McGeorge Law Review

Volume 7 | Issue 2 Article 10

7-1-1976

Comparative Negligence in California: Multiple Party Litigation

Mark C. Raskoff
University of the Pacific; McGeorge School of Law

Comparative Negligence In California: Multiple Party Litigation

In 1975, the California Supreme Court in *Li v. Yellow Cab Co.*[1] unilaterally adopted a system of pure comparative negligence.[2] In so doing, the court judicially abolished the doctrines of contributory negligence,[3] "unreasonable" assumption of the risk,[4] and last clear chance,[5]

---

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

2. The unilateral adoption of comparative negligence by the California Supreme Court is interesting in view of prior unsuccessful attempts to amend California Civil Code Section 1714 so as to provide for comparative negligence. These attempts include A.B. 500 (Proposed Addition to Civil Code Section 6660), 586, 731, 1975-76 Regular Session, which would have provided for a system of comparative negligence in which a plaintiff must have been less than 50 percent responsible for the accident [hereinafter referred to as a 50 percent system]; S.B. 494, 1975-76 Regular Session, which would have provided for special verdicts and comparative negligence; S.B. 10 (Proposed Addition to Civil Code Section 6660), 557, 2021, 2350, 2425, 1973-74 Regular Session, which proposed a similar 50 percent system; A.B. 50 (Proposed Addition to Civil Code Section 6660), 1666, 1973-74 Regular Session, which sought to create a 50 percent system of comparative negligence; A.B. 102, 125 (Proposed Addition to Civil Code Section 6660) and S.B. 40 (Proposed Addition to Civil Code Section 6660), 132, 384, 1493 (Proposed Addition to Civil Code Section 6660) 1972 Regular Session, which were introduced to modify California Civil Code Section 1714; A.B. 694 and S.B. 43, 1971 Regular Session, which would have provided for a 50 percent system; A.B. 2895, 1961 Regular Session, which would have provided for a system of pure comparative negligence; S.B. 845, 1957 Regular Session, which would have provided for mandatory special verdicts and a system of pure comparative negligence; A.B. 1845 and S.B. 1063, 1955 Regular Session, which proposed pure comparative negligence; A.B. 406, 779 and S.B. 1492, 1953 Regular Session, which were introduced to provide a system of pure comparative negligence; A.B. 1310, 1951 Regular Session, which attempted to enact a 50 percent system of negligence; and A.B. 909, 1941 Regular Session, which also proposed a 50 percent system of comparative negligence.

One possible conclusion from the prior proposed legislation is that the legislature was uncertain as to the potential scope of California Civil Code Section 1714. Another possible interpretation is that the legislature did not want to modify the common law defense of contributory negligence.

3. 13 Cal. 3d at 828-29, 532 P.2d at 1243, 119 Cal. Rptr. at 875. "Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm." RESTATEMENT (SECOND) OF TORTS §463 (1965); 13 Cal. 3d at 809, 532 P.2d at 1230, 119 Cal. Rptr. at 862. A pure comparative negligence system diminishes the damages awarded a plaintiff in proportion to his fault. Thus, if in P's suit against D, P is found to have suffered $10,000 in damages and is found to have been 20 percent at fault, P will recover $8000.

4. 13 Cal. 3d at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875. The *Li* court repudiated that portion of the defense of assumption of the risk, similar to contributory negligence, where a plaintiff unreasonably assumes a particular known risk. *Id.* at 824-25, 532 P.2d at 1240-41, 119 Cal. Rptr. at 872-73.

5. *Id.* at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875. The last clear chance doctrine describes those situations in which a defendant had the last clear opportunity to

thus concluding a protracted assault on these doctrines by numerous courts and commentators.[6] While certainly injecting a greater element of fairness into California tort law, the *Li* case raises a number of substantive and procedural problems which must be addressed by the courts and the legislature.

The implementation of a system of comparative negligence should affect the existing doctrines of contribution and indemnity and the rules of joinder of parties and causes of action. Hence, this comment will consider potential problems arising in the specific context of multiple party suits. First, the comment will examine the application of comparative negligence in single party and multiple party suits.[7] Second, it will consider the effect of comparative negligence on the doctrines of contribution and indemnity.[8] Third, since all parties may not be present and all issues may not be resolved in a single suit, the impact of pure comparative negligence upon the doctrines of res judicata, collateral estoppel, and the rules of joinder of parties and causes of action, insofar as they affect subsequent suits, will be examined.[9] Finally, after delineating the significant impacts of the adoption of comparative negligence on these issues, proposals for legislative reform will be advanced.[10]

Comparative Negligence in Single Party Suits

The most basic application of comparative negligence concerns the situation in which the plaintiff, injured solely by the act of one defendant, sues that defendant for property damage and/or personal injury. Of course, the plaintiff must still allege and prove the traditional elements of actionable negligence: duty, breach of duty, legal cause, and damages.[11] In pre-comparative negligence cases, the defendant would often allege that plaintiff's negligence was a contributory cause of the accident so as to bar the plaintiff's recovery.[12] Under a system of comparative negligence, a defendant will still wish to allege plaintiff's negligent

avoid the harm and did not do so. *See* W. Prosser, Handbook of the Law of Torts 427-33 (4th ed. 1971) [hereinafter cited as Prosser].

6. *See, e.g.*, Prosser, *Comparative Negligence*, 51 Mich. L. Rev. 465, 469 (1953); Comment, *Torts—The Theory and Operation of Comparative Negligence*, 22 S. Cal. L. Rev. 276 (1949). For a general consideration of various arguments, both for and against comparative negligence, *see* Duniway, *California Should Adopt A "Comparative Negligence" Law*, 28 Cal. St. B.J. 22 (1953); McKinnon, *The Case Against Comparative Negligence*, 28 Cal. St. B.J. 23 (1953). *See also* McWilliams, *On Amending Our Law of Contributory Negligence*, 24 Cal. St. B.J. 66 (1953); Yager, *Justice Expedited—A Ten-Year Summary*, 7 U.C.L.A. L. Rev. 57, 70-73 (1960).

7. See text accompanying notes 11-42 *infra*.

8. See text accompanying notes 43-116 *infra*.

9. See text accompanying notes 117-200 *infra*.

10. See statutory proposal following the conclusion *infra*.

11. *See* Book of Approved Jury Instructions, Nos. 3.00, 3.50, 14.90 (1975 Revision) [hereinafter cited as BAJI].

12. Prosser, *supra* note 5, §65, at 417, §67 at 433.

conduct because it may serve to reduce the amount of recovery.[13] The court in *Li* made no express reference to the manner in which the plaintiff's alleged negligence should be raised by the defendant, but in view of existing case law in other pure comparative negligence jurisdictions, it appears that the defendant bears the burden of pleading and proving that the plaintiff's negligence was also a proximate cause of the injury.[14] This analysis is consistent with existing California case law requiring the defendant to persuade the trier of fact that the plaintiff was contributorily negligent.[15]

Assuming the defendant has raised this issue, the manner in which the trier of fact is to evaluate the evidence and make findings becomes important. The *Li* court noted that juries, in evaluating comparative fault, may be tempted to average each juror's estimate of the plaintiff's fault and render a quotient verdict.[16] Quotient verdicts are inappropriate for two reasons: first, the verdict is not founded upon collective reasoning, discussion, or deliberation; and second, a quotient verdict enables a juror who recommends an unreasonably small or large figure to exert inordinate and unfair influence upon the determination of the quotient. A quotient verdict thus may be substantially disproprotionate to the judgment of almost all other jurors, who are nevertheless bound by the antecedent agreement to accept the quotient as their verdict.[17]

The *Li* majority felt, however, that this problem could be overcome through the use of either special verdicts or interrogatories to the jury.[18] Various forms of these special verdict questions and interrogatories do exist, but generally the trier of fact is asked to (1) determine whether the plaintiff was negligent, and, if so, whether that negligence was a proximate cause of his injuries; (2) determine whether the defendant was negligent, and, if so, whether that negligence was a proximate cause of the plaintiff's injuries; (3) assuming that the negligence of both parties caused all of the plaintiff's injuries, estimate the percentage of

13. V. SCHWARTZ, COMPARATIVE NEGLIGENCE §17.1 (1974) [hereinafter cited as SCHWARTZ].

14. *See, e.g.*, Yazoo & M.V.R. Co. v. Lucken, 137 Miss. 572, 592-93, 102 So. 393, 398 (1925); Jefferson Funeral Home v. Pinson, 219 Miss. 427, 436, 69 So. 2d 234, 238 (1954); Mobile & O.R. Co. v. Campbell, 114 Miss. 803, 820, 75 So. 554, 560 (1917).

15. *See, e.g.*, Gyerman v. U.S. Lines Co., 7 Cal. 3d 488, 501, 498 P.2d 1043, 1051, 102 Cal. Rptr. 795, 803 (1972); Anthony v. Hobbie, 25 Cal. 2d 814, 818, 155 P.2d 826, 829 (1945).

16. 13 Cal. 3d at 824, 532 P.2d at 1240, 119 Cal. Rptr. at 872; *see also* SCHWARTZ, *supra* note 13, §17.1.

17. *See* Annot., 8 A.L.R.3d 335, 347-48 (1966).

18. 13 Cal. 3d at 824, 532 P.2d at 1240, 199 Cal. Rptr. at 872. The argument that the use of special verdicts would require amendment of Civil Code of Procedure Section 625 (special findings may be made at the court's discretion) was stated to pose no problem at the present. *Id.* at 824 n.18, 532 P.2d at 1240 n.18, 119 Cal. Rptr. 872 n.18. The court could resolve the matter differently in the future, however.

fault attributable to each party; and (4) determine the amount of damage that the plaintiff has suffered.[19]

This procedure has not gone without criticism. One commentator has stated that asking the jury to make a determination of the percentage of fault ascribable to each party is calling for an arbitrary distinction without a difference.[20] Another has noted that since special verdict questions are written in general terms, all the material ultimate facts of the case may not be included.[21] Notwithstanding these criticisms, the special verdict procedure has been hailed as properly focusing the jury's inquiry through separation of the question as to damages and degree of fault, facilitating appellate review, and serving to isolate troublesome issues such as the proportionate causation of each party.[22] Therefore, they should become an integral part of a comparative negligence system.

Comparative Negligence in Multiple Party Suits

Frequently the plaintiff has been damaged through the combined activity of two or more tortfeasors. The following discussion considers the problems associated with multiple party litigation and assumes that all interested persons are before the court as parties. In order to attain a basic understanding of these problems, it will be helpful to consider a hypothetical case.

Perhaps the most common situation illustrative of these actions is the multiple automobile collision. P is stopped at an intersection. D_1 negligently strikes P's car, which is pushed into an intersection where D_2, who is negligently making a turn, also strikes P's auto. Several lawsuits could potentially arise out of this incident:

1. P v. D_1, for negligence;[23]
2. P v. D_2, for negligence;[24]
3. D_2 v. D_1, for negligence;[25]
4. D_1 v. D_2, for contribution;[26] or
5. D_1 or D_2 v. P, for negligence.[27]

---

19. *See* BAJI, *supra* note 11, Nos. 3.00, 3.50, 14.93, 14.94, 14.95, 14.96 (1975 Revision); Schwartz, *supra* note 13, §17.4. If the defendant suffers damage, as the result of the plaintiff's activity, the procedure described in the text would be applied in terms of the defendant. The court could then setoff damages.

20. Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 S. Cal. L. Rev. 728, 747 (1968).

21. Schwartz, *supra* note 13, §17.4, at 288.

22. *See* McCloud v. Roy Riegels Chems., 20 Cal. App. 3d 928, 936-37, 97 Cal. Rptr. 910, 915-16 (1971); Schwartz, *supra* note 13, §17.4, at 289.

23. See text following note 30 *infra*.

24. See text following note 30 *infra*.

25. See text accompanying note 31 *infra*.

26. See text following note 88 *infra*.

27. See note 19 *supra* and text accompanying note 31 *infra*.

In any of these suits the trier of fact must first determine the degree of negligence and causation to be ascribed to each party,[28] and then allocate responsibility for the accident between the plaintiff and defendant.[29] With respect to the latter determination, the plaintiff's fault should be compared against the combined negligence of both defendants under a system of pure comparative negligence.[30] The following analysis is then applied by the trier of fact: (1) A determination is made as to the amount of damages the plaintiff has suffered; (2) If the defendants have counterclaimed for damages, the trier of fact first determines whether the damages were proximately caused by the negligence of the plaintiff, and then calculates the net liability of each party to all other parties by reducing the award of counterclaim damages to the defendant by the proprotionate fault of that defendant.

---

28. *See* BAJI, *supra* note 11, Nos. 3.00, 3.50, 14.90, 14.91, 14.93, 14.94, 14.95, 14.96 (1975 Revision); C. HEFT AND C. J. HEFT, COMPARATIVE NEGLIGENCE MANUAL §1.70, at 26-31 (1971) [hereinafter cited as HEFT]. Identical questions would be posed for all remaining parties. *See generally* Cadena, *Comparative Negligence and the Special Verdict*, 5 ST. MARY'S L.J. 688 (1974); *Panel on Instructions and Special Verdicts Under Comparative Negligence*, 10 ARK. L. REV. 94 (1955).

29. *See* BAJI, *supra* note 11, Nos. 3.00, 3.50, 14.90, 14.91, 14.93, 14.94, 14.95, 14.96 (1975 Revision); HEFT, *supra* note 28, §1.70, at 26-31.

30. *See* BAJI, *supra* note 11, Nos. 14.90, 14.91, 14.93, 14.94, 14.95, 14.96, 15.13, 15.14, 15.16, 15.17, 15.18, 15.19 (1975 Revision).

