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**Casenote**

*Torres v. Xomox: Allocating Worker’s Compensation Benefits and Post Verdict Settlement Proceeds Under Proposition 51*

Mike Weed*

**INTRODUCTION**

If you asked Americans on the street, most would probably agree that we have developed into a society bent on litigation. Faster than ever, people today are turning to the courts to settle disputes that seemingly, just a few years’ ago, would have been quickly and rationally resolved among themselves. In particular, tort litigation, or what the layman would understand as the law of personal injury, leads the lawsuit frenzy in proliferation of suits and controversy generated. Whether it is a suit over the temperature of coffee spilled on oneself, or a suit against a city for a turned ankle on a public tennis court, the perception created by today’s commonplace tort actions is that the legal system is out of control and headed for a breakdown.

Tort litigation has come a long way in its storied history. Driven by the balancing of competing public policies, it became clear that injuries to persons and property

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2. *See* Nicholson, *supra* note 1, at 18 (stating that a permissive attitude regarding filing lawsuits has evolved in American society, particularly suits involving injuries to person and property); Opdyke, *supra* note 1, at B1 (detailing specific “nuisance lawsuits” as examples of the controversial suits being initiated, such as a surfer suing a city for injury to his lip, a drunk driver suing paramedics and police for battery and false imprisonment during their efforts to provide aid, and a driver who rear-ended a truck suing a city claiming the caulking compound used to repair the street caused her inability to stop).

3. *See* A Second Lawsuit is Filed Over Spillage of Hot Coffee, Hou. Chron., May 26, 1995, at 34 (explaining that the attorney who won a 2.8 million dollar verdict against McDonald’s for burns sustained when a woman spilled hot coffee on herself had initiated a second, similar suit against Burger King on behalf of a man who claimed he was burned by hot coffee in that establishment).

4. *See* Opdyke, *supra* note 1, at B1 (noting the questionable basis of suits seeking damages for turned ankles or stumbles during recreational activities, pointing out that those types of injuries are the risks of the game).

5. *See* Mark C. Barabak, *Peninsula Group Pushes Initiative on Lawsuits*, S.F. Chron., Dec. 4, 1986, at 14 (detailing the effort planned by a group of businessmen to alter the existing tort system with a “loser pays” requirement); Robert B. Gunnison, *State Lawmakers to Tackle Tort Reform*, S.F. Chron., Dec. 15, 1986, at 8 (anticipating a “flock” of bills to be introduced to the state legislature in an attempt to reform the tort system); Nicholson, *supra* note 1, at 18 (calling for further changes in the tort system, beyond those enacted by Proposition 51, to help destroy the “psychology of entitlement” that has added to the rush to the courthouse).
often deserved to be, in fact needed to be, compensated. This evolution is on-going, but some claim that it has gone too far; that today, tort law recognizes and compensates people with injuries beyond those that are deserving. Moreover, it is argued that what began as a doctrine dedicated to establishing fair standards of accountability between victim and tortfeasor, has been distorted over time into a legal mechanism that often indiscriminately thrusts financial responsibility on tortfeasors who are the least culpable among several.

As with any evolutionary pattern, characteristics develop and change. The process of natural selection retains those characteristics that are beneficial to the evolving entity and discards those that are harmful or obsolete. So it is with the law of torts.

As the intricacies of tort law evolved, the doctrine of joint and several liability developed. Over time, this doctrine too has undergone change, and the changes continue to this day. Those aspects that are beneficial are retained, and those that are deemed harmful or obsolete are discarded. The difficulty, however, is that the evolution of tort law, and joint and several liability in particular, is driven by the subjective minds of human beings, not the objective processes of nature. Thus, while the changes are being undertaken, it is difficult, if not impossible, to separate ourselves from the process and find an objective vantage point. Moreover, the process of evolution in tort requires a balancing of competing social interests, which must be continually adjusted as social values shift and change. What characteristics are beneficial, and what should be discarded, must be decided subjectively, and the passage of time is the only available guidepost from which we can form an evaluation of those decisions.

This Casenote examines one narrow vein in the evolution of California tort law. The doctrine of joint and several liability has been and continues to be a hallmark of tort law. However, caught in the pressures of evolution, joint and several liability has also been altered. Proposition 51, approved by the voters of California in

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7. See supra notes 1 and 3 and accompanying text.
9. See Deep Pockets, S.F. CHRON., June 2, 1986, at 52 (arguing that joint and several liability results in local governments being held liable for huge damage awards even though they are minimally at fault); Cherry Gee, The Statewide Propositions on the June 3 Ballot, L.A. TIMES, June 1, 1986, at 3 (claiming that passage of Proposition 51 would result in fewer frivolous suits and end the unfairness produced by existing law).
10. See infra Part I.
11. See infra Part I.
12. See infra Part I.
13. See infra Part I.
1986, changed joint and several liability, causing continuing questions of interpretation.15 This Casenote examines the case of Torres v. Xomox Corp.,16 which is the first appellate court decision interpreting the proper method of allocating, or crediting, worker’s compensation benefits and post-verdict settlements between multiple tortfeasors in light of Proposition 51.17

Part One of this Casenote overviews the development of joint and several liability in California, from its beginning to the enactment of Proposition 51. Specifically, Part One addresses the particular changes created and the various policies asserted in favor of and against the initiative. Part Two describes the facts and holding of Xomox. Part Three discusses the alternative methods of allocation considered by the court, emphasizing the method selected. Finally, Part Four offers an alternative method of damage allocation, focussing on achieving the best possible balance between the competing interests of plaintiffs, defendants and the public in general, in light of the policy goals of both Proposition 51 and the law of tort itself.

I. THE EVOLUTION

A. A HISTORICAL OVERVIEW OF JOINT AND SEVERAL LIABILITY IN CALIFORNIA

For more than a century, California has followed the concept of joint and several liability, in which any one of multiple tortfeasors can be held liable for the entire amount of damages sustained by an injured plaintiff.18 Codified as California Civil Code § 1431, the concept dates back to California’s adoption of the Field Code in 1872.19 Underlying joint and several liability was the rationale that a plaintiff’s damages could not be mechanically distributed among several tortfeasors if each had played a causal role in the harm.20 Liability for any particular defendant depended on

15. See infra Part I.B.
17. Id. at 7, 56 Cal. Rptr. 2d at 459.
20. See, e.g., McCool v. Mahoney, 54 Cal. 491, 491 (1880) (stating that, in an action for joint trespass, the damages could not be divided among several defendants). This notion may focus upon the indivisibility of the harm, rather than the indivisibility of fault on the part of the defendants. Until 1976, California refused to allocate fault among multiple defendants, thus justifying joint and several liability against any one tortfeasor if culpable in any degree. See Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P. 2d 1226, 119 Cal. Rptr. 858 (1975) (adopting the comparative fault system in California). Indivisibility of harm functions as its own rationale for joint and several liability, justifying the imposition of liability on any one defendant if no single cause among many can be directly attributed to a particular portion of the harm. Because each tortfeasor’s conduct could have caused the entire harm, each must be potentially liable for the whole of the damages, absent individual exculpation. See, e.g., Kingston v. Chicago & N.W. Ry., 211 N.W. 913, 915 (Wis. 1927). However, at least one court has been willing to venture into the apportionment of harm between multiple defendants where a reasonable basis for the division can be identified. See, e.g., In re Bell Petroleum Svcs., Inc., 3 F.3d 889, 903-04 (5th Cir. 1993); see also RESTATEMENT (SECOND) OF TORTS, § 433A.
the establishment of a causal connection between that defendant and the plaintiff's harm, but once established, that defendant could be forced to bear the entire burden of the judgment regardless of the relative degree of culpability of that defendant. In 1948, the California Supreme Court expanded the reach of joint and several liability in *Summers v. Tice.* Prior to *Summers,* imposition of joint and several liability was founded on the concurrence of harmful conduct by multiple actors, with liability attaching only to those actors playing a causal role in the injury. In *Summers,* however, the court imposed joint and several liability on two defendants, only one of whom could possibly have caused the plaintiff's injury. Unfortunately, it was not physically possible to determine which defendant actually caused the injury. Basing its decision on public policy, the Court held that the plaintiff should not bear the burden of proving which defendant caused the harm, but rather, the defendants should be forced to absolve themselves individually to escape liability. The alternative, which would leave the plaintiff without redress because of the physical impossibility of proving individual causation, was not acceptable as a policy matter. Based on the parties' relative positions, it was preferable to hold each potential tortfeasor jointly and severally liable, rather than entirely denying the plaintiff's opportunity to recover. Thus, after *Summers,* joint and several liability was expanded to reach not only those defendants found to be causally connected to the harm, but also those wrongdoers who could not absolve themselves of a possible causal connection.

21. See Moscowitz, supra note 19, at 911-12.
22. 33 Cal. 2d 80, 199 P.2d 1 (1948).
23. See Moscowitz, supra note 19, at 911.
24. *Summers,* 33 Cal. 2d at 85-86, 199 P.2d at 3-4. The facts of the case were as follows: The plaintiff and the two defendants were together on a hunting trip, when both defendants fired their shotguns simultaneously. The plaintiff was struck in the eye by a pellet fired by one of the defendants. Medical and forensic technology at the time did not provide any means to identify from which gun the pellet had been fired. Thus, at trial, the plaintiff had no physical method to prove which of the defendants had actually caused his injury, though it was clear that one of the two was responsible. *Id.* at 80-81, 199 P.2d at 1-2.
25. *Id.* at 80-81, 199 P.2d at 1-2.
27. *Id.*
28. *Id.; see also RESTATEMENT (SECOND) OF TORTS, § 433B(3) & cmt. f (1966) (adopting the holding of *Summers* and offering the justification that the plaintiff should not be forced to forego recovery merely because the circumstances are such that he cannot identify which wrongdoer actually caused his injury).
29. For an expansive application of the *Summers* doctrine, see Sindell v. Abbott Labs., 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), where the California Supreme Court allowed a plaintiff to proceed against a group of drug manufacturers, even though it was not certain that the particular harm-causing manufacturer was in the courtroom. *Id.* at 610-12, 607 P.2d at 936-37, 163 Cal. Rptr. at 144-45. The Court held that the defendant manufacturers could be held jointly and severally liable if the plaintiff demonstrated that the named defendants represented a "substantial share" of the market-manufacturers of the particular drug. *Id.* In practical effect, the Court expanded the *Summers* doctrine to require each defendant, in order to escape joint and several liability, to prove that it had not caused the plaintiff's harm, even if the plaintiff could not establish that one of the named defendants actually caused the harm.
With California's adoption of comparative fault principles in *Li v. Yellow Cab*, the resilience of joint and several liability was challenged. One possible view was that the comparative fault system, founded on the principle of liability in proportion to fault, was inherently contrary to the concept of joint and several liability, where a minimally culpable tortfeasor could bear the full financial responsibility for an injury. However, the California Supreme Court reached the opposite conclusion in *American Motorcycle Association v. Superior Court*. Confronted with the argument that the comparative fault principles adopted in *Li v. Yellow Cab* undermined the doctrine of joint and several liability, the Court concluded that their acknowledgment of the law's ability to apportion fault did not translate into an acknowledgment that injuries were necessarily divisible in correlation to those proportions of fault. The Court reasoned that causation was distinct from culpability; a minimal degree of fault did not necessarily demonstrate that a defendant's conduct only caused a corresponding degree of harm. Thus, joint and several liability remained viable in California after the adoption of comparative fault principles, protecting plaintiffs' ability to recover the entire judgment from any one defendant.

