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to his degree of fault.[23] Thus, the system of assigning tort liability was consistent with the system of procedural joinder.

The early American courts tended to follow the English rule of joint and several liability among joint tortfeasors, although they gradually permitted more flexible joinder rules.[24] The enactment of the New York Field Code of Procedure in 1848, followed by similar legislation in most other states, substantially liberalized procedural rules. The liberalized rules permitted the joinder of all parties necessary for a complete resolution of the plaintiff's case, thus permitting the joinder of concurrently negligent tortfeasors in a single action.[25] Moreover, *joined* tortfeasors were treated carelessly as *joint* tortfeasors, and were held jointly and severally liable for the entire loss, even though they had not acted in concert.[26] This liberal classification of joint tortfeasors blurred the distinction between the procedural rule of permissive joinder of parties and the substantive doctrine of joint and several liability of concurrently negligent tortfeasors for damages.[27] Originally, when party joinder was permitted as a matter of convenience, each defendant remained responsible only for his portion of the damages based on his degree of fault.[28] Over time, the courts came to use the term "joint tortfeasor" to refer to all tortfeasors whose negligence combined to produce a single injury, and each defendant was held liable for the entire damage.[29]

The confusion surrounding permissive joinder and joint liability was intensified because American courts also required one verdict when defendants were joined in a single action.[30] The rationale for the one-verdict rule was that, because joint tortfeasors had acted in concert, the act of one was considered the act of all; therefore, the jury was not permitted to apportion damages because the injury was necessarily single and indivisible.[31] This rationale, however, was no longer viable once the new procedural rules allowed joinder of defendants without concerted action. Thus, the expansion of party joinder rules,

23. *See id.* at 328-29. This is essentially the definition of concurrent negligence. *See infra* note 25.

24. PROSSER, *supra* note 16, § 47, at 325-26.

25. *Id.* Concurrently negligent tortfeasors are parties whose separate or unrelated negligent acts combine to cause a single and indivisible injury to another party. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 149 (1973).

26. PROSSER, *supra* note 16, § 47, at 328-29.

27. *Id.* The purpose behind the joinder statutes was to provide convenience and expediency, and to avoid multiplicity of suits, not to affect the substantive liability of the parties. *Id.* at 327.

28. *See id.* at 329.

29. *Id.* at 328-29; *see* V. SCHWARTZ, COMPARATIVE NEGLIGENCE 252 (1974).

30. PROSSER, *supra* note 16, § 47, at 329.

31. *Id.* § 46, at 322-23, 325; *see* Sir John Heydon's Case, 11 Co. Rep. 5a, 77 Eng. Rep. 1150 (1613).

the careless application of the term "joint tortfeasor" to refer to all concurrently negligent tortfeasors, and the courts' adherence to strict rules against dividing damages among defendants — all combined to alter the substantive law of loss allocation.

B. Contribution

1. *Early Development.* Like the development of joint and several liability, the early development of the contribution doctrine was impeded by the application of traditional rules after their original rationales no longer applied. For example, courts continued to apply the common law rule that barred contribution among joint tortfeasors[32] after the definition of "tort" was broadened to include negligent acts.[33] At the time the rule denying contribution among "tortfeasors" developed, the meaning of "tort" was limited to willful or intentional wrongs.[34] The rule against contribution emerged as an exception to the general rule that contribution was permitted among negligent wrongdoers.[35] The rationale for the rule against contribution was that although courts would allow negligent parties to sue for contribution, courts would not assist deliberate wrongdoers in settling their disputes.[36] Although the original rationale for denying contribution was "lost to sight,"[37] most American courts continued to deny contribution among concurrently negligent tortfeasors until the mid-1950's, even though English courts permitted contribution in cases of vicarious liability, accident, mistake, or *mere negligence.*[38] Thus, the judiciary's failure to evaluate clearly the meanings of "tort" and "joint tortfeasor," as they were understood when the rule against contribution was developed, led many American courts to apply the rule inappropriately to cases of concurrently negligent tortfeasor.[39]

32. *See, e.g.*, Vertecs Corp. v. Reichhold Chem., Inc., 661 P.2d 619, 621 (Alaska 1983); *see* Comment, *A Criticism of Judicially Adopted Comparative Partial Indemnity as a Means of Circumventing Pro Rata Contribution Statutes,* 47 J. AIR. L. & COM. 117, 119 & n.6 (1981); *see also* PROSSER, *supra* note 16, § 50, at 336-37.

33. PROSSER, *supra* note 16, § 50, at 337.

34. *See* Reath, *Contribution Between Persons Jointly Charged for Negligence — Merryweather v. Nixan,* 12 HARV. L. REV. 176, 178 (1898).

35. *See id.* at 177, 182-83. The original rule permitting contribution is generally attributed to *Battersey's Case,* Winch's Rep. 48 (C.D. 1623). "The general rule is that among persons jointly liable the law implies an assumpsit either for indemnity or contribution and the [Merryweather v. Nixan] exception is that no assumpsit, either express or implied, will be enforced among wilful tort-feasors or wrongdoers." Reath, *supra* note 34, at 177.

36. Reath, *supra* note 34, at 186-87 (quoting Bailey v. Bussing, 28 Conn. 455 (1859) (Ellsworth, J.)).

37. *Id.*; RESTATEMENT (SECOND) OF TORTS § 886A comment a.

38. PROSSER, *supra* note 16, § 50, at 337.

39. *See id.*

Nevertheless, the rule denying contribution was consistent with the doctrine of contributory negligence.[40] The doctrine of contributory negligence prohibited a plaintiff from recovering damages if his negligence contributed to his own injury.[41] The parallel between contributory negligence and the rule against contribution is clear: just as negligent plaintiffs could not recover against negligent defendants, negligent defendants could not recover against other negligent defendants.[42] Together, the two doctrines barred negligent parties from recovering against other parties.

In practice, the rule against contribution permitted faultless plaintiffs to determine who would bear the loss for their injuries because defendants could not compel other tortfeasors to share the burden. Persistent criticism of the rule against contribution and recognition of its "obvious lack of sense and justice" led many state legislatures and courts to provide for contribution among joint tortfeasors.[43] Most of the reforms were statutory enactments based on

40. The endurance of contributory negligence is discussed in Note, *supra* note 4, at 108. The lengthy history of the rule against contribution is discussed in RESTATEMENT (SECOND) OF TORTS § 886A comment a.

41. Kaatz v. State, 540 P.2d 1037, 1046-47 (Alaska 1975).

42. The similarity of rationale and operation between the rule against contribution and contributory negligence is discussed in Leflar, *Contribution and Indemnity Between Tortfeasors,* 81 U. PA. L. REV. 130, 132 (1932).

43. PROSSER, *supra* note 16, § 50, at 337. The persistent criticisms of contributory negligence by legal scholars and the judiciary are summarized in Note, *supra* note 4, at 103-04 & nn.5-12. The author suggests that "early acceptance of the rule was undoubtedly [influenced by] the desire to protect developing industry, particularly the hazardous yet essential railroads, from unlimited liability in the tort field." *Id.* at 107. The long retention of contributory negligence "may ultimately be attributed to the principle of stare decisis or to legislative neglect." *Id.* at 108 (footnote omitted); *see also* Williams & Davidson, *Kaatz v. State: The Rule of Comparative Negligence Afloat Upon Uncharted Alaskan Waters,* 6 UCLA-ALASKA L. REV. 175, 175-76 (1977) (noting the opposition of the insurance industry to adopting comparative negligence).

The status of contribution rules in American jurisdictions as of 1959 is summarized in Note, *supra* note 6, at 981-82 app. *See, e.g.,* ALASKA STAT. §§ 09.16.010-.060 (1983); CAL. CIV. PROC. CODE §§ 875-77 (1980); MASS. ANN. LAWS ch. 231B, §§ 1-4 (Michie/Law Co-op 1974); N.C. GEN. STAT. §§ 1B-1 to -6 (1983); N.D. CENT. CODE §§ 32-38-01 to -04 (1976); TENN. CODE ANN. §§ 29-11-101 to -106 (1980). These statutes, except California's, were modeled after the 1955 version of the Uniform Contribution Among Tortfeasors Act and provide for pro rata contribution. 12 U.L.A. 63 (1975).

The 1939 version of the Uniform Contribution Among Tortfeasors Act requires contribution according to each tortfeasor's relative degree of fault. 9 U.L.A. 230 (1957). Many states have adopted relative fault statutes. *See, e.g.,* ARK. STAT. ANN. § 34-1002(4) (1962); DEL. CODE ANN. tit. 10, § 6302(d) (1975); FLA. STAT. ANN. § 768.31(3)(a) (West Supp. 1984); HAWAII REV. STAT. § 663-12 (1976); S.D. COMP. LAWS ANN. § 15-8-15 (1984); TEX. REV. CIV. STAT. ANN. art. 2212a, §§ 1, 2 (Vernon Supp. 1985); UTAH CODE ANN. § 78-27-40(2) (1977). Several other states' comparative contribution statutes are listed in Comment, *Comparative Contribution:*

the Uniform Contribution Among Joint Tortfeasors Act.[44]

2. *Alaska's Uniform Contribution Among Tortfeasors Act.* Alaska's Contribution Act[45] was passed in 1970 to "avoid the injustice often resulting under the common law."[46] At that time, the doctrine of contributory negligence was still recognized in Alaska;[47] courts and juries were considered by many to be incompetent to apportion damages accurately or efficiently among wrongdoers.[48] Therefore, Alaska's Contribution Act, like most contribution acts,[49] limited contribution to pro rata shares.[50] Alaska's Act creates a right of contribution in favor of one tortfeasor who has paid more than his pro rata share[51] and does not permit consideration of the relative fault of the tortfeasors in determining the appropriate loss allocation.[52]

The drafters of Alaska's Contribution Act avoided several procedural restrictions that created problems in other states.[53] Alaska's statute does not require that a joint judgment be rendered against

The Legislative Enactment of the Skinner *Doctrine,* 14 J. MAR. L. REV. 173, 183 n.61 (1980).

44. The original Uniform Contribution Among Tortfeasors Act was approved in 1939 by the National Conference of Commissioners on Uniform State Laws and the American Bar Association. 9 U.L.A. 230 (1957). Few states adopted it, and those that did amended it extensively. The lack of uniformity prompted the withdrawal of the old Act and its replacement in 1955 with a new one designed to avoid many of the procedural issues that had created problems in many states. 12 U.L.A. 57, 59-60 (1975); PROSSER, *supra* note 16, § 50, at 338 n.20.

45. ALASKA STAT. §§ 09.16.010-.060 (1983).

46. Arctic Structures, Inc. v. Wedmore, 605 P.2d 426, 430 n.8 (Alaska 1979) (quoting the House Judiciary Committee Report, 1970 House Journal 437).

47. *Arctic Structures,* 605 P.2d at 430.

48. *See Kaatz,* 540 P.2d at 1048.

49. *See generally* Note, *supra* note 6.

50. *See* ALASKA STAT. § 09.16.020 (1983). The legislature did consider apportioning contribution according to relative degrees of fault when it considered the Contribution Act in 1970. The Judiciary Committee of the Alaska House of Representatives reported that:

> The Judiciary Committee amendment would require each tortfeasor's share of the liability to be based on his relative degree of fault. After a review of the official comments accompanying the uniform Act and of the relevant pages of the transcript of the meeting of the national conference's committee which wrote this Act, the Judiciary Committee is unconvinced of the need to prohibit the degrees of fault from being considered (as is done in the original version).

Arctic Structures, 605 P.2d at 430 n.13. Without explanation, and despite the recommendation of the House Judiciary Committee, the legislature enacted the pro rata mechanism.

51. ALASKA STAT. § 09.16.010(b) (1983).

52. *Id.* § 09.16.020(2).

53. *See generally* Fischer, *The New Settlement Statute: Its History and Effect,* 40 J. MO. B. 13 (1984).

multiple tortfeasors before the right to contribution arises.[54] Thus, if a plaintiff is unable or unwilling to sue some of the individuals who are allegedly responsible for his injuries, the named defendant may join other tortfeasors or sue them separately for contribution. The Contribution Act also permits a tortfeasor to bring a claim for contribution even without satisfying the entire judgment, as long as the claimant has paid, or may have to pay, more than his pro rata share.[55]

In addition, Alaska's Contribution Act creates an incentive for settlement. A tortfeasor who settles with the plaintiff in good faith is released from further liability for contribution to non-settling tortfeasors.[56] If a settling party negotiates a release for other tortfeasors, the settlement reduces the amount of the plaintiff's claim against non-settling, non-released tortfeasors by the amount of the settlement or by any amount stipulated in the release, whichever is greater. The settling party may then sue the released tortfeasors for contribution.[57]

Significantly, Alaska's Contribution Act "does not impair any right [of] indemnity under existing law."[58] As discussed more fully below, the traditional form of indemnity is the common law equitable doctrine that shifts the entire burden of tort loss from one defendant to another. Alaska's Contribution Act makes it clear that contribution and indemnity are mutually exclusive remedies, yet it does not attempt to define or limit the law of indemnity in Alaska.[59] The Contribution Act also does not indicate when courts should apply indemnity instead of contribution, apparently leaving that determination to the courts.

C. Indemnity

1. *Early Development.* In multiple tortfeasor cases, damages may be allocated among the tortfeasors by way of either contribution or indemnity. The right to indemnity was recognized at early common

54. ALASKA STAT. § 09.16.030(a) (1983).

55. *See id.* § 09.16.010(a).

56. *Id.* § 09.16.040(2); *see* Vertecs Corp. v. Fiberchem, Inc., 669 P.2d 958, 960-61 (Alaska 1983) (a settlement prompted by desire to avoid liability for contribution not necessarily in bad faith; settlement upheld).

57. ALASKA STAT. § 09.16.040(1) (1983). *But see infra* note 154, discussing Criterion Ins. Co. v. Laitala, 658 P.2d 112 (Alaska 1983).

58. *Id.* § 09.16.010(f).