There is some difficulty, however, under a so-called "50 percent" or modified comparative negligence system. Under this system a plaintiff must be less negligent than the defendant or defendants before recovery is allowed. In these jurisdictions, a split of authority exists as to whether a plaintiff's fault should be compared with that of the combined negligence of all defendants. Those courts which refuse to combine the negligence of the defendants have reasoned that under their existing statutory language, it would be incompatible with the state's comparative negligence system to allow a plaintiff to recover from a defendant who is less at fault than the plaintiff. *Compare* Ross v. Koberstein, 220 Wis. 73, 264 N.W. 642 (1936) *and* Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721 (1934) (both cases holding that the plaintiff's negligence may not be compared with the combined negligence of all defendants) *with* Krengel v. Midwest Automatic Photo, Inc., 295 Minn. 200, 203 N.W.2d 841 (1973). However, some of the courts which refuse to combine the negligence of the defendants make an exception to this rule if there is a common relationship between the tortfeasors. *E.g.*, Marier v. Memorial Rescue Serv., Inc., 296 Minn. 242, 207 N.W.2d 706 (1973).

The rule that the negligence of the defendants may not be combined appears particularly unjust in those cases where the combined acts of the defendants have caused a single indivisible injury to the plaintiff. *See* Jacobs v. Milwaukee & Suburban Transp. Corp., 41 Wis. 2d 661, 165 N.W.2d 162 (1969). First, the rule undercuts the principle of joint and several liability of joint, concurrent, or successive tortfeasors for *all* proximately caused harm occasioned to the plaintiff, irrespective of source. Second, if, for example, a plaintiff is found to be 40 percent at fault and sues defendants D_1 and D_2 who are each 30 percent responsible for the accident, the plaintiff is left without a remedy for an injury that was caused largely (60 percent) by the negligence of other persons.

The rule against combining the negligence of the defendants has already been criticized by members of a supreme court of a state which follows the rule. *See* Gross v. Denow, 61 Wis. 2d 40, 52-53, 212 N.W.2d 2, 9-10 (1973) (Wilkie & Beilfuss, J.J., concurring; Hallows, C.J., dissenting in part).

For the aforementioned reasons, the California system of pure comparative negligence should permit a comparison of a plaintiff's negligence against the combined negligence of all defendants. Other states do permit a comparison of the plaintiff's negligence against the combined negligence of all defendants. NEV. REV. STAT. §41.141 §§1, 2(a) (1975); TEX. CIV. STAT. ANN. Art. 2212a §§1, 2 (1975). For a further discussion of these problems, see SCHWARTZ, *supra* note 13, §16.6 at 258-60.

The following examples demonstrate these principles.

Example One. Plaintiff is 10 percent at fault, Defendant D_1 is 40 percent at fault, and Defendant D_2 is 50 percent at fault. Plaintiff is found to have suffered $10,000 in damages. The maximum that Plaintiff can recover from D_1 and D_2 is $9000. This amount is computed by deducting the percentage of the damage occasioned by the plaintiff's own negligence.

Example Two. Plaintiff is found to be 10 percent at fault and to have suffered $10,000 in damages; Defendant D_1 is found to be 40 percent at fault and to have suffered $2000 in damages; Defendant D_2 is found to be 50 percent at fault and to have suffered $5000 in damages. The maximum that Plaintiff can recover is $9000; the maximum that D_1 can recover is $1200; the maximum that D_2 can recover is $2500. Defendants D_1 and D_2 are jointly liable to the Plaintiff for $9000; Plaintiff and D_2 are jointly liable to D_1 for $1200; Plaintiff and D_1 are jointly liable to D_2 for $2500.[31]

With this basic understanding of the mechanics which are used to determine the relative liabilities of the various parties, the inquiry must be directed to the issue of who bears the responsibility for payment of the damage award. In a suit involving only one defendant, the answer is obvious: the sole defendant pays the entire amount. However, where there are jointly liable parties, the problem becomes more complex.

A. Joint and Several Liability of Tortfeasors

Under existing California law, where the activity of two or more persons has combined to cause an indivisible injury to another, the injured party may seek compensation from either tortfeasor individually[32] or from both in a single proceeding in accord with the principle of joint and several liability.[33] Joint and several liability is imposed in situations in which tortfeasors have acted concertedly or independently to cause an injury. Where two or more persons have acted in concert as joint tortfeasors, the basis of liability can be explained in terms of a joint enterprise, each party having acted with a common purpose so that the

31. As to the question of the amounts the parties should pay in discharging the judgment and the final setoff of damages, see text following note 88 *infra.*

32. *E.g.*, Linberg v. Stanto, 211 Cal. 771, 774, 297 P. 9, 10 (1931); Gosliner v. Briones, 187 Cal. 557, 563, 204 P. 19, 22 (1921); Apodaca v. Haworth, 206 Cal. App. 2d 209, 213, 23 Cal. Rptr. 461, 463-64 (1962); Waterhouse-Wilcox Co. v. Betz & Mabrey, 73 Cal. App. 236, 240, 238 P. 763, 765 (1925).

33. *See* Finnegan v. Royal Realty Co., 35 Cal. 2d 409, 433-34, 218 P.2d 17, 32 (1950) (joint tortfeasors); Merrill v. Los Angeles Gas & Elec. Co., 158 Cal. 499, 506, 111 P. 534, 537 (1910) (concurrent tortfeasors); CAL. CODE CIV. PROC. §§379, 427.10.

act of one is the act of all.[34] Where two or more persons have acted independently, either concurrently or successively, to cause an indivisible injury, liability is predicated on the basis that each tortfeasor's conduct was a substantial factor in bringing about the loss and on the impracticality of apportioning that loss.[35]

This rule of law is the product of various public policy considerations. There are two major concerns in any tort case where liability has been established: compensation for an injured plaintiff, and the assessment of reasonable liability on the defendant for the amount of damages he has caused. In non-comparative negligence jurisdictions, the courts have determined that the plaintiff's interest in compensation is more important than the defendant's interest in being held liable only for that portion of the damage which he has caused. Thus, despite arguments to the contrary, no allowance is made for damage caused by a concurrent act of God or of a nonparty tortfeasor.[36] The only recognized exception arises where the act of God or of the absent person has caused the plaintiff to suffer a totally unforeseeable loss,[37] thereby superseding the defendant's negligent act as a proximate cause of the injury.[38] As a result of the plaintiff's predominant interest in compensation for his injury, joint tortfeasors are held to be jointly and severally liable for the plaintiff's injury. Hence, if one defendant does not pay his proportionate part of the judgment, the other defendant is compelled to pay the entire amount, even though the latter's negligent act may have been of minor consequence in comparison to that of the former.

B. Joint and Several Liability Under Comparative Negligence

There is some question whether the imposition of joint and several liability should be continued under a system of pure comparative negligence. If the policy underlying the concept of joint and several liability is largely a result of the impracticality of apportionment,[39] the comparative negligence system seems to cure this problem since the trier of fact

34. *See, e.g.*, Unruh v. Truck Ins. Exch., 7 Cal. 3d 616, 631, 498 P.2d 1065, 1074, 102 Cal. Rptr. 815, 825-26 (1972); Mary Pickford Co. v. Bayly Bros., Inc., 12 Cal. 2d 501, 515, 86 P.2d 102, 109 (1939); Weinberg Co. v. Bixby, 185 Cal. 87, 106-07, 196 P. 25, 34 (1921); Revert v. Hesse, 184 Cal. 295, 301, 193 P. 943, 946 (1920); Black v. Sullivan, 48 Cal. App. 3d 557, 566-67, 122 Cal. Rptr. 119, 1 (1975); F. HARPER & F. JAMES, THE LAW OF TORTS, §10.1, at 692 (1956); PROSSER, *supra* note 5, §46, at 291.

35. *See* Finnegan v. Royal Realty Co., 35 Cal. 2d 409, 433-34, 218 P.2d 17, 32 (1950); PROSSER, *supra* note 5, §52, at 315-16; Carpenter, *Proximate Cause*, 15 S. CAL. L. REV. 427, 439-42 (1942).

36. PROSSER, *supra* note 5, §52, at 315-16; HEFT *supra* note 28, §8.131 at 73-75 (Supp. 1975); HEFT, *supra* note 28, §1.40 at 13 (1971).

37. *See* PROSSER, *supra* note 5, §44, at 284-86.

38. *See id.* at 270-89.

39. *Id.* §52, at 315-16.

must specifically estimate the amount of fault attributable to each party. In addition, to the extent that the general policy of comparative negligence is probably that of allowing a claimant to recover those damages *not* caused by his own negligence, the argument can be made that a defendant should be liable only for those damages caused by his negligent act. In fact, this seems to be the whole purpose of apportioning fault between plaintiff and defendant.

However, the courts which have considered this question have refused to abandon joint and several liability.[40] Although no reason for the retention of this policy has been advanced by these courts, one can infer that the plaintiff's interest in full compensation continues to outweigh a defendant's interest in being held liable for more damage than he has caused. In addition, it should be remembered that in a joint tortfeasor situation, each defendant's activity was a substantial factor in causing the plaintiff's injury. Another rationale might be a distinction between the relationship of the plaintiff with respect to the defendants and that of the defendants *inter se*. In terms of providing compensation to an injured party, the fact that one defendant might be forced to pay more than his share is collateral to the recovery of the injured party and should be litigated between the defendants in terms of contribution or indemnification after the plaintiff has been compensated. If joint and several liability is abandoned, a claimant will not be able to receive compensation for those damages attributable to a tortfeasor unable to discharge his share of the judgment. Therefore, it can be persuasively argued that there remain strong policy considerations in favor of joint and several liability, notwithstanding the introduction of a system of comparative negligence.

Contribution and Indemnity

Assuming a joint judgment is rendered against multiple defendants, there is some question as to the exact responsibility of the defendants *inter se*. If one party is unable to pay the award, the remaining party or parties may have to discharge the entire judgment in order to avoid execution on that judgment. To provide some equitable method of allocation of loss *among defendants*, and to avoid the potential injustice of holding one party solely responsible for an injury that was occasioned

40. *See, e.g.*, Gazaway v. Nicholson, 190 Ga. 345, 348 9 S.E.2d 154, 156 (1940); Saucier v. Walker, 203 So. 2d 299, 302-03 (Miss. 1967); Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 30, 286 N.E.2d 241, 243, 334 N.Y.S.2d 851, 855 (1973) (after this decision, the New York Legislature expressly retained the principle of joint and several liability as part of the new comparative contribution statute; N.Y.C.P.L.R. §1404 (McKinney 1975-76)); Caldwell v. Piggly-Wiggly Madison Co., 32 Wis. 2d 447, 460, 145 N.W.2d 745, 752-53 (1966).

at least partly by the activity of another, the doctrines of contribution and indemnity have been formulated.[41] The major difference in loss allocation between contribution and indemnity is that indemnity shifts the entire burden of the loss onto one party while contribution shifts only a portion.[42]

A. Contribution and Indemnity Before Comparative Negligence

1. Contribution

Notwithstanding the common law rule barring contribution among joint tortfeasors,[43] most jurisdictions today allow contribution as the result of legislative[44] or judicial[45] action. In jurisdictions which do not follow the doctrine of comparative negligence, contribution is accomplished on a pro rata basis,[46] the share of each defendant being determined simply by dividing the total damages by the number of responsible defendants.[47] Any party who has paid more than his pro rata share of a judgment has a cause of action against any party who has not paid his share.[48] Most courts also follow the rule that contribution is not dependent on the degree of participation in the wrong.[49]

The current California contribution statute[50] does not recognize a claim for contribution until a party has discharged more than his pro rata share of a *joint judgment* rendered against him and another defendant.[51] A defendant may obtain judgment for contribution in the origi-

41. *See* F. HARPER & F. JAMES, THE LAW OF TORTS, §10.2, at 717 (1956); PROSSER, *supra* note 5, §50, at 307; Comment, *Contribution and Indemnity in California*, 57 CAL. L. REV. 490, 490-502 (1969). *See also* Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 CORNELL L.Q. 552 (1935-36); Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 HARV. L. REV. 1170 (1941); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEX. L. REV. 150 (1947); James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941); James, *Replication*, 54 HARV. L. REV. 1178 (1941).

42. *See* Herrero v. Atkinson, 227 Cal. App. 2d 69, 73, 38 Cal. Rptr. 490, 492 (1964); Cahill Bros. v. Clementina Co., 208 Cal. App. 2d 367, 376, 25 Cal. Rptr. 301, 305 (1962); Alisal Sanitary Dist. v. Kennedy, 180 Cal. App. 2d 69, 75, 4 Cal. Rptr. 379, 383 (1960); Molinari, *Tort Indemnity in California*, 8 SANTA CLARA LAWYER 159, 160-61 (1968).

43. *See* PROSSER, *supra* note 5, §50, at 305.

44. *See, e.g.*, MINN. STAT. ANN. §604.01 (1975); TEX. CIV. STAT. ANN. Art. 2212a, §2 (1975).

45. *See, e.g.*, Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972); Packard v. Whitten, 274 A.2d 169 (Maine 1971); Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

46. *See* PROSSER, *supra* note 5, §50 at 310.

47. *See id.*

48. *See* CAL. CODE CIV. PROC. §875(c).

49. *See* Mox Inc. v. Woods, 202 Cal. 675, 677-78, 262 P. 302, 303 (1927); Schaefer v. Berinstein, 140 Cal. App. 2d 278, 293, 295 P.2d 113, 123 (1956) (joint tortfeasors); Annot., 53 A.L.R.3d 184, 190 (1973) (concurrent or successive tortfeasors).