At the same time, however, the Court also created the doctrine of equitable indemnity, providing a mechanism for defendants who pay more than their proportional share of the plaintiff's recovery to seek contribution from the other defen-

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30. See *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (adopting a comparative fault system for negligence actions in California); see also *Safeway Stores, Inc. v. Nest-Kart*, 21 Cal. 3d 322, 579 P.2d 441, 144 Cal. Rptr. 550 (1978) (extending comparative fault principles to strict liability actions); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978) (extending comparative fault principles to products liability actions).

31. See *Li*, 13 Cal. 3d at 812-13, 532 P.2d at 1232, 119 Cal. Rptr. at 864 (discussing the fairness inherent in proportional fault).

32. See, e.g., *Brown v. Keill*, 580 P.2d 867, 873-74 (Kan. 1978) (interpreting the Kansas comparative fault statute as necessarily abrogating the doctrine of joint and several liability). The Kansas Supreme Court held that the mandate of a comparative fault system is to ensure that the extent of liability equates to a defendant's degree of fault. *Id.* In the Court's view, fairness can only be achieved by maintaining this correlation. *Id.* The Court found no social policy compelling a defendant to pay more than its proportional share of damages as determined by fault, stating that, even when defendant insolvency is a variable, after the enactment of comparative fault, "[t]he plaintiffs now take the parties as they find them." *Id.*; see also, e.g., *COLO. REV. STAT. ANN.* § 13-21-111.5 (West 1987) (abolishing joint and several liability as contrary to comparative fault principles); *UTAH CODE ANN.* § 78-27-38 (1996) (same); *WYO. STAT. ANN.* § 1-1-109 (Michie 1997) (same).

33. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

34. *Id.* at 588-89, 578 P.2d at 905, 146 Cal. Rptr. at 188.

35. *Id.* (explaining that it will remain commonplace, even after comparative fault, for the actions of each tortfeasor to be potentially responsible for an entire injury).

36. *Id.* at 588-90, 578 P.2d at 905-907, 146 Cal. Rptr. at 188-90. As was the Kansas Supreme Court's decision in *Brown*, the California court's conclusion was founded on concepts of fairness. *Id.* However, the California court focused upon the notion that it is patently unfair to place the risk of defendant insolvency on the victim of negligent conduct. *Id.* The Court found that, given a choice between the parties, the wrongdoers should bear the risk of the insolvency rather than the plaintiff. *Id.* Therefore, the retention of joint and several liability, rather than its abolition, preserves the principles of fairness on which comparative fault is based. To paraphrase the Kansas Supreme Court, in California terms, the defendant takes the parties as they find them. See supra note 32.
By creating this common law doctrine of contribution, the Court was satisfied that it had achieved the proper balance between the plaintiff's interest in obtaining full recovery and the need for equitable limits on a defendant's exposure to disproportionate liability.

B. Proposition 51 Emerges

Although the decision in American Motorcycle was intended to strike an equitable and maintainable balance between the competing interests of injured plaintiffs and defendants, it was not long until the push for further tort reform resurfaced. Throughout the 1980's, the push for tort reform was a constant theme among legislators, lobbyists, and the insurance industry. These efforts were resisted on several fronts by the proponents of the victim's, consumer's or plaintiff's interests. The election of June 3, 1986, turned out to be the battleground where the competing interests would engage, battling over what was termed the "Fair Responsibility Act of 1986." Proposition 51, placed on the June 1986 ballot as a voter initiative, was a direct attack on the status quo of joint and several liability in California. Focusing on the line between economic and non-economic damages in a plaintiff's award, the

37. *American Motorcycle*, 20 Cal. 3d at 590-98, 578 P.2d at 907-12, 146 Cal. Rptr. at 190-95.
38. *Id.* The practical usefulness of the equitable indemnity doctrine seems limited in many situations. Where defendant insolvency is not an issue, the plaintiff collects from one defendant, and that defendant merely bears the inconvenience of collecting the proportional shares from the other defendants. This, of course, forces a separate proceeding upon already overburdened courts. However, if defendant insolvency is an issue, the plaintiff collects from the solvent defendant, who is then essentially left without a remedy. Clearly, that defendant has the right to an equitable indemnity action against the non-paying defendants, but if they are insolvent, the right has little value. Thus, in reality, the defendant has no recourse even after equitable indemnity. Moreover, in the event of a good-faith settlement by a defendant, the non-settling defendant cannot pursue the settling defendant at all. *See id.* at 604, 578 P.2d at 915-16, 146 Cal. Rptr. at 198-99. Because the liability of the non-settling defendant is reduced by the dollar amount of the settlement, rather than the percentage of fault apportioned to the settling defendant, unless the amount of the settlement is equal to or more than the settling defendant's share of the damages, the non-settling defendant will pay more than its proportional share of damages, and again, be left without recourse for collection. However, the Court certainly was aware of these possibilities in deciding *American Motorcycle Corp.*, apparently concluding, however, that the better social policy was to ensure that the plaintiff did not suffer the shortfall when insolvency or settlement made inequity in some form an unavoidable reality.
42. *See id.* at 32 (summarizing the initiative).
43. *Id.* at 33 (codified as *Cal. Civ. Code* § 1431.2(b)(1) (West Supp. 1997)) (defining "economic damages" as "objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and
McGeorge Law Review / Vol. 29

initiative barred the application of joint and several liability to the non-economic portion of the damages. Joint and several liability would continue to apply for all economic damages, enabling the plaintiff to continue to collect the whole of that portion of its damages from any one of multiple defendants. However, a defendant's liability for non-economic damages, under the proposal, would be several only. Thus, any one defendant could be liable for non-economic damages only in proportion to its allocated degree of fault, as determined under comparative fault principles.

Proposition 51 was one of the most hotly contested voter initiatives in California history. Each side spent freely in the campaign, with the total amount dedicated to swaying the voters reaching record levels. The battle focused squarely on the issue of fairness and which system of law could best achieve it. However, the competing views of fairness could not have been further polarized.

The proponents of Proposition 51 rallied around a concept of fairness that focused on equitable allocation of damages. Labeling joint and several liability as

loss of business or employment opportunities”).

44. Id. (codified as CAL. CIV. CODE § 1431.2(b)(2) (West Supp. 1997)) (defining “non-economic damages” as “subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation”).

45. Id. at 32 (analyzing the initiative).

46. Id.

47. Id. at 33 (codified as CAL. CIV. CODE 1431.2(a) (West Supp. 1997)).

48. Id. at 32 (explaining the impact of the initiative).

49. See Prop. 51 Insurance Changes Slow in Coming, SAN DIEGO UNION-TRIB., Nov. 27, 1986, at A50 (hereinafter Insurance Changes) (discussing the heated conflict over the initiative).

50. See id. at A50 (noting that over 11 million dollars were spent in the campaign for and against the initiative).

51. See BALLOT PAMPHLET, supra note 41, at 34-35 (contrasting the arguments for and against the initiative).

52. Proponents of Proposition 51 included the California Taxpayer's Association, the California State Parent-Teacher Association, League of California Cities, Consumer Alert, California Manufacturers Association, Association for California Tort Reform and the California Police Chiefs Association, among many others. BALLOT PAMPHLET, supra note 41, at 35.

53. See BALLOT PAMPHLET, supra note 41, at 34. The notion that it was unfair to force one defendant to pay for harm that was another defendant's fault is based on two component concepts. First, it is founded on the comparative fault principles established by Li, where the California Supreme Court accepted the idea that the conduct of several actors in causing a harm can be separated into proportional degrees of fault. More importantly, the proponents of Proposition 51 expanded the relation between proportionality of fault and a plaintiff's harm to make the theoretical assumption that a defendant's proportion of fault correlates to the amount of actual harm caused by that defendant. Proposition 51 rests on the argument that it is inherently fair that a defendant only pay damages proportional to its degree of fault. (Although Proposition 51 sought only to limit joint and several liability to "non-economic" damages, the fairness basis of their argument, taken to its logical conclusion, is that true fairness would mean that defendants pay proportionally to fault across the board. However, political realities and recognition of the need to protect a plaintiff's valid interest in compensation likely led to the compromise position of the initiative.) This argument necessarily rests on the assumption that the defendant, in doing so, is completely compensating the plaintiff for that portion of the harm caused by that defendant. This decides, without elaborating a justification, that a plaintiff's harm is divisible, or at least for the purposes of fairness, must be treated as divisible. Thus, in paying the plaintiff the proportional amount of damages, as determined by degree of fault, a defendant has
the "deep-pocket" rule, they argued that those entities that were perceived as having vast resources, whether a city, county or private enterprise, were being singled out as defendants primarily because of their ability to pay entire judgments. Because of joint and several liability, these "deep pocket" defendants were forced to bear the bulk of the financial responsibility for an injury award. Moreover, the "deep pocket" defendant was often minimally culpable; thus, the correlation between what their degree of culpability suggested they should pay, and what they actually were required to pay, was dramatically skewed. This disparity between degree of culpability and potential financial liability was the basis for the proponents' of Proposition 51 argument that the law in California was unfair and needed alteration.

Furthermore, the proponents of the initiative drove their point home by stating that, ultimately, it was the citizens, i.e., the voters, that paid for this inequity. A simple economic equation demonstrated that if cities or businesses were forced to balanced the scales for that particular portion of the plaintiff's harm, and the mandate of Proposition 51 prevents that defendant from being held liable for any remaining portions of harm.

This view, however, is exactly contrary to the holding of American Motorcycle. There, the California Supreme Court specifically addressed the divisibility of a plaintiff's harm in light of comparative fault principles and held that the ability to proportion fault did not equate to the divisibility of a harm. See supra notes 33-38 and accompanying text. Proposition 51 overruled this view, but limited its application to non-economic damages, not because non-economic damages are any more divisible than economic damages, but rather, in furtherance of a compromise between competing interests.

The practical realities of the compromise enacted by Proposition 51 are that the plaintiff's harm is not in fact divisible, but when a shortfall in compensation is unavoidable due to insolvency or settlement, the proponents of the initiative saw it as more fair to split the burden of the shortfall between the plaintiff and the defendants. The line they chose on which to make the split was the distinction between economic and non-economic damages.

54. See Balletpamphlet, supra note 41, at 34 (stating that cities, counties and businesses with substantial insurance coverage are commonly named in suits because of their perceived ability to pay). This argument implies that any fault attributable to the "deep pocket" defendant is often tenuous, and perhaps exaggerated or even created by attorneys and plaintiffs in order to secure the purse of that defendant. Whether this is a reality or not, the proponents of the initiative would nevertheless argue that holding a minimally at-fault defendant liable for the whole of a damage award was inequitable, even if the fault was clear.

55. See id. (offering a hypothetical situation wherein a defendant city, 5% at fault, is forced to pay the entire judgment of 1.5 million dollars to a plaintiff injured by an uninsured drunk driver).

