



7-1-1976

# Li v. Yellow Cab Company: A Survey of California Practice under Comparative Negligence

Victor E. Schwartz  
*University of Cincinnati*

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>



Part of the [Law Commons](#)

## Recommended Citation

Victor E. Schwartz, *Li v. Yellow Cab Company: A Survey of California Practice under Comparative Negligence*, 7 PAC. L. J. (1976).  
Available at: <https://scholarlycommons.pacific.edu/mlr/vol7/iss2/9>

This Article is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact [mgibney@pacific.edu](mailto:mgibney@pacific.edu).

## *Comparative Negligence in California*

### **Li v. Yellow Cab Company: A Survey Of California Practice Under Comparative Negligence**

VICTOR E. SCHWARTZ\*

On March 31, 1975, in the case of *Li v. Yellow Cab Co.*,<sup>1</sup> the Supreme Court of California gave birth to a brand new baby for the state—pure comparative negligence. The birth may have been a multiple one in that the introduction of comparative negligence represents much more than the abolition of the absolute contributory negligence defense. Indeed it has the potential of affecting and changing many other doctrines of tort law. Moreover, the nature of this new child will be substantially affected by the preexisting tort law of the state. For example, if California generally permitted contribution among joint tortfeasors, comparative negligence would have one effect; on the other hand, if California sharply limited contribution among joint tortfeasors, as it does now,<sup>2</sup> comparative negligence may bring about a different result.

---

\* J.D., 1965, Columbia University School of Law; Professor of Law, University of Cincinnati; Author, *COMPARATIVE NEGLIGENCE* (1974); Co-author, *PROSSER, WADE AND SCHWARTZ, CASES AND MATERIALS ON TORTS* (6th ed. 1976).

1. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). The *Li* opinion was modified by the supreme court on April 24, 1975. For a discussion of that modification see note 91 *infra*.

2. See CAL. CODE CIV. PROC. §§428.10, 875.

The purpose of this article is to acquaint the practitioner and student with some of the most important issues that will be faced by the California legal community as a result of the *Li* decision's potential impact on existing California tort law. Although no one can absolutely predict the ultimate resolution of the issues to be discussed herein, strong indicia can be gleaned from the decisions and statutes of other jurisdictions which have adopted some form of a comparative negligence system. The author has pursued a long and exhaustive study of all aspects of comparative negligence in light of tort law in all states. As a result of this research, he has attempted to identify and pose possible solutions to the intricate network of problems raised by the introduction of comparative negligence in California.

### A PURE COMPARATIVE NEGLIGENCE SYSTEM

It is important to begin with an understanding of the nature and problems unique to a *pure* comparative negligence system. As the reader should be aware, the supreme court in the *Li* case selected a pure comparative negligence system for California.<sup>3</sup> Under a pure system a contributorily negligent plaintiff recovers *some* damages unless his negligence was the sole proximate cause of the harm that befell him.<sup>4</sup> Only a few other states have adopted this type of system.<sup>5</sup> New York statutorily adopted a pure comparative negligence system on September 1, 1975;<sup>6</sup> Florida adopted pure comparative negligence by judicial decision in 1973,<sup>7</sup> while Washington<sup>8</sup> and Rhode Island<sup>9</sup> selected this system a few years before that. Only Mississippi<sup>10</sup> (since 1910) and the Federal Employer's Liability Act<sup>11</sup> (since 1908) have had a pure system for a long period of time and, on occasion, these precedents will provide helpful information to the practitioner.

A pure comparative negligence system is rather easy to apply. Apportionment of damages is made on the basis of proximately caused fault, and not pure physical causation.<sup>12</sup> Theoretically, plaintiff can

---

3. 13 Cal. 3d 804, 827, 532 P.2d 1226, 1242, 119 Cal. Rptr. 858, 874.

4. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS §67 (4th ed. 1971) [hereinafter cited as PROSSER]; V. SCHWARTZ, COMPARATIVE NEGLIGENCE §3.2, at 46 (1974) [hereinafter cited as SCHWARTZ]; see BOOK OF APPROVED JURY INSTRUCTIONS, No. 14.91 *et seq.* (5th rev. ed. 1975) [hereinafter cited as BAJI].

5. See SCHWARTZ, *supra* note 4, at 46-48.

6. N.Y.C.P.L.R. §1411 (McKinney 1975-76).

7. Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

8. WASH. LAWS 1973 (1st Ex. Sess.), ch. 138, §1.

9. R.I. GEN. LAWS ANN. 1956, §9-20-4 (1975 Supp.).

10. MISS. LAWS Special Sess. 1910, Ch. 135.

11. Act of April 22, 1908, ch. 149, §3, 35 Stat. 66, 45 U.S.C. §53.

12. For example, an intoxicated motorcyclist speeds down a highway at 25 miles an hour over the speed limit. He loses control of his vehicle, crosses over the center divider

recover damages as long as defendant's negligence contributed to the happening of the accident. For example, if plaintiff suffers \$10,000 damages and is determined by the jury to be 40 percent at fault, he recovers \$6000. Those who oppose a pure comparative negligence system sometimes pose the case of a plaintiff who was 95 percent at fault and ends up recovering damages from a defendant who was only 5 percent at fault. This situation may be more conjectural than real, for in all the years that Mississippi has had the pure comparative negligence, no case of this nature has arisen.

If such a case did arise, there is an argument by which a defendant may still be able to avoid liability. Where a plaintiff was extraordinarily more at fault than defendant in causing an accident, it can be argued that plaintiff's negligence was the *sole* proximate cause of the accident and that defendant's negligence, if any, was remote. This argument was successfully made to a jury in a Mississippi auto accident case wherein plaintiff alleged that the accident was caused by defendant's failure to observe the former's auto at a crossroad.<sup>13</sup> The defendant completely avoided liability by successfully demonstrating that the accident was caused solely by the plaintiff's act of proceeding through a stop signal.<sup>14</sup> On the other hand, if this type of argument is extended too far, "proximate cause" may well become a substitute for the passé contributory negligence defense, and courts should be wary that this defense tactic does not subvert the basic philosophy of the comparative negligence system.

An even stronger argument may be made if defense counsel can demonstrate that defendant's negligent conduct was not a cause-in-fact of plaintiff's injury. For example, suppose the plaintiff claims that defendant's negligence was based on his failure to signal when making a left turn. If defense counsel can prove that plaintiff would not have seen the signal even if it had been given, the alleged negligence was not a cause-in-fact of plaintiff's harm and there will be no apportionment of damages. In addition, there is no danger of this type of defense becoming a substitute for contributory negligence, for if the defendant's acts were not a cause-in-fact of plaintiff's injuries, there is no need to consider whether plaintiff's actions contributed to his own injuries.

