the employee be bound by his settlement with his employer under the Workers' Compensation Act or alternatively, should the third party defendant be compelled to pay for the employer's negligence on the basis of joint and several liability. The law, having placed a limit upon the responsibility of one defendant will call upon the other defendant to pay.

The problem of the immune or insolvent tortfeasor raises difficult problems of application. A pre-*Li* California case, for example, indicated in a nuisance action that a portion of the plaintiff's property damage to shoreline property resulted from the inevitable action of the waves. Accordingly, in entering a several judgment, the plaintiff received no recovery for that portion of his damage. That result should still obtain after *Li*.[72]

In respect to insolvency (or similar problems), consistent with the Supreme Court's enunciation of policy in *American Motorcycle*, the burden should be placed upon the remaining tortfeasors in the proportions of their respective responsibilities (excluding any settlements). For example, assume the following hypothetical in which the jury concludes the total damages amounted to $100,000:

Plaintiff (10%)	Defendant 1 (30%)
	Defendant 2 (20%)
	Defendant 3 (25%)
	Defendant 4 (15%)

Assuming Defendant 4 had settled out of the case for $10,000 prior to verdict, the remaining defendants are responsible for paying $80,000, *i.e.*, the total judgment less the percentage attributable to plaintiff (ten percent) and the amount paid in settlement ($10,000). Further, assuming Defendant 3 is insolvent, the remaining defendants will be called upon to divide the unpaid amounts in their respective allocated shares (3:2).[73] In short, Defendant 1

---

are not a party to the action. The court found reversible error when fault was not apportioned to a negligent employer. Payne v. Bilco Co., 54 Wis. 2d 245, 195 N.W.2d 641 (1972). Fault is apportioned to non-party defendants who have settled with the plaintiff. Lambertson v. Cincinnati Corporation, 257 N.W.2d 679 (Minn. 1977).

71. Skinner v. Reed-Prentice Division Package Machinery Co., 70 Ill. 2d 1, 6-7, 374 N.E.2d 437, 442-43 (1978).

72. Katenkamp v. Union Realty Co., 36 Cal. App. 2d 602, 98 P.2d 239 (1940).

73. For the mathematically interested, the litigating solvent defendants will be

will be compelled to pay $54,000 and Defendant 2 to pay $36,000.[74] Each will, in this hypothetical, pay almost twice as much as his allocable responsibility for the incident.[75]

IV. SETTLEMENT PROCEDURES

A. The Judicial and Legislative Background

The court, in its opinion, expressed the policy objective of encouraging settlement, and selected a particular method which compels the settling party to buy his peace for a dollar payment, holding:

> [T]o preserve the incentive to settle which section 877 [of the Code of Civil Procedure] provides to injured plaintiffs, we conclude that a plaintiff's recovery from nonsettling tortfeasors should be diminished only by the amount that the plaintiff has actually recovered in a good faith settlement, rather than by an amount measured by the settling tortfeasor's proportionate responsibility for the injury.[76]

Moreover, the court indicated that such a settlement by a plaintiff with a defendant or a cross-defendant would immunize the settling defendant against claims for any further contribution or indemnification. The court noted that:

> [W]hile we recognize that section 877, by its terms, releases a settling tortfeasor only from liability for contribution and not partial indemnity, we conclude that from a realistic perspective the legislative policy underlying the provision dictates that a tortfeasor who is entered into a 'good faith' settlement . . . with the plaintiff must also be discharged from any claim for partial or comparative indemnity that may be pressed by a concurrent tortfeasor.[77]

The court indicated that such settlements were intended to protect the plaintiff by assuring him of total compensation. In doing so, the court rejected the allocation principle at the heart of *Li* that liability will be determined in accordance with fault. It requires no great sophistication to realize that the payment of a dollar amount will rarely, if ever, conform to the settling defendant's percentage of responsibility as allocated by the jury.

---

called upon to pay, respectively 3/5 and 2/5 of the amount. Defendant 1 must pay $30,000 + 3/5 ($25,000) + 3/5 ($15,000-$10,000) = $54,000. Defendant 2 must pay $20,000 + 2/5 ($25,000) + 2/5 ($5,000) = $36,000.

74. Settlements made in good faith are, of course, binding upon the litigating defendants. *See text* at notes 79-82 *infra*.

75. The examples and solution are based upon a similar, complicated pre-*Li* decision, Judson v. People's Bank & Trust Company of Westfield, 17 N.J. 67, 110 A.2d 24 (1954).

76. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 604, 578 P.2d 899, 916, 146 Cal. Rptr. 182, 199 (1978) (citations omitted).

77. *Id.* at 604, 578 P.2d at 915, 146 Cal. Rptr. at 198 (citations omitted).

