



1-1-1989

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Recommended Citation

Scott J. Hyman, *Far West Financial Corp. v. D & S Co. and the Abolition of Total Equitable Indemnity: What a Long, Strange Trip It's Been**, 21 PAC. L. J. 147 (1989).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol21/iss1/8>

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***Far West Financial Corp. v. D & S Co.*
and the Abolition of Total Equitable
Indemnity: What a Long, Strange Trip
It's Been***

In *Far West Financial Corp. v. D & S Co.*,¹ the California Supreme Court effectively eliminated the concept of total equitable indemnity.² In *Far West*, the court ruled that a good faith settlement by a tortfeasor precludes subsequent actions for total equitable indemnity by vicariously liable defendants.³ The decision in *Far West* resolved a disagreement among the California Courts of Appeal regarding the theoretical distinctions between contribution and indemnity.⁴ The theoretical disagreement was manifested by conflicting

* The Grateful Dead, *Truckin'*, AMERICAN BEAUTY (Warner Bros., Inc. 1970).

1. *Far West Financial Corp. v. D & S Co.*, 46 Cal. 3d 796, 760 P.2d 399, 251 Cal. Rptr. 202 (1988).

2. *Id.* at 809, 760 P.2d at 407-8, 251 Cal. Rptr. at 210-11. Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of some other person. CAL. CIV. CODE § 2772 (West Supp. 1989). Total equitable indemnity is the noncontractual equitable shifting of liability from a nonculpable party to a culpable party. *City of San Francisco v. Ho Sing*, 51 Cal. 2d 127, 330 P.2d 802 (1958). See *infra* notes 17-32 and accompanying text for discussion of total equitable indemnity.

3. *Far West*, 46 Cal. 3d at 817, 760 P.2d at 413, 251 Cal. Rptr. at 216.

4. See *infra* notes 104-191 and accompanying text examining the disagreement between the Courts of Appeals. Indemnity shifts the entire loss between joint tortfeasors. Contribution, on the other hand, involves equal sharing between tortfeasors. See, e.g., *Herrero v. Atkinson*, 227 Cal. App. 2d 69, 73, 38 Cal. Rptr. 490, 492 (1964).

interpretations of the settlement provisions of California Code of Civil Procedure section 877.6.⁵

The split among the Courts of Appeal resulted from the California Supreme Court's recognition of loss sharing between tortfeasors in the landmark case of *American Motorcycle Ass'n v. Superior Court*.⁶ The decision in *American Motorcycle* overcame the deficiencies in the California Joint Judgment Statute⁷ by introducing comparative negligence into multidefendant litigation.⁸ In 1980, the California Legislature codified the holding in *American Motorcycle* by enacting California Civil Procedure Code section 877.6 which bars subsequent claims for "equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault" after a good faith settlement.⁹ The confusion among the California Courts of Appeal whether *American Motorcycle* dealt with contribution or indemnity led to a split of authority regarding whether section 877.6 bars claims by vicariously or derivatively liable defendants for total indemnity after good faith settlements by joint tortfeasors.¹⁰

Part I of this note discusses the legal background leading to the confusion among the California Courts of Appeal.¹¹ Part II summarizes the facts of *Far West* and reviews the decision of the

5. California Civil Procedure Code section 877.6(c) provides:

A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on negligence or comparative fault.

CAL. CIV. PROC. CODE § 877.6(c) (West Supp. 1989).

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

7. CAL. CIV. PROC. CODE §§ 875-877 (West Supp. 1989).

8. *American Motorcycle*, 20 Cal. 3d at 599-600, 578 P.2d at 912, 146 Cal. Rptr. at 195. The California Supreme Court introduced comparative negligence between joint tortfeasors under the aegis of "partial indemnity." *Id.* "Partial indemnity," however, is simply contribution created by states frustrated with inequitable restrictions imposed by contribution or joint judgment statutes. RESTATEMENT (SECOND) OF TORTS § 386B, comment m (1977). See *infra* notes 65-79 and accompanying text for a discussion of the introduction of loss sharing in *American Motorcycle*.

9. Compare CAL. CIV. PROC. CODE § 877.6(c) (West Supp. 1989) (good faith settlement bars further claims for "equitable comparative contribution, or partial or comparative indemnity") with *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d at 603-4, 578 P.2d. at 915-16, 146 Cal. Rptr. at 198-199 (1978) (good faith settlement must discharge subsequent claim for partial or comparative indemnity). See also *Angelus Assocs. v. Neonex Leisure Prods., Inc.*, 167 Cal. App. 3d 532, 537, 213 Cal. Rptr. 403, 407 (1985) (section 877.6 is a codification of the holding in *American Motorcycle*).

10. See *infra* notes 105-190 and accompanying text (discussing the split of authority among the California Courts of Appeals).

11. See *infra* notes 14-190 and accompanying text.

California Supreme Court.¹² Part III discusses the legal ramifications of the decision in *Far West* and suggests reform for settlement practices in California.¹³

I. LEGAL BACKGROUND

A. *History of Indemnity and Contribution in California*

The confusion surrounding contribution and indemnity arose under California's attempt to allocate loss according to the relative degrees of culpability of the parties to an action. Indemnity seeks to shift the entire liability paid to the plaintiff, while contribution seeks recovery of a proportionate part of the sum paid to the plaintiff.¹⁴ Indemnity rights have existed in California since 1872,¹⁵ while rights to contribution have existed only since 1957.¹⁶ The historical background behind contribution and indemnity highlight the confusion culminating in the *Far West* decision.

1. *Indemnity*

The right to indemnity arises from an express contract between joint¹⁷

12. See *infra* notes 191-267 and accompanying text.

13. See *infra* notes 268-322 and accompanying text.

14. See RESTATEMENT (SECOND) OF TORTS § 886B, comment a (1977). See also *Herrero v. Atkinson* 227 Cal. App. 2d 69, 73, 38 Cal. Rptr. 490, 492 (1964) (indemnity shifts the entire loss between joint tortfeasors, while contribution involves equal sharing between tortfeasors).

15. See CAL. CIV. CODE § 2772 (West 1974) (definition of indemnity).

16. See CAL. CIV. PROC. CODE §§ 875-877 (West 1980 and Supp. 1989).

17. See CAL. CIV. CODE § 1430 (West 1982) (obligations imposed on persons are either joint, several, or joint and several). Joint and several liability generally arises in four distinct situations. DOBBS, TORTS AND COMPENSATION (West, 1985) (discussing joint and several liability). First, tortfeasors acting "in concert" are subject to joint and several liability. *E.g.*, *Gray v. Sutherland* 124 Cal. App. 2d 280, 289-90, 268 P.2d 754, 761 (1954) (those who act in concert are joint tortfeasors) See RESTATEMENT (SECOND) OF TORTS § 876 (1979) (persons acting in concert). See generally, Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 418 (1937) (historically, the rule of entire liability for joint tortfeasors applied only to those tortfeasors who acted in concert).

Second, joint and several liability arises where the tortfeasors produce a single indivisible injury. *Finnegan v. Royal Realty*, 35 Cal. 2d 409, 433-34, 218 P.2d 17, 32 (1950) (joint and several liability imposed for indivisible harm). See RESTATEMENT (SECOND) OF TORTS § 879 (1979). See also RESTATEMENT (SECOND) OF TORTS § 433A (1965) (defining single and divisible harm).

Third, joint and several liability arises where one tortfeasor directs or permits the conduct of the other. RESTATEMENT (SECOND) OF TORTS § 877 (1979). California adopts a more restricted view than the Restatement with regard to directing or permitting the conduct of another. See

tortfeasors¹⁸ or in an implied contractual¹⁹ or equitable²⁰ setting.²¹ In *City of San Francisco v. Ho Sing*,²² the California Supreme Court based the right to total indemnity on equitable considerations determined by the relative culpability of the tortfeasor defendants.²³ Following the decision in *Ho Sing*, indemnity between joint tortfeasors not involved in a contractual relationship came to be known as total equitable indemnity.²⁴ However, the court left the role of determining the scope of total equitable indemnity to the lower courts.²⁵ The

Orser v. George 252 Cal. App. 2d 660, 60 Cal. Rptr. 708 (1967) (triable issue of fact arose as to whether defendant knew codefendant's acts were tortious and was encouraging codefendant's acts by his own tortious conduct).

Fourth, joint and several liability arises where the tortfeasors are under a common duty. RESTATEMENT (SECOND) OF TORTS § 878 (1979).

18. California Civil Code § 2772 states: "Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person." CAL. CIV. CODE § 2772 (West 1974). Express contractual indemnity provisions must be specific in their terms. See *Markely v. Beagle*, 66 Cal. 2d 951, 962, 429 P.2d 129, 136, 59 Cal. Rptr. 809, 816 (1967) (absent specific language, "general" indemnity clause provides indemnity for loss resulting only from indemnitee's "passive" negligence, not "active" negligence); *Goldman v. Ecco-Phoenix Elec. Corp.*, 62 Cal. 2d 40, 44, 396 P.2d 377, 379, 41 Cal. Rptr. 73, 75 (1964) (agreement for indemnification must be clear and specific and strictly construed against the indemnitee).

19. See *San Francisco Unified School Dist. v. California Bldg. Maintenance Co.*, 162 Cal. App. 2d 434, 328 P.2d 785 (1958) (implied indemnification agreement in window washing contract between school district and maintenance company for injuries to employee of maintenance company). Although the basis of the right to implied contractual indemnity is contractual, the right must be consistent with the principles of equity. See, e.g., *Cahill Bros. v. Clemintina Co.*, 208 Cal. App. 2d 367, 382, 25 Cal. Rptr. 301, 309 (1962) (right to implied contractual indemnity barred where negligence is "active").

20. BAJI, No. 12.67-12.68 (7th ed. 1986) (right to implied noncontractual indemnity is based on findings that there was a specified legal relationship between the indemnitee and the indemnitor and that the indemnitee was not personally negligent). Indemnification of a vicariously liable principal by a fault source agent is an example of implied noncontractual indemnity. See RESTATEMENT (SECOND) OF TORTS § 886B (1979) (indemnity between tortfeasors).

21. See RESTATEMENT (SECOND) OF TORTS § 886B(2)(a)-(f) (1979) (instances in which indemnity may be granted). For a comprehensive work on indemnity, see *Molinari, Tort Indemnity in California*, 8 SANTA CLARA LAW. 159 (1967). See also *infra* notes 65-79 and accompanying text for a discussion of the recent development of loss sharing under the concept of partial or comparative indemnity.

22. *City of San Francisco v. Ho Sing*, 51 Cal. 2d 127, 330 P.2d 802 (1958).

23. *Id.* *Ho Sing* involved an action for indemnity between the city and a building owner arising from a prior suit. *Id.* at 129-30, 330 P.2d at 802-3. The city was held liable for damages resulting from a dangerous condition created and maintained by the building owner on his property. *Id.* at 130-31, 330 P.2d at 803-4. The California Supreme Court held that non-contractual indemnity could be based on: a "special relationship"; active/passive negligence; primary/secondary liability; direct/derivative liability; or general principles of equity and justice. *Id.* at 130-34, 330 P.2d at 803-6.

24. Comment, *Total Equitable Indemnity Under Comparative Negligence: Anomaly or Necessity?* 74 CALIF. L. REV. 1057, 1066 (1986) (non-contractual indemnity following the decision in *Ho Sing* known as total equitable indemnity).

25. See *City of Sacramento v. Gemsch Inv. Co.*, 115 Cal. App. 3d 869, 874, 171 Cal. Rptr. 764, 767 (1981) (although the *Ho Sing* court identified a number of rationales for allowing total equitable indemnity, the decision failed to identify upon which theory the court relied).

California courts developed concepts such as active/passive negligence²⁶ and primary/secondary liability²⁷ for purposes of determining relative culpability among joint tortfeasors and whether to permit an action for indemnity.²⁸ Interchange in use²⁹ and difficulty in application³⁰ invariably led to criticism by the courts of the viability of the concepts of active and primary liability.³¹ Further, since the active fault of many

26. Active negligence is "conduct which may consist of participation with another in an affirmative act of negligence," or the "connection with an act or omission of another by knowledge of or acquiescence in such act or omission." WITKIN, *SUMMARY OF CALIFORNIA LAW, Torts* § 92(2) (9th ed. 1988). The active-passive test purported to focus on degrees of fault by allowing the party with less culpability (the "passive" party) to be indemnified by the person found to be more culpable (the "active" party). Comment, *Total Equitable Indemnity: Can it Pierce a Pretrial Settlement?* 20 *LOY. L.A.L. REV.* 99, 107 (1987). See, e.g., *Pierce v. Turner*, 205 Cal. App. 2d 264, 23 Cal. Rptr. 115 (1962) (affirmative negligence of defendant bars right to indemnity); *Cahill Bros. v. Clementina Co.*, 208 Cal. App. 2d 367, 382, 25 Cal. Rptr. 301, 309 (1962) (participation in an affirmative act of negligence bars right of indemnification).

27. Secondary liability, as distinguished from primary liability, rests upon fault that is imputed or constructive only, being based on some legal relation between the parties, or arising from some positive rule of common or statutory law or because of a failure to discover or correct a defect or remedy a dangerous condition by the act of the one primary responsible. *Alisal Sanitary Dist. v. Kennedy*, 180 Cal. App. 2d 69, 75, 4 Cal. Rptr. 379, 383 (1960) (citing *Builders Supply Co. v. McCabe*, 366 Pa. 322, 325-28, 77 A.2d 368, 370-71 (1951)).

28. See Comment, *Total Equitable Indemnity: Can it Pierce a Pretrial Settlement?* 20 *LOY. L.A.L. REV.* 99, 107-110 (1987) (discussing the lack of consistent standards among the California courts in determining the availability of indemnity among tortfeasors).

29. See, e.g., *Aerojet Gen. Corp. v. D. Zelinsky & Sons*, 249 Cal. App. 2d 604, 610, 57 Cal. Rptr. 701, 705 (1967) (omission by the plant owner was secondary and passive, while the negligence of the contractor was immediate and active); *San Francisco Examiner Div., Hearst Publishing Co. v. Sweat*, 248 Cal. App. 2d 493, 497, 56 Cal. Rptr. 711, 714 (1967) (indemnity involves considerations of both primary and secondary liability and concepts of active and passive conduct).

30. E.g., *Muth v. Urricelqui*, 251 Cal. App. 2d 901, 60 Cal. Rptr. 166 (1967). In *Muth*, the Court of Appeals allowed a general contractor to recover indemnity from a subcontractor who had negligently graded a lot, although the general contractor had neglected to supervise the grading. The court held that the general contractor's negligence was "passive" and the subcontractor's negligence was "active". Consequently, the general contractor was entitled to indemnity from the subcontractor. *Id.* 251 Cal. App. 2d at 909-12, 60 Cal. Rptr. at 170-72. At least one commentator pointed out the inherent subjectivity involved in determining whether a tortfeasor's conduct was active or passive. See Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 *S. CAL. L. REV.* 728, 738 (1968) (asking whether the conduct of the general contractor in *Muth* was active in staying away from the site or passive in failing to go to the site and inspect). Similarly, a court could have found that the subcontractor either passively failed to grade the lot properly or actively graded improperly. *Id.* at 738.

31. *Kerr Chems. Inc. v. Crown Cork & Seal Co.*, 21 Cal. App. 3d 1010, 1014, 99 Cal. Rptr. 162, 164 (1971) (attempts to distinguish the line between primary and secondary liability are often difficult); *Pearson Ford Co. v. Ford Motor Co.*, 273 Cal. App. 2d 269, 272, 78 Cal. Rptr. 279, 282 (1969) (attempts to classify indemnitor's conduct as "active," "primary," or "positive" have been unsuccessful); *Atchison, Topeka & San Francisco Ry. v. Franco*, 267 Cal. App. 2d 881, 886, 73 Cal. Rptr. 660, 664 (1968) (criteria for determining the availability of indemnity are artificial and lack objectivity for determining predictability in the law). See also *RESTATEMENT (SECOND) OF TORTS* § 886B, comment c (1979) (expressions such as active and passive negligence or primary and secondary responsibility have proved misleading in some

defendants barred total shifting of all liability, the right to indemnity was unavailable in a majority of cases.³²

2. Contribution

California initially adopted the two common law rules governing loss sharing among joint tortfeasors³³ in multidefendant litigation: the doctrine of joint and several liability and the prohibition of loss sharing between culpable tortfeasors.³⁴ California's early procedural

applications).

Two subsequent cases cast further confusion on the criteria used to determine availability of indemnity by allowing indemnity between successive actively negligent tortfeasors. *See Niles v. City of San Rafael*, 42 Cal. App. 3d 230, 116 Cal. Rptr. 733 (1974) (indemnity allowed when negligence of treating doctors compounded negligence of original tortfeasor); *Herrero v. Atkinson*, 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (1964) (original tortfeasor allowed indemnity from treating doctors who negligently administered blood transfusion during subsequent operation on plaintiff). *See Comment, Total Equitable Indemnity Under Comparative Negligence: Anomaly or Necessity?* 74 CALIF. L. REV. 1057, 1070 (1986) (the availability of indemnity in *Niles* and *Herrero* effectively rejected the basic tenet that a party's active negligence bars his claim for total equitable indemnity).

32. *See American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 595, 578 P.2d 899, 910, 146 Cal. Rptr. 182, 193 (1978) (the great majority of cases do not require the imposition of the entire loss upon one or another tortfeasor).

33. Historically, the term "joint tortfeasor" had two implications: a plaintiff could join to an action only those who acted in concert to commit a trespass and each was held liable for the entire result. KEETON, DOBBS, KEETON, & OWEN, PROSSER AND KEETON ON TORTS §§ 46, 47, at 322-23, 324-25 (5th ed. 1984) Otherwise, a defendant was severally liable for the entire loss sustained by the plaintiff, even though his negligence combined with that of another to produce the harm. Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 418 (1936). The common law definition of "joint tortfeasor" eventually developed to include those whose conduct combines to produce an injury whether acting jointly or in succession. SCHWARTZ, COMPARATIVE NEGLIGENCE § 252 (1974).

34. *See, e.g., Dow v. Sunset Tel. & Tel. Co.*, 162 Cal. 136, 121 P. 379 (1912). The California Supreme Court stated:

[A]ny such wrongdoer cannot . . . insist that any or all of his associates in the act shall bear with him the burden of defending against the claim of the injured party or of compensating him for the injury. There is no right of contribution among them. They are all jointly and severally liable, as the injured party may elect. The injured party may sue all or any of them jointly, or each separately, or, having secured a joint judgment against all, enforce such judgment by execution against one only. . .

Id. at 139, 121 P. at 380 (quoting *Fowden v. Pacific Coast S.S. Co.*, 149 Cal. 151, 157, 86 P. 178, 180 (1906)). The common law doctrine barring loss sharing between joint tortfeasors originated in the case of *Merryweather v. Nixan*, 8 Term. Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799) (barring contribution between intentional tortfeasors). RESTATEMENT (SECOND) OF TORTS § 886A, comment a (1979). One rationale for the common law rule denying assistance to tortfeasors is that they are wrongdoers and thus not deserving of the aid of courts in achieving equal or proportionate distribution of the common burden. *Id.* The common law rule was also justified on a deterrence rationale. *See Leflar, Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 133-34 (1932) (arguing that because no defendant in a pool of co-defendants could know in advance if the plaintiff would choose to demand payment from one defendant or another, each arguably had an incentive to avoid or prevent accidents).

rules, however, inevitably led to harsh and inequitable results.³⁵ First, the procedural rules governing civil suits prohibited defendants from joining other negligent tortfeasors to the action.³⁶ Second, if the plaintiff chose to sue several defendants, the plaintiff retained the power to choose who would satisfy the judgment, regardless of fault or ability to satisfy the judgment.³⁷ Finally, early California law prohibited a joint tortfeasor from bringing an action to recover any of the judgment paid regardless of his or her share of fault.³⁸ Hence, when a plaintiff joined tortfeasors to an action, damages could not be apportioned between the tortfeasors and judgment for the full amount would be rendered against each.³⁹

In 1957, the California Legislature enacted the California Joint Judgment Statute.⁴⁰ The Joint Judgment Statute departed from common law principles in two areas: loss allocation between joint tortfeasors and discharge and release provisions.⁴¹ Under the Joint

35. See Note, *Contribution and Indemnity Collide with Comparative Negligence-The New Doctrine of Equitable Indemnity*, 18 SANTA CLARA L. REV. 779, 781 (1978) (contribution adopted in order to promote settlement and eliminate the harsh consequences of rules prohibiting allocation of loss).

36. See, e.g., *Reed v. Wing*, 168 Cal. 706, 712, 144 P. 964, 967 (1914) (cross-complaint not permitted for the purpose of joining a new party not necessary in deciding the matter before the court); *Alpers v. Bliss*, 145 Cal. 565, 570, 79 P. 171, 173 (1904) (cross-complaint for affirmative relief not permitted against one who is not already a party to the action). See also, Comment, *Total Equitable Indemnity Under Comparative Negligence: Anomaly or Necessity?* 74 CALIF. L. REV. 1057, 1061-2 (1962) (common law rule barring contribution among co-defendants, combined with common law rules governing civil suits, led to inequities in the allocation of loss).

37. 1851 Cal. Stat. ch. 5, sec. 32 at 56 (enacting CAL. CIV. PROC. CODE § 414) provided: "When the action is against two or more defendants jointly or severally liable on a contract, and the summons is served on one or more, but not all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants." 1969 Cal. Stat. ch. 1610, sec. 15 at 3373 (repealing CAL. CIV. PROC. CODE § 414).

38. *Adams v. White Bus Line*, 184 Cal. 710, 712-13, 195 P. 389, 391 (1921) (payor of judgment has no right of contribution from joint tortfeasor); *Dow v. Sunset Tel. & Tel. Co.*, 162 Cal. 136, 121 P. 379 (1912) (if one satisfies a judgment, no right accrues to seek contribution from joint tortfeasor).