---

line, and collides with a large truck traveling ten miles an hour over the speed limit. The motorcyclist is killed and his motorcycle is demolished. In terms of pure physical causation, an expert may conclude that 95 percent of the force that killed the motorcyclist was supplied by the truck. However, under a comparative negligence system, the jury does not focus on physical causation; rather, it considers and measures the culpability of the truck driver. SCHWARTZ, *supra* note 4, at 276.

13. *Bates v. Walker*, 232 Miss. 804, 100 So. 2d 611 (1958).

14. *Id.* at 805, 100 So. 2d at 612.

Hence, the need for early and complete investigation of an accident case becomes more important than it ever was before.

The other basic form of comparative negligence is a modified form wherein the contributory negligence defense becomes operative after a certain amount of fault is attributed to the plaintiff, usually 50 percent.<sup>15</sup> Because there is no such demarcation with a pure comparative negligence system, the question of whether setoffs will be allowed under the latter type of system becomes crucial. For example, suppose there has been a two-car collision wherein plaintiff suffered \$10,000 worth of damages and was 40 percent at fault. As we have seen previously, he would collect \$6000. But suppose that defendant was also injured and suffered \$10,000 of damages. By definition, he was 60 percent at fault, but he also has a potential recovery of \$4000. If setoffs are permitted, plaintiff will only be entitled to \$2000 and defendant will recover nothing.

An old California appellate case which has not been overruled, *Murphy v. Davids*,<sup>16</sup> stated that "[i]n every case the suitor has the right to ask for a setoff, and in every proper case as of right the motion should be granted. This is a power which exists independent of statute, and rests upon the general jurisdiction of courts over their suitors and processes."<sup>17</sup> Moreover, Section 666 of the California Code of Civil Procedure indicates that when an amount established in a cross complaint exceeds the demand established by plaintiff, judgment must be given to defendant "for the excess." Thus, in the absence of some statute or modifying legal principle, setoffs may well be allowed in California. This procedure is presently being followed by the courts of Mississippi.<sup>18</sup> On the other hand, the Rhode Island pure comparative negligence statute contains a provision that "there shall be no setoff of damages between the respective parties."<sup>19</sup> It should be noted that this statute is not limited to insurance cases, and prevents any party from applying for a setoff.

The matter of setoffs will probably have to be left to legislative determination. In that regard, one commentator has suggested that under a pure comparative negligence system, casualty insurance companies should be prohibited from obtaining setoffs for their insureds.<sup>20</sup>

---

15. See SCHWARTZ, *supra* note 4, §3.5.

16. 55 Cal. App. 416, 203 P. 802 (1921).

17. *Id.* at 421, 203 P. at 804.

18. See *Johnson v. Richardson*, 234 Miss. 849, 108 So. 2d 194 (1959).

19. R.I. GEN. LAWS ANN. 1956, §9-20-4.1 (1975 Supp.).

20. Flynn, *Comparative Negligence: The Debate*, 8 TRIAL MAGAZINE 49, 52 (May/June 1972).

Since there never has been such a statute enacted in any state, the constitutionality of that proposal remains untested.

One final note with regard to a pure system: it is still the defendant's responsibility to both plead and prove contributory negligence. He probably will not have to allege a specific percentage; however, it will be enough if he indicates that the negligence of the plaintiff has substantially contributed to the happening of the accident.

#### PRIOR LIMITATIONS ON THE CONTRIBUTORY NEGLIGENCE DEFENSE

In years prior to the *Li* case, courts in California developed a number of rules that limited the harshness of the contributory negligence defense. The continued viability of these rules is now questionable in light of the *Li* decision. The following discussion will focus on these judicially-created doctrines and the possible impact of pure comparative negligence thereupon.

##### *A. The Last Clear Chance Doctrine*

Under the traditional contributory negligence system, the contributory negligence defense could be avoided where the defendant had the "last clear chance" to prevent the accident from occurring. This could arise where the plaintiff was either inattentive or helpless, and the defendant, knowing of this situation and reasonably able to avoid it, failed to do so.<sup>21</sup> The court in the *Li* case did a favor for those members of the bar who desire clarity in that it specifically said that the doctrine of last clear chance will no longer be applicable in California<sup>22</sup> since the need for that doctrine no longer exists once comparative negligence is the law.<sup>23</sup> On the other hand, the question of whether last clear chance will "survive" comparative negligence has plagued other jurisdictions that have legislatively enacted a comparative negligence system.

Defense counsel should be pleased that the *Li* court accepted the view that retention of last clear chance would only result "in a windfall to the plaintiff in direct contravention of the principle of liability in proportion to fault."<sup>24</sup> Thus, defendant will no longer have to pay total damages when he had the last clear chance to avoid the accident; rather, the damages will be reduced by the amount that the plaintiff was at fault. Of course, where the defendant did have the last opportunity to avoid the accident, the percentage of his fault may be increased accordingly.

---

21. PROSSER, *supra* note 4, §66.

22. 13 Cal. 3d 804, 829, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875.

23. *Id.* at 824, 532 P.2d at 1240, 119 Cal. Rptr. at 872.

24. *Id.*

### B. *The Wilful and Wanton Defendant*

A second limitation on the contributory negligence defense under prior California law concerned the "wilful and wanton" defendant. Under this limitation, if the plaintiff proved that the defendant acted wilfully or with reckless disregard for the consequences of his own action, the contributory negligence defense would be avoided.<sup>25</sup> Will this doctrine still prevail after comparative negligence? The *Li* court hedged on this point, stating arguments both ways. On the one hand, it referred to the late Dean Prosser's view that the wilful and wanton defendant should still have to pay full damages because his negligence is different in kind rather than in degree from that of the plaintiff.<sup>26</sup> On the other hand, it is the author's view that sharp lines of distinction cannot be drawn among negligence, gross negligence, and wilful and wanton misconduct; fault increases *quantitatively*. The *Li* court alluded to this position also and may accept it eventually.<sup>27</sup> In that regard, apportioning fault when the defendant has acted wilfully and wantonly will be in harmony with the way the court handled the last clear chance doctrine. By apportioning fault between the parties, the court will adhere to "the principle of liability in proportion to fault."<sup>28</sup> It is important to note that the Committee on Standard Jury Instructions of the Superior Court of Los Angeles County (hereinafter referred to as the Baji Committee) refrained from expressing any opinion on the effect of contributory negligence where defendant's misconduct has been short of intentional, that is, reckless or grossly negligent. However, it did provide an applicable instruction should the attorney conclude wilful misconduct does bar consideration of plaintiff's contributory negligence.<sup>29</sup>

There is one special problem under California law with respect to the wilful and wanton defendant. In some case law definitions of this term, the "intentional" actor appears to be included.<sup>30</sup> When the defendant has acted intentionally, that is, with the purpose to cause the harm or with knowledge that the end result is substantially certain to occur, the plaintiff's "contributory negligence" should be immaterial and he should

25. *Aelletti v. Membrila*, 234 Cal. App. 2d 606, 44 Cal. Rptr. 588 (1965); *Cawog v. Rothbaum*, 165 Cal. App. 2d 577, 331 P.2d 1063 (1958); see BAJI, *supra* note 4, No. 3.52.