Although the court approved the use of a fixed dollar amount in settlement of a potential verdict, which will be expressed as a percentage of responsibility, it failed to approve an alternative method.[78] The latter method has generally been utilized outside of California. It permits settlement upon the basis of the percentage as ultimately determined by the jury. As discussed below, the failure to approve such an alternative procedure may cause needless litigation over issues which could have been resolved by the use of a few additional words in the release.

Initially, it must be recognized that litigants settle claims for a wide variety of reasons. Inevitably, these reasons are translated into the payment of a fixed dollar amount. Such reasons may include the assessment by each settling party of its probability of prevailing on the merits. They may also include the more mundane, but vital issues revolving about the credibility of individual lay witnesses, expert witnesses and the vigor and ability of opposing counsel. Extrinsic considerations may have an impact. For example, the plaintiff, for the purpose of financing his lawsuit against the remaining defendants, may discount his claim, or the defendant, in order to obtain a bank loan, may pay a premium to dispose of a claim. Utilization of the only procedure approved by the court enables a plaintiff to receive a fixed dollar amount *and* additional benefits, some of which have been outlined above.

In relying *solely* upon the "good faith" provisions of the California Contribution Statute, the court may have unfortunately aided the proliferation of litigation. One suggested procedure, as described below, would assure that settlements would be in good faith as a matter of law. All settlements, as the court recognized, must be in good faith since the legislature has voided collusive settlements favoring one of several defendants.[79]

In every action, the good faith of the plaintiff and his counsel is a question of fact.[80] Moreover "[t]he price of a settlement is the prime badge of its good or bad faith."[81] Under the procedure set forth in *American Motorcycle*, that price will be expressed solely in dollar terms.

In settling an action, the plaintiff's obligation of good faith re-

78. *Id.* at 609, 578 P.2d at 919 n.1, 146 Cal. Rptr. at 202 n.1.

79. CAL. CIV. PROC. CODE §877 (West Supp. 1978); River Garden Farms v. Superior Court, 26 Cal. App. 3d 986, 993, 103 Cal. Rptr. 498, 503 (1972); Laureau v. Southern Pac. Transportation Co., 44 Cal. App. 3d 783, 798, 118 Cal. Rptr. 837, 846 (1975).

80. River Garden Farms v. Superior Court, 26 Cal. App. 3d 986, 1001, 103 Cal. Rptr. 498, 508-09 (1972); Laureau v. Southern Pac. Transportation Co., 44 Cal. App. 783, 798, 118 Cal. Rptr. 837, 846 (1975).

81. River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 996, 103 Cal. Rptr. 498, 505 (1972).

quires him to consider and eliminate any form of unfair dealing against the litigating defendants. The courts have encompassed the good faith of the settling plaintiff within well recognized and accepted principles stating:

> An analogous problem [to that of the good faith settlement by plaintiff] exists when an insurance carrier is called upon to exercise good faith in accepting or rejecting an offer to settle within the limits of its policy. The carrier's duty of good faith extends beyond fraud or dishonesty and encompasses any kind of unfair dealing . . . In the decisions involving wrongful refusal to settle, price is the immediate signal for the inquiry into good faith, but only one of the many factors influencing the finding.[82]

A settlement on the basis of plaintiff's release of the settling tortfeasor's negligence, as subsequently allocated, would be a good faith settlement as a matter of law.

By their nature, special verdicts or jury interrogatories assist judicial review of settlements, as a simple example will illustrate. The jury may determine responsibility to be as follows:

Plaintiff (10%)	Defendant 1 (25%)
	Defendant 2 (10%)
	Defendant 3 (55%)

Assume Defendant 1 has settled by paying $10,000 and the jury after allocating responsibility, concludes that total damages are $100,000. The resulting inference to be drawn by the litigating defendants (Defendants 2 and 3) is that there was a bad faith settlement.

Plaintiff will be subject to suit in the hypothetical settlement since a *prima facie* case of bad faith has been presented. The settlement, of course, may be subsequently subject to explanation based upon factors intrinsic to the process of negotiating which do not involve unfair dealing. The point is, of course, that the system should discourage such reexamination of settlements and encourage the finality of settlements once made. The waste of time and money to a plaintiff is unnecessary even if he is later found to have negotiated in good faith. Moreover, there is an additional lawsuit added to the trial courts' ever burgeoning civil calendar. The prospect of such litigation will necessarily dampen the interest of many plaintiffs in settling on a partial basis, even if otherwise disposed to do so.

In New York, the courts, while approving comparative indemnification, failed to permit percentage settlements after

82. *Id.* at 997, 103 Cal. Rptr. at 506 (citations omitted).

