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Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Association v. Superior Court*

By John G. Fleming**

List of Recommendations

Recommendation 1 (§ 8): (1) Statutory confirmation of “pure” comparative negligence, and
(2) Adoption of the modified set-off formula in Section 3 of the Uniform Comparative Fault Act.

* This Article was prepared under the auspices of the California Legislature Joint Committee on Tort Liability, and is published here with the permission of the Committee. The Joint Committee on Tort Liability is a legislative study committee composed of six Assemblymen and six Senators. The Chairman is Assemblyman John T. Knox (D-Richmond) and the Vice Chairman is Senator Robert G. Beverly (R-Manhattan Beach).

The Committee was formed in response to complaints regarding the high cost of liability insurance, and the reply of insurers that the uncertainty of the tort liability system allowed more frequent and higher recoveries for liability claims. The recommended solution was a study and revision of the tort system to bring greater certainty to the law. The Committee's scope of inquiry is the injury producing activities of society, the methods available for resolving conflict, and the determination of fair injury compensation and loss allocation. It is also charged with the responsibility of examining the liability insurance mechanism to see what changes, if any, could assist in reduction of premiums.

Because of the controversy aroused by *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978), the Committee requested Professor Fleming to identify and analyze those areas which are properly the subject of legislative action and which remain unresolved in the opinion. These areas include, but are not limited to, the necessary modification of Code of Civil Procedure §§ 875 and following relative to contribution, settlement procedures, and what constitutes a good faith settlement, set-offs and cross claims, and intrafamilial immunities. Letter from William C. George, Committee Counsel (on file with *The Hastings Law Journal*).

** M.A., D. Phil., D.C.L., Oxford University. Shannon Cecil Turner Professor of Law, University of California, Berkeley.

- Recommendation 2* (§ 19): (1) Apply "comparative negligence" to claims based on strict liability, and
- (2) include "recklessness" and "willful misconduct," short of intentional injury, among the kind of fault capable of reducing, but no longer necessarily barring recovery.
- Recommendation 3* (§ 26): Retention of the "joint and several" liability rule even where the plaintiff contributed to his injury through his own fault.
- Recommendation 4* (§ 30): Statutory enactment of contribution by shares proportioned to fault in lieu of the existing system of contribution "pro rata" (equal shares.)
- Recommendation 5* (§ 37): Abolition of the "joint judgment" requirement for contribution.
- Recommendation 6* (§ 42): The share of any insolvent or absent tortfeasor shall be distributed among the remaining defendants and the plaintiff (if at fault) in proportion to their respective shares of responsibility.
- Recommendation 7* (§ 49): A release entered into by the plaintiff and a tortfeasor shall discharge the latter from all liability for contribution, but the plaintiff's claim against the remaining tortfeasors shall be reduced by the amount of the released tortfeasor's share of the loss.
- Recommendation 8* (§ 67): (1) In the case of a work injury caused by the concurrent negligence of the worker's employer and a third party,
- (a) the employer should be allowed to recover from the third party any part of his compensation liability that exceeds his notional share of the tort damages, and
- (b) the third party should be allowed to claim contribution to the extent of the employer's share of fault or the employer's workmen's com-

pensation liability *whichever is the smaller* (§65).

- (2) If the employee's negligence concurred with that of the third party, his negligence should be imputed to the employer so as to reduce his claim to reimbursement (§ 70).
- (3) *Alternatively*, the employer's right of reimbursement should be abolished, regardless of whether he was negligent or not, but the third party's tort liability should be reduced by the amount of workmen's compensation paid or payable to the employee (§ 67).

I. Comparative Negligence

1. In *Li v. Yellow Cab Co.*¹ the Supreme Court of California abandoned the all-or-nothing common law doctrine of contributory negligence in favor of comparative negligence, so that a contributorily negligent claimant was no longer necessarily completely barred from recovery but merely suffered a reduction of damages in proportion to his own share of negligence for his injury. By this decision, California joined a spectacular trend in recent years which to date has brought thirty-two jurisdictions in the United States to adopt some version of comparative negligence.² The introduction of comparative negligence has encountered an overall favorable response, ranging from enthusiasm to, at least, acquiescence. While the *Li* decision has been criticized on the ground that the reform was an essentially legislative task,³ it is now obviously too late to assert a legislative priority. It would be desir-

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

2. See generally V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* (1974 & 1978 Supp.) [hereinafter cited as SCHWARTZ]; H. WOODS, *COMPARATIVE FAULT* (1978) [hereinafter cited as WOODS].

3. *E.g.*, *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 832-34, 532 P.2d 1226, 1246-47, 119 Cal. Rptr. 858, 878-79 (1975) (Clark, J., dissenting). See my vindication in *Foreword: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239, 273-83 (1976) [hereinafter cited as *Foreword*]. For a critical view of the court's handling of California Civil Code § 1417, see England, *Li v. Yellow Cab Co.—A Belated and Inglorious Centennial of the California Civil Code*, 65 CALIF. L. REV. 4 (1977). Besides California, Alaska, Florida, and Michigan adopted comparative negligence judicially, in all cases after a lengthy justification for judicial activism. See *Kaatz v. State*, 540 P.2d 1037 (Alas. 1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *Kirby v. Larson*, 400 Mich. 585, 256 N.W.2d 400 (1977).

able however to include a statutory statement of comparative negligence in a comprehensive statute recommended in this Study.

2. *"Pure" Comparative Negligence.* The only really controversial aspect of the *Li* decision was the court's choice of the "pure" form of comparative negligence in preference to the "Wisconsin rule" which enjoys overwhelming following among the statutes in other states⁴ and the qualified recommendation of the defense lobby.⁵ Under the "pure" version, a plaintiff may recover some damages however great his proportion of fault compared with the defendant's; whereas under the Wisconsin rule a plaintiff can recover only if his negligence is *less than* the defendant's or, under a more favorable variant, is *no greater than* the defendant's⁶—in the first case his share must not exceed 49%, in the latter 50%. The "Wisconsin" 49% rule is especially prejudicial to plaintiffs because it will continue to bar recovery by either party in the great number of automobile collisions where fault is found to be equal in the absence of any "finer tuning." This likelihood is compounded by the practice rule in some states requiring that the jury be kept in ignorance as to the legal consequence of a finding of 50% liability.⁷ Its harshness is further increased by the rule in some states requiring a comparison between the plaintiff's fault and each defendant's separately, so that if the plaintiff's share is less than the defendants' aggregate but more than that of each defendant separately, he still fails to recover.⁸ The other variant—the "50% rule"—which was pioneered by New Hampshire in 1969 and gained attention especially after Wisconsin switched to it in 1971, disqualifies only plaintiffs whose fault was greater than the defendant's so that, at least in the common case of equal fault, both parties can still recover an aliquot share from each other.

3. Proponents of the "49%" and the "50%" rule invoke the moral argument that it is unjust to permit a party who is more at fault to recover anything from another less culpable. This becomes the more plausible when the party with greater fault also happens to suffer the greater injury. Suppose the fault ratio in a collision between A and B was 25%:75%, while A's damage totalled \$1,000 and B's \$5,000. Is it fair

4. See SCHWARTZ, *supra* note 2, § 3.5; WOODS, *supra* note 2, § 4.3.

5. See the Defense Research Institute's position papers, endorsed by the International Association of Insurance Counsel (IAIC), the Federation of Insurance Counsel (FIC) and the Association of Insurance Attorneys (AIA), RESPONSIBLE REFORM 23 (1969) and its successor RESPONSIBLE REFORM—AN UPDATE 15 (1972).

6. Pioneered in New Hampshire, this version gained increased attention as the result of its adoption by Wisconsin in 1971. It has since been adopted in Connecticut, Montana, Nevada, New Jersey and Texas.

7. See *Foreward*, *supra* note 3, at 245 n.26.

8. This rule originated in Wisconsin. See SCHWARTZ, *supra* note 2, at 78-80, 256-60.

that B should be able to claim \$1,250 from A, when A could only recover \$750 from B—in other words, that the guiltier of the two should recover more than the other?

There are two answers to this rhetorical question. First, the degree of a defendant's fault and the extent of the plaintiff's damage are typically quite unrelated; slight negligence can cause a great deal of damage, while gross negligence may result in only little damage. Nor does the law attempt to modify that random relationship: a barely negligent defendant will have to pay for the whole of a large loss limited only by rules of "proximate cause." There is no reason for adopting a different principle in cases of contributory negligence. Comparative negligence merely requires a sharing (in accordance with the parties' fault) of each party's separate loss, but is indifferent to the size of their respective losses.

Secondly, the argument assumes that both parties will be paying for their liability out of their own pockets, whereas in all likelihood the losses will be borne by insurance carriers. Arguments appealing for fairness may carry some measure of plausibility in their application to individuals, but not to insurers whose function it is to spread the cost of accidents and levy premiums on a broad base.

4. A more pragmatic reason for the defense lobby's preference for the Wisconsin rule is that it reduces substantially the cost for defendants and their insurers. Not only does it disqualify all claims by a party more than 49% [or 50%] at fault, it also arms the defendant's insurance adjuster or attorney with a powerful negotiating weapon in beating down the demands of plaintiffs, under the risk that litigation may ultimately deny them any recovery whatever. The rule therefore has the tendency not only to disqualify many victims, but to depress the damages recovered by most others. Plaintiffs resisting such tactics would be driven to litigate. By the same token "pure" comparative negligence would tend to promote settlements, since defendants and their insurers would be more inclined to compromise when the stakes are so considerably reduced.

Significantly, all judicial adoptions of comparative negligence opted for the "pure" version,⁹ while most statutory adoptions chose the "Wisconsin" rule promoted by the defense bar.¹⁰ The judicial choice, I would suggest, was less likely the result of plaintiff-bias than of the conviction that the *Li* principle of loss sharing proportionate to fault should be applied to all cases of multiple responsibility rather than ad-

9. See cases cited note 3 *supra*.

10. A list updated to 1977 is found in *Foreward, supra* note 3, at 239-41 nn.1, 3 & 4.

mitted only by way of exception to some cases while the remainder continued under the contributory negligence bar. Retention of the "pure" version is therefore here recommended.

5. *Set-Off*. A more technical problem with "pure" comparative negligence is how to adjust counterclaims. Under the "Wisconsin" 49% rule counterclaims for losses arising out of the same accident are of course impossible, but under "pure" comparative negligence and the "50%" rule such counterclaims are quite frequent especially in cases of automobile collisions. Suppose that A and B each suffer \$100,000 of damage and that their fault is apportioned in the ratio of 30:70. A may therefore claim \$70,000 from B and B counterclaim \$30,000 from A.

Under modern procedure claim and counterclaim would ordinarily be set-off against each other,¹¹ with the result that A recovers \$40,000 from B and B nil from A. If both parties are uninsured, this result is entirely unexceptionable, indeed desirable, especially if B were judgment-proof so as to prevent him from pocketing \$30,000 from A while defaulting on his own larger debt to A.

6. The equities are, however, radically different where both parties carry liability insurance. The purpose of liability insurance is not only to protect the insured against the adverse impact of liability but to assure that the victim be actually compensated for his tort loss instead of having merely an empty claim against a judgment-proof defendant.¹² But to allow set-off between A's and B's liability insurers would thwart the latter function and confer an undeserved windfall on the insurers. To revert to the preceding example, instead of a total of \$100,000 (\$70,000 to A + 30,000 to B) flowing to the accident victims, only \$40,000 will; by the same token, the insurance carriers will together save \$60,000 at the expense of those they were meant, and paid, to benefit.

7. Two procedures are available to avoid this undesirable result. One is to prohibit set-off whenever one or all parties are insured against liability.¹³ The other would attain the same result whenever both parties are fully insured or solvent but deal more fairly with the not uncommon situation where one or the other party does not carry adequate cover. This procedure was adopted by the Uniform Comparative Fault Act § 3 and is here recommended.¹⁴

11. *Cf.* *Adams v. Cerritos Trucking Co.*, 79 Cal. App. 3d 957, 145 Cal. Rptr. 310 (1978) (claim by tortfeasor A against joint tortfeasor B for A's damage conditioned on A discharging her share of joint liability to plaintiff).

12. *See, e.g., Barrera v. State Farm Mut. Auto. Ins. Co.*, 71 Cal. 2d 659, 456 P.2d 674, 79 Cal. Rptr. 106 (1969).

13. *E.g., Civil Liability Act of 1961*, 1961 Acts of the Oierachtas, ch. 41, § 38 (Ire.).

14. Unlike California State Bar draft § 4 and S.B. 1959 (1978) (proposed CAL. CODE

Its formula is as follows: there shall be set-off; but "if either or both of the claims are covered by liability insurance and an insurance carrier's liability under its policy is reduced by reason of . . . set-off, the insured is entitled to recover from the carrier the amount of the reduction. Amounts so recovered shall be credited against pertinent liability policy limits."¹⁵ The underlying principle of this formula is that the insurance carrier would be enriched by the set-off and must disgorge that benefit to its own insured. If, in the preceding example, both parties were fully insured, A's carrier would pay nothing to B because of set-off. The set-off reduced its policy liability of \$30,000 and it must pay that amount to A. B's carrier must pay the net judgment of \$40,000 to A. Its own policy liability has been reduced by \$30,000 and it must pay that amount to B. In this instance, the end result is the same as if there had been no set-off. It is different, however, if we assume that A's and B's coverage is only \$30,000. In that event, A receives \$30,000 from his own insurer as in the previous example, but B's carrier pays \$30,000 to A and pays nothing to B; B remaining liable to A for \$10,000. Under a rule of "no set-off," A (who was entitled to greater damages) would have fared considerably worse, B better,¹⁶ thus "penalizing the party who can pay his obligation, if the other party is unable to pay."¹⁷ Instead, the suggested formula creates an incentive to carry adequate coverage, which would be desirable from everybody's point of view (including insurers').

8. *RECOMMENDATION 1: (1) Statutory confirmation of "pure" comparative negligence and (2) adoption of the modified set-off formula in Section 3 of the Uniform Comparative Fault Act.*

9. *Fault.* Your committee specifically solicited my comments on the question of what kinds of fault were susceptible to comparison under a comparative fault regime.¹⁸ At one end of the spectrum, one party may have been grossly negligent or even reckless; at the other end of the

CIV. PROC. § 878) which would specifically enact set-off in all situations. This proposal was of course opposed by the California Trial Lawyers Association (CTLA) in the committee hearings.

15. The Ingalls bill, A.B. 3643 (1978), contained alternative wording: "provided, that any party whose liability for damages is covered by a policy of insurance shall be compensated by the insurer to the extent that the party's damages otherwise recoverable have been used to reduce the insurer's liability." Both formulas appear to derive from the Republic of Ireland's Civil Liability Act of 1961, 1961 Acts of the Oireachtas, ch. 41, § 36(5).

16. A would have recovered only \$30,000 from B's insurer, nothing from his own, and thus been \$40,000 short (4/7 of his loss, \$30,000, from A's insurance).