56. See id. In their hypothetical, the proponents made the disparity dramatic. Being merely 5% at fault, the city was required to pay all of the victim's economic damages ($500,000) and all of the non-economic damages ($1,000,000), for a total of $1,500,000. Applying Proposition 51, the hypothetical concluded by showing that the city would only be required to pay $550,000 ($500,000 economic damages plus 5% of $1,000,000 non-economic damages, or $50,000), which reflected the proper compromise between the victim's need to be compensated and the city's need to pay more proportionally to fault. Id. If, and how, the plaintiff would recover the $950,000 shortfall in non-economic damages was not discussed. Similarly, whether the plaintiff was entitled to the shortfall was not discussed. However, the proponents did claim that, under Proposition 51, a victim would recover all its "actual" damages. Id. Referring to economic damages, the term "actual" perhaps suggests that non-economic damages are somehow less valid, and that any shortfall in a plaintiff's claim for non-economic damages is correspondingly less troublesome. This, of course, is not expressed, but the implication from the use of the term "actual" in relation to economic damages is clear.

57. See id. (stating that "[n]othing is more unfair than forcing someone . . . to pay for damages that are someone else's fault.").

58. See id. (sharpening the attack by relating the unfairness of current law to its ultimate victim, the citizen/voter).
bear the brunt of financial responsibility for injured plaintiffs, it would not take long for that expense to be passed on to consumers and citizens in the form of higher prices and taxes. Specifically, the proponents focused on rising insurance costs, arguing that joint and several liability forced cities to cut back on vital government services to enable them to afford liability insurance. By limiting the financial exposure of the perceived "deep pocket" defendants, insurance rates for cities and private enterprises would naturally decline, which would in turn result in lower taxes and prices and enhance government services.

Thus, the battlecry was fairness and from the proponents’ vantage point, it was manifestly unfair for the law to require one party to pay for damages that were someone else’s fault. The better view was to compromise, finding a way that the victim could be equitably compensated, while ensuring that those only partially at fault were not forced to bear the totality of the financial burden. By retaining a plaintiff’s ability to collect all of its economic damages from any defendant, the victim’s interests were protected. At the same time, however, “deep pocket” defendants would no longer be exposed to the potential for total financial liability, which would save defendants money, and ultimately, save the voters money. Based on the notion that it was unfair to make one person pay for another person’s harmful action, a strong argument was created, particularly when the person who ultimately paid was the same person entering the voting booth to decide the issue.

59. Id.
60. See BALLOT PAMPHLET, supra note 41, at 33 (codified as CAL. CIV. CODE § 1431.1(c) (West Supp. 1997)) (stating that because of the soaring costs of lawsuits and rising insurance rates, many cities and counties have been forced to cut back on police, fire and other essential protections).

61. See BALLOT PAMPHLET, supra note 41, at 34 (claiming that the initiative helps private enterprises and taxpayers alike by reducing insurance rates and preventing the adverse economic effect on cities that must be recaptured through tax increases).

62. See supra note 57.
63. See BALLOT PAMPHLET, supra note 41, at 34 (claiming that the initiative struck the proper compromise, mandating fair treatment of defendants, and ultimately the voters, while at the same time protecting the plaintiff’s right to recovery).

64. Id. at 34, 35 (relating a plaintiff’s economic damages to “actual” damages, thus implying that non-economic damages were not “actual,” which makes a plaintiff’s potential inability to recover non-economic damages as the result of the initiative’s application more justifiable); see also supra note 56.

65. BALLOT PAMPHLET, supra note 41, at 34.
66. The proponents made a strong case. Included in the initiative, and ultimately in the codified statute, were the following findings and declaration of purpose:

The People of the State of California find and declare as follows:

a) The legal doctrine of joint and several liability, also known as “the deep pocket rule”, [sic] has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers.

b) Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault. Under joint and several liability, if they are found to share even a fraction of the fault, they often are held financially liable for all the damage. The People—taxpayers and consumers alike—ultimately pay for these lawsuits in the form of higher prices and taxes.
The opponents of Proposition 51 also focused their attack on fairness. However, it was clear that they would not be able to defeat directly the simplistic argument of the proponents that fairness meant paying in proportion to fault. The opponents took another path, only briefly arguing that fair allocation of damages was secondary to a victim’s ability to recover. Full compensation of an injured victim, paid by one partially at fault defendant if necessary, should be the primary concern of the law. Contrasting the innocent victim and the tortfeasor, the opponents of Proposition 51 claimed that existing law put the responsibility right where it belonged.

Realizing that this argument could not remove the perceived unfairness of one defendant paying damages beyond his degree of culpability, opponents of...
Proposition 51 attempted to justify this seeming inequity on another ground. The opponents argued that holding cities and manufacturers liable under joint and several liability provided the necessary incentive to ensure safe products and the required standard of care. The corollary to this position is that if the initiative succeeded and defendants were allowed to escape full liability, more unsafe products and hazardous conditions in the cities would exist because much of the financial incentive to take care had been removed. Thus, even if the opponents had to concede the apparent inequity of joint and several liability in some situations, they argued that the beneficial impact it provided across society justified its retention.

However, the opponents of Proposition 51 did not confine their argument to issues of fairness as they related to the functional workings of the legal system. The primary attack leveled against the initiative was that it took money from deserving plaintiffs and put it back in the pockets of insurance companies who merely wanted to avoid paying claims. Opponents attacked Proposition 51 as a smoke screen created by the insurance industry, claiming that the alleged insurance crisis was in reality an effort by the industry to increase profits. The quintessential example of unfairness was to deny just compensation to an innocent victim for the sole purpose of fattening the bottom line of a faceless, compassionless insurance company. Moreover, opponents argued that Proposition 51 would, in reality, not lower insurance rates and taxes. From the opponent's position, the essence of Proposition 51 plaintiff might experience because, once a defendant had paid damages equal to his degree of culpability, it had satisfied its share of responsibility. Shifting responsibility to another was the evil of the day; thus, it was more important that a defendant not be forced to pay another's portion than it was to ensure that the plaintiff received full compensation. See supra notes 1-5 and accompanying text.

74. BALLOT PAMPHLET, supra note 41, at 35.

75. See BALLOT PAMPHLET, supra note 41, at 35 (stating that existing law worked and was fair, providing victims needed compensation and big business and cities needed incentives).

76. See BALLOT PAMPHLET, supra note 41, at 35; see also Nader, supra note 40.

77. See BALLOT PAMPHLET, supra note 41, at 35; see also Robert L. Habush, The Insurance "Crisis": Reality or Myth?, 64 DENV. U. L. REV. 641, 648 (1988) (claiming that any perceived crisis was created by the insurance industry to enlarge their profits). The debate whether the insurance crisis was a reality or a creation of the insurance companies continues. See, e.g., Harry Snyder, The Case Against Auto Insurers, SACRAMENTO BEE, Mar. 19, 1989, at F1 (suggesting that the crisis behind Proposition 51 was a myth created by the insurance companies); James P. Sweeney, Some Question Claims of Homeowners-Insurance Crisis, SAN DIEGO UNION-TRIB., June 20, 1995, at C1 (questioning whether the latest insurance crisis is another mirage created by the insurance companies).

78. See BALLOT PAMPHLET, supra note 41, at 35 (boiling the issue down to the burden forced on victims in favor of the greedy insurance industry).

79. Id. (arguing that the initiative will "solve[ ] nothing" and pointing out, that, although other states had enacted similar laws, the alleged insurance crisis in those states had not been alleviated). Following passage of Proposition 51, little actual impact in insurance rates resulted. See Maura Dolan, Numbers Fail to Show Feared Lawsuit Frenzy, L.A. TIMES, July 4, 1995, at 1 (noting that local governments have not felt a reduction in jury awards or insurance premiums since enactment of Proposition 51); see also Insurance Fees Still Too High, Official Argues, S.F. CHRON., Dec. 3, 1986, at 19 (quoting an Alameda County Supervisor as being irate enough to consider suing on the basis of voter fraud).
was to deny every citizen's right and opportunity to fair compensation for injury in order to allow insurance companies to avoid paying legitimate claims.  

Bolstered by the claim that this sacrifice of right and opportunity would provide no tangible benefits to citizens, opponents argued that the initiative could only harm the individual. Thus, the same voter who proponents claimed ultimately paid for the effects of joint and several liability would now go to the polls confronted with the argument that abolishing the alleged source of that expense would have no positive effect on their wallet and would diminish their protections against wrongdoers at the same time.

On June 3, 1986, the voters of California spoke, adopting Proposition 51 by a substantial margin of 62% in favor. Apparently, the argument of proponents that fairness meant proportional payment by defendants carried the day. The general dissatisfaction with the tort system was likely a significant factor as well, as voters perceived the initiative as an opportunity to partially temper a system viewed as out of control.

Soon after its passage, Proposition 51 received challenges regarding its constitutionality and retroactivity, but both challenges were unsuccessful. Beginning on June 4, 1986, individual defendants, in actions involving multiple tortfeasors, were

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80. See BALLOT PAMPHLET, supra note 41, at 35; Nader, supra note 40.

81. BALLOT PAMPHLET, supra note 41, at 35.

82. See Insurance Changes, supra note 49, at A50.

83. Whether or not legislation by voter initiative is a desirable process is an open question. See generally Cynthia L. Fontaine, Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative, 61 S. CAL. L. REV. 733 (1988). Because legislation or court decisions involving tort issues necessarily involve a balancing of competing public policies, it is facially logical that the general public would be the best body to decide these issues. However, reaching a well-balanced result requires a requisite level of knowledge regarding the various factors to be balanced. In the flurry of a campaign, it may often be the case that the true issues are camouflaged by the partisan arguments presented on either side of an issue. If so, the decision the voters make may not be based on a thoughtful analysis of competing factors but rather may be based on the results of the superior marketing campaign. See, e.g., John Marelis, FPPC Crackdown On 'Slate Mailers' Urged By Witnesses, SAN DIEGO UNION-TRIB., Dec. 10, 1986, at A3 (discussing the use of inaccurate direct mail materials in the battle over Proposition 51). This creates a particular danger since, in the realm of tort liability, policies can have significant adverse impact on parties and society in general. Whether this was the case with Proposition 51 is uncertain, but the risk was certainly present, as demonstrated by the polarized partisan arguments surrounding the initiative.

84. See supra notes 1-5 and accompanying text; see also BALLOT PAMPHLET, supra note 41, at 33 (codified as CAL. CIV. CODE § 1431.1(c) (West Supp. 1997)). Within the Findings and Declaration of Purpose, the following passage is contained:

The People of the State of California further declare that reforms in the liability laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses.

BALLOT PAMPHLET, supra note 41, at 33.

Including this passage in the initiative demonstrated the general dissatisfaction with the state of the tort system at the time the initiative was considered. Proposition 51 was viewed as a step in the right direction.

85. See Evangelatos v. Superior Court, 44 Cal. 3d 1188, 1204, 1226, 753 P.2d 585, 595, 611, 246 Cal. Rptr. 629, 639, 654 (1988) (holding that Proposition 51 was constitutional and that it did not apply retroactively to injuries that occurred prior to its passage); see also Buttram v. Owens-Corning Fiberglas Corp., 16 Cal. 4th 520, 941 P.2d 71, 66 Cal. Rptr. 438 (1997) (holding that a latent disease action accrues when the injury is discovered for purposes of Proposition 51).
only liable for non-economic damages in proportion to their degree of fault. What, exactly, this meant in practice would be played out in the courts in the years to come.

II. TORRES v. XOMox CORPORATION

A. The Facts

The case involved an accident at a chemical plant in which two maintenance workers were injured, with one worker dying from his injuries two days after the accident. The plaintiffs were Richard Sornborger, the surviving injured worker, and Mildred Torres, plaintiff for the deceased worker, Luis Torres. Defendants in the action were Xomox Corporation, a valve manufacturer, and Charles Lowe Company, the distributor of the Xomox valve. The worker's employer, Rhone-Poulenc, a chemical plant that processed sulfuric acid sludge for petroleum refineries, was not named in the suit as mandated by California law.