59. Even though "one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of the indemnity obligation." *Id.* In Industrial Risk Insurers v. Creole Prod. Servs., Inc., 568 F. Supp. 1323, 1328 (D. Alaska 1983), the federal district court noted that the Alaska Supreme Court has never "expressly identified the elements of a claim for implied indemnity."

law.[60] In its traditional form, indemnity allows a party to shift the entire liability for an injury from one tortfeasor to another.[61] In contrast, contribution permits one tortfeasor to compel another to share the liability, either on an equal or on a percentage basis. The right to indemnity may arise in several ways. For example, it may arise contractually, either expressly or by implication.[62] Indemnity may also arise "by operation of law to prevent a result which is regarded as unjust or unsatisfactory."[63] This is called implied or equitable indemnity. While the enforcement of contractual indemnity is justified by the express or implied agreement of the parties,[64] the enforcement of implied indemnity is based upon "a legal fiction founded not upon the parties' intent, express or implied, but upon justice, equity and the doctrine of unjust enrichment."[65] The remainder of this note focuses on implied, rather than contractual, indemnity.

Under early common law, the right to implied indemnity was narrowly defined.[66] Generally, courts implied an obligation to indemnify a tortfeasor only when there was a pre-existing relationship between the parties.[67] For example, an employer held vicariously liable for the tort of a servant or an independent contractor was entitled to indemnity from the "active tortfeasor" — the party who directly caused the injury.[68] Similarly, the right to implied indemnity was recognized for "an innocent partner or carrier held liable for the acts of another, or the owner of an automobile for the conduct of the driver."[69] Generally, the courts required an indemnitee to be innocent of any wrongdoing and exposed to liability only through the indemnitor's acts; in other words, the indemnitor was treated as having breached "his obligation not to expose the indemnitee to liability."[70]

60. RESTATEMENT (SECOND) OF TORTS § 886B comment a (1979).

61. *See* PROSSER, *supra* note 16, § 51, at 341.

62. *Id.*

63. *Id.* Common law equitable or implied indemnity is a specific remedy available to a party who has paid or may have to pay an obligation for which another party was primarily liable. D. DOBBS, *supra* note 25, at 135.

64. *See* Ferrini, *The Evolution from Indemnity to Contribution — A Question of the Future, If Any, of Indemnity*, 59 CHI. B. REC. 254, 255 (1978). This note is concerned primarily with implied indemnity; the law governing express and implied-in-fact indemnity contracts is discussed occasionally by way of contrast.

65. *Id.* The primary rationale for the doctrine of implied indemnity is said to be the aversion to unjust enrichment. "[O]ne who has been compelled in discharging his own legal obligation to pay off a claim which in fairness and good conscience should be paid by another can secure reimbursement from that other." Leflar, *supra* note 42, at 147.

66. Ferrini, *supra* note 64, at 254.

67. *Id.* at 255.

68. PROSSER, *supra* note 16, § 51, at 341-42.

69. *Id.*

70. Ferrini, *supra* note 64, at 255.

Over time, many courts expanded the doctrine of implied indemnity beyond its traditional limits. In response to the unavailability of contribution, even a *negligent* defendant was held to be entitled to indemnity, as long as the claimant was the less negligent party.[71] In the process, the courts developed various tests to determine whether the entire loss should be shifted from the passive or secondary tortfeasor to the active or primary tortfeasor.[72] For example, a passive tortfeasor might be a retailer who relies on a manufacturer's duty to guard against product defects, or a municipality that relies on a construction company to repair and maintain its streets.[73] The original significance of the active-passive distinction faded as courts expanded the doctrine to allow indemnity in favor of the less culpable of two or more negligent parties.[74] Because each court based its decision on equitable principles, the limits of implied indemnity became elusive and unpredictable.[75] As a result, it became "extremely difficult to state any general rule or principle as to when indemnity will be allowed and when it will not."[76]

71. *See Vertecs*, 661 P.2d at 621; Leflar, *supra* note 42, at 154-58. Professor Leflar, after summarizing the three areas of tort (non-contractual) indemnity already well-rooted in the common law when he wrote in 1932, described an additional body of cases using the active-passive negligence test to allow indemnity where the parties were not *in pari delicto*. *Id.* at 155. He criticized this approach for its uncertainty and lack of standards. He also described the cases in this field as granting indemnity only "to one whose only negligence was a failure to discover and remedy a dangerous condition formerly created by the misconduct of the one against whom indemnity is given." *Id.* at 156.

Since 1932, the courts using the active-passive and other tests have broadened the field to include any fact pattern where, for example, "there was a qualitative distinction between [the] relative culpability [of the parties]." Ferrini, *supra* note 64, at 257 (discussing Illinois law). Ferrini suggests that, incredible as it may seem, one "who is 49 percent negligent may obtain full indemnification from one who is 51 percent negligent. . . . Yet this was the natural and perhaps unavoidable consequence of the prohibition against contribution." *Id.*

72. The three primary tests have been described as (1) the active-passive test; (2) the primary-secondary test; and (3) the duty-no duty test. Other tests include misfeasance-nonfeasance and omission-commission tests, serving "basically the same function — to distinguish grades of fault." Comment, *Indemnity and Third-Party Tort Actions in South Dakota*, 21 S.D.L. REV. 393, 400-401 (1976) (citations omitted); *see generally* Annot., 28 A.L.R.3d 943, 950-89 (1969 & Supp. 1984) (listing states applying the active-passive and other tests in various factual settings).

73. PROSSER, *supra* note 16, § 51, at 342-43.

74. Ferrini, *supra* note 64, at 256 (quoting Bua, *Third Party Practice in Illinois: Express and Implied Indemnity*, 25 DEPAUL L. REV. 287, 296 (1976)).

75. *See* Ferrini, *supra* note 64, at 256; *see generally* Leflar, *supra* note 42, at 154-58 (discussing the vagueness already apparent by 1932).

76. PROSSER, *supra* note 16, § 51, at 343.

2. *Implied Indemnity in Alaska.* In addition to recognizing contractual indemnity,[77] the Alaska Supreme Court has occasionally discussed implied indemnity, and has allowed it in its traditional form as a means of shifting liability from a party who "is sued vicariously for the negligence of the indemnitor . . . ."[78] In 1981, the Alaska Supreme Court implied in dicta[79] that it might go beyond this traditional limit. The implication was that in addition to recognizing implied indemnity for vicarious liability, implied indemnity among concurrently negligent tortfeasors might be recognized in Alaska:

> Three broad possible fact patterns can arise in the indemnity setting: (1) the indemnitee is sued vicariously for the negligence of

77. For examples of contractual indemnity cases in Alaska, see City of Juneau v. Alaska Elec. Light & Power Co., 622 P.2d 954 (Alaska 1981); Amoco Prod. Co. v. W.C. Church Welding & Contracting Inc., 580 P.2d 697 (Alaska 1978); Manson-Osberg Co. v. State, 552 P.2d 654 (Alaska 1976).

The importance of carefully drafting contractual indemnity clauses is likely to increase after *Vertecs*, discussed *infra* in text accompanying notes 101-26. A good example of a potential problem is an indemnity provision that serves to hold another party harmless for injuries for which the indemnitor is to some degree at fault. In Industrial Risk Insurers v. Creole Prod. Servs., Inc., 568 F. Supp. 1323, 1329-30 (D. Alaska 1983), Creole had contracted with the Alyeska Pipeline Company to be in charge of starting up Alyeska's pump stations, and their contract included a provision whereby Creole would indemnify Alyeska for harm caused, in any degree, by Creole's negligence. Fluor Engineers and Constructors, Inc. had designed the pump stations. Alyeska sued Creole for indemnity under their contract after Alyeska had paid for injuries incurred in pipeline construction. Creole and Alyeska settled, but because Fluor was not released by the settlement agreement, Creole could not obtain contribution from Fluor.

The federal district court held that although the Alaska Supreme Court had never ruled on the issue, its previous decisions restricting implied indemnity in *Arctic Structures* and *Vertecs* demonstrated that the Alaska court would probably require Creole to prove its actual liability to Alyeska in order to prove that Fluor was under a legal obligation to indemnify Creole. Thus, in order to prove its liability to Alyeska, Creole had to prove its own negligence. The federal court noted the irony of the result but held that, under *Vertecs*, Creole would have to prove itself out of court — it it were negligent in any degree, implied indemnity would be unavailable.

78. *See, e.g.*, Austin v. Fulton Ins. Co., 498 P.2d 702, 705 (Alaska 1972) (insurer held vicariously liable for negligence of its agent); Kastner v. Toombs, 611 P.2d 62, 65 (Alaska 1980) (rules of indemnity apply where a master is held liable for his borrowed servant). The Alaska Supreme Court has neither adopted the definition of common law indemnity set out in the Restatement of Restitution, Section 76, nor expressly identified the standards it will apply. *Creole Production Services*, 568 F. Supp. at 1328. The federal district court in *Creole Production Services* assumed that the Alaska appellate courts would recognize the "essential elements of common law indemnity":

> The indemnity claimant must plead and prove that (1) he has discharged a legal obligation owed to a third party; (2) the defendant was also liable to the third party; and (3) as between the claimant and the defendant, the obligation ought to be discharged by the latter.

Id.

79. *Alaska Elec. Light & Power Co.*, 622 P.2d at 957.

> the indemnitor, (2) *the indemnitee and indemnitor are concurrently negligent, but, because there exists a joint and several liability, only one party is sued,* or (3) the indemnitee is *solely* negligent and the indemnitor is, by agreement, liable.[80]

The Alaska Supreme Court did not rule on the second fact pattern, however, because the case involved contractual indemnity.[81] Two years later, all doubts were resolved against implied indemnity among concurrently negligent tortfeasors when the court held in *Vertecs Corp. v. Reichhold Chemicals, Inc.*, that "public policy dictates that Alaska should not adopt implied indemnity between concurrently negligent tortfeasors."[82]

The following discussion analyzes two recent cases in which the Alaska Supreme Court rejected opportunities to modernize Alaska's tort loss allocation system. This analysis is necessary to understand the current issues and problems in this area.

a. Arctic Structures, Inc. v. Wedmore: No Implied Partial Indemnity Among Concurrently Negligent Tortfeasors. Implied partial indemnity is a judicial doctrine that some courts use to allow partial loss shifting despite the traditional rule that indemnity is a *total* loss shifting mechanism.[83] In 1979, the Alaska Supreme Court, without discussion, declined the opportunity to adopt the partial indemnity doctrine in *Arctic Structures, Inc. v. Wedmore.*[84] The petitioners in *Arctic Structures* argued that, because the court had rejected all the reasons for avoiding judicial apportionment of damages between plaintiff and defendant according to relative fault when it adopted comparative negligence, judicial apportionment of damages among multiple defendants according to relative fault should be permitted.[85] The petitioners contended that the rule of joint and several liability should be modified to assign percentages of fault among the defendants; this would be in harmony with the changed approach to tort loss allocation indicated by the new comparative negligence rule. In addition, the modification would further the Contribution Act's fundamental

80. *Id.* (emphasis added). The argument that the court had recognized implied indemnity among concurrently negligent tortfeasors in *Alaska Elec. Light & Power Co.* was raised in *Vertecs*. *See Vertecs*, 661 P.2d at 622.

81. *Alaska Elec. Light & Power Co.*, 622 P.2d at 957.

82. 661 P.2d 619, 626 (Alaska 1983). The court in *Vertecs* expressly noted that its comment in *Alaska Elec. Light & Power Co.* merely described fact patterns and in no way recognized implied indemnity among concurrently negligent tortfeasors. *Id.* at 622.

83. *See, e.g.*, American Motorcycle Ass'n, Inc. v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978) (discussing and applying the doctrine).

84. 605 P.2d 426, 435 n.27 (Alaska 1979).

85. *Id.* at 429, 431.

purpose of equitable loss apportionment.[86] The court refused to contravene the language of the Contribution Act and apportion fault among concurrently negligent tortfeasors.[87]

The Alaska Supreme Court rejected petitioners' arguments primarily because the court believed it would have to abolish joint and several liability and therefore "cast the total risk of uncollectability upon the injured plaintiff."[88] In reaching its decision, the court relied heavily on the language of the Contribution Act, the limited legislative history of the statute, and the comments of the Commissioners on Uniform State Laws regarding the Uniform Contribution Among Tortfeasors Act — the model for Alaska's Act.[89] According to the court, the statute's direction that "principles of equity applicable to contribution generally shall apply" in determining tortfeasors' pro rata shares was intended "to govern contribution when one defendant is found to be insolvent, and [not] . . . to affect the requirement that relative degrees of fault are not to be considered as a factor in the apportionment."[90] The court also noted that the rule of joint and several liability had been retained in the Uniform Comparative Fault Act[91] and in both California[92] and Florida,[93] where comparative negligence and pro rata contribution coexisted.

The California Supreme Court, however, retained joint and several liability even though it had adopted the doctrine of implied partial indemnity.[94] In other words, although California courts may ignore the state's pro rata contribution statute for purposes of assigning percentages of fault, each tortfeasor remains jointly liable for the entire amount of the damages. California's method of using both joint and several liability and implied partial indemnity was designed partly to accommodate the same concern voiced by the Alaska Supreme Court: to protect plaintiffs from bearing the entire risk of uncollectability.[95] Nevertheless, in *Arctic Structures* the Alaska Supreme Court rejected the doctrine of implied partial indemnity without discussing its merits or viability.[96]

As Justice Boochever pointed out in his dissenting opinion in *Arctic Structures*, joint and several liability can coexist with relative-fault

86. *Id.* at 431.

87. *Id.* at 430-32.

88. *Id.* at 431.

89. *Id.* at 430-32.

90. *Id.* at 430-31.

91. *Id.* at 431-32.

92. *Id.* at 433-35 (discussing primarily *American Motorcycle Ass'n*).

93. *Id.* at 432-33 (discussing Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973)).

94. *See American Motorcycle Ass'n*, 20 Cal. 3d at 590, 578 P.2d at 907, 146 Cal. Rptr. at 188-89.