50. CAL. CODE CIV. PROC. §§875-880 (§875, *added*, CAL. STATS. 1957, c. 1700, at 3076 §1, §876-880, *added*, CAL. STATS. 1957, c. 1700, at 3077, §1).

51. *See* General Elec. Co. v. California *ex rel.* Dep't of Pub. Works, 32 Cal. App. 3d 918, 925-26, 108 Cal. Rptr. 543, 547-48 (1973); CAL. CODE CIV. PROC. §875.

nal proceeding brought by the injured party upon notice to all interested parties.[52] This right has not been expanded, however, to encompass a contingent claim for contribution brought before the entry of judgment.[53] Therefore, by definition, no right of contribution can lie against a tortfeasor who was not made a party to a suit or even against a co-defendant before entry of judgment.

2. *Indemnity*

While the doctrine of contribution presupposes that the parties are equal in legal fault and therefore liable on a pro rata basis, the doctrine of indemnity imposes liability solely on one person.[54] The right of indemnity is not affected by the California contribution statute,[55] and may be expressly provided for or implied by law.[56]

Under California law a party is free to obtain an indemnification agreement against negligence.[57] These express indemnification agreements may be in any form desired by the parties, provided that there is a writing which complies with the California Statute of Frauds.[58] The courts have generally upheld such agreements without modification;[59] however, an ambiguous agreement will not be construed to create a right of indemnity.[60] Express indemnity agreements should not be disturbed

---

52. CAL. CODE CIV. PROC. §878.

53. *See* General Elec. Co. v. California *ex rel.* Dep't Pub. Works, 32 Cal. App. 3d 918, 926, 108 Cal. Rptr. 543, 548 (1973); Thornton v. Luce, 209 Cal. App. 2d 542, 550-52, 26 Cal. Rptr. 393, 398-99 (1963).

54. *See* Herrero v. Atkinson, 227 Cal. App. 2d 69, 73, 38 Cal. Rptr. 490, 492 (1964); Cahill Bros., Inc. v. Clementina Co., 208 Cal. App. 2d 367, 376, 25 Cal. Rptr. 301, 305 (1962); Alisal Sanitary Dist. v. Kennedy, 180 Cal. App. 2d 69, 75, 4 Cal. Rptr. 379, 383 (1960); Molinari, *Tort Indemnity in California,* 8 SANTA CLARA LAWYER 159, 160-61 (1968).

55. CAL. CODE CIV. PROC. §875(f).

56. *See* Molinari, *Tort Indemnity in California,* 8 SANTA CLARA LAWYER 159, 159-60 (1968).

57. *E.g.* John E. Branagh & Sons v. Witcosky, 242 Cal. App. 2d 835, 839, 51 Cal. Rptr. 844, 847 (1966). The courts have determined that if the indemnification agreement appears in an adhesion contract or is against public policy it will not be upheld; *see* Tunkl v. Regents of the Univ. of Calif., 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963). *See generally Comment, Contractual Exculpation From Tort Liability in California—The "True Rule" Steps Forward,* 52 CAL. L. REV. 350, 352 (1964).

58. CAL. CIV. CODE §1624(2).

59. *See, e.g.,* Markley v. Beagle, 66 Cal. 2d 951, 962, 429 P.2d 129, 136, 59 Cal. Rptr. 809, 816 (1967); John E. Branagh & Sons v. Witcosky, 242 Cal. App. 2d 835, 844, 51 Cal. Rptr. 844, 850 (1966). *See also* Conley & Sayre, *Indemnity Revisited: Insurance of the Shifting Risk,* 22 HAST. L.J. 1201, 1231 (1971). The most typical agreements are those contained in insurance or building contracts. *See* PROSSER, *supra* note 5, §82 at 542-43.

60. *See* Goldman v. Ecco-Phoenix Elec. Corp., 62 Cal. 2d 40, 44, 396 P.2d 377, 379, 41 Cal. Rptr. 73, 75 (1964); Harvey Mach. Co. v. Hatzel & Buehler, Inc., 54 Cal. 2d 445, 447-48, 353 P.2d 924, 926-27, 6 Cal. Rptr. 284, 286-87 (1960); Vinnell Co. v. Pacific Elec. Ry., 52 Cal. 2d 411, 415, 340 P.2d 604, 607 (1959); Dart Transp. Serv. v. Mack Trucks, 9 Cal. App. 3d 837, 847-49, 88 Cal. Rptr. 670, 677-78 (1970); Whitmire v. H.K. Ferguson Co., 261 Cal. App. 2d 594, 599-602, 68 Cal. Rptr. 78, 80-82 (1968); John E. Branagh & Sons v. Witcosky, 242 Cal. App. 2d 835, 839, 51 Cal. Rptr. 844, 847

by comparative negligence since persons subject to certain risks should be free to protect themselves from liability.[61]

The form of indemnity which is more often encountered is equitable or implied indemnity. Although there is no universal rule,[62] implied indemnity is usually applied in situations where there is an extreme disproportion in the relative culpability of the parties.[63] The court consequently looks for disparities in the levels of culpability of the parties in assessing liability,[64] rather than for a breach of the underlying contract as in express indemnity situations.[65]

To determine whether a party may be indemnified, the courts have inquired whether that person in some manner participated in the wrong.[66] In attempting to describe the differences in the types of conduct, terms such as active and passive negligence, or primary and secondary liability, have been utilized.[67] Thus, a person who has been an active participant in a wrong may not obtain indemnification.[68] Active participation generally consists of either personal participation in an affirmative act of negligence or physical connection with an act or omission which the claimant for indemnification may have undertaken by agreement.[69] On the other hand, mere nonfeasance, or passive negligence, will not prevent a party from obtaining indemnification.[70]

(1966); King v. Timber Structures, Inc., 240 Cal. App. 2d 178, 181-82, 49 Cal. Rptr. 414, 417 (1966).

61. None of the reported cases allowing comparative contribution involved an express indemnity situation. It should be noted, however, that under general freedom of contract principles, parties should be permitted to apportion their respective responsibilities.

62. Prosser was of the opinion that it is extremely difficult to state any general rule or principle. *See* PROSSER, *supra* note 5, §51, at 313. One commentator has noted that indemnity may be granted in the following situations: (1) where a party has been held liable solely on the basis of imputed or vicarious liability; (2) where a party has performed, at the direction of another, an act not manifestly wrong; (3) where a party has incurred liability as a consequence of reliance on a supplier of goods' duty of care; or (4) where a party has incurred liability for failure to correct a hazardous condition, which as between indemnitor and indemnitee, it was the duty of the indemnitor to make safe. Annot., 53 A.L.R.3d 184 (1973). *See also* Annot., 88 A.L.R.2d 1355, 1356-57 (1963).

63. *See* PROSSER, *supra* note 5, §51, at 311-13.

64. *See* Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 S. CAL. L. REV. 728, 746 (1968).

65. *See* Cahill Bros., Inc. v. Clementina Co., 208 Cal. App. 2d 367, 379-80, 25 Cal. Rptr. 301, 308 (1962).

66. *See id.*

67. *See* PROSSER, *supra* note 5, §51, at 312-13.

68. *E.g.*, American Can Co. v. City & County of San Francisco, 202 Cal. App. 2d 520, 21 Cal. Rptr. 33 (1962).

69. *See* Molinari, *Tort Indemnity in California*, 8 SANTA CLARA LAWYER 159, 172 (1968). Thus, where a claimant for indemnity negligently drove a truck into a truck operated by defendant's employees and injured them, the court rejected the claim on the grounds of active participation. American Can Co. v. City & County of San Francisco, 202 Cal. App. 2d 520, 21 Cal. Rptr. 33 (1962).

70. *See* Cahill Bros. v. Clementina Co., 208 Cal. App. 2d 367, 380-83, 25 Cal. Rptr. 301, 308-10 (1962).

The preceding discussion evidences the fact that contribution and indemnity evolved to more fairly allocate the loss among tortfeasors. The approach of both doctrines is mechanical and neither provides an estimation of the causation attributable to each person, a purportedly elusive concept. Thus, in situations where there is an extreme disproportion in the persons' respective participation, justice supposedly requires liability to be shifted entirely onto one person. Likewise, in cases where both persons are active participants, equality of liability is felt to be equitable.[71] It must be noted that equality is not necessarily equity—one party may have been much more responsible than another for an injury. Hence, the doctrines of contribution and indemnity cannot be said to solve complex liability questions in all circumstances.

B. *Contribution and Indemnity Under Comparative Negligence*

1. *Comparative Contribution*

The courts' difficulties in delineating the parties' degree of participation permits the inference that fairness may require the trier of fact to determine the relative liability of the wrongdoers in terms of quantity. The formulation of comparative negligence thus raises the question of whether there should be *comparative* contribution; that is, whether a defendant should ultimately be held liable only for those damages caused directly by his own negligence.[72] The great majority of comparative negligence jurisdictions consider comparative fault in contribution actions,[73] either under direct provisions in the comparative negligence statutes[74] or by virtue of separate legislation.[75]

Prior to the *Li* decision, only one California appellate court had followed the rule of comparative contribution.[76] Unfortunately, the appeal of this decision was dismissed at the request of the parties after a hearing had been granted by the supreme court.[77] However, support for the argument that the California Supreme Court might at a later date

71. *See* PROSSER, *supra* note 5, §50, at 310; Braun, *Contribution: A Fresh Look*, 50 CAL. ST. B.J. 166, 169 (1975).

72. The liability of the defendants *inter se* is to be distinguished from the liability of the defendants to the plaintiff. The defendants' proportionate causation is not relevant to liability with respect to the plaintiff. See text following notes 40 *supra*.

73. Out of the 28 jurisdictions that follow systems of comparative negligence only 4 states, Colorado, Connecticut, Nebraska, and Utah, refuse to allow comparative contribution. SCHWARTZ, *supra* note 13, §§16.7-16.8.

74. *See, e.g.*, IDAHO CODE ANN. §6-803 (1975); MINN. STAT. ANN. §604.01 subd. 1 (1976); N.J. STAT. ANN. §2A:15-5.3 (1975).

75. *See, e.g.*, ARK. STAT. ANN. §34-1002 (1962 Repl.); WYO. STAT. ANN. tit. 1, §1.7.3(c) (1975).

76. *See* City of Sausilito v. Ryan, 65 Cal. Rptr. 391 (1968).

77. The dismissal of this case was noted in Kerr Chems., Inc. v. Crown Cork & Seal Co., Inc., 21 Cal. App. 3d 1010, 1016, 99 Cal. Rptr. 162, 165 (1971).

allow comparative contribution is found in the language of *Li.*[78] Although discussing the distinctions between wilful and wanton misconduct and ordinary negligence, the court stated that "a comprehensive system of comparative negligence should allow for apportionment of damages in all cases involving misconduct which falls short of being intentional."[79] At the present time, however, the California contribution statute[80] would appear to preclude comparative contribution for two reasons. First, the statute requires payment of more than a pro rata share before a right to contribution may arise.[81] Second, the pro rata share is determined by simply dividing the judgment equally among the responsible defendants, not on the basis of proportionate liability.[82]

The California Supreme Court could follow the approach of New York's highest court, which judicially adopted comparative contribution. In *Dole v. Dow Chemical Co.*,[83] the New York court considered a products liability case that could have been characterized as involving either contribution or indemnity. In *Dole*, the defendant, D_1, asserted a third party claim for indemnity against a tortfeasor, D_2, who had not been named as a defendant by the plaintiff. The court held that if D_1 was found negligent, D_2's negligence could also be considered either in the same or in another action.[84] It is important to note that the court stated that D_2 could be liable to D_1 either for a specific proportion of the judgment *or* for the full amount, even though it labeled this concept as a form of indemnity.[85] In reality, the *Dole* court did not follow the principles of indemnity or of pro rata contribution; it adopted comparative contribution.[86] The court reached this result notwithstanding a New York contribution statute which was virtually identical to that of California.[87] The court avoided the statute by construing it to be applicable only where there was no apportionment of liability contained in the judgment.[88] Hence, under the court's unique analysis, D_1 was

78. *See* Li v. Yellow Cab. Co., 13 Cal. 3d 804, 826, 532 P.2d 1226, 1241, 119 Cal. Rptr. 858, 873 (1975).
79. *Id.*
80. CAL. CODE CIV. PROC. §875.
81. CAL. CODE CIV. PROC. §875(c). *See* Augustus v. Bean, 56 Cal. 2d 270, 272, 363 P.2d 873, 874, 14 Cal. Rptr. 641, 642 (1961); Thornton v. Luce, 209 Cal. App. 2d 542, 551-52, 26 Cal. Rptr. 393, 397-99 (1962).
82. *See* CAL. CODE CIV. PROC. §876.
83. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).
84. *Id.* at 149, 282 N.E.2d at 292, 331 N.Y.S.2d at 387-88.
85. *Id.* at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 391.
86. Subsequently, the New York Court expressly allowed comparative contribution on the basis of the *Dole* decision. *See* Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 29-30, 286 N.E.2d 241, 243, 334 N.Y.S.2d 851, 854-55 (1972).
87. *See* N.Y.C.P.L.R. §1401 (McKinney 1972). After *Dole*, the New York Legislature amended the contribution statute so as to allow comparative contribution by impleader and allowed subsequent suits for comparative contribution by removing the joint judgment requirement. N.Y.C.P.L.R. §1401-1403 (McKinney 1975).
88. 30 N.Y.2d 143, 153, 282 N.E.2d 288, 295, 331 N.Y.S.2d 382, 391.

entitled either to pro rata contribution or to what the court referred to as indemnity, but not both. Presumably, absent legislative reform, California could also adopt comparative contribution by judicial action.