The accident occurred during an attempted "line entry" at the chemical plant. Sornborger and Torres were scheduled to replace an "expansion joint" and a "reducer" that were component parts of a pipeline traveling out of a storage tank containing sulfuric acid sludge. In order to remove and replace these parts, it was
necessary to break the seal on the pipeline leading from the storage tank.\textsuperscript{95} Adjacent to, but upstream from the parts to be replaced (in between those parts and the storage tank), was a Xomox valve that controlled the flow of the acid.\textsuperscript{96} So long as the integrity of that valve was not disturbed, and the proper precautions were made ensuring that the valve remained closed, the "line entry" down stream from the valve could be accomplished without danger to the workers.

As part of the worker's routine maintenance of the pipeline, during a "line entry" the workers would often replace bolts that had become corroded.\textsuperscript{97} This was done, in part, to maintain the quality of the pipeline, and also to make any future maintenance of that section of pipeline more convenient.\textsuperscript{98} In preparation for this particular "line entry," Sornborger and Torres decided to replace some corroded bolts adjacent to, but downstream from, the Xomox valve.\textsuperscript{99} The replacement of these specific bolts did not cause any danger in itself, as the integrity of the pipeline could be maintained easily during the process.\textsuperscript{100}

However, a bracket that was attached to the Xomox valve was blocking access to the bolts the workers intended to replace.\textsuperscript{101} This specific bracket was not the original bracket provided with the valve by Xomox.\textsuperscript{102} The valve itself, with all the original components, was installed in the plant in 1969 by Rhone-Poulenc's predecessor.\textsuperscript{103} The original bracket was of such design that, had it been attached to the valve the day Sornborger and Torres were working, their access to the bolts adjacent to the valve would not have been hindered.\textsuperscript{104} In 1983, however, the original bracket had been replaced by Rhone-Poulenc with a replacement bracket obtained from the defendant distributor, Charles Lowe Company.\textsuperscript{105} Rhone-Poulenc had ordered a replacement bracket from the distributor, but Charles Lowe had sent the wrong type of bracket.\textsuperscript{106} Because the bracket they received did not fit the valve, Rhone-Poulenc cut the bracket apart, welded an additional piece of metal onto it, and then mounted the bracket onto the Xomox valve.\textsuperscript{107} When Sornborger and Torres went to replace

\begin{itemize}
  \item \textsuperscript{95} Id.
  \item \textsuperscript{96} Id. Contained in the same pipeline were the "expansion joint" and "reducer" that were to be replaced and the Xomox valve. All three components were in close proximity to each other, connected in the pipeline by another component called a "flange." The parts were spatially related such that the valve was closest to the storage tank, with the expansion joint and reducer adjacent to, but downstream from, the valve. Thus, since the valve controlled the flow of acid through the line, if the valve remained closed, the downstream parts could be removed and replaced safely, with the valve operating to protect the workers from the acid stored in the tank upstream. Id.
  \item \textsuperscript{97} Id.
  \item \textsuperscript{98} Xomox, 49 Cal. App. 4th at 8-11, 56 Cal. Rptr. 2d at 459-62.
  \item \textsuperscript{99} Id.
  \item \textsuperscript{100} Id.
  \item \textsuperscript{101} Id.
  \item \textsuperscript{102} Id.
  \item \textsuperscript{103} Id.
  \item \textsuperscript{104} Id.
  \item \textsuperscript{105} Id.
  \item \textsuperscript{106} Id.
  \item \textsuperscript{107} Id.
\end{itemize}
the bolts on the day of the accident, the altered bracket blocked their access to the bolts.\textsuperscript{108} Had the proper bracket been in place, the workers would have had free access to the bolts.\textsuperscript{109}

As the situation existed, however, Somborger and Torres needed to remove the bracket in order to gain access to the bolts they wanted to replace.\textsuperscript{110} Unfortunately, the design of the Xomox valve was such that the same bolt securing the bracket was the only bolt securing the cover of the valve.\textsuperscript{111} Removal of that bolt, even if only to remove the bracket, could also loosen the valve cover and destroy the integrity of the pipeline.\textsuperscript{112} Somborger and Torres proceeded anyway,\textsuperscript{113} and, after loosening the bolt, attempted to remove the bracket with a series of hammer blows.\textsuperscript{114} This successfully dislodged the bracket, but at the same time, loosened the valve cover, breaking the seal of the line.\textsuperscript{115} Sulfuric acid immediately spewed from the valve, forcefully enough to knock off Somborger's hat and glasses.\textsuperscript{116} Somborger and Torres, who were not wearing any protective clothing,\textsuperscript{117} were helicoptered to the hospital.\textsuperscript{118} Somborger suffered second and third degree chemical burns over 50% of his body, and Torres was burned over 90% of his body.\textsuperscript{119} Torres died two days after the accident.\textsuperscript{120}

\textsuperscript{108} Id. The shape of the altered bracket was such that it extended out on both upstream and downstream sides of the valve. Id.

\textsuperscript{109} Id. The altered bracket blocked the downstream bolts, which were the object of the worker's process. The original bracket, or any bracket not blocking the downstream bolts, would have allowed the workers access to the bolts without disturbing the bracket or the valve itself. Id.

\textsuperscript{110} Id.

\textsuperscript{111} Id. Xomox's liability in the case was premised on both the design of the valve and its failure to warn of the potential dangers presented by the design. Id. at 15-21, 56 Cal. Rptr. 2d at 462-68. Termed a "single bolt cover mounted" design, Xomox manufactured these valves for approximately twenty-five years, until switching to a double bolt design in the mid-1970's. Id. at 13-14, 56 Cal. Rptr. 2d at 463. Evidence in the case showed that the single bolt valve had been determined to be the cause of two or three accidents previous to the accident involving Somborger and Torres, although Xomox denied having knowledge of the dangers inherent in the design prior to its switch to the double bolt design. Id. at 12-13, 56 Cal. Rptr. 2d at 463.

\textsuperscript{112} Id. at 8, 56 Cal. Rptr. 2d at 460.

\textsuperscript{113} Id. at 10-11, 56 Cal. Rptr. 2d at 461-62. Whether the workers realized the danger, or knew that the single bolt secured both the bracket and the valve cover, was contested at trial. Somborger gave conflicting testimony regarding his knowledge of the design. Id. at 12, 56 Cal. Rptr. 2d at 462. Nevertheless, these were issues for the jury to consider in apportioning fault and were not necessary for the appellate review of damage allocation.

\textsuperscript{114} Id. at 11, 56 Cal. Rptr. 2d at 462.

\textsuperscript{115} Id.

\textsuperscript{116} Id.

\textsuperscript{117} Id. As part of the preparation phase of a "line entry," a permit for the entry is issued by the maintenance foreman. Id. at 9, 56 Cal. Rptr. 2d at 460. Included in this permit is a list of the protective gear to be worn during the entry. The protective gear normally required included rubber pants, a rubber coat, gloves and boots, a hard hat, face shield and respirator. Id. Apparently lulled into a false sense of security by the circumstances of the line entry, neither Somborger or Torres were wearing protective gear at the time of the accident. Id. at 11, 56 Cal. Rptr. 2d at 462.

\textsuperscript{118} Id. at 11, 56 Cal. Rptr. 2d at 462.

\textsuperscript{119} Id.

\textsuperscript{120} Id.
B. The Verdict

Following a jury trial, a verdict was announced apportioning fault among the parties to the accident. The plaintiff's employer, Rhone-Poulenc, was found to be seventy-five percent at fault, although they would not be a factor in the damage award. The distributor of the valve and bracket, Charles Lowe Company, was found to be ten percent at fault. Xomox, and the individual plaintiffs, were each found to be five percent at fault.

Following the verdict, plaintiff Sornborger settled with both Xomox and Charles Lowe Company, removing himself from any further litigation. Torres also settled with Charles Lowe Company, for four hundred and fifty thousand dollars. Because Torres and Xomox did not reach a settlement, Xomox was left as the sole defendant subject to judgment in the action.

The special verdict awarded Torres damages totaling $2,056,321. This total was divided by the verdict between economic and non-economic damages as follows: $1,137,073 (55.3%) were economic damages; and $919,248 (44.7%) were non-economic damages. Because of Proposition 51, Xomox would be held jointly and severally liable for all of the economic damages, but only severally liable for its portion of non-economic damages. As a result, the maximum liability to which Xomox was exposed, after deductions for Torres' percentage of fault (5%), but prior to allocation of the settlement proceeds and worker's compensation benefits, was $1,126,181.75.

Table 1 - Jury Award and Xomox's Exposure

| Total Damages - Jury Verdict | $2,056,321.00 |
| Economic Damages | $1,137,073.00 |

121. Id. at 6-7, 56 Cal. Rptr. 2d at 459.
122. See infra note 148 (explaining that, under the worker's compensation system, employers are not liable in a civil action for an employee's injuries).
123. Xomox, 49 Cal. App. 4th at 6-7, 56 Cal. Rptr. 2d at 459.
124. Id.
125. Id.
126. Id. at 22, 56 Cal. Rptr. 2d at 469. Torres also received $328,548.85 in worker's compensation benefits from his employer's insurer. Id.
127. Id. at 21-22, 56 Cal. Rptr. 2d at 468-69.
128. Id.
129. See supra notes 39-86 and accompanying text (detailing the provisions of Proposition 51 and the changes it created in the doctrine of joint and several liability).
130. Xomox, 49 Cal. App. 4th at 22, 56 Cal. Rptr. 2d at 469. This figure is arrived at by the following calculation:
Xomox is jointly and severally liable for all of Torres' economic damages, less Torres' 5% fault, or $1,080,219.35; Xomox is severally liable for its percentage of non-economic damages, as determined by comparative fault, or 5% of $919,248, equaling $45,962.40. Adding the two figures together, the figure $1,126,181.75 is produced.
Non-Economic Damages $919,248.00

Xomox’s Maximum Liability (less Torres’ 5% fault)

Economic Damages $1,080,219.35

Non-Economic Damages $45,962.40

(5% of $919,248)

Xomox’s Total Exposure $1,126,181.75

How the settlement proceeds and worker’s compensation benefits were allocated between economic and non-economic damages would determine the full extent of Xomox’s liability.

Prior to Proposition 51, any settlement proceeds or worker’s compensation benefits could simply be deducted from the entire award, leaving the jointly and severally liable defendant paying the difference.\(^\text{131}\) However, after Proposition 51, settlement proceeds or worker’s compensation benefits allocated to economic damages could significantly reduce the liability of the remaining defendant by lowering the amount for which he could be held jointly and severally liable.\(^\text{132}\) Because the defendant could not be held accountable for non-economic damages beyond his percentage of fault, proceeds or benefits allocated to non-economic damages did not help the defendant’s position,\(^\text{133}\) but rather correspondingly reduced the amount of credit the defendant could potentially receive towards the joint and several liability portion of the judgment.\(^\text{134}\) Naturally, the plaintiff’s interests were exactly contrary to the defendant’s, as the higher the amount of settlement or worker’s compensation proceeds allocated to non-economic damages, the more economic damages the plaintiff could collect from the jointly and severally liable defendant. Thus, the court’s distribution of the post-verdict settlement and worker’s compensation proceeds between economic and non-economic damages would significantly impact, and could potentially alter, the situation for many parties in the future.