26. 13 Cal. 3d at 825, 119 Cal. Rptr. at 873, 532 P.2d at 1241; see also PROSSER, *supra* note 4, at 426.

27. *Id.* For a lengthy discussion of this concept, see SCHWARTZ, *supra* note 4, §§5.1-5.5.

28. *Id.* at 825-26, 532 P.2d at 1240, 119 Cal. Rptr. at 872.

29. See BAJI, *supra* note 4, No. 3.52 and "USE NOTE" following.

30. *E.g.*, *Goncalves v. Los Banos Mining Co.*, 58 Cal. 2d 916, 918, 376 P.2d 833, 834, 26 Cal. Rptr. 769, 770 (1962).

recover his *entire* damages. For example, if defendant committed a battery on plaintiff, the latter's damages should not be reduced because he was "contributorily negligent" in failing to duck.<sup>31</sup> This position has been expressly adopted by the Baji Committee.<sup>32</sup> Hence, a plaintiff's attorney should always be watchful for the opportunity to characterize a defendant's actions as "intentional" rather than as merely "negligent," thereby avoiding a reduction of the plaintiff's award for damages.<sup>33</sup>

### C. Violation of Statute

There was a third doctrine—not adverted to by the Supreme Court of California in *Li*—under which plaintiff's contributory negligence was ignored. This doctrine applied in two specific instances where defendant had violated a statute. The first instance arose in the simple situation where a statute specifically so provided. An example may be found under the Federal Employers Liability Act which states in part that "no such employee . . . shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."<sup>34</sup> Under comparative negligence, the plaintiff's contributory negligence will still be immaterial in such a situation.

The second instance where the contributory negligence defense was ignored was more subtle. It arose when a court determined that a defendant violated a statute that was *intended* to protect persons in plaintiff's class against their own inability to protect themselves.<sup>35</sup> Statutes of this type include those which prohibit: (1) the sale of alcohol to intoxicated persons;<sup>36</sup> (2) the sale of firearms to minors;<sup>37</sup> and (3) the employment of minors in dangerous occupations.<sup>38</sup>

Will this absolute avoidance of the contributory negligence defense continue after the *Li* case in this latter situation where a statute has been violated? The answer to that question is uncertain, but two lines of argument could be pursued. On the one hand, it could be argued that a basic reason for the old rule was to mitigate the contributory negligence

31. See *Schulze v. Kleeber*, 10 Wis. 2d 540, 103 N.W.2d 560 (1960) (battery); see also *Alsteen v. Gehl*, 21 Wis. 2d 349, 124 N.W.2d 312 (1963) (intentional infliction of emotional distress).

32. BAJI, *supra* note 4, No. 3.52.

33. For a more detailed discussion, see SCHWARTZ, *supra* note 4, §5.2.

34. 45 U.S.C. §53 (1971).

35. See generally SCHWARTZ, *supra* note 4, §6.2.

36. E.g., CAL. BUS. & PROF. CODE §25602; see *Vesely v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

37. See CAL. PEN. CODE §12551.

38. E.g., CAL. LABOR CODE §§1294, 1308; see *Boyles v. Hamilton*, 235 Cal. App. 2d 492, 45 Cal. Rptr. 399 (1965); *Tesche v. Best Concrete Products, Inc.*, 160 Cal. App. 2d 256, 325 P.2d 150 (1958).



defense. In that regard, the doctrine was similar to last clear chance. There is some support for this position in Wisconsin decisions. For example, in *Presser v. Seisel Construction Co.*,<sup>39</sup> a construction worker at a Nike missile base fell into a pit that was left unguarded in violation of a "Safe Place to Work" statute.<sup>40</sup> Plaintiff argued that his contributory negligence should not be subject to apportionment; rather, he should have a full recovery.<sup>41</sup> Plaintiff relied on a New York case that had held that a worker's contributory negligence was immaterial when defendant had violated a similar law.<sup>42</sup> The Supreme Court of Wisconsin distinguished the New York case in part on the ground that "[i]n New York contributory negligence is a complete bar to the action whereas in Wisconsin under the comparative negligence statute . . . [it] is not."<sup>43</sup>

On the other hand, plaintiff could argue in this specific situation that the court should totally ignore any contributory negligence on the part of plaintiff on the premise that the legislature intended such a result. The recent Minnesota case of *Zerby v. Warren*<sup>44</sup> would appear to lend support to this position. In *Zerby*, a state statute prohibited the sale of toxic glue to persons under the age of nineteen unless the glue was contained in "a packaged kit for the construction of a model automobile, airplane, or similar item."<sup>45</sup> Defendant violated this statute when he sold Steven Zerby, a fourteen year old, two pints of the proscribed glue. A friend of the youth inhaled fumes from the glue, injuring his central nervous system, which caused him to fall in a creek and drown.<sup>46</sup> The Minnesota court construed the purpose of the safety statute as protecting minors unable to exercise self-protective care from sniffing fumes from glue<sup>47</sup> and held that the enactment of comparative negligence in the state did not alter the exclusion of the contributory negligence defense in that precise situation.<sup>48</sup> In summary, the situation was different in principle from either the last clear chance or wilful and wanton defendant situations discussed previously.

#### INTERACTION WITH PREEXISTING TORT DOCTRINE

Notwithstanding the introduction of comparative negligence as a replacement for the old contributory negligence system, some of the

---

39. 19 Wis. 2d 54, 119 N.W.2d 405 (1963).

40. *Id.* at 57-58, 119 N.W.2d at 407-08.

41. *Id.* at 64-65, 119 N.W.2d at 411.

42. *Id.* at 65, 119 N.W.2d at 411.

43. *Id.* at 66, 119 N.W.2d at 411.

44. 297 Minn. 134, 210 N.W.2d 58 (1973).

45. *Id.* at 138, 210 N.W.2d at 61.

46. *Id.* at 137, 210 N.W.2d at 61.

47. *Id.* at 140, 210 N.W.2d at 62; *see also* MINN. STATS. §145.38 (subd. 1).

48. 297 Minn. at 140, 210 N.W.2d at 63.

most perplexing problems occur when a comparative negligence system is integrated with preexisting tort doctrine. In the sections to follow, the author discusses some of the major interactions that will be of particular importance in California.

