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Extending the Fairness Principle of *Li* and *American Motorcycle*: Adoption of the Uniform Comparative Fault Act

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INTRODUCTION

The trend in California has been to make the tort system conform to the basic principle of fairness enunciated in *Li v. Yellow Cab Company*;[1] "liability for damages must be borne by those whose negligence caused it in direct proportion to their respective fault."[2] However, at present because of the traditional doctrine of joint and several liability[3] one tortfeasor may have to bear a disproportionate share of plaintiff's loss when another tortfeasor is insolvent or has settled for an amount

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

2. *Id.* at 813, 532 P.2d at 1232, 119 Cal. Rptr. at 864.

3. The original meaning for a "joint tort" was the concept of vicarious liability for concerted action. All parties who acted in concert to commit a tort, in pursuance of a common plan or design, were held liable for the entire result. Each party was liable for the sum of the entire damage done, although his part in the plan may have only contributed to a fraction of the loss sustained. Under the modern liberal American Rule as to joinder, defendants whose negligence has concurred to produce a single loss to the plaintiff have been joined to one action, and under a standard which Dean Prosser refers to as a "careless usage," have been called joint tort-feasors. Once labeled as joint tort-feasors, each defendant is held jointly and severally liable for the entire loss. W. PROSSER, THE LAW OF TORTS §§46-47 (4th Ed. 1971). *See infra* notes 19-36 and accompanying text.

less than his proportional share. Prior to *Li*, fairness was not the prime concern in determining liability. A plaintiff who was found to be contributorily negligent could not recover from the defendant even if the defendant was overwhelmingly more negligent than the plaintiff.[4] The plaintiff was forced to bear the burden of the defendant's wrongful conduct. There were other areas in which it was necessary for one party to bear the burden of another's wrongful conduct. Assumption of risk was also a complete bar to recovery.[5] By statute, contribution among tortfeasors was on a pro rata basis regardless of the proportion of the damages which could be attributed to each defendant.[6] Equitable indemnity was awarded on an all-or-nothing basis; the tortfeasor who was found to be primarily liable would have to bear the burden of the entire loss in spite of a significant contribution by the secondary tortfeasor to the plaintiff's injuries.[7]

Because of *Li* and the cases which have followed it, these inequities have been resolved and the principle of fairness is firmly entrenched in the California tort system. *Li*, of course, established comparative negligence abolishing the all-or-nothing contributory negligence.[8] *Li* merged that form of assumption of risk which is also negligence into the comparative negligence doctrine.[9] *American Motorcycle Association v. Superior Court* circumvented the contribution statute and established what might be called comparative partial indemnity which apportions the payment of damages among the defendants.[10]

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4. Baltimore & P.R. Co. v. Jones, 95 U.S. 439 (1877); Buckley v. Chadwick, 45 Cal. 2d 183, 288 P.2d 12 (1955). The rule was rooted in the long-standing principle that one should not recover from another for damages brought upon oneself. *See generally* RESTATEMENT (SECOND) OF TORTS §467 (1977).

5. The theory behind the defense was that the defendant's conduct involves certain dangers or risks, which the plaintiff voluntarily accepts. *See* Morton v. California Sports Car Club, 163 Cal. App. 2d 685, 329 P.2d 967 (1958); RESTATEMENT (SECOND) OF TORTS §496A (1977).

6. Contribution was "limited to the excess so paid over the pro rata share of the person so paying and in no event shall any tortfeasor be compelled to make contribution beyond his own pro rata share of the entire judgment." CAL. CIV. PROC. CODE §875(c). The pro rata share of each defendant was determined by "dividing the entire judgment equally among all of them." *Id.* §876(a); *see* Rollins v. California, 14 Cal. App. 3d 160, 92 Cal. Rptr. 251 (1971).

7. The rationale underlying the principle of indemnity was that "everyone is responsible for the consequences of his own wrong, and if others have been compelled to pay damages which ought to have been paid by the wrongdoer, they may recover from him." Herrero v. Atkinson, 227 Cal. App. 2d 69, 74, 38 Cal. Rptr. 490, 493 (1964).

8. In abolishing contributory negligence, the court noted that "this reexamination leads us to the conclusion that the 'all-or-nothing' rule of contributory negligence can be and ought to be superseded by a rule which assesses liability in proportion to fault." *Li*, 13 Cal. 3d at 810, 532 P.2d at 1230, 119 Cal. Rptr. at 862 (the court went on to adopt "pure" comparative negligence as the law to be applied in California).

9. "[T]he defense of assumption of risk is also abolished to the extent that it is merely a variant of the former doctrine of contributory negligence; [and is] to be subsumed under the general process of assessing liability in proportion to negligence." 13 Cal. 3d at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875; Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

10. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978). The court held that the common law doctrine should be modified to permit partial indemnity among concurrent tort-feasors on a

The only vestige of the pre-*Li* period is the doctrine of joint and several liability and the effect that doctrine has upon situations involving multiple defendants. The doctrine requires that a solvent tortfeasor pay the entire judgment even though his proportional share of the fault was far less than that of an insolvent defendant or one who had settled earlier with the plaintiff. Contribution and indemnity, which normally protect one tortfeasor from bearing the burden of another's liability, do not work against an insolvent tortfeasor or against a solvent one who has settled with plaintiff and is therefore protected by the laws governing release. The solvent tortfeasor is required to bear the burden of the insolvent or settling tortfeasor even if the plaintiff has contributed to his own injuries in a greater proportion than the solvent tortfeasor.[11]

The inequity of the law as it stands is shown in a recent case which reached the appellate court level.[12] Although this case was subsequently "unpublished" by the California Supreme Court,[13] the facts are still significant. Following a somewhat routine automobile "fender bender," plaintiff settled with defendant A for $4000 and continued to prosecute his suit against B who in turn cross-complained against A for contribution and indemnity. At trial, the jury by special verdict set defendant A's share of the fault at eighty percent and defendant B's share at twenty percent. The total amount of damages was found to be $19,700.[14] The trial court continued to hear the case without the jury. The court found the settlement between plaintiff and A to have been made in good faith, and so the court deducted the amount of the settlement from plaintiff's damages[15] and ordered B to pay the remaining amount of $15,700.[16] Because Code of Civil Procedure section 877(b) bars contribution from a settling tortfeasor, defendant B had to bear the burden of the entire judgment less the amount of settlement.[17] Thus a defendant who was twenty percent liable had to pay eighty percent of the damages. The inequity of the result was amplified in this particular case because defendant A was the wife of the plaintiff and would share in his recovery against defendant B. However, the unfair-

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comparative fault basis. *See, e.g.*, United States v. Reliable Transfer Co., 421 U.S. 397 (1975); Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974); Gomes J. Brodhurst, 344 F.2d 465 (3rd Cir. 1967); *cf.* Lindenberg v. Issen, 318 So. 2d 386 (Fla. 1975).

11. *See infra* note 173.

12. Baget v. Shepard, 128 Cal. App. 3d 433 (1982) Reporter of Decisions directed not to publish this opinion in the Official Reports, by the authority of the CAL. CONST. art. VI, §14; CAL. R. CT. Div. III Rule 976. The opinion of such a case shall not be cited by a court or a party to an action or preceding, except in very limited circumstances. *See* CAL. R. CT. Div. III Rule 977.

13. *See supra* note 12.

14. 128 Cal. App. 3d at 436 (unpublished opinion).

15. *Id.* at 438 (unpublished opinion).

16. *Id.*

17. *Id.* at 438-39 (unpublished opinion).

ness in this situation does not rest upon the quirk of fate that plaintiff and defendant A were married; rather there is an inherent injustice in one defendant having to pay damages far in excess of his proportional liability.

In one sense, the injustice is even greater in situations involving insolvent defendants. For if defendant A, who is insolvent, is eighty percent at fault and defendant B is twenty percent at fault, defendant B, under the present rule of joint and several liability, will have to pay one hundred percent of the damages despite having been found liable for 1/5 that amount. The unfairness created by joint and several liability takes other forms as well. Two examples, the second more unfair than the first, involving an insolvent defendant, are appropriate here. In the first, plaintiff is ten percent at fault, defendant A, who is insolvent, seventy percent, and defendant B twenty percent. Defendant B pays ninety percent of the damages. In the second, plaintiff is twenty percent at fault, defendant A, who is again insolvent, seventy percent, and defendant B ten percent. Defendant B is liable for eighty percent of the damages. Although in these two hypotheticals the solvent defendant will pay less out of pocket than he would if plaintiff were not liable, the injustice still seems greater than when plaintiff is not at fault. It can at least be said that between an innocent plaintiff and a culpable defendant, the defendant should bear the risk of an insolvent co-defendant.[18] But when plaintiff is also at fault, and especially when plaintiff is more at fault than the solvent defendant, this rationale loses all meaning. A defendant should not have to bear the entire risk of an insolvent co-defendant when plaintiff is also culpable.