Dole v. Dow Chemical Company.[83] Furthermore, New York has permitted non-settling tortfeasors to sue the settling party for insufficient contribution. Only two years after *Dole*, the New York Legislature was required to amend the statute governing contribution in order to approve settlements "in the amount of the released tortfeasor's equitable share of the damages."[84] The New York experience of dampening settlements need not be repeated in California. Implementation of a system which permits the settling defendant to be relieved of any further problems on the basis of the plaintiff's release of an allocable percentage is simple. The Wisconsin Supreme Court considered the following language sufficient to accomplish this result:

> [T]he plaintiff does hereby release and discharge, the fraction and portion and percentage of his total causes of action and claim for damages against all parties . . . which shall hereafter, by further trial or other disposition of this or any other action be determined to be the sum of the portions or fractions or percentages of causal negligence for which any or all of the settling parties hereto are found to be liable. . . .[85]

Such a procedure is fair and should eliminate, as a matter of law, the potentially disruptive and expensive inquiry into the plaintiff's good faith. Such an allocable settlement system has been legislatively or judicially adopted by numerous other comparative negligence jurisdictions.[86]

California adopted its contribution statute generally following the New York model; there were only three amendments to it.[87] Although related to the 1939 and 1955 drafts of the Uniform Contribution Among the Joint Tortfeasors Act proposed by the National Conference of Commissioners, California legislation does not copy either version.[88] The suggested solution of approving allocable settlements appears consistent with the express language and intent of the statute. Section 877(a) of the Code of Civil Procedure permits a release to "reduce the claims against the others

---

83. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

84. N.Y. GEN. OBLIG. LAW §15-108 (McKinney 1978).

85. Pierringer v. Hoger, 21 Wis. 2d 182, 184-85, 124 N.W.2d 106, 108 (1963). The settling defendants are not required to remain as parties. "[T]he release should be given immediate effect . . . and the judgment, if any, against the nonsettling defendant should only be for that percentage of negligence allocated to him by the findings or the verdict." *Id.* at 193, 124 N.W.2d at 112.

86. Nebben v. Komalski, 307 Minn. 211, 213 n.1, 239 N.W.2d 234, 236 n.1 (1976); Gomes v. Brodhurst, 394 F.2d 465, 470 (3d Cir. 1967); TEX. REV. CIV. STAT. ANN. art. 2212a, §2(e) (Vernon Supp. 1978); UTAH CODE ANN. §78-27-40 (1977); WYO. STAT. § 1-7.6 (1975 Supp.); R.I. GEN. LAWS §10-6-8 (1969); MASS. ANN. LAWS. ch. 231B, §4 (West Supp. 1978-1979); S.D. COMPILED LAWS ANN. §15-8-18 (1967); HAW. REV. STAT. §§ 663-14, 663-15 (1968); Rogers v. Spady, 147 N.J. Super 274, 277-78, 371 A.2d 285, 287-88 (1977).

87. JOURNAL OF THE SENATE 128-30 app. (Cal. 1957).

88. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1939), as amended by UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1955).

[*i.e.* defendants] *in the amount* stipulated by the release."[89] The term "amount" is not defined in the statute. It can be read as including a release of the percentage amount of responsibility attributable to the settling tortfeasor's actions, with the exact percentage being later determined by the jury. This suggested interpretation would provide a finality to the settlement process, equity to the settling parties, and would discourage the preparation of collusive settlements. This solution would, therefore, implement those objectives sought by the legislature in enacting the statute.

First, the legislature sought to encourage finality by providing in section 877(b) of the Code of Civil Procedure that: "It [*i.e.* the release] shall discharge the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors."[90] By adopting section 4(b) of the 1955 Uniform Act in this respect, the legislature rejected the lack of finality which had been the source of unfavorable comment in respect to the 1939 Uniform Act.[91] The suggested interpretation would insure such finality in settlements.

Second, the legislative aim was to provide an equitable allocation. As discussed above, section 875(b) provides: "Such right of contribution shall be administered in accordance with the principles of equity."[92] In adopting this provision, the legislature promulgated the principle of section 2(4) of the 1939 Uniform Act which had provided that: "When there is such a disproportion of fault among tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares."[93] Necessarily, the legislature rejected the 1955 version in which the code commissioners had indicated that "relative degrees of fault shall not be considered."[94] That rejection of comparative negligence was explained by the commissioners as follows: "This section in positive terms resolves several difficult questions of policy. First, it recognizes and registers *the lack of need* for a comparative negligence or degrees of

89. CAL. CIV. PROC. CODE §877(a) (West Supp. 1978).
90. *Id.* §877(b) (West Supp. 1978).
91. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT §4(b) (1955). *See* Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 506 (1953).
92. CAL. CIV. PROC. CODE §875(b) (West Supp. 1978).
93. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT §2(4) (1939).
94. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT §2 (1955).

fault rule in contribution cases."[95] The suggested procedure expressly recognizes that the settlement would be based upon allocable percentage; as recognized by the court in *American Motorcycle*, an allocable percentage is an equitable distribution of responsibility.