\(^{131}\) Absent demarcation between economic and non-economic damages, any proceeds a plaintiff received, either by settlement or worker’s compensation, would simply be deducted from the total judgment since the total judgment is a single amount, not the sum of two categories of damages.

\(^{132}\) Settlement proceeds or worker’s compensation benefits a plaintiff received that are deemed economic damages are offset against the economic damage portion of the award. Because the remaining defendant is only jointly and severally liable for the economic portion of damages, any credit to that portion lowers the defendants total liability correspondingly.

\(^{133}\) Proposition 51 ensured that defendants only could be held liable for non-economic damages in proportion to their percentage of fault. See supra notes 42-48 and accompanying text. Thus, any monies allocated to non-economic damages will not lower a defendant’s liability, as Proposition 51 has already established a limit to the non-economic damages portion of any defendant’s liability.

\(^{134}\) Any part of settlement proceeds or worker’s compensation benefits that is credited to non-economic damages is obviously not available to help offset the economic portion of the award, thus the economic portion of the award remains higher.
III. ALLOCATION OF DAMAGES

A. The Method Adopted

Following the jury verdict, the trial court allocated the worker’s compensation benefits and the Charles Lowe settlement money using the same approach for both.\textsuperscript{135} Using what is termed the “Espinoza method,”\textsuperscript{136} the trial court divided the monies into economic and non-economic damages based on the proportion of each within the total judgment, as determined by the jury.\textsuperscript{137} Of the total judgment, 55.3\% were economic damages and 44.7\% were non-economic damages.\textsuperscript{138} Thus, the worker’s compensation benefits and the settlement proceeds were divided under the Espinoza approach by the same percentages, allocating 55.3\% of each category to economic damages and 44.7\% of each to non-economic damages.\textsuperscript{139} By calculating these amounts, the specific dollar amount of economic damages within the settlement and worker’s compensation proceeds was determined. That dollar amount, then, was credited against Xomox’s joint and several liability which remained following the judgment.

\textsuperscript{137} Xomox, 49 Cal. App. 4th at 23-24, 56 Cal. Rptr. 2d at 469-70. The Espinoza method is a straight forward and logical approach to the division of damages between economic and non-economic portions. The specific percentages of each category are derived easily from the verdict since the jury assigns economic and non-economic damage amounts which combine to create the total verdict. These percentages are then applied to the settlement or worker’s compensation benefit in question, thus arriving at the dollar amounts to be categorized as economic or non-economic damages. By using this method, consistency among the various awards is maintained and discrepancies between recovery and over-payment are evenly distributed among the parties.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
Table 2 - The Espinoza Method

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
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</thead>
<tbody>
<tr>
<td>Worker’s Compensation Benefit</td>
<td>$328,548.85</td>
</tr>
<tr>
<td>*Economic (55.3%)</td>
<td>$181,687.51</td>
</tr>
<tr>
<td>Non-Economic (44.7%)</td>
<td>$146,861.34</td>
</tr>
<tr>
<td>Charles Lowe Settlement</td>
<td>$450,000.00</td>
</tr>
<tr>
<td>*Economic (55.3%)</td>
<td>$248,850.00</td>
</tr>
<tr>
<td>Non-Economic (44.7%)</td>
<td>$201,150.00</td>
</tr>
<tr>
<td>Xomox’s Economic Damage Liability</td>
<td></td>
</tr>
<tr>
<td>Total Exposure</td>
<td>$1,080,219.35</td>
</tr>
<tr>
<td>*Less Credits</td>
<td></td>
</tr>
<tr>
<td>Worker’s Compensation</td>
<td>$181,687.51</td>
</tr>
<tr>
<td>Charles Lowe Settlement</td>
<td>$248,850.00</td>
</tr>
<tr>
<td>Net Joint and Several Liability</td>
<td>$649,681.85</td>
</tr>
</tbody>
</table>

Under this approach, the settlement proceeds were credited against the judgment to Xomox’s disadvantage. Charles Lowe’s liability for non-economic damages, under the application of Proposition 51, should have been limited to 10% of the total non-economic damage award of $919,248.00, or $91,924.80. If the trial court had used this method, a remainder of $358,075.20 from the $450,000 settlement would have been deemed economic damages, and would have been credited against the total amount of economic damages. This, in turn, would naturally reduce the extent of Xomox’s joint and several liability by that amount.

Under the trial court’s approach, 44.7% of the settlement money, or $201,150.00, was allocated to non-economic damages, leaving only $248,850.00 available to reduce Xomox’s liability for economic damages. The same method of division was utilized with regard to the worker’s compensation benefits. Naturally, because Xomox believed it had been required to pay economic damages beyond what the law mandated, an appeal followed.

140. *Id.* at 39, 56 Cal. Rptr. 2d at 480. Because Charles Lowe was 10% at fault, Lowe’s liability for non-economic damages, under Proposition 51, was a maximum of 10% of the total non-economic damage award.
141. *Id.*
142. *Id.*
143. *Id.* at 30-31, 56 Cal. Rptr. 2d at 474-75.
Upon review, the appellate court analyzed the trial court’s allocation method, dealing with each category of monies separately. Beginning with the worker’s compensation benefits, the appellate court searched for the proper allocation method, considering its practical effects in light of the mandate of Proposition 51. Determination of the proper allocation method required the court to balance Proposition 51’s mandate that defendants pay in closer proportion to their degree of fault with the plaintiff’s interest in obtaining full recovery.

1. The Worker’s Compensation Benefits

Ultimately, the appellate court adopted the trial court’s method of allocation for the worker’s compensation benefits. The appellate court found that the Espinoza approach was the proper method of division, based on the notion that worker’s compensation benefits were a hybrid of economic and non-economic damages. Because worker’s compensation benefits represent the entire recovery an injured worker can collect from an employer, the court concluded that those benefits contained elements of economic and non-economic damages. Xomox argued that worker’s compensation benefits were solely economic in nature, and as such, should be credited in full against the economic portion of the judgment. However, the

144. Id. at 25-37, 56 Cal. Rptr. 2d at 470-79.
145. See supra Part I.B. (discussing the balance of interests at stake under Proposition 51).
146. See supra note 137 and accompanying text (explaining the Espinoza method adopted by the trial court).
147. The court declined to label worker’s compensation benefits “damages,” stating that they were different from traditional common law damages. Xomox, 49 Cal. App. 4th at 37, 56 Cal. Rptr. 2d at 478-79. Although this distinction is valid, in real terms a plaintiff receiving worker’s compensation benefits is receiving damages, at least in the situation where an employer is at fault to some degree. Because any worker’s compensation benefits paid must be accounted for in a civil suit for injuries, the practical effect of those benefits is the same whether they are labeled damages or not.
148. See CAL. LAB. CODE § 3602 (West 1989 & Supp. 1997). Worker’s compensation is a statutory scheme providing recovery to injured workers regardless of employer culpability. As such, it is a legislative determination of the proper compensation based on particular injuries, providing an injured worker certain recovery for injuries sustained on the job. The worker is provided this recovery, while at the same time the employer is protected from further liability in civil proceedings. In this manner, an employer can obtain worker’s compensation insurance and be certain that no further liability will attach. In gaining this certainty, however, the employer is required to pay for injuries even if not at fault. This compromise provides the worker with benefits for an injury but necessarily precludes further action against the employer in order to justify requiring employer payment without a showing of culpability. Thus, the statutory scheme provides a certain level of compensation in all cases, meeting the worker’s need for payment, but also limits employer exposure to liability, which protects employers and the courts from litigation expense. See Langridge v. Oakland Unified Sch. Dist., 25 Cal. App. 4th 664, 31 Cal. Rptr. 2d 34 (1994) (noting that the worker’s compensation system is a statutory compromise imposing liability on an employer regardless of fault in exchange for immunity (except under specific circumstances) from civil suit).
149. Xomox, 49 Cal. App. 4th at 37, 56 Cal. Rptr. 2d at 478-79.
150. Id. at 26-28, 56 Cal. Rptr. 2d at 471-72. The argument focused on the terminology in the worker’s compensation statutes in comparison to the definition of economic damages in Proposition 51. Central to the argument was the notion that worker’s compensation benefits are based on “objectively verifiable” damages, which also capsulizes the definition of economic damages under Proposition 51. Xomox contended, therefore, that, under the spirit of Proposition 51, worker’s compensation benefits were more properly considered entirely economic
court settled on the Espinoza method of allocation, concluding that that method distributed the benefits most equitably between the affected parties.\textsuperscript{151} (See Table 2).

Under the worker's compensation statutes, the plaintiff is foreclosed from bringing a civil suit against an employer for damages beyond the benefits paid under the statute, even if the employer is at fault.\textsuperscript{152} The civil recovery system, of course, differentiates between economic and non-economic damages and allows an injured plaintiff to recovery both categories of damages if appropriate. Thus, if the entire amount of worker's compensation proceeds were in fact economic damages, this would, in effect, deny the plaintiff recovery of non-economic damages that would be due from a culpable employer if the worker was permitted to pursue civil recovery.\textsuperscript{153} Therefore, the court concluded that those benefits must represent a policy compromise that in essence accounts for both economic and non-economic compensation.\textsuperscript{154} To hold otherwise would be, in essence, stating that where an employer is at fault to some degree, the injured worker is not entitled to non-economic damages at all.\textsuperscript{155} This result would be at tension with the accepted forms of damage recovery available under civil recovery. Because the Legislature has completely displaced the civil recovery system with the statutory worker's compensation system in situations involving injured employees, it was reasonable to the court to conclude that the statutory recovery system must have incorporated non-economic damage elements as well as economic.\textsuperscript{156}

2. The Settlement Proceeds

Addressing the settlement proceeds next, the appellate court rejected the allocation method adopted by the trial court.\textsuperscript{157} The trial court had employed the Espinoza method in dividing the settlement proceeds, just as it had in allocating the worker's compensation benefits.\textsuperscript{158} This resulted in 55.3% of the proceeds being credited against the economic portion of the judgment, thereby reducing Xomox's compensation, rather than a combination of economic and non-economic. \textit{Id.}

\begin{itemize}
  \item \textsuperscript{151} \textit{Id.} at 37, 56 Cal. Rptr. 2d at 478-79.
  \item \textsuperscript{152} \textit{See supra} note 148 (discussing the Worker's Compensation scheme in California).
  \item \textsuperscript{153} If the entire worker's compensation benefit is economic, and the worker is not allowed to take action against the employer beyond that statutory compensation, then the statute has the effect of barring non-economic recovery for an injured employee against an employer.
  \item \textsuperscript{154} \textit{Xomox}, 49 Cal. App. 4th at 31-32, 37, 56 Cal. Rptr. 2d at 474-75, 478-79.
  \item \textsuperscript{155} This can be seen by imagining an employer could be held liable in suit. If so, the injured worker would be entitled to non-economic damages, as in any other situation. But, because the employee cannot pursue the employer, the worker's compensation benefits must represent the whole recovery to which the employee is entitled. If allocated totally as economic damages, this is the same as statutorily stating that an injured employee is not entitled to non-economic damages from his employer.
  \item \textsuperscript{156} \textit{Xomox}, 49 Cal. App. 4th at 31-32, 56 Cal. Rptr. 2d at 474-75.
  \item \textsuperscript{157} \textit{Id.} at 39-40, 56 Cal. Rptr. 2d at 480-81.
  \item \textsuperscript{158} \textit{Id.}
\end{itemize}
liability correspondingly. However, this left 44.7% of the money allocated as non-economic damages attributable to Charles Lowe, the settling defendant. When viewed under the mandates of Proposition 51, this created a surplus of $109,225.20 of non-economic damages, which in turn left Xomox paying that amount as part of its joint and several liability.