95. *See id.* at 589-90, 578 P.2d at 906, 146 Cal. Rptr. at 188.

96. 605 P.2d at 435 n.27.

contribution or indemnity. He argued that joint and several liability should be retained, *and* losses among defendants should be allocated in accordance with their relative degrees of fault.[97] Justice Boochever reasoned that such a scheme would be consistent both with earlier precedent in Alaska[98] and with the Contribution Act's purpose and language.[99] Thus, he asserted, despite the pro rata language of the Contribution Act, "the reason for dividing liability equally no longer exists."[100]

b Vertecs Corp. v. Reichhold Chemicals, Inc.: No Implied Indemnity Among Concurrently Negligent Tortfeasors. The most recent development in Alaska's loss allocation system was the decision in *Vertecs Corp. v. Reichhold Chemicals, Inc.*[101] In *Vertecs*, the Alaska Supreme Court held that the right to implied indemnity does not exist among concurrently negligent tortfeasors.[102] The following analysis of the *Vertecs* decision introduces some of the issues and problems presented by legislative inactivity in this field of law.

In 1970, Vertecs Corporation (Vertecs) was hired to install polyurethane foam insulation in a cold storage plant under construction for the City of Yakutat. Reichhold Chemicals, Inc. (Reichhold) supplied some of the foam that Vertecs used to insulate the building.[103] In 1977, a fire destroyed the cold storage plant, and the foam insulation supplied by Reichhold allegedly aggravated the fire damage. The City of Yakutat and the plant's former tenant brought an action against Vertecs and Reichhold,[104] alleging liability under eight theories including negligence. Reichhold settled with both plaintiffs in March 1981 and obtained a release. Subsequently, the action against Reichhold was dismissed with prejudice.[105]

In March 1981, Vertecs filed a cross-claim against Reichhold for either contribution or indemnity, alleging that any negligence on its part was merely "passive," whereas Reichhold's negligence was "active."[106] The superior court ruled that "Alaska law did not provide

97. *Id.* at 440-41.
98. *Id.*
99. *Id.* at 441.
100. *Id.*
101. 661 P.2d 619 (Alaska 1983).
102. *Id.* at 626.
103. *Id.* at 620.
104. On May 11, 1979, the plaintiffs brought actions against fifteen parties, including Vertecs and Reichhold, in their amended complaint. *Id.*
105. *Id.*
106. *Id.* The superior court granted summary judgment to Reichhold on the contribution claim "since Reichhold had settled in good faith with the plaintiffs." *Id.* at 621.

for indemnity between concurrently negligent tortfeasors. Since only fault-based claims had been alleged against Vertecs . . . it could not obtain indemnity . . . ."[107]

On appeal, the *Vertecs* case gave the Alaska Supreme Court the opportunity to adopt or reject the implied indemnity doctrine for concurrently negligent tortfeasors. The court reviewed the historic development of contribution and indemnity[108] and considered several aspects of the implied indemnity doctrine advanced by Vertecs.[109] The court concluded that public policy required denial of implied indemnity for tortfeasors who are negligent in any degree.[110]

The court identified three advantages that might result from allowing implied indemnity in favor of tortfeasors whose relative fault is slight.[111] The first was stated by the court as follows:

> The most fundamental argument in favor of indemnity between two concurrently negligent tortfeasors is that of fairness. Even if two tortfeasors are held jointly and severally liable, often one will pay the entire judgment. If that tortfeasor bears only a minor degree of fault, it is indeed grating to contemplate that it may well shoulder the entire loss while the tortfeasor bearing a large degree of fault suffers none.[112]

The second advantage mentioned by the court in support of implied indemnity was that it would more accurately match the liability of each tortfeasor with his degree of fault. The court noted, however, that under the traditional doctrine of implied indemnity, the *entire* loss shifts to the more blameworthy tortfeasor, which is not in complete accord with the underlying tort principle of relative fault.[113] The third advantage noted by the court was that "loss-shifting via indemnity may well serve the modern tort goal of shifting losses in a socially desirable fashion so that the loss is most efficiently spread throughout society."[114]

107. *Id.* at 620.
108. *See id.* at 621.
109. *See id.* at 623-26.
110. *Id.* at 626.
111. *See id.* at 623-24.
112. *Id.* (footnote omitted).
113. *Id.* at 624. The court did not discuss the doctrine of implied partial indemnity which it had previously rejected in a footnote in *Arctic Structures*, 605 P.2d at 435 n.27.
114. *Vertecs*, 661 P.2d at 624. The court suggested that if the indemnitor were insured, or were "a governmental entity, then the loss may be diffused among the large population of policy-holders, customers, or taxpayers." *Id.* (citation omitted). Nevertheless, local retailers may not be good loss-bearers, even for a pro rata share, because they may be underinsured and thus forced to pass their loss directly on to retail customers.

Despite the court's recognition of the advantages of allowing implied indemnity, the countervailing arguments persuaded the court that the doctrine should not be available to negligent parties.[115] The court was understandably concerned with the vagueness of the doctrine.[116] It would be difficult to determine which cases of concurrent negligence would justify implied indemnity in favor of one party.[117] Vague and confusing judicial standards would result.[118] A proliferation of indemnity actions in multiparty lawsuits would burden trial courts with "a bewildering array of issues."[119] Furthermore, adopting the implied indemnity doctrine would disrupt the current scheme of incentives. In some cases, the deterrent of potential liability would be sacrificed,[120] and the incentive for potential indemnitors to settle would be lost because there would be no guarantee of a complete release from liability as long as another tortfeasor might sue for implied indemnity.[121] Finally, the court was strongly influenced by the existence of Alaska's Contribution Act, which demonstrated the legislature's "considered policy judgment . . . that concurrently negligent tortfeasors should share equally in the loss caused by their tortious acts."[122] In sum, the court believed that implied indemnity among

115. *See id.* at 624-26.

116. *Id.* at 624.

117. *Id.*

118. *Id.*

119. *Id.* at 624 (quoting Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362, 367 (Minn. 1977)).

120. *Id.* at 625. The deterrence argument is weak for at least two reasons. First, many tort cases based on fault involve no moral culpability, and second, where the tortfeasor is insured, the only deterrent is the indirect cost of higher insurance premiums. *Cf.* D. DOBBS, *supra* note 25, at 586-87 (discussing deterrence in a different context).

121. *See* ALASKA STAT. § 09.16.020 (1983); *see also Vertecs*, 661 P.2d at 625. The court explained that while a tortfeasor who settles with the injured party would be discharged from liability for contribution under Alaska Statutes section 09.16.040(2), the tortfeasor would still be liable for indemnity under Alaska Statutes section 09.16.010(f). *Vertecs*, 661 P.2d at 625.

122. *Vertecs*, 661 P.2d at 625 (footnote omitted). The court in *Vertecs* also stated that "two distinguished commentators have concluded that once a state adopts contribution, that should be the sole method of non-contractual loss-shifting among concurrently negligent tortfeasors." *Id.* (footnote omitted). One of these commentators, Dean Keeton, acknowledged that his view was not consistent with the majority of scholars at that time. "Contrary to the views of most of my legal education colleagues, I have never believed that it was practical or feasible to compare faults other than in a general way, such as through the recklessness and negligence concepts." Keeton, *Contribution and Indemnity Among Tortfeasors*, 27 INS. COUNS. J. 630, 633 (1960). The other commentator, Professor Leflar, wrote in 1932 that "[i]ndemnity between tortfeasors serves a good purpose when as between them substantially the whole of the fault was in the one against whom indemnity was given. Roughly, that is the area within which it is now permitted." Leflar, *supra* note 42, at 159.

It is arguable that contribution should be the sole remedy [illegible]

concurrently negligent tortfeasors should not be recognized.[123]

The breadth of the *Vertecs* rule is demonstrated by the subsequent disposition of Vertecs's indemnity claims that were not based on negligence.[124] On remand, the superior court relied on the Supreme Court's earlier decision in *Vertecs*, which broadly declared that any degree of negligence by a tortfeasor barred implied indemnity.[125] The superior court held that if the claimant were negligent in any degree, even nonnegligence claims labeled "breach of warranty" or "strict liability" would be barred as merely restated, and impermissible, indemnity claims.[126]

upon the more blameworthy tortfeasor, and the need for implied indemnity would be greatly reduced. The court in *Vertecs* noted that the Alaska legislature chose the pro rata scheme over a relative fault amendment proposed by the House Judiciary Committee. 661 P.2d at 625. The court recognized the shortcomings of the pro rata method, but felt that the legislature had already decided the issue against comparative loss shifting among tortfeasors. This left two wooden alternatives: pro rata contribution and total loss shifting under implied indemnity. The court concluded that, given pro rata contribution, no modern function remained for implied indemnity among concurrently negligent tortfeasors, despite the unfairness of pro rata contribution in some cases. *Id.* at 626.

123. *Id.* at 625-26. Two months after *Vertecs*, the court clarified its postion on this issue. "To the extent that an expansion of the common law of indemnity would overlap into and judicially abrogate portions of the contribution act, we are reluctant to create such an expansion." State Mechanical, Inc. v. Liquid Air, Inc., 665 P.2d 15, 17 n.2 (Alaska 1983). In *State Mechanical*, the court applied the *Vertecs* rule "that no claim for non-contractual implied indemnity [lies] between concurrently negligent tortfeasors" to affirm a superior court decision precluding an indemnity claim by a negligent contractor against a manufacturer of a defective product. *State Mechanical*, 665 P.2d at 17.

124. *See Vertecs*, 671 P.2d at 1275 (outlining the complex series of procedural events in the Vertecs litigation). Vertecs had filed breach of express and implied warranty and strict liability counter-claims against Reichhold in July 1982. Reichhold challenged Vertecs's right to amend its answer on the theory that res judicata barred Vertecs's nonnegligence indemnity claims. The superior court dismissed Vertecs's cross-claims and third party claims, but the Alaska Supreme Court reversed and remanded to the superior court to decide the merits of the nonnegligence theories. *Id.* at 1275, 1277. In May 1984, the superior court granted summary judgment in favor of Reichhold against Vertecs' nonnegligence indemnity claims. *See* City of Yakutat v. Witco Chem. Corp., No. 3AN-79-1134 Civ. (Alaska Super. Ct., May 24, 1984).

125. *Witco Chem. Corp.* at 11, 13-14.

126. *Id.* at 15-18. The Alaska Supreme Court had previously held that attorney's fees, costs, and interest could not be recovered in an indemnity action unless the claimant were free of personal fault. *See* D.G. Shelter Prod. Co. v. Modulite Indus., Inc., 684 P.2d 839, 841 n.5 (Alaska 1984).

III. Current Issues and Problems in Alaska's Pro Rata Allocation System

A. Alaska's Contribution Act and Legislative Intent

In evaluating the degree of reliance the Alaska Supreme Court has placed on the policy decisions embodied in the Contribution Act, it is helpful to examine the legislative intent underlying the statute. The Alaska legislature passed the Contribution Act to relieve the harshness of the common law doctrine that barred contribution among joint tortfeasors.[127] The Act was passed to ensure that each joint tortfeasor would pay his fair share of the damages rather than have one tortfeasor bear the entire loss.[128] At the time the Contribution Act was passed, loss allocation on a comparative fault basis was considered judicially and administratively unworkable and inaccurate.[129]

The pro rata Contribution Act represented a great improvement over the common law rule barring all contribution. Nevertheless, whether the Alaska legislature intended the Contribution Act to preclude the future development of implied indemnity remains unclear. The language of the Contribution Act arguably demonstrates an intent to leave the development of the doctrine of indemnity to the judiciary by providing in part:

> This chapter does not impair any right [of] indemnity under existing law. If one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.[130]

On one hand, the troublesome phrase "under existing law" supports the proposition that the legislature intended to preclude judicial expansion of implied indemnity to include negligent tortfeasors because

127. *See* Criterion Ins. Co. v. Laitala, 658 P.2d 112, 115-16 (Alaska 1983) (quoting House Judiciary Comm. Report, House Journal of 1970, at 437); *see also* City of Juneau v. Alaska Elec. Light & Power Co., 622 P.2d 954, 959 (Alaska 1981); Arctic Structures, Inc. v. Wedmore, 605 P.2d 426, 430 n.8 (Alaska 1979) (quoting at length the report in 1970 House Journal 437). The court in *Alaska Elec. Light & Power Co.* noted that the House Judiciary Committee Report on the bill stated that one purpose of the proposed legislation was to "avoid the injustice often resulting under the common law," due to the no contribution rule. 622 P.2d at 959 n.15 (quoting House Judiciary Comm. Report, House Journal of 1970, at 437).

128. *Laitala*, 658 P.2d at 115. The court in *Laitala* discussed the purpose of the Contribution Act when it determined whether a post-judgment settlement agreement satisfied the judgment so as to extinguish all the tortfeasors' liability to the plaintiff, and, if so, whether a right of contribution existed among the tortfeasors under Alaska Statutes sections 09.16.010(a),(d) and .030(e) (1983). 658 P.2d at 115; *see supra* note 154.

129. *See* Kaatz v. State, 540 P.2d 1037, 1048 (Alaska 1975).

130. Alaska Stat. § 09.16.010(f) (1983).

this form of implied indemnity did not exist in Alaska when the statute was drafted.[131] On the other hand, perhaps the phrase indicates that the legislature wanted to give the courts the freedom to provide common law indemnity and to expand or contract the common law equitable doctrine as fairness and justice might require.[132]

If the Alaska legislature did not intend to freeze judicial development of implied indemnity, how far can or should the courts expand the doctrine? The Contribution Act does not specify acceptable forms of indemnity. As noted above,[133] other states have allowed implied indemnity in favor of tortfeasors who are only slightly at fault against those who are greatly at fault because it is more equitable than enforcing the statutory remedy — a fifty percent split. Nonetheless, the Alaska Supreme Court apparently concluded that the legislature intended the Contribution Act to preclude implied indemnity even for tortfeasors whose relative fault was only slight.[134]

The California Supreme Court interpreted a similar statute, which preserved indemnity "under existing law," to permit the expansion of California's implied indemnity doctrine to encompass implied partial indemnity.[135] The California court reasoned that the legislature could not have foreseen that equitable considerations would justify judicial creation of the doctrine.[136] The California legislature

131. *But cf. Alaska Elec. Light & Power Co.*, 622 P.2d at 959 n.17 (Contribution Act does not impair parties' right to agree, in good faith, on an alternative loss allocation formula).