17. UNIFORM COMPARATIVE FAULT ACT § 3, Comment.

18. Letter from Denise Jarman, legal intern, to John Fleming (July 7, 1978).

spectrum his liability may be strict (no fault): how can one compare either one with ordinary negligence? Even where both parties are negligent, their negligence may be related to entirely different spheres, like the negligent producer of a defective automobile and an inattentive driver. Justice Clark has been foremost in focussing criticism on the perplexity of comparing "apples and oranges."¹⁹ The problem has been considered in several contexts by California courts:

10. *Strict Liability*. Most important was the decision in *Daly v. General Motors Corp.*²⁰ that a plaintiff's contributory negligence would, since *Li*, reduce his damages against the manufacturer of a car, strictly liable for a defectively designed latch. Prior to *Li*, contributory negligence other than continued use of the product after becoming aware of the defect (assumption of risk) or actual misuse was not a defense to a claim based on strict liability, although it involved the Quixotic result that a negligent manufacturer was treated less harshly than one sued on a no-fault theory of strict liability. The problem in *Daly* was therefore whether to retain that rule or henceforth to admit a limited defense of comparative negligence. The latter alternative would itself entail the somewhat paradoxical result of worsening the position of plaintiffs pursuant to a decision (*Li*) whose objective and effect had been to improve it. On the other hand, the widespread exclusion of the defense of contributory negligence from claims for strict liability was largely motivated by the harshness of the all-or-nothing rule as well as by a desire not to impede the loss-distributive function of products liability. Since Professor Schwartz is submitting a detailed analysis of the specific problem of products liability to your committee, the following comments are addressed primarily to the "apples and oranges" argument and to *general* policy considerations.

Justice Richardson, speaking for the majority in *Daly*, admitted "the theoretical and semantic distinctions between the twin principles of strict products liability and traditional negligence"²¹ but questioned the "insistence on fixed and precise definitional treatment of legal concepts."²² For one thing, there had been "much conceptualistic overlapping and interweaving"²³ in this area; for another, contributory "negligence" was itself a misnomer since it did not connote breach of a

19. *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 616-17, 578 P.2d 899, 923-24, 146 Cal. Rptr. 182, 206-07 (1978) (Clark, J., dissenting); *Daly v. General Motors Corp.*, 20 Cal. 3d. 725, 748-50, 575 P.2d 1162, 1175-77, 144 Cal. Rptr. 380, 393-95 (1978) (Clark, J., concurring).

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

21. *Id.* at 734, 575 P.2d at 1167, 144 Cal. Rptr. at 385.

22. *Id.*

23. *Id.* at 735, 575 P.2d at 1167, 144 Cal. Rptr. at 385.

duty to another and was therefore different anyway from "actionable negligence" by a defendant. Comparative "fault" would therefore have been a better term; or, better still, "equitable apportionment or allocation of loss."²⁴ Hence, instead of "matching linguistic labels," it was more useful to "examine the foundational reasons underlying the creation of strict products liability in California to ascertain whether the purposes of the doctrine would be defeated or diluted by adoption of comparative principles."²⁵ Justice Richardson's opinion concluded that these goals would not be frustrated, inasmuch as the plaintiff would continue to be relieved of proving the defendant's negligence, "defenseless" plaintiffs would still be protected except for a reduction of damages proportionate to their own fault, and the cost would still be spread among society.

After dismissing the contention that the admission of comparative negligence would lessen the manufacturers' incentive to produce safe products, the court addressed the claim that, "as a practical matter, triers of fact, particularly jurors, cannot assess, measure, or compare plaintiff's negligence with defendant's strict liability."²⁶ Pointing to the federal experience under the maritime doctrine of unseaworthiness, Richardson J. concluded that jurors were quite capable of undertaking a fair apportionment of liability. This view is evidently shared by a preponderant number of courts in other states,²⁷ by many scholars²⁸ and by the draftsmen of the Uniform Comparative Fault Act which defines fault as including "acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, *or that subject a person to strict liability*."²⁹

11. The contrary viewpoint was forcibly put in *Daly* by the dissenting opinions of Jefferson, J. and Mosk, J.³⁰ The former stressed the difficulty faced by jurors in comparing negligence with strict liability and

24. *Id.* at 736, 575 P.2d at 1168, 144 Cal. Rptr. at 386. It is notable that the American usage of "comparative negligence" stands alone; in England and the Commonwealth it is called "apportionment."

25. *Id.*

26. *Id.* at 738, 575 P.2d at 1170, 144 Cal. Rptr. at 388.

27. *Id.* at 739-40, 575 P.2d at 1170-71, 144 Cal. Rptr. at 388-89. This view is also shared by most foreign countries with substantial experience of this problem. See Honoré, *Causation and Remoteness of Damage*, in 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW § 173 (1972) [hereinafter cited as Honoré].

28. 20 Cal. 3d at 740-41, 575 P.2d at 1171, 144 Cal. Rptr. at 389.

29. UNIFORM COMPARATIVE FAULT ACT § 1(b). See also California State Bar draft § 1 (S.B. 775) which applies comparative fault to "all tort . . . actions." The accompanying comment specifically argues for inclusion of strict liability.

30. 20 Cal. 3d at 750-57, 575 P.2d at 1177-81, 144 Cal. Rptr. at 395-99 (Jefferson, J., concurring in part, dissenting in part); *id.* at 757-64, 575 P.2d at 1181-86, 144 Cal. Rptr. at 399-404 (Mosk, J., dissenting).

the resulting unpredictability and inconsistency of verdicts; the latter predicted substantial prejudice to plaintiffs because the majority decision handed a powerful and "boilerplate" negotiating ploy to defendants and thus undermined the protective function of strict products liability.

12. Clearly, the issue is one of policy, not semantics. If one views strict liability as an exceptional deviant from a central principle of liability based on fault, the plaintiff's fault not only seems relevant but may invite the conclusion that it should actually exclude *all* liability of the tortfeasor. Thus it is the preponderant view that a tortfeasor liable without fault is entitled to a full indemnity from a negligent tortfeasor,³¹ but it is of course notable that the issue in that context does not affect the victim and therefore does not impinge as directly on any protective purpose of the strict liability rule. Hence where the issue is not between joint tortfeasors *inter se*, but between defendant and victim, the real choice is between the "risk" and the "insurance" theory of liability.³²

Under the risk theory, the plaintiff's negligence would be taken into account when the basis of the tortfeasor's strict liability is the risk created by his activity. That risk is of course all too obvious in the case of *defective* products, so obvious indeed that the liability is frequently distinguished from "absolute" liability and some courts have even likened it to "fault" liability, sufficient on any account for comparing fault.³³ This theory has its strongest proponent in Germany. Some of the German statutes creating strict liability specifically provided for the defense of comparative negligence, but the principle has long since become one of general "common law" application.³⁴ Weighed on the side of strict liability is the "enterprise risk" (*Betriebsgefahr*), *e.g.* the risk posed by driving an automobile, truck or train, flying an airplane, or transmitting gas or electricity. This is counted against plaintiffs no less than defendants,³⁵ so that in an automobile collision even an "innocent" driver ordinarily suffers a reduction in his claim against another negligent driver. Even the "conceptual" problem has been eased because, according to the official theory, what is being compared is not fault but causative effect. Thus the reduction or extinction of liability

31. See Kissel, *Contribution and Indemnification Among Strictly Liable Defendants*, in 16 FOR THE DEFENSE 133 (1975); *Foreword*, *supra* note 3, at 270 n.118.

32. See Honoré, *supra* note 27.

33. *Powers v. Hunt-Wesson Foods*, 64 Wis. 2d 532, 219 N.W.2d 393 (1974). The Wisconsin statute authorizes comparative negligence only with respect to "claims based on negligence."

34. Honoré, *supra* note 27.

35. O. ESSER, 2 SCHULDRECHT 496 (3d ed. 1969).

depends on the injured party's contribution to the harm, and even gross negligence does not wholly exclude liability.

The competing "insurance" theory stresses the protective purpose of the strict liability rule which arguably should not be impaired by the threat of reduction for the injured party's fault. This view appears to have the largest following in the United States where traditionally the plaintiff's contributory negligence has been regarded as irrelevant to claims based on strict liability.³⁶ But as already pointed out, the chief motivation in the past appears to have been to escape the drastic effect of the all-or-nothing rule rather than any philosophical commitment. Moreover, the case law was sparse and unimpressive until strict liability received its mighty boost in its application to defective products. The problem is therefore essentially novel in the United States.

13. Unfortunately, the debate in *Daly* did not yield an adequate justification of the opposing views. Only Mosk, J. put the "insurance" theorem clearly into the forefront of his dissent; Jefferson, J. alluded to it³⁷ but only to explain briefly why he preferred to allow the plaintiff to recover in full rather than bar him completely, his main point being to continue the all-or-nothing rule for want of any practical method of comparison. On the other hand, the majority was bent only on defending the practicality of comparison and the negative proposition that it would not impair the efficacy of strict products liability. It assumed as an incontrovertible premise that the *Li* rationale was otherwise applicable to strict liability. It thus failed to propose a sound theoretical foundation for making the required comparison and floundered amidst such terms as "comparative *fault*" and "equitable apportionment" as better alternatives to "comparative negligence."

The risk theory would have furnished such a needed foundation, as would perhaps a nod toward causation as an auxiliary criterion for comparison. Notably, the English legislation avoided this impasse by employing the more open terminology that the damages "shall be reduced to an extent as the court thinks *just and equitable* having regard to the claimant's share in the *responsibility* of the damage."³⁸ Moreover, the same legislation defines fault as consisting in "negligence, breach of duty or other act or omission which gives rise to liability in tort."³⁹ This has enabled courts to have regard not only to the parties' fault in the conventional sense, but also to the causative potency of

36. See RESTATEMENT (SECOND) OF TORTS § 402A, Comment n.

37. 20 Cal. 3d at 756-57, 575 P.2d at 1181, 144 Cal. Rptr. at 399 (Jefferson, J., concurring in part, dissenting in part).

38. Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c.28, § 1.

39. *Id.* § 4.

their conduct, the fact that the impact of reduction on the plaintiff is quite different from that on a defendant (who is insured) and other considerations relevant to fair loss distribution. As already pointed out, the Uniform Comparative Fault Act specifically includes strict liability in its definition of fault.⁴⁰

14. Oddly enough, neither side in the *Daly* debate took issue over whether reduction on account of contributory fault would advance the cause of accident prevention. The argument that it would has been a staple of the new school of lawyer-economists who seek liability rules that would promote the most "efficient" accident preventive responses by potential plaintiffs and defendants.⁴¹ Their argument typically assumes rational responses by the affected parties to given choices, such as that users of a product will exercise greater care in self-protection under the threat of reduced damages. Professor G. Schwartz recently explored but convincingly demolished this utilitarian argument as an unrealistic foundation for the defense of contributory negligence in any of its forms.⁴² This does not, of course, preclude other justifications, such as a sense of fairness that one who claims compensation from another for having created an unreasonable or excessive risk should not expect the law to ignore completely his own contribution in foolishly bringing about his own injury.

15. Strict liability may raise a problem in the context not only of contributory negligence but also of contribution. A strictly liable defendant may seek contribution from a negligent joint tortfeasor, and vice versa. Pre-*Li* law was largely distorted by distinctions between "primary and secondary" or "active and passive" negligence, and by the all-or-nothing dilemma where contribution was not available. It was this very confusion which prompted the New York and California courts in *Dole* and *American Motorcycle* to make a new start under the banner of "partial indemnity." The California Supreme Court in *American Motorcycle* specifically stressed the need for a new start after commenting at length on the unsatisfactory prior decisions dealing with products liability defendants.⁴³ These decisions can therefore no longer provide any guidance for the future.

40. See note 29 & accompanying text *supra*.

41. *E.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW 123-24 (2d ed. 1977); Demsetz, *When Does the Rule of Liability Matter?*, in 1 J. LEGAL STUD. 13, 27 (1972).

42. Schwartz, *Contributory and Comparative Negligence*, 87 YALE L.J. 697 (1978).

43. *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 591-99, 578 P.2d 899, 907-12, 146 Cal. Rptr. 182, 190-95 (1978). See especially its analysis of *Ford Motor Co. v. Poeschl*, 21 Cal. App. 3d 694, 98 Cal. Rptr. 702 (1971). See also Note, *Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants*, 50 S. CAL. L. REV. 73 (1976).

In accordance with the preceding discussion, therefore, there is no longer any good reason why a strictly-liable defendant should necessarily either have to bear the whole or none of the loss concurrently caused by his defective product and the negligent conduct of another tortfeasor. In particular, not even the "insurance" theory of strict liability would militate against contribution since it is not within the protective purpose of the strict liability rule to protect anyone other than the victim, least of all anyone whose negligence contributed to the injury. This view was recently adopted by the Supreme Court of Illinois in *Skinner v. Reed-Prentice Division Package Machinery Co.*,⁴⁴ allowing contribution to the manufacturer of defective machinery against a negligent employer.⁴⁵ As that court saw it, "the public policy considerations which motivated the adoption of strict liability were that the economic loss suffered by the user should be imposed on the one who created the risk and reaped the profit. When the economic loss of the user has been imposed on a defendant in a strict liability action the policy considerations are satisfied and the ordinary equitable principles governing the concepts of indemnity or contribution are to be applied."⁴⁶

On the facts of *Skinner*, contribution rather than indemnity appeared the proper solution. Significantly, the court regarded causation as the criterion for apportioning the loss.⁴⁷

16. *Willful Misconduct*. So far there has been little judicial clarification of the converse situation, namely, the effect of grosser forms of fault by the plaintiff. One problem area concerns the supply of liquor to a person who is obviously intoxicated, in violation of Business & Professions Code § 25602 (since partially repealed).⁴⁸ In *Kindt v. Kauffman*⁴⁹ the court of appeal upheld a demurrer to a claim for personal injuries sustained in an automobile accident by a bar patron who was obviously intoxicated when supplied with liquor by the defendant bartender. The court held that no duty was owed to such a patron and that an adult bar customer who voluntarily becomes intoxicated is

44. 374 N.E.2d 437 (Ill. 1977).

45. How to reconcile contribution or indemnity with the employer's immunity under the workmen's compensation statute raises another issue discussed in Section VIII of this Study. See notes 138-86 & accompanying text *infra*.

46. 374 N.E.2d at 443 (citations omitted).

47. "[T]he governing equitable principles require that ultimate liability be apportioned on the basis of the relative degree to which the defective product and the employer's conduct proximately caused [the injuries]." 374 N.E.2d at 442.

48. See 1978 Cal. Legis. Serv., ch. 929, at 3244 (West) (amending CAL. BUS. & PROF. CODE § 25602; CAL. CIV. CODE § 1714); *id.*, ch. 930, at 3245 (to be codified as CAL. BUS. & PROF. CODE §§ 25602.1-3).