The thesis of the present article is that the harsh and unfair effect of the doctrine of joint and several liability should be judicially or legislatively modified by the adoption of the Uniform Comparative Fault Act. The sections which follow will examine: (1) the nature and origins of the present law; (2) the fairness principle of *Li* and *American Motorcycle* and why it dictates modification; (3) the arguments raised in *American Motorcycle* for not abolishing the doctrine to the point of showing that these arguments should not govern the issue of modification; (4) the case law and legislation of other jurisdictions; and (5) the ways in which modification can be made.

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18. The reason for imposing liability on each for the entire consequence is that there exists no basis for dividing damages and the law is loath to permit an innocent plaintiff to suffer as against a wrongful defendant.
20 Cal. 3d at 588, 578 P.2d at 905, 146 Cal. Rptr. at 188.

I. BACKGROUND

In order to resolve the problems created by the continuing existence of the doctrine of joint and several liability, it will be necessary to examine not only the doctrine itself but also the laws which govern contribution and release. Indeed, as will be discussed later, one of the ways to ameliorate the unfair effect of joint and several liability is to modify the law governing contribution.

A. Joint and Several Liability

Perhaps a better name for the doctrine of joint and several liability is "entire liability" because under the doctrine each tortfeasor is "liable for the entire loss sustained by the plaintiff."[19] In multi-defendant cases, the practical effect of this rule is that if one tortfeasor is insolvent or cannot be levied upon, or even if the plaintiff merely chooses not to execute a judgment against one defendant, another tortfeasor can be called upon to satisfy the entire judgment.[20] If one tortfeasor has settled, another may be called upon to pay the entire judgment less the amount of settlement.[21] The solvent or non-settling tortfeasor is liable without regard to the proportional share of the injury which he caused.[22]

Originally the rule of entire liability was applied only to those tortfeasors who had acted in concert, true joint tortfeasors.[23] But over the centuries, it has come to be applied to tortfeasors who possessed a common duty to the plaintiff; to tortfeasors who have a relationship which causes one of them to be vicariously liable for the other's conduct; and to tortfeasors who act concurrently to cause a single, indivisi-

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19. Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413, 418 (1937); 1 F. HARPER & F. JAMES, LAW OF TORTS § 10.1, at 692 (1956); Browne v. McDonnell Douglas Corp., 504 F. Supp. 514 (N.D. Cal. 1980).

20. *American Motorcycle Ass'n.*, 20 Cal. 3d at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189. The court stated that

> one of the principal by-products of the joint and several liability rule is that it frequently permits an injured person to obtain full recovery for his injuries even when one or more of the responsible parties do not have the financial resources to cover their liability.

Id.

21. Wouldridge v. Zimmerman, 21 Cal. App. 3d 656, 98 Cal. Rptr. 778 (1971) ("[t]he purpose of the rule requiring such reduction is to avoid double recovery and unjust enrichment which a plaintiff would enjoy if he were able to collect part of his total claim from one, and all from another . . ."); CAL. CIV. PROC. CODE §877 (release of one tortfeasor "shall not discharge any other such tortfeasor from liability unless its terms so provide, but it shall reduce the claim against others . . . in the amount of the consideration paid for it. . . .").

22. 20 Cal. 3d at 590, 578 P.2d at 906-07, 146 Cal. Rptr. at 189-90.

23. Prosser, *supra* note 19, at 418; HARPER AND JAMES, *supra* note 19, at 692; Alexander v. Hammarberg, 103 Cal. App. 2d 872, 230 P.2d 399 (1951). The former belief was that, to constitute joint tort-feasors, there must be a concert of action, a unity of purpose or design, and two or more defendants working separately but to a common purpose; each acting with the other's knowledge and consent.

ble injury.[24]

Tortfeasors are said to act in concert when they "act in pursuance of a common plan or design."[25] It is not necessary for both tortfeasors to actually commit the act that directly injures the plaintiff.[26] Prosser stated that concerted action includes all those who "actively participate in the wrongful act, by cooperation or request, or who lend aid, encouragement or countenance to a wrongdoer, or approval to the acts for their benefit . . . ."[27] The rationale for entire liability in this situation has always been that, when defendants act in concert, the act of one will be considered the act of all.[28] Tortfeasors who do not act out a common plan may still be considered joint if they have a common duty toward the plaintiff imposed upon them by law. Most cases in this category involve co-owners of property who negligently maintain some aspect of the property—e.g., a building,[29] a party wall,[30] or even a flowerpot.[31]

Joint and several liability is also imposed upon multiple-tortfeasors when an agent or principal is held vicariously liable for the acts of a

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24. Harper and James point out that these last two categories are not joint torts within the true meaning of the words.

> Strictly speaking, the words 'joint-tort' should be used only where the behavior of two or more tort-feasors is such as to make it proper to treat the conduct of each as the conduct of the others as well. In effect this requires the existence of a concert of action or the breach of a joint duty.

HARPER AND JAMES, *supra* note 19, at 692. Prosser divides the joint torts into several more categories which are also incompassed in Harper and James' four: (1) concert of action; (2) vicarious liability; (3) common duty; (4) concurrent causation of a single, indivisible result, which would have caused alone; (5) successive injuries; (6) damages of the same kind, which it is difficult to apportion; (7) acts innocent in themselves which together cause damage; and (8) alternate liability. Prosser, *supra* note 19, at 429-43; *see* Southland Mechanical Constructors Corp. v. Nixen, 119 Cal. App. 3d 417, 173 Cal. Rptr. 917 (1981) (multiple parties under a common duty).

25. HARPER AND JAMES, *supra* note 19, at 698 (1956); *see* Davis v. Hearst, 160 Cal. 143, 116 P. 530 (1911) (newspaper proprietor gave his subordinates carte blanche to do anything to make the paper a success); *see also* RESTATEMENT (SECOND) OF TORTS §876 (1977).

26. HARPER AND JAMES, *supra* note 19, at 698; RESTATEMENT (SECOND) OF TORTS §876(a) (1977); Tide Water Associated Oil Co. v. Superior Court of Los Angeles County, 43 Cal. 2d 815, 279 P.2d 35 (1955); *see also* Wetherton v. Growers Farm Labor Ass'n., 275 Cal. App. 2d 168, 79 Cal. Rptr. 543 (1969). The court, in distinguishing tort and criminal conspiracy, stated that in tort

> the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tort-feasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity.

Id. at 176, 79 Cal. Rptr. at 548.

27. "Express agreement is not necessary; all that is required is that there shall be a common design or understanding." Prosser, *supra* note 19, at 429-30; *cf.* Schaefer v. Berinstein, 140 Cal. App. 2d 278, 295 P.2d 113 (1956) (each participant in the wrongful act is responsible for all damages ensuing from the wrong regardless of the degree of his activity).

28. HARPER AND JAMES, *supra* note 19, at 692; Heydon's Case, 11 Co. Rep. 5, 77 Eng. Rep. 1150 (1613) ("[w]ith all coming to do an unlawful act, and of one party, the act of one is the act of all . . . ."). The origins of this view appear to be the same as those of the rationale for modern criminal conspiracy. *See* Smithson v. Garth, 3 Lev. 324, 83 Eng. Rep. 711 (1691); *see also* Mox Incorporated v. Woods, 202 Cal. 675, 262 P. 302 (1927).