The utility of a system of comparative contribution is shown by reference to the following example. Plaintiff, P, is 10 percent at fault and is found to have sustained $10,000 in damages; Defendant D_1 is found to be 40 percent at fault and to have suffered $2000 in damages; Defendant D_2 is found to be 50 percent at fault and to have suffered $5000 in damages. The maximum amount P can recover is $9000. This amount is computed by deducting the percentage of damages attributable to P's negligence. Similarly, the maximum that D_1 can recover is $1200 and the maximum that D_2 can recover is $2500.

To resolve the issues presented by the example, a court should consider the case as involving three separate suits: in each suit, the injured party sues the other two parties for damages.

Suit One—P v. D_1 and D_2. Examining P's negligence, 90 percent of the cause of the accident is attributable to the negligence of the defendants, and hence they will be liable for 90 percent of P's damages. Assuming both defendants are able to pay the judgment directly to P, D_1 should be liable for that portion of the damages occasioned by his negligence; that is $\frac{40\%}{90\%}$ of $9000, or $4000. D_2 should be responsible for $\frac{50\%}{90\%}$ of $9000, or $5000.

Suit Two—D_1 v. P and D_2. Applying the same analysis as was used in *Suit One*, 60 percent of the cause of the accident is attributable to the negligence of the other parties if the negligence of D_1 is excluded. P should thus be liable for that portion of the damages attributable to his negligence; that is $\frac{10\%}{60\%}$ of $1200, or $200. D_2 should be responsible for $\frac{50\%}{60\%}$ of $1200, or $1000.

Suit Three—D_2 v. P and D_1. Again applying the same rationale used in *Suits One* and *Two*, 50 percent of the cause of the accident is attributable to the negligence of the other parties if D_1's negligence is excluded. P should be liable for that portion of the damages attributable to his negligence; that is, $\frac{10\%}{50\%}$ of $2500, or $500. D_1 should be liable for $\frac{40\%}{50\%}$ of $2500, or $2000.

To illustrate how comparative contribution differs from pro rata contribution, it should be assumed that in *Suit One*, D_1 is compelled to

pay the entire $9000 judgment. Pursuant to the present California contribution statute, D_1 would be entitled to only $4500 from D_2, not the full $5000, because of the pro rata requirement. However, under comparative contribution, D_1 would be entitled to $5000 from D_2 because this amount reflects the latter's percentage of liability, even though it is disproportionate to the percentage of liability attributable to D_1. Hence a policy of comparative contribution will achieve an equitable result between the defendants *inter se* in the situation where one tortfeasor has been compelled to discharge more than his share of the joint judgment, while still ensuring that the plaintiff will be fully compensated for his damages under the principle of joint and several liability.

One final matter which could concern the courts under a comparative negligence system is the problem of setoffs. The result of the setoff procedure with respect to the foregoing hypothetical would be as follows: P is owed $4000 and $5000 by Defendants D_1 and D_2, respectively. However, P owes Defendants D_1 and D_2 $200 and $500, respectively. Therefore P's net recovery is $3800 from D_1 and $4500 from D_2, for a total recovery of $8300. By the same token, D_1 owes D_2 $2000 and D_2 owes D_1 $1000. A setoff of these amounts would leave D_1 still owing D_2 $1000. It is important to note that the problem of setoffs would not present itself in a jurisdiction which does not follow comparative negligence, as all parties would be barred from recovery by their own contributory negligence.

2. *Indemnity*

Before *Li*, the California courts, in delineating the respective levels of the defendants' culpability for purposes of indemnity, followed the case of *Builders Supply Co. v. McCabe*[89] which refused to adopt any rule of comparative negligence.[90] The reason for this refusal, as stated by the court in *McCabe*, was that

> [t]he 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 and in the nature of the legal obligation owed by each of the wrongdoers to the injured person . . . . But the important point to be noted in all the cases is that secondary as distinguished from primary lia-

89. 366 Pa. 322, 77 A.2d 368 (1951).
90. *See* Ford Motor Co. v. Robert J. Poeschl, Inc., 21 Cal. App. 3d 694, 696-97, 98 Cal. Rptr. 702, 703-04 (1971) (cases cited in n.1).

> bility rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties, or arising from some positive rule of common law or statutory law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible.[91]

Notwithstanding the strong language contained in the *McCabe* opinion, there is obviously some question as to whether these statements are viable today as they were made prior to the adoption of a system of comparative negligence. It should be remembered that the court had only the options of reducing an extremely blameworthy party's liability by placing the burden on a party relatively free from fault, or of holding the blameworthy party solely responsible for the damage. However, under a system of pure comparative negligence and comparative contribution, most or all of the loss may be ascribed to an extremely blameworthy party according to the percentage of his causal negligence as determined by the trier of fact. It seems that some state supreme courts have denied claims for indemnification and have held that contribution is the proper remedy because of this possibility.[92] The statement of the California Supreme Court in *Li* that a system of comparative negligence should provide for apportionment of damages in all cases[93] also appears to be a recognition that indemnity should be replaced with comparative contribution. In fact, it has been suggested by one commentator that the adoption of comparative negligence will cause comparative contribution to be used in all cases where indemnity had previously been granted, except where liability is predicated solely on the fault of another or based on an express indemnity agreement.[94]

C. Contribution Suits Under Comparative Negligence—Problems of Impleader Where Plaintiff Sues Only One Potential Joint Tortfeasor

The case may occur where a plaintiff, although injured by the negligent acts of two wrongdoers, sues only one person for his injuries and thus fails to join the other wrongdoer who could be a party defendant.[95] The party defendant, faced with the possibility of litigating the suit

---

91. 366 Pa. 322, 325-26, 77 A.2d 368, 370-71.

92. *See* Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972); City of Franklin v. Badger Ford Truck Sales, Inc., 58 Wis. 2d 641, 207 N.W.2d 866 (1973).

93. 13 Cal. 3d 804, 826, 532 P.2d 1226, 1241, 119 Cal. Rptr. 858, 873.

94. *See* SCHWARTZ, *supra* note 13, §16.9.

95. Various tactical reasons such as general reluctance on the part of the jury to impose liability on similarly situated persons, a tortfeasor's possession of a good defense, or the presence of particular counsel, could cause a plaintiff not to join an otherwise responsible person. In addition, there may be a problem of obtaining jurisdiction over a particular person.

alone and being held solely liable, may often wish to expand the lawsuit by impleading the absent wrongdoer. Past California cases have found two obstacles to impleader; first, the California contribution statute, and second, the California joinder of parties provision as it existed between 1957 and 1971.[96] Although a joinder of parties provision was adopted in 1971 to provide for impleader,[97] the California contribution statute[98] has not been changed, and no right to implead a party for contribution has been found to exist under the express terms of that statute.[99]

Before the 1971 adoption of the impleader device, the right of a party to bring additional parties into the litigation was uncertain.[100] In 1957, when the then existing California joinder of parties provision was amended after a recommendation and study by the California Law Revision Commission,[101] there was no intention to provide for third party practice.[102] Indeed, there was considerable opposition from members of the bar to the adoption of third party practice without careful study.[103] The Law Revision Commission had only considered addition of new parties in the context of indispensable parties and, in the terminology of the current statute, "counterclaims" against a plaintiff.[104] However, the statute was drafted in ambiguous language, giving rise to the inference that third party practice was intended.[105] Consequently, California courts allowed impleader when a party asserted a claim for indemnification against a third party;[106] but in cases where a claim for

96. *See* Thornton v. Luce, 209 Cal. App. 2d 542, 550-52, 26 Cal. Rptr. 393, 398-99 (1962); *accord*, Balding v. D.B. Stutsman, Inc., 246 Cal. App. 2d 559, 562, 54 Cal. Rptr. 717, 719 (1966).

97. *See* CAL. CODE CIV. PROC. §§428.10, 428.20, 428.30; *see generally Recommendation And Study Relating To Counterclaims And Cross-Complaints, Joinder Of Causes Of Action, And Related Provisions*, 10 CAL. L. REVISION COMM'N REPORTS 500 (1971) [hereinafter cited as COMM'N REPORT 1971].

98. CAL. CODE CIV. PROC. §§875-880.

99. *See* General Elec. Co. v. California *ex rel.* Dep't Pub. Works, 32 Cal. App. 3d 918, 108 Cal. Rptr. 543 (1973); Balding v. D.B. Stutsman, Inc., 246 Cal. App. 2d 559, 54 Cal. Rptr. 717 (1966); Thornton v. Luce, 209 Cal. App. 2d 542, 26 Cal. Rptr. 393 (1962).

100. *See* Friedenthal, *The Expansion of Joinder in Cross-Complaints by the Erroneous Interpretation of Section 442 of The California Code of Civil Procedure*, 51 CAL. L. REV. 494, 498-500 (1963).

101. *See Recommendation And Study Relating To Bringing New Parties Into Civil Actions*, 1 CAL. L. REVISION COMM'N REPORTS M-1 (1957).

102. See Friedenthal, *The Expansion of Joinder in Cross-Complaints by the Erroneous Interpretation of Section 442 of The California Code of Civil Procedure*, 51 CAL. L. REV. 494, 496 (1963).

103. *See* Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions*, 23 STAN. L. REV. 1, 31 (1970).

104. *See* Friedenthal, *The Expansion of Joinder in Cross-Complaints by the Erroneous Interpretation of Section 442 of The California Code of Civil Procedure*, 51 CAL. L. REV. 494, 495 (1963).

105. *See* Comment, *Bringing New Parties Into Civil Actions in California*, 46 CAL. L. REV. 100, 104-05 (1958).

106. *See, e.g.*, Roylance v. Doegler, 57 Cal. 2d 255, 368 P.2d 535, 19 Cal. Rptr. 7 (1962); J.C. Penney Co. v. Westinghouse Elec. Corp., 217 Cal. App. 2d 834, 32 Cal. Rptr. 172 (1963); Linday v. American President Lines, Ltd., 214 Cal. App. 2d 146, 29

contribution was made, no right of impleader was found to exist under the statute.[107] The reason for this distinction is unclear, but perhaps the requirements of the contribution statute were a factor. In addition, the interjection of an additional party into the lawsuit without the plaintiff's consent was felt to be an undesirable complication absent clear legislative authority.[108] Partly because of these uncertainties, impleader was expressly provided for by statute after a new study and recommendation by the Law Revision Commission.[109] At the present time, therefore, it is clear that a procedural device does exist to bring in an absent party if a claim for contribution can be made. However, by the express terms of the California contribution statute, a defendant who has been found jointly liable with another defendant for the plaintiff's injuries must have paid more than his pro rata share of the judgment before a claim for contribution can be made.[110] A fortiori, before the imposition and payment of a joint judgment, only a *contingent* claim for contribution can exist. As noted previously, the California courts have rejected contingent claims for contribution, not only because of the problems with impleader, but also because contribution was not recognized at common law.[111] In summary, the existing California law is anomalous: impleader is recognized but a contingent claim for contribution is not. As a result, a defendant cannot implead another person on the basis of a claim for contribution. Whether comparative negligence will change this result is undetermined at present.

It should be noted that under a pure comparative negligence system, the policy of refusing to place all of the loss on a plaintiff simply because his conduct in some measure contributed to his injury is inconsistent with the policy of placing all of the loss on a defendant who together with another person caused injury to the plaintiff, simply because the plaintiff sued only that defendant. Under certain circumstances, however, this result can be justified after a consideration of the interests of the respective parties. The societal interest in providing compensation for an injured person should not be made contingent on a defendant's right to minimize his liability by shifting some of the loss to a person whose conduct was also a substantial factor in causing the injury. If there is an injustice as between defendants, provision should be made to

Cal. Rptr. 465 (1963); Simon Hardware Co. v. Pacific Tire & Rubber Co., 199 Cal. App. 2d 616, 29 Cal. Rptr. 12 (1962).

107. See cases cited note 99 *supra*.

108. *Id.*

109. *See* CAL. CODE CIV. PROC. §§428.10, 428.20, 428.30; COMM'N REPORT 1971, *supra* note 97, at 551-53, 610-15.

110. CAL. CODE CIV. PROC. §875(c).

111. *E.g.*, American Can Co. v. City & County of San Francisco, 202 Cal. App. 2d 520, 523, 21 Cal. Rptr. 33, 34 (1962).

allow the defendants to subsequently allocate the responsibility for the harm between themselves. On the other hand, this result is not mandated in all cases. If a defendant is able to locate and serve an absent wrongdoer without inconvenience, there is no valid reason to prohibit impleader of that person. Clearly, the artificial requirement of the California contribution statute pertaining to the need for a joint judgment[112] is not such a reason.

In New York, which had a contribution statute[113] virtually identical to that of California, the courts interpreted their statute as providing for impleader.[114] In arriving at this interpretation, the courts utilized a multi-step analysis which included the following reasoning: first, a defendant could implead a third party to assert a right of indemnity. Second, the distinction between contribution and indemnity was a strained concept and was difficult to apply. Third, both doctrines evolved before comparative negligence and comparative contribution as attempts to more fairly allocate loss among tortfeasors. Fourth, if contribution was dependent on the existence of a joint judgment, the injured party's willingness or ability to sue more than one wrongdoer was determinative.[115] Finally, the courts held that the New York contribution statute did not contemplate an apportionment that had already been made as part of the judgment. As a result of this analysis, these courts, perhaps artificially or superlegislatively, were able to circumvent the state contribution statute and provide for impleader.