132. The argument against interpreting the legislative intent behind the passage of a contribution statute as to provide contribution as "the sole permissible remedy" is made in O'Donnell, *Implied Indemnity in Modern Tort Litigation: The Case for a Public Policy Analysis*, 6 Seton Hall L. Rev. 268, 284 n.40 (1974-75). *See also* Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 Iowa L. Rev. 517, 518 n.9 (1952).

133. *See supra* text accompanying notes 71-76.

134. *See Vertecs*, 661 P.2d at 621.

135. American Motorcycle Ass'n, Inc. v. Superior Court, 20 Cal. 3d 578, 602, 578 P.2d 899, 914-15, 146 Cal. Rptr. 182, 197 (1978). In *American Motorcycle Ass'n*, the California Supreme Court relied upon the decision in Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), in which the New York Court of Appeals created a right of implied partial indemnity despite the existence of a pro rata contribution statute. "In authorizing equally shared contribution among tortfeasors jointly found liable, this statute [CPLR § 1401, repealed in 1974] did not contemplate an apportionment already made in the judgment, and the joint responsibility described was not one of indemnity." *Id.* at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 391. California's contribution statute, Cal. Civ. Proc. Code § 876(a) (West 1980), provides that "the pro rata share of each tortfeasor judgment debtor shall be determined by dividing the entire judgment equally among all of them."

136. *American Motorcycle Ass'n*, 20 Cal. 3d at 602, 578 P.2d at 914, 146 Cal. Rptr. at 197.

"had no intention of completely withdrawing the allocation of loss issue from judicial purview."[137]

In contrast, the Alaska Supreme Court in *Vertecs* found that the Alaska Contribution Act

> represents the legislature's considered policy judgment that concurrently negligent tortfeasors should share equally in the loss caused by their tortious acts. . . . Although pro rata contribution may not in all cases be the most fair method of loss-shifting, it seems more fair than the "blunt instrument" of indemnity where all tortfeasors are to some degree at fault.[138]

It is now up to the legislature to determine whether its intent has been accurately construed and whether its 1970 policy judgments are still valid.

B. Balancing Fairness and Efficiency in *Vertecs*

In the *Vertecs* decision, the Alaska Supreme Court balanced public policy considerations for and against the implied indemnity doctrine. By balancing various concerns, the court implicitly recognized that neither contribution nor implied indemnity, standing alone, guarantees the fairest outcome in many cases. Nevertheless, the court did not focus on whether or how the two doctrines might coexist.

In order to analyze the merits of implied indemnity and contribution, it is important to recognize that the fairness of implied indemnity is crucially affected by the availability of contribution as an alternative loss-shifting remedy. The relative fairness of contribution and implied indemnity also varies as the relative fault percentages change. These interrelationships are best illustrated by considering how the remedies would affect two tortfeasors, A and B, under two scenarios. First, consider the case where A's share of the fault for an injury is 5% and

137. *Id.* at 602, 578 P.2d at 915, 146 Cal. Rptr. at 198. The California Supreme Court also discussed the provision in its contribution act "which explicitly mandates that the 'right of contribution shall be administered in accordance with the principles of equity.'" *Id.* (citing CAL. CIV. PROC. CODE § 875(b)). The court concluded that "this provision demonstrates that the Legislature did not conceive of its contribution legislation as a complete and inflexible system for the allocation of loss between multiple tortfeasors." *Id.* at 602-03, 578 P.2d at 915, 146 Cal. Rptr. at 198 (citations omitted). Without deciding whether this provision would permit judicial alteration of the pro rata contribution formula, the court stated that the provision "refutes the argument that the Legislature intended to curtail judicial discretion in apportioning damages among multiple tortfeasors." *Id.*

The Alaska Supreme Court, however, interpreted this provision in the Alaska Statute (ALASKA STAT. § 09.16.020(3) (1983)) as intended to apply only when one defendant is insolvent; it was not intended, according to the court, to "affect the requirement that relative degrees of fault are not to be considered as a factor in the apportionment." *Arctic Structures*, 605 P.2d at 430-31 (footnote omitted) (relying on the commissioners' comments interpreting the Uniform Contribution Among Tortfeasors Act).

138. *Vertecs*, 661 P.2d at 625-26.

B's is 95%.[139] Implied indemnity would allow A to shift all of the damages to B. Pro rata contribution would force each to tfeasor to bear 50% of the loss. Clearly, implied indemnity would provide a better match of liability with fault. A second scenario demonstrates that implied indemnity becomes less fair as relative percentages of fault became more equal: if A's share of the fault is 40% and B's is 60%, the pro rata, 50%-50% split is preferable to 0%-100% indemnity.

The expansion of the implied indemnity doctrine has been criticized for creating "confusion and unfairness."[140] The expansion occurred, however, during a period when contribution was unavailable. It is arguable that because contribution is now available, the standard for implied indemnity can be considerably more restrictive and concrete, allowing courts to apply the doctrine in narrowly defined types of cases.[141] Moreover, if the focus is on fairness, the role for implied indemnity among concurrently negligent tortfeasors is even more important where pro rata contribution is the only alternative than where comparative contribution is available.

A standard which could accommodate both contribution and implied indemnity might be achieved by allowing implied indemnity instead of pro rata contribution only when the results otherwise would

139. This may occur, for example, where A, a retailer, fails to discover a defect in a product manufactured by B.

140. *See* Comment, *supra* note 72, at 400-02.

141. *See generally* Ferrini, *supra* note 64, at 268. Ferrini found a meaningful role for implied indemnity in Illinois, a state in which comparative contribution had been *judicially* adopted. He argued that while a tortfeasor who was 1% at fault had a right to contribution from a tortfeasor who was 99% at fault, indemnity should be permitted when one party's culpability exceeds 99%:

> That point is found where the indemnitee is held liable by operation of law — where the indemnitor owed the indemnitee a duty of care not to expose the [indemnitee] to liability to a third party and, as a consequence of the indemnitor's breach of that duty, the indemnitee had been held liable on a technical basis only.

Id. This standard is essentially the standard for vicarious liability. Ferrini suggests that once comparative contribution is adopted, implied indemnity should be limited to cases of vicarious liability, respondeat superior, or similar cases involving pre-tort relationships. *Id.* In rejecting implied indemnity, the court in *Vertecs* relied in part on Comment, *supra* note 72, at 422, which urged a greater emphasis on contribution than on active-passive indemnity because South Dakota's contribution statute, based on relative degrees of fault, is consistent with the tort philosophy of comparative negligence in South Dakota.

The *Vertecs* court also cited Davis, *supra* note 132, at 560, which concluded that "there are legitimate rights of indemnity among negligent concurrent tortfeasors in a variety of factual situations." Davis proposed that the test for implied indemnity should be a "disproportionate duty" test. *Id.* at 546-53. Davis concluded that, "[i]n order to have a mature, well-rounded law governing relations between negligent tortfeasors, contribution should be allowed between them in proportion to their relative fault in cases where indemnity is not proper." *Id.* at 560.

be extremely harsh and unfair. A mere claim by one tortfeasor that he was less at fault than his co-tortfeasors would not suffice. Instead, implied indemnity could be restricted to specific types of cases in which the imbalance of fault is severe, for example, "where one tortfeasor, by his active conduct, has created a danger to the plaintiff, and the other has merely failed to discover or to remedy it."[142] Just as Alaska recognizes a right of implied indemnity in cases of respondeat superior,[143] the courts also could recognize the right in favor of a retailer, whose negligence in failing to detect a product defect was only slight, against the manufacturer who created the dangerous condition. If the facts of a case were this simple, there would be a clear disparity in the degree of fault attributable to the retailer and the manufacturer. Total loss shifting in this case would not be difficult to justify and arguably would be preferable to pro rata contribution.[144]

142. PROSSER, *supra* note 16, § 51, at 343. This approach — contribution plus a limited right to implied indemnity — was proposed at the Illinois Judicial Conference Study Committee on Indemnity, Third Party Actions, and Equitable Contributions:

> 5(b) Nothing contained in this article shall impair any right of indemnity or subrogation under existing law except that the right to indemnification of one personally at fault shall be limited to those circumstances where he merely fails to discover the dangerous condition created by another.

Ferrini, *supra* note 64, at 269 (quoting Report of the Study Committee on Indemnity, Third Party Actions and Equitable Contributions, SR 21, SR 27, SR 28). The committee's comments explained that this language was intended to limit indemnity "to its common law uses once [comparative] contribution is accepted as the law . . . ." *Id.* The purpose was to avoid "the results of creative expansion of indemnity by Illinois courts, which the committee believes have developed only in response to the absence of contribution." *Id.* The rule could also be applied, as Prosser explains,

> against a supplier of goods when a retailer or user of the goods incurs liability by reason of negligent reliance upon the supplier's proper care. The same is true where the owner of a building negligently relies upon a contractor who makes improvements or repairs. Again, it is quite generally agreed that there may be indemnity in favor of one who was under only a secondary duty where another was primarily responsible, as where a municipal corporation, held liable for failure to keep its streets in safe condition, seeks recovery from the person who has created the condition, or a property owner who has permitted it; or an owner of land held liable for injury received upon it sues the wrongdoer who created the hazard.

PROSSER, *supra* note 16, § 51, at 342-43 (footnotes omitted).

143. *See* Austin v. Fulton Ins. Co., 498 P.2d 702, 705 (Alaska 1972).

144. *See generally* O'Donnell, *supra* note 132, at 287-88. The author contends that the issues involved in determining an indemnity claim will be argued, for example as defenses, in the plaintiff's case anyway. O'Donnell concludes that even if indemnity would add a slight burden to the judge or jury it is justified. "[The] sacrifice of fairness to [an] individual litigant would be a high price for what would often be a slight saving of judicial time." *Id.* at 287; *see also* Ferrini, *supra* note 64, at 268 (urging the continued vitality of indemnity, at least in its traditional form (applying in cases of pre-tort relationship) as part of a flexible and equitable system of comparative contribution and implied indemnity).

Other cases in which denying indemnity may be extremely harsh and unfair are

Unfortunately, the over-simplified example of the retailer is misleading. Defining clear standards for implied indemnity has proven extremely difficult and has resulted in a variety of vague formulations.[145] The Alaska Supreme Court's rejection of the implied indemnity doctrine in *Vertecs* was motivated in part by the difficulties it saw in determining the boundaries of a narrow category of slightly negligent tortfeasors.[146] Furthermore, the case by case development of the doctrine would be slow in producing a body of predictable authority. Numerous cross-claims and third party claims could be expected, and the volume and cost of litigation based on implied indemnity theories would increase.[147]

In addition, as the *Vertecs* court noted,[148] adoption of implied indemnity could discourage settlements. When pro rata contribution affords the sole method of loss allocation, a good-faith settlement ends the litigation for the settling party by barring later contribution claims against him.[149] Indemnity rights, however, are unaffected by settlement under the statute.[150] Thus, if implied indemnity were available, settlement would not guarantee a discharge from liability for a settling party in all cases; a slightly negligent tortfeasor could not sue for contribution, but may sue for implied indemnity. This might reduce the attractiveness of settlement as a strategy.[151] Nevertheless, it is the greatly blameworthy tortfeasor — the potential indemnitor — whose settlement is discouraged by the availability of implied indemnity, because a slightly blameworthy tortfeasor would not be sued for indemnity.

where the statute of limitations has run on the contribution claim, *see* ALASKA STAT. § 09.16.030(d) (1983), or culpable parties are not subject to service of process, forcing one tortfeasor to bear the entire loss.

145. *See Vertecs*, 661 P.2d at 624.

146. *See supra* notes 115-19 and accompanying text.

147. The projected increase in the volume of litigation may be viewed as a consequence of discouraging settlement.

148. *See supra* note 121 and accompanying text.

149. ALASKA STAT. § 09.16.040(2) (1983).

150. *See* ALASKA STAT. § 09.16.010(f) (1983).

151. This uncertainty could be avoided by discharging a settling tortfeasor from liability for implied indemnity as well as contribution. This approach was recently adopted by statute in Missouri:

> When an agreement by release, covenant not to sue or not to enforce a judgment is given in good faith. . . . [it] shall discharge the tortfeasor to whom it is given from all liability for contribution or non-contractual indemnity to any other tortfeasor. The term "non-contractual indemnity" as used in this section refers to indemnity between joint tortfeasors culpably negligent, having no legal relationship to each other and does not include indemnity which comes about by reason of contract, or by reason of vicarious liability.

MO. ANN. STAT. § 537.060 (Vernon Supp. 1984). *See generally* Fischer, *supra* note 53.

The dynamics of the settlement process are illustrated, albeit simplistically, in the following hypothetical case. Assume that P sues D1 and D2 for negligence, seeking $100,000 in damages. Assume further that D1 is 90% at fault for manufacturing a defective product, and D2 is 10% at fault for failing to discover the defect. Implied indemnity, if permitted, would allow D2 to shift his entire loss to D1 for breach of implied warranty. This creates a disincentive for D1 to settle because, although the settlement would discharge his potential liability to D2 for pro rata contribution,[152] it would not discharge his potential liability for indemnity to D2, if D2 had to pay P.[153]

The same case comes out differently when indemnity is unavailable pursuant to the *Vertecs* rule. D1 is able to offer P a settlement without the risk of subsequent liability to D2. If settlement were achieved between D1 and P, and D2 were not involved in the settlement, D2 would be liable either for contribution to D1 (if D1 paid the entire damages and obtained a release of D2),[154] or for damages to P for the unrecovered amount of P's loss. Moreover, D1 has some incentive to avoid litigation with D2, because if D1 merely obtained a release for D2, D2 could raise a defense of nonnegligence. Such a defense might be attractive to a sympathetic jury whose only other option would be forcing D2, who was only 10% at fault, to bear 50% of the loss.[155] Thus, the pro rata system might induce a highly culpable party to offer to pay more than a pro rata share of the damages in order to bring a slightly culpable party into the settlement process.