Finally, the court sought to preclude collusion in settlements by requiring that they be in good faith, a principle adopted by the 1955 draft act.[96] In this respect, section 877 of the Code of Civil Procedure 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. . . .[97]

The emphasized portion is the element focused upon in the discussion above and by the court in *American Motorcycle*. The suggested procedure must be in good faith since the plaintiff cannot attempt to secure that loss percentage from the litigating defendants.

B. Sliding Scale Recovery Agreements (Mary Carter Agreements)

By an order of modification, filed March 6, 1978, the court modified the list of statutory provisions affected by its discussion of contribution and comparative indemnification.[98] The Sliding Scale Agreement or as it is more popularly known, the Mary Carter Agreement, is a variant of the normal release or covenant not to sue. The term is derived from the comment by the Florida Appellate Court in *Maule Industries v. Roundtree*,[99] which stated:

> The term arises from the agreement popularized by the case of *Booth v. Mary Carter Paint Co.*, [citation omitted] and now appears to be used rather generally to apply to an agreement between the plaintiff and some (but less than all) defendants whereby the parties place limitations on the financial responsibility of the agreeing defendants, the amount of which is variable and usually in some inverse ratio to the amount of recovery

---

95. *Id.* Comm'r Note.

96. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 604, 578 P.2d 899, 915-16, 146 Cal. Rptr. 182, 198-99 (1978).

97. CAL. CIV. PROC. CODE §877 (West Supp. 1978) (emphasis added).

98. The Court modified its opinion by an addition to footnote 5. Justice Clark in his dissent added two additional footnotes (footnotes 1 and 2). These footnotes are incorporated in the Pacific and California Reporters.

The modification to footnote 5 makes it clear that CAL. CIV. PROC. CODE §877.5 (West Supp. 1978), concerning sliding scale recovery agreements, does not preclude the court from establishing equitable implied indemnity.

99. 264 So.2d 445 (Fla. Dist. Ct. App. 1972) *rev'd* 284 So.2d 389 (Fla. 1973).

> which the plaintiff is able to make against the nonagreeing defendant or defendants.[100]

The Mary Carter Agreement creates even more substantial difficulties in ascertaining good faith than the agreements outlined above.

In a Mary Carter Agreement, the objective of the settling defendant is to assist the plaintiff to increase the size of the total judgment. The relation between settlement price and percentage allocation is more difficult to determine than the typical settlement. The settling defendant usually remains in the litigation to assist the plaintiff in prosecuting his action. Accordingly, it appears that the greater the success of the defendant in increasing the amount of the verdict, the more likely it is that there will be an attack upon the settlement by the litigating defendants, particularly in view of the settling defendant's decreasing share of the total judgment as the judgment increases in size.

The Mary Carter Agreement establishes, almost by its definition, an irreconcilable tension between the two major elements comprising the test of good faith: (1) the price paid by the settling defendant and (2) the calculated dollar value of that defendant's responsibility as determined by the jury at the time of trial. Secrecy has been the key element in such agreements. The 1977 legislative revisions to the settlement and contribution provisions indicate that such agreements are legal.[101]

The legislature, in its amendment, has established a remedy for the litigating defendant in the form of disclosure to the trier of fact of the existence and the essential terms of the agreement. In relevant part, section 877.5(2) provides:

> If the action is tried before a jury, and a defendant party to the agreement is a witness, the court shall, upon motion of a party, disclose to the jury the existence and content of the agreement or covenant, unless the court finds that such disclosure will create substantial danger of undue prejudice, of confusing the issues, or misleading the jury.
>
> The jury disclosure herein required shall be no more than necessary to be sure the jury understands (1) the essential nature of the agreement, but not including the amount paid, or any contingency, and (2) the possibility that the agreement may bias the testimony of the alleged tortfeasor or tortfeasors who entered into the agreement.[102]

The impact of revealing to the jury that one of the parties (1) has settled, but is continuing to litigate the matter, and (2) has agreed

100. *Id.* 264 So.2d at 446 n.1.
101. CAL. CIV. PROC. CODE §§877.5 *et. seq.* (West Supp. 1978).
102. *Id.* §877.5(a)(2) (West Supp. 1978).

to help the plaintiff, is intended to benefit the litigating defendant. In the context of allocating responsibility to the settling defendant, it may well lead to an increase in the proportion of responsibility allocated to that party who is now a "*pseudo*" plaintiff.

Within the framework of good faith, it seems inevitable that such settlements will be attacked as being in bad faith. Absent special circumstances, the attack should be successful.

V. Conclusion

We have discussed the impact of *American Motorcycle Association* upon the law of torts; it has significantly revised substantive and procedural law in the State of California. The basic holdings will become the predicate of numerous other related decisions. Similarly, the philosophical tenets underlying the decision will continue to affect and guide California tort law for many years to come.