This result is probably justified in that it creates a fairer system which also avoids multiplicity of litigation. However, as one New York court emphasized,[116] a system permitting impleader should not be allowed to become an obscurant. The principle of joint and several liability should not be abolished and the plaintiff's right to recover should not be made conditional on the presence of all potential joint tortfeasors. It is

---

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

113. N.Y.C.P.L.R. §§1401, 1402 (McKinney 1963); *amended*, L. 1974 c. 742, §1 (McKinney 1975-76) (amending §§1401, 1402, adding §§1403, 1404).

114. *See, e.g.*, Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972); Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972); Lipson v. Gerwitz, 70 Misc. 2d 599, 334 N.Y.S.2d 662 (1972).

115. Prosser was critical of conditioning contribution on the existence of a joint judgment, as evidenced by the following:

> There is an obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered on one alone, according to the accident of a successful levy of execution, . . . the plaintiffs whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free.

PROSSER, *supra* note 5, §50, at 307. For a similar criticism of the California contribution statute, see Comment, *Joint Tortfeasors: Legislative Changes in the Rules Regarding Releases and Contribution*, 9 HAST. L.J. 180, 186-87 (1958).

116. *See* Lipson v. Gerwitz, 70 Misc. 2d 599, 602, 334 N.Y.S.2d 662, 665 (1972).

therefore urged that California also adopt this approach by appropriate alteration of the contribution statute, or, if necessary, by judicial interpretation.

Subsequent Actions and Comparative Negligence

The prior discussion assumed that all interested parties were present and that all issues in a comparative negligence action were settled in a single suit. However, subsequent suits between the same or different parties may be necessary for a variety of reasons. This section will analyze the effect of the adoption of comparative negligence on these subsequent actions, focusing particularly on the doctrines of res judicata and collateral estoppel where one or more persons have not participated in the original suit. In addition, the existing statutory rules of joinder of parties and causes will be considered.

The following hypothetical is illustrative of the problems to be encountered in the discussion to follow. Plaintiffs P_1 and P_2 suffer property damage and personal injuries when a car owned and operated by D_1 collides with a car owned and operated by D_2. P_1 brings an action against D_1 for his property damages and is found to have suffered $10,000 in damages and to have been 10 percent at fault. D_1 is found to have suffered no damage and to have been 50 percent at fault. D_2, although not a party to the action, is found to have been 40 percent at fault. D_1 discharges the entire judgment by paying $9000 to P_1. After final determination of the original suit, the following actions might be commenced:

1. P_1 sues D_1, for additional property damage;
2. P_1 sues D_1, for personal injuries;
3. P_2 sues D_1 and D_2, for injuries and damages sustained as the result of the collision;
4. D_1 sues D_2, for contribution for the amount paid to P_1.

The following discussion focuses on how the courts should resolve these suits under California law after the introduction of comparative negligence.

A. Rules of Joinder of Parties and Causes

The statutes concerning the joinder of parties and causes are legislatively enacted rules that may serve as limitations on subsequent suits. The general objective of these rules is to promote an efficient judicial system which may effectively resolve, in a single action, all disputes arising out of a particular incident.[117] In some cases, effective relief

necessitates the presence of all persons affected by the decision;[118] thus, a plaintiff must bring all these persons before the court at the same time or suffer a dismissal.[119] However, where a claimant suffers an injury as the result of the combined activities of two or more persons, all responsible parties need not be joined.[120] This rule is predicated upon the concept of joint and several liability. A wrongdoer whose negligence is a substantial factor in causing all of a claimant's damages should not be allowed to object at the expense of the claimant that other persons are not present as parties to share the liability.

On the other hand, joinder rules compel a *defendant* to assert all causes arising out of an incident against the claimant in the same proceeding.[121] Thus, if a defendant has any claim for damages arising out of the same occurrence which is the subject matter of the claimant's cause of action, he must assert it against the claimant by way of cross-complaint in that suit.[122] It is important to note that a plaintiff is not compelled to assert all causes that he might possess against a defendant. The reason for this distinction is not expressed in the statute, but a proposed provision requiring a plaintiff to assert all his causes of action against a defendant in a single action was deleted at the request of the California State Bar Assocation.[123] The State Bar Association believed that such a provision would unduly complicate the administration of justice by burdening the courts with a determination of when an additional cause of action is barred, and infringe upon the plaintiff's right to defer some actions until possible settlement or to recover under newly discovered causes of action.[124]

It seems that these considerations should remain intact under a comparative negligence system. The imposition of a mandatory joinder of parties and causes provision, although advocated by some, is not re-

117. *See* Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 330, 338 (1957); *Developments in the Law—Multiparty Litigation in Federal Courts*, 71 HARV. L. REV. 874, 879-881 (1958); Note, *Indispensable Parties in the Federal Courts*, 65 HARV. L. REV. 1050, 1052-1058 (1952).

118. See authorities cited in note 117 *supra*.

119. *See* FED. R. CIV. PROC. 19; CAL. Code CIV. PROC. §389.

120. *See, e.g.*, Pioche Mines Consol., Inc. v. Fidelity-Philadelphia Trust Co., 206 F.2d 336, 337 (9th Cir. 1953), *cert. denied*, 346 U.S. 899 (1953); People *ex rel.* Dep't Pub. Works v. Clausen, 248 Cal. App. 2d 770, 786, 57 Cal. Rptr. 227, 239 (1967); *see also* J. MOORE, 3A FEDERAL PRACTICE ¶19.11 at 2364-66 (2d ed. 1974).

121. *See* Brenner v. Mitchum, Jones & Templeton, Inc., 494 F.2d 881 (9th Cir. 1974); Rothrock v. Ohio Farmers Ins. Co., 233 Cal. App. 2d 616, 43 Cal. Rptr. 716 (1965); Datta v. Staab, 173 Cal. App. 2d 613, 343 P.2d 977 (1959).

122. *See* FED. R. CIV. PROC. 13(a); CAL. CODE CIV. PROC. §426.30.

123. CALIFORNIA STATE BAR ASSOCIATION, COMMITTEE ON ADMINISTRATION OF JUSTICE AND ADVISORS (1970-71), *Minutes of General Meeting of June 18-19, 1971* at 7-8; CALIFORNIA STATE BAR ASSOCIATION, COMMITTEE ON ADMINISTRATION OF JUSTICE AND ADVISORS (1970-71), *Statement on S.B. 201* at 2-7 (March 22, 1971).

124. See authorities cited in note 123 *supra*.

quired for the system to function properly.[125] Therefore, a plaintiff should not be compelled to join all his causes of action against a defendant in one law suit or to join all potential tortfeasors.

B. *Res Judicata and Collateral Estoppel*

The doctrines of res judicata and collateral estoppel may significantly affect subsequent suits. These doctrines evidence a public policy designed to promote efficiency in the judicial system and insure uniformity in decisions.[126] Further objectives inherent in the doctrines of res judicata and collateral estoppel are:

1. to decrease the volume of litigation;
2. to protect persons from the harassment of having to repeatedly relitigate the same cause of action against the same adversary;
3. to diminish the expense of litigation by avoiding repeated and/or protracted litigation;
4. to hasten resolution of disputes; and
5. to satisfy the constitutional requirements of due process.[127]

The term res judicata as used in this comment refers to that doctrine in its pure sense, which incorporates the principles of merger and bar as they apply to plaintiffs and defendants. Merger applies to the plaintiff who has won a judgment: his cause of action is merged into the

---

125. Some commentators have advocated mandatory joinder of parties under a system of comparative negligence. *See, e.g.*, Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 503-04 (1953); SCHWARTZ, *supra* note 13, at §17.1. However, it is this writer's conclusion that it should not be required. Notwithstanding "long-arm statutes" granting jurisdiction over a tortfeasor, mandatory joinder of parties would make a plaintiff's recovery contingent upon his locating and obtaining service of process on all persons whose activities contributed to his injury. If a plaintiff failed to do so, his suit would be dismissed. A consideration of the interests of the parties reveals that this is not justified. See text following note 40 *supra*. The societal interest in providing full compensation to an injured party outweighs the interest of a defendant, whose conduct was a substantial factor in causing an indivisible injury to the plaintiff, in being able to escape a duty to compensate an injured plaintiff merely because another person's negligence was also a contributing cause of the injury. If there is an injustice in providing full compensation to an injured party at the expense of one of a number of responsible tortfeasors then that injustice should be corrected, but not by the Procrustean remedy of conditioning recovery on the presence of all responsible persons.

Two methods can be seen to eliminate this potential injustice without compulsory joinder of all tortfeasors. First, a defendant present before the court should be allowed to assert a cause of action for contribution by impleader. Any other person alleged to be responsible for the plaintiff's injuries or damages thus may be brought into court to share the responsibility. Second, subsequent suits for contribution should be allowed without the artificial requirement of a joint judgment as the right to such relief should be conditioned upon conduct which jointly, successively, or concurrently causes injury to the plaintiff. See text accompanying notes 72-88 *supra*.

126. *See Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 820-30 (1952).

127. *Id. See generally* Polasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 IOWA L. REV. 217 (1954); Wright, *Estoppel By Rule: The Compulsory Counterclaim Under Modern Pleading*, 39 IOWA L. REV. 255 (1954).

judgment and is thereby extinguished.[128] Bar is applicable where the defendant has won; the plaintiff is barred from asserting the same cause of action again.[129] Thus, res judicata operates to reduce litigation between the same parties on the same cause of action by precluding further litigation on any matter raised in that cause of action after a court of competent jurisdiction has made a final decision on the merits.[130] In addition, even though a particular matter may not have been raised in a prior suit, under res judicata the parties are precluded from relitigating *any* issue entailed in the same cause of action.[131] On the other hand, collateral estoppel operates as a bar to further litigation of issues actually litigated and determined by making the prior finding conclusive in subsequent suits, even though the parties may not be identical.[132]

As originally formulated, the doctrines of res judicata and collateral estoppel bound only the parties to the original suit under the so-called "mutuality of estoppel" rule.[133] This rule required that a party asserting an estoppel must also be subject to an assertion of the same estoppel by the opposing party.[134] As a result, in most cases, only the original parties were bound by the original judgment. However, in *Bernhard v. Bank of America National Trust*,[135] the California Supreme Court discarded this rule by holding that one need not have been a party to the original suit in order to assert the prior resolution of an issue against a person who *did* participate in the former adjudication.[136] The basis for the court's ruling was the principle that once a party has had a full and fair opportunity to litigate an issue, there is no sound reason for allowing that party to relitigate the matter.[137] Hence, assuming identity of issue, a prior adverse ruling on an issue would be conclusive in a subsequent suit and a party would not stand to benefit by a second suit against a different person or by a related cause of action against the same party. Thus, this new rule, coupled with the time and expense of additional litigation, is a strong influence on a party to assert all causes in a single suit.

In *Bernhard*, the supreme court determined that the doctrine of

128. F. JAMES, CIVIL PROCEDURE §11.9 at 550 (1965).
129. *Id.*
130. *See* Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457, 1457-58 (1968).
131. *See* Clark v. Lesher, 46 Cal. 2d 874, 880, 299 P.2d 865, 868 (1956).
132. *Id.*
133. *See* Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 283-84 (1957).
134. *See id.*
135. 19 Cal. 2d 807, 122 P.2d 892 (1941).
136. *Id.* at 813, 122 P.2d at 895.
137. *Id.*

collateral estoppel could be asserted in subsequent litigation if: (1) the issue decided in the prior adjudication is identical with the one presented for resolution in the case at bar; (2) there is a final decision on the merits; and (3) the party against whom the plea is asserted is a party or in privity with a party to the prior adjudication; that is, the party has had a day in court to litigate the issue.[138] Thus, the pleadings, record, and specific findings, if any, of the prior action must be carefully scrutinized to determine if identity of issue is present. The former resolution of the issue must also be clearly apparent, or actually and necessarily included in the prior resolution to be binding in a subsequent suit.[139]

The abolition of the mutuality of estoppel rule has led the courts to consider, in addition to the factors enumerated in *Bernhard*, whether the former judgment is asserted offensively or defensively. Offensive use of a judgment occurs when a person, ordinarily the plaintiff in the second action, relies on the former judgment to conclusively establish in his favor a necessary element of his cause of action or claim.[140] Defensive use of a judgment occurs when a stranger to the former judgment, ordinarily the defendant in the second action, relies on it as conclusively establishing in his favor an issue he must prove in his defense.[141]

The offensive or affirmative use of a prior judgment has been criticized on many grounds; however, the usual criticism is that its allowance favors plaintiffs too heavily.[142] If offensive use is allowed, the argument runs, prospective plaintiffs will be influenced to refrain from joining in a suit in the expectation that a decision may be rendered in favor of similarly situated parties. Thus, if the decision is in favor of a party with whom the person could have joined, the person who refrained from joining in the prior suit may assert the judgment against the defendant in a subsequent action pursuant to the general principles of collateral estoppel.[143] On the other hand, if the decision is against the party with whom the person could have joined, it would not be binding upon him under the due process notions inherent in collateral estoppel since the latter did not participate in the prior action.[144]

---

138. *Id.*
139. *See* Eichler Homes, Inc. v. Anderson, 9 Cal. App. 3d 224, 233, 87 Cal. Rptr. 893, 898, (1970); *accord* Taylor v. Hawkinson, 47 Cal. 2d 893, 896, 306 P.2d 797, 799 (1957).
140. Goolsby v. Derby, 189 N.W.2d 909, 913 (Iowa 1971).
141. *Id.*
142. *Cf.* Currie, *Civil Procedure: The Tempest Brews*, 53 CAL. L. REV. 25, 27 (1965); Editorial Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel By a Nonparty*, 35 GEO. WASH. L. REV. 1010, 1033 (1967).
143. See authorities cited note 142 *supra.*
144. See authorities cited note 142 *supra.*