39. See, e.g., *Hallinan v. Prindle*, 220 Cal. 46, 55, 29 P.2d 202, 206 (1934); *Oldham v. Aetna Ins. Co.*, 17 Cal. App. 2d 144, 146, 61 P.2d 503, 504 (1936) (verdict held invalid for attempted apportionment).

40. 1957 Cal. Stat. ch. 1700, sec. 1 at 3076 (enacting CAL. CIV. PROC. CODE §§ 875-880). The purpose of the Joint Judgment Statute was to alleviate the deficiencies under the existing doctrine of total indemnity regarding equitable allocation of loss between joint tortfeasors. See *Fourth Progress Report to the Legislature by the Senate Interim Committee on the Judiciary*, 129-30, 1 Appendix to Senate Journal (1957 Reg. Sess.) ("Under the common law there is no contribution between joint tortfeasors. . . The purpose of this bill is to lessen the harshness of that doctrine."). See also Comment, *Total Equitable Indemnity Under Comparative Negligence: Anomaly or Necessity?* 74 CALIF. L. REV. 1057, 1072 n.81 (1986) (doctrine of contribution developed at roughly the same time as development of doctrine of indemnity).

41. See generally, Comment, *Indemnity in California: Is it Really Equitable after American*

Judgment Statute, a defendant, jointly and severally liable for the whole damage done to the plaintiff, may seek contribution from another defendant only after a joint judgment has been rendered and the joint judgment debtor has paid more than his or her pro rata share.⁴² The Joint Judgment Statute also mandates that a release discharges only those defendants to whom releases are given,⁴³ discharges a settling joint tortfeasor from further claims by nonsettling tortfeasors for contribution,⁴⁴ and reduces the claims against the nonsettling tortfeasors on a pro tanto basis.⁴⁵

Despite the attempt by the legislature to equitably allocate fault under the Joint Judgment Statute, the statutory scheme failed to fairly apportion loss between joint tortfeasors.⁴⁶ The requirement of joint judgment liability prevented joinder by named defendants of additional defendants via cross-complaint.⁴⁷ Consequently, plaintiffs retained absolute control over the litigation and could refuse to sue or obtain judgment against one or more of the joint tortfeasors.⁴⁸ The Joint Judgment Statute perpetuated the power of the plaintiff to confer immunity upon chosen tortfeasors and secure complete compensation from others.⁴⁹ Further, the Joint Judgment Statute

Motorcycle and section 877.6? 18 PAC. L.J. 201, 206-7 (1986) (discussing the effects of the California Joint Judgment Statute). Note that California retained the traditional common law bar to contribution among intentional tortfeasors. CAL. CIV. PROC. CODE § 875(d) (West 1980).

42. CAL. CIV. PROC. CODE § 875 (West 1980). Pro rata apportions liability according to the tortfeasors proportionate share. See BLACK'S LAW DICTIONARY (5th ed.) (definition of pro rata).

43. CAL. CIV. PROC. CODE § 877 (West Supp. 1989) (release of one or more tortfeasors or co-obligors does not discharge any other tortfeasor). The Joint Judgment Statute abandoned the common law release provisions under prior law. See KEETON, DOBBS, KEETON & OWEN, PROSSER & KEETON ON TORTS, *supra* note 34, § 47 at 324-25 (at common law, the plaintiff had only one cause of action against all tortfeasors and a release of one tortfeasor from liability operated a release of all tortfeasors from liability).

44. CAL. CIV. PROC. CODE § 877 (West Supp. 1989) (discharging settling tortfeasor from further liability for contribution).

45. CAL. CIV. PROC. CODE § 877(a) (West Supp. 1989) (claims against nonsettling tortfeasors reduced by the amount of consideration paid for the release). "Pro tanto reduction" reduces the judgment by as much as is paid for the release. BLACK'S LAW DICTIONARY (5th ed.).

46. See Gregory, *Tort Contribution Practice in New York*, 20 CORNELL L.Q. 269 (1935) (criticizing requirement of joint judgment liability as a predicate to rights to contribution in New York joint judgment statute).

47. Adams, *Settlements after Li: But is it "Fair?"* 10 PAC. L.J. 734 (1979). In order to implead a third party defendant for contribution, the named defendant had to show that the third party defendant "is or may be liable to the [named defendant] for all or part of the plaintiff's claim against him." CAL. CIV. PROC. CODE § 428.10 (West Supp. 1989). Since the Joint Judgment statute requires joint judgment liability, no basis exists for impleading third party defendants for contribution. Adams at 734 n.33.

48. Adams, *Settlements after Li: But is it "Fair?"* 10 PAC. L.J. 734 (1979) (discussing the problems associated with California's Joint Judgment Statute).

49. *Id.*

inequitably apportioned loss between joint tortfeasors by requiring pro rata apportionment between joint tortfeasors who were not equally culpable.⁵⁰

The enactment of the Joint Judgment Statute retained the theoretical differences between contribution and indemnity.⁵¹ Indemnity shifts liability⁵² while contribution presupposes that tortfeasors should share responsibility.⁵³ The doctrinal distinctions between contribution and indemnity highlighted California's inadequate attempts to apportion loss based on the relative degrees of culpability of the tortfeasors.⁵⁴ The failure of total indemnity and the Joint Judgment Statute to proportionately allocate fault gave rise to a judicially created system of loss allocation between joint tortfeasors based on relative culpability.⁵⁵ The California Supreme Court recognized loss sharing between plaintiffs and defendants in *Li v. Yellow Cab Co.*⁵⁶ and between joint tortfeasors in *American Motorcycle Association v. Superior Court*.⁵⁷

50. See *id.* at 733-34 (illustrating problems which arise under the pro rata system of assessing liability). Assume that a jury determines that D(1) is 20 % at fault and D(2) is 80 % at fault, both defendants having acted negligently. A judgment is rendered against both but the judgment is satisfied by D(1) only. Assuming D(1) was entitled to pro rata contribution, it would appear unjust for D(1) to bear half the burden of liability. *Id.*

51. See CAL. CIV. PROC. CODE § 875(f) (West Supp. 1989) (providing that enactment of the Joint Judgment Statute shall not impair any right of indemnity under existing law, and barring contribution where a right to indemnity exists). See Comment, *Contribution and Indemnity Collide with Comparative Negligence: The New Doctrine of Equitable Indemnity*, 18 SANTA CLARA L. REV. 779, 783 (1978).

Compare RESTATEMENT (SECOND) OF TORTS § 886A (1979) (contribution among tortfeasors) with RESTATEMENT (SECOND) OF TORTS § 886B (1979) (indemnity among tortfeasors). The American Law Institute takes the position that contribution and indemnity are mutually inconsistent remedies. See RESTATEMENT (SECOND) OF TORTS § 886A(4) (1979) ("[w]hen one tortfeasor has a right of indemnity against another, neither of them has a right of contribution against the other"). See also RESTATEMENT (SECOND) OF TORTS § 886A, comment I (1979) ("Indemnity, which shifts the entire loss from one tortfeasor to another, and contribution, which shifts only a proportionate share of that loss, are mutually inconsistent remedies. When there is a right of indemnity, it controls, and neither tortfeasor has a right of contribution against the other").

52. See *supra* notes 17-32 and accompanying text for a discussion of the difficulties in determining culpability and rights to equitable indemnity.

53. See *Herrero v. Atkinson*, 227 Cal. App. 2d 69, 73, 38 Cal. Rptr. 490, 492 (1964) (indemnity shifts entire loss while contribution equally distributes loss).

54. See *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 584, 578 P.2d 899, 902, 146 Cal. Rptr. 182, 185 (1978) (creating loss sharing between joint tortfeasors in light of failure of Joint Judgment Statute to adequately apportion liability).

55. *Id.* at 583, 578 P.2d at 907, 146 Cal. Rptr. at 190.

56. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (creating comparative fault in response to harsh contributory negligence rules).

57. *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 583, 578 P.2d 899, 907, 146 Cal. Rptr. 182, 185 (1978) (recognizing loss sharing between joint tortfeasors).

B. The Equitable Allocation of Fault and the Fairness Doctrine

The decision in *Li v. Yellow Cab Co.* replaced a system of contributory negligence with a system of comparative fault,⁵⁸ thus providing a mechanism to assess the respective liability between plaintiffs and defendants.⁵⁹ The *Li* court recognized that joint and several liability⁶⁰ and the existing doctrines of contribution⁶¹ and indemnity⁶² might operate to defeat the new principle of apportioning

58. *Li*, 13 Cal. 3d at 813, 532 P.2d at 1232, 119 Cal. Rptr. at 864. In *Li*, the California Supreme Court noted that the term "fault" merely meant "negligence." *Id.* However, subsequent decisions which extended the concept of comparative fault to strict products liability no longer restrict the use of the term "fault" to negligence. See *Safeway Stores, Inc. v. Nest-Kart*, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

The California Supreme Court adopted a system of "pure" comparative negligence in which liability is assessed in proportion to the respective fault of each of the parties. *Li*, 13 Cal. 3d at 808, 532 P.2d at 1229, 119 Cal. Rptr. at 861. The "pure" form of comparative negligence involves assessment of liability in proportion to the fault of the parties without regard to whether the plaintiff is equally or more at fault than the defendant. *Id.* at 808, 532 P.2d at 1229, 119 Cal. Rptr. at 861. See also Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on Problems Associated with American Motorcycle v. Superior Court*, 30 HASTINGS L.J. 1465, 1468-70 (1979) (discussing the various forms of comparative negligence).

59. See *Li*, 13 Cal. 3d at 808, 532 P.2d at 1229, 119 Cal. Rptr. at 861. The California Supreme Court recognized the potential impact of its decision in *Li* on multiple defendant tortfeasors. However, the court chose not to address the effect on multiple parties because the issue was not specifically before the court. *Id.* at 826, 532 P.2d at 1241, 119 Cal. Rptr. at 873.

60. See Adams, *Settlements after Li: But is it "Fair?"* 10 PAC. L.J. 729, 737-38 (1979) (existence of joint and several liability in California results in conflicts between the fairness principle of *Li* and the contribution statutes in California). The doctrine of joint and several liability and the claim reduction provisions of section 877 force a nonsettling defendant whose relative degree of fault is less than that of the settling tortfeasor to pay a portion of the judgment greater than his equitable share of fault. *Id.* See also CAL. CIV. PROC. CODE § 877(a) (West Supp. 1989) (claims against nonsettling tortfeasors reduced to the extent of the settlement by settling defendants).

61. The California Joint Judgment Statute which apportioned liability among joint tortfeasors on a pro rata basis operated mechanically to defeat the *Li* mandate of apportionment of liability according to fault. See *supra* note 50 and accompanying text.

62. The existing doctrine of total equitable indemnity also operated to defeat the mandate of the *Li* decisions to apportion liability according to fault. See Adams, *Settlements After Li: But is It "Fair?"* 729, 738. In order for a joint defendant to be entitled to indemnity, he or she must prove that their negligence was either passive or secondary. See *supra* notes 26-32 and accompanying text (discussing the entitlement to indemnity based on active/passive or primary/secondary negligence). If the defendant could sustain that burden, then the entire loss was shifted to the more culpable defendant. See *supra* notes 26-32 and accompanying text (discussing total equitable indemnity). If the defendant failed to meet the burden that he or she was the less culpable tortfeasor, then that defendant would bear the entire loss. *Id.* See also Adams, *supra* at 738 (discussing failure of *Li* to deal with inequity of total equitable indemnity).

liability according to fault.⁶³ However, the court in *Li* postponed consideration of the doctrines of contribution, indemnity, and joint and several liability because *Li* did not involve a multiple party action.⁶⁴

The remedial inadequacies of the Joint Judgment Statute became painfully clear in *American Motorcycle Ass'n v. Superior Court*.⁶⁵ The Joint Judgment Statute would have left the Association without redress by preventing the Association from joining the parents of the injured plaintiff.⁶⁶ Consequently, the Association would be forced to bear the parents' portion of negligence. In order to avoid the joint judgment requirement and the procedural joinder difficulties, the California Supreme Court held that joint and several liability should be preserved⁶⁷ and that the existing indemnity principles should be

63. See *Li*, 13 Cal. 3d at 823, 532 P.2d at 1239, 119 Cal. Rptr. at 87. The court stated that multiple party cases presented difficult and uncertain issues with respect to its decision. *Id.*

64. *Id.* at 826, 532 P.2d at 1241, 119 Cal. Rptr. at 873. See Comment, *Loss Sharing Among Contract Defendants: English Parts for the American Motorcycle*, 12 PAC. L.J. 893, 898 (1981) (the California Supreme Court postponed re-evaluation of the doctrines in light of comparative fault principles because it was presented with only a single party action).

65. *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978). In *American Motorcycle*, plaintiff, a teenage motorcycle racer, suffered serious injuries in a cross-country motorcycle race for novices sponsored by defendants American Motorcycle Association (AMA) and Viking Motorcycle Club (Viking). *Id.* at 584-85, 578 P.2d at 902, 146 Cal. Rptr. at 185-86. Plaintiff sued AMA and Viking, alleging that their negligent supervision and administration of the race proximately caused his injuries. *Id.* AMA answered the complaint and sought leave to file a cross-complaint against plaintiff's parents alleging negligent supervision. *Id.* at 586, 578 P.2d at 903, 146 Cal. Rptr. at 186. The cross complaint sought allocation of loss based on two theories: (1) AMA sought indemnity based on the assertion that its negligence, if any, was "passive," while that of plaintiff's parents was "active," thereby entitling AMA to indemnity; (2) AMA sought a declaration of the "allocable negligence" of the parents in order that any damages awarded against AMA might be reduced by the percentage of damages allocable to the parents' negligence. *Id.* AMA's argument in this second respect was based on the assumption that *Li* abrogated the doctrine of joint and several liability of concurrent tortfeasors and established a new rule. *Id.* Under the new rule, each concurrent tortfeasor would be held liable only for that tortfeasor's portion of the plaintiff's recovery, determined on a comparative fault basis. *Id.* at 586-87, 578 P.2d at 903, 146 Cal. Rptr. at 186.

66. *Id.* at 605-6, 578 P.2d at 917, 146 Cal. Rptr. at 199.

67. The California Supreme Court enumerated four reasons why the doctrine of joint and several liability should not be abrogated: (1) The simple feasibility of apportioning fault on a comparative negligence basis does not render an indivisible injury "divisible" for purposes of the joint and several liability rule (*Id.* at 589, 578 P.2d at 905-6, 146 Cal. Rptr. at 189); (2) the abandonment of joint and several liability is not warranted by the plaintiff's lack of "innocence" after *Li* (*Id.*); (3) the relative culpability between a plaintiff and defendant are not equal because a plaintiff's culpability relates to lack of due care in his own protection, while a defendant's culpability relates to failure to exercise due care for others (*Id.* at 589-90, 578 P.2d at 905-6, 146 Cal. Rptr. at 189); and (4) the policy underlying joint and several liability which stresses full compensation to the victim often permits full recovery for his injuries even when one or more of the responsible parties do not have the financial resources

modified to permit loss sharing between joint tortfeasors under a theory⁶⁸ of "partial indemnity."⁶⁹ By creating loss sharing under a partial indemnity theory, the procedural rules did not prevent the Association from joining the parents via cross-complaint for partial indemnity on a comparative fault basis.⁷⁰ Moreover, loss sharing under partial indemnity allowed the court to avoid the joint judgment requirement of the Joint Judgment Statute.⁷¹ Thus frustration with

to cover their liability (*Id.* at 590, 578 P.2d at 905-6, 146 Cal. Rptr. at 180) (citing *Summers v. Tice*, 33 Cal. 2d 80, 88, 199 P.2d 1, 5 (1948) (wronged party should not be deprived of his right to redress, but wrongdoers should be left to work out between themselves any apportionment)).

68. *American Motorcycle*, 20 Cal. 3d at 600-02, 578 P.2d at 911, 146 Cal. Rptr. at 216-17 (citing *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972)) (despite the apparent preclusion under California's Joint Judgment Statute of judicial development of comparative contribution between joint tortfeasors, the Court followed the course of other states by creating the theory of partial indemnity). In *Dole*, a widow sued Dow, the manufacturer of a fumigant that caused the death of her husband. *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 145-46, 282 N.E.2d 288, 290, 331 N.Y.S.2d 382, 384-85 (1972). Dow sought full indemnification from the husband's employer. *Id.* at 146, 282 N.E.2d at 290, 331 N.Y.S.2d at 385. The court recognized that although the facts before the court might merit apportionment between Dow and the employer, the existing New York contribution scheme precluded contribution for anything but a pro rata share. *Id.* at 147-48, 282 N.E.2d at 291, 331 N.Y.S.2d at 386-87. Moreover, the all-or-nothing approach of the existing indemnity doctrine lacked the flexibility desired by the court in apportioning liability. *Id.* at 148, 282 N.E.2d at 292, 331 N.Y.S.2d at 387. Thus, believing that it was foreclosed from judicial development of the contribution scheme and viewing indemnity as an inappropriate, inflexible approach, the court allowed apportionment of liability under a theory of partial indemnity based on the relative responsibility of the parties. *Id.* at 148-9, 282 N.E.2d at 292, 331 N.Y.S.2d at 387.

69. *American Motorcycle*, 20 Cal. 3d at 598, 578 P.2d at 912, 146 Cal. Rptr. at 195. The Restatement (Second) of Torts § 886B recognizes the constraints faced by the California Supreme Court in *American Motorcycle* and the New York Court in *Dole*. One California court of appeals addressed the issue of indemnity between joint tortfeasors prior to *American Motorcycle* in the case of *Stambaugh v. Superior Court*, 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976). In *Stambaugh*, petitioner Stambaugh caused another's death in a vehicle accident. After settling with Stambaugh for the full amount of his insurance, the decedent's heirs sued other alleged joint tortfeasors, including Pacific Gas & Electric Co. (PG&E). PG&E cross complained against Stambaugh, arguing that *Li* required each contributing joint tortfeasor to bear responsibility for his own share of fault. Disclaiming any purpose to seek indemnity or contribution from Stambaugh, PG&E sought to join Stambaugh so that the finder of fact could better determine PG&E's proportionate share of total liability. The Court of Appeals held that in light of the strong policy favoring settlement of disputes, a joint tortfeasor who has settled in good faith with the plaintiff is "forever discharged of further obligation to the claimant, and to his joint tortfeasors by way of contribution or otherwise." *Id.* at 235, 132 Cal. Rptr. at 844-46.

70. *American Motorcycle*, 20 Cal. 3d at 605-6, 578 P.2d at 916-17, 146 Cal. Rptr. at 199. Since the California Supreme Court had earlier held that a named defendant could implead an unnamed defendant for indemnity in *Roylance v. Doelger*, 57 Cal. 2d 255, 368 P.2d 535, 19 Cal. Rptr. 7 (1962), the court held that the procedural rules did not prevent joinder of parties for a claim for loss sharing under a theory of partial indemnity. *American Motorcycle*, 20 Cal. 3d at 605-6, 578 P.2d at 917, 146 Cal. Rptr. at 199.

71. The court explained that where total indemnity was inappropriate and contribution was not allowed because a joint judgment had not been rendered, the law inequitably leaves

the Joint Judgment Statute led the California Supreme Court to utilize comparative fault principles between joint tortfeasors in the form of partial indemnity. However, the judicial creation of loss sharing in *American Motorcycle* was actually contribution under a different label.⁷²

The decision in *American Motorcycle* altered the settlement practices under the Joint Judgment Statute. The court expanded the settlement rules under the Joint Judgment Statute to preclude claims from joint tortfeasors for partial or comparative indemnity.⁷³ Further, a judgment against nonsettling defendants is not diminished by the settling tortfeasors' pro rata responsibility,⁷⁴ but instead is given pro tanto effect.⁷⁵

The court in *American Motorcycle* balanced several competing settlement policies. The policy of maximizing the recovery to the injured party justified both the retention of joint and several liability⁷⁶ and the rejection of the pro rata reduction of plaintiff's judgment upon settlement by joint tortfeasor.⁷⁷ The policy of encouraging settlement of the injured party's claim justified the expansion of the doctrine which barred claims for contribution against good faith settling tortfeasors.⁷⁸ Finally, the policy of fair and equitable appor-

the parties without redress. *American Motorcycle*, 20 Cal. 3d at 597-98, 578 P.2d at 910-11, 146 Cal. Rptr. at 193-4.

72. RESTATEMENT (SECOND) OF TORTS, § 886B, comment m (1979). Under the heading of "Contribution," the American Law Institute explains that some courts, frustrated by contribution statutes, created the theory of partial indemnity by declaring that indemnity is an equitable doctrine judicially developed and subject to further development for the purposes of attaining justice. *Id.*

73. *American Motorcycle*, 20 Cal. 3d at 604-5, 578 P.2d at 913-915, 146 Cal. Rptr. at 198.

74. Note that a subsequent court did adopt this view. See *Baget v. Shepard*, 128 Cal. App. 3d 433, 180 Cal. Rptr. 396 (1982). However, *Baget* was officially decertified by the California Supreme Court pursuant to CAL. R. CT. § 976(d), and can not be cited as authority.

75. *American Motorcycle*, 20 Cal. 3d at 605, 578 P.2d at 915-16, 146 Cal. Rptr. at 199. See *supra* note 45 (defining pro tanto). The plaintiff's recovery from the nonsettling tortfeasors should be diminished only by the amount that the plaintiff has actually recovered in a good faith settlement. *Id.*

76. *Id.* at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189. See Comment, *Contribution and Indemnity Collide with Comparative Negligence—The New Doctrine of Equitable Indemnity*, 18 SANTA CLARA L. REV. 779, 788-801 (1978) (discussing the conflict between the common law rules of joint and several liability and the doctrine of comparative negligence).