In sum, it is difficult to balance fairness and efficiency in Alaska's current tort loss allocation system. If the supreme court had adopted implied indemnity among joint tortfeasors, the resulting system would still strike only a rough balance. Therefore, other approaches should be considered.

IV. An Alternative Approach to Tort Loss Allocation Among Concurrently Negligent Tortfeasors: Matching Liability with Fault

A. Matching Liability with Relative Fault

The Alaska Supreme Court has considered several alternative systems of tort loss allocation. The system approved in *Vertecs* forces concurrently negligent tortfeasors to share the loss equally.[156] The *Vertecs* court rejected an alternative system that would split

152. Alaska Stat. § 09.16.040(2) (1983).

153. *Id.* § 09.16.010(f).

154. *Id.* § 09.16.010(b),(d). In Criterion Ins. Co. v. Laitala, 658 P.2d 112, 116-17 (Alaska 1983) (distinguishing Young v. State, 455 P.2d 889, 893 (Alaska 1969)), the court held that a post-judgment settlement between a tortfeasor's insurer (Criterion) and an injured party discharged another tortfeasor (Laitala) from liability to the injured party even though Laitala was not specifically named in the release. The court reasoned that because the statute of limitations had run on any claims by the injured party against Laitala, the general release in effect discharged Laitala under Alaska Statutes section 09.16.010 (d) (barring a settling tortfeasor's contribution action unless the settlement extinguishes the non-settling tortfeasor's liability), and Laitala was liable for contribution to Criterion. *Id.*

In a concurring opinion, Justice Rabinowitz argued that precisely because the statute of limitations had run on the plaintiff's claims against Laitala, the release could not have discharged Laitala in any real sense. *Id.* at 118. Justice Rabinowitz noted that section 09.16.010 (d) "was intended only to protect a non-discharged tortfeasor . . . from being sued by both the settling tortfeasor and the injured party." *Id.* (footnote omitted). Thus, that section does not apply where the non-discharged tortfeasor is protected by the statute of limitations. *Id.* Nevertheless, even Justice Rabinowitz agreed that Laitala was liable for contribution because Criterion's contribution action was timely. *Id.* at 114 n.3, 118.

Justice Rabinowitz suggested that the plaintiff and Criterion probably did not consider Laitala when they settled because Laitala was protected by the statute of limitations. *Id.* at 118 n.1. However, the statute of limitations did not protect Laitala from a contribution action by Criterion; thus, in settling, Criterion may have contemplated a later suit against Laitala for contribution. Although a full discussion of the ramifications of *Laitala* is beyond the scope of this note, it is important to note that the supreme court will treat a tortfeasor as discharged with respect to the plaintiff under section 09.16.010 (d), for purposes of contribution liability, if the statute of limitations has run on the plaintiff's claims against him.

155. D2, only 10% negligent, may be in a good position to appeal to the jury's sense of fairness if the jury understands that under the pro rata system D2 will pay either 50% of the damages, if D2 is found to be negligent, or none, if D2 is found not to be negligent. Jury confusion over this issue is demonstrated in *In re* Barrow Air Crash, No. 3AN-81-2321 Civ. (Alaska filed Oct 13, 1978). The plaintiff and each of two defendants were negligent in causing plaintiff's injuries. In accordance with the rule of comparative negligence, the jury instructions and verdict form required the jury to determine the relative percentages of fault between the plaintiff on one line and the defendants, as a group, on another line. The jury sent a note to the judge asking whether there should be three lines for percentages of fault, one each for the plaintiff, the first defendant, and the second defendant. After being instructed that they should simply subtract the plaintiff's percentage from 100% to find the defendants' percentage, the jury sent another note to the judge:

> Are you saying we may *not* assign separate percentages to [defendant] Ehredt and [defendant] DeHavilland? We want to assign each party, *i.e.*, [plaintiff] Walters, Ehredt, and DeHavilland, the % we feel applies to each specific party.

(Transcript 3002-03). The judge refused to explain to the jury that relative fault among defendants was irrelevant and that no relative fault apportionment would occur. He sent a verdict to the jury with separate lines for percentages of fault for each of the three parties. The jury found the plaintiff 10% at fault, the first defendant 75% at fault, and the second defendant 15% at fault. The jurors later learned that the defendants would split the liability equally. Several jurors expressed their disappointment to the judge and indicated that the verdict might have come out differently had they known how the pro rata contribution system worked. Appellant's Opening Brief at 11-17, *In re* Barrow Air Crash.

156. The system of tort loss allocation in Alaska after *Vertecs* is pro rata contribution and no implied indemnity among currently negligent tortfeasors. *See* Vertecs Corp. v. Reichhold Chem. Corp., Inc., 661 P.2d 619, 625-26 (Alaska 1983).

tortfeasors into two categories — those who should share equally in the loss and those whose minimal degree of negligence entitles them to shift the loss entirely.[157] Another alternative, which was not seriously considered by the court in *Vertecs* or in *Arctic Structures*, is a system of partial indemnity in which each tortfeasor's share of the loss is proportionate to his degree of fault.[158]

This last alternative — matching liability with relative fault — is the tort loss allocation system most consistent with the comparative negligence system employed in Alaska.[159] Under comparative negligence, juries may consider the relative fault of the plaintiff and defendant in determining the plaintiff's maximum recovery. Consider a hypothetical case in which plaintiff (P) is found to be 10% at fault and the defendants 90% at fault in causing a $100,000 loss to P. The old contributory negligence rule would have barred P's suit altogether. The comparative negligence rule permits P to recover $90,000 from the defendants. As the Alaska Supreme Court noted: "The basic objection to [contributory negligence] — grounded in the primal concept that in a system in which liability is based on fault, the extent of fault should govern the extent of liability — remains irresistible to reason and all intelligent notions of fairness."[160]

The fundamental principle of fairness that supports the comparative negligence system also strongly supports the adoption of implied partial indemnity or comparative contribution for fault-based loss allocation among concurrently negligent *defendants*.[161] For example,

157. A system dividing tortfeasors into two categories would result where pro rata contribution applies to all concurrently negligent tortfeasors except those determined to be non-participating, passive, or secondary. These tortfeasors would be entitled to indemnity.

158. Partial indemnity and comparative contribution are identical in outcome. Implied partial indemnity is used by some courts to accomplish apportionment based on relative fault where no statutory scheme accomplishes this. *See generally* Comment, *supra* note 32, at 130-44.

159. Both implied partial indemnity and comparative negligence apportion loss among defendant tortfeasors according to their relative degrees of fault. Apportionment by fault parallels the notion of comparative negligence and should be adopted in comparative negligence jurisdictions. UNIFORM COMPARATIVE FAULT ACT, 12 U.L.A. Supp. 39, 40 commissioners' prefatory note (1985). Once a jury has apportioned fault in a plaintiff's action under the comparative negligence rule, it is intuitively unfair to require pro rata contribution among defendants. *See supra* note 155.

160. Kaatz v. State, 540 P.2d 1037, 1048 (quoting Li v. Yellow Cab Co., 13 Cal. 3d 804, 810, 532 P.2d 1226, 1230-31, 119 Cal. Rptr. 858, 862 (1975) (footnotes omitted)). The court also quoted the following strong language from *Li*: "The essence of that criticism [of contributory negligence] has been constant and clear: the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault. Against this have been raised several arguments in justification, but none have proved even remotely adequate to the task." *Id.*

161. *Cf.* Sowle & Conkle, *Comparative Negligence Versus the Constitutional Guarantee of Equal Protection: A Hypothetical Judicial Decision*, 1979 DUKE L.J. 1083, 1124-33 (presenting a constitutional argument that there is no legally significant difference between a negligent plaintiff and a negligent defendant, each seeking to share a tort loss; there is no legitimate and meaningful government interest in treating the two categories differently; and the plaintiff-defendant allocation rules should match the defendant-defendant allocation rules).

under the current rule of pro rata contribution, if D1 and D2 were concurrently negligent defendants, they each would be liable under pro rata contribution for 50% of the judgment. Under a relative fault system, if a jury found D1 to be 90% at fault and D2 10% at fault, D1 would be liable for 90% and D2 for 10% of the damages awarded to the plaintiff. In deciding whether to settle, the defendants would estimate relative degrees of fault. Their estimates and presumably their settlements would more closely reflect actual culpability if litigation were expected to result in apportionment according to fault.

A recent trend toward more equitable treatment of concurrent tortfeasors is evident.[162] The first step toward embracing this trend in

162. *See Kaatz*, 540 P.2d at 1049. Apportioning loss among wrongdoers based upon relative fault appears to represent the modern wisdom in this area of jurisprudence. PROSSER, *supra* note 16, § 51, at 344-45. The Prosser treatise recognizes that changes in the law of contribution and relative fault will make courts reconsider indemnity rules. Now that the choice is no longer between the two stiff alternatives of pro rata contribution and total loss-shifting indemnity, comparative fault modifications have begun and can be expected to continue. Confusion over labels should not discourage attempts to modify the law. *Id.* at 344; *see Kaatz*, 540 P.2d at 1047 (recognizing trend in the majority of American jurisdictions toward comparative fault systems); UNIFORM COMPARATIVE FAULT ACT, 12 U.L.A. Supp. 39 commissioners' prefatory note (1985); Ferrini, *supra* note 64, at 258, 260. *See generally* Comment, *supra* note 43; Williams & Davidson, *supra* note 43, at 175-76.

In *Vertecs* the Alaska Supreme Court relied in part on American Motorcycle Ass'n, Inc. v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978), for its statement that the doctrine of implied indemnity has left indemnity jurisprudence in disarray. *See Vertecs*, 661 P.2d at 624 n.12. In *American Motorcycle Ass'n*, the California court avoided potential problems resulting from vague standards for "active-passive" indemnity by permitting implied *partial* indemnity. *See American Motorcycle Ass'n*, 20 Cal. 3d at 595, 608, 578 P.2d at 910, 918, 146 Cal. Rptr. at 191, 199. The development of implied partial indemnity in California demonstrates two important points. First, the new doctrine highlights the current movement toward the development of equitable loss-shifting among wrongdoers. *See, e.g.*, ILL. ANN. STAT. ch. 70, §§ 301-05 (Smith-Hurd Supp. 1983) (codifying comparative contribution — shifting loss according to relative degrees of fault — two years after the Illinois Supreme Court judicially created that right in Skinner v. Reed-Prentice Div. Packing Mach. Co., 70 Ill. 2d 1, 374 N.E.2d 439 (1977), *modified*, 70 Ill. 2d 16, *cert. denied*, 436 U.S. 946 (1978)); Comment, *supra* note 43, at 173.

Initially, indemnity jurisprudence was expanded to promote the goal of requiring each tortfeasor to bear the burden of the loss commensurate with his culpability. Later, courts and legislatures softened the harsh effects of all-or-nothing loss shifting by adopting comparative negligence. Comparative contribution is the next logical link in the evolution of these remedies. The Alaska Supreme Court joined this movement by judicially creating comparative negligence and noting that it requires amendment

Alaska was perhaps the supreme court's statement in *Kaatz* that it is willing to accept jury verdicts apportioning fault, even though not "precisely scientific," in order to avoid the harshness of contributory negligence.[163] The judicial efficiency and vagueness arguments advanced by opponents of comparative negligence were rejected by the court in *Kaatz:*

> Judicial administration of the [comparative negligence] rule has not presented insuperable difficulties in those jurisdictions which have long employed it. Experience has not borne out the argument that comparative negligence is difficult for courts and juries to apply.
>
> Similarly, careful studies tend to show that settlement of cases can be achieved as readily under the comparative negligence system as under the contributory negligence rule.[164]

The supreme court has indicated the importance of altering the unfair rule of statutory pro rata contribution in Alaska.[165] In *State v. Guinn,*[166] decided one year after the court adopted comparative negligence, the court said in a footnote: "We are cognizant that this court's adoption of the doctrine of comparative negligence in *Kaatz v. State* will require amendment of Alaska's Uniform Contribution Among Tortfeasors Act."[167] Similarly, in *Vertecs,* the Alaska Supreme Court recognized that "pro rata contribution may not in all cases be the most fair method of loss-shifting . . . ."[168]

The Alaska Supreme Court could have taken the initiative and adopted implied partial indemnity.[169] Judicial action in the face of legislative silence or indecision in the field of loss allocation is not new

of Alaska's Contribution Act. *See* State v. Guinn, 555 P.2d 530, 547 n.42 (Alaska 1976).

The second point highlighted by the development of implied partial indemnity is the crucial role the judiciary has played in the development of equitable loss shifting. In New York, for example, the judicial adoption of the implied partial indemnity doctrine was followed by legislative enactment of a comparative contribution statute two years later. *See* N.Y. CIV. PRAC. LAW §§ 1401-04 (McKinney 1976). The same process occurred in Illinois. *See* Comment, *supra* note 43, at 173. The Alaska Supreme Court has performed an equally significant role in the field of loss allocation. Alaska is one of a few states where the old contributory negligence rule was replaced by the judiciary with comparative negligence. The *Kaatz* decision was a judicial response to nine years of legislative indecision. *See infra* note 170 and accompanying text.

163. *Kaatz,* 540 P.2d at 1048. Juries may naturally want to apportion damages in cases of great disparity of fault. *See supra* note 155.

164. *Kaatz,* 540 P.2d at 1048 (footnote omitted).

165. *Guinn,* 555 P.2d at 547 n.42; *see also Arctic Structures,* 605 P.2d at 435 n.29.

166. 555 P.2d 530 (Alaska 1976).

167. *Id.* at 547 n.42 (citations omitted).

168. *Vertecs,* 661 P.2d at 625.