This fear of the "wait and see" strategy is untenable for several reasons. First, a person must wait for the first action to become final before he can assert any estoppel against the defendant in a subsequent case. It would appear that few people could afford to wait until the first judgment was finalized.[145] Second, the possibility that the statute of limitations might bar a subsequent action may impose a significant risk in delaying an action until the final resolution of the prior action. Hence, in order to prevent a claim from being barred by the statute, a plaintiff will have to file a complaint nonetheless and hope that the defendant will not move to consolidate the trials.[146] Finally, the suggestion has been made in the Restatement of Judgments[147] and by a number of courts[148] that collateral estoppel should not be applied in a manner inconsistent with public policy. For example, some courts have considered such factors as the ability of counsel,[149] the amount of the prior award in relation to the amount demanded in the subsequent suit,[150] and the length of the prior trial,[151] in determining whether offensive use of a judgment will be allowed. Thus, the discretion of the court is a sound check on the possibility of abusing this doctrine. Presently, in California there is a conflict among the appellate courts concerning the offensive use of a judgment.[152] However, it appears that the modern trend of

---

145. *See* JUDICIAL COUNCIL OF CALIFORNIA, 1975 JUDICIAL COUNCIL REPORT TO THE GOVERNOR AND LEGISLATURE 99-101 (1975). The report states that the median time from the filing of a complaint to trial ranges from four to five months in Santa Barbara, Santa Clara and Stanislaus Counties to 41.5 months in San Jose. *Id.* The difference is attributable to the fact that in some counties a filed complaint is treated as a certificate of readiness. Should the decision be appealed, the median time for an appeal ranges from 13 to 26 months. *Id.* at 81. Furthermore, California Code of Civil Procedure Section 1049 states that an unsatisfied action is pending until its final determination on appeal or until the time for appeal has passed. California Rules of Court 2 and 16(a) give 180 days in which to file a notice of appeal and 30 more days to file a record of the decision below. California cases have held that a judgment must be final before it can be asserted. *E.g.*, Busick v. Workmen's Comp. Appeals Bd., 7 Cal. 3d 967, 974, 500 P.2d 1386, 1392, 104 Cal. Rptr. 42, 48 (1972). It is clear, therefore, that it would take at least two years before a final decision can be rendered in California.

146. *See* CAL. CODE CIV. PROC. §1048, granting the court, at its discretion, the power to consolidate actions involving a common question of law or fact; Jackson v. Lactein Co., 209 Cal. 520, 288 P. 781 (1930) (holding that the trial court in its discretion may consolidate actions).

147. RESTATEMENT OF JUDGMENTS, §70f (1942).

148. *E.g.*, Timmsen v. Forest E. Olson, Inc., 6 Cal. App. 3d 860, 870, 86 Cal. Rptr. 359, 365 (1971); Thain v. City of Palo Alto, 207 Cal. App. 2d 173, 185, 24 Cal. Rptr. 515, 522 (1962).

149. *See* Annot., 31 A.L.R.3d 1044, 1052-54 (1970).

150. *See* Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532 (2nd Cir. 1965), *cert. denied*, 382 U.S. 983 (1966).

151. *See* United States v. United Air Lines, Inc., 216 F. Supp. 709, 725-729 (D.C. Nev. 1962), *aff'd sub nom.*, United Air Lines, Inc. v. Weiner, 335 F.2d 379, 404-05 (9th Cir. 1964).

152. *Compare* Vanguard Recording Soc'y, Inc. v. Fantasy Records, Inc., 24 Cal. App. 3d 410, 100 Cal. Rptr. 826 (1972) *and* Louie Quierlo Trucking, Inc. v. Superior Court, 252 Cal. App. 2d 194, 60 Cal. Rptr. 389 (1967) (allowing offensive use) *with* Lea v. Shank, 5 Cal. App. 3d 964, 85 Cal. Rptr. 709, 86 Cal. Rptr. 515 (1969); McDougall v. Palo Alto Unified School Dist., 212 Cal. App. 2d 422, 28 Cal. Rptr. 37

authority is to allow such use.[153] Before moving to a discussion of the application of res judicata and collateral estoppel in a comparative negligence system, however, the California definition of a cause of action must be considered. Notwithstanding the language of some early and seemingly conflicting California cases,[154] a cause of action is determined by an examination of the primary rights infringed by the defendant during a single tortious event or related series of events.[155] Thus, where a defendant is involved in an automobile collision which causes injury to both the automobile and the person of a plaintiff, two separate causes of action are created. First, since plaintiff's interest in the quiet enjoyment of his property was infringed when defendant damaged plaintiff's car, a cause of action is created for that injury.[156] Second, since plaintiff's interest in freedom from impermissible interference with the integrity of his person was infringed when he sustained personal injuries, a second cause of action is also created.[157] This theory has been criticized on the basis that there is a potential for increased litigation through the creation of two separate causes of action.[158] However, the cost of additional litigation and the possibility that a court may find a

(1963); Nevarov v. Caldwell, 161 Cal. App. 2d 762, 327 P.2d 111 (1958) (disallowing offensive use).

153. The increasing number of cases that allow offensive use is one indication of this trend. United States v. United Air Lines, Inc., 216 F. Supp. 709, 725-29 (D.C. Nev. 1962), *aff'd sub nom.* United Air Lines, Inc. v. Weiner, 335 F.2d 379, 404-05 (9th Cir. 1964); Skrzat v. Ford Motor Co., 389 F. Supp. 753 (D.R.I. 1975); Cover v. Platte Valley Pub. Power & Irr. Dist., 162 Neb. 146, 75 N.W.2d 661 (1956); Continental Can Co. v. Hudson Foam Latex Prod., Inc., 129 N.J. Super. 426, 324 A.2d 60 (1974); Desmond v. Kramer, 96 N.J. Super. 96, 232 A.2d 470 (1967); B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967); Bahler v. Fletcher, 275 Or. 1, 474 P.2d 329 (1970). In addition, one of the early commentator's criticism of the allowance of offensive use has been withdrawn. *See* Currie, *Civil Procedure: The Tempest Brews*, 53 CAL. L. REV. 25 (1965).

In comparative negligence actions it makes little sense to prohibit offensive use. It should be noted that if a prior decision fixes a high proportionate share of fault on a plaintiff, a defendant will wish to assert the judgment against the plaintiff. The nature of this type of assertion fixing plaintiff's recovery, although defensive, is not significantly different than the plaintiff's assertion of a judgment which had fixed a high responsibility for the accident on the defendant. Prohibition of offensive use would unduly favor defendants. For example, a defendant who has been found to be 75 percent at fault will not wish to assert the judgment, while a defendant who has been found 25 percent at fault will wish to rely on the judgment. Thus, if offensive use is prohibited, the only times a judgment will be used are cases where a prior finding has fixed a large portion of the responsibility on a plaintiff. Therefore, in comparative negligence actions there should be no absolute prohibition of offensive use; the court in its discretion should determine the applicability of a former judgment.

154. *E.g.*, Dobbins Title Guar. & Trust Co., 22 Cal. 2d 64, 136 P.2d 572 (1943); Phelan v. Quinn, 130 Cal. 374, 62 P. 623 (1900); Woolverton v. Baker, 98 Cal. 628, 33 P. 731 (1893); Morrison v. Wilhoit, 62 Cal. App. 2d 830, 145 P.2d 707 (1944).

155. Holmes v. David H. Bricker, Inc., 70 Cal. 2d 786, 452 P.2d 647, 76 Cal. Rptr. 431 (1969); *see also* Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions*, 23 STAN. L. REV. 1, 13 (1970).

156. *See* Holmes v. David H. Bricker, 70 Cal. 2d 786, 452 P.2d 647, 76 Cal. Rptr. 431 (1969).

157. *See id.*

158. Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions*, 23 STAN. L. REV. 1, 13 (1970).

subsequent suit subsumed by a previously asserted cause of action appear to provide a check on this danger.

C. Application in Multiple Party Litigation

The paucity of applicable case law necessitates the creation of specific hypothetical situations to illustrate the application of the aforementioned concepts. Unless otherwise indicated, these hypotheticals are those of the writer.

1. Party Plaintiff Against a Defendant Party to Prior Proceedings

This hypothetical assumes that Plaintiff, P, sustains property damage as the result of a collision between two automobiles owned and operated by D_1 and D_2. P, believing D_1 is more able to discharge any award, brings suit only against D_1 in accordance with the principle of joint and several liability of concurrent tortfeasors, for negligently inflicted property damage. P is found to have been 10 percent at fault and to have suffered $1000 in damage. D_1 discharges the judgment of $900. Within the period of limitation, P subsequently discovers personal injuries and additional property damage and again sues D_1 alone.

The existing case law in California holds that a plaintiff who has been found contributorily negligent in one action is barred from suing again for any related damages on the basis of collateral estoppel.[159] Contributory negligence thus operates as a complete bar to any recovery for negligently inflicted personal injury or property damage because, even though a subsequent suit may present a different cause of action than the first suit, contributory negligence will still be an issue. However, this rule should no longer apply under a system of comparative negligence. Unlike the former rule concerning contributory negligence, the new system allows a plaintiff to recover all damages not occasioned by his negligence. Therefore, a plaintiff will not be totally barred from asserting a different cause of action to recover all damages not occasioned by his negligence.

When P sues D_1 for additional property damage, however, the action will be barred under the doctrine of res judicata, since the second suit is based on the same cause of action presented in the prior suit against the same party. The fact that the claim for the additional damage has not

159. *See* Todhunter v. Smith, 219 Cal. 690, 694-96, 28 P.2d 916, 918-19 (1934); Manning v. Wymer, 273 Cal. App. 2d 519, 526, 78 Cal. Rptr. 600, 604 (1969) (dictum); Artucovich v. Arizmendiz, 256 Cal. App. 2d 130, 135, 63 Cal. Rptr. 810, 812 (1967). *See generally* Comment, *Res Judicata: Prior Adjudication of Negligence Bars Relitigation Of That Issue By Defendant To Former Action*, 1966 DUKE L.J. 283 (1966).

yet been determined is irrelevant as res judicata affects all claims arising from a cause of action which *might* have been litigated as well as those which were actually litigated.[160] On the other hand, P's claim for personal injuries sustained as a result of the collision is an assertion of a different cause of action than that of the first suit. This result obtains because the "primary rights" theory grants a cause of action for injury to one's person and another cause of action for injury to one's property. Thus, the doctrine of res judicata would be inapplicable to bar the claim.

Collateral estoppel might apply however, if the *Bernhard* elements are present.[161] The first action was for negligently inflicted property damage and the second action was for negligently inflicted personal injury arising out of the same incident; therefore, the same issue of D_1's negligent conduct is presented. The discharge of the judgment by payment thereof ensures the finality of the decision. D_1, as a party to the first action, clearly satisfies the privity requirement. Therefore, the *Bernhard* elements are present and collateral estoppel would be applicable. Since P would wish to assert the former judgment to establish the liability of D_1, this would be an offensive use of collateral estoppel. Assuming offensive use would be allowed by the court, D_1 will be responsible for 90 percent of the fault in inflicting P's personal injuries in accordance with the finding in the first suit.

It should be noted that if in the second suit D_1 attempts to recover damages sustained in the accident, the compulsory cross-complaint rule will bar his claim.[162] The *defendant* must assert any claim arising out of the accident by way of counterclaim against the claimant or be barred from any subsequent recovery.

2. *New Plaintiff Against Party Defendants*

In the next situation, P_2, not a party to the prior action, sues D_1 and D_2, who were parties to the prior suit brought by P_1. The hypothetical assumes that P_1 and P_2 are passengers in a car driven by D_1. D_1's car collides with an automobile owned and operated by D_2. Suit 1 is brought by P_1, who is found to have been 10 percent at fault; Defendants D_1 and D_2 are found to be 70 percent and 20 percent at fault, respectively. The judgment is paid to P_1. Suit 2 is then brought by P_2 against D_1 and D_2.

To avoid litigating the issues of the defendants' liability and propor-

160. See authorities cited note 159 *supra.*
161. See text accompanying notes 135-139 *supra.*
162. *See* FED. R. CIV. PROC. 13(a); CAL. CODE CIV. PROC. §426.30.

tionate causation, P_2 might wish to assert the Suit 1 judgment offensively in Suit 2 against D_1 and D_2. Since the parties against whom the plea is sought to be asserted were parties to the prior suit, and since the judgment was made final by payment, two of the elements of the *Bernhard* test are present. The major problem posed is whether the issues presented for adjudication in the second suit are identical with those in the first. Additionally, there is the ancillary consideration as to whether offensive use of the judgment will be permitted.

If it is undisputed that both passengers were only nominally negligent, perhaps for failure to keep a lookout, there appears no sound reason why the former resolution of the issues concerning their negligence should be relitigated. Indeed, under almost identical facts, a federal court in *Gorski v. Commercial Insurance Co. of Newark, New Jersey*[163] held a prior decision to be conclusive, and thus the drivers in that case were collaterally estopped to dispute a prior finding of negligence.[164] However, if there is extreme disparity in the amount of the two claims, public policy would probably dictate against making the prior judgment conclusive.[165] For example, the motivation to vigorously defend the first suit may not have been present on the part of D_1 and D_2 if the amount of P_1's claim was relatively small.

