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Safeway Stores, Inc. v. Nest-Kart: The Culmination of Li v. Yellow Cab Co.

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INTRODUCTION

The landmark case of *Li v. Yellow Cab Co.*[1] developed the doctrine of comparative negligence in California. *Li* was based upon equitable principles of fairness. The case established an equitable precedent which was destined to be applied under different fact situations which called for similar apportionments of fault.

Between defendants, the traditional manner of apportioning the judgment has been contribution and indemnity. In California, the doctrine of contribution is covered by a statute which requires the pro rata apportionment of the judgment.[2] The recent case of *American Motorcycle Association v. Superior Court*[3] developed the doctrine of *comparative indemnity* which allows the apportionment of fault among multiple tortfeasors. From an equitable standpoint, the decision was a logical application of the comparative fault concepts promulgated in *Li*.

1. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). The plaintiff and defendant in *Li* were involved in an automobile accident. Both the defendant and the plaintiff were found to be negligent. Under the traditional contributory negligence doctrine, applied by the trial court, the plaintiff's negligence was a complete bar to her cause of action. The California Supreme Court reversed, adopting the doctrine of "comparative negligence." The plaintiff's cause of action was not barred, but the recoverable damages were reduced by her proportion of the total fault. *Li* has been cited and commented upon in numerous law review articles. *See* Braum, *Contribution: A Fresh Look*, 50 CAL. ST. B.J. 166 (1975); Englard, *Li v. Yellow Cab Co.—A Belated and Inglorious Centennial of the California Civil Code*, 65 CALIF. L. REV. 4 (1977); George and Walkowiak, *Blame and Reparation in Pure Comparative Negligence: The Multi-Party Action*, 8 SW. L. REV. 1, 2 (1976); Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337, 351 (1977); Rosenburg, *Anything Legislatures Can Do Courts Can Do Better?*, 62 A.B.A.J. 587 (1976); Schwartz, *Li v. Yellow Cab Company: A Survey of California Practice Under Comparative Negligence*, 7 PAC. L.J. 747 (1976); Comment, *Comparative Negligence, Multiple Parties, and Settlements*, 65 CALIF. L. REV. 1264 (1977); Comment, *Comparative Fault and Strict Products Liability: Are They Compatible?*, 5 PEPPERDINE L. REV. 501 (1978); Note, *Third Party and Employer Liability After Nga Li v. Yellow Cab Company for Injuries to Employees Covered by Workers' Compensation*, 50 S. CAL. L. REV. 1029 (1977); Note, *Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants*, 50 S. CAL. L. REV. 73 (1976).

2. CAL. CODE CIV. PROC. §§ 875, 876 (West Supp. 1978).

3. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

Prior to the recent case of *Daly v. General Motors Corp.*,[4] the relative fault of a negligent plaintiff was not applied against a defendant who was found liable on the basis of strict products liability. The strictly liable defendant was responsible for the whole of the plaintiff's injuries even though the plaintiff was partially responsible. The court in *Daly* recognized this as an inequitable result and decided to allow the jury to make an allocation of relative *fault* between a negligent plaintiff and a strictly liable defendant. The negligent plaintiff's judgment would be reduced according to his respective allocation of fault.

The principle case, *Safeway Stores, Inc. v. Nest-Kart*,[5] extended the concepts of allocation among defendants and plaintiffs developed in *Daly* to the allocation of *fault* among multiple defendants. From an historical perspective, the developments in *Daly* and *Nest-Kart* are factually similar to *Li* and *American Motorcycle* in that both began initially between plaintiffs and defendants and were subsequently applied among multiple defendants. The paramount principle throughout this historical progression is the allocation of liability for damages in direct proportion to one's respective fault as mandated by *Li*.[6] The present analysis of *Nest-Kart* considers both comparative indemnity and the apportionment of strict liability, followed by their future implications for California tort law.

FACTS

The plaintiff was injured while using a shopping cart owned by Safeway Stores, Inc. The plaintiff sued Safeway and the manufacturer of the cart, Nest-Kart, for damages incurred from the injury.[7] The jury was directed to first find on which, if any, grounds the defendants were liable, and second, to determine the relative fault between the parties. Safeway was found liable on the theories of negligence and strict products liability and was held eighty percent responsible for the accident. Nest-Kart was found liable solely on a strict liability theory and was held responsible for twenty percent of the injury.