29. Johnson v. Chapman, 43 W. Va. 639, 28 S.E. 744 (1897).

30. Simmons v. Everson, 124 N.Y. 319, 26 N.E. 911 (1891).

31. World v. Grozalsky, 277 N.Y. 364, 14 N.E.2d 437 (1938).

servant or agent. Strictly speaking vicarious liability stems from the agency doctrine of respondeat superior. However, although the agent and principal have not committed a joint tort,[32] both can be joined in the same suit and both are subject to entire liability. Of course the practical effect is that the master or principal usually must pay for the full amount of the damages.[33]

In terms of the thesis of this article, the most important application of joint and several liability is to tortfeasors who concurrently cause an indivisible injury to the plaintiff.[34] The rationale for applying entire liability to concurrent tortfeasors is largely a matter of causation. The court stated in *American Motorcycle*, "the principle that each tortfeasor is personally liable for any indivisible injury of which his negligence is the proximate cause has commonly been expressed in terms of joint and several liability."[35] Concurrent tortfeasors are especially susceptible to unequal apportionment of responsibility. It is possible that one tortfeasor's act alone would not have caused any harm to the plaintiff, or that alone it might have caused the entire injury, or that it would have caused a lesser injury.[36]

For most of the time that joint and several liability was developing, the law was far more defendant oriented than it is today. Contributory negligence and assumption of risk were absolute. There were no long arm statutes to aid plaintiff in gaining jurisdiction. The practical problems related to slower communication and transportation could also work to protect defendants. Although the doctrine did not mitigate the harsh effects of contributory negligence and assumption of the risk, it did help plaintiff when he or she could not gain jurisdiction or when other practical problems prevented him or her from recovering from one tortfeasor. The doctrine, of course, helped the plaintiff when one defendant was insolvent. It should also be noted that during the development of joint and several liability all plaintiffs who received a judgment in their favor were entirely innocent in the eyes of the law. Moreover, the concept of apportioning liability according to fault was

32. HARPER AND JAMES, *supra* note 19, at 700 (1956). *See generally* W. SEAVEY, STUDIES IN AGENCY 65-105, 129-53, 220-79 (1949).

33. HARPER AND JAMES, *supra* note 19, at 700. Obviously the servant or agent is not liable for the tortious acts of the master or principal, unless other principles of joint tort liability would make him so. The failure to impose any liability where the tort is the master's alone indicates that the liability relationships are not truly joint torts.

34. There may have been a safety valve in the English system. Since under English law there was no joinder of defendants unless there was concerted action, concurrent tortfeasors were tried separately. Thus, the jury could apportion the damages to the portion of the injury the defendant caused. More liberal American rules allowed joinder of concurrent tortfeasors, and this meant that "a verdict for one sum [was] returned against all those found liable, without regard to the fact that the juries in separate actions would not be so bound." *Prosser, supra* note 19, at 420.

35. 20 Cal. 3d at 586, 578 P.2d at 904, 146 Cal. Rptr. at 187.

36. HARPER AND JAMES, *supra* note 19, at 702.

non-existent or at least unaccepted. When judges were confronted with the issue of who should bear the burden of the damages caused by an insolvent tortfeasor, they had no means to apportion the loss. Therefore, if the choice was between the totally innocent plaintiff and the culpable solvent defendant, the answer was easy: the culpable defendant should bear the burden and pay the whole judgment. This view is expressed in a leading California case supporting the doctrine:

> Even though persons are not acting in concert, if the result(s) produced by their acts are indivisible, each person is held liable for the whole . . . . The reason for imposing liability on each for the entire consequence is that there exists no basis for dividing damages and the law is loath to permit an innocent plaintiff to suffer as against a wrongdoing defendant.[37]

B. Contribution

Contribution is a method of allocating the loss among concurrent tortfeasors. Since the doctrine of joint and several liability will make each of them liable for the entire judgment, the one who satisfies the entire judgement or a disproportionate share may seek contribution against the others. It is often stated that there was no common law right to contribution.[38] However, this statement is not historically accurate. The original rule against contribution was stated in a conversion case,[39] and the rationale was that "plaintiff's claim rested upon what was, in the eyes of the law, entirely his own deliberate wrong."[40] Following this case, contribution was sometimes applied in negligence cases in both England and the United States on the grounds that the rule against contribution applied only to intentional torts. It was not until "the door was thrown open to joinder" that the American courts began to apply widely the rule against contribution.[41] Yet, according to Prosser, eight states still allowed contribution in negligence cases without the aid of a statute.[42]

Despite this common law authority for contribution, most states have

37. Finnegan v. Royal Realty Co., 35 Cal. 2d 409, 433-34, 218 P.2d 17, 32 (1950).

38. "Although early common law decisions established the broad rule that a tortfeasor was never entitled to contribution. . . ." American Motorcycle Association v. Superior Court, 20 Cal. 3d 578, 592, 578 P.2d 899, 908, 146 Cal. Rptr. 182, 191 (1978). "At common law there is no right of contribution between persons jointly or severally liable in tort. . . ." 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW 2344 (8th ed. 1979).

39. Merryweather v. Nixan, 8 Term. Rep. 186, 101 Eng. Rep. 1337 (1799).

40. PROSSER, *supra* note 3, at 305.

41. *Id.* at 306.

42. *Id.*; *see* Knell v. Feltman, 85 App. D.C. 22, 174 F.2d 662 (1949); Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23 (1956); Quatray v. Wicker, 178 La. 289 (1933); Bedell v. Reagan, 159 Me. 292, 192 A.2d 24 (1963); Ankeny v. Moffett, 37 Minn. 109, 33 N.W. 320 (1887); Goldman v. Mitchell-Fletcher Co., 292 Pa. 354, 141 A. 231 (1928); Davis v. Broad St. Garage, 19 Tenn. 320, 232 S.W.2d 355 (1950); Ellis v. Chicago and N.W.R. Co., 167 N.W. 1048 (1918).

established contribution by statute.[43] One of the strongest forces in bringing about statutory change was the Uniform Contribution Acts of 1939[44] and 1955.[45] Both of the Acts recommended a pro rata division of the loss: each defendant's share is determined by dividing the number of defendants who have been found liable into the amount of the judgment.[46] Thus each defendant's share was equal, and no attempt was made to apportion liability according to fault. California adopted a contribution statute allowing for pro rata shares,[47] and it was this statute that the court circumvented in *American Motorcycle* by establishing comparative partial indemnity, which allowed the courts to apportion the contribution share according to the fault.[48] If the statute had not stood as a road block, the Supreme Court would not have had to use the common law doctrine of indemnity, which traditionally did not allow any sharing of the liability among tortfeasors, as a vehicle to apportion liability among tortfeasors.[49]

C. Release

Release is simply the "surrender of a cause of action, which may be gratuitous or for inadequate consideration."[50] A problem developed early on because release was confused with satisfaction, which is the

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43. Prosser stated that there were 23 states which had adopted a contribution statute in 1971. PROSSER, *supra* note 3, at 307.

44. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1939).

45. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 63 (1975) (1955 version).

46. One of the major differences between the two uniform acts is the manner in which they treat the settling tortfeasor. Under the 1939 act there was no release granted to the settling tortfeasor who would still be liable for contribution. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT §2 (1939). *See infra* note 144. This provision, because it discouraged settlement, was unpopular and lead to the enactment of the 1955 act which allowed for the full release of the settling tortfeasor as a means of encouraging settlement. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT 4b, 12 U.L.A. 99 (1975).

47. CAL. CIV. PROC. CODE §877(a).

48. American Motorcycle Association v. Superior Court, 20 Cal. 3d 578, 591, 578 P.2d 899, 912, 146 Cal. Rptr. 182, 196 (1978).

> In order to attain such a system, in which liability for an indivisible injury caused by concurrent tortfeasors will be borne by each individual tortfeasor 'indirect proportion to [his] respective fault,' we conclude that the current equitable indemnity rule should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis.

Id. The Supreme Court held that the contribution statute did not prevent modification of the common law doctrine of equitable indemnity because "in enacting the 1957 contribution legislation the Legislature did not intend to prevent the judiciary from expanding the common law equitable indemnity doctrine. . . ." *Id.* at 603, 578 P.2d at 915, 146 Cal. Rptr. at 198.

49. A suit for contribution is brought for the recovery of a proportionate part of the sum paid by the plaintiff, on the ground that the parties were both equally guilty of negligence and should share the cost. . . . A suit for indemnity is brought to recover the total amount of the payment by the plaintiff, on the ground that the plaintiff's conduct was not as blameworthy as the defendant's. . . .

RESTATEMENT (SECOND) OF TORT, §886b comment a.