Significantly different considerations arise if the facts of the hypothetical are altered so that D_1 and D_2 allege in the second suit that P_2 was negligent because of interference with the driver. This factual setting would be distinguishable from that of *Gorski*, where the court noted that there was no allegation of negligence on the part of the plaintiff.[166] The allegation of negligence should preclude the total binding effect of the former judgment because the prior decision fixed virtually all of the responsibility for the accident on the defendants.[167] If P_2's negligence is to be taken into account, then a new finding must be made as to the proportionate responsibility of the parties. On the other hand, the prior finding that the defendants were negligent to some degree should not be disturbed if the defendants had a full and fair opportunity to disprove P_1's allegation of negligence.[168]

Under the above circumstances the court faces two alternatives: it may allow only the negligence of the plaintiff to be determined, with the defendants then being liable for the plaintiff's recoverable damages in

163. 206 F. Supp. 11 (E.D. Wis. 1962).
164. *Id.* at 13.
165. *See* Berner v. British Commonwealth Pac. Airlines, 346 F.2d 532, 540-41 (2nd Cir. 1965), *cert. denied*, 382 U.S. 983 (1966).
166. 206 F. Supp. at 12-13.
167. *Id.*
168. *See* text accompanying notes 135-139 *supra.*

the relative proportion fixed in the former decision;[169] or it may allow the defendants to relitigate the issue of their negligence. In selecting an alternative, the court should consider the amount of time to be saved by litigating only the issue of plaintiff's negligence. If it appears that virtually the same witnesses would be presented and that the same factual disputes must be resolved to determine the plaintiff's negligence as would be required to determine the proportionate responsibility of the defendants, the defendants should be allowed to relitigate the quantum of their negligence. The court might also consider the possibility that one defendant might be unable to pay, which would focus the responsibility for the accident on the other defendant. If this appears to be the case, there would be nothing to be gained by allowing the defendants to relitigate their proportionate share of liability and therefore the court should allow only the negligence of the plaintiff to be determined in the second suit.

In any event, the court should be wary of the possibility that a defendant, previously found to be largely responsible for an accident, may use a bare allegation of plaintiff's negligence as a means to relitigate and hopefully reduce the amount of his proportionate share. In resolving this issue the court should carefully examine the pleadings, record, and special findings of the prior action to determine whether the same issue was presented therein. If it had been tried and determined, then there is no triable issue in the second action under the doctrine of collateral estoppel. Of course, if there is a new ground presented for the plaintiff's possible negligence, the court should allow the parties to relitigate the issue. In summary, a court should weigh a number of different considerations in arriving at its decision of whether to allow the doctrine of collateral estoppel to be invoked.

3. Absent Person Made a Party Defendant in a Subsequent Proceeding

In contrast with the above hypotheticals, the situation may arise where a wrongdoer was not a defendant in the prior suit. Subsequently, a second action might be brought and the absent person made a party defendant. The following hypothetical situation assumes that Plaintiff, P, sues D_1 for property damage sustained as the result of a collision between automobiles owned and operated by D_1 and D_2. D_2 cannot be located, and therefore P brings an action against D_1 alone. The trier of fact determines that P was 10 percent at fault, that D_1 was 60 percent at

169. Since P was 10 percent at fault, 10 percent of his $10,000 damages would be deducted ($1000), leaving a total award of $9000.

fault, and that D_2 was 30 percent at fault. D_1 pays the entire award under the principle of joint and several liability. Subsequently, P sues D_1 for his personal injuries, and, now able to locate D_2, joins him as a party defendant.

Any of the parties present in the second action could conceivably raise the claim that collateral estoppel precludes the litigation of certain issues. P could argue that D_1 is estopped to relitigate his proportionate liability; D_1 or D_2 could argue that P is precluded from relitigating his own negligence; and D_2 could argue that P and D_1 are estopped to relitigate their negligence. Irrespective of any finding in the first suit purportedly establishing D_2's negligence or proportionate liability, it is elementary that due process prevents D_2 from being bound by that prior determination since he was not a party.[170] Therefore, D_2 must be allowed to litigate the issues of his negligence and proportionate causation, if any. The problem thus becomes the extent to which the prior decision will bind P and D_1.

The courts should not permit relitigation of the issue of whether P and D_1 were negligent, as both were parties to the prior action and had a full and fair opportunity to litigate this issue in the first action. However, if their *proportionate* liability is found to be conclusive in the subsequent suit, D_2's liability is fixed as well as the remaining percentage. Perhaps the question of the conclusiveness of P and D_1's proportionate liability should depend upon whether D_2 is found to have been negligent by the trier of fact in the second suit. If it is found that D_2 was *not* negligent, then the doctrine of collateral estoppel should be applied to preclude P and D_1 from relitigating the proportionate share of their combined negligence because the most accurate determination of all persons' responsibilities is made in the subsequent proceeding where all persons were present as parties. Furthermore, D_1 should not be allowed to object on the grounds of inconsistency with the first suit. Under the principle of joint and several liability, D_1 was liable for the entire award in the first action; the end result of the second action is the same: he is liable for the entire award as the sole tortfeasor. Thus, no injustice results from the application of collateral estoppel in this situation.

On the other hand, if D_2 is found negligent in the second suit, the courts have a number of alternatives in determining the effect of the first action. If the tortfeasor absent from the first action, D_2, is willing to waive his due process objections, the court could treat the first action as

170. See text accompanying note 144 *supra.*

establishing the negligence of P_1 and the *combined* negligence of the defendants. The actual proportionate liability of each defendant would then be relitigated in the second action. A defendant, absent from the first action, would generally desire this application of collateral estoppel in situations where the prior determination ascribed a high proportion of liability to the plaintiff. Similarly, in cases where the prior decision affixed most of the responsibility on the plaintiff and the sole defendant, the absent person might also be willing to allow the first adjudication to have preclusive effect in the second action.

Of course, the absent person would not be willing to waive his due process objections under certain circumstances. For example, in cases where he believes that more liability may be attributed to the plaintiff in the second action, he may argue that the first finding should not be made conclusive. By the same token, if the prior finding assigned a large portion of the liability to him, the absent person will attempt to prevent the former action from having preclusive effect. Thus, in cases involving a defendant absent from the first proceeding, that person will argue for the application of collateral estoppel only where it would be to his benefit in the second action. Thus, an apparent inconsistency is created by an absent person's privilege to argue for or against the imposition of collateral estoppel: in some cases a decision will be given preclusive effect while in other cases preclusive effect will be denied.

The rationale for permitting this inconsistency can be found in the due process notions inherent in the doctrine of collateral estoppel.[171] The absent person's constitutional protection against being bound by a decision in which he was not a participant is certainly important enough to justify the inconsistency. Additionally, in some instances the most efficient use of the judicial system will be achieved by allowing a prior action to have preclusive effect rather than creating an absolute prohibition on its use. One method which the courts could use to eliminate some potential problems would be to require a finding in the first suit only as to the *combined* negligence of the defendants and not a specific determination as to the negligence of each defendant severally. The plaintiff could not object to this procedure because he had the opportunity to fully litigate the issue of his negligence in the first action. Similarly, the defendants could not object because they will be allowed to litigate the issue of their *proportionate* liability. If this procedure is applied to the above hypothetical case, the trier of fact in the second suit must accept the prior finding that P was 10 percent at fault and the two defendants 90 percent at fault. Thus, it will be determined in the

171. See text accompanying note 144 *supra.*

subsequent suit how the 90 percent will be apportioned between D_1 and D_2.

4. Subsequent Actions for Additional Compensation Against a Person Absent From the Prior Proceeding

Thus far, the assessment of proportionate liability and the ramifications of that process have been considered. The discussion now turns to a consideration of the manner in which a plaintiff who has recovered part of his damages may collect any remaining or additional damages from other persons. The following hypothetical assumes that P is found to have been 30 percent at fault and to have suffered $10,000 in damages in the first suit. D_1, a party defendant in that proceeding, is found to have been 40 percent at fault; D_2, absent from the action, is found to have been 30 percent at fault. D_1, under the principle of joint and several liability, pays the entire judgment of $7000, the amount remaining after the percentage of damages attributable to the plaintiff's negligence is deducted. P now attempts to obtain the remaining 30 percent of his damages ($3000) from D_2.

Once a plaintiff receives the full sum remaining *after* his damages are reduced proportionately by the amount of his own negligence, a claim for additional compensation on the same cause of action from a tortfeasor absent from the prior proceeding should be denied. If the claim is on the same cause of action, that is, if it involves infringement of the same primary right, it can be rejected on several grounds. First, the doctrine of collateral estoppel precludes any assertion of a claim inconsistent with the claim in the former proceeding since the issues of negligence and proportionate liability are identical with those presented in the former action. D_2, although not a party to the former action, may assert the judgment against the plaintiff defensively since the latter was a party to the prior proceeding and had a full and fair opportunity to litigate the matter. Consequently, the plaintiff will be estopped to claim a different amount of damages or to dispute the prior finding of his negligence. Second, due to the general rule that a plaintiff is entitled to but one compensation for a single injury,[172] any payment over the amount of the first judgment constitutes a double recovery. Third, the goal of a comparative negligence system is to allow a plaintiff

172. *See* Panos v. Great W. Packing Co., 21 Cal. 2d 636, 638, 134 P.2d 242, 244 (1943); Beronio v. Southern Pac. R.R., 86 Cal. 415, 421, 24 P. 1093, 1094 (1890). However, the damages awarded can include future loss of earnings and pain and suffering reasonably certain to occur. Bellman v. San Francisco High School Dist., 11 Cal. 2d 576, 588, 81 P.2d 894, 900 (1938); Bonneau v. North Shore R.R., 152 Cal. 406, 414, 93 P. 106, 110 (1907).

to recover for damages not attributable to his own negligence.[173] Allowing him to recover damages attributable solely to his negligence would free a plaintiff from any responsibility for his conduct. This result could not have obtained under the old contributory negligence system,[174] and it should not obtain under comparative negligence.

The hypothetical situation may arise, however, where a plaintiff does not obtain full satisfaction of his award due to the default of the judgment debtor.[175] In a subsequent suit against a joint tortfeasor absent from the prior proceeding, the former judgment can have no binding effect on the absent person because of due process considerations. Thus, the plaintiff would have to prove liability on the part of that defendant in order to be entitled to damages. Of course, if the former decision placed a large responsibility on the plaintiff for his injuries, the absent person might wish to take advantage of the judgment defensively by waiving his due process objections. The elements of collateral estoppel would definitely be present to allow such use: the identical issue of plaintiff's negligence was determined in the prior proceeding; a final decision was rendered on the merits; and the plaintiff was a party to the prior action.[176] The fact that the liability of the absent defendant is indirectly determined because it is the percentage of negligence remaining after the percentage attributable to the plaintiff is deducted should not affect the application of collateral estoppel. Therefore, that doctrine could be applied should the defendant assert it.

5. Summary

The previous hypotheticals have illustrated the effect of prior actions on subsequent suits involving the same or different parties. Because res judicata precludes the same cause of action from being relitigated after a final decision on the merits, a plaintiff cannot sue for additional damage once a case has been finally determined. Similarly, if a different cause of action is asserted, the prior resolution of the issue will be conclusive on the parties participating in the prior decision under the doctrine collateral estoppel.

A plaintiff not participating in a former action will be allowed to assert that judgment against the parties who did participate assuming

---

173. See text following note 39 *supra.*
174. *See* PROSSER, *supra* note 5, §65 at 425, §67 at 433.
175. This hypothetical assumes that execution on the judgment is an unavailable remedy. In addition, if the judgment is only partially satisfied, the defendant may plead this amount to reduce his liability. *See* Savage v. Emery, 255 Cal. App. 2d 603, 63 Cal. Rptr. 566 (1967); Black v. Bringhurst, 7 Cal. App. 2d 711, 46 P.2d 993 (1935).
176. See text accompanying notes 135-139 *supra.*

the issues are the same. However, a colorable allegation by a defendant that the new plaintiff was negligent which was not litigated in the original proceeding presents a different issue. The court, after examining the evidence to be presented and the potential time consumed, should usually allow the plaintiff's negligence to be relitigated and fix the defendants' proportionate liability in the same ratio as the former suit. Where a person absent from a prior proceeding has been joined as a defendant in a subsequent suit, the court should allow the defendants to relitigate their *proportionate* negligence. However, they should be bound by the amount of negligence ascribed to the plaintiff in the first action; which in turn binds them to the finding as to their *combined* negligence.

D. Subsequent Actions Between Tortfeasors

1. Suits for Contribution[177]

The California contribution statute, as presently phrased, does not permit a subsequent suit for contribution unless a joint judgment has been entered against both parties.[178] The adoption of a system of comparative negligence raises the question of whether a joint judgment should still be required in cases where absent persons can subsequently be proved to have been joint, concurrent, or successive tortfeasors. Numerous commentators have found the joint judgment requirement unfair and illogical.[179] The following discussion pertains to the ramifications of an amendment deleting that requirement from the contribution statute.

Initially, it should be remembered that any finding purporting to affix the liability of an absent tortfeasor is not binding on that person unless his due process objections are waived.[180] If comparative contribution is followed and specific findings were made in the prior action as to the proportionate liability of each concurrent tortfeasor, however, the absent tortfeasor may wish to assert the judgment in a contribution suit against

177. The various comparative negligence jurisdictions have taken different approaches to contribution. Some of these jurisdictions resolve the issue directly in the primary suit brought by a plaintiff. *E.g.*, MINN. STAT. ANN. §604.01(1) (1976); N.Y.C.P.L.R. §1401-1404 (McKinney 1975-76); TEX. CIV. STAT. ANN., Art. 2212a §2(b) (1975). Other jurisdictions permit contribution to be treated in a separate suit brought by a defendant who has discharged more than his proportionate share of a judgment. *E.g.*, IDAHO CODE ANN. §6-803 (1975); N.Y.C.P.L.R. §§1401-1404 (McKinney 1975-76); UTAH CODE ANN. §78-27-39 (1975).