Safeway and Nest-Kart initially satisfied the judgment on the

4. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

5. 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978).

6. *See* Li v. Yellow Cab Co., 13 Cal. 3d 804, 813, 532 P.2d 1226, 1232, 119 Cal. Rptr. 858, 864 (1975), and Daly v. General Motors Corp., 20 Cal. 3d 725, 737, 575 P.2d 1162, 1169, 144 Cal. Rptr. 380, 387 (1978).

7. Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 325, 579 P.2d 441, 442, 146 Cal. Rptr. 550, 551 (1978). Technibilt Corp., which occasionally repaired some of Safeway's shopping carts, was also sued but the jury found Technibilt to be free from fault. The jury also found the plaintiff to be free from fault.

eighty-twenty proportion as determined by the jury. Safeway subsequently asked for contribution from Nest-Kart. The trial court applied sections 875 and 876 of the California Code of Civil Procedure and granted Safeway contribution on a fifty-fifty basis. It is from this ruling that Nest-Kart appealed to the California Supreme Court.[8] Nest-Kart contended that the jury's apportionment of fault should have been the basis of dividing the judgment and not the fifty-fifty pro rata division under the contribution statute.

COMPARATIVE INDEMNITY

Traditionally, contribution and indemnity have been considered two separate and distinct doctrines.

> [Q]uestions as to the apportionment of damages among multiple tortfeasors were seen as presenting solely an issue of contribution; the equitable indemnity doctrine, by contrast, was viewed historically as an all-or-nothing concept concerned only with the complete shifting of liability from one tortfeasor to another, rather than with the sharing of liability between the two.[9]

The contribution theory apportioned damages on a pro rata basis without taking relative fault into consideration. Fault was considered in the theory of indemnity, but only as to the question of whether indemnity was to be granted in the first place.[10] Indemnity worked equitably in extreme cases where one defendant's fault was "active" and the other defendant's fault "passive," but equity was not served in less extreme cases by contribution. Fault would be unequal but insufficient for indemnification.

In *American Motorcycle*,[11] the court developed comparative indemnity so as to avoid the inequities of traditional indemnity. The new doctrine allocates, between the defendants, the judg-

8. *Id.* at 325-27, 579 P.2d at 442-44, 146 Cal. Rptr. at 551-53.

9. *Id.* at 328, 579 P.2d at 444, 146 Cal. Rptr. at 553.

10. Indemnity has traditionally involved the so called active-passive analysis of the defendant's fault. This test focused on the *kind* of fault and not the *degree* of fault. Exactly what was active or passive fault has been a matter of confusion for the courts. *See* Gardner v. Murphy, 54 Cal. App. 3d 164, 126 Cal. Rptr. 302 (1975); Niles v. City of San Rafael, 42 Cal. App. 3d 230, 116 Cal. Rptr. 733 (1974); Kerr Chemicals, Inc. v. Crown Cork & Seal Co., 21 Cal. App. 3d 1010, 99 Cal. Rptr. 162 (1971). The confusion did not arise out of an inability to define the terms, but out of the difficulty of dealing with the all-or-nothing nature of indemnity.

11. 20 Cal. 3d at 491-99, 578 P.2d at 907-12, 146 Cal. Rptr. at 190-95 (1978). The court relied heavily upon Ford Motor Co. v. Robert J. Poeschl, Inc., 21 Cal. App. 3d 694, 98 Cal. Rptr. 702 (1971). The court in *Poeschl* discussed the unfairness of traditional indemnity and contribution and indicated that the comparative fault basis of apportionment would be more equitable.

ment in direct proportion to each defendant's respective fault. Lower California court cases, along with cases from other states, were cited in *American Motorcycle* to illustrate the inequity of traditional indemnity, but *Li* was the determinative factor in the court's decision to modify traditional indemnity.[12] The court relied upon the mandate of *Li* to establish "a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault."[13]