49. 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976).

guilty, as a matter of law, not of mere negligence but of willful misconduct. Even after *Li*, such conduct remained an absolute bar to recovery, whether the defendant was himself guilty merely of negligence or also of willful misconduct; in short, there was no rule of comparative willful misconduct. However, in *Ewing v. Cloverleaf Bowl*⁵⁰ the supreme court disapproved of two propositions in *Kindt*: it held (1) that bartenders did owe a duty to their patrons no less than to third-parties endangered by their patrons,⁵¹ and (2) that a patron does not necessarily, as a matter of law, commit willful misconduct in consuming liquor even when bent on deliberately becoming drunk.⁵² In consequence, if the jury concluded that the patron's conduct was merely negligent but the bartender's amounted to willful misconduct, such willful misconduct would remove the bar of contributory negligence in accordance with pre-*Li* law. The court did not venture any comment on the likely outcome of such a case under the *Li* rule.

The Uniform Comparative Fault Act applies the "comparative fault" regime to all "acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others."⁵³ It is doubtful whether "reckless" was not intended to include also "willful misconduct"; at any rate there is no policy reason why it should not: only intended injury or self-injury should be excluded. But for the sake of clarity, it would be advisable to include in any adoption of the Uniform Act in California a specific reference to "willful misconduct," a term less familiar in other states.

17. The application of "comparative negligence" to forms of aggravated fault may occur in three different situations. First, the defendant may be reckless, but the plaintiff merely negligent. The pre-*Li* rule which allowed the plaintiff to recover in full was dominated by the all-or-nothing dilemma. Since this compunction has now disappeared, it is possible to combine reduced recovery for the plaintiff with liability for the defendant. To say that recklessness or willful misconduct is fault of a different kind rather than degree was merely a rhetorical device which is no longer necessary to do justice in this situation.

The second situation is the converse: the plaintiff being reckless but the defendant merely negligent. Under pre-*Li* law, the plaintiff

50. 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978).

51. *Id.* at 401, 572 P.2d at 1161, 143 Cal. Rptr. at 19.

52. *Id.* at 404, 572 P.2d at 1163, 143 Cal. Rptr. at 21.

53. UNIFORM COMPARATIVE FAULT ACT § 1(b). The same conclusion could be inferred, but less clearly from the California State Bar draft's open-ended definition of fault as "any act or omission . . . which constitutes breach of any duty . . ." §2. (The comment to § 2 does not advert to the problem.)

could not recover if merely negligent, *a fortiori* if reckless. Under the comparative negligence formula, it will now be possible to allow him to recover albeit substantially reduced damages. Aggravated fault is still fault that can and should be brought into comparison with lesser fault, regardless of its label. Significantly, a recent Swedish reform allows reduction of damages no longer for ordinary negligence at all but only for gross negligence and the like.⁵⁴ This distinction is based on the view that the impact of reduced recovery for a plaintiff who is typically not covered by insurance is too punitive to be justified except in case of grosser forms of misconduct. In the United States where social security benefits are far less available to accident victims than in Sweden, this reasoning has, if anything, added force.

The third situation is one where both parties are guilty of recklessness or willful misconduct, as is likely to be the case of the bartender and intoxicated patron. Here two solutions are possible: either to compare the two equal types of fault or to deny all recovery. The latter alternative, as already related, appealed to the court of appeal in *Kindt v. Kauffman*.⁵⁵ It likened the situation to persons who engaged in a joint illegal enterprise, such as speeding and prize fights, where the traditional rule has been to dismiss all claims on the maxim *ex turpi causa non oritur actio*. To allow recovery, even reduced recovery, would not only offend morality, but tend to encourage patrons to excessive consumption of liquor. Nor would liability provide a deterrent to tavern owners who would simply pay higher insurance premiums and pass the cost on to the public. The dissenting judge, Friedman, J., on the other hand, believed that, while Business & Professions Code § 25602 was ineffective as a criminal or licensing provision, a civil sanction would stimulate the tavern owner's responsibility in conjunction with the comparative negligence rule. Clearly, the issue is one of policy which might well be left to the courts to work out on an *ad hoc* basis. A specific provision to deal with joint illegal enterprises involving "willful misconduct" is not therefore recommended.

18. I do not propose to discuss the relation between contributory negligence and voluntary assumption of risk. This topic has been extensively debated by courts and commentators.⁵⁶ I am in full agreement with the proposal of the Uniform Comparative Fault Act to include in the definition of fault in Section 1(b): "unreasonable assumption of risk not constituting an enforceable express consent."

54. Tort Liability Act, ch. 6, § 1 (1975).

55. 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976).

56. *E.g.*, SCHWARTZ, *supra* note 2, §§ 9.1-5, at 153-73 & Supp. 53-61; Woods, *supra* note 2, at §§ 6:1-11; *Foreword, supra* note 3, at 260-67.

19. *RECOMMENDATION 2*: (1) Apply "comparative negligence" to claims based on strict liability; and (2) include "recklessness" and "willful misconduct," short of intentional injury, among the kind of fault capable of reducing, but no longer necessarily barring recovery.

II. American Motorcycle

20. The *Li* court deliberately refrained from addressing itself to the several problems raised by the introduction of comparative negligence in multi-party situations. It noted that such problems "lurk in the background" but directed the lower courts to apply the *Li* rationale to unsettled questions in a practical manner.⁵⁷ A weighty argument in favor of legislative rather than judicial introduction of comparative negligence has been precisely the need to deal with the whole complex of incidental issues in one blow instead of countenancing a protracted period of legal uncertainty. This pessimistic prognosis revealed itself as only too true: hundreds of cases came to clog trial courts in the next two years in anticipation of an authoritative resolution of issues that were hopelessly dividing intermediate courts of appeal.⁵⁸ Nothing whatever was gained by this postponement, since the issues were from the start unlikely to be clarified by protracted reflection or practical experience. It was none too soon when the supreme court in *American Motorcycle Association v. Superior Court*⁵⁹ at last had an opportunity of addressing these tardy issues.

21. In *American Motorcycle* the plaintiff, a teenage boy, sought to recover damages for serious injuries he incurred as participant in a cross-country motorcycle race for novices. He sued the sponsoring organizations who (besides denying negligence and alleging contributory negligence) sought leave to file a cross-complaint against the plaintiff's parents for negligent failure of supervision. The trial court denied the motion on the ground that the California Contribution Act, Code of Civil Procedure § 875, allowed contribution only among tortfeasors held liable in a joint judgment and, since the plaintiff himself had not

57. 13 Cal. 3d 804, 823-27, 532 P.2d 1226, 1240-42, 119 Cal. Rptr. 858, 872-74 (1975).

58. *American Motorcycle Ass'n v. Superior Court*, 135 Cal. Rptr. 497 (Cal. App. 1977), *vacated on writ of mandate*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978); *Stambaugh v. Superior Court*, 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976); *Safeway Stores v. Nest-Kart*, 63 Cal. App. 3d 934, 134 Cal. Rptr. 150 (1976), *rev'd and vacated*, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978).

59. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

(for obvious reasons) made his parents co-defendants, the defendant had no cause of action against them for contribution.⁶⁰ The court of appeal reversed, holding that the rationale of *Li* required the abrogation of joint and several liability for concurrent tortfeasors:⁶¹ first, because any individual defendant's liability should no longer exceed his own share of fault any more than a plaintiff's; secondly, because a plaintiff guilty of contributory negligence did not have the same equity as a totally innocent victim in claiming to recover his full damages from any one of several co-tortfeasors. For this reason, the court's solution was expressly limited to situations where a plaintiff was himself at fault.

Eventually the supreme court, though affirming the writ of mandate, differed radically from either of the courts below regarding the resolution of the problems raised.⁶² In an opinion by Tobriner, J., the court held that (1) the *Li* rationale did not warrant abolition of the joint and several liability of concurrent tortfeasors, regardless of whether the plaintiff was himself at fault;⁶³ (2) a defendant could claim "partial indemnity" from a concurrent tortfeasor for his apportioned share of fault,⁶⁴ notwithstanding the direction of Code of Civil Procedure §§ 875-876 that contribution be allocated "pro rata" (i.e. according to the number of defendants) and not in accordance with their individual shares of fault;⁶⁵ (3) such "partial indemnity" can be claimed from a co-tortfeasor even though he has not been made a party-defendant by the plaintiff, notwithstanding the requirement of Code of Civil Procedure § 875 that contribution is limited to tortfeasors who have been held liable in a joint judgment;⁶⁶ (4) a good faith settlement with one tortfeasor released him from all liability to share with co-tortfeasors but reduced the plaintiff's claim against such co-tortfeasors only by the amount of the settlement, not by the settlor's share of fault: in both respects adopting for "partial indemnity" the policy laid down for contribution by Code of Civil Procedure § 877;⁶⁷ (5) the plaintiff's share of fault must be determined by weighing his negligence against the combined total of all causative negligence, not

60. See *Thornton v. Luce*, 209 Cal. App. 2d 542, 26 Cal. Rptr. 393 (1962).

61. 135 Cal. Rptr. 497, 503, 505 (Cal. App. 1977). The court granted mandate to allow the joinder on the ground that it was desirable to fix the share of the cross-defendant.

62. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

63. *Id.* at 586-91, 578 P.2d at 903-07, 146 Cal. Rptr. at 186-90.

64. *Id.* at 591-99, 578 P.2d at 907-12, 146 Cal. Rptr. at 190-95.

65. *Id.* at 599-605, 578 P.2d at 912-16, 146 Cal. Rptr. at 195-99.

66. *Id.* at 605-07, 578 P.2d at 916-18, 146 Cal. Rptr. at 199-201.

67. *Id.* at 603-04, 578 P.2d at 915-16, 146 Cal. Rptr. at 198-99.

only that of co-defendants but including even absent tortfeasors.⁶⁸

The following discussion will analyze each of these points in turn.

III. Joint and Several Liability

22. The court reaffirmed the traditional "joint and several" judgment rule⁶⁹ in its application, after *Li*, as much to plaintiffs who are guilty of contributory fault as to those who are completely innocent. It thereby differed from the court below which would have allowed contributorily negligent plaintiffs to recover from any one defendant only his apportioned share of liability.⁷⁰ The court advanced three arguments: First, it rejected the contentions that since *Li* there was now a basis for dividing damages, namely on a comparative negligence basis, in contrast to the prior all-or-nothing philosophy. The joint and several liability rule, the court said, was long ago extended from "joint tortfeasors," in the strictest sense of tortfeasors acting in concert, to all concurrent tortfeasors who, though acting independently, cause an indivisible injury. (The term "joint tortfeasors" is hereafter used in this Study in the more comprehensive second sense). Since the negligence of each was a proximate cause of an entire and indivisible injury, there was no equitable claim vis-à-vis an injured plaintiff to be relieved from liability for the whole of that injury. "In other words, the mere fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury."⁷¹

But as Clark, J. pointed out in his dissent,⁷² this argument by the majority proves too much: plaintiff's negligence is also a proximate cause of the entire indivisible injury, but this did not prevent the *Li* court from repudiating the all-or-nothing solution.

23. The court's second argument consists of two parts: first,⁷³ it points to the incontestable fact that even after *Li* some plaintiffs will continue to be wholly free of contributory negligence. But while these no doubt continue to deserve the benefits of the "joint and several" liability rule,

68. *Id.* at 590 n.2, 578 P.2d at 906, 146 Cal. Rptr. at 189.

69. This terminology has become customary in the United States, by and large superseding "*liability in solidum*" or "solidary liability."

70. That decision, 135 Cal. Rptr. 497 (Cal. App. 1977), had been influenced by the desire to conform to the *Li* rationale without violating Code of Civil Procedure § 875. Since the supreme court found another way around CAL. CODE CIV. PROC. § 875, it was under no similar constraint regarding the issue of "joint and several" liability.

71. 20 Cal. 3d at 589, 578 P.2d at 905, 146 Cal. Rptr. at 188.

72. *Id.* at 611, 578 P.2d at 920, 146 Cal. Rptr. at 203.

73. *Id.* at 589, 578 P.2d at 905, 146 Cal. Rptr. at 188.

this does not prove that those guilty of contributory negligence should be treated the same. All one can say is that, *if* there is to be the same rule for *all* plaintiffs, the hardship of depriving innocent plaintiffs of the "joint and several" liability rule arguably outweighs the hardship for defendants in being so answerable even to negligent plaintiffs.

24. The second part of this argument in favor of "joint and several" liability⁷⁴ is that a plaintiff's culpability is not equivalent to a defendant's because the first consists merely in lack of self-care ("self-directed negligence") whereas the second connotes danger to others.⁷⁵ This distinction ought, of course, to be heeded in apportioning shares of fault,⁷⁶ but does not seem to justify treating the shares, once ascertained, differently under the focus of the *Li* principle (viz. that liability should not exceed an individual's share of fault). Indeed, the argument comes close to challenging the *Li* principle itself insofar as it suggests that plaintiff's and defendant's culpability are of a different order.⁷⁷ The court itself recognized the double-edged nature of its own argument by weakly suggesting that, although it did not preclude comparative negligence, "the fact remains that insofar as the plaintiff's conduct creates only a risk of self-injury, such conduct, unlike that of a negligent defendant, is not tortious."⁷⁸ At this point the argument collapses.

25. However, the court's third rationale touched a firmer base. The cutting edge of the "joint and several" liability rule is that it imposes the risk of a co-tortfeasor's *inability* to pay his share on the remaining defendants, whereas limiting a co-tortfeasor's liability to his own share alone would place that risk on the plaintiff. As already pointed out, the former solution is universally regarded as the fairer where the plaintiff is entirely innocent. On the other hand, it is not self-evidently also the fairer (as the court thought it was) where the plaintiff was himself at fault. One's doubt increases the greater the proportion of the plaintiff's fault compared with the defendant's: suppose that P(laintiff)'s fault was 60%, D(efendant)₁'s is 10% and D₂'s 30%. Why should D₁, who is far less at fault than P(1:6), "guarantee" also D₂'s share, when P's negligence, no less than D₁'s, was a proximate cause of his injury and his fault greater to boot?⁷⁹ Surely, the only fair solution compatible with

74. Its link with the first part is obscure; it looks more like an independent rationale.

75. *Id.* at 589-90, 578 P.2d at 906, 146 Cal. Rptr. at 189.

76. See J. FLEMING, *THE LAW OF TORTS* 257 (5th ed. 1977).

77. 20 Cal. 3d at 612, 578 P.2d at 921, 146 Cal. Rptr. at 204 (Clark, J.,dissenting) ("But the differences warrant departure from the *Li* principle in toto or not at all.")

78. *Id.* at 589-90, 578 P.2d at 906, 146 Cal. Rptr. at 189.