50. PROSSER, *supra* note 3, at 301.

"acceptance of full compensation for the injury."[51] Courts held that the release of one tortfeasor was the release of all.[52] This problem was circumvented with the development of the "covenant not to sue" which by definition released only the tortfeasor who was a party to the covenant.[53] Ultimately the most sensible approach prevailed: a release of one tortfeasor would not discharge any other tortfeasors. This position was adopted by the Uniform Contribution Act of 1955,[54] by California in 1957[55] and by the Second Restatement.[56]

It is important to note the effect of release on contribution. If a settlement is made in return for a release, the general view is that the released party is free from any further contribution and the amount of the settlement is deducted from the amount of the judgment which the remaining tortfeasors must pay.[57] The Uniform Contribution Among Tortfeasors Act of 1939 took the opposite view, that the released tortfeasor could still be liable for contribution in the amount that his pro rata share exceeds his settlement.[58] Although at least five states accepted this view at one time,[59] it is now widely disfavored. However, as will be discussed below, this position may provide one solution to the problem this article addresses.[60]

II. THE FAIRNESS DOCTRINE: THE CASE FOR MODIFICATION

The fundamental reason for the modification of joint and several liability is that the present system unfairly favors plaintiffs over defend-

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51. *Id.*

52. "Until quite recent years, most of the courts have continued to hold that a release to one of two concurrent tortfeasors is a complete surrender of any cause of action against the other, and a bar to any suit against him, without regard to the sufficiency of the compensation actually received." In California the rule was well settled that the release of one joint tortfeasor discharged them all. *E.g.*, Markwell v. Swift & Co., 126 Cal. App. 2d 245, 272 P.2d 47 (1954); Flynn v. Manson, 19 Cal. App. 400, 126 P. 181 (1912). There were cases which applied this rule to concurrent tortfeasors. *E.g.*, Hadden v. Moran, 104 Cal. App. 2d 777, 232 P.2d 544 (1951); Hawber v. Raley, 92 Cal. App. 701, 268 P. 943 (1928). However, the California cases use the joint liability so loosely ("making no distinction between strict joint tortfeasors and other jointly and severally liable") that one commentator has stated the the Supreme Court had still left "open the question as to concurrent tortfeasors." 4 Witkin, *supra* note 38, at 2336.

53. Holtz v. United Plumbing Co., 49 Cal. 2d 501, 319 P.2d 617 (1957); Kincheloe v. Retail Credit Co., 4 Cal. 2d 21, 46 P.2d 971 (1935); Beck v. Bel Air Properties, 134 Cal. App. 2d 834, 286 P.2d 503 (1955); Abbott v. Goodyear Rubber Co., 116 Cal. App. 665, 3 P.2d 56 (1931).

54. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT §4(a), 12 U.L.A. 98 (1975).

55. CAL. CIV. PROC. CODE §877(a).

56. RESTATEMENT (SECOND) OF TORTS §886A.

57. If it is clear that the satisfaction received was understood to be only partial, it should not discharge the claim against a second tortfeasor. All courts are agreed, however, that it must be credited pro tanto to diminish the amount of damages recoverable against him. . . .

PROSSER, *supra* note 3, at 304-05; accord, CAL. CIV. PROC. CODE §877(a).

58. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT §2 (1939).

59. Delaware, Maryland, New Mexico, Pennsylvania, and Rhode Island. Adams, *Settlements After Li: But Is It Fair*, 10 PAC. L.J. 729, 744, n.104.

60. *See infra* text accompanying notes 147-174.

ants. The fairness principle requires that loss should be apportioned according to the percentage of fault.[61] However, because of joint and several liability, a defendant's liability may be based not on proportional fault but rather on the solvency of codefendants[62] or on the willingness of the plaintiff to settle with another defendant. *Li, American Motorcycle*, and the cases which follow them firmly establish the fairness principle in California tort law. Although none of these cases, except *American Motorcycle* which refused to abolish the doctrine, have discussed changing the law to negate the harsh effect of joint and several liability, these cases form the foundation for the argument that this change must be made.

A. Li v. Yellow Cab Co.

The concept of fairness is the guiding principle of *Li*: fairness is the foundation for comparative negligence, and it plays an important role in the resolution of other issues. When the California Supreme Court established comparative negligence, it used strong language. The court was critical of contributory negligence because "the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault."[63] The court noted that juries often try to correct the unfairness of contributory negligence in the jury room[64] and that this unfairness undermines confidence in the legal system.[65] The court's actual holding is couched in terms of fundamental fairness:

> We are likewise persuaded that logic, practical experience, and fundamental justice counsel against the retention of the doctrine rendering contributory negligence as a complete bar to recovery—and that it should be replaced *in this state by a system under which liability for damages will be borne by those whose negligence caused it in direct proportion to their respective fault*.[66]

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61. *See infra* notes 36-42 and accompanying text.

62. *See* Adler, *Allocation of Responsibility After* American Motorcycle Association v. Superior Court, 6 PEPPERDINE L. REV. 1 (1978).

63. 13 Cal. 3d at 810, 532 P.2d at 1230, 119 Cal. Rptr. at 862. Dean Prosser states the kernel of critical comment in these terms: "It [the rule] places upon one party the entire burden of a loss for which two are, by hypothesis, responsible." PROSSER, *supra* note 3, §67, at 433. Harper and James express the same basic idea:

> [T]here is no justification—in either policy or doctrine—for the rule of contributory negligence, except for the feeling that if one man is to be held liable because of his fault, then the fault of him who seeks to enforce that liability should also be considered. But this notion does not require the all-or-nothing rule, which would exonerate a very negligent defendant for even the slight fault of his victim. The logical corollary of the fault principle would be a rule of comparative or proportional negligence, not the present rule.

2 HARPER AND JAMES, *supra* note 19, §22.3 at 1207; 13 Cal. 3d at 810-11 n.3, 532 P.2d at 1230-31, 119 Cal. Rptr. at 862-63.

64. 13 Cal. 3d at 811, 532 P.2d at 1231, 119 Cal. Rptr. at 863.

65. *Id.* at 812, 532 P.2d at 1231, 119 Cal. Rptr. at 863.

66. *Id.* at 812-13, 532 P.2d at 1232, 119 Cal. Rptr. at 864 (emphasis added).

The court's view that fairness should govern the tort system was so strong that it ignored a century-old interpretation of Civil Code section 1714 which established contributory negligence in California.[67] Moreover, the court chose the pure form of comparative negligence which "apportioned liability in direct proportion to fault in all cases"[68] because the other form "also distorts the very principle it recognizes, i.e., that persons are responsible for their acts to the extent their faults contribute to the injurious results."[69] The court even allows a limited form of retroactivity because of "considerations of fairness. . . ."[70]

B. American Motorcycle

Although the Supreme Court in *American Motorcycle Association v. Superior Court* refused to abolish the doctrine of joint and several liability, this case is a major application of the fairness principle.[71] Because *Li* involved only one plaintiff and one defendant, the court reserved the issue of the application of comparative negligence to cases involving multiple tortfeasors until such a case was actually before the court.[72] *American Motorcycle Association* presented the facts which allowed the court to resolve the issues connected with multiple parties.[73] In *American Motorcycle* a minor received serious injury in a motorcycle race sponsored by the Association. The minor sued the Association which filed an answer and sought to file a cross-complaint against the minor's parents.[74] The Association argued that it should only be responsible for its proportional share of the damages on two grounds: first, that joint and several liability should be abolished and, second, that there should be contribution or indemnity in proportion to fault.[75] Although the Supreme Court refused to abrogate joint and several liability, the Court, in order to further establish the system of tort liability envisioned in *Li* in which liability is allocated in direct proportion to fault,[76] modified its traditional, all-or-nothing aspect of equitable in-

67. California Civil Code section 1714 states in part that:
Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases in defined by the Title on Compensatory Relief.

68. 13 Cal. 3d at 827, 532 P.2d at 1242, 119 Cal. Rptr. at 874.

69. *Id.* at 828. 532 P.2d at 1243, 119 Cal. Rptr. at 875.

70. *Id.* at 830, 532 P.2d at 1244, 119 Cal. Rptr. 876.

71. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182.

72. Justice Sullivan noted that "[p]roblems of contribution and indemnity among joint tortfeasors lurk in the background." 13 Cal. 3d at 823, 532 P.2d at 1240, 119 Cal. Rptr. at 872.

73. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182.

74. *Id.* at 585, 578 P.2d at 903, 146 Cal. Rptr. at 186.

75. *Id.*

76. *Li*, 13 Cal. 3d at 813, 532 P.2d at 1232, 119 Cal. Rptr. at 864.

demnity and established what might be called comparative partial indemnity allowing "a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis."[77]

The Supreme Court made it clear that the reason for establishing comparative partial indemnity was the fairness principle. The Court noted that the courts in general have abandoned traditional grounds for the application of equitable indemnity,[78] basing further applications of the doctrine on the grounds of equity and good conscience.[79] The language of the court leaves no doubt that the principle of fairness is the basis for the court's action:

> [T]he all-or-nothing aspect of the doctrine has precluded courts from reaching a just solution in the great majority of cases in which equity and fairness call for apportionment of loss between wrongdoers in proportion to their relative culpability, rather than the imposition of the entire loss upon one or the other tortfeasor.[80]

The Court not only established comparative partial indemnity, it also circumvented the legislatively mandated contribution statute[81] which limits contribution to those against whom there is a joint judgment[82] and which requires that contribution be made on a pro rata basis.[83] Evidently the court felt comfortable in circumventing this legislation because the statute itself states that "the right of contribution shall be administered in accordance with principles of equity."[84] The Court in-

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77. 20 Cal. 3d at 598, 578 P.2d at 912, 146 Cal. Rptr. at 195.

78. *Id.* at 591-98, 578 P.2d at 907-12, 146 Cal. Rptr. 190-95. The formulations for determining the proper applications of equitable indemnity were vague. Some authorities characterized the negligence on the part of the indemnitor as "active," "primary," or "positive," and the negligence of the indemnitee as "passive," "secondary," or "negative." These formulations were criticized as artificial and "lacking the objective criteria desirable for predictability in the law." *Id.* at 594, 578 P.2d at 909, 146 Cal. Rptr. at 192; *see* Atchison T. & S.F. Ry. Co. v. LanCranco, 267 Cal. App. 2d 881, 886, 73 Cal. Rptr. 660, 664 (1968).

79. Some courts have abandoned the welter of inconsistent standards and have turned to equity:

> The duty to indemnify may arise, and indemnity may be allowed in those fact situations *where in equity and good conscience the burden of the judgment should be shifted from the shoulders of the person seeking indemnity to the one from whom indemnity is sought*. The right depends upon the principle that everyone is responsible for the consequences of his own wrong, and if others have been compelled to pay damages which ought to have been paid by the wrongdoer, they may recover from him. Thus the determination of whether or not indemnity should be allowed must of necessity depend upon the facts of each case.

20 Cal. 3d at 595, 578 P.2d at 909-10, 146 Cal. Rptr. at 192-93 (quoting from Herrero v. Atkinson, 227 Cal. App. 2d 69, 74, 38 Cal. Rptr. 490, 493 (1964).

80. 20 Cal. 3d at 595, 578 P.2d at 910, 146 Cal. Rptr. at 193.

81. CAL. CIV. PROC. CODE §§875-79.

82. *Id.* §875(c). The section provides in part that liability "shall be limited to the excess paid over the pro rata share of the person so paying and in no event shall any tortfeasor be compelled to make contribution beyond his own pro rata share of the entire judgment." *Id.*

83. "Such right of contribution may be enforced only after one tortfeasor has, by payment, discharged the joint judgment or has paid more than his pro rata share thereof." CAL. CIV. PROC. CODE §875(c).

84. *Id.* at §875(b) (quoted in *American Motorcycle*, 20 Cal. 3d at 602, 578 P.2d at 915, 146 Cal. Rptr. at 198).

terpreted this provision to mean that the legislature intended the courts to elaborate on these principles.[85] By this interpretation the Court is placing the principles of equity and fairness in almost a supreme position: not only do these principles justify comparative partial indemnity but they show that the legislature also seeks to embody these principles in the ultimate tort system which results after judicial interpretation.

C. Cases following Li *and* American Motorcycle

The importance attached to the fairness principle by the Supreme Court of California and the courts of appeal, can be seen in the expansion of comparative partial indemnity to situations not discussed in *American Motorcycle*. The first step in this expansion occurred several months after *American Motorcycle*. In *Safeway Stores v. Nest-Kart*,[86] the Supreme Court held that comparative partial indemnity justified the apportionment of damages between a negligent tortfeasor and one who was strictly liable. The court used language which makes clear the reason for applying comparative partial indemnity to this situation: "even when an injury was in part caused by a defective product, fairness and good social policy . . . dictated a sharing or apportionment of liability."[87]

Perhaps the most important expansion of *American Motorcycle* is the application of comparative partial indemnity to a settling tortfeasor. In *Sears, Roebuck, and Co. v. International Harvester Co.*,[88] the court of appeal held that a settling tortfeasor could seek indemnification for a portion of the settlement from a cross-defendant. Comparative indemnity has also been applied to governmental entities,[89] to employees in

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85. 20 Cal. 3d at 603, 578 P.2d at 915, 146 Cal. Rptr. at 198.

86. 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978).

87. *Id.* at 329, 579 P.2d at 444, 146 Cal. Rptr. at 553 (emphasis added). The court proceeded to quote from Ford Motor Co. v. Robert J. Poeschl, Inc., 21 Cal. App. 3d 694, 98 Cal. Rptr. 702 (1971), in which the court expressed discontent with traditional equitable indemnity doctrines which would permit the dealer and leasing agency to escape any liability whatsoever surrounding an accident relating to a defective automobile. The *Poeschl* court noted:

> The dealer and the leasing agency shared Ford's ability to reach the customer before the accident occurred . . . on the assumption that they did nothing, their escape from financial responsibility is troublesome. Judicially favored objective of deterrence and accident prevention would be promoted by imposing some liability on a dealer who knew of a danger and did nothing. To shift the entire loss to him would not serve these objectives, for then the manufacturer would escape scot-free. *A wise rule of law—one designed to stimulate responsibility throughout the merchandising chain—would require both parties to share the loss. A rule of . . . partial indemnification would permit that result.*

21 Cal. 3d at 330, 579 P.2d at 445, 146 Cal. Rptr. at 554.

88. 82 Cal. App. 3d 492, 147 Cal. Rptr. 262 (1978).

89. Wagner v. State of California, 86 Cal. App. 3d 922, 150 Cal. Rptr. 489 (1978) (holding a governmental entity liable for injury caused by a dangerous condition of its property). The court allowed a cross complaint by a defendant against the state seeking contribution in proportion to the state's fault.

workers' compensation cases,[90] and to contractual indemnity.[91]

III. The Concerns of *American Motorcycle Association*

In *American Motorcycle*, the California Supreme Court upheld the doctrine of joint and several liability.[92] The court is forthright and unequivocal on this matter, and indeed, the fact that the court chose to "unpublish" the appellate court decision in *Baget v. Shepard*[93] shows that the court is firm in its resolve to maintain the doctrine. However, the court limits its discussion to the subject of abrogation of the doctrine; no mention is made of the possibility that joint and several liability could be modified to remove the inequity which presently exists. The reasons which justify the court's refusal to abolish joint and several liability are not entirely satisfactory. As one commentator has noted, the court "got lost in a maze of conceptualism. . . ."[94] Even if the court's rationale for not abrogating joint and several liability are valid, they do not justify a refusal to modify the inequitable effect of the doctrine.

This failure to discuss modification can, of course, be attributed to the failure of counsel to seek modification. However, a more plausible explanation is that the court of appeal chose to abolish the doctrine,[95] and the Supreme Court seems to be reacting to the appellate court. Therefore the appellate court decision in *American Motorcycle* is important background for understanding the view of the Supreme Court and the need for further action on this issue.

A. The Appellate Court Decision

Although the Supreme Court overruled[96] the court of appeal,[97] the goals of the two courts were similar. Both sought to mitigate the harsh effects on defendants imposed by the "limited" forms of contribution

90. Associated Const. & Eng'r Co. v. Workers' Compensation, 22 Cal. 3d 829, 587 P.2d 684, 150 Cal. Rptr. 888 (1978) (held that a concurrently negligent employer was entitled to a credit against workers' compensation obligations to the extent which exceeds the proportional liability that the employer would incur for indemnification of a third party tort-feasor under a comparative system of tort responsibility allocated among multiple wrongdoers); *accord* Aceves v. Regal Pale Brew. Co., 24 Cal. 3d 502, 595 P.2d 619, 156 Cal. Rptr. 41 (1979).