The fundamental rationale for the mandate of *Li* is to promote responsibility for one's actions. A person should be held responsible for his actions but not for the actions of others. If the burden upon one party is larger than his actual responsibility, then the other parties are not encouraged to act in a careful manner. To have all parties responsible for their individual behavior promotes accident-reducing behavior, or in the alternative, deters dangerous conduct.[14]

The more perplexing issue faced in *American Motorcycle* was whether the legislature in enacting California's contribution statute[15] precluded the court from developing comparative indemnity.[16] The court made a strict distinction between the legislatively-developed doctrine of contribution and the court-developed doctrine of indemnity. The court reasoned that since indemnity was developed by the court, it could therefore be modified by the court. After examining the statute, the court concluded that the legislature did not intend to limit the development of comparative indemnity, and decided to develop the doctrine as a present evolution of the common law. The majority opinion in *Nest-Kart* reaffirmed the *American Motorcycle* decision.[17] The trial court's ruling which allowed apportionment on a pro rata basis was reversed and directions were given to allow apportion-

12. The court referred to Dole v. Dow Chemical Co., 30 N.Y.2d 143, 331 N.Y.S.2d 382 (1972), which judicially developed partial indemnification in New York. *See* Kelly v. Long Island Lighting Co., 331 N.Y.2d 25, 334 N.Y.S.2d 851 (1972).

13. Li v. Yellow Cab Co., 13 Cal. 3d 804, 813, 532 P.2d 1226, 1232, 119 Cal. Rptr. 858, 864 (1975).

14. *See* text at note 28 *infra*.

15. CAL. CODE CIV. PROC. §§ 875, 876 (West Supp. 1978).

16. 20 Cal. 3d at 599-605, 578 P.2d at 912-16, 146 Cal. Rptr. at 195-99. "The legislative history of the 1957 contribution statute quite clearly demonstrates that the purpose of the legislation was simply 'to lessen the harshness' of the then prevailing common law no contribution rule. Nothing in the legislative history suggests that the legislature intended by the enactment to preempt the field or to foreclose future judicial developments which further the act's principal purpose of ameliorating the harshness and inequity of the old no contribution rule. Under these circumstances, we see no reason to interpret the legislation as establishing a bar to judicial innovation." *Id.* at 601, 578 P.2d at 914, 146 Cal. Rptr. at 197 (footnote omitted).

17. 21 Cal. 3d at 328, 579 P.2d at 444, 146 Cal. Rptr. at 553 (1978).

ment on a relative fault basis.[18]

APPORTIONMENT OF STRICT PRODUCTS LIABILITY

The primary issue raised by *Nest-Kart* is "whether the comparative fault principle of *Li* should be utilized as the basis for apportioning liability between two tortfeasors, one whose liability rests upon California's strict products liability doctrine and the other whose liability derives, at least in part, from negligence theory."[19] This issue was decided in the affirmative. There are two main arguments against such apportionment of liability: first, to do so would frustrate the very purpose of strict liability, and second, no standards exist upon which to compare the two theories. The latter argument will be considered first.

Negligence is based upon the acts of the defendant. Did the defendant act as an average reasonable man would under like or similar circumstances? On the other hand, strict liability does not focus upon the acts of the defendant, but primarily upon the product.[20] Whether the defendant was negligent is not the determinative factor for liability. Hence, the basis for strict liability is considered to be "no fault" and the basis for negligence to be "fault." How does one compare "fault" and "no fault"? A number of commentators have concluded that such a comparison is like comparing apples and oranges.[21] The court's response to such arguments was basically pragmatic in nature.

From a practical standpoint, the court concluded that no fundamental obstacles existed to prevent the application of apportionment. In the present case the jury was able to allocate *fault*[22]

18. *Nest-Kart* was tried prior to the decision in *American Motorcycle*, so the issue of the retroactive application of *American Motorcycle* arose. The court decided in favor of its application: "[W]hen—as in the instant 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 to cases presently pending upon appeal." Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 333, 579 P.2d 441, 447, 146 Cal. Rptr. 550, 556 (1978).

19. 21 Cal. 3d at 325, 579 P.2d at 442, 146 Cal. Rptr. at 551.