79. Justice Clark, in dissent, thought it more plausible for a jurisdiction like Wisconsin to adhere to "joint and several" liability because a plaintiff whose share was greater than the defendant's would still be debarred from recovering against any of them. *Id.* at 613, 578

the *Li* rationale of limiting each participant's liability to his own share of causative fault, is to impose the risk of D_2 's insolvency neither wholly on P nor wholly on D_1 but to distribute it among P and D_1 in proportion to their respective shares of fault. The best way to accomplish this result is to retain the "joint and several" liability rule, subject however (as will be pointed out below) to a later redistribution of D_2 's unsatisfied share.

An additional practical reason is that a rule of "several" liability would inject substantial complications into tort litigation and settlement, and thereby place a new burden on the disposition of tort claims. It would necessitate a verdict on the responsibility of all conceivable parties to the litigation even where there is no question of the plaintiff's contributory negligence and might even tempt the plaintiff into the embarrassing position of arguing that an insolvent defendant was *not* negligent in order to avoid reduction of his verdict against the remaining defendants.

26. In sum, the majority opinion in *American Motorcycle* did not make the strongest case on behalf of a sound result. It got lost in the maze of conceptualism instead of facing up to the practical aspects of jettisoning the "joint and several" liability rule. That rule is justified, not by a one-sided preference for plaintiffs, but by the very principle of evenhandedness between plaintiffs and defendants enunciated in *Li*. It should therefore appeal to the plaintiffs' and defendants' bar alike on grounds of fairness: the "several" liability rule of the court of appeal in *American Motorcycle* is unfairly skewed against plaintiffs, whereas the supreme court's opinion carries the seeds of unfairness for defendants.

In a small number of jurisdictions the "joint and several" liability rule has been abandoned in its application to contributorily negligent plaintiffs.⁸⁰ But the overwhelming majority has extended the rule to such plaintiffs, either by express legislation or by judicial decision.⁸¹ Such an extension is also contained in the Uniform Comparative Fault Act and the California State Bar draft (S.B. 1959), and was recommended in Professor G. Schwartz's Report to your Committee⁸² in opposition to the proposal of the California Citizens' Commission Report.⁸³ Since such an extension was not precluded by legislation in

P.2d at 922, 146 Cal. Rptr. at 205. But the problem differs only in degree, not kind, according to the plaintiff's share being more or less than the defendant.

80. *E.g.*, under the Kansas, Nevada, New Hampshire and Vermont statutes.

81. See the state-by-state tabulation, with citation to the relevant statutes or decisions, in the Appendix to *American Motorcycle Ass'n v. Superior Court*, 135 Cal. Rptr. 497, 506-12 (Cal. App. 1977).

82. Recommendation 4D.

83. Report 114-23.

California, no objection could be raised to the court's decision to so extend it in working out the implications of its own *Li* precedent.⁸⁴ It may nonetheless be preferable to give statutory sanction to the rule in the context of the more general statutory revision recommended by this Study.

RECOMMENDATION 3: *Retention of the "joint and several" liability rule even where the plaintiff contributed to his injury through his own fault.*

IV. Comparative Contribution

27. The second major ruling of the court in *American Motorcycle* was to sanction comparative contribution among tortfeasors under the new label of "partial indemnity."⁸⁵ Contribution among tortfeasors has in the main been a creature of statute in derogation of the common law which, as in the parallel situation of contributory negligence, countenanced only an all-or-nothing solution. In a few but ill-defined situations, the common law permitted a shifting of the *whole* liability from one tortfeasor to another (principally from one who was liable merely for faultless causation, *e.g.*, in cases of vicarious liability); otherwise it denied all relief on the puritannical ground that it would not assist a wrongdoer (*in pari delicto potior est conditio defendentis*). In no event could there be sharing.

In a majority of U.S. jurisdictions contribution was introduced by adoption, or at least under the inspiration, of the Uniform Contribution Among Tortfeasors Act. This model, in both its versions (1939 and 1955), opted for "pro rata" contribution, *i.e.*, by equal shares among the tortfeasors, rather than for "comparative" contribution, *i.e.*, in proportion to their shares of fault. This choice has been defended on the following grounds: first, that (contribution being an equitable doctrine) "equity is equality." Secondly, since the negligence of each tortfeasor must have been a proximate cause of the injury, its causative effect could not be assessed otherwise than by giving it equal weight with that of the others. More persuasive than these *a priori* arguments are two practical considerations: first is the simplicity of pro rata division. It dispenses with the need for, and costs of, any protracted inquiry into shares of fault and aids settlements because the formula is categorically fixed by law. Secondly, its advocates contend that the formula pro-

84. Justice Clark's insistence that this was a legislative task, 20 Cal. 3d at 612-13, 578 P.2d at 921, 146 Cal. Rptr. at 204, must be viewed in the light of his same objection against the *Li* decision. See note 3 and accompanying text *supra*.

85. 20 Cal. 3d at 599, 578 P.2d at 912, 146 Cal. Rptr. at 195. Applied to strict liability in *Safeway Stores v. Nest-Kart*, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978).

motes settlements in yet another way: insofar as a defendant with a low percentage of fault will settle rather than risk being found liable at a trial and incurring pro rata liability. This argument, however, seeks to make a virtue out of its potential for serious abuse, namely, as a means not for encouraging but for extorting settlements from slightly negligent defendants. As the Wisconsin court observed, after labelling it "a convenient blackjack," "the end does not justify [such] means."⁸⁶

28. Pro rata contribution is, however, incompatible with the *Li* rationale of apportioning liability in accordance with shares of fault. That rationale clearly has as much relevance between several defendants as it has between plaintiff and defendant(s). Obviously, its appeal increases the larger the disparity of fault: no wonder that it was in a case of 5:95 that the Wisconsin court felt impelled to abandon the pro rata rule.⁸⁷ Moreover, in cases where a contributorily negligent plaintiff is facing several negligent defendants, the pro rata rule would, since *Li*, lead to strikingly odd results: suppose, *e.g.*, that P is adjudged 25% at fault, D₁ 25% and D₂ 50%. If P chose to collect 75% of his loss of \$100,000 from D₁, as he is entitled to do under the "joint and several" liability rule, it would run counter to the *Li* rationale to limit D₁'s claim for contribution to \$37,500 (50% of \$75,000) instead of \$50,000 (D₂'s fault-proportioned share). Such a rule would make the ultimate allocation of liability contingent on a random factor, namely, the amount which the plaintiff chose to collect from D₁. Hence whatever the justification for the "pro rata" rule at the time when contributory negligence was a complete defense, it became incongruous with the introduction of comparative negligence. An increasing number of jurisdictions have therefore adopted "comparative contribution" either by legislation⁸⁸ or judicial decision.⁸⁹

29. The only obstacle to the California court following this trend was California's contribution statute of 1957 (Code of Civil Procedure § 876) which followed the 1955 Uniform Act in prescribing the "pro rata" rule.⁹⁰ The same obstacle had been faced down by the New York

86. *Bielski v. Schulze*, 16 Wis. 2d 1, 12, 114 N.W.2d 105, 111 (1962).

87. *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

88. *E.g.*, MINN. STAT. ANN. § 604.01 (West Supp. 1978); 1973 Nev. Stats. ch. 787 § 1(3)(b); N.H. REV. STAT. ANN. § 507: 7-a (Supp. 1977); N.J. STAT. ANN. §§ 2A: 15-15.1-3 (West Supp. 1977); N.Y. CIV. PRAC. § 1401 (McKinney 1976); N.D. CENT. CODE § 9-10-07 (1975); OR. REV. STAT. § 18.485 (1977); TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(b) (Vernon Supp. 1978); UTAH CODE ANN. § 78-27-40(2) (1977); VT. STAT. ANN. tit. 12, § 1036 (1973).

89. *Packard v. Whitten*, 274 A.2d 169 (Me. 1971); *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

90. The statute was sponsored by the State Bar of California which provided an expla-

Court of Appeals five years earlier in *Dole v. Dow Chemical Co.*⁹¹ Following this precedent, the supreme court argued that its version of sharing among tortfeasors in accordance with fault was a development of "equitable partial indemnity" which had not been foreclosed by the statutory scheme of "contribution" enacted by Code of Civil Procedure §§ 875-877. This argument was entirely result-oriented and might well be criticized as a usurpation of the legislative function.⁹² As previously explained, indemnity has always meant a shifting of the *complete* liability, while contribution signifies a sharing of liability. Thus for the court to invent the label of "partial indemnity" for a new judicial regime of loss sharing was merely a semantic maneuver to sidestep the parameters of the legislative regime of "contribution."⁹³ In effect, the court read Code of Civil Procedure §§ 875-877 out of the statute book by freeing "partial indemnity" from two unwelcome limitations: (1) the requirement of a joint judgment and (2) the "pro rata" allocation of shares.

The New York legislature, prodded by its own court's decision in *Dole v. Dow Chemical Co.*, two years later amended its Contribution Act by enacting contribution in proportion to fault.⁹⁴ Faced with exactly the same situation, the California legislature should do likewise. Such also is the proposal of the Uniform Comparative Fault Act and the California State Bar draft (S.B. 1959).

30. *RECOMMENDATION 4: Statutory enactment of contribution by shares proportioned to fault in lieu of the existing system of contribution "pro rata" (equal shares).*

V. The "Joint Judgment" Rule

31. In enacting its contribution statute in 1957, Code of Civil Procedure § 875, California deviated from its model, the Uniform Contribution Among Tortfeasors Act of 1955, by limiting contribution to tortfeasors against whom "a money judgment has been rendered jointly." It has since been held that no cross-complaint for contribution can be filed against a tortfeasor not sued by the plaintiff so as to make

nation of its purposes to the Senate Judiciary Committee. 1 SEN. J. APP. 130 (Reg. Sess. 1957).

91. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

92. See my criticism of *Dole v. Dow Chemical* in *Foreword*, *supra* note 3, at 255-56.

93. The court also attempted to reinforce its position by finding statutory encouragement in the statute itself for a continued development of "equitable indemnity." 20 Cal. 3d at 599-605, 578 P.2d at 912-16, 146 Cal. Rptr. at 195-99. It would serve no purpose in this study to counter this disingenuous argument point for point.

94. N.Y. CIV. PRAC. LAW § 1401 (McKinney 1976).

him a party defendant in the plaintiff's action and thus set the stage for an eventual joint judgment.⁹⁵ "The result is a circular series of contingencies that cannot be satisfied. The defendant has no right of contribution unless he obtains a joint judgment, he cannot obtain a joint judgment unless he states a cause of action, and he cannot state a cause of action unless he has a right of contribution."⁹⁶

32. Several arguments account for this position. One is that it avoids such complications as inconsistent verdicts, disputes over the amount of the plaintiff's loss, what effect to attach to a prior settlement, lapse of time and so forth. Another is that it promotes administrative efficiency by deterring multiple litigation. But both objectives can be attained without prohibiting cross-complaints. Thus Michigan, prior to abandoning the joint judgment requirement altogether in 1974, specifically permitted cross-complaints for contribution to satisfy the joint judgment requirement.⁹⁷

Less tractable are two policy arguments. Foremost is the plea that the plaintiff should be free to select his adversaries without possible prejudice from having defendants foisted on him at the trial who might evoke special sympathy, leading to lower verdicts. This is an argument against cross-complaints but not, of course, against separate actions for contribution.

The preceding argument may be reinforced on the ground that a plaintiff's decision not to sue a particular co-tortfeasor will often be based on the conviction that he is less well equipped to bear any part of the loss than the other(s). Denial of contribution may thus serve sound notions of loss allocation by preventing a "strong" tortfeasor from shifting part of the accident cost to a substantially weaker tortfeasor; the most obvious illustration being a liability insurer seeking contribution from an uninsured tortfeasor. The very facts of the *American Motorcycle* case reveal just such a situation: namely, two presumably insured corporate defendants claiming contribution from the teenage victim's parents who were almost certainly uninsured against claims for negligent lack of supervision. Although this policy argument has been raised categorically against any form of contribution among tortfeasors,⁹⁸ it might be implemented at least—so the argument

95. *General Elec. Co. v. State Dep't of Pub. Works*, 32 Cal. App. 3d 918, 925-26, 108 Cal. Rptr. 543, 547-48 (1973); *Thornton v. Luce*, 209 Cal. App. 2d 542, 551-52, 26 Cal. Rptr. 393, 398-99 (1962); see *Goldenberg & Nicholas, Comparative Liability Among Joint Tortfeasors*, 8 U.W.L.A. L. REV. 23, 43-54 (1976) [hereinafter cited as *Goldenberg & Nicholas*].

96. *Goldenberg & Nicholas, supra* note 95, at 45.

97. MICH. COMP. LAWS ANN. § 600.2925 (West Supp. 1974).

98. See *James, Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV.

runs—where the plaintiff himself considered contribution undesirable.⁹⁹

33. The argument to the contrary, however, strikes most observers as the stronger on balance. It is simply that a plaintiff should not have the unrestricted power unilaterally to decide how the loss should be allocated among several tortfeasors and thus to prevent, if he so wishes, any distribution among them. In truth, the “joint judgment” rule perpetuates the worst feature of the old common law principle of no-contribution by giving this enormous, uncontrolled power to plaintiffs. If indeed, there are situations in which contribution would be against public policy, that determination ought to be made by the law, not the plaintiff, granting a specific immunity or prohibiting contribution.

Besides, the “joint judgment” rule may tend to discourage settlements, since a settlor is disqualified from claiming contribution. The risk he takes of settling for more than his due share is indeed somewhat increased under comparative contribution since he would have to guess right not only the total amount of the damages but also his own relative share of fault. That the prejudicial effect on settlements is not a figment of the imagination is documented by the special legislative waiver of the requirement that it was felt necessary to pass in order to facilitate speedy settlements after the Baldwin Hills Dam disaster in 1963.¹⁰⁰

The trend has therefore been decisively against perpetuation of the “joint judgment” rule. Michigan long ago first mitigated it, as already pointed out, by authorizing joinder and later abolished the requirement altogether.¹⁰¹ New York also abolished it, in train with introducing comparative negligence for plaintiffs¹⁰² and comparative contribution among tortfeasors.¹⁰³ Legislation in California should follow the same course.

L. REV. 1156 (1941), which elicited a rebuttal from Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 HARV. L. REV. 1170 (1941). Recently, Weir in 9 INTERN'L ENCYCL. COMPARATIVE LAW ch. 12, at 78, sided with James by advocating abolition of contribution, if not altogether, at least by insurers and other “excellent loss-spreaders.”

99. It is all the more remarkable that the court's opinion in *American Motorcycle* barely adverted to this aspect, merely guarding itself against any implication that it endorsed filial claims of this sort. 20 Cal. 3d at 607, 578 P.2d at 918, 146 Cal. Rptr. at 201.

100. 1965 Cal. Stats. 1st Ex. Sess., ch. 1, at 103 (held constitutional in *City of Los Angeles v. Standard Oil Co.*, 262 Cal. App. 2d 118, 68 Cal. Rptr. 512, *appeal dismissed*, 393 U.S. 267 (1968)). An illustration of a settling tortfeasor's claim for “partial indemnity” since *American Motorcycle* is *Sears, Roebuck & Co. v. International Harvester Co.*, 82 Cal. App. 3d 492, 147 Cal. Rptr. 262 (1978).