Table 3 - Charles Lowe’s Non-Economic Damages Under Proposition 51

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Non-Economic Damages - Jury</td>
<td>$919,248.00</td>
</tr>
<tr>
<td>Charles Lowe % Fault</td>
<td>10%</td>
</tr>
<tr>
<td>Prop. 51 Non-Economic Liability</td>
<td></td>
</tr>
<tr>
<td>Espinoza Method - Non-Economic Liability</td>
<td>$91,924.80</td>
</tr>
<tr>
<td>(See Table 2)</td>
<td></td>
</tr>
<tr>
<td>Surplus Non-Economic Damages Under Espinoza</td>
<td>$109,225.20</td>
</tr>
</tbody>
</table>

The appellate court recognized this inequity and overturned the result. The court pointed out that Charles Lowe was liable for a maximum of $91,924.80 in non-economic damages, according to the verdict when calculated under Proposition 51. Thus, dividing the settlement proceeds using the Espinoza method allotted too much settlement money to non-economic damages and left Xomox liable for more than its appropriate share of the economic damages. (See Table 3). The court created its own method of allocation that it termed the “ceiling approach.” Under the “ceiling approach,” the settlement proceeds are allocated as

159. Id.
160. Id.
161. The fundamental mandate of Proposition 51 was that no defendant be held liable for more than his proportionate share of non-economic damages as determined by comparative fault principles. See supra Part I.B. (discussing the campaign for and eventual enactment of Proposition 51). Thus, because Charles Lowe was 10% at fault, the maximum extent of its non-economic liability should have been $91,924.80. By using the Espinoza approach, $109,225.20 more was allocated to Charles Lowe’s non-economic liability, thus lowering the reduction effect the settlement had on Xomox’s liability of economic damages as the remaining defendant. This, in effect, provided the plaintiff with a double recovery because Xomox paid the $109,225.20 as economic damages and Torres collected the same amount from Lowe as surplus non-economic damages. See Xomox, 49 Cal. App. 4th at 39, 56 Cal. Rptr. 2d at 480.
162. Xomox, 49 Cal. App. 4th at 39, 56 Cal. Rptr. 2d at 480.
163. Id.
164. Id. at 40-42, 56 Cal. Rptr. 2d at 481-82. Another method of allocation considered by the appellate court was the proportional method advanced by Xomox. Xomox argued that, because the extent of Charles Lowe’s liability was known at the time of settlement, the settlement proceeds should be divided in proportions equal to the ratio of Lowe’s potential liability for economic and non-economic damages had they not settled. In this case, those proportions would have been 92.2% economic damages ($1,080,219.25 of $1,172,144.15 total exposure) and 7.8%
non-economic damages up to the maximum liability of the settling defendant, as determined by degree of fault.\textsuperscript{165} This method, the court concluded, was consistent with Proposition 51 in that it fully accounted for the entire extent of a settling defendant's non-economic liability, without creating a situation in which a double recovery was possible.\textsuperscript{166}

In this case, $91,924.80 of the $450,000.00 settlement was deemed non-economic damages by the appellate court, representing the entirety of the settling defendant's non-economic liability.\textsuperscript{167} The remainder was termed economic damages and credited against the judgment rendered against Xomox, thus reducing the extent of Xomox's joint and several liability correspondingly.\textsuperscript{168}

\begin{center}
\textbf{Table 4 - The Ceiling Approach (Settlement Proceeds)}
\end{center}

\begin{tabular}{|l|c|}
\hline
Settlement Amount & $450,000.00 \\
\hline
Non-Economic Damages & \\
Under Proposition 51 & $91,924.80 \\
Economic Damages & $358,075.20 \\
\hline
\end{tabular}

\textbf{Xomox's Joint and Several Liability}

\begin{itemize}
\item Total Exposure (economic) & $1,080,219.35 \\
\item Less Credits (economic) & \\
\item Worker's Comp. (Espinoza) & $181,687.51 \\
\item Settlement (Ceiling) & $358,075.20 \\
\item Net Joint and Several Liability & $540,456.64 \\
\end{itemize}

non-economic damages ($91,924.80 of $1,172,144.15 of total exposure). Thus, under this method, 92.2\% of $450,000 would be termed economic damages ($414,900) and 7.8\% would be non-economic ($35,100). This method would have been most favorable to Xomox, producing a $414,900 reduction of its joint and several liability, leaving it jointly and severally liable for $483,631.84 after all credits are taken. This concept also has an internal consistency which is attractive, particularly because the settlement is post-verdict. Because the potential exposure for economic and non-economic damages is known to both settling parties at the time of the settlement, it is arguably fair to impose corresponding ratios onto that settlement for allocation purposes.

\textsuperscript{165} \textit{Id}.

\textsuperscript{166} \textit{Id.} The trial court's method created a double recovery for the plaintiff. By allocating the $109,225.20 surplus to Lowe's non-economic damages, Xomox was required to pay $109,225.20 more in economic damages than it would have if Lowe's non-economic damages had been limited to 10\% of the non-economic award. Thus, the plaintiff collected the $109,000 as non-economic damages from Lowe and collected $109,225.20 again as part of the economic damages paid by Xomox.

\textsuperscript{167} \textit{Id.} at 42, 56 Cal. Rptr. 2d at 482.

\textsuperscript{168} \textit{Id}.
By using this method, the plaintiff was given full compensation for the settling defendant’s non-economic liability, and the non-settling defendant, Xomox, remained jointly and severally liable for a lesser amount of economic damages. Furthermore, the plaintiff would still fully recover because Xomox would be required to pay the entire economic portion of the judgment.

IV. WERE THE ALLOCATION METHODS APPROPRIATE?

A. Worker’s Compensation

The enactment of Proposition 51 created new problems for damage allocation by requiring consideration of the two distinct categories of damages (economic and non-economic) and their application to individual defendants. Additionally, the initiative created new confusion in the arena of worker’s compensation because the statutory system for worker’s compensation does not recognize any distinction between types of damages. Worker’s compensation benefits are not classified in the statutes as partially economic and partially non-economic. They are simply the total benefits available to an injured worker. This clash between Proposition 51 and worker’s compensation necessitated the appellate interpretation undertaken in Xomox.

Labeling worker’s compensation damages as wholly one or the other (economic or non-economic damages) is logically inconsistent with their purpose. Clearly, worker’s compensation benefits are not solely non-economic damages. The basis for damage benefits is injury in the workplace, and a significant portion of the rationale for the statutory recovery is to compensate for the loss of earning capacity due to the workplace injury. As such, worker’s compensation benefits must possess a strong economic element.

However, classifying the benefits as solely economic would be inconsistent with the goals of tort recovery in general. Injured persons are compensated by the tort system in an effort to make them whole, as well as to provide deterrent incentives to all potential tortfeasors, among other considerations. This compensation has evolved to include an element for non-economic damages, commonly classified as a “pain and suffering” classification. Labeling worker’s compensation benefits as entirely economic ignores the non-economic elements of compensation that have developed in the tort system. This is so because the worker’s compensation system

169. See supra Part I.B.
170. See CAL. LAB. CODE §§ 3207, 3209 (West Supp. 1997) (defining “compensation” for purposes within the statutory system, and distinguishing “damages” which are available in an action at law).
171. See id. § 3207 (West Supp. 1997).
174. Id.
entirely replaces an injured worker’s avenue for recovery against an employer for that injury.\textsuperscript{175} The statutory system displaces the normal tort recovery system, providing compensation for the injury, regardless of fault, but also precluding civil recovery against an employer in the event of fault.\textsuperscript{176} The system provides certainty and clarity.

However, because it entirely replaces the common law tort recovery system, it is reasonable to assume that it encompasses all the elements of tort compensation, including both economic and non-economic damages. Thus, when an injured employee collects under an employer’s worker’s compensation coverage, that recovery necessarily accounts for the worker’s economic and non-economic damages. Concluding otherwise creates an inconsistency without a policy justification because the employee is statutorily barred from recovering whatever damages are not considered part of the worker’s compensation benefits.\textsuperscript{177} If worker’s compensation benefits were deemed entirely economic, the statutory system would deny the injured party just recovery of non-economic damages from an employer. It seems unlikely that this is the intent of the worker’s compensation system.

When considering allocation of damages, therefore, the court’s conclusion that the \textit{Espinoza} method best divides worker’s compensation benefits seems appropriate. Taking the jury’s determination of the respective amounts of economic and non-economic damages, it is reasonable to transpose that ratio on to the worker’s compensation benefits. If a plaintiff has sustained 60\% economic damages and 40\% non-economic damages, it is logical to assume that any worker’s compensation benefits collected, which represent the entire amount recoverable from an employer, correspond to those percentages.

Utilizing this method does not take into consideration the fundamental requirement of Proposition 51 that a culpable party pay non-economic damages solely in proportion to degree of fault.\textsuperscript{178} Where the employer is culpable, the worker’s compensation benefits may or may not be sufficient to totally compensate for what would be the employer’s non-economic liability under Proposition 51.\textsuperscript{179} However, because the worker’s compensation system does not account for fault, and because it precludes an employer from being a potentially liable defendant in suit, the mandate of Proposition 51 can never be fully reconciled with the worker’s

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{175} See \textsc{Cal. Lab. Code} § 3602 (West Supp. 1997); \textit{supra} note 148 (discussing the California Worker’s Compensation system).
\item \textsuperscript{176} See \textsc{Cal. Lab. Code} § 3602 (West Supp. 1997).
\item \textsuperscript{177} It is conceivable that the Legislature could intentionally preclude injured workers from recovering non-economic damages. However, it seems very unlikely that they would do so without expressly saying so, and in particular, without expressing a reason why.
\item \textsuperscript{178} The worker’s compensation system does not incorporate fault. Thus, because the employer’s fault is not considered in calculating worker’s compensation recovery, the proportionality requirements of Proposition 51 cannot be consistently integrated into the worker’s compensation system.
\item \textsuperscript{179} This, of course, depends entirely on the percentage of fault assigned to the employer and its proportional relation to the amount recovered under worker’s compensation.
\end{itemize}
\end{footnotesize}
compensation system. At best, the statutory benefit can be divided proportionately between economic and non-economic damages, thus representing both elements of the employee's recovery entitlement from the employer. The potential inconsistency between the plaintiff's recovery of non-economic damages under worker's compensation and the employer's degree of culpability represents a policy compromise which operates to best implement an exclusive compensation system. In this way, the allocation method adopted by the court creates a consistency that best resolves the conflict between Proposition 51's insistence that non-economic damages be proportional to degree of fault and the worker's compensation system where an employer's fault is not a consideration.

B. The Settlement Proceeds

In contrast to worker's compensation benefits, settlement proceeds can be logically divided into economic and non-economic classifications. The settlor is a named defendant in the suit, and absent the settlement, the settlor would be liable in judgment for his proportionate amount of non-economic damages, as well as potential full liability for economic damages. By virtue of the settlement, the settlor escapes judgment. The allocation of the settlement proceeds, however, has a significant impact on the judgment and the non-settling defendant.