77. See Comment, *Total Equitable Indemnity Under Comparative Negligence: Anomaly or Necessity?*, 74 CALIF. L. REV. 1057, 1078 (1986) (court's rejection of a pro rata reduction of plaintiff's judgment presumably reflects the primacy of the policy favoring full recovery of the plaintiff over the equitable allocation of liability).

78. *American Motorcycle*, 20 Cal. 3d at 603-4, 578 P.2d at 915-16, 146 Cal. Rptr. at 198-99 (citing *Stambaugh v. Superior Court*, 62 Cal. App. 3d 231, 236, 132 Cal. Rptr. 843, 846

tionment of liability among joint tortfeasors justified the adoption of loss sharing between joint tortfeasors on a comparative fault basis.⁷⁹

Despite the judicial utilization of loss sharing to ascertain percentages of fault between joint tortfeasors, the California Supreme Court left unanswered the fate of total indemnity, or the total shifting of loss.⁸⁰ In *Safeway Stores, Inc. v. Nest-Kart*,⁸¹ the California Supreme Court held that loss sharing principles should be applied to apportion liability between a strictly liable defendant and a negligent defendant,⁸² but expressly reserved the question whether the loss sharing principles under *American Motorcycle* should be applied in situations where the liability of a party is entirely derivative or vicarious.⁸³

(1976) (lack of finality of judgments will discourage settlement)). Courts before and after the decision in *American Motorcycle* have recognized the conflict between the two policies of encouraging settlements and of equitable allocation of fault among joint tortfeasors. See, e.g., *Torres v. Union Pac. R.R.*, 157 Cal. App. 3d 499, 504, 203 Cal. Rptr. 825, 829 (1984); *River Garden Farms v. Superior Court*, 26 Cal. App. 3d 986, 997, 103 Cal. Rptr. 498, 506 (1972).

79. *American Motorcycle*, 20 Cal. 3d at 584, 578 P.2d at 902, 146 Cal. Rptr. at 185.

Subsequent cases placed the policies underlying the decision in *American Motorcycle* in a hierarchy. See *Sears Roebuck & Co. v. International Harvester Co.*, 82 Cal. App. 3d 492, 147 Cal. Rptr. 262 (1978) (first is maximization of recovery to the injured party; second is encouragement of settlement of the injured party's claim; third is the equitable apportionment of liability among the tortfeasors); *accord Teachers Ins. Co. v. Smith*, 128 Cal. App. 3d 862, 180 Cal. Rptr. 701 (1982). Thus, since the fairness doctrine had been enumerated in *Li*, it was subjected to third place in the hierarchy of competing policies which determine the allocation of fault among joint tortfeasors. Compare *Li v. Yellow Cab, Co.*, 13 Cal. 3d 804, 813, 532 P.2d 1226, 1232, 119 Cal. Rptr. 858, 864 (1974) (principle objective is to establish a system under which liability for damage is borne by those whose negligence cause it in direct proportion to their respective fault) with *Sears Roebuck & Co. v. International Harvester Co.*, 82 Cal. App. 3d 492, 147 Cal. Rptr. 262 (1978) (tertiary objective is equitable allocation of fault among joint tortfeasors).

80. See Comment, *Indemnity in California: Is it Really Equitable after American Motorcycle and Section 877.6?* 18 PAC. L.J. 201, 212 (1986) (*American Motorcycle* did not expressly abandon total equitable indemnity).

81. *Safeway Stores v. Nest-Kart*, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978). *Safeway Stores* involved a personal injury action for a foot injury caused by a shopping cart. *Id.* The jury in found that the manufacturer's liability rested on strict liability and the supermarket's liability rested on negligent maintenance of equipment. *Id.* at 325-26, 579 P.2d at 442-43, 146 Cal. Rptr. at 551. The trial court concluded that apportionment on a comparative fault basis was not permissible under existing law and consequently ordered a pro rata apportionment of liability. *Id.*

82. Unlike *American Motorcycle*, the defendants in *Safeway Stores* were joint judgment debtors and subject to the apportionment rules of section 875 of the California Code of Civil Procedure. *Safeway Stores*, 21 Cal. 3d at 327 n.2, 579 P.2d at 443 n.2, 146 Cal. Rptr. at 552 n.2. However, the court allowed apportionment under the common law principles of comparative negligence enumerated in *American Motorcycle*. *Id.* at 328, 579 P.2d at 444, 146 Cal. Rptr. at 553 (citing *American Motorcycle* 20 Cal. 3d at 591-99, 578 P.2d at 907-912, 143 Cal. Rptr. at 189-95).

83. *Safeway Stores*, 21 Cal. 3d at 332 n.5, 579 P.2d at 446 n.5, 146 Cal. Rptr. at 555 n.5. The court explained:

In the instant case, the jury found that Safeway was itself negligent in failing to

However, in *People ex rel. Department of Transportation v. Superior Court*,⁸⁴ the California Supreme Court explained that *American Motorcycle* had simply modified the existing indemnity principles and did not create a new action for indemnity.⁸⁵ The court held that a defendant who could not be sued directly because of the expiration of the statute of limitations could be sued by other defendants in a subsequent action for indemnity.⁸⁶ Various courts and commentators cited the decisions in *Safeway Stores* and *People ex rel. Department of Transportation* regarding the existence of total equitable indemnity after *American Motorcycle*.⁸⁷

safely maintain its carts, and thus Safeway's liability is in no sense solely derivative or vicarious. Accordingly, we have no occasion to determine in this case whether the comparative indemnity doctrine should be applied in a situation in which a party's liability is entirely derivative or vicarious in nature (citations omitted).

Id.

84. *People ex rel. Department of Transp. v. Superior Court*, 26 Cal. 3d 711, 608 P.2d 673, 163 Cal. Rptr. 585 (1980). In *People ex rel. Department of Transp.*, plaintiff, injured in an automobile accident on a public highway, sued a number of individuals, but did not file a timely claim against the state pursuant to the Tort Claims Act (Cal. Gov't Code §§ 810-996.6). *Id.* at 747, 608 P.2d at 625, 163 Cal. Rptr. at 587. Several of the defendants filed a claim for partial equitable indemnity against the state, alleging the state's negligence in blocking off lanes of traffic proximately caused the plaintiff's injuries. *Id.*

85. *Id.* at 756-57, 608 P.2d at 681, 163 Cal. Rptr. at 592-3.

86. *Id.* The court explained that an action for indemnity is independent of the plaintiff's cause of action and accrues only when the tort defendant has suffered actual loss through payment. *Id.* at 749, 608 P.2d at 676, 163 Cal. Rptr. at 588.

87. *Compare Tulco, Inc. v. Narmco Materials, Inc.*, 203 Cal. App. 3d 914, 920, 236 Cal. Rptr. 224, 228-29 (Cal. App. 4th Dist. 1987) *reh'g granted* 737 P.2d 1350, 238 Cal. Rptr. 66 (1987) *remanded by Supreme Court* 763 P.2d 479, 252 Cal. Rptr. 816 (1988) (the court explained that the restraint exercised in *Safeway Stores* is enough to evidence the continued viability of total indemnity, despite *Tech-Bilt's* silence as to whether total indemnity could be extinguished by a good faith settlement); *Angelus Assocs. Corp. v. Neonex Leisure Prods., Inc.*, 167 Cal. App. 3d 532, 213 Cal. Rptr. 403 (1985) (*Safeway Stores* is evidence that *American Motorcycle* may not have abolished common law total indemnity); *Huizar v. Abex Corp.*, 156 Cal. App. 3d 534, 203 Cal. Rptr. 47 (1984) (decision in *Safeway Stores* shows that *American Motorcycle* did not abolish common law indemnity); *with Far West Fin. Corp. v. D & S Co.*, 46 Cal. 3d 796, 807, 760 P.2d 399, 251 Cal. Rptr. 202 (1988) (the language in the footnote provides only "oblique support" for the contention that the total indemnity doctrine survived *American Motorcycle*); *IRM Corp. v. Carlson*, 179 Cal. App. 3d 94, 106, 224 Cal. Rptr. 438, 444 (1986) (despite language in *Safeway Stores*, dilemmas facing counsel wishing to settle gives rise to the need to encompass total indemnity in comparative or partial indemnity); *City of Sacramento v. Gemsch Inv.*, 115 Cal. App. 3d 869, 876, 171 Cal. Rptr. 764 (1981) (despite decision in *Safeway Stores*, partial indemnity encompasses total indemnity). See also Comment, *Indemnity in California: Is it Really Equitable After American Motorcycle and Section 877.6?* 18 PAC. L.J. 201, 227-28 (1986) (language in *Safeway Stores* presumably indicates the survival of total indemnity after *American Motorcycle*); Comment, *Total Equitable Indemnity: Can it Pierce a Pretrial Settlement?* 20 LOY. L.A.L. REV. 99, 128-29 (1986) (subsequent opinions such as *Safeway Stores* indicate that *American Motorcycle* did not abolish total equitable indemnity).

Compare, e.g., White v. City of Huntington Beach, 138 Cal. App. 3d 366, 376, 187 Cal. Rptr. 879, 885 (1982) (*American Motorcycle* and *People ex rel. Dept. of Transp.* indicate that the indemnity doctrine was merely modified to allow partial indemnity in appropriate cases,

C. California Civil Procedure Code section 877.6

In 1980, despite critical commentary,⁸⁸ the California Legislature codified the holding of *American Motorcycle* by enacting California Civil Procedure Code section 877.6(c).⁸⁹ Section 877.6, like the decision in *American Motorcycle*, bars claims for contribution or partial or comparative indemnity after a good faith settlement by a joint tortfeasor.⁹⁰ The adoption of the exact language of the decision in *American Motorcycle*, however, resulted in two problems: the definition of a good faith settlement⁹¹ and the continued existence of total indemnity.⁹²

not to eliminate the concept of total equitable indemnity in appropriate cases) with *Standard Pac. of San Diego v. A.A. Baxter Corp.*, 176 Cal. App. 3d 577, 586-87, 222 Cal. Rptr. 106 (1986) (based on the explicit language in *American Motorcycle* and the explanation in *People ex rel. Dept. of Transp.*, the comparative indemnity doctrine is not separate and distinct from the common law doctrine of total indemnity). Thus, comparative equitable indemnity includes the entire range of possible apportionments, from no right to any indemnity to a right of total indemnity. *Id.*

88. See, e.g., England, Li v. Yellow Cab Co. *A Belated and Inglorious Centennial of the California Civil Code*, 65 CALIF. L. REV. 4, 22-27 (1977) (court's analysis of historical basis is inaccurate).

89. CAL. CIV. PROC. CODE § 877.6(c) (West Supp. 1989) (good faith settlement bars claims by other joint tortfeasors against the settling tortfeasor for "equitable comparative contribution, or partial or comparative indemnity").

The legislature enacted section 877.6 to provide for a hearing on the issue of good faith of a settlement entered into by the plaintiff. See *Review of Selected 1980 California Legislation*, 12 PAC. L.J. 290, 290-91 (1980). Section 877.6 was in apparent response to *Fisher v. Superior Court*, 103 Cal. App. 3d 434, 163 Cal. Rptr. 47 (1980) (holding issue of good faith should be tried separately and in advance of the trial of tort issues). See CAL. CIV. PROC. CODE § 877.6(a) (West Supp. 1989) (any joint tortfeasor is entitled to a hearing on good faith of settlement entered into by another joint tortfeasor with the plaintiff).

90. Compare CAL. CIV. PROC. CODE § 877.6(c) (West Supp. 1989) with *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 603-4, 578 P.2d. 899, 915-16, 146 Cal. Rptr. 182, 198-199 (1978).

On June 3, 1986, the California voters drastically altered the concept of joint and several liability by approving the Fair Responsibility Act of 1986 (popularly known as "Proposition 51" or "The Deep Pocket Initiative"). Proposition 51 retains joint and several liability for economic damages, but makes liability for non-economic damages several. CAL. CIV. CODE § 1431.2(a) (West Supp. 1989). Economic damages are those "objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities." CAL. CIV. CODE § 1431.2(b)(1) (West Supp. 1989). Non-economic damages are those "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation." CAL. CIV. CODE § 1431.2(b)(2) (West Supp. 1989).

91. See Roberts, *The "Good Faith" Settlement: An Accommodation of Competing Goals*, 17 LOY. L.A.L. REV. 841, 855-58 (1984) (review of conflicting criteria to test the good faith of a settlement).

92. See CAL. CODE CIV. PROC. § 877 (West Supp. 1989).

1. *Good Faith Settlements under section 877.6*

A pretrial settlement pursuant to section 877.6(c) which is not in good faith does not bar claims for contribution or indemnity.⁹³ Without guidance from either the legislature or the California Supreme Court as to what constitutes a “good faith” settlement, the lower courts focused on either the absence of tortious or collusive conduct between the settling tortfeasor and the plaintiff,⁹⁴ or whether the settlement was within the reasonable range⁹⁵ of the potential liability of the settling tortfeasor.⁹⁶ The California Supreme Court eventually provided guidelines as to what constitutes a good faith settlement in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*.⁹⁷

In *Tech-Bilt*, the court rejected the “tortious or collusive conduct” test as the exclusive criteria for “good faith” and adopted the “reasonable range” test.⁹⁸ The court explained that the reasonable range requirement, coupled with a requirement of good faith in the dismissal of the claim, furthered the policies underlying section 877: encouragement of settlement and equitable allocation of fault between joint tortfeasors.⁹⁹ The court placed a heavy burden on those chal-

93. See CAL. CIV. PROC. CODE §§ 877, 877.6(c) (West Supp. 1989) (settlement must be in good faith).

94. See, e.g., *Ford Motor Co. v. Schultz*, 147 Cal. App. 3d 941, 950, 195 Cal. Rptr. 470, 475 (1983) (absent collusion, a joint tortfeasor should be permitted to negotiate settlement of an adverse claim according to his or her own best interests); *Burlington Northern R.R. Co. v. Superior Court*, 137 Cal. App. 3d 942, 945, 187 Cal. Rptr. 376, 378 (1982) (requirement of good faith is meant to insure that the settling parties do not *tortiously* injure the nonsettling parties); *Dompeling v. Superior Court*, 117 Cal. App. 3d 798, 809-10, 173 Cal. Rptr. 38, 44-45 (1981) (bad faith not established by mere showing that settling tortfeasor paid less than fair or proportionate share); *Cardio Systems v. Superior Court*, 122 Cal. App. 3d 880, 890, 176 Cal. Rptr. 254 (1981) (reversing trial court's refusal to dismiss despite absence of collusion, concealment, or sinister motive).

95. See, e.g., *Torres v. Union Pac. R.R.*, 157 Cal. App. 3d 499, 203 Cal. Rptr. 825, 831 (1984) (“good faith” requires that the price of a defendant's settlement bear some relationship to the merits and values of the case against that defendant); *accord* *Owen v. United States*, 713 F.2d 1461 (9th Cir. 1983); *accord* *River Garden Farms, Inc. v. Superior Court*, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972).

96. See Roberts, *The “Good Faith” Settlement: An Accommodation of Competing Goals*, 17 Loy. L.A.L. REV. 841, 855-58 (1984) (exhaustive review of conflicting criteria to test the good faith of a settlement).

97. *Tech-Bilt v. Woodward-Clyde & Assocs.*, 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985). See generally, Mishky, Tessier, and Vastano, *California Code of Civil Procedure Sections 877, 877.5, and 877.6: The Settlement Game in the Ballpark that Tech-Bilt*, 13 PEPPERDINE L. REV. 823, (1985) (stating that the decision in *Tech-Bilt* is a step in the right direction on the path towards fairness for all litigants).

98. *Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263.

99. *Id.* at 497, 698 P.2d at 164-65, 213 Cal. Rptr. at 261-62 (quoting *Commercial Union*

lenging the good faith of a settlement¹⁰⁰ by requiring a challenging party to show that the settlement amount was "so far out of the ballpark" as to be inconsistent with the objectives of the good faith requirement.¹⁰¹

2. Total Indemnity after section 877.6

After the decision in *American Motorcycle* and the enactment of section 877.6, the Courts of Appeal divided over whether a good faith settlement by a joint tortfeasor barred subsequent claims for total indemnity by vicariously or derivatively liable defendants.¹⁰² The theoretical underpinnings of the dispute lay in the confusion over whether *American Motorcycle* involved contribution and left equitable indemnity intact, or whether *American Motorcycle* merged the concepts of contribution and indemnity. Some courts and commentators argued that a good faith settlement barred claims for total equitable indemnity.¹⁰³ Other courts and commentators supported the

Ins. Co. v. Ford Motor Co., 640 F.2d 210, 213 (9th Cir. 1980) *cert. denied*, 454 U.S. 858 (1981)). The court explained that the amount of the settlement is relevant in determining good faith and must be equitable in light of the following factors: (1) A rough approximation of plaintiff's total recovery and the settlor's proportionate liability; (2) the allocation of settlement proceeds among plaintiffs; (3) a recognition that a settlor should pay less in settlement than he would have if he were found liable after a trial; (4) financial conditions, including insurance policy limits; and (5) any indications of fraud, collusion, or tortious conduct aimed to injure the interests of the non-settling defendants. *Id.* at 499, 698 P.2d at 166-67, 213 Cal. Rptr. at 263-64.

100. *Id.* at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263.

101. *Id.* at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263.

102. Zarback v. Superior Court, 195 Cal. App. 3d 120, 240 Cal. Rptr. 479 (1987) *reh'g granted* 746 P.2d 451, 242 Cal. Rptr. 476 (1987) *remanded by Supreme Court* 763 P.2d 479, 252 Cal. Rptr. 816 (1988). A split also developed among the Courts of Appeal with regard to whether an indemnity claim resting on an implied contractual indemnity theory is barred by a good faith settlement. Compare, e.g., IRM Corp. v. Carlson, 179 Cal. App. 3d 94, 109-110, 224 Cal. Rptr. 438, 446-447 (1986) (claim for total indemnity based on implied contractual indemnity theory barred by good faith settlement); accord County of L.A. v. Superior Court; Stratton v. Peat, Marwick, Mitchell & Co., 190 Cal. App. 3d 286, 292, 235 Cal. Rptr. 374 (1987); Kramer v. Cedu Found., Inc., 93 Cal. App. 3d 1, 12, 155 Cal. Rptr. 552 (1979) (implied contractual indemnity replaced by *American Motorcycle* principles of implied equitable comparative negligence); with County of Los Angeles v. Superior Court, 155 Cal. App. 3d 798, 803 (1984) (claim for total indemnity based on implied contractual indemnity theory not barred by good faith settlement); accord Bear Creek Planning Comm'n v. Title Ins. & Trust Co., 164 Cal. App. 3d 1227, 1239, 211 Cal. Rptr. 172 (1985).

103. See Zarback v. Superior Court, 195 Cal. App. 3d 120, 240 Cal. Rptr. 479 (1987) *reh'g granted* 746 P.2d 451, 242 Cal. Rptr. 476 (1987) *remanded by Supreme Court* 763 P.2d 479, 252 Cal. Rptr. 816 (1988) (good faith settlement bars subsequent claim for total indemnity); accord Horton v. Superior Court, 194 Cal. App. 3d 727, 238 Cal. Rptr. 467 (1987); *In re Nucorp Energy Sec. Litigation*, 661 F. Supp. 1403 (S.D.Cal. 1987) (federal court sitting in diversity holding that good faith settlement bars subsequent claim for total indemnity); IRM

continued existence of the right to total indemnity by vicariously or derivatively liable defendants.¹⁰⁴

a. Good Faith Settlement Forecloses a Claim for Total Equitable Indemnity

Analytically, the cases holding that a good faith settlement bars subsequent claims for total indemnity can be divided between those in which the court found rights to total indemnity did not exist¹⁰⁵ and those in which the court found that traditional rights to indemnity did exist.¹⁰⁶ The seminal case in the first category, *City of Sacramento v. Gemsch Investment Co.*,¹⁰⁷ held that the doctrine of partial indem-

Corp. v. Carlson, 179 Cal. App. 3d 92, 224 Cal. Rptr. 438 (1986) (good faith settlement bars subsequent claim for total indemnity); *accord* Standard Pac. of San Diego v. A.A. Baxter Corp., 176 Cal. App. 3d 577, 222 Cal. Rptr. 106 (1986); Torres v. Union Pac. R.R., 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984); Lopez v. Blecher, 143 Cal. App. 3d 736, 192 Cal. Rptr. 190 (1983); Kohn v. Superior Court, 142 Cal. App. 3d 323, 191 Cal. Rptr. 78 (1983); Turcon Constr., Inc. v. Norton-Villiers, Ltd., 139 Cal. App. 3d 280, 188 Cal. Rptr. 580 (1983); City of Sacramento v. Gemsch Inv. Co., 115 Cal. App. 3d 869, 171 Cal. Rptr. 764 (1981) (total indemnity subsumed in comparative fault inquiry and is barred by good faith settlement). See also Comment, *Total Equitable Indemnity Under Comparative Negligence: Anomaly or Necessity?* 74 CALIF. L. REV. 1057 (1986) (the doctrine of total indemnity should be subsumed under the doctrine of comparative indemnity and good faith settlements should bar all cross-complaints for indemnity, both total and partial).