101. MICH. COMP. LAWS ANN. § 600.2925 (West Supp. 1974).

102. N.Y. CIV. PRAC. LAW § 1401 (McKinney 1976).

103. *Id.*

34. Abandoning the "joint judgment" rule opens the possibility of increased multiple litigation which would not only increase legal costs and impose an unnecessary burden on judicial administration but also raise the prospect of inconsistent verdicts. A tortfeasor sued in the second action would not be bound by the verdict in the first with respect either to liability or shares of fault.¹⁰⁴ Since the responsibility of all participants in the accident must in any event be assessed in order to fix the shares of fault of any one of them, it is all the more desirable to have all of them before the court in order to take advantage of their conceivably conflicting testimony and fix their shares of responsibility once and for all.

However, I do not consider it necessary to impose either incentives or penalties in order to promote joinder. For if the plaintiff chooses not to join a particular tortfeasor himself, it will in most cases be in the defendant's interest to do so. So long as the latter may freely implead any other person for the purpose of asserting a claim for contribution or indemnity—and such procedure is readily available¹⁰⁵—there is thus already a sufficient incentive based on self-interest which needs no reinforcement. Given the ample authority of California's long-arm statute,¹⁰⁶ nonresidence will rarely be a reason for the plaintiff's failure to join a particular tortfeasor, but in any event such an obstacle could no more be overcome by the defendant than the plaintiff.

35. If, contrary to the preceding recommendation, sanctions for *compelling* joinder were deemed desirable, two alternatives are available. One would debar a defendant from later claiming contribution in a separate action, at least if he had no reasonable cause for failing to cross-claim.¹⁰⁷ This would be analogous to the existing compulsory cross-claim provision regarding any "related cause of action . . . [a defendant] has against the plaintiff."¹⁰⁸

The other alternative would be to put pressure on the plaintiff by

104. Goldenberg & Nicholas, *supra* note 95, at 49-50, add: "Any inconsistency of verdicts between the two actions could result either in unjust enrichment to the prior defendant (*i.e.*, if in the later verdict the plaintiff's damages are found to be greater or the defendant's proportionate fault found to be less), or in the defendant being short-changed (*i.e.*, if the later verdict found plaintiff's damages or proportion of fault smaller or the defendant's degree of culpability greater)."

105. CAL. CIV. PROC. CODE § 428.10(b) (West 1973). This procedure was hitherto precluded by the "joint judgment" rule.

106. CAL. CIV. PROC. CODE § 410.10 (West 1973).

107. Goldenberg & Nicholas, *supra* note 95, at 50-53. Such a provision is contained in the Proposed Statute of the State Bar (§ 6) and S.B. 1959 (proposed Code of Civil Procedure § 881). It was adopted by the Ontario Court of Appeal in *Cohen v. S. McCord & Co.*, [1944] 4 D.L.R. 753 and *Rickwood v. Aylmer*, 8 D.L.R.2d 702 (1957).

108. CAL. CIV. PROC. CODE § 426.30(a) (West 1973).

limiting his claim to each defendant's individual share only, in case of unjustifiable non-joinder of others. Admittedly, this method would in one respect be less drastic than the former, since it would not preclude the plaintiff from later bringing a separate action against those he originally omitted to sue. But in most situations in which he wished to spare a particular tortfeasor, *e.g.*, because (as in *American Motorcycle*) he was a close relative, his reason for doing so would also preclude him from suing later. In any event, we are accustomed to respect a plaintiff's unwillingness to take the initiative in joining a particular party for whatever reason; and so long as the defendant he does sue has the opportunity of joining him as a co-defendant, there can be no great opportunity for abuse. Thus the plaintiff's decision against joinder need not be at the defendant's expense since the latter has always the means to defuse it.

36. Yet another ground for objecting to a plaintiff proceeding separately against different defendants is the abusive practice of verdict-shopping, *i.e.*, testing his luck before several juries in the expectation of eventually collecting up to the highest verdict.¹⁰⁹ Under the English legislation which has been widely followed in the British Commonwealth this practice was discouraged at the time of introducing contribution among tortfeasors by limiting plaintiff's recovery in subsequent actions to the amount awarded in the first and depriving him of his legal costs unless the court is of the opinion that there is a reasonable ground for bringing the subsequent action.¹¹⁰ Verdict-shopping, however, is not widespread because the contingent fee system discourages it and because it is generally in the defendant's interest to join all other tortfeasors for contribution. No legislative change in this regard is therefore recommended.

37. *RECOMMENDATION 5: Abolition of the "joint judgment" requirement for contribution.*

VI The Insolvent or Absent Joint Tortfeasor

38. If one or more of several joint tortfeasors is unable to pay his full share of the damages, who should bear the burden of the shortfall? Three solutions are possible: (1) the plaintiff, (2) the solvent defendant(s) or (3) to distribute the shortfall among the solvent defendant(s) and any contributorily negligent plaintiff in proportion to their shares of fault. Alternative (1) is accomplished by limiting the liability of each

109. See Note, *Consequences of Proceeding Separately Against Concurrent Tortfeasors*, 68 HARV. L. REV. 697, 700-02 (1955).

110. Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c.30, § 6(1)(b); see J. FLEMING, *THE LAW OF TORTS* 242-43 (5th ed. 1977).

tortfeasor to his own share only, in lieu of "joint and several" liability. In section III of this Study that solution was rejected, even in its application to plaintiffs guilty of contributory negligence, as incompatible with the *Li* rationale of distributing the accident cost proportionately to fault. The solvent defendant has no greater equity than the plaintiff to escape his share of the shortfall.

The flaw of solution 2 lies in the fact that it makes no allowance for the plaintiff's contributory negligence, if any. For there is no reason, compatible with the *Li* rationale, why a defendant should bear a share disproportionately larger to his fault than a contributorily negligent plaintiff merely because a co-defendant is unable to pay his own full share.¹¹¹ In sum, to place the shortfall wholly on the solvent defendant would be as unfair to him as placing it wholly on the plaintiff would be to the latter. Neither solution is compatible with the principle of proportionate loss allocation.

39. The only sound solution compatible with *Li* is therefore to distribute the shortfall among the solvent parties, plaintiff as well as defendant(s), in the proportion of their respective shares of fault. Thus if the ratio between P, D₁ and D₂ was 25:50:25 and D₂ was insolvent, P's share would be increased by 1/3 and D₁'s by 2/3 of the deficiency. This solution has been widely advocated by scholars,¹¹² enacted in several common law jurisdictions,¹¹³ and recently adopted by the Uniform Comparative Fault Act.¹¹⁴ It was also approvingly commented on by Clark, J. in the *American Motorcycle* case.¹¹⁵

40. How would that principle be translated into practice? As pointed out in Section III of this Study, the "joint and several" liability rule is the first but not necessarily the final step in the adjustment between plaintiff and defendant(s). If, to continue with the preceding example, D₂'s insolvency is already known at the time of the trial, his share can, and should, be immediately redistributed between P and D₁ in the ratio of 1/3 and 2/3, as is indeed contemplated already under the existing

111. The State Bar draft § 6(c) and S.B. 1959: proposed Code of Civil Procedure § 880(c)) incorporates solution (2) but without stating any reason for excluding plaintiffs at fault. That that proposal passed without objection from the plaintiff's bar (CTLA) is hardly surprising.

112. The originator was C. GREGORY, *LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS* 77-79 (1936). For others, see G. WILLIAMS, *JOINT TORTS AND CONTRIBUTORY NEGLIGENCE* § 48 (1951); *Foreword*, *supra* note 3, at 251-52.

113. *E.g.*, Republic of Ireland's Civil Liability Act of 1961, 1961 Acts of the Oireachtas, ch. 41, § 38; *cf.* South Africa's Apportionment of Damages Act of 1956, ch. 2, § 8(ii) (redistribution between solvent joint wrongdoers).

114. UNIFORM COMPARATIVE FAULT ACT § 2(d).

115. 20 Cal. 3d 578, 614, 578 P.2d 899, 922, 146 Cal. Rptr. 182, 205 (1978) (Clark, J., dissenting).

statutory direction, Code of Civil Procedure § 875(b), to administer contribution "in accordance with the principles of equity."¹¹⁶

There is of course no reason for applying a different principle if the insolvency becomes known only later. But in that event a supplementary judicial order would be needed to reallocate the insolvent's share. This raises no serious administrative problem since D_2 's share would already have been fixed by the jury's verdict; the matter can therefore be expeditiously dealt with by motion. Section 2(d) of the Uniform Comparative Fault Act properly suggests a time limit for such a motion, such as one year after judgment in the original action, and specifically provides that the party whose share is reallocated remains "subject to contribution and to any continuing liability to the claimant on the judgment."

41. A related problem is how to deal with *absent* tortfeasors. The California Supreme Court in *American Motorcycle* expressly approved the revised Book of Approved Jury Instructions (BAJI) instruction (No. 14.90) that juries assess shares of responsibility among all responsible participants of the accident, whether or not joined as parties to the litigation.¹¹⁷ It would seem proper that, rather than adding the absent tortfeasor's share to the remaining defendants alone, that share be distributed proportionately among them and any contributorily negligent.¹¹⁸ The absent defendant would of course remain liable to contribution, though free to relitigate his liability since he is obviously not bound by *res judicata* or issue estoppel. If the claim for contribution is successful, the latter's share would be redistributed among the plaintiff and the defendants in the original action who had provisionally absorbed it. Since the plaintiff is directly interested in such a contribution claim, he should have a right to initiate it and/or become a party co-plaintiff.

An alternative approach, espoused by the Uniform Comparative Fault Act, is to limit the allocation of shares to the litigating parties. Ignoring "absent tortfeasors" is defended on the ground that "it cannot

116. CAL. CIV. PROC. CODE § 875(b) (West Supp. 1978). That this provision has the purpose of determining "pro rata" shares by first excluding insolvent tortfeasors is expressly mentioned in the Comment to the Uniform Contribution Among Tortfeasors Act § 2 (1955). The procedure is illustrated by the English case of *Fisher v. C.H.T. Ltd.*, [1966] 2 Q.B. 475, 480-81 (C.A.).

117. 20 Cal. 3d at 590 n.2, 578 P.2d at 906, 146 Cal. Rptr. at 189.

118. The State Bar draft § 6(c) and S.B. 1959 (proposed Code of Civil Procedure § 880(c)) would distribute the absentee shares only among the remaining "judgment debtors" (i.e., defendants). See also State Bar draft § 3, Comment A. As already pointed out in relation to the same proposal for uncollectible shares of part defendants, see note 111 *supra*, this does not hold the scales evenly between faulty defendants and plaintiffs.

be told with certainty whether [such a] person was actually at fault or what amount of fault should be attributed to him, or whether he will ever be sued."¹¹⁹ The effect of this proposal, it will be noted, is in practice identical with the first-mentioned proposal of distributing the share of the absentee among the remaining defendants *and* any plaintiff at fault.¹²⁰

42. *RECOMMENDATION 6: The share of any insolvent or absent tortfeasor shall be distributed among the remaining defendants and the plaintiff (if at fault) in proportion to their respective shares of responsibility.*

VII. The Settling Joint Tortfeasor

43. Settlement with one of several joint tortfeasors raises two principal issues: (1) the finality of the settlement vis-à-vis the remaining tortfeasors, and (2) the amount the plaintiff can recover from those other tortfeasors. Varying answers, reflecting continuing shifts in assessing this situation, have been forthcoming.¹²¹

The original version of the Uniform Contribution Among Tortfeasors Act (1939) espoused the principle of equality among tortfeasors by providing that the settling tortfeasor (S) remained liable for contribution in the amount by which his share exceeded the dollar value of the settlement. The settlement could be made final only by stipulating for a reduction of the remaining tortfeasors' liability by the amount of S's pro rata share.¹²² Only three states adopted this version of the Act, a common explanation being that it discouraged settlements by providing little incentive to either S or P to settle.

44. Under Dean Prosser's direction, the second version of the Uniform Act (1955) therefore abandoned this approach and provided for (1) finality of a good faith settlement vis-à-vis any other tortfeasor (D) as well as P, and (2) reduction of D's liability only by the amount stipu-

119. UNIFORM COMPARATIVE FAULT ACT § 2, Comment. It is also—rightly—pointed out that "both plaintiff and defendants will have significant incentive for joining available defendants who may be liable." *Id.*

120. A difference would arise only if under the first-mentioned proposal the absentee's share were distributed only among the defendants, excluding any plaintiff at fault.

121. See generally Note, *Settlement in Joint Tort Cases*, 18 STAN. L. REV. 486 (1966). Compare Weir in 9 INTERNAT'L ENCYCLOPEDIA COMPARATIVE LAW §§ 100-101, 125-126.

122. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2 (1939). Adopted by Arkansas, Hawaii and South Dakota. See also *Martello v. Hawley*, 300 F.2d 721 (D.C. Cir. 1962), in which as an alternative to "pro rata" reduction, reduction by the plaintiff's share of fault was alternatively countenanced.

lated in such settlement or actually paid, whichever was the larger. This version was adopted by a greater number of states, including California,¹²³ but it is far from clear whether it was this feature rather than an increasing disenchantment with the common law rule of no-contribution which was the primary motive. The plaintiffs' bar has been the principal advocate of this solution, because an under-value settlement in good faith does not prejudice the plaintiff. On the other hand, it is clearly incompatible with the *Li* principle of each party bearing his own proportionate share of the loss and thereby unfairly disadvantages the nonsettling tortfeasors by a transaction to which they are not a party and in which they have no voice. Besides, while there is an undoubted public benefit in settlement, that benefit accrues only where *all* claims relating to the loss are included. Such, however, is not accomplished by the 1955 version because P is free to litigate with the remaining tortfeasors. The saving of "transaction costs" (principally legal and court expenses) in settling merely with one joint tortfeasor is too marginal and speculative to justify the rule in face of the *Li* principle.

45. Accordingly, there has been a swing of the pendulum to the more moderate view that, while the settlor (S) should be free from claims for contribution, the plaintiff's recovery from the other tortfeasors should be reduced by S's full share of fault. This formula, long advocated by scholars,¹²⁴ has by now acquired a large following in legislation¹²⁵ as well as independent judicial decisions;¹²⁶ it has also been adopted by the Uniform Comparative Fault Act (1977) but not by drafts bills endorsed by the plaintiffs' bar.¹²⁷ It is clearly more compatible with the *Li* rationale than the "pro tanto" reduction rule in that it limits the nonsettling tortfeasors' liability to their own proportionate shares, unaffected by the settlement to which they were not privy and in which they had no voice.¹²⁸ Surprisingly, however, the California Supreme

123. CAL. CIV. PROC. CODE § 877 (West Supp. 1978).

124. C. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS 78 (1936); G. WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE 416 (1951); *Foreword*, *supra* note 3, at 257-58; Goldenberg & Nicholas, *supra* note 95, at 53; Comment, *Comparative Negligence, Multiple Parties, and Settlements*, 65 CALIF. L. REV. 1264 (1977).