#### A. Assumption of Risk

The assumption of risk defense is divided into express and implied assumption of risk. Under the doctrine of express assumption of risk, an individual agrees orally or in writing to hold another individual blameless in the event the assumed risk causes injury. A common example is found in waivers signed by customers in beauty or barber schools. Express assumption of risk is an absolute defense and should remain such after comparative negligence. The new Baji Committee instructions now reflect this policy.<sup>49</sup>

The form of assumption of risk defense that is most common is not express, but implied. The implied assumption of risk defense is established when defendant shows that plaintiff voluntarily encountered a known risk.<sup>50</sup> However, this defense presents a great problem after the introduction of comparative negligence. Will it remain as an absolute defense or will damages be apportioned? The Supreme Court of California in the *Li* case fortunately supplied some guidance on this issue:

[T]he adoption of a system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence.<sup>51</sup>

This means that where a plaintiff has *unreasonably* assumed a risk, as when plaintiff voluntarily rides in an automobile with a driver known to be intoxicated, his conduct will not totally bar his claim; rather, his fault will be taken into account and utilized to reduce the amount of his recovery.

However, this is not the approach being utilized in all jurisdictions which have adopted a comparative negligence system. Many state courts have held that an unreasonable assumption of risk can act as a complete defense to plaintiff's recovery,<sup>52</sup> leaving the ultimate determi-

49. BAJI, *supra* note 4, No. 4.30.

50. See PROSSER, *supra* note 4, §68 at 440.

51. 13 Cal. 3d at 825, 532 P.2d at 1241, 119 Cal. Rptr. at 873.

52. See, e.g., *Spradlin v. Klump*, 244 Ark. 841, 427 S.W.2d 542 (1968); *Bugh v. Webb*, 231 Ark. 27, 328 S.W.2d 379 (1959); *Roberts v. King*, 102 Ga. App. 518, 116 S.E.2d 885 (1960); *Saxton v. Rose*, 201 Miss. 814, 29 So. 2d 646 (1947); *Mason v. W. Power & Gas Co.*, 183 Neb. 392, 160 N.W.2d 204 (1968); *Bartlett v. Gregg*, 77 S.D. 406, 92 N.W.2d 654 (1958).

nation of plaintiff's unreasonableness to the jury. Hopefully, this approach will not be adopted in California. Of course, defense counsel should always be alert to the situation where the plaintiff's unreasonable conduct is the sole cause of his injuries. On the other hand, when the plaintiff has *reasonably* assumed a risk, as when plaintiff sits in an area of a baseball stadium that has no protective screening, his conduct will not be considered as "fault" under comparative negligence. Rather, the court will decide whether the defendant breached a duty to the plaintiff by not providing a protective screening or warning him of the risks involved.<sup>53</sup> If the trier-of-fact concludes that the defendant discharged his duty, the defendant will win the case. On the other hand, if it is concluded that the defendant should have done more, plaintiff's conduct of sitting in the open area will have no effect on his claim. Obviously, this matter is quite conceptual and involves careful study of each case wherein this issue arises.<sup>54</sup> However, counsel for both parties must always be wary of its possible application to the particular case under consideration.

### B. *Strict Liability*

The *Li* opinion, which was concerned with a typical automobile negligence case, contained no discussion of strict liability. In its April 24th modification of the opinion, the court in a number of places deleted the word "fault" and substituted the word "negligence," perhaps indicating that it did not intend for its holding to apply to strict liability. Further, in a footnote of the modified opinion the court stated that "[i]n employing the generic term 'fault' throughout this opinion we follow a usage common to the literature on the subject of comparative negligence. In all cases, however, we intend the term to import nothing more than 'negligence' in the accepted legal sense."<sup>55</sup> Thus, the court was careful not to venture into the land of strict liability. What will happen in a strict liability case where the claim is based either on a defective product or in an abnormally dangerous activity? In light of the *Li* court's avoidance of this issue we are left to speculation and case law from other jurisdictions. It does seem likely, however, that comparative negligence principles will ultimately be used by California courts in strict liability cases. Instead of references to "comparative negligence,"

53. See *Lee v. National League Baseball Club of Milwaukee*, 4 Wis. 2d 168, 89 N.W.2d 811 (1958) (dictum); cf. *Hoar v. Sherburne Corp.*, 327 F. Supp. 570 (D. Vt. 1971).

54. For a complete discussion of the concept of assumption of risk in a comparative negligence system, see SCHWARTZ, *supra* note 4, §§9.1-9.5.

55. 13 Cal. 3d at 813, n.6a, 532 P.2d at 1232, n.6a, 119 Cal. Rptr. at 864, n.6a.

a court should speak of "comparative fault," thereby focusing on plaintiff's conduct. In such cases, however, the courts will have to be quite precise in their analysis.

In some cases, plaintiff will have misused a product; a woman using a permanent wave solution is injured because she failed to follow instructions. It is arguable that in this case the defendant should not be held liable at all because, as couched in strict liability terminology, the product was "not defective." On the other hand, some instances of misuse are quite foreseeable. For example, one court has held that a manufacturer of a chair could foresee that purchasers or others might stand on it; therefore, the manufacturer had the duty to make a chair that would withstand such a use.<sup>56</sup> However, under comparative fault, plaintiff would not recover his entire damages; the jury would consider the plaintiff's misuse and reduce damages accordingly.<sup>57</sup>

A second type of *potential* defense in strict liability cases is contributory negligence. It should be noted that California courts appear to have rejected contributory negligence as a defense in strict liability cases where plaintiff's conduct consisted of a failure to discover a defect in a product or an abnormally dangerous activity.<sup>58</sup> While a number of reasons have been given for refusing to apply the contributory negligence defense in strict liability cases, the decisions of these courts were probably based on the modern judicial distrust and dislike of the defense and an unwillingness to introduce it into a new area. It is possible, however, that under comparative negligence the California courts will accept the argument that plaintiff's damages should be reduced by the amount he was at fault in a products liability case. Thus, in a case where plaintiff continued to ride on a defective tire that a reasonable person would have discovered, a jury may ascribe some quantum of fault to him and his damages would be reduced by that amount. Case law from other jurisdictions lends support to this proposition.<sup>59</sup>

The final basic defense in strict liability cases is assumption of risk. In California and many other jurisdictions this has remained a defense, although the burden is on the defendant to establish that the plaintiff voluntarily encountered a known risk.<sup>60</sup> If the defense is established, it

56. *Phillips v. Ogle Aluminum Furniture, Inc.*, 106 Cal. App. 2d 650, 235 P.2d 857 (1951).

57. See SCHWARTZ, *supra* note 4, §12.4.

58. See *Luthringer v. Moore*, 31 Cal. 2d 489, 190 P.2d 1 (1948) (ultrahazardous activity) (dictum); *McGoldrick v. Porter Cable Tools*, 34 Cal. App. 3d 885, 110 Cal. Rptr. 481 (1973) (products liability).