178. CAL. CODE CIV. PROC. §§875-880.

179. *See, e.g.*, PROSSER, *supra* note 5, §50 at 307; Comment, *Joint Tortfeasors: Legislative Changes in the Rules Regarding Releases and Contribution*, 9 HAST. L.J. 180, 186-87 (1958).

180. See text accompanying note 144 *supra*.

the tortfeasor who was a party to the prior action. If contribution is made in the same ratio as the finding of negligence, assertion of the party tortfeasor's liability will fix the liability of the absent tortfeasor as the remaining portion. Thus, in those cases where the absent tortfeasor was adjudged to have been minimally at fault, he will probably seek to make the finding conclusive in the subsequent suit for contribution brought by the defendant in the first action.

Some decisions rendered before the adoption of comparative negligence have held that a prior finding of negligence on the part of joint tortfeasors does not affect a later suit for contribution.[181] The rationale of these cases is that the liability of the defendants *inter se* was not litigated in the first case wherein the joint judgment was rendered.[182] Thus, in the contribution suit, the tortfeasors are free to litigate their relative liability on the judgment because the doctrine of collateral estoppel does not apply. The rule of these cases should be inapplicable under a comparative negligence system. Unlike the situations posed in the pre-comparative negligence cases, the proportionate liability of the parties would have been at issue in the first suit if specific findings were made as to the liability of each party. Therefore, if all parties to the contribution suit participated in the first case, the prior determination of their relative negligence should be made conclusive under the doctrine of collateral estoppel.

2. *Suit For Damages Between Codefendants*

A similar situation is presented where one defendant sues a former codefendant for damages in a subsequent suit. Assume that P sustains property damage as the result of a collision between automobiles owned and operated by D_1 and D_2. In the first suit, P receives a judgment against D_1 and D_2 on the basis of their negligence. Subsequently, D_1 sues D_2 in a second suit for personal injuries he sustained in the collision.

Past California cases have held that collateral estoppel is not applicable in the second suit because D_1's suit for damages against D_2 does not present the same issues as the previous suit brought by P.[183] These cases proceed on the rationale that the first suit determined only the liability of D_1 and D_2 with respect to P, and not the relative liability of

181. *See, e.g.*, Truck Ins. Exch. Co. v. Torres, 193 Cal. App. 2d 483, 14 Cal. Rptr. 408 (1961); Preferred Accident Ins. Co. v. Musante, Berman & Steinberg Co., 133 Conn. 536, 52 A.2d 862 (1947).

182. See cases cited note 181 *supra*.

183. Truck Ins. Exch. v. Torres, 193 Cal. App. 2d 483, 494-95, 14 Cal. Rptr. 408, 414-15 (1961); Quinn v. Litten, 148 Cal. App. 2d 631, 633-35, 307 P.2d 90, 92-93 (1957); Hardy v. Rosenthal, 2 Cal. App. 2d 442, 445-46, 38 P.2d 412, 413-14 (1934).

D_1 and D_2 *inter se.*[184] However, it must be remembered that these cases were decided under a non-comparative negligence system. Thus, the courts were faced with the possibility that D_1's claim would be barred by his contributory negligence if the prior finding of his negligent conduct as to P were given conclusive effect.

These considerations arguably change, however, in comparative negligence cases, wherein specific findings are made as to the relative liability of the parties. Assuming that comparative contribution is followed, it would benefit either defendant in the first action to secure a finding of a low percentage of respective negligence. Therefore, these parties will generally actively litigate the issue of their relative liability in that action. As a result, it would appear that the basic elements of collateral estoppel as espoused in *Bernhard* are present.[185] Hence, the prior finding of the relative negligence of D_1 and D_2 should be conclusive in the suit for damages.

3. *Suit for Indemnity*

A defendant in a previous suit may be able to institute a subsequent suit for indemnification against another person in certain cases. This type of action may be brought either against a former co-defendant or against a person not a party to the first suit. If, as suggested previously,[186] comparative contribution will replace indemnity in all situations except where express indemnity is involved or where the right of indemnity is predicated solely on the fault of another, the usual suit for indemnification will be no different from a suit for contribution. Consequently, if both parties in the indemnity action were parties to the former action and thus litigated their proportionate liability, the prior finding should be made conclusive under the *Bernhard* test.[187] However, if either party to the indemnity action was not a party to the former action, the prior finding can bind that absent person only if he waives his due process objections.

On the other hand, if comparative contribution does not replace indemnity, the traditional law of that doctrine should control. Thus, a defendant who was found negligent in the first action will be collaterally estopped from trying to prove that he was not negligent in his subsequent suit for indemnification.[188] However, he will ordinarily not be

184. See cases cited note 183 *supra.*
185. See text accompanying notes 135-139 *supra.*
186. See text accompanying notes 94 *supra.*
187. See text accompanying notes 135-139 *supra.*
188. Conley & Sayre, *Indemnity Revisited: Insurance of the Shifting Risk*, 22 HAST. L.J. 1201, 1227 (1971).

precluded from litigating the *quality* of his negligence in an attempt to prove that he was only passively negligent.[189]

E. Effect of Settlements in Multiple Party Actions

Some interesting issues are presented when the possible impact of comparative negligence upon settlements is considered. It has been provided by statute that the release of one jointly liable tortfeasor is not a release of other tortfeasors.[190] Thus, under the principle of joint and several liability, a plaintiff retains a cause of action for uncompensated damage against nonsettling tortfeasors. However, a plaintiff's recovery against these parties must be diminished by the amount of the settlement on the ground that a plaintiff is entitled to but one satisfaction.[191] Therefore, if a settlement is not accompanied by a dismissal with prejudice, its effect on a plaintiff should be unchanged by the adoption of comparative negligence.

Different problems are presented where a settlement is coupled with a dismissal with prejudice. Pursuant to California law formulated before the *Li* decision, a plaintiff's acceptance of a settlement and dismissal with prejudice is treated as an admission of his contributory negligence.[192] As a result, some California decisions have given this admission collateral estoppel effect in the plaintiff's later suit against the nonsettling tortfeasors, thereby barring his recovery.[193] This rule is unsound and should not be continued under the comparative negligence system. As noted throughout this comment, the purpose of a pure comparative negligence system is to afford recovery for all damages not occasioned by the plaintiff's negligence. Therefore, a plaintiff's admission of his contributory negligence should serve only to reduce his recovery from the other tortfeasors. A better solution would be a total rejection of the "admission of contributory negligence" rule. The nonsettling tortfeasors should bear the burden of proving the plaintiff's

---

189. *Id.*

190. *See* CAL. CODE CIV. PROC. §877.

191. *See* Butler v. Ashworth, 110 Cal. 614, 618, 43 P. 4, 5 (1895); Carr v. Cove, 33 Cal. App. 3d 851, 854, 109 Cal. Rptr. 449, 451 (1973); Reinach v. City & County of San Francisco, 164 Cal. App. 2d 763, 768, 331 P.2d 1006, 1009 (1958).

192. *See, e.g.*, Artucovich v. Arizmendiz, 256 Cal. App. 2d 130, 63 Cal. Rptr. 810 (1967); Louie Quierlo Trucking, Inc. v. Superior Court, 252 Cal. App. 2d 194, 60 Cal. Rptr. 218 (1967); Sylvester v. Soulsberg, 252 Cal. App. 2d 185, 60 Cal. Rptr. 218 (1967); Rothrock v. Ohio Farmers Ins. Co., 233 Cal. App. 2d 616, 43 Cal. Rptr. 716 (1965); Datta v. Staab, 173 Cal. App. 2d 613, 343 P.2d 977 (1959). *Contra* Clovis Ready Mix Co. v. Aetna Freight Lines, 25 Cal. App. 3d 276, 101 Cal. Rptr. 820 (1972); Lea v. Shank, 5 Cal. App. 3d 964, 85 Cal. Rptr. 709 (1970). *See* Nellis, *Avoiding Collateral Estoppel in California Multiple Tort Litigation*, 9 CAL. W. L. REV. 115, 124 (1972).

193. See authorities cited note 192 *supra*.

causal negligence, just as they would have had to do absent the settlement.[194]

Some question is also raised as to whether the trier of fact should consider a settling tortfeasor's negligence in the later suit.[195] Three important factors militate against this practice: (1) a release of a settling tortfeasor is not a release of other tortfeasors;[196] (2) the nonsettling tortfeasors are liable for the entire amount of plaintiff's recoverable damages remaining after the settlement is deducted under the doctrine of joint and several liability; and (3) the California contribution statute generally precludes a contribution suit against a settling tortfeasor.[197] Thus, the issue of a settling tortfeasor's negligence should be irrelevant as there is no purpose served by considering it.

As noted above, the present California law precludes contribution from a settling tortfeasor.[198] The only exception to this rule arises where the settlement has been entered into in bad faith.[199] Notwithstanding the fact that this comment advocates both the rejection of the joint judgment rule as a prerequisite to a suit for contribution and the adoption of comparative contribution,[200] the present California law regarding settling tortfeasors should remain in effect. The strong public policy in favor of settlements will be compromised if contribution suits are allowed, as tortfeasors settling in good faith would not be absolutely protected from additional liability. Therefore, any proposed change of this particular part of the contribution statute should be rejected.

CONCLUSION

The *Li* decision adopting pure comparative negligence represents the first step in the evolution of a truly equitable method of loss allocation among all parties contributing in some measure to an injury. The implementation of comparative negligence, in its most basic application to suits between a single plaintiff and a single defendant, is a relatively simple procedure. First, the duty, breach of duty, legal causation, damages, and proportionate fault of each person are assessed by the trier of fact through specific findings. Second, a deduction from the plaintiff's total damages is made for those damages attributable solely to the plaintiff's negligence.

---

194. See text accompanying notes 13-15 *supra.*
195. *See* Pierrenger v. Hoger, 21 Wis. 2d 182, 124 N.W.2d 106 (1963); SCHWARTZ, *supra* note 13, §16.5 at 255-56.
196. CAL. CODE CIV. PROC. §877.
197. CAL. CODE CIV. PROC. §877(b).
198. CAL. CODE CIV. PROC. §877(b).
199. *See* CAL. CODE CIV. PROC. §877.
200. See text accompanying notes 72-88 *supra.*

In suits involving multiple parties, the basis of liability is the concept of joint and several liability. Tortfeasors whose actions, either jointly, concurrently, or successively, are a substantial factor in causing an indivisible injury to the plaintiff may be sued either jointly or severally for all damages not occasioned by the plaintiff's negligence. In multiple party suits where all responsible parties are before the court, the same basic procedure as that of the two party suit is applied. In cases where one responsible person is not before the court, the plaintiff's negligence should be compared against the combined negligence of *all* responsible persons, regardless of whether all are parties. In cases where more than one party has suffered damage, each should recover for all damages caused by the combined activities of others, but with a setoff for any amounts owed by him to the others.

Where all responsible persons are not before the court, or where all issues are not resolved in a single proceeding, different considerations arise. First, the existing California case law barring a plaintiff's recovery in subsequent suits solely on the basis of this contributory negligence should be discarded as a result of the adoption of comparative negligence. Second, if the plaintiff in the subsequent proceeding did not participate in the prior action, assuming that no new issues are presented, he should be allowed to offensively assert the former judgment to fix the liability of the defendants. A different result is reached if an issue not litigated in the former suit is raised. In this situation, only the negligence and not the proportionate fault of the defendants should be fixed by the prior decision.

Contribution under a complete system of comparative negligence should be determined on the basis of proportionate responsibility, not by equally dividing the damages among the defendants. Additionally, a defendant should be allowed to implead other responsible persons to that end. Finally, contribution should not be limited to those cases where a plaintiff has joined multiple defendants; if joint, concurrent, or successive liability to the plaintiff can be established in a subsequent suit, contribution should also be allowed. Due process, however, forbids making a prior finding of proportionate liability conclusive unless the person absent from the prior proceeding waives his due process objections.

The adoption of comparative negligence does not require legislative reform of the procedural rules of joinder of parties as the interest in providing compensation for a plaintiff does not compel the enactment of a provision for mandatory joinder. Rather, the current contribution statute should be reformed so as to provide for impleader and comparative contribution.

The introduction of a pure comparative negligence system in California does not signal a drastic change in the existing procedural and substantive tort law. However, the California courts and legislature must definitely reevaluate some of the existing doctrines in light of comparative negligence. To provide some aid in this endeavor, the following revisions to Section 1714 of the California Civil Code and Section 875 of the California Code of Civil Procedure are proposed:

(a) Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the title on compensatory relief.

(b) In all actions brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property, may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the trier of fact in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.

(c) If unreasonable delay or prejudice to the parties already before the court will not result, a defending party may cause a person not a party to the proceeding to be made a party for purposes of contribution if that person is alleged to be jointly, concurrently, or successively liable with the defending party, for all or part of the plaintiff's claim.

(d) When there are two or more persons who are jointly, concurrently, or successively liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each, provided, however, that each shall remain jointly and severally liable for the entire award.

(e) A cause of action for contribution may be asserted in a separate proceeding whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought. No claim for contribution may be asserted against a tortfeasor who has in good faith obtained a release, dismissal with or without prejudice, or covenant not to sue from the injured party.

Mark C. Raskoff