169. It has been noted recently that courts have more flexibility to modify common law indemnity than they do to modify statutory pro rata contribution; nevertheless, the respective role of the legislature should be considered. *See* PROSSER, *supra* note

in Alaska. The judicial adoption of comparative negligence in *Kaatz* occurred nine years after the legislature first considered, but failed to enact, a bill to adopt comparative negligence.[170] At the time *Kaatz* was decided, at least twenty-six states had enacted comparative negligence statutes, but only three states, including Alaska, had judicially adopted the doctrine.[171] In contrast, the Alaska Supreme Court took a passive role in 1979 when it "considered and reject[ed] judicial creation of a partial indemnity rule of law," without ever discussing the doctrine in its opinion.[172] Similarly, the decision in *Vertecs* demonstrates that the Alaska Supreme Court is reluctant to intrude on the legislative role.

Clearly, the court believes that adopting implied indemnity would offend the policies of the Contribution Act. Thus, the court would almost certainly believe that adopting implied *partial* indemnity would be a far greater intrusion on the statutory pro rata mechanism, because implied partial indemnity would *replace* statutory contribution rather than supplement it in certain cases. Therefore, it is unlikely that the court will reconsider its rejection of implied partial indemnity in light of the decision in *Vertecs.*

B. Suggested Legislative Amendments to the Contribution Act to Permit Comparative Contribution

It is time for the Alaska legislature to replace its rigid pro rata contribution rule with the comparative fault provision proposed by the House Judiciary Committee in 1970.[173] States that have adopted a comparative fault system for plaintiffs, as Alaska did in *Kaatz,* should also adopt a comparative fault system for defendants.[174] The Alaska legislature could accept the judicial invitations and enact comparative contribution by simply amending the Contribution Act provision that provides: "in determining the pro rata shares of tortfeasors in the en-

16, § 51, at 344; *see also id.* § 3, at 20 (at least one current commentator believes courts should be more active in re-examining outmoded statutes).

170. For a brief recount of the unsuccessful attempts to pass comparative negligence legislation in Alaska, see Williams & Davidson, *supra* note 43, at 175 n.5.

171. *See id.* at 175 & nn.2-4.

172. *Arctic Structures,* 605 P.2d at 435 n.27.

173. *See* Heft, *Spreading the Burden: The Better Way to Accomplish Contribution Is by Comparative Negligence,* 22 FED. INS. COUNSEL Q. 37 (Summer 1972) (urging the adoption of comparative contribution and offering practical suggestions for attorneys who may later work with the doctrine); Note, *Reconciling Comparative Negligence, Contribution, and Joint and Several Liability,* 34 WASH. & LEE L. REV. 1159 (1977) (urging the adoption of comparative contribution); *see also supra* note 50.

174. *See* UNIFORM COMPARATIVE FAULT ACT, 12 U.L.A. Supp. 39, 40 commissioners' prefatory note (1985) (suggesting the enactment of a comparative contribution statute).

tire liability . . . their relative degrees of fault shall not be considered."[175] The amendment should allow consideration of relative fault. For clarity, the statute should also be amended by replacing the phrase "pro rata share" with "equitable share" wherever it appears in the Contribution Act.

In 1983, the Alaska Supreme Court recommended an amendment along these lines:

> We question whether the rule [prohibiting consideration of relative fault] "distribute[s] the responsibility equitably among those who are jointly liable." . . . While the question of whether the Act should be amended is a matter committed to the judgment of the legislature, it is our view that where one joint tortfeasor seeks contribution from another, the tortfeasor's "pro rata share" should mean a share proportionate to his comparative fault. We add that such a rule would not undermine the rule of joint and several liability announced in *Arctic Structures, Inc. v. Wedmore*. We invite legislative consideration of this aspect of the Act.[176]

The Uniform Comparative Fault Act (UCFA) would provide guidance to those drafting an amendment to the Contribution Act.[177] The UCFA is the most recent product of the National Conference of Commissioners on Uniform State Laws, approved in 1977, and is expressly intended to replace the 1955 pro rata Uniform Contribution Among Tortfeasors Act in those states that have adopted comparative negligence.[178] The UCFA requires that percentages of fault be established for each party in an action, including a plaintiff who is contributorily at fault.[179] The basis for contribution is each party's established equitable share, determined by considering relative degrees of fault in light of the nature of the conduct and its causal relationship to the damages.[180] Joint and several liability is retained, but reallocation of uncollectible shares occurs among all negligent parties, including negligent plaintiffs.[181]

V. CONCLUSION

The doctrines of implied indemnity and contribution were developed to remove common law obstacles to the fair allocation of tort loss. Alaska's tort loss allocation system is gradually advancing toward the goal of fairness, paralleling the increasing confidence in the judicial system's ability to apportion fault accurately and efficiently.

175. ALASKA STAT. § 09.16.020 (1983).

176. Criterion Ins. Co. v. Laitala, 658 P.2d 112, 118 n.11 (Alaska 1983) (citation omitted).

177. *See* 12 U.L.A. Supp. 39 (1985).

178. *Id.* at 40 commissioners' prefatory note.

179. *Id.* § 2(a), at 43.

180. *Id.* § 2(b); *see id.* at 43-44 commissioners' comment (listing circumstances relevant to determining relative fault).

The Alaska Supreme Court has participated in this development, most notably by adopting comparative negligence. Nonetheless, the court has clearly signalled its view that further improvement in this field requires the combined effort of the judiciary and the legislature.

The Alaska Supreme Court made it clear that, in light of the fact that the legislature chose and has left intact an equal sharing mechanism, the court will not impose on the legislature the court's view that contribution should be apportioned according to fault. As matters now stand, therefore, Alaska's tort loss allocation system forces joint tortfeasors to share losses equally regardless of their relative degrees of fault. Given the court's adherence to the statutory rule of pro rata contribution, its conclusion in *Vertecs* that adopting implied indemnity would create more uncertainty than it would resolve was correct. Rather than add a vague doctrine, Alaska should modernize its current rules to accomplish their intended result. The tradeoff between fairness and efficiency is unnecessary. The conflict should be resolved by amending the Contribution Act to permit comparative contribution. This legislative action would implement a tort loss allocation system that matches each party's liability with the percentage of damage for which he is responsible.

David Edward Mills

The Attack on Joint and Several Liability

By James Granelli

• In Los Angeles a driver high on drugs went through a stop sign and was broadsided by another motorist. A 16-year-old passenger in his car was crippled and brain-damaged in the 1979 crash. Last March a jury returned a verdict of $2.16 million against the driver—and the City of Los Angeles. The city had failed to trim bushes that partly obstructed the view of the driver and was found to be 22 percent liable. But unless the award is overturned on appeal, the city will pay nearly all of it. The negligent driver has no money and three co-defendants settled for their insurance policy limits—a total of $200,000. (*Sills v. City of Los Angeles*, C-333504, San Fernando Superior Court.)

• In New York City 12 persons were killed and scores injured in a 1970 gas explosion caused by a restaurant owner who turned on a partly installed gas main that had been inspected by the city. A jury found the city 4 percent negligent, but the verdict exposed the city to millions of dollars in damages because the defendants most at fault were bankrupt. But the city was lucky; the verdict was reversed on other grounds in 1983. (*O' Connor v. City of New York*, 447 N.E.2d 33.)

• In San Diego a university soccer player was a passenger in a car on the scenic Torrey Pines Road when a speeding drunk driver crossed the center line on a curve and smashed into the car, killing two of his teammates and rendering him quadriplegic. The drunk driver offered his insurance policy limits of $25,000. The city also was named as a defendant on a claim for faulty road design. Rather than risk a jury trial, the city settled in 1983—for $1.6 million. (*Duggan v. City of San Diego*, Civ. 484152, San Diego Superior Court.)

Across the nation these judgments and settlements have become more common, especially in catastrophic injury cases. Public entities, often dragged into cases as defendants with scant liability exposure, find themselves the target defendants forced to pay off the entire judgment when codefendants can't pay. The real villain, public officials say, is the doctrine of joint and several liability.

Changing the ancient doctrine

Fourteen states have limited or abolished the doctrine in recent years. Municipal officials and some lawmakers want the doctrine changed, and pending legislation in California and New York —home of the nation's largest personal injury verdicts—would doom the joint-and-several rule, if enacted.

Developed over centuries by English and American courts, the rule dictates that when a person is injured by the joint acts of several people, liability is indivisible. That means, in practical terms, a plaintiff can collect an award from the defendants most able to pay—those with "deep pockets."

The rationale is basic fairness. "Who should suffer, the innocent victim or one of the wrongdoers who can afford to pay?" said James Frayne, executive director of the California Trial Lawyers Association. He and CTLA president Robert B. Steinberg of Los Angeles also contend that the joint-and-several rule acts as a deterrent—forcing cities, for instance, to trim trees that could obscure a motorist's vision and lead to an accident—and keeps a penniless victim from going on welfare.

"These cases are not that easy to win," Steinberg said. "So when the city is included, the jury has got to be pretty darned convinced the city was at least partially liable."

"The nature of the beast is such that it's the single greatest problem that cities face in liability issues," said California State Assemblyman Alister McAlister, who is supporting a colleague's proposal to limit the liability of public bodies. And Jay Biggins, consultant to New York City's Office of Management and Budget, complained, "The entire public treasury is considered available to each and every plaintiff. They're treating government as the ultimate insurer."

The League of California Cities has compiled figures from 134 cities statewide on cases involving joint and several liability. It found that those cities paid more than $15.5 million in settlements and judgments during the fiscal year ending in June 1984. Two years earlier the same cities paid out $4.5 million. That kind of a hike has forced insurance carriers either to raise premiums drastically—300 percent to 450 percent for one group of California cities—or to stop writing liability policies for public entities.

It is the hand of the insurance industry that the plaintiffs' trial bar sees behind the current efforts to abolish or modify the rule.

"Insurance companies have sold public entities a bill of goods that would save them millions and millions of dollars if they could have the joint-and-several rule changed," said Frayne. Although his group killed four bills to limit the rule in the last five years, Frayne admits the fight this year will be the toughest ever. Not only is the League of California Cities better organized, he said, but more legislators are sensitive to the needs of local governments because they once served on those bodies.

Even if no state changes the rule this year, lobbyists for public entities believe that change is inevitable. "We're very confident that, at some time, we will succeed because the joint-and-several

Illustrations by Chuck Slack

problem becomes more severe every year," said Kenneth Emanuels, who heads the lobbying team for the California league. State Sen. John F. Foran, who introduced one of those previous bills and reintroduced it this session, said, "I've never seen a bill as controversial as this one pass in the first or second session."

A new generation of lawsuits

One reason joint and several liability has become more of a problem for public entities is that more plaintiffs are going to court. It used to be that injured persons whose own negligence, no matter how minor, contributed to their injuries could not sue anyone else. Contributory negligence is still the rule in five states, but the rest of the nation has adopted comparative negligence statutes, which allow partly negligent plaintiffs to recover damages—minus the percentage of their own fault—from others who caused their injuries. Most of the "comparative" states bar recovery if the plaintiff is 50 or 51 percent negligent.

As comparative negligence opened courtroom doors to a new generation of lawsuits in the 1970s, public officials began questioning whether the rationale for joint and several liability used for non-negligent plaintiffs ought to apply in cases brought by partly negligent plaintiffs. Fairness, they claim, also dictates that plaintiffs bear more of the responsibility for their own negligence.

"If you give more people the opportunity to recover damages, you also should give them the risk of assuming an unrecoverable judgment," said David Lyons, legal counsel to the legislative service bureau in Iowa, one of nine states that have modified the rule. Five other states have abolished it.

But it is the innocent plaintiff, the one who would not be barred by any contributory negligence law, who forms the biggest obstacle to those seeking to change the rule. "If we go to the legislature with all potential allies on our side and we don't have an answer for how we can take care of innocent victims, we'll have a hard road ahead," said San Diego City Attorney John W. Witt.

The Iowa rule

Iowa thinks it has at least one answer. After the Iowa Supreme Court adopted pure comparative negligence in December 1982 and retained joint and several liability in a case a year later, the legislature went into action, Lyons said, with an idea of preventing "someone who's more at fault" from benefiting in a lawsuit. First, the legislature adopted a modified 50 percent comparative fault law; then it altered the joint-and-several rule.

Under the Iowa law, joint and several liability remains in effect against defendants who are more at fault than the plaintiff. But a defendant less negligent than a plaintiff pays only the percent of the award for which he is liable. So if a plaintiff is 20 percent negligent, one defendant is 10 percent negligent and another defendant is 70 percent negligent, the plaintiff can collect only 10 percent of any award from the first defendant but could collect either 70 percent or the full 80 percent of the award from the second defendant.

In Minnesota the same facts would present a different outcome under that state's modified joint-and-several rule, said Michael K. Steenson, a tort law professor at William Mitchell College of Law in St. Paul. The state retains the rule except in cases with a judgment-proof defendant. In those cases the share of damages from that defendant is reallocated to all others, including a partly negligent plaintiff.

In some states that have abolished joint and several liability, court decisions have reimposed it in limited situations. In New Hampshire, for instance, the rule is revived when, because of immunities or procedural bars, the plaintiff can collect from only one defendant. Kansas, New Mexico, Ohio and Vermont also have abolished the rule.

No more deep pockets

Foran's California bill provides that all defendants would pay for pain and suffering losses "based on their fault rather than on the size of their pocketbooks," he says. In other words, if a city is 20 percent liable, it would only pay 20 percent of any award for pain and suffering, the noneconomic damages that provide plaintiffs with most of the money against public entities. The bill would not limit the amount of money defendants would have to pay for such damages as medical expenses or lost wages. An identical bill, introduced in February 1983, was amended to apply only when a defendant was less than 40 percent liable. The amended version died in committee.

"There must be comparable degrees of fault," Foran maintains. "Equity de-

States abolishing joint and several liability

New Hampshire and Vermont

Abolished the rule in favor of several liability in 1981. N.H. Rev.Stat.Ann. Sec. 507:7-a; Vt. Stat.Ann. Tit. 12, Sec. 1036.