125. Arkansas, Hawaii, New York, Rhode Island, South Dakota, Texas, Utah, Wyoming.

126. *E.g.*, *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir.1967); *Theobald v. Angelos*, 44 N.J. 228, 208 A.2d 129 (1965); *Pierringer v. Hoyer*, 21 Wis. 2d 182, 124 N.W.2d 106, 110-12 (1963).

127. The State Bar draft § 10(a) and S.B. 1959 (proposed Code of Civil Procedure § 884(a)) are identical with the current version of CAL. CIV. PROC. CODE § 877(West Supp. 1978). The comment in the State Bar draft does not even alert the reader to alternatives!

128. For the same reason it is also preferable to "pro rata" reduction, which had been the first choice of the Uniform Contribution Among Tortfeasors Act (1939). See *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1967) (applying Virgin Is. law without statutory guidance,

Court in *American Motorcycle*¹²⁹ broke with the *Li* rationale a second time¹³⁰ by adopting the Contribution Act formula of "pro tanto" reduction also for "partial indemnity." It did so *obiter*, without the benefit of briefing or argument¹³¹ and without any extended discussion beyond invoking the pro-settlement argument which, as already pointed out, does not really support its weight.

46. The alternative solution of reducing the plaintiff's recovery by the full amount of the settlor's full share does, however, raise the question why the plaintiff should in this instance bear the whole burden of any deficiency (regardless indeed of whether he was himself contributorily negligent), when in situations not involving a settlement the burden would either be shared with the remaining defendants¹³² or placed entirely on the latter (depending on whether the plaintiff was contributorily negligent or not).

There are several reasons for drawing this distinction. The plaintiff remains of course the sole arbiter whether to settle and, if so, for how much. If he does not wish to assume the risk that the settlement is subsequently determined to be under-value, he need not settle at all. On the other hand, he is given a strong incentive to drive the hardest bargain with the settlor and not to prejudice the remaining tortfeasors by a settlement that is either collusive, deliberately discriminatory or unintentionally inadequate. This self-regulatory incentive is clearly more effective than the requirement of "good faith" under the current California statute and the Uniform Contribution Act from which it is derived.

47. Actually, there has been little occasion for clarifying the meaning of "good faith" in this context.¹³³ Clearly the burden of proving lack of good faith is in practice a heavy one as long as courts are persuaded that settlements should be encouraged in pursuit of the statutory policy

which specifically preferred "fault" to "pro rata" reduction and argued that its effect on settlements was the same.

129. 20 Cal. 3d 578, 603-04, 578 P.2d 899, 915-16, 146 Cal. Rptr. 182, 198-99 (1978).

130. As pointed out by Clark, J., dissenting who preferred the view recommended in the present Study. *Id.* at 613-15, 578 P.2d at 922-23, 146 Cal. Rptr. at 205-06.

131. *Id.* at 609 n.1, 578 P.2d at 919, 146 Cal. Rptr. at 202 (Clark, J., dissenting). *Lemos v. Eichel*, 83 Cal. App. 3d 110, 147 Cal. Rptr. 603 (1978), held that reduction for plaintiff's fault is made prior to reduction of settlement amount. This is clearly correct though less advantageous to plaintiffs.

132. According to the recommendation in Section V of this Study *supra*.

133. The *Uniform Laws Annotated* contains no case citations whatever to this phrase. In California, it has been explored only in *River Garden Farms, Inc. v. Superior Court*, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972) and *Stambaugh v. Superior Court*, 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976).

underlying the "pro tanto" rule.¹³⁴ If the consideration for the settlement approximates the plaintiff's best estimate of the settlor's share of liability, the requirement is obviously satisfied. But it seems also to be common ground that a settlement up to the settlor's insurance cover will pass muster, even though it falls far short of the settlor's share.¹³⁵ Why should a plaintiff bear the whole deficiency in such a case, when he would only have to bear a proportionate share if he declined to settle? Evidently, a plaintiff who did so must have reason for thinking that it would still be advantageous for him to do so: perhaps because it guarantees him a partial recovery and cushions him against the risk of loss from an unfavorable judgment in subsequent litigation; perhaps because he thinks it worth his while to eliminate prejudicial testimony or even to induce the settlor to give testimony slanted in the plaintiff's favor against the remaining defendants.¹³⁶ Most important, however, is that the plaintiff is under no pressure whatever to enter such an under-value settlement, if he does not wish to assume the financial risk of the deficiency.

48. Finally, the plaintiff should be rewarded by being allowed to keep the whole of any *over*-value settlement even if he would in the end thereby receive more than a simple satisfaction of his loss.¹³⁷ Any other rule would create a no-win situation which would tend to diminish his incentive to settle. Nor does the windfall aspect present a serious argument to the contrary. The purpose of the one-satisfaction rule is to prevent the plaintiff from unjustly enriching himself at the expense

134. Clark, J., dissenting in *American Motorcycle*, argued that the good faith requirement in practice tends to discourage settlements and thus defeats the rationale of the "pro tanto" rule. 20 Cal. 3d at 610 n.2, 578 P.2d at 931, 146 Cal. Rptr. at 203. Sanctions for lack of good faith are explored by Friedman, J., in *River Garden Farms, Inc. v. Superior Court*, and depend on whether the plaintiff and the settlor, or either of them alone was implicated. 26 Cal. App. 3d 986, 999-1003, 103 Cal. Rptr. 498, 507-10 (1972). It should be noted that, due to California's "joint judgment" rule, a settlor still cannot be sued for contribution even if the settlement is set aside.

135. See *Stambaugh v. Superior Court*, 62 Cal. App. 3d 231, 238-39, 132 Cal. Rptr. 843, 848 (1976): "But we opine that it would be a rare case indeed, where, as here, a joint tortfeasor who was the immediate causative agent of the claimant's injuries, *who settles for the full amount of his insurance coverage*, may reasonably be charged with lack of good faith under section 877." (emphasis added)

136. So-called "Mary Carter" or "sliding scale recovery agreements" have indeed prompted judicial or even legislative protection for the remaining defendants. See CAL. CIV. PROC. CODE § 877.5 (West Supp. 1978). See Professor G. Schwartz's Report to your Committee (at 110-13) on the California Citizens' Committee recommendation 4B-2 to "prohibit Mary Carter" agreements. If anything, the recommended rule will tend to discourage such collusive arrangements far more than the present rule.

137. *Theobald v. Angelos*, 44 N.J. 228, 239, 208 A.2d 129, 135 (1965); see Comment, *Comparative Negligence, Multiple Parties, and Settlements*, 65 CALIF. L. REV. 1264, 1277-79 (1977).

of the defendants, but here that principle is not violated: The non-settling defendants will still not be required to pay any more than their apportioned shares and the settlor has bought his peace.

49. *RECOMMENDATION 7: A release entered into by the plaintiff and a tortfeasor shall discharge the latter from all liability for contribution, but the plaintiff's claim against the remaining tortfeasors shall be reduced by the amount of the released tortfeasor's share of the loss.*

This exhausts those aspects of comparative fault specifically raised by *American Motorcycle*. There remain, however, a few other multiple party problems in the wake of the *Li* decision which it would be proper to deal with in the course of comprehensive legislation in this area.

VIII. Immunities and Workers' Compensation

50. A right of contribution exists only among parties who are jointly liable for the same injury. This condition is not satisfied if the party from whom contribution is sought is not liable to the tort victim on account of an immunity. Common examples are when that party is the spouse, parent or child of the victim.¹³⁸ In a few jurisdictions the view has been taken that such immunities may not defeat contribution if their rationale is linked exclusively to direct claims by the victim, *e.g.*, fear of collusion between spouses at the cost of the defendant's liability insurer,¹³⁹ a concern which would not extend with the same force, or at all, to contribution claims; most jurisdictions however apply the immunity to both claims. Hitherto the problem has not been faced in California because, prior to *American Motorcycle*, contribution was permitted only among parties held liable in a joint judgment. Besides, the problem is now of lesser dimension than it would have been 20 years earlier because most of the more common immunities figuring in tort litigation have in the meantime been abolished in California, *e.g.*, the family immunities, charitable immunity, the guest statute and some aspects of sovereign immunity.¹⁴⁰

138. See W. PROSSER, LAW OF TORTS 309 (4th ed. 1971).

139. *Id.* at n.75.

140. Remember that in *American Motorcycle*, the claim for contribution was made against the victim's parents. Such a claim would have foundered prior to *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971), on the ground of family immunity. A number of courts have decided to retain parental immunity from claims for negligent supervision, principally in order to block claims for contribution by other insured defendants. See, *e.g.*, *Holodook v. Spencer*, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974).

51. Several solutions are possible.¹⁴¹ One is to hold immunities on principle inapplicable to claims for contribution. Such was apparently the decision of the New York Court of Appeals when in *Dole v. Dow Chemical Co.* it allowed a claim for "partial equitable indemnity" against the plaintiff-employer notwithstanding the latter's tort immunity under the workmen's compensation act.¹⁴² Most courts, however, refuse to permit contribution (as distinct from indemnity) from the plaintiff's employer or workmen's compensation insurer on the ground that contribution would erode the employer's statutory protection for which he bargained as a trade-off in return for no-fault benefits to his employees.¹⁴³ As against this, however, the third-party defendant has to bear a larger share of the tort liability through the fortuity that the other culpable actor happened to be entitled to a personal immunity vis-à-vis the tort victim.

52. There are several ways in which the third-party's predicament, can be eased without infringing the other's immunity. But all of these are at the expense of the tort victim. First, the immune party could be treated like a released tortfeasor in accordance with the recommendation of section VI of this Study, *i.e.*, by reducing the plaintiff's recovery from the third-party by the former's share of fault. This solution is not only unduly prejudicial to the tort victim but also based on an improper analogy: the underlying rationale regarding a settling tortfeasor's share is to protect the other defendants against collusive releases, whereas the immunities here considered exist entirely independently of the plaintiff's voluntary choice. There is no more reason to deny a faultless plaintiff full compensation from a tortfeasor when the other culprit has an immunity than when the other is insolvent.

A less prejudicial alternative would be to adopt the same formula as recommended in § 42 of this Study for dealing with the share of an insolvent tortfeasor, *i.e.*, to distribute that share ratably among the remaining liable parties, including a contributorily negligent plaintiff. This could be accomplished by simply disregarding, from the outset, the share of the immune party in fixing the liability of the other defendants (and a contributorily negligent plaintiff), though to do so would deviate from the usual procedure of requiring the jury to assess the shares of all culpable actors, whether they are party defendants or not.

141. Compare Weir in 9 INTERNATIONAL ENCYCLOPEDIA COMPARATIVE LAW §§ 87-104.

142. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

143. See 2A A. LARSON, LAW OF WORKMEN'S COMPENSATION § 76.00 (1966) [hereinafter cited as LARSON]; W. PROSSER, LAW OF TORTS 309 (4th ed. 1971).

Workers' Compensation

53. The problem is most acute in the context of worker's compensation. This is so not only because the employer's immunity is far and away the most common in modern accident litigation; it is aggravated by the fact that the accident victim becomes entitled to compensation benefits from his employer as well as to tort damages from the third party. How are these two, basically incompatible systems (workmen's compensation and tort) to be harmonized?¹⁴⁴ This question calls for consideration when the employer or the employee or both negligently contributed with the third-party in causing the employee's injury.

54. Prior to *Li*, the position in California was as follows:¹⁴⁵ An employee's contributory negligence, while not affecting his right to compensation from his employer, barred any tort recovery from a culpable third party. On the other hand, an employee free from fault could recover tort damages from a third-party tortfeasor, reduced only by the workmen's compensation benefits previously received.

If the employer was at fault, whether on account of managerial negligence or vicarious liability for the negligence of his agents or servants, he was not—as already mentioned—liable for contribution, but in *Witt v. Jackson*¹⁴⁶ he also lost his right to recoup from the third party the compensation benefits paid to the injured employee. Thus, the negligent employer and the third-party shared the loss although by no means in proportion to their shares of fault or even equally; on the other hand, the employee did not “double-recover” because, whether his employer was negligent or not, he (the employee) had to give credit against the tort damages for compensation benefits received. In sum, the employer's negligence enured solely to the third-party's advantage by reducing his total liability by the amount of the compensation benefits paid.

The situation worked out differently where compensation benefits were claimed after the third-party's liability was finalized. In that event, California Labor Code § 3861 allows the employer or his insurance carrier a *credit* against the damages recovered from the third party. However, in *Roe v. Workmen's Compensation Appeals Board*¹⁴⁷

144. A comparative conspectus of the treatment of these problems in different countries is found in Fleming, *Tort Liability for Work Injury*, in 15 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW §§ 56-71 (1975).

145. See 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) [hereinafter cited as *Third Party*]; Note, *Worker's Compensation/Third-Party Lawsuits*, 11 U.S.F. L. REV. 541 (1977) [hereinafter cited as *Worker's Compensation*].

146. 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961).

147. 12 Cal. 3d 884, 528 P.2d 771, 117 Cal. Rptr. 683 (1974).

the supreme court (shortly before *Li*) held that, if the employer's negligence concurred with the third-party's, it was preferable to deny the employer his statutory credit rather than deny the employee double-recovery. In this instance, therefore, the employer's negligence enured to the benefit of the employee, since (at least in the absence of statutory authority) the benefit of the later compensation could not be passed on to the third-party like the benefit of compensation received prior to judgment or settlement with him.

55. I propose first to consider the effect of *Li* on the liability of a negligent employer and third-party in cases where the employee was not also contributorily negligent.¹⁴⁸

The *Li* rationale might well suggest that the third-party's liability should no longer exceed his own share of negligence. That could be accomplished either by allowing the third-party contribution from the employer or limiting the employee's tort claim to the third-party's share only. Either solution has been firmly rejected by different courts of appeal.¹⁴⁹

56. Contribution from the employer has been opposed both on doctrinal and policy grounds. As for the first, contribution assumes joint liability, not just joint negligence; and the employer happens to be immune from tort liability.¹⁵⁰ Besides, to subject the employer to contribution would entail the ridiculous result that if the employer is the only negligent party, he need only pay his workers' compensation; but if a negligent third-party contributed to the injury, the employer must pay his share of the jury verdict.¹⁵¹ As for the second, contribution would undermine the employer's immunity in violation of a basic tenet of workers' compensation. The "trade-off" for the employer's no-fault liability for compensation benefits to his employees was, and is, his immunity from any tort claim with respect to the injury. To expose him to contribution from the third-party would taint worker's compensation with tort law. It would increase the risk and cost to the employer and require him to carry additional insurance. Some jurisdictions, it is true, have condoned violation of the employer's immunity by allowing in-

148. Various alternatives were systemically and first, discussed by Peyrat, *Comparative Negligence in Third Party Cases*, in [1975] 3 CAL. WORKERS' COMP. REP. 99; see *Third Party*, *supra* note 145; *Workers' Compensation*, *supra* note 145.