59. See *Hagenbuch v. Snap-on-Tools Corp.*, 339 F. Supp. 676 (D.N.H. 1972).

60. See *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

is absolute and plaintiff recovers nothing. It is probable that under comparative fault the Supreme Court of California will hold that plaintiff's damages will be apportioned in that situation.<sup>61</sup> In that regard, in the case involving the defective tire posed previously, if plaintiff had examined his tires, realized that they were defective, and continued to ride on them, he still might have recoverable damages. Nevertheless, his damages would be reduced, and probably quite substantially, by the amount that he was at fault. In sum, under comparative fault, the distinction that is made between contributory negligence and assumption of risk in the products area in California may ultimately become a thing of the past.<sup>62</sup>

### *C. Derivative Claims*

Of special concern in California will be the impact of comparative negligence upon derivative claims. In a derivative claim plaintiff is seeking to recover damages that he has incurred as a result of a direct injury that defendant has caused to a third party. If a claim is truly derivative in nature, however, plaintiff will be subject to all defenses that could be asserted by the defendant against the injured third party. A paradigm example is a wrongful death action. Assume that a husband brings a wrongful death action derived from an automobile accident wherein his wife was killed while she was driving. Assume further that her husband was at home at the time. It is clear that if the wife was contributorily negligent, the husband's claim would have been barred under prior California law.<sup>63</sup> Under comparative negligence, however, his claim will not be barred, but will be subject to reduction by the amount his wife was at fault in the accident.<sup>64</sup> However, a derivative claim can become a bit more complicated. Let us assume that the husband was in the car at the time of the accident, that he was alert and looking out of the car windows at night, but that he failed to tell his wife that she did not have her headlights on. Let us assume further that the failure to have the headlights on was a cause of the collision with another car that was being negligently driven by defendant. Finally, assume that both the husband's and the wife's negligence contributed to the happening of the accident. In this case, the jury will be required to apportion an amount of negligence to both the husband and wife. Thus, if the defendant was speeding at 70 miles per hour and could not stop in

---

61. See text accompanying notes 49-54 *supra*.

62. For a discussion of that distinction as it now exists, see *Luque v. McLean*, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).

63. *E.g.*, *Buckley v. Chadwick*, 45 Cal. 2d 183, 288 P.2d 12 (1955).

64. See *BAJI*, *supra* note 4, No. 3.53.

time to avoid the accident, the jury might apportion 40 percent to him, 50 percent to the wife driver, and 10 percent to the husband passenger. As a result, the husband would recover only 40 percent of his damages in the wrongful death action.

The author believes that the same approach will be followed in worker's compensation cases with regard to the rule promulgated by the California Supreme Court in *Witt v. Jackson*.<sup>65</sup> Under the rule in that case, an employee's contributory negligence will bar his employer's worker's compensation carrier from asserting a claim against a third party wrongdoer who injured the employee.<sup>66</sup> But with comparative negligence, the carrier's claim will not be barred; it will be reduced by the amount the employee was at fault. Moreover, if an analogy is made to wrongful death suits, the carrier's claim will be subject to a further reduction in the amount that the employer was at fault in the occurrence of the accident.<sup>67</sup> For example, suppose the carrier has paid the employee \$10,000 in benefits. In the employee's action against the third party defendant, the jury finds the employee was 10 percent at fault, the employer 20 percent at fault, and the third party defendant 70 percent at fault. The carrier will then be able to obtain a \$7000 judgment against the defendant by virtue of its subrogation to the employee's claim against the third party tortfeasor. This approach appears to be the one taken by the Baji Committee.<sup>68</sup>

The same principles of derivative claims will apply with regard to a parent's claim for past *medical* expenditures resulting from injuries negligently inflicted by defendant upon a child. Under prior law, contributory negligence of a child over five years of age would have barred recovery.<sup>69</sup> Under comparative negligence, the child's negligence will simply reduce the amount of that recovery.<sup>70</sup> Further, if the parents' negligence contributed to the injury of the child, their recovery for medical expenditures may be reduced by that amount.<sup>71</sup>

The same result could obtain in a situation similar to that found in the

---

65. 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961).

66. *Id.* at 69, 366 P.2d at 647, 17 Cal. Rptr. at 375.

67. *Id.* at 72, 366 P.2d at 649, 17 Cal. Rptr. at 377.

68. See BAJI, *supra* note 4, No. 15.13. (Note II(B) and materials following).

69. *E.g.*, *Courtell v. McEachen*, 51 Cal. 2d 448, 334 P.2d 870 (1959).

70. . . .

Contributory negligence, if any, on the part of the minor does not bar a recovery by him against the defendant but the total amount of damages to which the minor would otherwise be entitled shall be reduced in proportion to the amount of negligence attributable to the minor.

The negligence, if any, of the parents, or either of them, does not bar or reduce recovery of damages for injuries to the minor.

BAJI, *supra* note 4, No. 3.60.

71. See *Mattox v. Isley*, 111 Cal. App. 2d 774, 245 P.2d 664 (1952).

landmark California case of *Dillon v. Legg*.<sup>72</sup> Under the principle of this case, one may be able to recover for emotional harm caused by his observation of an injury negligently inflicted upon his child or possibly his spouse.<sup>73</sup> The court in *Dillon* indicated in dictum that the contributory negligence of the physically injured party (the child or spouse) would be imputed to the party seeking recovery for emotional harm;<sup>74</sup> in other words, the claim for emotional harm was derivative in nature. Hence, with comparative negligence, the relative's claim would be subject to apportionment if the physically injured party was contributorily negligent.

One area where there may be substantial controversy is actions for loss of consortium.<sup>75</sup> If the claim is regarded as nonderivative, that is, in the nature of a totally independent injury to the plaintiff, there may be no apportionment where the injured spouse was contributorily negligent. On the other hand, if it is regarded as derivative, and thus similar to claims for wrongful death, emotional harm, or by parents for past medical expenses for their injured child, then plaintiff's claim will be subject to apportionment.<sup>76</sup>

As the reader has seen, the possible impact of comparative negligence upon the existing law with regard to derivative claims for damages is substantial. By virtue of the specialized nature of these claims and the public policy considerations underlying them, this may offer a fertile area for legislative pronouncements of what the law shall be after the *Li* decision. However, until the legislature does act, it would seem that the principles espoused in *Li* should apply to both derivative and direct claims.

#### PROCEDURAL ASPECTS: SPECIAL VERDICTS

Previous sections of this article have already discussed the procedural matters of the defendant's right to setoffs<sup>77</sup> and his burden of pleading and proving contributory fault.<sup>78</sup> At this juncture, it will be useful to consider the issue of special verdicts as addressed by the supreme court in *Li*. In reference to this device, the court stated that "the utilization of special verdicts or jury interrogatories can be of invaluable assistance in assuring that the jury has approached its sensitive and often complex

72. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

73. *Id.* at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.

74. *Id.* at 733, 441 P.2d at 916, 69 Cal. Rptr. at 76.