104. See *Tulco, Inc. v. Narmco Materials, Inc.*, 203 Cal. App. 3d 914, 915, 236 Cal. Rptr. 224, 225 (Cal. App. 4 Dist. 1987) *reh'g granted* 737 P.2d 1350, 238 Cal. Rptr. 66 (1987) *remanded by Supreme Court* 763 P.2d 479, 252 Cal. Rptr. 816 (1988) (cross-complaint for total indemnity survives a cross-defendant's good faith settlement); *Hale v. Laden*, 178 Cal. App. 3d 668, 674, 224 Cal. Rptr. 182, 184 (1986) (claim for total indemnity barred by good faith settlement because codefendant could allege no facts entitling him to total indemnity); *Angelus Associates Corp. v. Neonex Leisure Prods., Inc.*, 167 Cal. App. 3d 532, 534, 213 Cal. Rptr. 403 (1985) (nonsettling defendant retailer in a products liability action may pursue a cross-complaint for total equitable indemnity despite good faith settlement); *Huizar v. Abex Corp.*, 156 Cal. App. 3d 534, 541, 203 Cal. Rptr. 47, 51 (1984) (doctrine of total or equitable indemnity not abolished by *American Motorcycle*); *E.L. White, Inc. v. City of Huntington Beach*, 138 Cal. App. 3d 366, 377-78, 187 Cal. Rptr. 879, 886 (1982) (good faith settlement not a bar to claim for total indemnity). See also Comment, *Indemnity in California: Is it Really Equitable After American Motorcycle and Section 877.6?* 18 PAC. L.J. 201, (1986) (right to total indemnity continues to exist despite good faith settlement); Comment, *Total Equitable Indemnity: Can it Pierce a Pretrial Settlement?* 20 LOY. L.A.L. REV. 99 (1986) (right total indemnity survives good faith pretrial settlements).

105. See, e.g., *Torres v. Union Pac. R.R.*, 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984); *Lopez v. Blecher*, 143 Cal. App. 3d 736, 192 Cal. Rptr. 190 (1983); *Turcon Constr., Inc. v. Norton-Villiers, Ltd.*, 139 Cal. App. 3d 280, 188 Cal. Rptr. 580 (1983); *City of Sacramento v. Gemsch Inv. Co.*, 115 Cal. App. 3d 869, 171 Cal. Rptr. 764 (1981).

106. See, e.g., *Standard Pac. of San Diego v. A.A. Baxter Corp.*, 176 Cal. App. 3d 577, 222 Cal. Rptr. 106 (1986); *Kohn v. Superior Court*, 142 Cal. App. 3d 323, 191 Cal. Rptr. 78 (1983).

107. *City of Sacramento v. Gemsch Inv. Co.*, 115 Cal. App. 3d 869, 171 Cal. Rptr. 764 (1981).

nity absorbed the concept of total equitable indemnity.¹⁰⁸ In *Gemsch*, the city brought a claim for total indemnity against a landowner after both were joined as defendants in a personal injury suit.¹⁰⁹ The plaintiff sustained injuries in a fall on the sidewalk adjacent to the property of the landowner.¹¹⁰ The plaintiff sued the city as the owner of an easement over the sidewalk and the landowner on the basis of a statutory duty to maintain the sidewalk.¹¹¹ The city filed a cross-complaint for total indemnity based on a theory of "implied contract" between the city and landowner.¹¹² The trial court denied the claim by the city for total indemnity.¹¹³ In affirming the decision of the trial court, the Court of Appeals for the Third District rejected the argument by the city that the decision in *American Motorcycle* did not repudiate the total equitable indemnity theory.¹¹⁴ The court explained that fault on the part of the city barred a claim for indemnity and traditional notions of indemnity did not relieve the city from liability.¹¹⁵

108. *Id.* at 877, 171 Cal. Rptr. at 768.

109. *Id.* at 871, 171 Cal. Rptr. at 765.

110. *Id.*

111. *Id.* at 872-73, 171 Cal. Rptr. at 765-66.

112. *Id.* at 873, 171 Cal. Rptr. at 765-66.

113. *Id.* at 877, 171 Cal. Rptr. at 768.

114. *Id.* The court stated that *American Motorcycle* "did not expressly repudiate the concept of equitable indemnity where the alleged indemnitor's negligence versus the indemnitee's fault was passive/active, negative/positive, or secondary/primary." *Id.* at 875-76, 171 Cal. Rptr. at 767.

The court stated three bases for its decision. First, the lack of finality in allowing a continued right of indemnity would discourage settlements. *Id.* at 876-77, 171 Cal. Rptr. at 768. A settling defendant would face further litigation in order to determine liability to nonsettling codefendants for total indemnity. *Id.* Second, there was no evident equity in favor of allowing the city to recover full indemnity. *Id.* The city had a separate, but concurrent duty to trim or remove the trees and otherwise prevent a dangerous condition of which it had notice. *Id.* The court employed the pre-*American Motorcycle* terms and found the city's conduct primary, but passive. *Id.* at 876, 171 Cal. Rptr. at 768. Consequently, the court, noting the apparent contradiction in terms, rejected the use of the active/passive-primary/secondary distinctions and denied the City's claim for indemnity. *Id.* at 876, 171 Cal. Rptr. at 768. Finally, the court stated that section 877, broadly and equitably interpreted, includes tortfeasors who are passive/negative/secondary. *Id.* Courts have generally refused to narrowly construe California Civil Procedure Code sections 877 and 877.6. Comment, *Total Equitable Indemnity: Can it Pierce a Pretrial Settlement?* 20 LOY. L.A.L. REV. 99, 118 n.100 (1986).

115. *Gemsch*, 115 Cal. App. 3d at 877, 171 Cal. Rptr. at 768. While appearing to reject total indemnity altogether, the court left open the issue of total indemnity where the indemnitee is without fault or negligence. *Id.* Absent fault on the part of the City, the court referred to Restatement (Second) of Torts section 886B for examples of when total indemnity would lie. *Id.* Restatement (Second) of Torts section 886B, comment j provides:

The duty to protect the indemnitee from liability may arise under a contract or be imposed by statute or the common law. A typical example arises when a landowner allows a sidewalk to fall into disrepair and is required to indemnify the city when

Decisions subsequent to the enactment of section 877.6 cite *Gemsch* for the proposition that the new doctrine of comparative or partial indemnity absorbed total indemnity concepts of primary/secondary negligence and active/passive negligence,¹¹⁶ despite the fact that *Gemsch* was decided before the enactment of section 877.6.¹¹⁷ The Court of Appeals for the Second District held in *Turcon Construction, Inc. v. Norton-Villiers, Ltd.*¹¹⁸ that under section 877.6, the doctrine of

it becomes liable for injury to a pedestrian.

RESTATEMENT (SECOND) OF TORTS § 886B, comment j (1977).

The dissent in *Gemsch* disagreed as to the fate of total equitable indemnity after *American Motorcycle*. *City of Sacramento v. Gemsch Inv. Co.*, 115 Cal. App. 3d 869, 878, 171 Cal. Rptr. 764, 769 (1981) (Paras, J. dissenting). The dissent explained that *American Motorcycle* merely modified the existing equitable indemnity doctrine and that equitable indemnity was a separate and distinct concept from that of comparative indemnity. *Id.* Consequently, the dissent argued that total equitable indemnity should not be foreclosed by a "good faith" settlement. *Id.* at 879, 171 Cal. Rptr. at 769.

116. See, e.g., *Kohn v. Superior Court of San Mateo County*, 142 Cal. App. 3d 323, 191 Cal. Rptr. 78 (1983) (total indemnity absorbed by comparative or partial indemnity); *accord Turcon Constr., Inc. v. Norton-Villiers, Ltd.*, 139 Cal. App. 3d 280, 188 Cal. Rptr. 580 (1983); *Lopez v. Blecher*, 143 Cal. App. 3d 736, 192 Cal. Rptr. 190 (1983) (Court of Appeals for the Fourth District held that in light of statutory policy encouraging settlements, a good faith settlement under section 877.6 bars claims for total indemnity). See also Comment, *Total Equitable Indemnity: Can it Pierce a Pretrial Settlement?* 20 LOY. L.A.L. REV. 99, 119 (1986) (*Gemsch* mysteriously misquoted as authority for proposition that all forms of indemnity are barred by *American Motorcycle* and section 877.6). See generally *Angelus Assocs. v. Neonex Leisure Prods., Inc.*, 162 Cal. App. 3d 532, 542, 213 Cal. Rptr. 403, 407 (1985) (*Lopez* did not address the issue of a claim for total indemnity against a settling tortfeasor).

117. See *City of Sacramento v. Gemsch Inv. Co.*, 115 Cal. App. 3d 869, 873 n.1, 171 Cal. Rptr. 764, 766-67 n.1 (1981) (issue of total indemnity decided solely on the basis of the decision in *American Motorcycle* and section 877).

118. *Turcon Constr., Inc. v. Norton-Villiers, Ltd.*, 139 Cal. App. 3d 280, 188 Cal. Rptr. 580 (1983). In *Turcon*, a motorcycle driver who was severely injured in a collision with an automobile brought suit against the automobile driver and the companies allegedly liable for the defective manufacture of the motorcycle and its gas tank. *Id.* at 281-82, 188 Cal. Rptr. at 581. *Turcon Construction*, the owner and operator of the vehicle, cross-complained against Norton-Villiers, et al., manufacturers of the motorcycle and its component parts for indemnity and/or contribution. *Id.* at 281, 188 Cal. Rptr. at 581. The plaintiff first settled with *Turcon Construction* and later with the other defendants (Norton-Villiers, et. al). *Id.* Norton-Villiers moved to set aside the cross-complaint on the basis that their good faith settlement pursuant to Code of Civil Procedure section 877.6 barred further actions for indemnity or contribution. *Id.* The trial court granted the motion and *Turcon Construction* appealed. *Id.* at 282, 188 Cal. Rptr. at 581-82.

On appeal, *Turcon Construction* based its complaint for indemnity on two grounds: First, *Turcon Construction* was not a "joint tortfeasor" because it was a concurrent or successive tortfeasor and as such was not barred from pursuing its claim for indemnity by section 877.6; second, *Turcon Construction's* conduct was only passive/secondary vis-a-vis Norton-Villiers'. *Id.* at 283-84, 188 Cal. Rptr. at 582-83. As to the first ground, the court held *Turcon* was a joint tortfeasor within the meaning of section 877.6. *Id.* As to the second ground, although *Turcon* couched the complaint in traditional total indemnity terms, *Turcon* was in substance seeking indemnity on a partial or comparative fault basis. *Id.* at 284, 188 Cal. Rptr. at 582-83. The court explained that the claim by the indemnitee contained no allegations which could provide the basis for a shifting of total liability to the indemnitor. *Id.* See *supra* notes 17-32 and accompanying text for traditional basis for shifting total liability between joint tortfeasors.

comparative or partial indemnity subsumed the doctrine of total indemnity. Despite a finding that no indemnity rights existed,¹¹⁹ the court ruled that absent contractual indemnity¹²⁰ a good faith settlement pursuant to section 877.6 barred the claim by the indemnitee for total indemnity.¹²¹

In *Kohn v. Superior Court*, the Court of Appeals for the First District decided a case in which a traditional right to indemnity existed between successive tortfeasors.¹²² The court cited the holdings of *Gemsch* and *Turcon* for the proposition that a good faith settlement barred all forms of indemnity between joint tortfeasors.¹²³ The court stated that absent express contractual indemnity rights,¹²⁴ the

119. *Turcon*, 139 Cal. App. 3d at 284, 188 Cal. Rptr. at 582-83 (the claim by the indemnitee contained no allegations which could provide the basis for a shifting of total liability to the indemnitor). See *supra* notes 17-32 and accompanying text for traditional basis for shifting total liability between joint tortfeasors.

120. See *IRM Corp. v. Carlson*, 179 Cal. App. 3d 94, 106, 224 Cal. Rptr. 438, 444 (1986) (*Turcon* left open the door to cross-complaints based on contractual indemnity or to those where liability of a cross-complaint to the plaintiff is imposed solely as a matter of law because of the relationship with the settling tortfeasor).

121. *Turcon*, 139 Cal. App. 3d at 284, 188 Cal. Rptr. at 582-83.

122. *Kohn v. Superior Court of San Mateo County*, 142 Cal. App. 3d 323, 191 Cal. Rptr. 78 (1983). *Kohn* involved an action by home buyers against a real estate broker and a construction company for fraud in failing to disclose structural defects caused by a prior fire. *Id.* at 325-26, 191 Cal. Rptr. at 80. The real estate broker cross-complained against the construction company for total or partial indemnity. *Id.* When the construction company settled with the plaintiff, the court dismissed the cross-complaint. *Id.*

The Court of Appeals for the First District, citing *Gemsch*, upheld the dismissal of the cross-complaint. *Id.* at 330, 191 Cal. Rptr. at 83. The court, approving of the expansion in the *Turcon* decision of the meaning of the term "joint tortfeasor," rejected petitioner's argument that they were not "joint tortfeasors" within the meaning of section 877. *Id.* at 328-29, 191 Cal. Rptr. at 82-83. The court explained that although the alleged fraud and the alleged failure to repair or inspect occurred on different dates, they combined to create an indivisible injury which took place when the sale of the house was consummated. *Id.* See *Blecker v. Wolbart*, 167 Cal. App. 3d 1195, 1202-3, 213 Cal. Rptr. 781, 784-85 (1985) (comparative indemnity doctrine of *American Motorcycle*, although dealing factually only with concurrent tortfeasors, also applies to successive tortfeasors). See also *RESTATEMENT (SECOND) OF TORTS* § 886B(e) (1977) (right to indemnity exists where indemnitor creates a dangerous condition on land as a result of which both were liable to the third person, and the indemnitee innocently or negligently failed to discover a defect). Consequently, the pre-trial dismissal of the claim for total indemnity denied the indemnitee-broker the opportunity to litigate the issue of fault and equitably allocate loss.

123. *Kohn v. Superior Court of San Mateo County*, 142 Cal. App. 3d 323, 191 Cal. Rptr. 78 (1983).

124. *Id.* at 330, 191 Cal. Rptr. at 83 (petitioners failed to assert express contractual indemnity rights). The court was careful to explain that it addressed only the issue of implied equitable indemnity based on tort theories, because the petitioner had failed to properly present the issue of implied contractual indemnity to the trial court. *Id.* at 330 n.3, 191 Cal. Rptr. at 83 n.3. The court explained that petitioners' claim for "implied" contractual indemnity rights failed under *Kramer v. Cedu Foundation, Inc.*, 93 Cal. App. 3d 1, 12, 155 Cal. Rptr. 552, 558 (1979) which held that *American Motorcycle's* principles of implied equitable comparative indemnity replaced the doctrine of implied contractual indemnity. *Id.* at 330 n.3, 191 Cal. Rptr. at 83 n.3.

trial court, having found good faith in the settlement, had no basis for permitting the continued prosecution of the cross-complaint for indemnity.¹²⁵

In *Standard Pacific of San Diego v. A.A. Baxter Corporation*,¹²⁶ the Court of Appeal for the Fourth District denied a claim for total indemnity against a settling tortfeasor by a party whose legal responsibilities were derivative or vicarious.¹²⁷ The court found three bases for concluding that the claim by petitioner for total indemnity should be denied.¹²⁸ First, the court disapproved of the line of cases holding that the comparative indemnity principles of section 877.6 were separate and distinct from the common law doctrine of total indemnification.¹²⁹ The court explained that distinctions between total indemnity and comparative negligence are artificial because both are simply methods of equitably allocating or apportioning loss.¹³⁰ Consequently, the court held that comparative indemnity includes the entire spectrum of possible apportionments, from no right to any indemnity to a right of complete indemnity.¹³¹ Second, the court held that section 877.6 protects vicariously or derivatively liable defendants by requiring that the settlement be in good faith.¹³² Under the standard enumerated in *Tech-Bilt*, one who is nearly factually innocent and one whose liability is imposed as a matter of public policy are similarly situated and the law should act to bar subsequent claims

125. *Id.* at 330, 191 Cal. Rptr. at 83.

126. *Standard Pac. of San Diego v. A.A. Baxter Corp.*, 176 Cal. App. 3d 577, 222 Cal. Rptr. 106 (1986).

127. *Id.* In *Baxter*, a group of homeowners sued the builders and retailers of their homes, the contractors who had done the grading and compacting of the soil, and the original landowner for damages to their homes resulting from a soil subsidence. *Id.* at 580-81, 222 Cal. Rptr. at 107. The contractors settled with the homeowner-plaintiffs, and sought a determination by the trial court that subsequent claims for total indemnity should be dismissed. *Id.* at 581, 222 Cal. Rptr. at 107. Based on the good faith of the settlement, the trial court dismissed the development company's indemnity claim. *Id.*

128. *Id.*

129. *Id.* at 586-87, 222 Cal. Rptr. at 110-12 (citing for example *Angelus Assocs. Corp. v. Neonex Leisure Prods., Inc.*, 167 Cal. App. 3d 532, 213 Cal. Rptr. 403 (1985)). See *infra* notes 141-186 and accompanying text for discussion of cases which hold that total equitable indemnity survives *American Motorcycle*.

130. *Baxter*, 176 Cal. App. 3d at 587, 222 Cal. Rptr. at 111-12. However, the court neglected to discuss that although both the doctrines of total indemnity and comparative negligence operate to equitably allocate or apportion loss among joint tortfeasors, the former operates equitably to shift the entire loss to the responsible party, while the latter operates equitably to share responsibility between jointly responsible parties. See *supra* notes 52-54 and accompanying text.

131. *Baxter*, 176 Cal. App. 3d at 587, 222 Cal. Rptr. at 111-12.

132. *Id.* at 589, 222 Cal. Rptr. at 112-13.

for indemnification after a good faith settlement.¹³³ The court indicated that the approach under *Tech-Bilt* balances the competing policies of equitable allocation of fault and the encouragement of settlements.¹³⁴ Finally, the court concluded that vicarious or derivative tortfeasors are "joint tortfeasors" within the meaning of section 877.6.¹³⁵ The court held that the term "joint tortfeasor" should be extended to include those innocent of wrongdoing but who have liability imposed for purposes of public policy.¹³⁶

The earlier cases of *Gemsch* and *Turcon* involved situations in which traditionally, the party seeking indemnity could not allege facts sufficient to show rights to total indemnity. *Gemsch* and *Turcon* reached the conclusion that the tortfeasors were seeking partial or comparative indemnity based on their own comparative negligence or their lack of legal relationship.¹³⁷ Consequently, the courts dismissed the indemnity claims, which were barred in the face of a good faith settlement. Nevertheless, the courts expanded *American Motorcycle* and section 877.6 to subsume total indemnity.

Kohn and *Baxter* and their progeny, on the other hand, balance the competing interests of encouraging settlement and equitably allocating loss among joint tortfeasors.¹³⁸ These cases explained that

133. *Id.* at 580, 222 Cal. Rptr. at 107. The court reasoned that a vicariously liable defendant whose liability is based on public policy is similarly situated to a defendant who is nearly factually innocent. *Id.* at 589, 222 Cal. Rptr. at 112-13. The court found incongruous an interpretation of section 877.6 allowing one who might be one percent liable to be barred from further indemnification while allowing one who is factually innocent but vicariously liable a surviving right to full indemnity. *Id.*

See also *Torres v. Union Pac. R.R.*, 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984) (although recognizing exceptions to the interpretation which barred total equitable indemnity, the Court of Appeals for the Second District held that the broad definition of good faith under *Tech-Bilt* mandates that all cases of indemnity, partial or total, should be subject to sections 877 and 877.6). But see Comment, *Indemnity in California: Is it Really Equitable After American Motorcycle and Section 877.6?* 18 Pac. L.J. 201, 222-23 (1986) (*Torres* did not abolish total indemnity).

134. *Baxter*, 176 Cal. App. 3d at 589, 222 Cal. Rptr. at 112-13.

135. *Id.* at 591-92, 222 Cal. Rptr. at 114-15.

136. *Baxter*, 176 Cal. App. 3d at 590-91, 222 Cal. Rptr. at 113-14. The court noted the trend towards broadening the term "joint tortfeasor" to include those defendants who acted jointly, concurrently, or simultaneously. See, e.g., *Turcon Constr., Inc. v. Norton-Villiers, Ltd.*, 139 Cal. App. 3d 280, 188 Cal. Rptr. 580 (1983) (expanding the definition of the term "joint tortfeasor" to include concurrent and successive tortfeasors); *Kohn v. Superior Court of San Mateo County*, 142 Cal. App. 3d 323, 191 Cal. Rptr. 78 (1983) (fraud and failure to repair or inspect occurring on different dates created indivisible injury and consequent "joint tortfeasor" status for purposes of section 877.6). See generally, 5 WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts*, §§ 43-47, 106-110 (9th ed. 1988) (discussing expansion of term "joint tortfeasor").

137. See *Horton v. Superior Court*, 194 Cal. App. 3d 727, 735, 238 Cal. Rptr. 467, 471 (1987) (non-settling tortfeasor not claiming total indemnity but that other party is 100% liable).

138. See *Zarback v. Superior Court*, 195 Cal. App. 3d 120, 240 Cal. Rptr. 479 (1987)

total indemnity was one end of the spectrum of comparative equitable indemnification.¹³⁹ However, the primacy in these cases of the policy of encouraging settlements over the policy of fairly allocating loss, deviates from the principle of equitable allocation of fault enumerated in *Li*.¹⁴⁰

b. Good Faith Settlement does not Foreclose a Claim by a Derivative or Vicariously Liable Defendant for Total Equitable Indemnity

Although the majority of courts ruled that total indemnity was subsumed by the partial indemnity principles of *American Motorcycle*, some courts refused to abrogate total indemnity in situations involving vicarious or derivative liability.¹⁴¹ These cases recognized the doctrinal distinctions between contribution and indemnity by holding that total indemnity survived *American Motorcycle* and section 877.6. In a postjudgment action for indemnity, the Court of Appeals for the Fourth District ruled in *E.L. White, Inc. v. City of Huntington Beach* that the doctrine of total equitable indemnity survives the decision in *American Motorcycle*.¹⁴² In *White*, representatives of a deceased employee of a subcontractor brought a wrongful death action against the City of Huntington Beach and a contractor

reh'g granted 746 P.2d 451, 242 Cal. Rptr. 476 (1987) *remanded by Supreme Court* 763 P.2d 479, 252 Cal. Rptr. 816 (1988) (vicariously liable defendant barred from pursuing claim of total indemnity against settling tortfeasor); *accord In re Nucorp Energy Sec. Litigation*, 661 F. Supp. 1403 (S.D.Cal. 1987); *IRM Corp. v. Carlson*, 179 Cal. App. 3d 94, 224 Cal. Rptr. 438 (1986) (good faith settlement bars claim for total indemnity under active/passive and implied contractual theories).