As the court noted, utilization of the Espinoza method regarding settlement proceeds creates the potential for double recovery by the plaintiff, where the settlement amount is large enough to create a surplus of non-economic damages. For this reason, the court adopted its "ceiling approach," which ensures that the plaintiff will not recover more in non-economic damages from the settlement than that amount proportional to the settlor's degree of fault. This method also ensures that the excess settlement proceeds beyond the amount of non-economic damages are available as an offset against the economic judgment for which a non-settling defendant remains liable.

However, the distinguishing characteristic of the Xomox situation is that the settlement was reached following the verdict. In this situation, both the plaintiff and the settling defendant knew at the time of settlement the exact amount of liability in non-economic damages and the amount of potential liability for economic damages, although they could not be certain how the court would allocate the settlement proceeds. However, with the precedent Xomox creates, post-verdict settlements will now be allocated using the "ceiling approach." Thus, future plaintiffs and defendants wishing to settle will be able to calculate the amount of the non-economic

180. See supra note 161 (noting that, in the trial court's allocation method had provided Torres with a double recovery).
181. Xomox, 49 Cal. App. 4th at 37-38, 56 Cal. Rptr. 2d at 479.
182. Id.
liability as determined by the verdict and the affect the apportionment of any settlement will be given.

In the Xomox case, the settlement was adequate to provide money beyond Lowe’s proportional non-economic liability, but this may not always be the case. Particularly, the knowledge that the court will apply settlement proceeds toward non-economic damages until the complete proportion of the settling defendant’s non-economic liability is satisfied may create situations whereby the non-settling defendant is disadvantaged by virtue of the allocation method. A plaintiff will have no incentive to demand a settlement beyond the non-economic liability of a settling defendant if the plaintiff knows that the non-settling defendant will be required to pay the entire economic portion of the judgment. Although these basic rules of joint and several liability cannot be altered by a court, the allocation method can be altered to provide the proper incentives for more equitable settlements.

The adverse potential of the ceiling approach can be seen in the following hypothetical (hypothetical 1). Assume two defendants are jointly and severally liable to a single plaintiff, whose damages are one million dollars economic damages and five hundred thousand dollars non-economic damages, as determined by the jury. Defendant A is found 30% at fault and defendant B is 70% at fault. Under Proposition 51, defendant A would be liable for $150,000 non-economic damages (30% of $500,000), with defendant B liable for $350,000 in non-economic damages (70% of $500,000). Both are potentially jointly and severally liable for one million dollars in economic damages. All parties are aware of the extent of the liability and of the ceiling approach to allocation of settlement proceeds.

**Table 5 - Hypothetical 1**

<table>
<thead>
<tr>
<th>Damages</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Economic</td>
<td>$1,000,000.00</td>
</tr>
<tr>
<td>Non-Economic</td>
<td>$ 500,000.00</td>
</tr>
<tr>
<td><strong>Total Damages</strong></td>
<td>$1,500,000.00</td>
</tr>
<tr>
<td><strong>Defendant A’s Exposure (30% at fault)</strong></td>
<td></td>
</tr>
<tr>
<td>Economic</td>
<td>$1,000,000.00</td>
</tr>
<tr>
<td>Non-Economic</td>
<td>$ 150,000.00</td>
</tr>
<tr>
<td><strong>Defendant B’s Exposure (70% at fault)</strong></td>
<td></td>
</tr>
<tr>
<td>Economic</td>
<td>$1,000,000.00</td>
</tr>
</tbody>
</table>

183. With Lowe being liable for 10% of $919,248, or $91,924.80, in non-economic damages, the $450,000 settlement was more than sufficient to cover Lowe’s non-economic liability.

184. For simplicity, assume that the plaintiff was not culpable and that no employer was involved, thus no worker’s compensation set-off is involved.
Non-Economic $ 350,000.00

Under this scenario, both defendants have the incentive to settle as close as possible to their respective liability for non-economic damages. Each defendant is aware that if it does not settle and the other defendant does, it will be jointly and severally liable for the entire economic judgment, less the set-off from the settlement surplus beyond the non-economic liability of the settlor. The plaintiff has the incentive to settle with one or the other, but not both. The plaintiff's incentive is to settle with the least solvent defendant, knowing the remaining, more solvent defendant will be saddled with the judgment from which the plaintiff can fully recover. More importantly, the plaintiff has no incentive to demand a settlement beyond the non-economic portion of the settlor's liability. Because the ceiling approach will be used to allocate the settlement proceeds, any settlement money beyond the non-economic liability of the settlor will be offset against the economic portion of the judgment. This excess reduces the liability of the non-settling defendant, but does not alter the plaintiff's recovery (assuming the solvency of the non-settling defendant). Thus, the plaintiff's only requirement is to settle for the equivalent of the non-economic liability of the least solvent defendant. Simultaneously, the defendants will each race to settle so that they are not the remaining defendant subject to the judgment because the judgment will include the remainder of the economic liability of both defendants. 185 Although the ceiling approach encourages settlement in this situation, it encourages settlements based solely on self-interest; both the plaintiff and the settling defendant reach their agreement out of their own best interest. The non-settling defendant is thus left paying the bulk of the damages, contrary to the spirit of Proposition 51. 186

In support of the ceiling approach, the court noted that post-verdict settlements do not create immunity from contribution (or equitable indemnity under American Motorcycle) 187 for the settling defendant. 188 Under California Code of Civil Procedure § 877, settling defendants are only immune from contribution actions by codefendants for settlements prior to verdict or judgment. 189 Similarly, the decision in American Motorcycle does not prevent an equitable indemnity action against settling

185. Of course, a corollary to the race to settle between the defendants is that the race itself might drive up the price of the settlement. With each defendant eager to avoid joint and several liability, the settlement offers may rise as they compete with each other to be the winner of the settlement race. If this occurred, the adverse incentives the ceiling approach creates for the plaintiff may be partially offset.
186. See supra Part I.B. (discussing the primary intent of Proposition 51 as creating a mechanism by which defendants will pay damage amounts more closely correlating to their individual degree of culpability).
188. *Xomox*, 49 Cal. App. 4th at 39, 56 Cal. Rptr. 2d at 480.
189. CAL. CIV. PROC. CODE § 877 (West 1997).
defendants in the post-verdict situation. Thus, a post-verdict settlement does not provide the settling defendant protection against collateral action by the non-settling defendant, which in theory lessens the inequity to the non-settling defendant from a shortfall in the settlement amount.

However, because defendant solvency will be the primary characteristic considered by the plaintiff in choosing with whom to settle, any future right to contribution may be essentially meaningless. Moreover, an allocation method should not unnecessarily create additional litigation if it is avoidable initially. Thus, the availability of future contribution actions by the non-settling defendant does not satisfactorily answer the problems created by the ceiling approach to allocation of post-verdict settlements.

The better method of allocating post-verdict settlement proceeds would seem to be a modified approach to the method advanced by Xomox. Xomox contended that the settlement proceeds should be divided between economic and non-economic damages in the same proportions as the verdict established the settling defendant’s potential liability. This method takes the known economic and non-economic liability of the settling defendant and translates these amounts into ratios. For example (call this hypothetical 2), if a defendant is liable for $100 in non-economic damages and potentially liable for a judgment of $400 in economic damages (the total economic damage award), the resulting ratio would produce 20% non-economic damage liability ($100 of a total exposure of $500) and 80% economic damage liability ($400 of a total exposure of $500). These percentages are then imposed on the settlement amount, with 20% of the settlement deemed non-economic and 80% deemed economic damages. The rationale behind this allocation is that both parties, the plaintiff and the settling defendant, know at the time they reach the settlement the maximum extent of the settling defendant’s liability. It is therefore reasonable to assume that in negotiating the settlement, the plaintiff takes into account the pro-

190. See American Motorcycle Ass’n v. Superior Court, 20 Cal. 3d 578, 604, 578 P.2d 899, 915-16, 146 Cal. Rptr. 182, 198-99 (1978) (adopting the same settlement bar as found in CAL. CIV. CODE § 877 which does not bar contribution actions against post-verdict settlors).

191. Since the non-settling defendant can pursue the settlor in a contribution or equitable indemnity action, the inequity possibly created by the ceiling approach can be remedied in the subsequent action.

192. See supra note 38 (discussing that defendant insolvency, or finite resources, will often make an available contribution or equitable indemnity action meaningless).

193. It should be noted that the Espinoza method is the accepted allocation method for pre-verdict settlements. See Xomox, 49 Cal. App. 4th at 37-38, 56 Cal. Rptr. 2d at 479. With pre-verdict settlements, the parties are dealing with unknowns and more flexibility is justifiable in allocating these settlement proceeds. If a pre-verdict settlement is insufficient to equitably reduce the liability of a non-settling defendant under the Espinoza method, it is reasonable to declare this shortfall part of the price of refusing to settle. Moreover, the settling defendant bears less condemnation for the shortfall, as does the plaintiff, since prior to the verdict, the settling parties are each gambling that they may not achieve a settlement advantageous to their sides. Because of the additional variables involved, and to encourage settlement prior to protracted litigation, surpluses and shortfalls are tolerated with pre-verdict settlements as long as they meet the “good faith” standard. See Tech-built, Inc. v. Woodward-Clyde & Assoc., 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985).

194. See Xomox, 49 Cal. App. 4th at 38-39, 56 Cal. Rptr. 2d at 480; supra note 164.
portions of economic and non-economic damages to which that defendant is exposed. Thus, a straight proportional division of the settlement is justified since the parties were negotiating with known liabilities.

Applied to hypothetical 1 above, this method advocated by Xomox would derive the following results. After the verdict, but prior to settlement, defendant A had potential liability equaling $150,000 for non-economic damages and $1,000,000 in economic damages, for a total potential exposure of $1,150,000. (See Table 5). The proportion of defendant A’s non-economic exposure is thus 13.1% and its economic exposure is 86.9%. Under the method advanced by Xomox, any settlement reached between defendant A and the plaintiff would be allocated in the same ratios, with 13.1% allocated to non-economic damages and 86.9% allocated as economic damages. This amount, the 86.9% economic damages, would then be credited against the economic portion of the judgment for which the non-settling defendant remains liable. Because both settling parties were working with known liability proportions, the argument concludes that they should be held to those proportions.¹⁹⁵

The results under this method, however, are too harsh on the negotiating parties, particularly the plaintiff, and as such, will not encourage settlement. If the plaintiff settles with defendant A for as much as $575,000 (half of the full potential liability), the plaintiff forever loses a portion of his non-economic recovery. (This result becomes even harsher when it is noted that it would be extremely unusual for a settlement to reach the level of half the full potential liability in a multiple defendant situation). Applying this method advanced by Xomox, 13.1% of $575,000 would be allocated to defendant A’s non-economic liability with the remainder being credited towards the full economic damages judgment. The result would be that the plaintiff would collect $75,325 in non-economic damages from defendant A, and the remaining $499,675 would be termed economic damages and credited against the judgment against defendant B. This would leave defendant B paying its full non-economic liability ($350,000), but only paying $500,325 in economic damages ($1,000,000 economic damages less $499,675 credit from the settlement). More importantly, the plaintiff has lost the ability to collect the $74,675 shortfall from the non-economic damages award ($150,000) against defendant A. In short, the only way the plaintiff can ever recover the full non-economic damages amount from a settling defendant is to settle for the full amount of that defendant’s potential liability, both economic and non-economic, which will never be the case.