75. See *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1975).

76. See PROSSER, *supra* note 4, at 892-93.

77. See text accompanying notes 15-20 *supra*.

78. See text following note 20 *supra*.

task with proper standards and appropriate reverence."<sup>79</sup> However, in a footnote, the court made it clear that special verdicts are not mandatory, but will be left to the sound discretion of the trial courts.<sup>80</sup> Nevertheless, special verdicts are extraordinarily useful in comparative negligence cases. In drafting the special verdicts there are two basic questions to be determined by the jury: (1) what percentage of fault was attributable to each party; and (2) how much damage did each party suffer? Of particular importance are the cases involving derivative claims or multiple parties, wherein the comparative negligence system becomes virtually unworkable if the special verdict procedure is not utilized.

It is the law of all states that have included a special verdict procedure in their comparative negligence statute that the *judge* and not the jury should compute the amount of damages apportionable to each defendant.<sup>81</sup> In other words, after the jury determines the percentage of fault attributable to each party, the judge takes out a pocket calculator and determines what, for example, is 41 percent of \$3175.65. Nevertheless, the Baji Committee appears to leave the calculations to the jury.<sup>82</sup> Hopefully, the Baji Committee will follow the lead of other states and reconsider this question, leaving the matter of calculation to the judge. Probably this issue is one that the legislature should ultimately resolve.

Special verdicts are vital to a comparative negligence system because they afford an opportunity to the litigants to determine what the jury did and where it may have erred. For example, assume plaintiff's total damages are \$100,000 in a case where he was also at least 60 percent at fault. If the jury returns a general verdict of \$100,000, where did it go wrong? Did it inflate plaintiff's damages, or did it fail to abide by the comparative negligence system and accordingly reduce plaintiff's damages based on his fault? If the jury had been required to return a special verdict, the defendant's counsel would be able to know what went wrong and then appeal the verdict on that specific ground.

In a case where the jury has failed to properly allocate a percentage of fault to the plaintiff, the author advocates that a court should implement a procedure similar to remittitur and fix the highest jury verdict that it would uphold and then give the plaintiff the option of accepting that amount in judgment or face a new trial on *all* the issues.<sup>83</sup> If this

79. 13 Cal. 3d 804, 824, 532 P.2d 1226, 1240, 119 Cal. Rptr. 858, 872.

80. *Id.* at 824 n.18, 532 P.2d at 1240 n.18, 119 Cal. Rptr. at 872 n.18.

81. See SCHWARTZ, *supra* note 4, §17.4, at 282-83.

82. See BAJI, *supra* note 4, No. 14.90 (requiring the jury to make each calculation and then return a general verdict).

83. See SCHWARTZ, *supra* note 4, §18.4.



procedure is implemented, it will cut down on the number of appeals on cases tried under a comparative negligence system.

#### PROBLEMS ASSOCIATED WITH MULTIPLE DEFENDANTS

##### A. *Whose Negligence is to be Considered?*

There are numerous and complex problems with regard to cases involving multiple defendants. One that was alluded to but not resolved in the *Li* opinion focuses on whether fault may be allocated to parties who are not before the court.<sup>84</sup> The answer to this question may make a very practical difference with regard to the amount of damages recovered by plaintiff. There are a few Wisconsin cases that have dealt with this situation, indicating that the jury may consider the fault of an out-of-court party (or parties) and allocate a proper percentage to him.<sup>85</sup> Thus, if plaintiff, a pedestrian, is injured in a two-car accident but sues only one driver, that defendant may argue to the jury that a percentage of fault should be apportioned to the out-of-court party. A fortiori, this can be done when the out-of-court party has settled.<sup>86</sup>

On the other hand, an argument can be made that fault should only be apportioned among the parties who are actually before the court. An exception could be made in the limited situation where there has been a settlement. In all other situations, it should be the responsibility of both plaintiff and defendant to bring before the court all persons whose conduct has a bearing on the transaction. Clearly, under California law plaintiff can accomplish this result by the use of procedural joinder.<sup>87</sup> This problem is a bit more complex with defendants, but it would seem that the defendant could file a cross complaint against a third party if it states an independent cause of action arising out of the same transaction or occurrence.<sup>88</sup> Certainly, the matter is of importance to defendant because he may want the jury to consider the amount of fault that might be allocated to this third party. Defendant's basic problem under California law is that his cross complaint may be limited to a claim for contribution or indemnity,<sup>89</sup> raising procedural difficulties which will be discussed presently.<sup>90</sup> It should be noted here, however, that a careful

84. 13 Cal. 3d 804, 823, 532 P.2d 1226, 1240, 119 Cal. Rptr. 858, 872.

85. See, e.g., *Ross v. Koberstein*, 220 Wis. 73, 264 N.W. 642 (1936); *Walker v. Kroger Grocery & Baking Co.*, 214 Wis. 519, 252 N.W. 721 (1934).

86. See *Pierringer v. Hoyer*, 21 Wis. 2d 182, 124 N.W.2d 106 (1963) (release of settling defendant provided for discharge of that percentage of plaintiff's damages caused by the former).

87. See CAL. CODE CIV. PROC. §§378, 389.

88. See CAL. CODE CIV. PROC. §428.10(b).

89. See CAL. CODE CIV. PROC. §428.10(b); see also CAL. CODE CIV. PROC. §§875 *et seq.*, 1055.

90. See text accompanying notes 81-89 *infra*.

judgment must always be made by plaintiff and/or defendant in joining additional parties. For example, if defendant is able to add additional parties, thereby enabling the jury to consider their respective fault, this might reduce from the jury's perspective the amount of fault attributable to plaintiff.

It is possible that the supreme court has already resolved the issue of whether a jury may consider the negligence or fault of a party who is not before the court. In its *original* opinion, the *Li* court stated that under comparative negligence liability for damages will be assigned "in direct proportion to the fault of the *persons* whose negligence has brought such damage about."<sup>91</sup> However, in its modified opinion of April 24th, the court changed this language to "in direct proportion to the amount of negligence of each of the *parties*."<sup>92</sup> The court well may have meant by this change that apportionment of damages is to be based only on the fault of the parties before the court and not on that of all persons whose acts contributed to the cause of the accident. On the other hand, the Baji Committee did not attribute this intent to the court, and under its suggested instruction the negligence of *all* persons will be considered.<sup>93</sup> Undoubtedly, this is an issue that will have to be expressly resolved by the supreme court in some future case.

### B. Joint and Several Liability

Under basic tort law, when two or more persons combine expressly or impliedly and act in concert to injure another, they will be deemed joint tortfeasors. The joint tortfeasor concept also includes those whose independent acts of negligence are a substantial cause of an indivisible injury to another. In either case each joint tortfeasor will be jointly and severally liable for the entire damage caused to the victim.<sup>94</sup> Will comparative negligence change this well-established policy of tort law? A reason that might prompt the change is that a jury will now allocate specific percentages of fault among the tortfeasors, thus providing a reliable method of dividing the damages among multiple defendants.