Kansas

Abolished the rule in 1978 case that interpreted a 1976 comparative negligence statute. *Brown v. Keill*, 580 P.2d 867, held that the rule does not apply in comparative negligence cases but that several liability does.

Ohio

Abolished the rule in favor of several liability in 1980. Ohio Rev.Code Sec. 2315.19(A)(2).

New Mexico

Abolished the rule in favor of several liability through state supreme court decisions that adopted comparative negligence. *Scott v. Rizzo*, 634 P.2d 1234 (1981); *Bartlett v. New Mexico Welding Supply Inc.*, 646 P.2d 579 (1982).

States with limitations on joint and several liability

Nevada, Texas, Indiana, Louisiana, Oregon, Pennsylvania

Limited the rule so that it applies only when plaintiff's negligence is less than defendant's. Otherwise, several liability applies when plaintiff's negligence is greater than defendant's. Nev. Rev.Stat. Sec. 41.141(3) (1975); Tex. Rev.Civ.Stat.Ann. Art. 2212(a) (Vernon's Supp. 1982, 83, 85); Indiana SB-287 (1985); La. Civ. Code Ann. Art. 2324 (1982); Or. Rev.Stat. Sec. 18.485 (1983); 42 Pa. C.S. Secs. 7102(b), 8322 et seq; *General State Authority v. Sutter Corp.*, 452 A.2d 75 (1982).

Iowa

Limited the rule so it would not apply to defendants found to bear less than 50 percent of total fault assigned to all parties, leaving them liable for their several amount. Iowa 1984 Act, Secs. 668.1-668.3, 619.17.

Minnesota

Limited the rule only to point at which the share of an uncollectible defendant's damages would be reallocated among all others, including partially negligent plaintiff. Minn. Stat.Ann. Sec. 604.01(1).

Oklahoma

Limited the rule to cases where damages cannot be apportioned or when plaintiff is not at fault. *Lawbach v. Morgan*, 588 P.2d 1071 (1978); *Boyles v. Oklahoma Natural Gas Co.*, 619 P.2d 613 (1980).

Sources: City of New York Law Department; Michael K. Steenson, William Mitchell School of Law, St. Paul, Minn; Ohio Municipal League.

mands that a defendant found 10 percent at fault pay only 10 percent of the verdict. One injustice shouldn't provoke another injustice. As more flagrant cases come to the forefront, people will come to realize this isn't free money. It's taxpayers' money. And if we don't do something, we'll have to curtail other services."

But California Assemblyman Elihu Harris, who chairs the judiciary committee that killed Foran's previous bill, is troubled by the proposal. First, he said, potential "deep pocket" defendants—manufacturers, hospitals and insurance companies—are better able to handle the burden of paying damages than the injured victims are.

Harris also believes that statistics are misleading. "I want hard examples," he said. "Statistics on cases settled could mean defense lawyers are lazy. There are not many cases, and those cases that exist are decided by jurors who will have to pay the verdicts in taxes."

Limiting liability

Arguments to abolish or modify the joint-and-several rule may have more merit, he said, if they are limited to the public sector and to cases in which liability is only incidental or passive, such as an accident caused by a speeding drunk driver on a road others have used safely. But a 1982 bill abolishing joint and several liability for only California public entities was defeated when other target defendants sided with the trial lawyers to urge its defeat.

New York City officials, however, think a bill limited to local governments will pass the state legislature. "We think public entities are distinguishable from other defendants because they're looking out for the public welfare," said city consultant Biggins. "The indications are that other target defendants—doctors, hospitals and so forth—won't go over to the trial lawyers' side to fight this bill." To ensure support, the city sent management and budget liaison McGrath to cities throughout the state on a year-long mission to explain the effects of joint and several liability on small cities as well as larger ones.

Ceilings on awards

New York City's proposal goes further than just abolishing the joint-and-several rule for public entities. Besides allowing public entities to pay only their proportionate share of liability, the bill would put a ceiling of $150,000 per individual and $450,000 per occurrence on any award and would force plaintiffs to prove they had incurred at least $2,500 in medical expenses before they could collect damages for pain and suffering. The last provision, Biggins said, is "an attempt to establish objective standards" for pain and suffering. "We're not saying people shouldn't be compensated, we're just saying the numbers are not foreordained in heaven," he said.

In California and New York officials and attorneys for local governments believe the joint-and-several rule is creating a crisis. In California, especially, the tax-limiting initiative known as Proposition 13 has made it difficult for public bodies to raise funds. Some local leaders bemoan what they see as an impending spiral: By paying accident victims, cities have to shift funds from other budgets such as street repairs, leaving potholes or untrimmed bushes that might contribute to accidents and lead to more victims suing the cities.

But other states also are feeling squeezed by the rule. Colorado, Florida and Michigan, for instance, have legislative bills pending or planned for this year. "We see the rule as a major potential problem," said Tami A. Tanoue, staff attorney for the Colorado Municipal League, which is supporting a current bill in the state legislature. In Florida last year, the Florida Medical Association supported a ballot initiative to abolish joint and several liability, but the state Supreme Court struck it from the ballot because it improperly included other issues.

In Michigan settlements and judgments against the state transportation department alone last year hit some $14 million, said State Sen. Alan Cropsey, who noted that payments have been rising dramatically in the last five years. An April 1982 state appellate court decision helped to spur awards against the department by rejecting the state's claim for contribution and letting the joint-and-several rule force the state to pay nearly three times the amount of its liability, said Assistant State Attorney General Carl Carlsen.

In that 1982 case a trucking firm had settled a personal injury suit for $150,000. In a later trial against the codefendant state, the plaintiff won $1,299,400 but was found to be 60 percent negligent. The state, which was 10 percent negligent, had argued that the trucking firm should contribute to the award by paying another $239,820 for its 30 percent share of the blame. But the court ruled that the amount of the settlement was the only setoff the state was entitled to. Carlsen said that with several liability the state would have had to pay only $129,940, instead of $369,760. *Bacon v. Michigan Department of Transportation*, 115 N.W. 2d. 382.

Cropsey said such cases have forced the state to settle more lawsuits to avoid the possibility of higher jury verdicts. As Los Angeles Deputy County Counsel Charles V. Tackett put it: "Many situations are extremely dangerous financially, and if we can work out a deal where we have a sure loss rather than the potential for an extraordinary loss, we take it."

—*Journal*

James R. Granelli is a reporter for the Los Angeles Times.

HB 368

AS 09.16.010
AS 09.16.020(3)
AS 23.30.055

THE QUESTION OF THE LIABILITY OF PARTIES FOR CONTRIBUTION TO A COMMON JUDGMENT IS EXAMINED.

The Supreme Court of Alaska held that an employer obliged under the law to obtain workers' compensation insurance who fails to obtain it is not relieved from the obligation to contribute to a common judgment against a joint tort feasor; the Court agreed that when an employer secures compensation insurance, a third party's cross-claim under AS 09.16.010 for contribution to the common judgment is barred by the exclusivity provisions of AS 23.30.055. State v. Wien Air Alaska, 619 P.2d 719 (Alaska 1980). In this situation, the Court concluded that the employer should not receive the protection of the exclusivity provision when it has failed to secure the payment of compensation; "The exclusivity provision is an incentive for compliance, not a reward for noncompliance." A defendant found to have a lesser degree of fault urged the Court to consider the relative degrees of fault as found by the jury in determining the amount of contribution in order to avoid injustice. The Court indicated that it considered itself bound by the prohibition in AS 09.16.020(1) against considering the relative degrees of fault. That law makes the question of the fair division of contribution a "question for the legislature," citing Criterion Insurance v. Laitala, 658 P.2d 112, 118 n. 11 (Alaska 1983). "We refuse to avoid the clear language of subparagraph (1) prohibiting contribution according to relative fault by relying

on our statutory power to avoid injustice found in subparagraph (3)." Ehredt v. DeHavilland Aircraft Co. of Canada, 705 P.2d 913.

The section in question (and, in fact, the entire chapter) has created problems since the Court's decision on "comparative negligence" in Kaatz v. State, 540 P.2d 1037 (Alaska 1975). The Court has invited legislative review of the chapter a number of times. Review is recommended.

Contract providing for indemnity liability not precluded. — A contract executed in good faith, providing for a measure of indemnity liability, is not precluded by this section. City of Juneau v. Alaska Elec. Light & Power Co., Sup. Ct. Op. No. 2265 (File No. 4795), 622 P.2d 954 (1981).

Cited in Kastner v. Toombs, Sup. Ct. Op. No. 2087 (File No. 4119), 611 P.2d 62 (1980).

Collateral references. — 18 Am. Jur. 2d, Contribution, §§ 33-57; 74 Am Jur. 2d, Torts, §§ 78, 85.

18 C.J.S., Contribution, §§ 2, 6, 8, 11-13.

Manufacturer and dealer or distributor as joint or concurrent tortfeasors, 97 ALR2d 811.

Financial worth of one or more of several joint defendants as proper matter for consideration in fixing punitive damages, 9 ALR3d 692.

Voluntary payment into court of judgment against one joint tortfeasor as release of others, 40 ALR3d 1181.

What statute of limitations applies to action for contribution against joint tortfeasor, 57 ALR3d 927.

Sec. 09.16.010. Right to contribution. (a) Except as otherwise provided in this chapter, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than that tortfeasor's pro rata share of the common liability, and the total recovery of that tortfeasor is limited to the amount paid in excess of the pro rata share. No tortfeasor is compelled to make contribution beyond the tortfeasor's pro rata share of the entire liability.

(c) There is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death.

(d) A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

(e) A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, is subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's pro rata share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.

(f) This chapter does not impair any right of indemnity under existing law. If one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution,

and the indemnity obligor is not entitled to contribution from the obligee for any portion of the indemnity obligation.

(g) This chapter does not apply to breaches of trust or of other fiduciary obligation. (§ 1 ch 80 SLA 1970; am § 13 ch 59 SLA 1982)

Effect of amendments. — The 1982 amendment substituted "of" for "or" in the first sentence of subsection (f).

Legislative history reports. — For report on ch. 80, SLA 1970 (SSSB 245 [FCC]), see 1970 House Journal, p. 437.

NOTES TO DECISIONS

Contract providing for indemnity liability not precluded. — See note under heading "Contract providing for indemnity liability not precluded" following chapter analysis. City of Juneau v. Alaska Elec. Light & Power Co., Sup. Ct. Op. No. 2265 (File No. 4795), 622 P.2d 954 (1981).

Amendment of section required. — The supreme court's adoption of the doctrine of comparative negligence in Kaatz v. State, Sup. Ct. Op. No. 1187 (File Nos. 2259, 2291), 540 P.2d 1037 (1975), aff'd in part, rev'd in part on other grounds, Sup. Ct. Op. No. 1536, 572 P.2d 775 (1977), will require amendment of this section. State v. Guinn, Sup. Ct. Op. No. 1315 (File No. 2451), 555 P.2d 530 (1976).

Rule of joint and several liability not abrogated. — This chapter introduced the concept of pro rata contribution among tort-feasors but it did not abrogate the doctrine of joint and several liability which ultimately makes each concurrently negligent defendant liable for the whole of the plaintiff's loss where the co-defendants turn out to be insolvent. Arctic Structures, Inc. v. Wedmore, Sup. Ct. Op. No. 1993 (File Nos. 3633, 3654), 605 P.2d 426 (1979).

Or judicially modified. — In light of Alaska's existing pro rata legislative scheme for apportionment of damages among joint tort-feasors and the public policies implemented by the legislation, the common law rule of joint and several liability should not be judicially modified. Arctic Structures, Inc. v. Wedmore, Sup. Ct. Op. No. 1993 (File Nos. 3633, 3654), 605 P.2d 426 (1979).

Implied indemnity between concurrently negligent tortfeasors. — Public policy dictates that Alaska should not adopt implied indemnity between concurrently negligen tortfeasors. Vertecs Corp. v. Reichhold Chems., Inc., Sup. Ct. Op. No. 2647 (File No. 6566), P.2d (1983); State Mechanical, Inc. v. Liquid Air, Inc., Sup. Ct. Op. No. 2684 (File Nos. 6145, 6172), P.2d (1983).

When post-judgment agreement establishes right to contribution. — The main requirement for a post-judgment agreement to be considered a satisfaction establishing a right to pro rata contribution is that it terminate the litigation. Criterion Ins. Co. v. Laitala, Sup. Ct. Op. No. 2599 (File No. 6014), 658 P.2d 112 (1983).

Challenge to reasonableness of post-judgment settlement. — The right to challenge the reasonableness of the post-judgment settlement pursuant to subsection (d) of this section was limited, under the facts of the case, to only a determination of whether the amount was reasonable in light of the plaintiff's injuries and the likelihood of the jury award being upheld on appeal. Criterion Ins. Co. v. Laitala, Sup. Ct. Op. No. 2599 (File No. 6014), 658 P.2d 112 (1983).

Reduction of settlement by amount of prior settlement. — Neither this section, AS 09.16.040 nor common sense requires that one settlement be reduced by the amount of a prior settlement. Continental Ins. Co. v. Bayless & Roberts, Inc., Sup. Ct. Op. No. 2032 (File Nos. 2922, 2923), 608 P.2d 281 (1980).

Applied in Alaska Airlines v. Sweat, Sup. Ct. Op. No. 1464 (File Nos. 2912, 3103), 568 P.2d 916 (1977).

Quoted in Insurance Co. of N. Am. v. State Farm Mut. Auto. Ins. Co., Sup. Ct. Op. No. 2675 (File No. 5700), P.2d (1983).

Cited in Howey v. United States, 481 F.2d 1187 (9th Cir. 1973); Macey v. United States, 454 F. Supp. 684 (D. Alaska 1978).

Collateral references. — Liability of several persons guilty of acts one of which alone caused injury, in absence of showing as to whose act was the cause, 5 ALR2d 98.

Release of, or covenant not to sue, one primarily liable for tort, but expressly reserving rights against one secondarily liable, as bar to recovery against latter, 20 ALR2d 1044.