20. PROSSER, LAW OF TORTS § 99, p. 658 (4th ed. 1971).

21. *See* Boone, *Comparative Negligence: Solution or Problem?*, CAL. TRIAL LAW. A.J. 17, 33 (Fall 1975); Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337, 351-56 (1977).

22. The trial court gave the following direction to the jury: "The word '*fault*' as used herein, means a defective product or negligence which was a proximate cause of the accident." Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 326 n.1, 579 P.2d 441, 443 n.1, 146 Cal. Rptr. 550, 552 n.1 (1978) (emphasis added).

among the defendants even though one defendant was strictly liable. The court emphasized that this practical experience and the experience of other states[23] was evidence enough to allow such apportionment. The pragmatic nature of the decision is apparent. The court appears to have said that if something works, let us not argue about why it should not. The decision was a very practical way of avoiding an academically sensitive issue.

Justice Clark, in his concurring opinion, took issue with the majority's practical approach. "While the jury determined Safeway was 80 percent at fault," observed Clark, "it could just as well have concluded the manufacturer was 80 percent at fault. Such division is clearly arbitrary because it is standardless."[24] The majority emphasized the equity of its approach, but if Justice Clark is correct, then the ultimate result is inequitable. Clark called on the legislature to reclaim its rightful role by reaffirming the contribution statutes. Assuming Clark's approach to be correct, pro rata apportionment would be more equitable than comparative indemnity. The pro rata standard is fixed and less arbitrary than the jury's standardless determination. It can only be said that the majority demonstrated a higher degree of faith in the jury's ability to make such apportionments.

The second argument against the allocation of liability was developed in the dissenting opinion by Justice Mosk. In his dissent, Mosk argued that apportionment should not take place because it would detract from the very purpose of strict liability.[25] The purpose of strict products liability, as stated in the landmark case, *Greenman v. Yuba Power Products, Inc.*,[26] which developed the doctrine, "is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market. . . ."[27] If fault is allocated to a plaintiff, then the full burden of the injury resulting from the defective product would not be borne by the manufacturer. As a result, the purpose of the doctrine would be partially defeated.

The majority opinion rebutted Justice Mosk's criticism by concluding that the policy to place the burden upon the strictly liable manufacturer is not so predominating that it should permit a negligent party to escape responsibility for his wrong. One of the pri-

23. *See* Gies v. Nissen Corp., 57 Wis. 2d 371, 204 N.W.2d 519, 526-27 (1973); City of Franklin v. Badger Ford Truck Sales, Inc., 58 Wis. 2d 641, 207 N.W.2d 866, 871-73 (1973); Noble v. Desco Shoe Corp., 41 App. Div. 2d 908, 343 N.Y.S.2d 134, 136 (1973).

24. 21 Cal. 3d at 325, 579 P.2d at 448, 146 Cal. Rptr. at 557.

25. *Id.* at 336 (Justice Mosk's dissent is not included in the California Reporter or the Pacific Reporter).

26. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

27. *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

mary objectives of tort law is the "deterrence of dangerous conduct [and the] encouragement of accident-reducing behavior. . . ."[28] If a party is allowed to avoid responsibility for his conduct then the deterrence objective is totally defeated. Under such circumstances, the negligent party is not discouraged from acting in a negligent manner. The majority in *Nest-Kart* apparently preferred the partial frustration of the purpose of strict liability, to the total frustration of the deterrence objective. The court balanced the two policies and concluded that the deterrence function is to be given preference. Prior California cases allowing contribution among negligent and strictly liable defendants were cited by the court to illustrate that the purpose of strict liability was never so paramount as to forbid apportionment.[29] This is another example of the court's practical approach to decision-making.

FUTURE IMPLICATIONS

Nest-Kart is significant as the most recent segment of the trend allowing apportionment of fault which began with *Li*. Apportionment of fault is now allowed between plaintiffs and defendants and among multiple defendants, irrespective of whether fault is based upon negligence or strict products liability. The procedural impact of the decision is discussed below.