91. 13 Cal. 3d 804, 829, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (emphasis added). The opinion cited as 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 is the *Li* opinion *as modified*. There is no official citation for the original opinion in *Li*. The original opinion (L.A. 30277, March 31, 1975) may be referred to for purposes of comparison.

92. *Li v. Yellow Cab Co.*, 14 Cal. 3d 103a, 103c, *modifying* 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (emphasis added). Copies of the *original* and *modifying* opinions presently can only be found in the paperbound advance sheets of the CALIFORNIA OFFICIAL REPORTS. As mentioned in note 91, *supra*, the opinion now appearing at 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 is the modified opinion.

93. See BAJI, *supra* note 4, No. 14.90.

94. PROSSER, *supra* note 4, §52.

Hence, a defendant can argue that he should only be liable for the amount of damages ascribed to him individually by the jury.

In most jurisdictions that have adopted a comparative negligence system, the doctrine of joint and several liability has remained unchanged. It has been modified or abolished only in jurisdictions where that step was specifically taken by the legislature.<sup>95</sup> In light of the fact that joint and several liability is likely to remain in most comparative negligence jurisdictions, a rather shocking hypothetical has been discussed by some commentators. They pose a plaintiff who was 10 percent negligent, defendant A who was 85 percent negligent, and defendant B who was 5 percent negligent. Assuming that defendants A and B are joint tortfeasors, they note, plaintiff can recover 90 percent of his damages from defendant B. This result could not have obtained before the introduction of comparative negligence because plaintiff's claim would have been barred by his own contributory negligence. Of course, even under a contributory negligence system, had plaintiff not been at fault at all, he still could have recovered his entire damages against B even though the proportion of fault between A and B was substantially different.

The one fundamental problem with this so-called shocking hypothetical is that it is extremely hard to imagine this situation ever occurring in fact. Joint tortfeasors are almost always relatively equal in degree of fault, for recall that joint tortfeasors either have to act in concert, or they must all *substantially* and negligently cause an indivisible injury. If a situation arose where one tortfeasor's culpable conduct was only five percent of the total picture, a very strong defense argument could be made that that individual's act was not a cause in fact at all, thereby avoiding the whole concept of joint and several liability. In sum, comparative negligence should not affect the concept of joint and several liability except in those cases where plaintiff would have been barred from recovery against any tortfeasor by contributory negligence.

### *C. Comparison of Negligence Among Defendants*

#### *1. Contribution Among Joint Tortfeasors*

The common law doctrine prohibiting contribution among joint tortfeasors has been modified by statute in California.<sup>96</sup> This statutory inroad upon the common law rule is quite restrictive, however, allowing contribution only when a money judgment has been rendered jointly

---

95. *E.g.*, KAN. STATS. ANN. §60-258a(d) (1974).

96. *See* CAL. CODE CIV. PROC. §§875-880.

against two or more defendants.<sup>97</sup> In that regard, it has been held that a defendant's cross complaint under Section 875 of the Code of Civil Procedure does not state a cause of action for contribution where there has not been a money judgment rendered against the cross defendant.<sup>98</sup> Decisions of this type are totally discordant with the needs of a comparative negligence system, for recall that the jury under a special verdict procedure will allocate fault among the parties.<sup>99</sup> Moreover, it is easier for the jury to do this if all the parties who caused harm are before the court. In sum, in order for comparative negligence to work properly, a defendant should be able to assert a contribution claim *prior* to judgment by way of a cross complaint under Section 428.10(b). Unfortunately, the phraseology of this statute, drafted before comparative negligence became the law in California, prevents a defendant from doing so. Therefore, in order to fully implement the comparative negligence system, the legislature should amend that section to allow a defendant to bring into the case other potential tortfeasors that plaintiff has failed to name in his complaint.

One other troublesome provision of the California contribution statute provides that when a contribution claim is allowed damages will be allocated on a pro rata basis. In plain English, this statute calls for an equal division of damages among joint tortfeasors, regardless of the amount of fault actually attributable to each.<sup>100</sup> This position of the statute is also out of harmony with the principle and spirit of a pure comparative negligence system, wherein damages are to be allocated on the basis of the relative fault or negligence of the parties, not upon an equal division.

## 2. Indemnity

Under California law, a defendant can bring a cross complaint for noncontractual indemnity in order to be reimbursed by a third party for the damages he will have to pay to plaintiff.<sup>101</sup> The right to indemnity, however, is an all-or-nothing remedy: if defendant is successful in his cross complaint, he will recover the *entire* damages that he has to pay plaintiff. Because of this "all-or-nothing rule," California courts have given a very restrictive scope to noncontractual indemnity. The cross complainant must show that he did not actively or affirmatively partici-

97. See CAL. CODE CIV. PROC. §875.

98. General Elec. Co. v. State of Calif., 32 Cal. App. 3d 918, 108 Cal. Rptr. 543 (1973).

99. See text accompanying notes 77-83 *supra*.

100. See CAL. CODE CIV. PROC. §876.

101. See 3 B. WITKIN, CALIFORNIA PROCEDURE, Pleading §777 (2d ed. 1971); 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, Torts §50 (8th ed. 1974).

pate in the wrong and that he could have done nothing to avoid it at the time plaintiff was injured.<sup>102</sup> As an appellate court noted in the case of *Ford Motor Co. v. Robert J. Poeschl, Inc.*:<sup>103</sup>

The right of *indemnity* rests upon a difference between the primary and secondary liability of two persons each of whom is made responsible by the law to an injured party. . . . The difference between primary and secondary liability is not based on a difference in *degrees* of negligence or on any doctrine of *comparative* negligence,—a doctrine which, indeed, is not recognized by the common law. . . . It depends on a difference in the *character* or *kind* of the wrongs which cause the injury.<sup>104</sup>

In sum, indemnity as it exists in California will not be very helpful to defendant in bringing other parties into a comparative negligence suit.

### 3. A Possible Judicial Solution

The California approaches to contribution and indemnity had been criticized even prior to the *Li* case.<sup>105</sup> That criticism becomes even stronger in light of the *Li* decision. However, there is a possible escape from the restrictive California contribution statute<sup>106</sup> which California courts may find useful. Specifically, the situation confronting California also occurred in New York. Under the New York statute, which is remarkably similar to the California statute, a contribution claim was allowed only when plaintiff had already obtained a judgment against defendant; furthermore, allocation of damages could only be made on a *pro rata* basis.<sup>107</sup>

In a somewhat remarkable feat of judicial "lawmaking," the New York Court of Appeals in *Dole v. Dow Chemical Co.*<sup>108</sup> attempted to resolve the problem created by the New York statute. In *Dole*, one of two "wrongdoers" sought an indemnity claim prior to judgment against the other. The court permitted the claim even though the parties were not totally disparate in terms of their respective fault, under the label of "indemnity," but it changed the nature of that remedy.<sup>109</sup> The court held that in a noncontractual indemnity action, damages could be

102. See *People v. Daly City Scavenger Co.*, 19 Cal. App. 3d 277, 281, 96 Cal. Rptr. 669, 671 (1971).

103. 21 Cal. App. 3d 694, 98 Cal. Rptr. 702 (1972).