149. *Arbaugh v. Procter & Gamble Mfg. Co.*, 80 Cal. App. 3d 500, 145 Cal. Rptr. 608 (1978) (joint and several liability); *Christensen v. Kaiser Alum. & Chem. Corp.*, 69 Cal. App. 3d 922, 138 Cal. Rptr. 426 (1977) (hearing denied by Sup. Ct. with order against publication of opinion); *E.B. Wills Co. v. Superior Court*, 56 Cal. App. 3d 650, 128 Cal. Rptr. 541 (1976) (no contribution).

150. CAL. LAB. CODE § 3601 (West Supp. 1978).

151. *Brown v. Dickey*, 397 Pa. 454, 459-60, 155 A.2d 836, 839 (1959).

demnity claims based on a contractual relationship between the employer and the third-party,¹⁵² but California emphatically repudiated this trend in 1959 by specifically legislating against indemnity claims except when based on an express written contract.¹⁵³ This prohibition would cover also claims for "partial indemnity" within the meaning of *American Motorcycle*.¹⁵⁴ In sum, the reason for hitherto denying contribution (and indemnity) against the employer was not the all-or-nothing rule discarded by *Li* but an independent policy of limiting the employer's liability for work injuries.¹⁵⁵ Contribution, under whatever label, is not therefore acceptable.¹⁵⁶

57. Another alternative for limiting the third-party's liability to his own share of fault would be to abandon the "joint and several" liability rule and reduce the employee's tort recovery from the third party by his employer's share of negligence. While contribution would promote the *Li* rationale at the cost of the employer, this formula would do so at the cost of the employee. The only argument for it is that this is not an unfair price to exact in return for the employee's assured compensation benefits; in other words that the price consists in giving up all tort claims whatever with respect to his employer's negligence and absorbing that share himself for all purposes.¹⁵⁷ It will be recalled that this formula is actually recommended in § 49 of this Study for dealing with a settling tortfeasor's share, but, as already pointed out,¹⁵⁸ the two situations are hardly analogous: the plaintiff has a free choice whether to

152. See LARSON, *supra* note 143, at §§ 76.30-.53; Larson, *Workmen's Compensation: Third Party's Action Over Against Employer*, 65 NW. U.L. REV. 351 (1970). In California, see *Baugh v. Rogers*, 24 Cal. 2d 200, 148 P.2d 633 (1944) (bailor-bailee). The United States Supreme Court lent kudos to this theory in allowing indemnity to an unseaworthy ship against the longshoreman's employer notwithstanding the immunity provision of the Longshoremen's and Harbor Workers' Compensation Act § 5. *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1955). The doctrine was nullified by amendment of the Act in 1972. A product manufacturer's claim to an "implied right of indemnity" from a purchasing employer was recently negated in *Olch v. Pacific Press & Shear Co.*, 19 Wash. App. 89, 573 P.2d 1355 (1978).

153. CAL. LAB. CODE § 3864 (West 1971). This section was enacted to nullify the rationale of *San Francisco United School Dist. v. California Bldg. Maintenance Co.*, 162 Cal. App. 2d 434, 328 P.2d 785 (1958).

154. *Arbaugh v. Procter & Gamble Mfg. Co.*, 80 Cal. App. 3d 500, 507, 145 Cal. Rptr. 608, 613 (1978).

155. *E.B. Wills Co. v. Superior Court*, 56 Cal. App. 3d 650, 128 Cal. Rptr. 541 (1976).

156. But see *Skinner v. Reed-Prentice Div. Package Mach. Co.*, 70 Ill.2d 1, 374 N.E.2d 437 (1977); *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

157. See *Third Party*, *supra* note 145, at 1042. This view has been adopted in the Ontario Workmen's Compensation Act, ONT. REV. STAT. ch. 505 § 8(11) (1970), and the British Columbia Workmen's Compensation Act, B.C. REV. STAT. ch. 413, § 11(6) (1960).

158. See text accompanying notes 150-56 *supra*.

settle with any one of the tortfeasors and for how much; it is therefore not unfair to hold him to that bargain. In contrast, the particular employee has no choice whatever in dealing with his negligent employer; the latter's immunity is imposed by law and bargained for only in a purely theoretical-historical sense.¹⁵⁹ A closer analogy is that of a co-tortfeasor's insolvency, the risk of which is and should remain (as recommended in section III of this Study) with the solvent tortfeasor(s), at any rate where the plaintiff is free from fault himself. Why should a tortfeasor be better off because someone else contributed to the injury than if he had been solely responsible? Finally, it may be urged that the object of the *Li* reform was to improve the position of plaintiffs, not to worsen it.¹⁶⁰ Accordingly, no change in the existing rule of un-reduced tort liability by the third-party¹⁶¹ is here recommended.

58. If the *Li* rationale of each negligent actor bearing no more than his own share of responsibility cannot be implemented exactly in this context without violence to other competing policies, does it not at least call for some other modification(s) of the prior system of rules? Two possible modifications must here be considered. The first concerns the *Witt* rule which used to disqualify a negligent employer from claiming any indemnity from the third-party for compensation benefits paid. The BAJI Committee promptly amended the relevant jury instructions to reflect its view that a negligent employer could henceforth claim reimbursement from the third-party for compensation benefits paid, reduced only by his own apportioned share of negligence.¹⁶² This modification of the *Witt* rule has been criticized on the ground that it operates to reduce excessively a negligent employer's already limited statutory liability at the expense of a concurrently negligent third party whose liability is not so limited.¹⁶³ Suppose an employee is killed in an industrial accident caused in equal degrees by the negligence of his employer and a third-party. A wrongful death action results in an award of \$250,000 in favor of the survivors. Under *Witt*, the employer would have borne the whole of the compensation award, maximally \$55,000;

159. *Contra*, *Murray v. United States*, 405 F.2d 1361, 1365-66 (D.C. Cir. 1968) (applied the settlement analogy to the instant situation).

160. *Arbaugh v. Procter & Gamble Mfg. Co.*, 80 Cal. App. 3d 500, 507, 145 Cal. Rptr. 609, 614 (1978).

161. *Christensen v. Kaiser Alum. & Chem. Corp.*, 69 Cal. App. 3d 922, 138 Cal. Rptr. 426 (1977) (hearing denied by supreme court with order against publication of opinion). The reason for the supreme court's order against publishing the opinion of the court of appeal was most probably that this issue was being dealt with in *American Motorcycle*. A year later, in *Arbaugh v. Procter & Gamble Mfg. Co.*, the court considered itself bound by *American Motorcycle*.

162. BAJI 15.14 (6th ed. 1977). See especially *id.*, Use Note at 672-77.

163. *Worker's Compensation*, *supra* note 145, at 577.

the remaining \$195,000 would have been borne by the third-party. Under the BAJI formula, the employer could have recovered \$27,500 from the third-party, with the result that the third-party's share is now increased to \$222,500. But not only would this formula result in excessively increasing the disparity between the shares of the parties; it is also wrong in principle: for the *Li* rationale calls for the application of the fault ratio to the total amount of the damages rather than the amount of the employer's lien upon that amount—in other words, to the shares in which torts damages, not worker's compensation, should be borne.

59. Accordingly, the correct method of applying *Li* is to require the third-party to reimburse the employer only to the extent that the compensation benefits have exceeded the proportionate share of the damages attributable to the employer's negligence. Thus in the preceding hypothetical, the employer would have been entitled to no reimbursement at all, since the benefits paid (\$55,000) fell far short of his 50% share of the damages (\$125,000). This formula has now been repeatedly endorsed by courts of appeal in preference to the BAJI proposal.¹⁶⁴ It is preferable to the *Witt* rule because, in cases where the employer's negligence is slight but his compensation payments are relatively high, he may now force the third-party to bear a share of the tort damages proportionate to his own, larger share of fault. Suppose that the tort damages amount to \$20,000 and the benefits to \$8,000, the fault ratio being 10:90: Under *Witt*, the employer would have borne \$8,000 and the third-party \$12,000; under the new formula, the employer will be entitled to reimbursement of \$6,000. Not that this formula necessarily assures sharing in exact proportion to fault, as it does in the preceding example. For if the fault ratio were reversed, the employer would recover nothing but the third-party—failing contribution—would still be left with \$12,000 or 60% of the loss.

The recommended formula presents no practical problem in application, if the third-party claim was actually litigated: the verdict will fix both the plaintiff's total damages and the shares of fault. But a settlement would fix neither.¹⁶⁵ The employer might therefore be forced to take the matter to court. But even the *Witt* rule was contingent on a

164. *Arbaugh v. Procter & Gamble Mfg. Co.*, 80 Cal. App. 3d 500, 145 Cal. Rptr. 608 (1978); *Christensen v. Kaiser Alum. & Chem. Corp.*, 69 Cal. App. 3d 922, 138 Cal. Rptr. 426 (1977) (hearing denied by supreme court with order against publication of opinion). It is also the rule in France and Germany. See Fleming, *Tort Liability for Work Injury*, in 15 INTERNATIONAL ENCYCLOPEDIA § 29 (1975).

165. It cannot even be assumed that the settlement represents a good faith estimate of the plaintiff's total loss instead of the third-party's share of fault, with or without a deduction of the compensation benefits.

finding of negligence by the employer, and the *Li* rule applied to the lien (rather than the tort damages) would also require a finding of the parties' shares of fault. An additional finding of the total damages does not therefore substantially add to the administrative burden of the recommended formula.

60. The second modification suggested by *Li* concerns the employer's credit where the injured employee delays his claim for permanent disability under workers' compensation until after the civil liability of the third-party has been disposed of. It will be recalled¹⁶⁶ that under the prior law as decided in *Roe* shortly prior to *Li*, a negligent employer was disqualified from all credit for such later benefits against the prior civil recovery, on the ground that it was preferable to condone double recovery by the employee rather than permit the employer to profit from his wrong. Application of the preceding reimbursement formula to the *Roe* credit would tend to minimize the employee's double recovery. It is true that it would neither completely eradicate double recovery (to the extent that credit was still denied up to the employer's share of fault) nor that the benefit of the modification would enure to the third-party rather than the employer. But it is at least a step in implementing the *Li* mandate.

The plaintiffs' bar is opposed to any modification of *Roe*, its main argument being that it merely transfers a portion of the windfall from the pocket of the employee to that of the employer, and that the innocent employee is more deserving than the negligent employer.¹⁶⁷ For it will have been noticed that, while the formula applied to reimbursement will not affect the employee's recovery, the formula applied to credit will. But the likely impact is much smaller than imagined by its opponents who assume reduction of the credit in accordance with the employer's fault, while, as previously pointed out, the correct formula would allow reduction only to the extent that the compensation benefits exceed the employer's share of the tort damages. In any event, the critics (are forced to) concede that the best solution would be to transfer the "windfall" to the third-party, although its effect on employees would of course be the same.

61. To accomplish that result, a simple reform would be to introduce a legislative provision, analogous to the employer's reimbursement provision, allowing the third-party to assert a claim against any future compensation award.¹⁶⁸ Besides eliminating double recovery, it would

166. See text accompanying notes 162-63 *supra*.

167. *E.g.*, Steinberg, *The Argument on Associated Constr. & Engin. Co. v. WCAB*, *ADVOCATE*, No. 7, at 1 (1977).

168. *Cf.* *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 584, 578 P.2d

also dispose of the vexing jurisdictional problem raised by the employer's negligence. For, already in *Roe*, the court suggested a legislative amendment to relieve the Workers' Compensation Appeals Board from having to decide whether the employer was negligent and thus forfeited his claim to credit.¹⁶⁹ The problem would be aggravated if the Board also had to apportion shares of negligence.¹⁷⁰ By permitting the third-party to raise these issues and have them disposed during the civil trial, issues of fault need no longer be injected into the adjudication of workers' compensation.

62. Another formula which would achieve the same result is to authorize contribution against a negligent employer but not exceeding the latter's workmen's compensation liability. This would in effect subrogate the third-party to the employee's compensation benefits paid *and payable* by the employer, just as under workmen's compensation acts in many states the employer's right of reimbursement is defined as a right of subrogation to the employee's rights against the third-party.¹⁷¹ A right of contribution so limited would respect the traditional policy of limiting the employer's liability to the workmen's compensation benefits, but make sure that the employer does not escape with paying less merely because the employee has not yet exercised his full rights against him by the time the civil claim is settled.

Such a limited right of contribution has long been practiced in Pennsylvania,¹⁷² was recently adopted in Minnesota,¹⁷³ and has had some following among federal courts in application to federal workmen's compensation statutes.¹⁷⁴ As Larson points out, "it postulates an optimum result" and probably represents "the fairest available com-

899, 902, 146 Cal. Rptr. 182, 185 (1978). The idea was originally aired in Comment, in [1976] 4 CAL. WORKERS' COMP. REP. 63. A somewhat analogous proposal to prorate workmen's compensation and tort damages (instead of basing the division on fault) was made in Note, *Workmen's Compensation and Third Party Suits*, 21 HASTINGS L.J. 661 (1969).

169. *Roe v. WCAB*, 12 Cal. 3d 884, 892, 528 P.2d 771, 777, 117 Cal. Rptr. 683, 689 (1974).

170. If the third-party claim was settled, the Board would also have to make a finding of the plaintiff's total damages, since it cannot be assumed that the settlement represented a good faith estimate of the *total* loss. This has been employed as an additional argument for retaining *Roe*, but loses much of its force if the recommended amendment were adopted.

171. Even in California, it has been described as " 'merely a legislative recognition of the equitable doctrine of subrogation.' " *De Cruz v. Reid*, 69 Cal. 2d 217, 222, 444 P.2d 342, 345, 70 Cal. Rptr. 550, 553 (1968) (quoting *Western States Gas & Electric Co. v. Bayside Lumber Co.*, 182 Cal. 140, 148, 187 P. 735, 738 (1920)).

172. *Maio v. Fahs*, 339 Pa. 180, 14 A.2d 105 (1940).

173. *Lambertson v. Cincinnati Corp.*, 257 N.W.2d 679, 688-89 (1977).

174. This goes back to the Third Circuit's opinion in *Baccille v. Halcyon Lines*, 187 F.2d 403 (3rd Cir. 1951), *rev'd on another ground sub nom.* *Halcyon Lines v. Haen Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952). The cases are discussed at length in LARSON, *supra* note 143, § 76.22.

promise in the light of all the conflicting policy interests.”¹⁷⁵

63. A much more radical reform in the way of coordinating workers' compensation with tort liability is the proposal of the American Insurance Association¹⁷⁶ which takes a middle ground between the extremes of, on the one hand, abolishing all third-party claims¹⁷⁷ and, on the other, making the employer liable in contribution for the full amount of any tort judgment. The AIA proposes that all tort defendants (or at least all third-party product liability defendants)¹⁷⁸ be entitled to credit for the amount of workmen's compensation liability paid or payable to the injured employee, regardless of the negligence or other fault of the employer. The employer's right of reimbursement would be abolished, as would all claims for contribution or indemnity other than those provided for by contract.