¹⁹⁵. See id.
Table 6 - Xomox's Ratio Method Applied to Settlement With Defendant A
(Hypothetical 1)

| Economic       | $1,000,000.00 |
| Non-Economic   | $ 150,000.00  |
| Total Exposure | $1,150,000.00 |

Ratios for Damage Allocation

| Economic       | 89% |
| Non-Economic   | 13.1% |

Settlement Amount $ 575,000.00

| Economic       | $ 499,675.00 |
| Non-Economic   | $ 75,325.00  |

(13.1% of $575,000)

Plaintiff's Shortfall in Non-Economic Damages

| Defendant A’s Exposure | $ 150,000.00 |
| Collected in Settlement | $ 75,325.00  |
| Shortfall               | $ 74,675.00  |

The drawback to this method is not that it provides a shortfall to the plaintiff in non-economic damage recovery. Some shortfall seems justifiable where the plaintiff is settling post-verdict, since all the liabilities are known and little litigation has been avoided. However, this method ignores the fact that defendant A remains jointly and severally liable along with defendant B prior to the settlement. Rather than using the entire economic damage amount to calculate a settling defendant's total potential exposure, it would be more equitable to divide the economic damages among all defendants (two in this hypothetical) for the purposes of calculating allocation ratios. The settling defendant's non-economic liability should be added to its pro rata share of the total economic damages when calculating that defendant's potential damage liability with which the allocation ratios are derived. In this way, a more realistic allocation would be achieved.

196. Proposition 51 by its terms envisioned that the plaintiff would bear some of the burden of a more equitable allocation of damages. As with any balancing of interests, Proposition 51 sacrificed some of a plaintiff's ability to fully recover so that defendants would be held liable in closer relation to their individual degree of fault.

197. For example, in hypothetical 2, the following would result. The defendant remains liable for $100 non-economic damages, but is now, pro rata, potentially liable for only $200 in economic damages. Thus, the percentages used to allocate the settlement money would be 33.3% non-economic damages ($100 of $300 total potential pro rata exposure) and 66.7% economic damages ($200 of $300 total potential pro rata exposure). In this way, the plaintiff's shortfall in collecting the non-economic damage portion of the settling defendant's liability is reduced.
number is utilized to derive the ratios by which the settlement proceeds will be allocated. If allocation is to be based on the realities of the negotiation and what the parties know when they enter negotiations, a more realistic total for the settling defendant’s total exposure is required. Because the settling defendant is not the sole defendant, the pro rata calculation of potential liability more realistically reflects the settlor’s liability.

Applying this pro rata ratio method to hypothetical 1 results in the following allocation. Defendant A’s exposure is $150,000 for non-economic damages just as before, but the pro rata method reduces Defendant A’s potential economic liability to $500,000 (defendant A’s half of $1,000,000). Thus, defendant A’s realistic total exposure prior to settlement is $650,000. Thus, defendant A’s non-economic liability is 23.1% of the damages and its economic liability is 76.9%. Applying these ratios to a settlement of $575,000, defendant A pays $132,825 in non-economic damages and $442,175 in economic damages. Defendant B is thus liable for its entire $350,000 in non-economic damages and the remaining $557,825 in economic damages.

**Table 7 - Pro Rata Ratio Method Applied to Settlement With Defendant A**

(Hypothetical 1)

<table>
<thead>
<tr>
<th></th>
<th>Economic (½ of $1,000,000)</th>
<th>$500,000.00</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Non-Economic</td>
<td>$150,000.00</td>
</tr>
<tr>
<td><strong>Total Pro Rata Exposure</strong></td>
<td></td>
<td>$650,000.00</td>
</tr>
</tbody>
</table>

**Pro Rata Ratios for Damage Allocation**

<table>
<thead>
<tr>
<th></th>
<th>Economic ($500,000 of $650,000)</th>
<th>76.9%</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Non-Economic ($150,000 of $650,000)</td>
<td>23.1%</td>
</tr>
</tbody>
</table>

**Settlement Amount**

<table>
<thead>
<tr>
<th></th>
<th>Economic (76.9% of $575,000)</th>
<th>$422,175.00</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Non-Economic Portion (23.1% of $575,000)</td>
<td>$132,825.00</td>
</tr>
</tbody>
</table>

**Plaintiff’s Shortfall in Non-Economic Damages**

<table>
<thead>
<tr>
<th></th>
<th>Defendant A’s Exposure</th>
<th>$150,000.00</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Collected in Settlement</td>
<td>$132,825.00</td>
</tr>
<tr>
<td></td>
<td>Shortfall</td>
<td>$ 17,175.00</td>
</tr>
</tbody>
</table>

lessened.
The plaintiff has still received a shortfall in non-economic damages ($17,175), but that shortfall is much less drastic than that under the method advanced by Xomox. More importantly, this method more accurately represents the true extent of the settling defendant’s liability when negotiations are begun, since absent any settlement at all, each defendant will be liable for its pro rata share of the economic damages.

The primary effect of this proportional allocation method will be to provide the plaintiff with sufficient incentive to demand realistic settlements. Knowing the liabilities determined by the verdict, and the allocation method that will be applied, the plaintiff can calculate with precision how much a settlement will cost him. At the same time, the plaintiff is not afforded the luxury the ceiling approach provides of only needing to demand the amount of non-economic damages from the settling defendant in order to obtain full recovery. Although the pro rata method shifts some of the burden of firm negotiation, and perhaps the risk of insolvency, to the plaintiff, it is justified by the fact that the settlement follows the completion of the litigation. Throughout the litigation, the degree of solvency of each defendant is likely within plaintiff’s knowledge, and settlement at this stage in the proceedings is likely intended merely to avoid appeal. Thus, an allocation method that provides incentive for the plaintiff to obtain a settlement close in degree to actual liability amounts, or incur a recovery shortfall, seems reasonable in the situation where the litigation has passed the verdict stage.

Moreover, this pro rata ratio method is more consistent with the spirit of Proposition 51. This method prevents a post-verdict settlement, which merely recoups the settling defendant’s non-economic liability, from saddling the non-settling defendant with the entire remaining judgment without any reduction by the settlement. Proposition 51 was initially drafted and approved by California voters to prevent this specific type of inequity. The spirit of the initiative should not be defeated by something as technical and controllable as a method of damage allocation.

Applying the pro rata ratio method to the Xomox situation, the following results are derived.
**Table 8 - Xomox Results Under the Pro Rata Ratio Method**

*Charles Lowe’s Pro Rata Total Exposure*

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Economic (½ of $1,080,219.35)</td>
<td>$540,109.67</td>
</tr>
<tr>
<td>Non-Economic</td>
<td>$91,924.80</td>
</tr>
<tr>
<td><strong>Total Pro Rata Exposure</strong></td>
<td>$632,034.47</td>
</tr>
</tbody>
</table>

**Ratios for Damage Allocation**

<table>
<thead>
<tr>
<th>Description</th>
<th>Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>Economic ($540,109.67 of $632,034.47)</td>
<td>85.5%</td>
</tr>
<tr>
<td>Non-Economic ($91,924.80 of $632,034.47)</td>
<td>14.5%</td>
</tr>
</tbody>
</table>

**Settlement Amount**

- Economic (85.5%) $384,750.00
- Non-Economic (14.5%) $65,250.00

**Plaintiff’s Non-Economic Damage Shortfall**

- *Charles Lowe’s Exposure* $91,924.80
- Collected in Settlement $65,250.00
- Shortfall $26,674.80

**Xomox’s Net Joint and Several Liability**

- Total Exposure $1,080,219.35
- Less Credits
  - Settlement $384,750.00
  - Worker’s Comp. $181,687.51
- Net Joint and Several Liability $513,781.84

A comparison of the results under the various allocation methods may help demonstrate the benefits and drawbacks of each alternative method.
Table 9 - Summary of Results Under Different Methods Of Allocation

**Espinoza Method**

| Xomox’s Joint and Several Liability | $ 649,681.84 |
| Non-Economic Damages | |
| from Charles Lowe Settlement | $ 201,150.00 |
| Plaintiff’s Surplus | $ 109,225.20 |

**Ceiling Method**

| Xomox’s Joint and Several Liability | $ 540,456.64 |
| Non-Economic Damages | |
| from Charles Lowe Settlement | $ 91,924.80 |
| Plaintiff’s Shortfall | $ 0.00 |

**Xomox’s Ratio Method**

| Xomox’s Joint and Several Liability | $ 483,631.84 |
| Non-Economic Damages | |
| from Charles Lowe Settlement | $ 35,100.00 |
| Plaintiff’s Shortfall | $ 56,824.80 |

**Pro Rata Ratio Method**

| Xomox’s Joint and Several Liability | $ 513,781.84 |
| Non-Economic Damages | |
| from Charles Lowe Settlement | $ 65,250.00 |
| Plaintiff’s Shortfall | $ 26,674.80 |

**CONCLUSION**

When California voters adopted Proposition 51 they hoped that the new law would inject some common sense into a tort system they perceived as out of control. Requiring defendants to pay damages more proportionate to their individual degree of fault had a logical consistency and the attraction of fairness.

At the same time, Proposition 51 did not deny deserving plaintiffs an equitable opportunity to collect their just awards. By limiting its application to non-economic damages, Proposition 51 did not deny plaintiffs too large a portion of the damages they sought. In this way, Proposition 51 was intended to achieve the proper balance between the competing interests of plaintiffs and defendants, a balance which the tort system itself continually places at the forefront of its evolution.
However, in application, Proposition 51 created conflicts that could not be solved neatly and precisely. Worker's compensation awards do not involve considerations of fault; thus, Proposition 51's focus on division of damages in proportion to fault did not translate neatly into worker's compensation situations. Similarly, settlements remove individual defendants from the equitable calculus envisioned by Proposition 51, and the settlement amounts themselves are not amenable to precise translation into Proposition 51 terms.

Thus, although the mandate of Proposition 51 may have been clear, the courts were forced to apply that mandate to situations where perfect application was not possible. The method of allocation utilized in these situations, specifically worker's compensation and post-verdict settlements, impacted the parties in the present case, as well as created implications for future parties. Because of these downstream impacts, any allocation method adopted must include a realistic evaluation of the ripples it creates when applied.

The allocation method utilized by the appellate court in Xomox seems appropriate for the worker's compensation situation, but creates potentially negative incentives in the post-verdict settlement situation. One's choice of emphasizing the interest of the plaintiff in obtaining full recovery, or the defendant's interest in paying only what is equitable, plays a large role in determining which allocation method is appropriate.

However, the voters of California have spoken as to the appropriate result in this balancing of competing interests. Proposition 51 expressly mandates that defendants pay damages more closely related to their degree of fault. The mechanism by which this mandate is to be achieved is to limit defendant liability for non-economic damages to the exact proportion as determined by their degree of fault. As seen above, this mechanism may not be completely effective in limiting a particular defendant's liability.

The allocation method used in Proposition 51 situations should reflect the broad purpose of the law—defendant liability should more accurately reflect their degree of culpability. With this goal in mind, it is more appropriate to adopt a damage allocation method that shifts some of the burden of negotiation and the risk of a recovery shortfall on to the plaintiff. The plaintiff's interests cannot be wholly abandoned, but the appropriate allocation method must place the mandate of Proposition 51 at the forefront. This requires emphasizing the defendant's interest in equitable treatment over the plaintiff's interest in total recovery. Perhaps this is a harsh result, but it goes no farther than what the voters demanded when they enacted Proposition 51.