104. *Id.* at 696-97, 98 Cal. Rptr. at 703-04.

105. See, e.g., Werner, *Contribution and Indemnity in California*, 57 CAL. L. REV. 490 (1959); Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 S. CAL. L. REV. 728, 737-47 (1968).

106. CAL. CODE CIV. PROC. §875.

107. N.Y.C.P.L.R. §1401 (McKinney 1963).

108. 30 N.Y.2d 143, 282 N.E.2d 288 (1972).

109. *Id.* at 150-51, 282 N.E.2d at 292.

allocated on the basis of the *relative* fault of the parties; in other words, under a system of pure comparative negligence.<sup>110</sup> This holding thus permitted a defendant to assert a cross claim that, in effect, was one for contribution *prior* to judgment, notwithstanding the language of the New York statute. If the defendant employed that device, however, he could not utilize the contribution statute after judgment. In actuality, the New York court allowed contribution prior to judgment and permitted damages to be allocated among the defendants on the basis of their relative fault.

The New York Court of Appeals adopted this unique approach to indemnity when the state had not yet enacted a comparative negligence statute. Obviously, the introduction of comparative negligence creates an additional reason why a court should utilize this approach for allocation of damages among joint tortfeasors. The reasoning in the *Dole* case would, to some degree, contradict the language of the California contribution statute. However, that statute is not phrased in terms of an exclusive remedy, and after all, the rule precluding contribution among joint tortfeasors is of common law origin and could be judicially changed the same way the contributory negligence rule was changed by *Li*. In fact, the same common law reluctance to apportion damages underlies both the contributory negligence defense and the rule prohibiting contribution among joint tortfeasors. Assuming that California were to follow the *Dole* rationale, a defendant should be able to assert a cross complaint for "indemnity" prior to judgment against a joint tortfeasor, and hence damages could be divided according to the relative fault of the parties defendant. Of course, the best way to achieve this desired result would be, as mentioned previously, the adoption of appropriate legislation.

#### TRIAL STRATEGIES FOR RESPECTIVE COUNSEL

##### A. *Considerations for Plaintiff's Counsel*

With the adoption of the comparative negligence system, plaintiff's counsel must obtain a new perspective in the planning and trial of his case. He must marshal the facts to show that plaintiff's negligence was in fact minor in comparison to the defendant's. In some situations, the plaintiff has only been negligent with regard to his own safety, whereas the defendant was negligent with regard to the safety of others. If this can be demonstrated, the jury may consider the defendant's disregard for the safety of others far more culpable than plaintiff's misconduct and

---

110. *Id.*

thus make the appropriate apportionment of fault. In addition, if plaintiff's counsel has done his job in conveying the nature and extent of plaintiff's injury to the jury, the reduction of damages may be minimized, as a very wide latitude is given to the jury in allocating fault in comparative negligence jurisdictions.

Although the doctrine of last clear chance is abolished, its underlying concept can be used in the closing argument. Plaintiff's counsel can stress to the jury that the defendant could have avoided the entire accident if he had only acted reasonably when he had the chance. While this will not provide plaintiff with total recovery of his damages, it might help him with the jury in terms of apportionment.

Plaintiff's counsel will also be able to find some Wisconsin cases indicating that a plaintiff should not be deemed more negligent than the defendant simply because his acts of negligence were *greater in number*.<sup>111</sup> Similarly, there are other Wisconsin cases indicating that negligence is not "equal" simply because it is similar in *kind*.<sup>112</sup> In the appropriate situation, plaintiff's counsel may be able to request an instruction to the jury based on these decisions.

#### B. Considerations for Defendant's Counsel

Defense counsel must realize and believe that comparative negligence is not as devastating a doctrine for defendants as some literature published by the defense bar has suggested. For example, comparative negligence appeals to the jury's sense of fairness much more than the contributory negligence defense does. As every trial lawyer knows, juries often ignore the contributory negligence defense and sometimes give plaintiff almost a total verdict when he does not deserve it. On the other hand, juries do not ignore comparative negligence. Throughout the trial, defense counsel should bring home the facts that show plaintiff was at fault in causing the accident. Then, in his summation, he should stress the fairness of a system that does not impose on his client the *entire* cost of an accident when his client was not *entirely* at fault. In addition, defense counsel should impress upon the jury that as concerned citizens and responsible jurors they must look beyond the damage plaintiff suffered in allocating fault between the parties. As a result, a defendant's attorney may find that the juries have followed his lead. The defendant will also be helped by special verdicts, which require the jury to focus on the question of relative fault of both plaintiff and defendant

---

111. *E.g.*, *Lovesee v. Allied Dev. Corp.*, 45 Wis. 2d 340, 345, 173 N.W.2d 196, 199 (1970); *Taylor v. W. Cas. & Surety Co.*, 270 Wis. 408, 411, 71 N.W.2d 363, 365 (1955).

112. *E.g.*, *Hansberry v. Dunn*, 230 Wis. 626, 284 N.W. 556 (1939).

in separate findings. Hence, it is much more difficult for the jury to ignore the plaintiff's acts which have contributed to his own injury.

Although implied assumption of risk is no longer an absolute defense, the facts underlying that concept may cause jurors to allocate a high percentage of fault to the plaintiff. Defense counsel should stress the facts where appropriate emphasizing that the plaintiff *voluntarily* encountered a *known* risk, and that in terms of fault, the responsibility for the accident is overwhelmingly that of the plaintiff, not the defendant. In addition, defense counsel may be able to use the concept of proximate cause to avoid liability altogether if there has been a situation where defendant's negligence was extremely remote. Of course, if the jury ignores defendant's pleas and irrationally apportions fault, defense counsel should begin a process of appeal on that specific ground. In summary, while the situation was better for defendants under the contributory negligence defense, pure comparative negligence does not present an impossible situation.

#### CONCLUSION

The purpose of this article has been to present an overview of the possible impact of comparative negligence in light of existing California law. Obviously, each major problem addressed herein could be the subject matter of an entire article. Nevertheless, it is important to convey the message that it will be of great advantage to both the client and the attorney if the latter will reconsider preexisting tort doctrine after the *Li* decision.

Many of the issues raised here must ultimately be resolved by the California judiciary and legislature. However, until this final resolution, the emerging law of comparative negligence affords an attorney the opportunity to argue what the law *should* be, rather than having to accept what the law already is. In other words, new law will have to be made before California's system of comparative negligence becomes firmly established. Hopefully, this article has provided some insight as to the factors which must be considered in making this new law.