91. Kramer v. Cedu Foundation, Inc., 93 Cal. App. 3d 1, 155 Cal. Rptr. 552 (1979) (indemnity may arise by virtue of express contractural language and such a right may also be found in equitable considerations brought into play by constructual language not expressly dealing with indemnification or by the equities involved in a particular case).

92. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

93. Baget v. Shepard, 128 Cal. App. 3d 433 (1982) (unpublished opinion, *see supra* note 12).

94. Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Association v. Superior Court*, 30 Hast. L.J. 1464, 1484 (1979).

95. 65 Cal. App. 3d 694, 135 Cal. Rptr. 497 (1977).

96. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182.

97. 65 Cal. App. 3d 694, 135 Cal. Rptr. 497.

provided by the contribution statute[98] and the doctrine of equitable indemnity.[99] The statutory right to contribution awards contribution only when there is a joint judgment[100] and apportions the award on a pro rata basis without regard to the proportional amount of fault.[101] The "complex system of equitable indemnity" provides recovery only on an all-or-nothing basis.[102]

In its desire to remedy the inequity facing defendants, the court of appeal, like the Supreme Court, was very much influenced by *Li v. Yellow Cab*; however, the court of appeal chose a different vehicle to right the wrong. The court of appeal applied the fairness principle of *Li* directly to the doctrine of joint and several liability. If the fairness principle of *Li* dictates that the all-or-nothing aspect of contributory negligence should be abolished, then so should the all-or-nothing effect of joint and several liability. If the fairness principle requires that the harsh results of contributory negligence be abolished, then so should the harsh results of joint and several liability. If a plaintiff who is at fault should only be liable in proportion to his fault, then the same should be true for defendants.[103]

The court of appeal added another argument in favor of abrogating joint and several liability. The court argued that the purpose of the tort system was to shift the burden of loss from plaintiff to a social fund made up of taxes and insurance. *Li* shifted the loss of a negligent plaintiff to this fund. Since this social fund was already overburdened, the fairness principle which was the basis for the shift should also be used to unburden the fund. Plaintiff should also bear part of the burden of an insolvent or settling tortfeasor.[104]

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98. CAL. CIV. PROC. CODE §§875, 876. Although dissatisfied with the present statutes, the court of appeal stated that the "intrusion upon the fundamental principle of separation of powers is one that should not be undertaken if it [could] be avoided." 65 Cal. App. 3d at 705, 135 Cal. Rptr. at 504.

99. [T]he equitable indemnity doctrine originated in the common sense proposition that when two individuals are responsible for a loss, but one is more culpable than the other, it is only fair that the more culpable party should bear a greater share of the loss. Of course, at the time the doctrine developed, the common law precepts precluded any attempt to ascertain comparative fault; and as a consequence equitable indemnity, like contributory negligence, developed as an all-or-nothing proposition.

20 Cal. 3d at 593, 578 P.2d at 908-09, 146 Cal. Rptr. at 191-92; *see* City & County of S.F. v. Ho Sing, 51 Cal. 2d 127, 330 P.2d 802 (1958) (first application of equitable indemnity by the California Supreme Court).

100. California Code of Civil Procedure section §75(c) states: "Where a money judgment has been rendered jointly against two or more defendants in a tort action there shall be a right of contribution among them as hereinafter provided."

101. *See supra* note 60.

102. *See supra* note 99.

103. "In a system where liability of several defendants concurrently causing an injury is based upon fault, the conclusion is equally irresistible that the extent of the fault of each should govern the extent of liability of each." 65 Cal. App. 3d at 701, 135 Cal. Rptr. at 501.

104. 65 Cal. App. 3d at 703, 135 Cal. Rptr. at 502. The court pointed out that the plaintiff

B. The Supreme Court

The Supreme Court's emphatic refusal to abrogate the doctrine of joint and several liability can perhaps be attributed to its reaction to the approach of the court of appeal. The Supreme Court succeeds in partially providing a solution to the inequity suffered by defendants. By establishing comparative partial indemnity, the Court has modified the system so that many defendants will only be liable in proportion to fault.[105] However, this solution, without modification of joint and several liability, still requires the defendant to bear the burden of an insolvent or settling tortfeasor alone.

The Court presented three arguments in support of its refusal to abolish joint and several liability. First, the plaintiff's injury is indivisible; second, the plaintiff's conduct is not as tortious as defendant's; and third, the present law allows injured persons to receive full recovery.

1. The Indivisibility of the Injury

The first argument is that the injury by the plaintiff is indivisible, therefore, each defendant should potentially bear the burden of the entire loss: "In other words, the mere fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant does not in anyway suggest that each defendant's negligence is not the proximate cause of the entire indivisible injury."[106]

This argument is, of course, contrary to *Li*. As Justice Clark pointed out in his dissent, "plaintiff's negligence is also the proximate cause of the entire indivisible injury,"[107] but this did not prevent the *Li* court from repudiating the all-or-nothing solution. Indeed, it is only because the injury is indivisible that liability can be apportioned between plaintiff and defendant as required in *Li*. If the injury were divisible, the only sensible way to apportion damages would be according to who caused each portion of the injury.

The better view would be that since the injury is truly indivisible, a culpable plaintiff and defendant should share the burden of plaintiff's injury. After all, the plaintiff is also the proximate cause of a single indivisible injury.

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would still be better off financially than he would have been prior to *Li*. The plaintiff will still recover something, the only variable would be the proportion of the total damages.

105. 20 Cal. 3d at 604, 578 P.2d at 915-16, 146 Cal. Rptr. at 198-99. After a lengthy analysis of the 1957 contribution statute the court determined that it was intended to lessen the harshness of the former common law no-contribution rule. Finding nothing in the legislative history of the statute indicating an attempt to foreclose future judicial development of the statute's purpose, the court held that the common law equitable indemnity doctrine should be modified to permit partial indemnity among concurrent tortfeasors on a comparative fault basis. *Id.*

106. 20 Cal. 3d at 589, 578 P.2d at 905, 146 Cal. Rptr. at 188.

107. *Id.* at 611, 578 P.2d at 920, 146 Cal. Rptr. at 203.

Although this argument is used to support the continued existence of joint and several liability, it is a better argument for modification of the doctrine. If the indivisibility of the injury allows apportionment of the loss between the culpable plaintiff and defendant, then the portion of the loss which is unsatisfied because of the settlement or insolvency of one tortfeasor should also be apportioned. The indivisibility of the injury should not be used for plaintiffs in *Li* and against defendants when it comes to the subject of modifying joint and several liability.

2. The Culpability of Plaintiff

As Justice Clark noted in his dissent, the second justification for joint and several liability offered by the majority is really a two-fold argument dealing with the culpability of the plaintiff.[108] The first part of this argument is that, although *Li* stated that parties should be liable in proportion to fault, not all plaintiffs are culpable. While it is undoubtedly true that not all plaintiffs will be found to be culpable, this argument serves only to justify the rule of entire liability when applied to situations involving a completely innocent plaintiff. However, since it is of course possible to have one rule for innocent plaintiff and one rule for culpable plaintiff, this argument actually favors modification of the current law which allows both culpable and innocent plaintiffs alike to use joint and several liability to the detriment of defendants.

In order to justify applying joint and several liability when the *plaintiff* is also at fault, the Supreme Court makes a second argument based on the *plaintiff*'s conduct. The Court states that the culpability of the plaintiff is not "equivalent to that of a defendant."[109] The degree of plaintiff's culpability is less because plaintiff has only violated a duty to protect himself, whereas defendant has violated a duty to prevent harm to others. The Court argues that since the degree of culpability is less, the rule of entire liability should be maintained.

There are several things wrong with this point of view. To begin, quite often a plaintiff in injuring himself will have created a tremendous risk of harm to others. Moreover, the scope of plaintiff's duty is irrelevant. The Supreme Court itself in *American Motorcycle* pointed out that the guiding principle is that "a tortfeasor is liable for any injury of which his negligence is a proximate cause."[110] It makes no dif-

108. *Id.* at 611, 578 P.2d at 920-21, 146 Cal. Rptr. at 203.