Release of one of joint and several defalcating tortfeasors as releasing insurer which was surety on fidelity bond of each, 35 ALR2d 1122.

Insured's release of tortfeasor before settlement by insurer as releasing insurer from liability, 38 ALR2d 1095.

Manner of crediting one tortfeasor with amount paid by another for release or covenant not to sue, 94 ALR2d 352.

Right of tortfeasor initially causing injury to recover indemnity or contribution from medical attendant causing new injury or aggravating injury in course of treatment, 8 ALR3d 639.

Tortfeasor's general release of cotortfeasor as affecting former's right of contribution against cotortfeasor, 34 ALR3d 1374.

Validity and effect of agreement with one cotortfeasor setting aside his maximum liability and providing for reduction or extinguishment thereof relative to recovery against nonagreeing cotortfeasor, 65 ALR3d 602.

Legal malpractice: defendant's right to contribution or indemnity from original tortfeasor, 20 ALR4th 338.

Sec. 09.16.020. Pro rata shares. In determining the pro rata shares of tortfeasors in the entire liability

(1) their relative degrees of fault shall not be considered;

(2) if equity requires, the collective liability of some as a group constitutes a single share; and

(3) principles of equity applicable to contribution generally shall apply. (§ 1 ch 80 SLA 1970)

NOTES TO DECISIONS

Contract providing for indemnity liability not precluded. — See note under heading "Contract providing for indemnity liability not precluded" following chapter analysis. City of Juneau v. Alaska Elec. Light & Power Co., Sup. Ct. Op. No. 2265 (File No. 4795), 622 P.2d 954 (1981).

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Stated in Macey v. United States, 454 F. Supp. 684 (D. Alaska 1978); Criterion Ins. Co. v. Laitala, Sup. Ct. Op. No. 2599 (File No. 6014), 658 P.2d 112 (1983).

Cited in State Mechanical, Inc. v. Liquid Air, Inc., Sup. Ct. Op. No. 2684 (File Nos. 6145, 6172), P.2d (1983).

Collateral references. — 82 Am. Jur. 2d, Workmen's Compensation, §§ 407-425.

101 C.J.S., Workmen's Compensation, §§ 918-935.

General or special employer's liability for compensation to injured employee. 3 ALR 1181; 34 ALR 768; 58 ALR 1467; 152 ALR 816.

Concurrent or joint employment by several employers. 30 ALR 1000; 58 ALR 1395.

Specific grounds for commutation of payments under workmen's compensation act. 69 ALR 547.

Duty of receiver of self-insured employer to continue payments under workmen's compensation award made prior to receivership. 94 ALR 863.

Fraud or mistake respecting amount of compensation to which employee was entitled as ground for release from settlement or compromise of claim. 121 ALR 1270.

Insurance carrier's liability for part of employer's liability attributable to violation of law or other misconduct on his part. 1 ALR2d 407.

Sec. 23.30.050. Employer's liability despite negligence of a third party. The liability of an employer for medical treatment is not affected by the fact that the employee was injured through the fault or negligence of a third party not in the same employ, until notice of election to sue has been given as required by AS 23.30.015(a) or suit has been brought against the third party without giving notice. The employer has, however, a cause of action against the third party to recover any amounts paid by the employer for the medical treatment in like manner as provided in AS 23.30.015(b). (§ 6(4) ch 193 SLA 1959)

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"Recover" means payment. — The employer is subrogated to the right to "recover," and the word "recover" means to get damages or compensation; not a judgment but the benefits of a judgment. It means payment. Andersen v. Pacific S.S. Co., 8 Alaska 291 (1931), decided under former law.

Employer is necessary party in action against third party. — By reason of the fact that the act gives to the employer the right to recover of a negligent third party the amount he has paid the employee, the employer is a necessary party to the action, which involves and should bind all parties upon the questions of defendant's negligence and the damages sustained by the plaintiff. Andersen v. Pacific S.S. Co., 8 Alaska 291 (1931), decided under former law.

Cited in Matanuska Elec. Ass'n v. Johnson, Sup. Ct. Op. No. 173 (File No. 278), 386 P.2d 698 (1963).

Collateral references. — 81, 82 Am. Jur. 2d, Workmen's Compensation, §§ 65-72, 403, 429-440.

101 C.J.S., Workmen's Compensation, §§ 992-1011.

Sec. 23.30.055. Exclusiveness of liability. The liability of an employer prescribed in AS 23.30.045 is exclusive and in place of all other liability of the employer and any fellow employee to the

employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee at law or in admiralty on account of the injury or death. However, if an employer fails to secure payment of compensation as required by this chapter, an injured employee or the employee's legal representative in case death results from the injury may elect to claim compensation under this chapter, or to maintain an action against the employer at law or in admiralty for damages on account of the injury or death. In that action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of the employment, or that the injury was due to the contributory negligence of the employee. (§ 4 ch 193 SLA 1959; am § 1 ch 42 SLA 1962)

Opinions of attorney general. — While it is true that under the Alaska Workmen's Compensation Act, employers, including the state (AS 23.30.265), are excluded from admiralty liability, this exclusive liability provision cannot act as a limitation on suits against the state under the federal maritime law once the state has unqualifiedly waived its immunity for negligent torts. 1963 Op. Att'y Gen., No. 28.

So much of this section as limits the liability of employers in admiralty must be considered an invalid infringement on the federal jurisdiction. 1963 Op. Att'y Gen., No. 28.

All employees on the Alaska ferry system who meet the classification of seamen or members of the crew within the scope of the Jones Act, 46 U.S.C. § 688, have an exclusive federal remedy within the terms of the Jones Act to the exclusion of the Alaska Workmen's Compensation Act, except as to those injuries that occur in a situation of only local concern or fall within the "twilight zone" between local and federal jurisdiction. 1963 Op. Att'y Gen., No. 28.

The "twilight zone" between local and federal jurisdiction encompasses all those employments for which a reasonable argument can be made both for and against the application of a state workmen's compensation law. 1963 Op. Att'y Gen., No. 28.

Seamen who come within the federal maritime jurisdiction for tort claims under the Jones Act, 46 U.S.C. § 688, can waive the federal remedy and elect to proceed under the Workmen's Compensation Act. 1963 Op. Att'y Gen., No. 28.

State ferry employees, who would be classified by their shore duties as longshoremen or harbor workers, are not subject to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. 1963 Op. Att'y Gen., No. 28.

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Constitutionality. — There is sufficient justification for the workmen's compensation scheme, including the "exclusive liability" provision, for it to pass muster as having a rational basis — even under the "less speculative, less deferential, more intensified means-to-end" application of that test. Wright v. Action Vending Co., Sup. Ct. Op. No. 1224 (File No. 2325), 544 P.2d 82 (1975).

The only classification in this section is that separating work-related and nonwork-related injuries. There is nothing inherently "suspect" about this classification, nor is appellant's right to sue for loss of consortium so "fundamental" as to require a "compelling state interest" to uphold statutory interference. Wright v. Action Vending Co., Sup. Ct. Op. No. 1224 (File No. 2325), 544 P.2d 82 (1975).

This section does not discriminate against women. Wright v. Action Vending Co., Sup. Ct. Op. No. 1224 (File No. 2325), 544 P.2d 82 (1975).

The exclusive liability provision of this chapter does not violate substantive due process since it has a reasonable relationship to a legitimate governmental

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

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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 I (§ 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.

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* 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*).

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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 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).

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 Ingland, *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 states[4] 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's[6]—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 Forward, supra* note 3, at 245 n.26.

8 This rule originated in Wisconsin. *See* SCHWARTZ, *supra* note 2, at 78-80, 286-91.

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 *Forward, 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 675, 79 Cal. Rptr. 106 (1969).

13. *E.g.*, Civil Liability Act of 1961, 1961 Acts of the Oireachtas, 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 scholars[28] 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* Honore, *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. Honore, *supra* note 27.

35. O. ESSER, 2 SCHULDRECHT III 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 it[37] 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 comparision 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 utilitaian 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*[43] specifically stressed the need for a new start after commenting at length on the unsatisfactory prior decisions dealing with products liability defendants.[44] 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.*,[45] 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 rais[es] 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 principle '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 3243 (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 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."

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.)

54. Tort Liability Act, ch. 6, § 1 (1975).
55. 67 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; WOZENCRAFT, *supra* note 2, at §§ 6.1-11; *Townsend*, *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 rec. hite*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978); Stam-baugh v. Sup[illegible]ourt, 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976); Safeway Stores v. Nest-Kart, [illegible] Cal. App. 3d 934, 134 Cal. Rptr. 159 (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, 25 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.[67]

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 rule[68] 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.[69] 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."[70]

But as Clark, J. pointed out in his dissent,[71] 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,[72] 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 "*habitat 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 592, 578 P.2d at 908, 146 Cal. Rptr. at 188.

72. *Id.* at 611, 578 P.2d at 920, 146 Cal. Rptr. at 201.

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" liability[74] 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 D$_2$'s 30%. Why should D$_1$, who is far less at fault than P(1:6), "guarantee" also D$_2$'s share, when P's negligence, no less than D$_1$'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 201 (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 c[illegible]ibutorily negligent plaintiffs.[80] But the overwhelming majority has [illegible]'ed the rule to such plaintiffs, either by express legislation or by [illegible]icial 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 Committee[82] 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 [illegible] 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 198. 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, D_1 25% and D_2 50%. If P chose to collect 75% of his loss of $100,000 from D_1, as he is entitled to do under the "joint and several" liability rule, it would run counter to the *Li* rationale to limit D_1's claim for contribution to $37,500 (50% of $75,000) instead of $50,000 ($D_2$'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 D_1. 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 legislation[88] 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: 15-5.1-3 (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 explanation of its purposes to the Senate Judiciary Committee. 1 SEN. J. APP. 130 (Reg. Sess. 1957).

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

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 to 146 Cal. Rptr. at 195-99. It would serve no purpose in this Study to counter this dissenting 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, 928-29, 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. 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 JURIS'S U.S. CYCL. 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."

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 plaintiffs[102] and comparative contribution among tortfeasors.[103] Legislation in California should follow the same course.

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 final claims of this suit. 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 available[105]—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 latter 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 (§ 61) 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. 785, 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 should 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, D_1 and D_2 was 25:50:25 and D_2 was insolvent, P's share would be increased by 1/3 and D_1'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, D_2's insolvency is already known at the time of the trial, his share can, and should, be immediately redistributed between P and D_1 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, § 34; South Africa's Apportionment of Damages Act of 1956, ch. 2, § 5(1) (relative contribution between solvent joint wrongdoers).

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

115. 20 Cal. 3d 578, 634, 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-a-vis any other tortfeasor (D) as well as P, and (2) reduction of D's liability only by the amount stipulated 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 legislation[125] 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

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.

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 [illegible] 228, 208 A.2d 129 (1965); Pietringer v. Hoger, 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 time[130] by adopting the Contribution Act formula of "pro tanto" reduction also for "partial indemnity." It did so *obiter*, without the benefit of briefing or argument[131] 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 defendants[132] 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, 195-99 (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. Bichel, 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 [illegible] 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, as 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?[143] 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]

143. 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 Ngo 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 888, 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; Worker's 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. 484, 489-90, 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* Larsons, *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 led: 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 negatived 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 Unified 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 unreduced tort liability by the third-party[161] 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 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 recalled[166] 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

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, *Torts: 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.

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. Matoy v. Tahs, 359 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 Baccellieri v. Halcyon Lines, 187 F.2d 910 (3rd Cir. 1951), *rev'd on another ground sub nom.* Halcyon Lines v. Haenn 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 Association[176] which takes a middle ground between the extremes of, on the one hand, abolishing all third-party claims[177] 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 salutory 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 Workers' 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-party[180] 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 benefit. 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 between 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-*

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, 673n (6th ed. 1977).

182. See text accompanying note 132 *supra*.

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

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* Peytal, *Comparative Negligence in Third Party Cases* [1978] 3 CAL. WORKERS' COMP. REP. 99, 100 ("Situation III").

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 Fleming, 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 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 comparision 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:[194] 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 88-108 *supra*.
194. See text accompanying note 111-20 *supra*.

Interstate Libel and Choice of Law: Proposals for the Future

By LAURENCE M. ROSE*

> We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.[1]

By those words, the United States Supreme Court in 1974 instructed the states that "any standard save strict liability"[2] could be devised to determine the fault of a media libel defendant. Since that time each state has struggled to determine the fault standard it should apply, and many states have adopted different fault standards with separate methods of determining what acts violate those standards.[3] Many litigants and courts have failed to see the possibility of a choice of law question, namely, which state's fault standard should apply to an allegedly libelous statement which was investigated, written, edited, or published in another state.[4]

While some commentators have noted the existence of this choice of law question,[5] no one has discussed the matter in any depth.[6] This issue has recently become most important, primarily due to the variety

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1. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).
2. *Id.* at 348 n.10.
3. See notes 87-126 & accompanying text *infra*.
4. *See, e.g.*, Lake Havasu Estates, Inc. v. Reader's Digest Ass'n, 441 F. Supp. 489, 492 (S.D.N.Y. 1977). In that case, however, the judge recognized the issue but did not decide it. *See also* Lambert v. Providence Journal Co., 508 F.2d 656, 658 n.6 (1st Cir. 1975).
5. *See* Anderson, *A Response to Professor Robertson: The Issue Is Control of Press Power*, 54 TEX. L. REV. 271, 275-76 n.19 (1976); Note, *The Gertz Case: Unbalancing Media Rights and Reputational Interests*, 2 W. ST. U.L. REV. 227, 234 & n.57 (1975); Recent Development, *State Court Reactions to Gertz v. Robert Welch, Inc.: Inconsistent Results and Reasoning*, 29 VAND. L. REV. 1331, 1446 (1976).
6. A hypothetical fact pattern was proposed in Reese & Leiwant, *Testimonial Privileges and Conflict of Laws*, 41 LAW & CONTEMP. PROB. 85, 91 (1977), which assumed that