139. See, e.g., *Baxter*, 176 Cal. App. 3d at 588-89, 222 Cal. Rptr. at 112-13.

140. See *supra* notes 58-64 and accompanying text for discussion of the *Li* case.

141. See *Tulco, Inc. v. Narmco Materials, Inc.*, 203 Cal. App. 3d 914, 236 Cal. Rptr. 224 (1987) *reh'g granted* 737 P.2d 1350, 238 Cal. Rptr. 66 (1987) *remanded by Supreme Court* 763 P.2d 479, 252 Cal. Rptr. 816 (1988); *Hale v. Laden*, 178 Cal. App. 3d 668, 224 Cal. Rptr. 182 (1986) (section 877.6 bars subsequent claim for equitable indemnity when measurable allegation of negligence, but does not bar claims for total shifting of liability); *Angelus Assocs. Corp. v. Neonex Leisure Prods., Inc.*, 167 Cal. App. 3d 532, 213 Cal. Rptr. 403 (1985) (doctrine of total indemnity continues to exist separate and distinct from comparative indemnity); *Huizar v. Abex Corp.*, 156 Cal. App. 3d 534, 203 Cal. Rptr. 47 (1984) (doctrine of total indemnity exists separate and distinct from comparative indemnity); *White v. City of Huntington Beach*, 138 Cal. App. 3d 366, 187 Cal. Rptr. 879 (1982) (good faith settlement not a bar to claim for total indemnity).

142. *E.L. White, Inc. v. City of Huntington Beach*, 138 Cal. App. 3d 366, 187 Cal. Rptr. 879 (1983). See *Far West Fin. Corp. v. D & S Co.* 46 Cal. 3d 796, 808 n.8, 760 P.2d 399 n.8, 916-17, 251 Cal. Rptr. 202, 210 n.8 (1988) (*White* did not address the right to total indemnity after a good faith settlement).

hired by the city.¹⁴³ Two of the chief construction inspectors of the city were present at the construction site where the employee was killed, and although they noticed safety violations, they took no action to remedy the violations.¹⁴⁴ The contractor brought an action for total indemnity against the city.¹⁴⁵ The city argued that the decision in *American Motorcycle* precluded the award of total equitable indemnity to the contractor.¹⁴⁶

The court rejected the argument made by the city by explaining that *American Motorcycle* sought simply to modify the all-or-nothing rule against loss sharing absent a joint judgment to allow loss sharing in appropriate cases.¹⁴⁷ The court explained that the loss sharing rules apply only to those defendants who share responsibility for causing injury and do not apply to those who are free from active fault.¹⁴⁸ The court explained that the loss sharing principles of *American Motorcycle* are not applicable to defendants whose liability is based on public policy and not a result of any shared active fault.¹⁴⁹ Consequently, since the city had been found actively at fault and the liability of the contractor was based on statutory vicarious liability,¹⁵⁰ the court held that vicarious or derivative liability did not fit within the framework of comparative fault principles.¹⁵¹ The court explained that *American Motorcycle* did not abandon the traditional concepts of total equitable indemnity and allowed the claim by the contractor for total equitable indemnity against the city.¹⁵²

143. *White*, 138 Cal. App. 3d at 375, 187 Cal. Rptr. at 885.

144. *Id.* at 375-76, 187 Cal. Rptr. at 885.

145. *Id.*

146. *Id.* at 376, 187 Cal. Rptr. at 885.

147. *Id.* at 376, 187 Cal. Rptr. at 885 (citing *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 598, 578 P.2d 899, 912, 146 Cal. Rptr. 182, 195 (1980)).

148. *Id.*

149. *Id.* at 377, 187 Cal. Rptr. at 886. As the decision in *American Motorcycle* relied on the equitable indemnity principles enumerated in a similarly situated New York court in *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382, 386 (1972), the court in *White* relied on subsequent rulings of New York courts regarding the continued existence of total indemnity after *Dole*. *White*, 138 Cal. App. 3d at 376, 187 Cal. Rptr. at 885. The New York courts had consistently held that the common law principles of full indemnity had not been abrogated and that a vicariously liable tortfeasor could still obtain full indemnity. *Id.* at 375-77, 187 Cal. Rptr. at 885-86 (citing *D'Ambrosio v. City of New York*, 44 N.Y.2d 454, 435 N.E.2d 366, 450 N.Y.S.2d 149, 152 (1982)).

150. *White*, 138 Cal. App. 3d at 377, 187 Cal. Rptr. at 886. The contractor was held vicariously liable under the "peculiar risk" doctrine. *Id.* at 377-78 n.4, 187 Cal. Rptr. at 886 n.4. See RESTATEMENT (SECOND) OF TORTS §§ 413, 416 (1979) (liability of an employer of an independent contractor for physical harm caused when the employer should recognize the employment is likely to create a peculiar risk of physical harm). See generally, Comment, *Clarifying the Peculiar Risk Doctrine: The Rule Restated*, 20 PAC. L.J. 197 (1988) (discussion of the peculiar risk doctrine).

151. *White*, 138 Cal. App. 3d at 377-78, 187 Cal. Rptr. at 886.

152. *Id.*

Subsequent decisions cite the *White* interpretation of *American Motorcycle* for the proposition that vicariously liable defendants may still obtain full indemnity from a settling tortfeasor under section 877.6.¹⁵³ In *Huizar v. Abex Corporation*, the Court of Appeals for the Second District held that a good faith settlement under section 877.6 did not bar subsequent claims for equitable or total indemnity.¹⁵⁴ In *Huizar*, the injured plaintiff sued a product manufacturer and its distributor for injuries sustained to his hand as a result of a defective punch press.¹⁵⁵ The manufacturer then filed a cross-complaint against the distributor seeking partial indemnity.¹⁵⁶ The distributor, in turn, filed a cross-complaint against the manufacturer for total indemnity based on the distributor's status as a derivative tortfeasor.¹⁵⁷ Both the manufacturer and the distributor entered into pretrial settlements with the plaintiff pursuant to section 877.6.¹⁵⁸ Upon a determination of good faith, the trial court dismissed the cross-complaints.¹⁵⁹

After affirming the determination by the trial court of good faith as to the respective settlements of the parties, the court held that a good faith settlement under section 877.6 barred the manufacturers claim for partial indemnity.¹⁶⁰ However, the court held that section 877.6 did not bar the claim which rested on traditional notions of total indemnity by the distributor.¹⁶¹ The court explained that, contrary to the manufacturer's contentions, neither *American Motorcycle* nor its codification in section 887.6 abolished total equitable indemnity.¹⁶² The court stressed that the California Supreme Court in *American Motorcycle* would have expressly stated an intent to abolish the doctrine of total indemnity had they intended that result.¹⁶³ Further, had the legislature intended to bar claims for total indemnity under section 877.6, the appropriate language would have been

153. See, e.g., *Huizar v. Abex Corp.* 156 Cal. App. 3d 534, 542, 203 Cal. Rptr. 47, 51 (1984); *Angelus Assocs. Corp. v. Neonex Leisure Prods., Inc.*, 167 Cal. App. 3d 532, 542, 213 Cal. Rptr. 403, 409 (1985); *Tulco, Inc. v. Narmco Materials, Inc.*, 203 Cal. App. 3d 914, 917, 236 Cal. Rptr. 224, 226 (Cal. App. 4 Dist. 1987), *reh'g granted* 737 P.2d 1350, 238 Cal. Rptr. 66 (1987) *remanded by Supreme Court* 763 P.2d 479, 252 Cal. Rptr. 816 (1988).

154. *Huizar v. Abex Corp.*, 156 Cal. App. 3d 534, 203 Cal. Rptr. 47 (1984).

155. *Id.* at 538, 203 Cal. Rptr. at 48-49.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 539-40, 203 Cal. Rptr. at 49-50.

161. *Id.* at 540, 203 Cal. Rptr. at 49-50 (citing Restatement (Second) of Torts § 886B, comment d).

162. *Id.* at 541-42, 203 Cal. Rptr. at 50-51.

163. *Id.*

incorporated into the statute.¹⁶⁴ Finally, the court stated that cases subsequent to *American Motorcycle* expressly left open the question of whether a claim for total equitable indemnity based on derivative or vicarious liability still existed.¹⁶⁵ Consequently, the court held that when the liability of a completely blameless party is premised solely upon the tortious act or omission of another, the doctrine of equitable or total indemnity continues to exist separate and distinct from that of contribution.¹⁶⁶

The Court of Appeals for the Fourth District used a different rationale in allowing a claim for total indemnity after a good faith settlement under section 877.6. In *Angelus Associates Corporation v. Neonex Leisure Products, Inc.*,¹⁶⁷ the court held that vicariously or derivatively liable defendants are not tortfeasors within the meaning of section 877.6 and therefore not subject to the good faith bar.¹⁶⁸ In reversing the dismissal of a cross-complaint for total indemnity, the court focused on two issues: whether total indemnity existed after *American Motorcycle* and whether a claim for total indemnity could be brought against a tortfeasor who settles in good faith with the plaintiff under section 877.6.¹⁶⁹ The court held that section 877.6 barred only cross-complaints against a tortfeasor settling

164. *Id.*

165. *Id.* at 542, 203 Cal. Rptr. at 51 (citing *Safeway Stores, Inc. v. Nest-Kart*, 21 Cal. 3d 322, 332 n.5, 579 P.2d 441, 446 n.5, 146 Cal. Rptr. 550, 555 n.5 (1978)).

The court remanded the *Huizar* case for a trial on the merits of the distributor's claim for total indemnity. The court held that should the trier of fact determine active negligence in any degree in contributing to the plaintiff's injuries, then principles of comparative negligence would apply and the distributor would be barred from obtaining any contribution from the manufacturer. *Id.* at 542, 203 Cal. Rptr. at 51. If the trial court found fault on the part of the distributor, the distributor's claim would be for a sharing of liability between joint tortfeasors and would be barred by a good faith settlement under section 877.6. However, if the trial court found no fault on the part of the distributor, then the distributor's claim would be for a shifting of liability between one who was at fault and one whose liability was imposed by public policy. See *supra* note 122 discussing the *Kohn* case (court denied indemnitee the opportunity to litigate its claim).

166. *Id.* at 542, 203 Cal. Rptr. at 51.

167. *Angelus Assocs. Corp. v. Neonex Leisure Prods., Inc.*, 167 Cal. App. 3d 532, 213 Cal. Rptr. 403 (1985).

168. *Id.* The court defined "tortfeasor" as "[a] wrong-doer; one who commits or is guilty of a tort." *Id.* at 541, 213 Cal. Rptr. at 408-9 (citing *Black's Law Dictionary* (5th ed. 1979) at 1335).

In *Angelus*, plaintiffs were injured by an explosion within their motorhome. *Id.* at 534, 213 Cal. Rptr. at 403-4. They sued the manufacturers of several component parts, the manufacturer of the motorhome itself, and the retailer who sold them the motorhome. *Id.* The manufacturer of the motorhome settled with the plaintiff and, upon a finding of good faith, the trial court dismissed all cross-complaints by co-defendants against the manufacturer. *Id.* The retailer appealed the dismissal of its cross-complaint for total equitable indemnity. *Id.*

169. *Id.* at 536-37, 213 Cal. Rptr. at 405-6.

in good faith for partial or comparative indemnity based on comparative fault.¹⁷⁰ Thus, the court held that total indemnity still exists in situations where the nonsettling defendant is vicariously or derivatively liable.¹⁷¹ The court further held that the settlement procedure under section 877.6 had no application to complaints for total indemnity.¹⁷² The court explained that the liability of the retailer stemmed solely from the retailer's relationship with the manufacturer in the context of the marketing chain.¹⁷³ The court stated that the retailer was neither a wrongdoer nor a tortfeasor.¹⁷⁴ Consequently, the principles of comparative fault were inapplicable since they provide a means of apportioning fault only among wrongdoers.¹⁷⁵

Finally, the court addressed the effects of its conclusion on pretrial settlements.¹⁷⁶ The court explained that the decision to allow claims for total indemnity after a good faith settlement would adversely affect pretrial settlements only when defendants who are clearly at fault attempt to buy peace too cheaply at the expense of vicariously liable defendants.¹⁷⁷ Further, proper pretrial analysis of the allegations contained in the complaints in order to determine the availability of common law indemnity protects against uncertainty in settlements.¹⁷⁸

A question arose as to whether the broad settlement provisions of *Tech-Bilt* eliminated the need to preserve claims for total equitable indemnity after a good faith settlement.¹⁷⁹ The Court of Appeals for

170. *Id.* at 536, 213 Cal. Rptr. at 405.

171. *Id.* at 542, 213 Cal. Rptr. at 409-10. *See Hale v. Laden*, 178 Cal. App. 3d 668, 224 Cal. Rptr. 182 (1986) (the right to total indemnity survives a good faith settlement, but is barred by section 877.6(c) as long as a measurable allegation of negligence by a co-defendant exists). *See also Tulco, Inc. v. Narmco Materials, Inc.*, 203 Cal. App. 3d 914, 918, 236 Cal. Rptr. 225, 227 (Cal. App. 4 Dist. 1987) *reh'g granted* 737 P.2d 1350, 238 Cal. Rptr. 66 (1987) *remanded by Supreme Court* 763 P.2d 479, 252 Cal. Rptr. 816 (1988) (*Hale* not inconsistent with holding in *Angelus* that total indemnity exists after *American Motorcycle*).

172. *Angelus*, 167 Cal. App. 3d at 541, 213 Cal. Rptr. at 408-9.

173. *Id.*

174. *Id.* The court explained that the retailer was entitled to total indemnity because under the doctrine of strict products liability, all persons and entities in the manufacturing and marketing chain are liable to the plaintiff even if they are not responsible for the defect proximately causing the loss. *Id.* at 535, 213 Cal. Rptr. at 404-5. However, as between themselves, persons not at fault for the defect are entitled to indemnity from those who are at fault, based on equitable principles. *Id.* (citations omitted).

175. *Id.* at 541-42, 213 Cal. Rptr. at 408-10.

176. *Id.* at 542-43, 213 Cal. Rptr. at 409-10.

177. *Id.* at 542, 213 Cal. Rptr. at 409.

178. *Id.*

179. *See Torres v. Union Pac. R.R.*, 157 Cal. App. 3d 499, 511 n.5, 203 Cal. Rptr. 825, 833 n.5 (1984) (with a broad definition of good faith, the preservation of actions for total equitable indemnity as in *Huizar* is not necessary). *See supra* note 97-101 and accompanying text (discussing the decision in *Tech-Bilt*).

the Fourth District ruled that the broad settlement provisions of *Tech-Bilt* had no effect on the right to total equitable indemnity.¹⁸⁰ In *Tulco, Inc. v. Narmco Materials, Inc.*, the court held that plaintiff's pleadings alleged facts sufficient to entitle the plaintiff to proceed with an action for total equitable indemnity against a joint tortfeasor notwithstanding a good faith settlement with the plaintiffs.¹⁸¹ The court explained that claims for total indemnity were not intended to be barred by section 877.6 absent contrary legislative enactment.¹⁸²

The decisions holding that claims for total indemnity survived a good faith settlement focused on a number of different principles. *White* relied primarily on the doctrinal distinctions between partial indemnity and total equitable indemnity.¹⁸³ *Huizar* focused on judicial language and legislative intent.¹⁸⁴ *Angelus* focused on deterrence of settlements and the definition of joint tortfeasor under section 877.6.¹⁸⁵ Finally, *Tulco* noted that broad settlement provisions had no effect on the continued right to claim total equitable indemnity.¹⁸⁶

The California Courts of Appeal were clearly divided on the doctrinal distinctions underlying the settlement practices of section 877.6. While some courts found that a good faith settlement barred subsequent claims for total indemnity,¹⁸⁷ other courts concluded that

180. *Tulco, Inc. v. Narmco Materials, Inc.*, 203 Cal. App. 3d 914, 918, 236 Cal. Rptr. 224, 227 (1987) rev. granted 737 P.2d 1350, 238 Cal. Rptr. 66 (1988) remanded by Supreme Court 252 Cal. Rptr. 816, 763 P.2d 479 (1988). In *Tulco*, heirs of employees severely burned or killed as a result of an explosion from the manufacture of a batch of epoxy brought actions for negligence and strict products liability against the employer and the manufacturers (Tulco and Ciba-Geigy) of defective ingredients, the distributor of the ingredients, and licensor of the ingredients. *Id.* at 916, 236 Cal. Rptr. at 225. Tulco and Ciba-Geigy each settled with the plaintiffs and the trial court dismissed the subsequent cross-complaints. *Id.* Tulco, which claimed total equitable indemnity based on derivative liability, appealed the dismissal of its cross-complaint. *Id.*

Compare *Torres v. Union Pac. R.R.*, 157 Cal. App. 3d 499, 511 n.5, 203 Cal. Rptr. 825, 833 n.5, (1984) (broad definition of "good faith" may make the exception for total indemnity unnecessary) with *Tulco, Inc. v. Narmco Materials, Inc.*, 203 Cal. App. 3d 919, 918, 236 Cal. Rptr. 224, 227 (1987) (broad "good faith" standard enumerated in *Tech-Bilt* does not affect right to total indemnity).

181. *Tulco*, 203 Cal. App. 3d at 923, 236 Cal. Rptr. at 230. The court remanded the case for a determination of fault of any degree on the part of the petitioner, a finding of which would bring petitioner's claim for indemnity within the ambit of section 877.6. *Id.* at 923, 236 Cal. Rptr. at 230-31. See also *Huizar v. Abex Corp.*, 156 Cal. App. 3d 534, 203 Cal. Rptr. 47 (1984) (case remanded for finding of measurable allocation of fault).

182. *Tulco*, 203 Cal. App. 3d at 922-23, 236 Cal. Rptr. at 230.

183. See *supra* notes 142-152 and accompanying text.

184. See *supra* notes 154-166 and accompanying text.

185. See *supra* notes 167-178 and accompanying text.

186. See *supra* notes 180-182 and accompanying text.

187. See *supra* notes 105-140 and accompanying text for cases which bar claims for total indemnity after a good faith settlement.

a codefendant's right to total equitable indemnity survived a joint tortfeasor's good faith settlement.¹⁸⁸ Recent courts have acknowledged the conflicting interpretations among the courts of appeal and awaited guidance from the California Supreme Court.¹⁸⁹ In September 1988, the California Supreme Court settled the issue in *Far West Financial Corp. v. D & S Co., Inc.*¹⁹⁰

II. THE CASE

In *Far West Financial Corporation v. D & S Company, Inc.*, the California Supreme Court absolved a tortfeasor who had entered into a good faith settlement from further claims for total equitable indemnity by a vicariously liable defendant.¹⁹¹ The court held that only a single doctrine of loss apportionment exists in California in light of the judicial background, the legislative history, and the legislative intent of section 877.6.¹⁹² Total indemnity is simply one end of the spectrum of loss apportionment even when based on vicarious or derivative liability.¹⁹³ The court explained that a vicariously liable defendant will be afforded protection against harm from an unfair settlement by a pretrial determination of "good faith" under section 877.6(c).¹⁹⁴ The court further explained that the inclusion of total indemnity claims in comparative indemnity is consistent with the statutory objectives of section 877.6(c): the encouragement

188. See *supra* notes 141-182 and accompanying text for discussion of cases which do not bar claims for total indemnity after a good faith settlement.

189. See *Zarback v. Superior Court*, 195 Cal. App. 3d 120, 240 Cal. Rptr. 479 (1987) (seeing no purpose in reiterating the rationales, policies, and legal analyses of minority and majority courts, court adopted majority view as enumerated in *Baxter*); *Horton v. Superior Court of Kern County*, 194 Cal. App. 3d 727, 740, 238 Cal. Rptr. 467 (1987) (until the Supreme Court resolves the issue, adopting the majority view that total equitable indemnity exists only as one end of the spectrum of comparative equitable indemnification); *IRM Corp. v. Carlson*, 179 Cal. App. 3d 94, 109-10, 224 Cal. Rptr. 438, 446 (1986) (after an exhaustive analysis of both the majority and minority views, the court was simply persuaded that the abandonment of the concept of total implied indemnity and its accompanying passive/active analysis was more consistent with concept of comparative indemnity espoused in *American Motorcycle* and section 877.6). See also *In re Nucorp Energy Sec. Litigation*, 661 F. Supp. 1403, 1413-1414 (S.D. Cal. 1987) (absent guidance from state supreme court, federal court sitting in diversity jurisdiction adopts state majority view that section 877.6 bars claims for total indemnity by vicariously or derivatively liable defendants).

190. *Far West Fin. Corp. v. D & S Co.*, 46 Cal. 3d 796, 760 P.2d 399, 251 Cal. Rptr. 202 (1988).

191. *Id.* at 800, 760 P.2d at 401, 251 Cal. Rptr. at 204.

192. *Id.* at 808, 760 P.2d at 407, 251 Cal. Rptr. at 210.

193. *Id.* at 808-9, 760 P.2d at 407, 251 Cal. Rptr. at 210.