109. *Id.* at 589, 578 P.2d at 906, 146 Cal. Rptr. at 189. Reduced to its simplest terms, the argument is that the conduct of the defendant is tortious, while the plaintiff's is not. *See* PROSSER, *supra* note 3, §65, at 418.

110. 20 Cal. 3d at 587, 578 P.2d at 904, 146 Cal. Rptr. at 187.

ference if plaintiff had a duty only to himself; it is enough that the breach of the duty to himself caused this injury.

Finally, the language of the court makes it sound as if the court holds the view that tort liability is based on the moral wrongfulness of defendant's conduct. The court goes so far as to say that "the fact remains that insofar as the plaintiff's conduct creates only a risk of self-injury, such conduct, unlike that of a negligent defendant, is not tortious."[111] The only reason the conduct is not tortious is that plaintiff has not "wronged" anyone else. However, a more acceptable view of tort law is that liability exists, not because of moral wrong, but because someone's conduct is such that this person should pay for the damages the conduct causes. In *Li*, the Supreme Court held that plaintiff, in effect, did have to pay for injuries which he caused to himself. Regarding the injury which plaintiff has caused himself, the plaintiff is not culpable to a lesser degree or order, his culpability is exactly the same as defendant's.[112]

3. Full Recovery for the Plaintiff

The Court's final justification for joint and several liability is that "it frequently permits an injured person to obtain full recovery for his injuries even when one or more of the responsible parties do not have the financial resources to cover their liability."[113] This position is laudable; our tort system must take care of those who are injured. However, fairness will often be violated in such a system which may make a tortfeasor of relatively incidental fault pay the damages to a plaintiff who is significantly at fault. Even with the laudable motive of taking care of the injured, such a result is blatantly pro-plaintiff and only tenable because it is assumed that defendant has insurance or in some other way may be considered to have deep pockets. Does it seem proper for a private individual to bankrupt himself or herself to cover injuries for which the plaintiff was more responsible?

To some degree the court must reach this harsh result because its discussion is limited to the subject of abrogation; it does not examine the possibility of modifying the inequitable effect of joint and several liability. However, there are other ways for society to fairly shift the burden of loss. While it is true that the total abolition of joint and several liability would shift the entire burden of an insolvent defendant to the plaintiff, there are methods by which the risk can be apportioned

111. *Id.* at 589-90, 578 P.2d at 906, 146 Cal. Rptr. at 189.
112. Fleming, *supra* note 94.
113. 20 Cal. 3d at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189.

between plaintiff and solvent defendant fairly.[114]

4. The Unstated Reason

Perhaps the real reason for the court's decision is unstated, for there is another justification for the court's refusal to abolish joint and several liability. This reason is succinctly stated by Professor Fleming:

> That rule is justified not by a one-sided preference for plaintiffs, but by the very principle of evenhandedness between plaintiffs and defendants enunciated in *Li*. It should therefore appeal to plaintiffs' and defendants' bar alike on the grounds of fairness: the "several" rule of the court of appeal in *American Motorcycle* is unfairly skewed against plaintiffs, whereas the supreme court's opinion carries the seeds of unfairness for defendants.[115]

The Supreme Court was confronted by a dilemma in determining the fate of joint and several liability. The real issue was who should bear the burden of the damages which are unsatisfied because one tortfeasor was insolvent or had settled for an amount less than his portion of the fault would justify his paying. If the court upheld joint and several liability, the defendant would bear the burden exclusively. If the court abrogated the doctrine, the plaintiff would bear the burden. As between plaintiff and defendant, the court chose the defendant, who at least, is always culpable to bear the burden. Therefore, joint and several liability was upheld.

The dilemma can be avoided entirely if the choice is not between the continued existence or abrogation of joint and several liability. If the issue is whether or not the doctrine should be modified so that plaintiff and defendant equally bear the burden of the unsatisfied damages, the answer is plain. The fairness principle of *Li* dictates modification.

IV. OTHER STATES

Although the Supreme Court chose not to abolish joint and several liability for the reasons stated above, the court seemed to take heart from the inability of the American Motorcycle Association to cite authority in support of abrogation of the doctrine: "AMA has not cited a single judicial author to support its contention that the advent of comparative negligence rationally compels the demise of the joint and several liability rule."[116] The Court also points out that the "over-

114. *See infra* note 173.

115. Fleming, *supra* note 94.

116. 20 Cal. 3d at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189 (accordingly the court held that a concurrent tortfeasor remained liable for the total amount of damage, diminished only proportionally to the degree of negligence attributable to the person recovering).

whelming majority of jurisdictions which have adopted comparative negligence have retained the joint and several liability doctrine"[117] and cites a number of cases which refuse to abolish joint and several liability.[118]

While the court is certainly correct in its view that the great weight of case authority is against the abrogation of the doctrine, the same cannot be said regarding the subject of modification. None of the cases cited by the Supreme Court fully deal with modification; only one mentions it. These cases, therefore, have dubious precedential value regarding modification. Moreover, a number of states have legislated either modification or abrogation.

A. The Cases Against the Abrogation of Joint and Several Liability

1. Those Cited by the Supreme Court

The Supreme Court in *American Motorcycle* cited five cases to illustrate the proposition that all courts which have considered the matter have refused to abrogate joint and several liability.[119] The court's use of these cases makes an interesting study in its own right. One of these strongly upholds the doctrine but does not discuss the subject of abrogation with anything near the thoroughness of the court in *American Motorcycle*. One of them indirectly upholds the doctrine against a challenge based upon comparative negligence. Another upholds joint and several liability but no mention is made of comparative negligence. And two of them, while upholding the doctrine of joint and several liability, actually modify it.

Kelly v. Long Island Lighting Co.[120] is the only case which lends strong support for the position of the Supreme Court in *American Motorcycle*. *Kelly* followed *Dole v. Dow Chemical Co.*, the New York case which allowed the apportionment of damages among contributing tortfeasors according to proportional fault.[121] In *Kelly*, the New York Court of Appeal stated:

> It should, of course, be understood that this refinement of the rule of contribution does not apply to or change the plaintiff's right to re-

117. *Id.*

118. Gazaway v. Nicholson, 190 Ga. 345, 9 S.E.2d 154 (1940); Saucier v. Walker, 203 So. 2d 299 (Miss. 1967); Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972); Chille v. Howell, 34 Wis. 2d 491, 149 N.W.2d 600 (1967); Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721 (1934).

119. *See supra* note 118.

120. 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851.

121. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). Damages were apportioned among the joint or concurrent tortfeasors regardless of the degree or nature of the concurring fault. The court in *Kelly* stated that "[w]e believe the new rule of apportionment to be pragmatically sound, as well as realistically fair." 31 N.Y.2d at 29, 286 N.E.2d at 243, 334 N.Y.S.2d at 854.

> cover against any joint tort-feasor in a separate or common action the total amount of his damages suffered and not compensated. We are only concerned here with the right of contribution between two or more joint or concurrent tort-feasors.[122]

This statement is all that is said in *Kelly* regarding joint liability, and even it seems to be made in passing. It is almost as if the court of appeal is not responding to arguments of counsel but rather merely clearing up a question which might occur in the minds of future readers.

Gazaway v. Nicholson, a Georgia case, also stands for the proposition that adoption of the comparative negligence doctrine does not require the abrogation of the rule which requires a joint verdict against jointly negligent tortfeasors.[123] However, in *Gazaway*, the primary concern of the court was the application of comparative negligence to multi-defendant cases.[124] As to joint and several liability, the Georgia Supreme Court added that "the mere fact that the same formula might produce results which vary to some extent as to the individual defendants [depending on whether defendants were sued jointly or separately] would not within itself authorize the conclusion that the comparative-negligence rule operated to change the common law rule as to joint verdicts."[125] This ruling upholds joint and several liability in the sense that there can be no joint and several liability unless there is a joint verdict.

While *Saucier v. Walker*[126] does stand for the principle that "there must be one verdict and that must be in one amount and against all the joint tort-feasors found liable,"[127] there is no mention of the existence of comparative negligence as the basis for a challenge to joint and several liability. It is true that comparative negligence was the law of Mississippi at the time *Saucier* was decided, and this case does include the following quotation: "It is the settled law of this state that there can be

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122. 31 N.Y.2d at 30, 286 N.E.2d at 243, 334 N.Y.S.2d at 855.