From the perspective of the trial itself, *Nest-Kart* would not seem to have the impact of *Li*. Prior to *Li*, contributory negligence operated as complete bar to the plaintiff's recovery. Although traditional indemnity was an all or nothing remedy, the pro rata contribution doctrine was also available to the defendants. A similar alternative was not available to the contributorily negligent plaintiff.

The court in *American Motorcycle* reaffirmed the traditional doctrine holding all joint tortfeasors jointly and severally liable for the plaintiff's judgment.[30] From the viewpoint of the plaintiff, each of the defendants is still liable for the full judgment. *Nest-*

28. Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 330, 579 P.2d 441, 445, 146 Cal. Rptr. 550, 554 (1978).

29. Barth v. B.F. Goodrich Tire Co., 15 Cal. App. 3d 137, 92 Cal. Rptr. 809 (1971); Kerr Chemicals, Inc. v. Crown Cork & Seal Co., 21 Cal. App. 3d 1010, 99 Cal. Rptr. 162 (1971); Pearson Ford Co. v. Ford Motor Co., 273 Cal. App. 2d 269, 78 Cal. Rptr. 279 (1969).

30. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 586-91, 578 P.2d 899, 903-07, 146 Cal. Rptr. 182, 186-90 (1978).

Kart does not affect this existing relationship between plaintiffs and multiple defendants. Its application is solely to allocation of the judgment among the defendants.

The effect of *Nest-Kart* and *Daly* upon strict products liability depends primarily upon the jury's ability to compare negligence and strict products liability. On a theoretical level, the question of whether the jury has the requisite capabilities is still in dispute, but from a practical standpoint it will be difficult to determine if, in fact, it has such capabilities. A jury's verdict is examined only after the fact; as a result, how the decision was reached is not known. Since it is the jury's duty to decide the issues of fact, substantial weight is given to their decision in any subsequent review. California Code of Civil Procedure § 657(7), concerning the standard for a new trial, states in pertinent part:

> A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision.[31]

This standard for a new trial makes exceedingly rare the review of a jury's findings.

Alleged disparities in the jury's verdict may be due to normal variations in deciding issues of fact or to the jury's inability to compare negligence and strict liability. Which is the controlling factor? The author predicts that the answer to this question will never be known. As the majority in *Nest-Kart* rationalized, "the jury evidently concluded that while the defectiveness of the shopping cart partially caused the accident, the primary fault for the accident lay with Safeway because of its negligent failure properly to maintain the cart in safe working condition."[32] Such rationalizations will make it difficult to overturn the jury's findings of fact.[33]

It is clear from *Nest-Kart* that comparative indemnity is to be given priority over contribution. Under California's contribution statute,[34] Safeway was entitled to contribution. Having paid eighty percent of the judgment, Safeway had contributed more than its pro rata share and had satisfied the statute. *Nest-Kart* reversed the trial court's ruling and allowed comparative indemnity. It is evident that contribution will not be allowed in the future

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31. CAL. CODE CIV. PROC. § 657 (West 1976).

32. Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 330, 579 P.2d 441, 445, 146 Cal. Rptr. 550, 554 (1978).

33. *See generally* F. JAMES & G. HAZARD, CIVIL PROCEDURE §§ 7.20, 7.22 (2d ed. 1977) for a discussion of the review of jury findings (new trial and judgment not withstanding the verdict).

34. CAL. CODE CIV. PROC. §§ 875, 876 (West Supp. 1978).

where the jury has made an allocation of respective fault. The contribution statute was not ruled unconstitutional, but from a procedural standpoint the result is substantially the same.

CONCLUSION

The mandate of *Li* to develop a system in which the burden for damages is to be allocated in direct proportion to one's fault has been brought closer to reality by the *Nest-Kart* decision. Comparative indemnity emerged in *American Motorcycle* and apportionment of strict products liability was developed in *Daly*. Both concepts have been reaffirmed in *Nest-Kart*. The pragmatic approach of the court made the decision possible.

Comparative fault is now available to apportion damages among plaintiffs and defendants, and among multiple defendants. All parties are now encouraged to be responsible for their respective conduct. The deterrence of dangerous conduct, which was the underlying rationale of *Li*, has been significantly advanced. This can only result in a more responsible and equitable legal system.

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