194. *Id.* at 815, 760 P.2d at 412, 251 Cal. Rptr. at 215.

of settlements, and the equitable allocation of costs among multiple tortfeasors.¹⁹⁵

A. The Facts

Far West Financial Corporation (Far West), a real estate developer involved in the financing and developing of condominiums, entered into a contract with D&S Company (D&S), a general contractor, for the building of a condominium project, called the Studio Village Townhouse Development.¹⁹⁶ Shortly after the completion of the project and the sale of the units, a number of defects in the common areas of the project appeared.¹⁹⁷ In October 1976, the Studio Village Homeowners Association (Association) and Far West entered into a settlement and release agreement in which Far West agreed to make a number of repairs in return for an agreement by the Association to release Far West from any further liability for the defects of the project.¹⁹⁸ Several years later, serious latent defects appeared after a heavy rainstorm season.¹⁹⁹ The Association attempted to set aside the prior settlement and filed suit against Far West, D&S, and numerous subcontractors, engineering firms, and architects who had worked on the project.²⁰⁰ In July 1981, Far West filed a cross-complaint against D&S seeking either indemnity or contribution from D&S.²⁰¹ In early 1984, Far West entered into a settlement agreement with the Association.²⁰² The trial court found the settlement with the Association to be in good faith pursuant to section 887.6 and dismissed the numerous indemnity cross-complaints that existed against Far West.²⁰³ Although the actions against Far West had been dismissed, Far West continued to pursue a cross-complaint against the remaining

195. *Id.* at 810-14, 760 P.2d at 408-411, 251 Cal. Rptr. at 211-214.

196. *Id.* at 800, 760 P.2d at 401, 251 Cal. Rptr. at 204.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* The Association attempted to set aside the prior agreement on the grounds of fraudulent concealment of the defects at the time of the initial settlement, negligent and intentional misrepresentation, strict liability, breach of express and implied warranties, negligence, and fraud and deceit. *Id.*

201. *Id.* Far West claimed that D&S had exercised complete control over the construction of the project and that any deficiencies in the construction were attributable to D&S or to the subcontractors hired by D&S. *Id.*

202. *Id.* Far West agreed to pay \$315,000 outright and a sliding scale guaranty of an additional \$35,000 recovery in return for the Association's agreement to release Far West from any further liability. *Id.*

203. *Id.*

defendants.²⁰⁴ In August 1984, D&S entered into a settlement agreement with the Association²⁰⁵ conditioned on both a good faith determination and dismissal of all outstanding cross-complaints pending against D&S.²⁰⁶ D&S then moved for an order declaring the settlement agreement in good faith and dismissing all of the pending cross-complaints against it.²⁰⁷ Far West filed a motion in opposition contending that a good faith settlement under section 877.6 did not operate to bar a claim for complete or total indemnity.²⁰⁸

The trial court found the D&S settlement to be in good faith and dismissed all of the cross-complaints against D&S.²⁰⁹ Far West appealed, contending that a claim for total equitable indemnity could not be extinguished by a good faith settlement.²¹⁰ The Court of Appeals for the Second District affirmed.²¹¹ The California Supreme Court granted review in order to resolve conflicting decisions among the courts of appeals.²¹²

B. The Majority Opinion

In an opinion written by Justice Arguelles, the California Supreme Court affirmed the decisions of the appellate and trial courts.²¹³ The court held that section 877.6 barred the complaint by Far West for total indemnity.²¹⁴ First, the court examined the judicial development

204. *Id.* Far West sought indemnification for the \$315,000 it had paid to the Association. *Id.* The court noted that Far West was within its rights to continue to seek indemnification in this manner. *Id.* at 801-802, 760 P.2d at 402, 251 Cal. Rptr. at 205 (citing *Sears, Roebuck and Co. v. International Harvester Co.*, 82 Cal. App. 3d 492, 147 Cal. Rptr. 262 (1978) and *Bolamperti v. Larco Mfg.*, 164 Cal. App. 3d 249, 210 Cal. Rptr. 155 (1985)).

205. *Far West*, 46 Cal. 3d at 801-2, 760 P.2d at 402, 251 Cal. Rptr. at 205. D&S agreed to pay \$115,000 to the Association in return for the Association's release of its claims against D&S. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 803, 760 P.2d at 403, 251 Cal. Rptr. at 206.

211. *Far West Fin. Corp. v. D & S Co.*, 189 Cal. App. 3d 1322, 234 Cal. Rptr. 771 (1987). The Court of Appeals for the Second District rejected the distinction between total and partial indemnity, stating that "[t]otal indemnity is just one end of the spectrum of comparative equitable indemnification." *Id.* at 775 (citing *Standard Pac. of San Diego v. A.A. Baxter Corp.*, 176 Cal. App. 3d 577, 587-88, 222 Cal. Rptr. 106, 112 (1986)).

212. *Far West*, 46 Cal. 3d at 799, 760 P.2d at 401, 251 Cal. Rptr. at 202.

213. *Id.* at 880, 760 P.2d at 403, 251 Cal. Rptr. at 206.

214. *Id.* However, the California Supreme Court declined to rule on whether an indemnity claim resting on an implied contract theory or arising from an express indemnification agreement is barred by a good faith settlement under section 877.6(c). *Id.* at 803 n.5, 760 P.2d at 403 n.5, 251 Cal. Rptr. at 206 n.5.

of total equitable indemnity following the decision in *American Motorcycle*.²¹⁵ Second, the court examined whether section 877.6 included claims for total indemnity in addition to claims for contribution.²¹⁶ Finally, the Court examined the effects of its holding in light of the legislative policies underlying section 877.6.²¹⁷

1. Total Equitable Indemnity

The court recognized the mandate of *American Motorcycle* that a tortfeasor who enters into a good faith settlement with a plaintiff is free from any subsequent claim for contribution.²¹⁸ The court, however, rejected the argument that *Safeway Stores, Inc. v. Nest-Kart*²¹⁹ provided support for the claim by Far West that total equitable indemnity and comparative indemnity are separate legal concepts.²²⁰ The court explained that the subsequent decision of *People ex rel. Dept. of Transportation v. Superior Court*²²¹ clarified the confusion surrounding *American Motorcycle* and *Safeway Stores*.²²² Consequently, the holding in *People ex rel. Dept. of Transportation* clearly indicated that *American Motorcycle* did not create two separate equitable indemnity doctrines, but a single comparative indemnity doctrine that permits partial indemnification on a comparative fault basis.²²³

215. *Id.* at 805-808, 760 P.2d at 404-8, 251 Cal. Rptr. at 207-11.

216. *Id.* at 808-9, 760 P.2d at 407-8, 251 Cal. Rptr. at 210-11.

217. *Id.* at 810-14, 760 P.2d at 408-11, 251 Cal. Rptr. at 211-14.

218. *Id.* at 806, 760 P.2d at 405, 251 Cal. Rptr. at 208 (citing *American Motorcycle*, 20 Cal. 3d at 604, 578 P.2d at 915, 146 Cal. Rptr. at 198)).

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

220. *Far West*, 46 Cal. 3d at 806-807, 760 P.2d at 406, 251 Cal. Rptr. at 209, (citing *Safeway Stores v. Nest-Kart*, 21 Cal. 3d 322, 146 Cal. Rptr. 550, 579 P.2d 441 (1978)). See Comment, *Indemnity in California: Is it Really Equitable After American Motorcycle and Section 877.6?* 18 PAC. L.J. 201 (1986) (language in *Safeway Stores* provides support for the claim that a right to total indemnity continues to exist despite good faith settlement).

221. *People ex rel. Department of Transportation v. Superior Court*, 26 Cal. 3d 744, 608 P.2d 673, 163 Cal. Rptr. 585 (1980).

222. *People ex rel. Department of Transp. v. Superior Court*, 26 Cal. 3d 744, 608 P.2d 673, 163 Cal. Rptr. 585 (1980). Justice Arguelles explained that *American Motorcycle* did not create a new type of indemnity based on a new theoretical basis, but simply modified the existing pre-*American Motorcycle* equitable indemnity doctrine. *Far West*, 46 Cal. 3d at 807, 760 P.2d at 406-7, 251 Cal. Rptr. at 209 (citing *People ex rel. Department of Transp. v. Superior Court*, 26 Cal. 3d 744, 608 P.2d 673, 163 Cal. Rptr. 585 (1980)).

223. *Far West*, 46 Cal. 3d at 807, 760 P.2d at 406-7, 251 Cal. Rptr. at 209 (citing *People ex rel. Dept. of Transp. v. Superior Court*, 26 Cal. 3d 744, 608 P.2d 673, 163 Cal. Rptr. 585 (1980)).

2. *Legislative Intent Behind Section 877.6*

The court next considered the effect of the enactment of section 877.6 on the doctrine of total indemnity. The court found that the legal background and legislative history of section 877.6 support the interpretation adopted by the majority of the courts of appeals.²²⁴ The court explained that the legislature indicated no intention to distinguish some indemnity claims from others by enacting section 877.6.²²⁵ The court concluded that the legislative history of section 877.6 indicated that the legislature had simply intended not to alter existing law, which was a single comparative indemnity doctrine.²²⁶ Consequently, the court held that the legislature intended section 877.6 to bar the entire spectrum of potential indemnity claims because existing law included only a single comparative indemnity doctrine.²²⁷

3. *Policies Underlying Section 877.6*

The court stated that including total indemnity claims within types of claims barred by good faith settlements under section 877.6 supports the legislative policies underlying the settlement rules in California. First, the court examined the effect on the settlement provisions of section 877.6.²²⁸ Second, the court examined the effect on the equitable allocation of costs among multiple tortfeasors.²²⁹ Finally, the court discussed the effect of settlement provisions on defendants whose liability is imposed based on public policy.²³⁰

The court reiterated that a lack of finality would discourage settlements whether the claim was for total indemnity or partial/comparative indemnity.²³¹ The court rejected the argument made by

224. *Id.* at 808-9, 760 P.2d at 407-8, 251 Cal. Rptr. at 210. See *supra* notes 105-140 and accompanying text discussing those cases holding that good faith settlements bar subsequent claims for total indemnity.

225. *Far West*, 46 Cal. 3d at 808-9, 760 P.2d at 407-8, 291 Cal. Rptr. at 210.

226. *Id.* at 809 n.9, 760 P.2d at 407 n.9, 251 Cal. Rptr. at 210 n.9. The court explained that according to the Legislative Digest of the bill, the drafters intended simply to codify the effect of a good faith settlement under "existing law." *Id.*

227. *Id.*

228. *Id.* at 811, 760 P.2d at 408-9, 251 Cal. Rptr. 211-12.

229. *Id.* at 814-15, 760 P.2d at 411, 251 Cal. Rptr. at 214.

230. *Id.* at 813 n.13, 760 P.2d at 410-11 n.13, 251 Cal. Rptr. at 213-14 n.13.

231. *Id.* at 810, 760 P.2d at 408-9, 251 Cal. Rptr. at 211-12 (citing *American Motorcycle* 20 Cal. 3d 578, 604, 578 P.2d 899, 915-16, 146 Cal. Rptr. 182, 198-99 (1978)).

Far West that claims for total equitable indemnity would have minimal effect on settlement practices in light of the overriding objective of equitable allocation of loss among multiple tortfeasors.²³² The court found that allowing an exception under section 877.6 would encourage litigants to characterize claims as derivative or vicarious in order to avoid finality of the settlement.²³³ Further, a determination that a defendant's liability is vicarious or derivative provides no assurance that the defendant would be entitled to a total shifting of liability or succeed in a claim for total indemnity.²³⁴ Thus, the court concluded that in most cases, a settling defendant would face continued litigation on a total indemnity claim by a nonsettling defendant.²³⁵

The court stated that a good faith determination under the *Tech-Bilt* standards equitably allocates loss under section 877.6.²³⁶ The court explained that the reasonable range criteria under the *Tech-Bilt* approach protects a vicariously or derivatively liable tortfeasor, like any other minimally culpable tortfeasor, against harm from an unfair settlement.²³⁷ The court conceded that a non-settling tortfeasor might be left to bear some portion of the plaintiff's loss.²³⁸ However, the court noted that good faith under *Tech-Bilt* is met even if the settling defendant pays less than their proportionate share, as long as that defendant pays less in settlement than they would at trial.²³⁹

232. *Id.* at 811, 760 P.2d at 408-9, 251 Cal. Rptr. at 211-12.

233. *Id.* at 811-12, 760 P.2d at 409-10, 251 Cal. Rptr. at 212-13 (citing *e.g.* *City of Sacramento v. Gemsch Inv. Co.*, 115 Cal. App. 3d 869, 171 Cal. Rptr. 764 (1981)).

234. *Id.* at 812, 760 P.2d at 410, 251 Cal. Rptr. at 213. The court explained that the characterization of a defendant's liability as vicarious or derivative provides no assurance that the defendant bears no responsibility for the plaintiff's harm. *Id.* A defendant who is vicariously liable for the acts of another might also bear some direct responsibility for an accident; *e.g.* negligent hiring or supervision of an agent. *Id.*

235. *Id.* at 814, 760 P.2d at 411, 251 Cal. Rptr. at 214.

236. *Id.* at 814-15, 760 P.2d at 411, 251 Cal. Rptr. at 214.

237. *Id.* The court stated:

If a more culpable tortfeasor settles with the plaintiff before the vicariously liable tortfeasor, and if the settlement does not require the more culpable tortfeasor to bear its fair share of the loss, the trial court can find that the settlement is not in good faith and, as a consequence, the settlement will not bar the less culpable tortfeasor from pursuing its equitable indemnity claim . . . [Similarly], if, as in this case, an allegedly vicariously liable tortfeasor has already settled with the plaintiff in order to limit its potential liability and has continued to pursue its indemnity claim, the allegedly less culpable tortfeasor retains the right to challenge the good faith of any subsequent settlement by the allegedly more culpable tortfeasor.

Id.

238. *Id.* at 816, 760 P.2d at 413, 251 Cal. Rptr. at 216 (citing *Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 166-67, 213 Cal. Rptr. at 263).

239. *Id.*

Finally, the court held that the vicarious or derivative nature of a tortfeasor's liability does not justify special treatment from the settlement rules applicable to other joint tortfeasors whose liability is based on public policy.²⁴⁰ The court explained by example that both vicarious liability and strict product liability rest on policies of deliberate allocation of risk.²⁴¹ According to the court, a vicariously or derivatively liable defendant should not be afforded special treatment to pursue an indemnity action while a strictly liable defendant is barred from pursuing the same claim.²⁴²

C. *The Dissenting Opinion*

Justice Kaufman agreed with the majority that claims for total loss sharing or contribution are barred by a good faith settlement but argued that section 877.6 does not bar a claim for total loss shifting based on indemnity by a vicariously liable defendant.²⁴³ Justice Kaufman posed three arguments against the majority's holding that a good faith settlement bars subsequent claims by vicariously liable defendants for total indemnity.²⁴⁴ First, a claim for total indemnity based on vicarious liability differs in kind from other indemnity claims.²⁴⁵ According to Justice Kaufman, a vicariously liable defendant is not a tortfeasor but simply an involuntary surety or guarantor.²⁴⁶ Justice Kaufman opined that the majority incorrectly

240. *Id.* at 813 n.13, 760 P.2d at 410-11 n.13, 251 Cal. Rptr. at 213-14 n.13.

241. *Id.*

242. *Id.* The court explained that in strict products liability, for example:

... tort law places the "direct" liability on an individual or entity which may have exercised due care in order to serve the public policies of a fair allocation of the costs of accidents or to encourage even greater safety efforts than are imposed by the due care standard. . . . [T]he modern justification for vicarious liability closely parallels the justification for imposing liability on the nonnegligent manufacturer of a product Thus, the fact that a tortfeasor's liability is vicarious does not necessarily distinguish him from other tortfeasors nor does it indicate the public policies on which tort liability rests justify special dispensation from the good faith settlement rules applicable to other tortfeasors.

Id.

243. *Far West Fin. Corp. v. D & S Co.*, 46 Cal. 3d 796, 817, 760 P.2d 399, 251 Cal. Rptr. 202 (Kaufman, J., dissenting).

244. *Id.* at 817-828, 760 P.2d at 413-421, 251 Cal. Rptr. at 217-224 (Kaufman, J., dissenting).

245. *Id.* at 818, 760 P.2d at 413, 251 Cal. Rptr. at 217 (Kaufman, J., dissenting).

246. *Id.* at 819-20, 760 P.2d at 414-15, 251 Cal. Rptr. at 217-18. California Code of Civil Procedure section 876(b) provides in relevant part: "Where one or more persons are held liable solely for the tort of one of them or of another, as in the case of the liability of a master for the tort of his servant, they shall contribute a single *pro rata* share, as to which

attempted to equate the imposition of strict products liability on manufacturers with the justification for imposing vicarious or derivative liability.²⁴⁷ Further, the majority ignored historical logic, precedent, and fairness by equating vicariously liable parties with joint and concurrent tortfeasors who defectively manufacture products.²⁴⁸

Second, Justice Kaufman explained that section 877.6 does not authorize or support the rule that total indemnity claims based on vicarious liability are barred by good faith settlements.²⁴⁹ By enacting section 877.6, the legislature intended to preserve rights of indemnity under the existing law.²⁵⁰ Since vicarious liability had never been subject to a good faith settlement bar, Justice Kaufman stated that the enactment of section 877.6 had no effect on rights to total indemnity.²⁵¹ Justice Kaufman believed that the decision in *American Motorcycle* did not replace or supersede earlier actions for total indemnity, but simply recognized and created a rule allowing loss sharing without a joint judgment.²⁵² Thus, Justice Kaufman concluded that section 877.6 could not be interpreted to bar claims for total indemnity based on vicarious liability after a good faith settlement.²⁵³

there may be indemnity between them." CAL. CODE CIV. PROC. § 876(b). Justice Kaufman explained:

As the Legislature has recognized in section 876(b), one who is vicariously liable is not a tortfeasor. When the issue is equitable apportionment of responsibility for the plaintiff's loss, the vicariously liable party and the fault-source defendant are to be jointly assessed a single share based on the fault of the latter but as between themselves apportionment of loss is governed by the traditional rule of full equitable indemnity, a rule of loss *shifting* rather than loss *sharing*, as the law has recognized from very early days. (emphasis in original)

Far West, 46 Cal. 3d at 819-20, 760 P.2d at 414-15, 251 Cal. Rptr. at 217-18 (Kaufman, J., dissenting).

247. *Far West* at 819, 760 P.2d at 414, 251 Cal. Rptr. at 217 (Kaufman, J., dissenting). See *id.*, 46 Cal. 3d at 813 n.13, 760 P.2d at 410-11 n.13, 251 Cal. Rptr. at 213-14 n.13 (equating strict products liability with vicarious liability).

248. *Id.* at 819, 399 P.2d at 414, 251 Cal. Rptr. at 217 (Kaufman, J., dissenting).

249. *Id.* at 821, 760 P.2d at 416-17, 251 Cal. Rptr. at 219 (Kaufman, J., dissenting).

250. *Id.* California Code of Civil Procedure section 875 (f) provides in relevant part: "This title shall not impair any right of indemnity under existing law. . ." CAL. CODE CIV. PROC. § 875(f) (West 1980).

251. *Far West*, 46 Cal. 3d at 821, 760 P.2d at 416-17, 251 Cal. Rptr. at 219 (Kaufman, J., dissenting).

252. *Id.* at 822, 760 P.2d at 417, 251 Cal. Rptr. at 220 (Kaufman, J., dissenting). This interpretation is supported by statements in *Safeway Stores* that the court had "no occasion to determine whether the comparative indemnity doctrine should be applied in a situation in which a party's liability is entirely derivative or vicarious in nature." *Safeway Stores*, 21 Cal. 3d at 332 n.5, 579 P.2d at 446 n.5, 146 Cal. Rptr. at 555 n.5. See also Comment, *Indemnity in California: Is it Really Equitable After American Motorcycle and Section 877.6?* 18 PAC. L.J. 201 (1986) (language in *Safeway Stores* supports the theory that a claim for total indemnity continues to exist despite good faith settlement). See *supra* notes 65-79 and accompanying text (discussing the decision in *American Motorcycle*).

253. *Far West*, 46 Cal. 3d at 823, 760 P.2d at 417-18, 251 Cal. Rptr. at 221 (Kaufman,

Third, Justice Kaufman argued that the rule adopted by the majority will not promote settlement.²⁵⁴ Vicariously or derivatively liable defendants will have a great disincentive to settle absent provisions either reserving full veto power over subsequent settlements or requiring the plaintiff to dismiss the causes of action against the fault-source tortfeasor.²⁵⁵ Under the rule adopted by the majority, only primarily liable tortfeasors seeking immunity from subsequent indemnity claims by vicariously liable defendants will be encouraged to settle, but at the expense of equitable allocation of fault.²⁵⁶ A vicariously liable defendant in this situation may prefer to gamble at trial rather than settle a claim he or she believes should be paid by another.²⁵⁷

In a separate dissenting opinion, Justice Eagleson agreed with Justice Kaufman that section 877.6 should not bar a claim for total indemnity based on vicarious liability after a good faith settlement.²⁵⁸ He added, however, that the majority's analysis resulted in funda-

J., dissenting). Justice Kaufman explained:

The majority's decision at this late date to extend the reach of section 877.6(c) to include vicarious liability indemnity claims conflicts not only with the plain meaning of that section's words, but also with subdivision (f) of section 875, which prohibits any construction of section 877.6(c) impairing indemnity rights existing at the time of its enactment.

Id.

254. *Id.* at 823-26, 760 P.2d at 418-20, 251 Cal. Rptr. at 221-24 (Kaufman, J., dissenting).

255. *Id.* at 824, 760 P.2d at 418, 251 Cal. Rptr. at 221 (Kaufman, J., dissenting). Justice Kaufman explained that

[u]nlike the majority, I think it improbable the vicariously liable tortfeasor will settle in reliance on the trial court's power to withhold its "good faith" approval of a later settlement by the fault-source tortfeasor which fails to provide reimbursement for the vicariously liable defendant. Realizing the great pressure on trial courts to approve settlements, and the unlikelihood of appellate reversal of a good faith determination, vicariously liable defendants will prefer and probably insist on the certainty of a veto or dismissal provision before making a substantial settlement with the plaintiff.