This proposal has two great attractions: it dispenses with all consideration of fault on the part of the employer and eliminates all cross-claims, thereby simplifying the compensation procedure and reducing “transaction costs.” California has hitherto stood pretty nearly alone in its apparent lack of concern over the complications resulting from injection of negligence into the workmen's compensation system, as evidenced by the *Witt* and *Roe* decisions.¹⁷⁹ By contrast, most other states have refused to deny a workmen's compensation lien to a negligent employer, not from motives of complacency with negligence, but so as to not burden the disposition of industrial accident injuries with investigations into fault. In other words, the clear majority view is that the cost of such investigations outbalances any deterrent or other salutary effect that a denial of the lien might conceivably have. The AIA proposal carries forward this important policy, though by denying a lien even to completely faultless employers. Anyway, complete faultlessness (managerial or vicarious) on the part of employers is rather rare, so that it is not inequitable to require all employers to bear a portion of the accident cost. The AIA proposal, by also denying the third-party any contribution, thus eliminates all consideration of fault on the part of

175. LARSON, *supra* note 143, at 14-311.

176. See Epstein, *Coordination of Worker's Compensation Benefits with Tort Damage Awards*, 13 FORUM 464 (1978) (address to American Bar Association Section of Insurance, Negligence, and Compensation Law, Aug., 1977).

177. Such a proposal is outlined in Weisgall, *Product Liability in the Workplace*, 1977 WIS. L. REV. 1035.

178. Both the AIA proposal and Weisgall's focus on the product liability third-party. So does U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT ch. VII, at 1-257 (1978). The major reason for isolating this problem is the relatively high incidence of these cases: 11% of all product liability accidents account for 42% of the total insurance premiums. *Id.* at 85.

179. See LARSON, *supra* note 143, § 75.22.

the employer or the third-party¹⁸⁰ and dispenses with all cross-claims. It therefore differs fundamentally from the proposals previously here considered which, instead of ejecting fault notions from workers' compensation, sought to harmonize two systems. Since the employer and the third-party are both likely to be insured and good loss distributors, the refinements of fault exact costs which many observers regard as unwarranted by any competing benefits. Your Committee should seriously ponder whether this is not a propitious time to undertake such a more fundamental reform rather than a mere implementation of the *Li* rationale.

64. We must now consider the added complications of the employee's contributory negligence. First as to his rights against the third-party. Whereas prior to *Li* any such claim would have been totally barred, it is now merely reduced by his own share of negligence. If he has received workmen's compensation, that amount must also be set-off against his damages. It seems to be generally assumed that the benefits must first be set-off before the remainder is reduced by the appropriate ratio of fault, rather than vice versa. Suppose the verdict is \$50,000, the compensation benefits \$10,000 and the employee was 10% negligent. If compensation is set-off first, he will be entitled to \$36,000 (50,000-10,000-4,000); if set-off last, he could only recover \$35,000 (50,000-5,000-10,000).¹⁸¹ The former order of deduction ought to be confirmed by statute.

65. What would be the effect of the injured employee's contributory negligence on the employer's claim for reimbursement of compensation benefits? It will be recalled that, according to current case law commended in this Study,¹⁸² a negligent employer is entitled to reimbursement to the extent that his compensation payments exceeded his notional share of the total damages. His negligence may of course be either managerial ("personal") or vicarious. No cases, however, have so far explored the question whether the injured employee's contributory negligence should be imputed to the employer just like that of any other employee so as to effect his right of reimbursement or credit.

The BAJI Committee assumed such imputation.¹⁸³ Thus in the preceding example (§ 62) [where compensation amounted to \$10,000, the verdict to \$50,000 and the employee was 10% negligent], the employer would on that basis be entitled to \$5,000, i.e., the difference be-

180. But the victim's contributory negligence could still be considered in relation to his tort claim against the third party.

181. See BAJI, Use Note at 673, 676 (6th ed. 1977).

182. See text accompanying note 132 *supra*.

183. See BAJI, Use Note at 674 (B1 and example 4) (6th ed. 1977).

tween the benefits paid and the 10% share of the total damages.¹⁸⁴

66. Alternatively, it may be argued that the third-party is already credited with the 10% share of the injured employee so as to reduce his total liability from \$50,000 to \$46,000 (*supra* § 69). Why should he get a double credit by imputing that share also to the employer so as to reduce the latter's right of reimbursement?¹⁸⁵ Without imputation, the employer would—in the previous hypothetical—be entitled to recover all of his payments (\$10,000). This would make no difference to the injured employee, but it would change the respective shares of employer and third party from \$5,000:41,000 to 0:46,000.

There are two possible arguments against this solution. The first is that traditionally an employee's negligence has been imputed to the employer so as to impair the latter's right of recovery from third parties. There is no reason why the *Li* principle should change that policy except that the employer's claim is no longer barred but merely reduced. But this assumes that the employer has suffered an injury of his own, whereas in our context it is the employee who has suffered the injury and his negligence is already debited against the third-party's liability. In other words, this is an entirely novel situation to which the doctrine of imputed negligence could never have been applied before, and it would be merely mechanical to extend that doctrine to the present situation.¹⁸⁶

The second argument is that, by reducing the third-party's share, the formula tends to mitigate a little the gross inequity which the employer's immunity tends to inflict on third-parties. This argument would, however, be stronger if, as BAJI had assumed, the percentage reduction were applied only to the employer's lien rather than to the total damages.

On balance, the arguments for imputing the injured worker's negligence to his employer for the purpose of reimbursement are perhaps the stronger. Thus, however diffidently, adoption of this alternative is recommended.

67. **RECOMMENDATION 8:** (1) *In the case of a work injury caused by the concurrent negli-*

184. BAJI example 4 would allow reimbursement of \$9,000, based on the assumption, since refuted, that the percentage reduction is made on the lien rather than the total damages.

185. See Peyrat, *Comparative Negligence in Third Party Cases*, [1975] 3 CAL. WORKERS' COMP. REP. 99, 100 ("Situation ID").

186. Remember Emerson's dictum, "A foolish consistency is the hobgoblin of little minds . . ." R.W. EMERSON, *Self-Reliance*, in *ESSAYS* 58 (n.p. 1863).

gence of the worker's employer and a third party

- (a) *the employer should be allowed to recover from the third party any part of his compensation liability that exceeds his notional share of the tort damages, and*
 - (b) *the third party should be allowed to claim contribution to the extent of the employer's share of fault or the employer's workmen's compensation liability whichever is the smaller (§ 65).*
- (2) *If the employee's negligence concurred with that of the third party, his negligence should be imputed to the employer so as to reduce his claim to reimbursement (§ 70).*
- (3) *Alternatively, the employer's right of reimbursement should be abolished, regardless of whether he was negligent or not, but the third party's tort liability should be reduced by the amount of workmen's compensation paid or payable to the employee (§ 67).*

IX. The Uniform Comparative Fault Act

68. Most of the recommendations of this Study are embodied in the draft of the Uniform Comparative Fault Act, promulgated by the National Conference of Commissioners on Uniform State Laws in August 1977. There are two good reasons for adopting that draft in its essentials rather than embarking on an original drafting effort: first, the Uniform Act is the result of careful preparatory work and draftsmanship which it would be uneconomical to duplicate; second, uniformity

entails obvious benefits by making available the combined interpretative experience of other States and eliminating conflicts problems.

69. The Act covers both comparative negligence and contribution among tortfeasors. If adopted in California, it would therefore put both matters on a statutory basis, a solution preferable to a mosaic of judicial decisions and statutory amendments. It would also require the repeal of the current version of Code of Civil Procedure §§ 875-77, dealing with contribution among tortfeasors and releases.

70. (1) § 1(a) of the Uniform Act enacts the principle of "pure" comparative negligence and § 1(b) defines the scope of its application in an embracing definition of "fault." Notably, that definition includes strict tort liability, including breach of warranty, as well as reckless conduct in accordance with the recommendations of Section I of this Study. The inclusion of "unreasonable failure to avoid an injury or to mitigate damages" would apply comparative negligence to situations like failure to use protective devices, like safety belts or helmets, if considered "unreasonable." Because conduct formerly classified as assumption of risk might now be deemed comparative negligence it might be desirable to insert in the definition of fault in line 4 of § 1(b) "violation of statute," following "breach of warranty."¹⁸⁷

(2) § 2(a) of the Act lays down a procedure of special interrogatories for the jury regarding the allocation of shares of responsibility between the parties, both for purposes of comparative negligence and contribution among tortfeasors.

§ 2(b) prescribes as the two criteria for such allocation (1) the "fault" of each party, and (2) the "extent of [its] causal relation" to the damages claimed; the second criterion provides a possible solution to the "apples and oranges" dilemma of comparing fault and strict liability.¹⁸⁸

§ 2(c), *inter alia*, confirms the rule of joint and several liability.

§ 2(d) enacts a procedure for reallocating the uncollectible share of an insolvent party among the other parties, as recommended in Section IV of this Study.

(3) § 3 deals with the problem of set-off, between parties who are either insured or uninsured, along lines set out at length and recommended in Section VII of this Study.

(4) § 4(a) of the Act creates a right of contribution, enforceable either in the original action or in a separate action. It therefore rejects the requirement of a joint judgment. § 4(b) specifically authorizes con-

187. See *Foreward*, *supra* note 3, at 261-67.

188. See text accompanying notes 20-29 *supra*.

tribution claims by settling tortfeasors. In both respects, it would change the law of Code of Civil Procedure § 875 in accordance with recommendations of Section IV of this Study.

(5) § 5 deals with the enforcement of contribution, including the period of limitation.

(6) § 6, prescribing the effect of releases, corresponds to Code of Civil Procedure § 877, except that the plaintiff's claim against other defendants is to be reduced by the released tortfeasor's equitable share in accordance with the recommendation in Section VII of this Study rather than by the amount of the settlement.

(7) § 9 on severability may be omitted. § 11 would repeal Code of Civil Procedure §§ 875-877.

71. The Uniform Act does not deal specifically with the problem of immunities or the workmen's compensation syndrome, except in a comment to § 6 which briefly canvasses several possible solutions. Section VIII of this Study also suggested alternative solutions; if one of these were ultimately enacted, it would more appropriately be placed in the Labor Code, Division 4, which deals specifically with the interaction of workmen's compensation and tort liability rather than in the Code of Civil Procedure as part of the general comparative fault legislation.

X. State Bar Draft and S.B. 1959 (Zenovich)

72. An alternative bill drafted by a Committee of the California State Bar was introduced by Senator Zenovich (March 28, 1978) as S.B. 1959.¹⁸⁹ Like the Uniform Act, it proposes a codification of comparative negligence, contribution among tortfeasors and releases. It is however more detailed than the former, especially in its prescription of procedures, and dovetailed into the California Code of Civil Procedure of which it would become part as Title II of Part 2, §§ 875-885.

I propose to draw attention to its most salient features, some of which are explained and emphasized in the comments accompanying the State Bar draft, while others only emerge by contrast with the Uniform Act.

73. (1) § 1 (S.B. § 875) is clearly limited to tort (and nuisance) actions, whereas the Uniform Act applies to all claims "based on fault" for "personal injury or death to person or harm to property." Thus,

189. *Proposed Statute re Comparative Negligence and Contribution*, recommended by the State Bar Standing Committee on Administration of Justice, August, 1977. (The draft remains under consideration by that Committee). S.B. 1959 died in the Rules Committee at the end of the 1978 legislative session.

unlike the latter, the California draft may be applicable to claims for economic loss (e.g. from misrepresentation) but would presumably exclude actions for breach of contract, including warranty. (Breach of warranty is specifically included in the Uniform Act's definition of fault: § 1(b)). But like the Uniform Act, it does apply comparative negligence to claims based on strict liability.

The exclusion of contract actions applies not only to the issue of comparative negligence but also to contribution. It therefore disqualifies claims for contribution between one liable in contract and another liable in tort (and, of course, between persons liable only in contract). This creates a serious gap which has recently been closed in England by the Civil Liability (Contribution) Act 1978.¹⁹⁰

(2) § 2 (S.B. § 876) defines fault to include "breach of any duty of [a] person to himself or others." This is, to say the least, infelicitous since one cannot owe a duty to oneself.¹⁹¹

(3) § 3 (S.B. § 877) prescribes the special verdict procedure, comparable to § 2 of the Uniform Act. One notable difference is that the California draft requires a comparison of fault between all "tortfeasors" (following *American Motorcycle*), while the Uniform Act deliberately confines comparison to the litigating "parties" alone. The significance of this difference is revealed in § 6 which deals with the distribution of the "absent" share. The result runs counter to the recommendation of this Study.¹⁹²

(4) § 4 (S.B. § 878) requires set-off without qualification and without so much as a word of explanation for ignoring the near-universal disapproval of set-off between insured parties. Although the draft is in several other respects tilted in favor of plaintiffs, this section has incurred the hostility of CTLA, and should be rejected.

(5) § 5 (S.B. § 879) enacts a right to contribution, affirms the joint-and-several-liability rule and preserves jury trial.

(6) § 6 (S.B. § 880) deviates from the Uniform Act by reallocating the uncollectible share of a tortfeasor (insolvent as well as "absent") proportionately among the remaining "judgment debtors" but apparently not including a plaintiff at fault. This solution does not hold the scales evenly between negligent plaintiffs and defendants and runs counter to the recommendation of Section V of this Study.

(7) § 7 (S.B. § 881) authorizes cross-complaints or a later sepa-

190. See also LAW COMMISSION, REPORT NO. 79 (1977).

191. See *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 735, 575 P.2d 1162, 1167-68, 144 Cal. Rptr. 380, 385-86 (1978).

192. See text accompanying notes 74-78 *supra*.

rate action for contribution subject to certain conditions.¹⁹³ It also provides for a right of intervention by anyone who may be called upon to make contribution (Sub.-§(d)).

(8) § 8 (S.B. § 882) lays down that each party's equitable share be based on fault.

(9) § 9 (S.B. § 883) provides for a problem omitted by the Uniform Act: can a non-party relitigate the extent of the plaintiff's award? Answering yes, how is the reduction, if any, to be redistributed?

(10) § 10 (S.B. § 884) reenacts in substance the existing rules of Code of Civil Procedure § 877 on releases. In particular it adheres to the rule that any non-settling defendant's liability is reduced only by the amount of the settlement, subject only to the control that such settlement was in good faith. This solution obviously favors plaintiffs and is therefore supported by CTLA. By contrast, the Uniform Act proposes to reduce the remaining defendant's liability by the settling tortfeasor's equitable share, if greater than the amount of the settlement. For reasons previously stated, this Study prefers the latter solution.¹⁹⁴

(11) § 11 (S.B. § 885) is an uncontroversial definition section.

193. See text accompanying notes 104-08 *supra*.

194. See text accompanying notes 111-20 *supra*.