Id. at 824 n.6, 760 P.2d at 418 n.6, 251 Cal. Rptr. at 221 n.6 (Kaufman, J., dissenting).

256. *Id.* at 824, 760 P.2d at 418, 251 Cal. Rptr. at 221 (Kaufman, J., dissenting).

257. *Id.* at 825, 760 P.2d at 419, 251 Cal. Rptr. at 222 (Kaufman, J., dissenting). Justice Kaufman explained:

The issue is not whether any defendant has been given a fair opportunity to participate in a settlement agreement but whether a solvent tortfeasor may shift any part of his own liability onto a vicariously liable defendant. In the context of the good faith determination this problem could be directly addressed by holding, as a matter of law, that a settlement which fails to provide for dismissal of vicarious liability causes of action based on the settlor's conduct is not in good faith, but the majority expressly rejects this solution.

Id. (Kaufman, J., dissenting).

258. *Far West Fin. Corp. v. D & S Co.*, 46 Cal. 3d 796, 828-832, 760 P.2d 399, 421-23, 251 Cal. Rptr. 202, 224-26 (1988) (Eagleson, J., concurring and dissenting).

mental unfairness.²⁵⁹ First, Justice Eagleson noted that the approach of the majority unfairly treats a vicariously liable defendant required to pay part of the plaintiff's damages by denying that party the opportunity to seek indemnity from the tortfeasor who caused the harm.²⁶⁰ In an action for indemnity, there is no need to protect plaintiffs as to fairness because they have already settled.²⁶¹ Thus, the only question is whether fairness has been achieved *among defendants*.²⁶² Justice Eagleson explained that, contrary to the holding of the majority, a nonsettling vicariously or derivatively liable tortfeasor is not in exactly the same position as any other minimally culpable tortfeasor.²⁶³ According to Justice Eagleson, the liability of a vicariously liable tortfeasor is based upon responsibility for another's wrongdoing whereas the liability for one who is minimally culpable is based on that party's own wrongdoing.²⁶⁴

Second, Justice Eagleson explained that the practicalities of settlement practices under the majority rule would result in further unfairness.²⁶⁵ When a claim involves vicarious liability, a settlement should be deemed in good faith only if the settlement leaves nothing to be paid by the vicariously liable defendant. The refusal of the majority to state as a matter of law that a settlement is not in good faith unless the settlement also relieves the vicariously liable defendant from further liability to the plaintiff results in fundamental unfairness.²⁶⁶ However, even assuming that unfairness does not result when the vicariously liable defendant is responsible for part of the plaintiff's damages, Justice Eagleson argued that fault on the part of the

259. *Id.* at 829, 760 P.2d at 421, 251 Cal. Rptr. at 224 (Eagleson, J., concurring dissenting).

260. *Id.* at 830, 760 P.2d at 423, 251 Cal. Rptr. at 226 (Eagleson, J., concurring and dissenting).

261. *Id.* at 829, 760 P.2d at 421, 251 Cal. Rptr. at 224 (Eagleson, J., concurring and dissenting).

262. *Id.* (Eagleson, J., concurring and dissenting) (emphasis in original). Justice Eagleson rejected any reliance on *Safeway Stores* for the proposition that imputed liability in a strict liability sense is similar to imputed liability in a vicarious or derivative liability sense. First, a strictly liable defendant is *directly* liable to the plaintiff, whereas a vicariously liable defendant is only *derivatively* liable. *Id.* Second, a strictly liable defendant is an active tortfeasor; i.e. responsible for his own conduct. *Id.* Third, a strictly liable defendant may be at "fault" to some degree. *Id.*

263. *Id.* at 830, 760 P.2d at 422, 251 Cal. Rptr. at 225-26 (Eagleson, J., concurring and dissenting).

264. *Id.* (Eagleson, J., concurring and dissenting).

265. *Id.* at 830-32, 760 P.2d at 423, 251 Cal. Rptr. at 226 (Eagleson, J., concurring and dissenting).

266. *Id.* at 831, 760 P.2d at 423, 251 Cal. Rptr. at 226 (Eagleson, J., concurring and dissenting).

nonsettling vicariously liable defendant must be a prerequisite to a settling defendant's good faith determination by the court.²⁶⁷

III. LEGAL RAMIFICATIONS

A. Expansion of section 877.6

In *Far West*, the court overruled the decisions finding that claims for total indemnity by vicariously or derivatively liable defendants survived a good faith settlement.²⁶⁸ Specifically, the court rejected the contention that an indemnity action between a vicariously or derivatively liable tortfeasor and a fault source tortfeasor is different from the loss sharing enumerated in *American Motorcycle* and section 877.6.²⁶⁹ Thus, the court expanded *American Motorcycle* and section 877.6²⁷⁰ by completely subsuming total indemnity under the loss sharing provisions of *American Motorcycle*.²⁷¹

B. California Settlement Policies

1. Encouragement of settlements

The decision in *Far West* purports to fulfill the statutory objective of promoting settlement.²⁷² After *Far West*, a vicariously liable de-

267. *Id.* (Eagleson, J., concurring and dissenting).

268. See *supra* notes 141-182 and accompanying text (discussing the cases which hold that total indemnity survives a good faith settlement).

269. *Far West*, 46 Cal. 3d at 804 n.7, 760 P.2d. at 404 n.7, 251 Cal. Rptr. at 207 n.7.

270. *American Motorcycle*, 20 Cal. 3d at 599, 578 P.2d. at 912, 146 Cal. Rptr. at 195. See also CAL. CIV. PROC. CODE § 875(f) (West 1980) ("[t]his title shall not impair any right of indemnity under existing law . . .").

271. See generally RESTATEMENT (SECOND) OF TORTS, § 886B, comment m, at 349 (1979) (development of partial indemnity by courts constrained by contribution statute inevitably results in merger of concepts of contribution and indemnity).

272. *Far West*, 46 Cal. 3d at 810, 760 P.2d at 408, 251 Cal. Rptr. at 211. The court stated that "[f]ew things would be better calculated . . . to discourage settlement of disputed tort claims, than knowledge that such a settlement lacked finality and would lead to further litigation with one's joint tortfeasors, and perhaps further liability." *Id.* (quoting *Stambaugh v. Superior Court*, 62 Cal. App. 3d 232, 237, 132 Cal. Rptr. 843, 486 (1976)). Accord *Lopez v. Blecher* 143 Cal. App. 3d 736, 741, 192 Cal. Rptr. 190 (1983).

But see *Far West*, 46 Cal. 3d at 824, 760 P.2d at 418-19, 251 Cal. Rptr. at 221-22 (Kaufman, J., dissenting) (defendants whose liability is based on vicarious or derivative liability will have a great disincentive to settle absent a provision reserving to itself full veto power over subsequent settlements or a provision requiring the plaintiff to dismiss the causes of action against the fault-source tortfeasor). Justice Kaufman also recognized that veto powers have a chilling

fendant who wishes to enter into a full value settlement with the plaintiff must insist on a provision dismissing an action against fault source defendants or giving the right to veto subsequent settlements.²⁷³ Otherwise, vicariously liable defendants who enter into full value settlements might have their indemnity claims against the fault source defendant barred by a trial judge who fails to consider the vicarious nature of their liability.²⁷⁴ The unattractiveness of vicariously liable defendants' insistence on veto provisions or dismissal of claims against fault source defendants will increase the amount of plaintiffs' settlement demand.²⁷⁵ Moreover, veto provisions, by nature, lead to inefficient and complex settlement practices.²⁷⁶ Although total protection from any subsequent claim encourages fault source tortfeasors to settle, *Far West* discourages vicariously liable defendants, like *Far West*, from entering into full value settlements because their subsequent claims will not be protected.²⁷⁷ Consequently, *Far West* en-

effect on settlement and often result in unnecessary trials. *Id.* (citing *Abbot T. Ford, Inc., v. Superior Court* 43 Cal. 3d 858, 883, 741 P.2d 124, 239 Cal. Rptr. 626 (1987)). *See also id.* at 831, 760 P.2d at 423, 291 Cal. Rptr. at 226 (Eagleson, J., concurring and dissenting) (majority refused to hold as a matter of law that a settlement by the directly liable tortfeasor with the plaintiff which does not include a dismissal of the claim against the vicariously liable defendant is not a "good faith" settlement).

273. *Far West*, 46 Cal. 3d at 824 n.6, 760 P.2d at 418 n.6, 251 Cal. Rptr. at 221 n.6 (Kaufman, J., concurring and dissenting). *But see id.* at 811 n.11, 760 P.2d at 409 n.11, 251, Cal. Rptr. at 212 n.11 (a vicariously or derivatively liable defendant who wished to settle with the plaintiff *could* settle for the full amount and obtain an agreement to dismiss the plaintiff's action against the directly liable defendant). The facts of *Far West* provide an excellent example of the land mines facing counsel for vicariously liable defendants in multiparty litigation:

[The] allegedly vicariously liable defendant (*Far West*) settled with the plaintiff first and paid the settlement amount. Without doubt that was done with the full expectation it could pursue its right to indemnification from the alleged wrongdoers (D&S defendants), a right which ripened upon payment of the settlement amount. The alleged wrongdoers thereafter unilaterally entered into a separate settlement with the plaintiff and this court now holds the vicariously liable defendant's clear right to pursue the wrongdoer for indemnification is barred. It theorizes that in determining a wrongdoer's settlement is in good faith the trial court can take into consideration the fact that another defendant's liability is vicarious only. But there is no indication that the trial court actually did so in this case.

Id. at 818, 760 P.2d at 414, 251 Cal. Rptr. at 217.

274. *Id.*

275. *Id.* at 824, 760 P.2d at 418-19, 251 Cal. Rptr. at 221-22 (Kaufman, J., dissenting).

276. *See Abbott Ford, Inc. v. Superior Court*, 43 Cal. 3d 858, 883, 741 P.2d 124, 239 Cal. Rptr. 626 (1987) (veto provisions in sliding scale agreements conflict with the public policy favoring full settlement of litigation and may frequently lead to unnecessary trials).

277. *Far West*, 46 Cal. 3d at 824, 760 P.2d at 418-19, 251 Cal. Rptr. at 221-22 (Kaufman, J., dissenting). *See Comment, Indemnity in California: Is it Really Equitable After American Motorcycle and Section 877.6?* 18 PAC. L.J. 201 (1986) (encouragement of settlements should not take place at the expense of a blameless party). Vicariously liable defendants, like all other parties to the action, weight the costs and benefits of settling the action. *See infra* notes 308-322 (discussing settlement under Uniform Comparative Fault Act). As Justice Kaufman

courages piecemeal settlement by various fault source tortfeasors at the expense of full-value settlement by one vicariously liable defendant.²⁷⁸

2. *Equitable allocation of costs among multiple tortfeasors*

By denying a vicariously liable defendant the right to seek total indemnity, the court tolerated unfairness in order to pursue the policy of encouraging settlement.²⁷⁹ The majority asserts that the *Tech-Bilt* good faith inquiry adequately protects vicariously liable defendants. However, the facts of *Far West* demonstrate that *Far West* was not afforded adequate protection under the *Tech-Bilt* approach and that the majority's conclusion does not support its premise.²⁸⁰

3. *Minitrials*

The California Supreme Court has expressed disfavor with minitrial procedures in a number of situations.²⁸¹ In *Tech-Bilt*, Justice Grodin,

explained:

[a] vicariously liable defendant may seek an early full value settlement with the plaintiff (anticipating reimbursement from the solvent fault-source tortfeasor) in order to limit the potential exposure, reduce litigation costs, and obtain the plaintiff's cooperation in litigation of the indemnity claim. If a liability insurance carrier is controlling the defense, it may seek an early full-value settlement to avoid potential liability to its insured for breach of the covenant of good faith and fair dealing. Under the rule espoused by the majority, a vicariously liable defendant will have a great disincentive to enter into a full-value settlement agreement . . .

Far West, 46 Cal. 3d at 823-24, 760 P.2d at 418, 251 Cal. Rptr. at 221 (Kaufman, J., dissenting).

278. *Far West*, 46 Cal. 3d at 823-24, 760 P.2d at 418, 251 Cal. Rptr. at 221 (Kaufman, J., dissenting).

279. *Far West*, 46 Cal. 3d at 820-28, 760 P.2d at 415-21, 251 Cal. Rptr. at 218-20 (Eagleson, J., concurring and dissenting). The court apparently found persuasive the hierarchy of the three policies underlying contribution legislation as enumerated in *Mesler v. Bragg Management Co.*: "First . . . is the maximization of recovery to the injured party for the amount of his [or her] injury to the extent fault of other has contributed to it . . . ; Second is the encouragement of settlement of the injured party's claim . . . ; Third is the equitable apportionment of liability among tortfeasors." *Mesler v. Bragg Management Co.*, 39 Cal. 3d 290, 702 P.2d 601, 216 Cal. Rptr. 443 (1985). This hierarchy departs from principle of equitable allocation of fault enumerated in *Li v. Yellow Cab Co.*, but is consistent with the general principle underlying vicarious liability that a plaintiff maximize his or her recovery for injury. See *supra* notes 58-64 and accompanying text for discussion of fairness principle as enumerate in *Li*.

280. See *Far West*, 46 Cal. 3d at 818, 760 P.2d at 414, 251 Cal. Rptr. at 217 (Kaufman, J., concurring and dissenting) (no indication that trial judge considered that *Far West*'s liability was vicarious only). See also *infra* note 286 & *supra* note 273 and accompanying text for practical settlement difficulties under *Far West* decision.

281. *Brown v. Superior Court*, 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1987)

concerned with burdening the trial courts with minitrials, stated that the settlement need only be "in the ballpark."²⁸² Nevertheless, the good faith inquiry has, as a practical matter, resulted in a minitrial determination of good faith.²⁸³ Minitrials clog the courts with unnecessary hearings and strain the resources of the entire judicial system.²⁸⁴ Further, minitrial procedures contradict the public policy favoring maximization of recovery to the injured party for the amount of his or her injury by allowing strategic defensive delay tactics to weaken a plaintiff's resolve and resources. Finally, minitrial determinations of good faith of settlements possess the inherent danger of inconsistent results in liability.²⁸⁵ By placing the issue of total indemnity into the good faith requirement of section 877.6, the California Supreme Court in *Far West* preserved the complex and expensive minitrial procedure of *Tech-Bilt*.²⁸⁶

(disapproving of minitrial procedure for determination of manufacturers liability for design defects of DES). See also *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.*, 38 Cal. 3d 488, 502, 698 P.2d 159, 213 Cal. Rptr. 256 (1985) (Bird, C.J., dissenting) ("good faith" standard will clog the courts with unnecessary pre-trial hearings).

282. *Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263.

283. See Foley, *Settling Out of a Multiparty Case*, 5 CAL. LAW. 25, 26-8 (1985) (*Tech-Bilt* "good faith" standard necessitates mini-trials involving examination of underlying issues of liability, causation, and damages).

284. See *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.*, 38 Cal. 3d 488, 502, 698 P.2d 159, 213 Cal. Rptr. 256 (1985) (Bird, C.J., dissenting) (pre-trial hearings requiring examination of underlying issues clog the courts and intolerably burden trial courts).

285. See Comment, *Comparative Negligence, Multiple Parties, and Settlements*, 64 CALIF. L. REV. 1264, 1275 (1977) (pro tanto reduction rule results in fluctuations of liability). For example:

. . . [S]uppose P. is injured by two tortfeasors, both equally at fault. If P suffers damages of \$10,000, a system in which the extent of fault governed the extent of liability would presumably hold each tortfeasor liable for \$5,000. If, however, P settles with tortfeasor A for \$3,000 and sues tortfeasor B, application of the *pro tanto* reduction rule would subject tortfeasor B to liability for the remaining \$7,000. Conversely, if P had settled with tortfeasor A for \$6,000, tortfeasor B's liability would have only been \$4,000, although the relative fault of the parties would not have changed. Only in the situation where the parties to the settlement were able to accurately predict the jury verdict of \$10,000, and settle accordingly for \$5,000, would the defendant's liability be apportioned in relation to fault.

Id. at 1275 n.64. See also *Brown v. Superior Court*, 44 Cal. 3d 1049, 1068, 751 P.2d 470, 481-82, 245 Cal. Rptr. 412, 423 (1987) (minitrials to determine manufacture liability in DES cases possess the inherent danger of inconsistent results between judges).

286. For example, assume an action for personal injury for \$100,000 arising out of an automobile accident with the following parties and liabilities:

Plaintiff (A) is 20% at fault.

Defendant (B), the driver, is 30% at fault.

Defendant (C), B's employer, is vicariously liable for B's tort.

Defendant (D), manufacturer of the brakes on B's truck, is 50% liable.

Hypothetical #1: B. settles prior to trial for \$20,000.

The trial court must make a *Tech-Bilt* determination whether B's settlement is in good faith. After *Far West*, the settlement may be in good faith even if C is not

C. Meaning of "Joint Tortfeasor"

A joint tortfeasor for purposes of section 877.6 includes those defendants whose liability is vicarious or derivative.²⁸⁷ In *Mesler v. Bragg Management*,²⁸⁸ the court held that section 877 eliminated the distinction between successive and concurrent tortfeasors and included tortfeasors allegedly liable for the same tort.²⁸⁹ The court in *Far West* apparently expanded *Mesler* by holding that vicariously liable defendants are joint tortfeasors within the meaning of section 877.6.²⁹⁰

released from the action. *Far West*, 46 Cal. 3d at 825, 760 P.2d at 419, 251 Cal. Rptr. at 222 (Kaufman, J., dissenting) (majority refuses to hold as a matter of law that a settlement which fails to provide for dismissal of vicarious liability causes of action is not in good faith). At the pre-trial stages, the court must conduct a minitrial to determine percentages of fault. Subsequent litigation might show that B's settlement was not in good faith because plaintiff had greater damages than originally estimated. This would force the parties to relitigate the issues of good faith or leave the vicariously liable defendant to bear a portion of the solvent employee's negligence. Moreover, either defendant could frustrate plaintiff's recovery by delaying litigation through litigation contesting good faith.

Hypothetical #2: C settles prior to trial for \$20,000.

As a vicariously liable defendant, C's liability would be the same as B's under the doctrine of joint and several liability. After *Far West*, C must demand that the plaintiff dismiss against B. Otherwise, as happened in *Far West*, A could subsequently settle with B for B's amount of damages and preclude C's indemnity rights. Further, as in *Far West*, the *Tech-Bilt* approach may not adequately protect C if the trial judge fails to account for the vicarious nature of C's liability. See *Far West*, 46 Cal. 3d at 818, 760 P.2d at 414, 251 Cal. Rptr. at 217 (Kaufman, J., dissenting) (no indication that trial judge considered that *Far West*'s liability was vicarious only). A might also demand a price for C's request to dismiss against B and for A's cooperation in the subsequent indemnity action against B; but this is a cost which the fault source defendant should bear.

Far West, 46 Cal. 3d at 826, 760 P.2d at 420, 251 Cal. Rptr. at 223 (Kaufman, J., dissenting).

287. The California Supreme Court did not expressly decide this issue. However, the Court of Appeals decision held that *Far West* was a joint tortfeasor within the meaning of section 877.6. *Far West Fin. Corp. v. D & S Co.*, 234 Cal. Rptr. 771, 774 (Cal. App. 2 Dist. 1987). See also *Turcon Constr., v. Norton-Villiers, Ltd., Inc.*, 139 Cal. App. 3d 280, 188 Cal. Rptr. 580 (1983) (term "joint tortfeasor" embraces joint, concurrent and successive tortfeasors). But see *Far West Fin. Corp. v. D & S Co.*, 46 Cal. 3d 796, 819, 760 P.2d 399, 251 Cal. Rptr. 202 (1988) (Kaufman, J., concurring and dissenting) (vicariously liable defendant is not a "tortfeasor" but an involuntary surety or guarantor). See also Comment, *Indemnity in California: Is it Really Equitable after American Motorcycle and section 877.6?* 18 PAC. L.J. 201, 229 (1986) (expansion of the term joint tortfeasors to include blameless defendants would be contrary to the historical meaning).

288. *Mesler v. Bragg Management Co.*, 39 Cal. 3d 290, 302, 702 P.2d 601, 216 Cal. Rptr. 443 (1985).

289. See *Mesler v. Bragg Management Co.*, 39 Cal. 3d 290, 302, 702 P.2d 601, 607-08, 216 Cal. Rptr. 443, 449-50 (1985) ("joint tortfeasors" in section 877 meant to include tortfeasors claimed to be liable for the same tort and eliminate the distinction between joint tortfeasors and concurrent or successive tortfeasors).

290. See *Far West Fin. Corp. v. D & S Co.*, 46 Cal. 3d 796, 819, 760 P.2d 399, 414,

Moreover, the court found that the policies underlying imposition of vicarious liability are no different than the policies underlying other forms of imputed tort liability such as strict products liability.²⁹¹

IV. PROPOSAL

Pretrial settlement procedures after the decision in *Far West* are needlessly complex and tolerate unfairness to joint tortfeasors.²⁹² The present complex pretrial determination process conflicts with the California Supreme Court's antipathy towards minitrial procedures.²⁹³ Commentators have in the past argued for the repeal of the current complex settlement practices in favor of less complicated practices similar to those expressed in the Uniform Comparative Fault Act²⁹⁴ and the statutes of such states as New York.²⁹⁵ The decision in *Far West* simply highlights the current need for the legislature to streamline via statutory enactment the pretrial settlement practices between joint tortfeasors in California.

In *Far West*, the California Supreme Court recognized three policies inherent in settlement practices: the policy encouraging full recovery by the plaintiff, the policy encouraging settlement of claims, and the policy of equitably allocating fault among joint tortfeasors. After *Far West*, settlement procedures will further settlements at the

251 Cal. Rptr. 202, 217 (1988) (Kaufman, J., dissenting) (vicariously liable defendant is not a "tortfeasor" but an involuntary surety or guarantor). See also *Angelus Assocs. Corp. v. Neonex Leisure Prods., Inc.*, 167 Cal. App. 3d 532, 213 Cal. Rptr. 403 (1985) (vicariously and derivatively liable defendants not tortfeasors within the meaning of section 877.6)

291. *Far West*, 46 Cal. 3d at 813 n.13, 760 P.2d at 410-11, n.13, 251 Cal. Rptr. at 213-14 n.13.

292. In 1986, the California voters passed Proposition 51 in order to hold defendants in tort actions financially liable in proportion to their degree of fault. CAL. CRV. CODE § 1431.1(c) (West Supp. 1989) (Prop. 51 expresses the policy that defendants be held financially liable in closer proportion to their degree of fault). The unfairness of the decision in *Far West* apparently contradicts the policies underlying Proposition 51.

293. See *supra* note 281 and accompanying text.

294. See Miller, *Extending the Fairness Principle of Li and American Motorcycle: Adoption of the Uniform Comparative Fault Act* 14 PAC. L.J. 835 (1983); Adams, *Settlements after Li: But is it "Fair?"* 10 PAC. L.J. 729, 743-49 (1979) (supporting provisions similar to the Uniform Comparative Fault Act). See also UNIF. COMP. FAULT ACT, §§ 1-10, 12 U.L.A. 39 (West Supp. 1989); Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle v. Superior Court*, 30 HASTINGS L.J. 1465, 1510-12 (1979) (recommending adoption of provisions in Uniform Comparative Fault Act, promulgated by the National Conference of Commissioners on Uniform State Laws in August 1977).

295. See *infra* notes 300-306 and accompanying text.

expense of equitable allocation of fault.²⁹⁶ If equitable allocation of fault were the primary concern of the court, the court would have allowed subsequent claims for indemnity under section 877.6. The tension between the settlement policies reflected by decisions in lower California courts was resolved in favor of settlements.

The policies inherent in California's statutory settlement practices need not be conflicting, but may be simultaneously pursued. For example, the New York state legislature responded to the creation of partial indemnity by expressly reserving the right to total indemnity.²⁹⁷ On the other hand, some states reacted to the creation of comparative fault by enacting the comprehensive settlement practices enumerated in the Uniform Comparative Fault Act.²⁹⁸ Each approach favors recovery by the plaintiff and equitable allocation of fault among all parties to the action without jeopardizing the policy of encouraging settlement of claims.²⁹⁹

A. *The New York Approach*

New York General Obligations Law contains a release provision similar to California section 877.6 that relieves a settling tortfeasor from claims for contribution after a good faith settlement.³⁰⁰ However, in response to the decision in *Dole v. Dow Chemical Co.*,³⁰¹ the New York State Legislature eliminated a settlement practice analogous to California's pro tanto reduction of plaintiff's claim in favor of a reduction of the released tortfeasor's equitable share of

296. *Far West* also appears to contradict the policy expressed in Proposition 51 to hold defendants in tort actions financially liable in proportion to their degree of fault.

297. N.Y. CIV. PRAC. L. & R. 1404(b) (McKinney Supp. 1989) (rights to indemnity preserved). See *supra* note 68 (discussing adoption of loss sharing between joint tortfeasors in New York in *Dole*).

298. UNIF. COMP. FAULT ACT, §§ 1-10, 12 U.L.A. 39 (West Supp. 1989) (comprehensive settlement statute for those states adopting comparative fault). See also UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1955) (comprehensive settlement statute for those states not applying the principle of comparative fault). Washington substantially adopted the Uniform Comparative Fault Act in 1981. See WASH. REV. CODE ANN. §§ 4.22.005-4.22.925 (West Supp. 1989) (substantially adopting the provisions of the Uniform Comparative Fault Act). Iowa substantially adopted the Uniform Comparative Fault Act in 1984. See IOWA CODE ANN. §§ 668.1-668.14 (substantially adopting the provisions of the Uniform Comparative Fault Act).

299. See *infra* notes 300-321 and accompanying text for discussion of settlement practices under approaches in New York and states adopting Uniform Comparative Fault Act.

300. N.Y. GEN. OBLIG. LAW § 15-108(b) (West Supp. 1989).

301. *Dole v. Dow Chem. Co.* 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 (1972) (creating partial indemnity doctrine in New York).

fault.³⁰² The New York State Legislature found that the elimination of pro tanto reduction in comparative fault situations encouraged settlements among joint tortfeasors.³⁰³ Further, the New York State Legislature created a statutory right to contribution while preserving a nonsettling tortfeasors right to total indemnity.³⁰⁴ However, although the vicariously liable defendant's right to indemnity is preserved, the plaintiff's claim against the vicariously liable defendant is reduced on a pro tanto basis rather than on the basis of equitable share of fault.³⁰⁵ By allowing indemnity claims, New York simultaneously encourages settlement while promoting the policy of equitable allocation of fault among joint tortfeasors. The California State Legislature could encourage settlement and promote the policy of equitable allocation fault among joint tortfeasors by emulating the

302. N.Y. GEN. OBLIG. LAW § 15-108 (a) (West Supp. 1989). Section 15-108 provides that a release given to a joint tortfeasor "reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages. . . , whichever is greatest." *Id.*

303. N.Y. GEN. OBLIG. LAW § 15-108(a)—practice commentary at 717 (West Supp. 1989).

304. N.Y. CIV. PRAC. L. & R. 1401-1404 (McKinney Supp. 1989) (creating statutory right to contribution and preserving rights to total indemnity).

305. N.Y. CIV. PRAC. L. & R. 1404:2—practice comments at 382 (McKinney 1974). The practice comments suggest that the provisions of General Obligations Law sections 15-108 with respect to releases do not rob a principal of his claim for indemnity when the active wrongdoer settles first. *Id.* Further, in order to encourage settlements, the plaintiff's claim is not reduced by the agent's equitable share (100%), but is reduced on a pro tanto basis. *See also* N.Y. CIV. PRAC. L. & R. 1404:2—practice comments at 138-39 (McKinney Supp. 1989). The supplemental practice comments cite the decision in *Riviello v. Waldron*, 47 N.Y.2d 297, 391 N.E.2d 1278, 418 N.Y.S.2d 300 (1979) as an example of settlement practices in New York involving a case of vicarious liability. *Id.* In *Riviello v. Waldron*, a bartender negligently injured one of the patrons. The plaintiff sued both the bartender and the bar. Prior to trial, the plaintiff settled with the bartender for \$25,000, but won a \$200,000 verdict against the bar alone. The bar argued that since its liability was based on vicarious liability, the plaintiff's claim should be reduced by the bartender's equitable share of fault; ie. 100%. Consequently, the bar argued that its liability must be reduced to zero. The practice comments explain that General Obligations Law sections 15-108 does not apply in indemnity situations based on vicarious liability. *See also Survey of New York Practice*, 59 ST. JOHN'S L. REV. 419, 421-22 (1985) (courts interpreting General Obligations Law sections 15-108 have determined that it does not apply to indemnification claims). Thus, the general rule in New York is that when A and B are both liable in tort to the plaintiff for equitable shares measurable at less than 100% (i.e. contribution), a release given to A reduces B's liability by the amount of the release or by the size of A's equitable share whichever is greater. N.Y. GEN. OBLIG. LAW § 15-108 (McKinney Supp. 1989). When A and B are liable in tort for the same injury, but as between them B is entitled to full indemnity from A, a release given to A merely reduces B's liability to the plaintiff by the amount of the release. N.Y. CIV. PRAC. L. & R. 1404:2—practice comments at 138-39 (McKinney Supp. 1989). Thus, the proper approach is to preserve the bar's rights to total indemnity and reduce the plaintiff's claim against the bar on a pro tanto basis. Consequently, the plaintiff's claim against the bar is reduced to \$175,000 and the bar retains the right to claim indemnity against the settling bartender.

New York approach of statutory preservation of claims for total indemnity.³⁰⁶

B. *The Uniform Comparative Fault Act Approach*

The California legislature enacted section 877.6 despite testimony and commentary recommending settlement practices embodied in the Uniform Comparative Fault Act (hereinafter referred to as the Act).³⁰⁷

Various provisions of the Act have received favorable commentary from California courts³⁰⁸ and commentators³⁰⁹ and have been en-

306. *But see* Wilner & Farrell, *Dole v. Dow Chemical Co.: The Kaleidoscopic Impact of a Leading Case*, 42 BROOKLYN L. REV. 457, 465 (1976) (section 15-108 encourages defendants to settle, but discourages settlement by plaintiffs because plaintiff's lawyers will be disinclined to settle absent certainty that the settlement is equivalent to settlor's proportionate share of liability). *See also* DeWolf, *Several Liability and the Effect of Settlement on Claim Reduction: Further Thoughts*, 23 GONZAGA L. REV. 37, 66 (1988) (nonsensical to encourage defendants to settle while discouraging plaintiffs to settle). However, in deciding whether or not to settle, a plaintiff must always weigh such factors as risk of unfavorable judgment at trial, immediate need for recovery, and possibility that the settlement will be high or low. *See* Comment, *Comparative Negligence, Multiple Parties, and Settlements*, 65 CALIF. L. REV. 1264, 1277-8 (1977) (factors relating to plaintiff's decision to settle are present whether multiparty or single party litigation). Of course, the plaintiff has the last say on the decision whether or not to settle. If he does not wish to assume the risk of an undervalued settlement, he need not settle. On the other hand, the plaintiff has a strong incentive to drive the hardest bargain. *See* Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle v. Superior Court*, 30 HASTINGS L.J. 1465, 1496 (1979) (self regulating device of giving plaintiff decision on whether or not to settle is more effective than "good faith" inquiry). Consequently, as the plaintiff has control over the decision to settle, the primary focus in settlement practices should be to encourage the defendants to settle. *See* Comment, *Comparative Negligence*, 65 CALIF. L. REV. at 1278 (most plaintiffs settle their claims because certainty of immediate recovery combined with possibility of high recovery outweighs possibility of loss).

307. *See* Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle v. Superior Court*, 30 HASTINGS L.J. 1465, 1510 (1979) (recommendations are embodied in the Uniform Comparative Fault Act, promulgated by the National Conference of Commissioners on Uniform State Laws in August 1977). For criticism subsequent to the adoption of section 877.6, *see also* Miller, *Extending the Fairness Principle of Li and American Motorcycle: Adoption of the Uniform Comparative Fault Act*, 14 PAC. L.J. 835 (1983) (urging adoption of the Act in California).

Section 877.6 was enacted in order to provide a pretrial hearing, as opposed to a separate jury trial, on the issue of the good faith of the settlement. *See Review of Selected 1980 California Legislation*, 12 PAC. L.J. 290, 290-91 (1980).

308. *See* *Allen v. Sundeam*, 137 Cal. App. 3d 216, 186 Cal. Rptr. 863 (1983) (approving section 1(b) of the Act relating to intentional torts); *Sorensen v. Allred*, 112 Cal. App. 3d 717, 723-25, 169 Cal. Rptr. 441, 444-46 (1980) (approving portions of the Act relating to willful and wanton behavior); *Safeway Stores, Inc. v. Nest-Kart*, 21 Cal. 3d 322, 332, 579 P.2d 441, 446, 146 Cal. Rptr. 550, 555 (1978) (Act authority for apportioning negligence between a strictly liable defendant and negligent defendant). In *Daly v. General Motors*, the California Supreme Court commented:

We find additional significance in the provisions of the proposed Uniform Comparative Fault Act (Act), authored by Professor Wade, a recognized torts scholar,

dorsed by California courts.³¹⁰ However, complete adoption of the Act by California courts would be contrary to certain statutory provisions,³¹¹ would effectively overrule portions of the decision in *Far West*,³¹² and would be beyond the scope of judicial authority.³¹³ Therefore, in order to balance the policies underlying the settlement practices in California, the legislature must act.

a. Good faith

Adoption of the Act would eliminate the complex *Far West* good faith minitrial by replacing the statutory pro tanto reduction mechanism with procedures reducing the plaintiff's claim against nonsettling defendants by the settling tortfeasor's equitable share of fault.³¹⁴ The plaintiff would retain ultimate control over the decision whether or not to settle and ultimately would be required to decide if the consideration for the settlement approximates his or her best estimate of the settling tortfeasor's share of liability.³¹⁵ With clear knowledge

distinguished professor of law, and former dean, Vanderbilt University, current reporter of the Restatement Second of Torts, and chairman of the special committee on the Act of the National Conference of the Commissioners on Uniform State Laws (Conference). Our attention has been called to the action of the Conference in August 1977, wherein it approved adoption of the Act by a vote of 40 states to 8 (*California voting favorably*). The Act is the distillation of approximately five years of discussion, analysis, and contribution by a special committee and a review committee of the Conference . . . While lacking any legislative sanction the Act, in our view, points in the direction of a responsible national trend.

Daly v. General Motors Corp., 20 Cal. 3d 725, 742-3, 575 P.2d 1162, 144 Cal. Rptr. 380, 389-90 (1978).

309. See Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle v. Superior Court*, 30 HASTINGS L.J. 1465, 1510 (1979) (recommendations are embodied in the Act, promulgated by the National Conference of Commissioners on Uniform State Laws in August 1977). See also Miller, *Extending fairness principle of Li and American Motorcycle: Adoption of the Uniform Comparative Fault Act*, 14 PAC. L.J. 835 (1983) (urging adoption of the Act).

310. See *Commercial Cleaning Corp. v. Allied Chem. Co.*, 206 Cal. App. 3d 1066, 254 Cal. Rptr. 401, 408-10 (1988) (adopting the equitable share reduction mechanism of the Act over the pro tanto reduction mechanism of California law in federal maritime claims); *Jess v. Herrman*, 26 Cal. 3d 131, 141 n.5, 604 P.2d 208, 213 n.5, 161 Cal. Rptr. 87, 92 n.5 (1979) (adopting section 3 of the Act relating to set off provisions).

311. Enactment of the Act would require the repeal of California Code of Civil Procedure sections 875-877 dealing with contribution among tortfeasors. Fleming, *supra* note 309 at 1511.

312. See *Far West*, 46 Cal. 3d at 808, 760 P.2d at 407, 251 Cal. Rptr. at 210 (holding that indemnity is one end of the spectrum of comparative negligence).

313. See *Jess v. Herrman*, 26 Cal. 3d 131, 152-53, 604 P.2d 208, 221, 161 Cal. Rptr. 87, 100 (1979) (Manuel, J., dissenting) (majority usurped legislative authority by adopting section 3 of the Act).

314. UNIF. COMP. FAULT ACT § 2. See Fleming, *supra* note 309 at 1496 n.133 (Act eliminates pro tanto reduction mechanism in favor of equitable share of fault reduction).

315. Fleming, *supra* note 309 at 1497.

and predictability of the ramifications of settlement, the plaintiff could make the decision whether the offer to settle was satisfactory.³¹⁶ Thus, the elimination of the pro tanto reduction system would encourage settlement and equitably allocate fault in accordance with *Li* and *American Motorcycle*.³¹⁷

b. Indemnity

The Act pertains only to comparative fault and does not alter the common law rule for indemnity.³¹⁸ Defendants who are vicariously or derivatively liable may be dealt with under the common law in one of two ways. First, as one commentator points out, situations in which one defendant is vicariously liable for the torts of another should be exempted from reallocation under equitable share of fault principles and should be reduced pro tanto in order to encourage settlements.³¹⁹ Alternatively, a vicariously liable defendant is subject to the same equitable fault reduction mechanism as a comparatively at fault defendant under the Act.

Under the second approach, the plaintiff would settle with the fault source and derivatively liable defendants as a unit; a settlement with the fault source tortfeasor reducing the equitable share by 100% and dismissing as a practical matter the case against the vicariously liable defendant. The second approach would not deter settlements. If the fault source tortfeasor is solvent, then the plaintiff must recover from that tortfeasor and dismiss as a practical matter the derivatively liable defendant. If the active tortfeasor can not pay the

316. See Harris, *Washington's Unique Approach to Partial Tort Settlements: The Modified Pro Tanto Credit and the Reasonableness Hearing Requirement*, 20 GONZAGA L. REV. 69, 77 (1985) (best method for promoting goal of settlement is to provide litigants with both the incentive to settle and with clear, predictable rules regarding the effect of settlement).

317. See *supra* note 306 (noting that the encouragement of defendants to settle should be of primary focus as risks inherent in plaintiff's decision whether or not to settle do not change); *American Motorcycle*, 20 Cal. 3d at 598, 578 P.2d at 912, 146 Cal. Rptr. at 195; *Li*, 13 Cal. 3d at 808, 532 P.2d at 1229, 119 Cal. Rptr. at 861.

318. See *Rees v. Dallas County*, 372 N.W.2d 503, 506 (Iowa 1985) (adoption of comparative negligence does not alter common liability rule for indemnity); *Noia v. Ferrell-Penning, Inc.*, 36 Wash. App. 13, 671 P.2d 790 (1983), *remanded* 688 P.2d 499 (1984), *remanded* 689 P.2d 1065 (1984) (apportionment based on relative fault not applicable in cases of full indemnity).

319. See Miller, *Extending the Fairness Principle of Li and American Motorcycle: Adoption of the Uniform Comparative Fault Act*, 14 PAC. L.J. 835, 863-64 n.164 (1983) ("In establishing the reallocation principle of the Act it would be possible to exempt from reallocation those situations in which one defendant would be vicariously liable for the damage caused by another under agency principles."). See also Riviello v. Waldron *supra* note 305 for discussion of New York approach to vicarious liability under equitable share reduction approach.

entire amount of plaintiff's damages, then the derivatively liable defendant must decide whether the strength of the plaintiff's case merits settlement.

c. *Settlement Policies*

The Act furthers the policy of encouraging plaintiffs' recovery by retaining the common law principle of joint and several liability.³²⁰ The plaintiff's decision to settle contains the same risks under both existing law and the Act, but the Act provides greater incentive for defendants to settle than existing law.³²¹ Moreover, the Act neither discourages settlements as a whole nor jeopardizes the principle of equitable allocation of fault among *all* tortfeasors. After *Far West*, a nonsettling vicariously liable defendant would rather litigate than settle a claim for which he can never be indemnified. Under the Act, the vicariously liable defendant is protected by the plaintiff's determination to settle and the future right to total indemnity, not by the

320. UNIF. COMP. FAULT ACT, 12 U.L.A. 39, 40 (Supp. 1989) (commissioners' comment to section 2) (common law rule of joint and several liability continues to apply under the Act). See also *American Motorcycle v. Superior Court*, 20 Cal. 3d 578, 591, 578 P.2d 899, 906, 146 Cal. Rptr. 182, 189 (1978) (abandonment of joint and several liability would have serious and unwarranted deleterious effect on ability of negligently injured plaintiffs to recover for their injuries).

The Act provides a solution for the problem of the insolvent tortfeasor. See UNIF. COMP. FAULT ACT, 12 U.L.A. 39, 47 (commissioners' comment to section 2) (Supp. 1989). For example:

A sues B, C and D. A's damages are \$10,000.

A is found 40% at fault.

B is found 30% at fault.

C is found 30% at fault.

D is found 0% at fault.

A is awarded judgment jointly and severally against B & C for \$6,000. The court also states in the judgment the equitable share of the obligation of each party:

A's equitable share is \$4,000 (40% of \$10,000)

B's equitable share is \$3,000 (30% of \$10,000)

C's equitable share is \$3,000 (30% of \$10,000)

On proper motion to the Court, C shows that B's share is uncollectible. The court orders that B's equitable share be allocated between A and C.

A's equitable share is increased by \$1,714 (4/7 of \$3,000)

C's equitable share is increased by \$1,236 (3/7 of \$3,000)

Id. The legislature could conversely conclude that the plaintiff should fully recover for his or her loss and not be forced to absorb part of the loss of the insolvent tortfeasor. Although this approach would clearly contradict the equitable allocation of fault mandated by *Li*, the legislature is the proper decisionmaking body to alter the hierarchy of settlement policies. See *Jess v. Herrman*, 26 Cal. 3d 131, 152-53, 604 P.2d 208, 221, 161 Cal. Rptr. 87, 100 (1979) (Manuel, J., dissenting) (legislature, not the courts, is the proper body to decide equity and wisdom of policy decisions).

321. See *supra* note 306 (discussing incentives to settle under New York approach).

illusory protection afforded under the *Far West/Tech-Bilt* approach.

CONCLUSION

The introduction of loss sharing principles in California had far-reaching implications for parties in multi-party litigation. Fairness and the encouragement of settlement dictate that a tortfeasor who settles in good faith with a plaintiff should be shielded from subsequent claims for loss sharing under comparative fault. However, doctrinal distinctions dictate that rights to shift the entire loss (ie. seek indemnity) should not be affected by a settlement. In *Far West Financial Corp. v. D & S Co.*³²² the California Supreme Court held that a good faith settlement by a joint tortfeasor barred subsequent actions by derivatively or vicariously liable defendants for total equitable indemnity. The decision preserves the cumbersome and expensive mini-trial procedures of *Tech-Bilt* at the expense of fairness to nonsettling vicariously liable defendants.

In order to return to the principle of equitably allocating fault among tortfeasors under *Li* and Proposition 51, the legislature must change the present system of settlement practices. The legislature could adopt an approach, such as New York, which legislatively preserves total indemnity rights. Alternatively, the legislature could adopt the systemic change urged by commentators, the California Supreme Court, and this note. Such a legislative change would clarify the confusion surrounding the distinctly separate concepts of contribution and indemnity. The result would be a more streamlined and fair settlement procedure in the California trial courts. Legislative action would preserve the policies underlying the settlement practices in California: recovery by the plaintiff, encouragement of settlements, and equitable allocation of loss among all tortfeasors.

Scott J. Hyman

322. *Far West Fin. Corp. v. D & S Co.*, 46 Cal. 3d 796, 760 P.2d 399, 251 Cal. Rptr. 202 (1988).