123. 190 Ga. 345, 9 S.E.2d 154. An action was brought on the behalf of a seven year old boy, who was struck by an automobile after exiting a school bus, against the driver of the automobile which hit him, the driver of the school bus, and the owner of the bus. The defendants were sued as joint tortfeasors.

124. It may be true that in such case the rule as to comparative negligence cannot in every instance be applied in favor of each separate defendant to the same extent as if one party only had been sued, the argument here being that in the former case the plaintiff's negligence must be compared with the combined negligence of all the defendants considered as a unit, whereas in the latter case, only the one and sole defendant can be treated as the unit of comparison.

190 Ga. at 348, 9 S.E.2d at 156.

125. 190 Ga. at 348, 9 S.E.2d at 156.

126. 203 So. 2d 299 (Miss. 1967).

127. *Id.* at 302-03.

no apportionment of damages against a joint tort-feasor. . . ."[128] Yet, this quotation is merely used as grounds to construe an ambiguous jury verdict.[129]

The last two cases cited in *American Motorcycle, Walker v. Kroger*[130] and *Chille v. Howell*,[131] are related in that *Chille* follows *Walker*. They both stand for the proposition that the comparative negligence doctrine does not require the demise of joint and several liability.[132] However, the practical effect of the form of comparative negligence which existed in Wisconsin at that time was to modify joint and several liability. Wisconsin followed the form of comparative negligence which barred the plaintiff from recovery where his negligence was "as great as" the defendant's.[133] Therefore, if the plaintiff's negligence was greater than one tortfeasor's, then there was no recovery whatsoever from that tortfeasor: "If such contributory negligence was as great as the negligence of one of the tort-feasors against whom recovery is sought, then as to that particular tort-feasor there still is no right to recover."[134] This position, established in *Walker*, was later reaffirmed in *Chille*,[135] and it solves one of the injustices which results from joint and several liability. A defendant who is less liable than the plaintiff should not have to pay the damages caused by all the defendants.

2. *Cases Not Cited in* American Motorcycle

There are additional cases which refuse to abolish the doctrine of joint and several liability despite the existence of comparative negligence. *Lincenberg v. Issen*[136] is the Florida equivalent of *American Motorcycle*: the Florida Supreme Court had adopted comparative negligence in *Hoffman v. Jones*,[137] and *Lincenberg* was the court's first opportunity to apply the comparative approach to multiple tortfeasors.

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128. *Id.* (citing Southland Broadcasting Co. v. Tracy, 210 Miss. 836, 850, 50 So. 2d 572, 577 (1951)).

129. In *Saucier*, the jury returned a verdict which was unclear as to whether three defendants were to pay $5000 each, for a total of $15,000, or $5,000 together. The court used the quotation above as a basis for holding that the verdict was for $5,000 against all three defendants as joint tortfeasors.

130. 214 Wis. 519, 252 N.W. 721 (1934).

131. 34 Wis. 2d 491, 149 N.W.2d 600 (1967).

132. This holding was reaffirmed in Fitzgerald v. Badger State Mutual Casualty Co., 67 Wis. 2d 321, 227 N.W.2d 444 (1975).

133. WIS. STAT. §331.045 (1931) provided in part that, in connection with contributory negligence, the negligence of the plaintiff would not bar recovery "if such negligence was not as great as the negligence of the person against whom recovery is sought" and that "any damages allowed shall be diminished by the jury in the proportion to the amount of negligence attributable to the person recovering." *Id.*

134. 214 Wis. at 536, 252 N.W. at 727-28.

135. 34 Wis. 2d at 500, 149 N.W.2d at 604.

136. 318 So. 2d 386 (Fla. 1975).

137. 280 So. 2d 431 (Fla. 1973).

The court held that it was bound by the legislature's recent adoption of the Uniform Contribution Among Joint Tortfeasors Act.[138] The court held that the will of the legislature should prevail; since the statute act expressly provided for the continued existence of joint and several liability, then this doctrine should continue to be the law of Florida. It should be noted that the court also declined to apportion contribution among tortfeasors according to fault because the statute expressly provides for pro rata contribution.[139]

In Colorado, one appellate court has held with little discussion that the Colorado rule of joint and several liability and the rule of no contribution among tortfeasors should continue to be the law. Although the court noted the existence of *American Motorcycle*, there was little discussion of it: the court simply noted that such a change "is not within the province of this court."[140] However, there is a vigorous dissent supporting both contribution based upon proportional fault[141] and the abrogation of joint and several liability.[142]

In *Arctic Structures, Inc. v. Wedmore*, the Supreme Court of Alaska refused to abandon the doctrine despite recognizing that it places the entire burden of an insolvent defendant on those defendants who can pay.[143] The court reasoned that even the Uniform Comparative Fault Act only suggested modification of the doctrine[144] and that the two

138. During the pendency of the appeal, the Florida Legislature passed FLA. STAT. §768.31 (1975), which was signed into law by the governor on June 13, 1975. The Florida statute was an adoption of the UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 63 (1975) (1955 version).

139. 318 So. 2d at 394. "The negligence attributed to the defendants will then be apportioned on a pro rata basis without considering relative degrees of fault although the multi-party defendants will remain jointly and severally liable for the entire amount." *Id.*

140. Stefanich v. Martinez, 570 P.2d 554 (Colo. App. 1977).

141. 570 P.2d at 555.

142. *Id.* at 555-57.

143. 605 P.2d 426, 432 (Alaska 1979).

144. UNIF. COMPARATIVE FAULT ACT §2, 12 U.L.A. 33, 38 (Supp. 1982) (Commissioners' Comment: *Joint and Several Liability and Equitable Shares of the Obligation*). The common law rule of joint-and-several liability of joint tortfeasors continues to apply under this Act. This is true whether the claimant was contributorily negligent or not. The plaintiff can recover the total amount of his judgment against any defendant who is liable.

The judgment for each claimant also sets forth, however, the equitable share of the total obligation to the claimant for each party, based on his established percentage of fault. This indicates the amount that each party should eventually be responsible for as a result of the rules of contribution. Stated in the judgment itself, it makes the information available to the parties and will normally be a basis for contribution without the need for a court order arising from motion or separate action.

Reallocation. Reallocation of the equitable share of the obligation of a party takes place when his share is uncollectible.

Reallocation takes place among all parties at fault. This includes a claimant who is contributorily at fault. It avoids the unfairness both of the common law rule at joint-and-several liability, which would cast the total risk of uncollectibility upon the solvent defendants, and of a rule abolishing joint-and-several liability, which would cast the total risk of uncollectibility upon the claimant." *Id.* The suggested modification of the Act is discussed *infra* note 173 and accompanying text.

other important jurisdictions—Florida in *Lincenberg* and California in *American Motorcycle*—which had considered this issue rejected any change in the doctrine.[145] The court concludes that the doctrine should not be "modified."[146] Although the term "modified" is used and there is mention of the suggested approach of the Uniform Comparative Fault Act, the bulk of the court's discussion deals with the subject of abrogation.

Although most of the cases discussed above—both those cited in *American Motorcycle* and those which are not—have some precedential value in support of the continued existence of joint and several liability, none of them, except *Arctic Structures*, even mention modification. None of them fully discuss the possibility of modification, much less attempt to come to grips with the problem of the settling or insolvent tortfeasor. Even *Walker* and *Chille* which do in effect modify the doctrine of joint and several liability, merely state a conclusion without real discussion. Failure to abolish a law does not mean it should not be modified; indeed, when someone is arguing abolition and the courts are resisting, perhaps modification is the moderate step which should be taken.

B. States Abolishing or Modifying Joint and Several Liability

Although the thrust of this article is not to advocate the abolition of joint and several liability, it should be noted that several jurisdictions have abolished the doctrine as being incompatible with comparative negligence. The court in *American Motorcycle* implies that it knew of these cases when it stated that "the overwhelming majority of jurisdictions which have adopted comparative negligence have retained the joint and several liability doctrine."[147] However, the tone of the court is such that it seems to be saying that no rational mind which has considered this issue has ever found any contradiction between the doctrine of joint and several liability and the fairness principle which lies behind comparative negligence.[148]

Three states—Vermont, Kansas, and New Hampshire—have abolished joint and several liability using similar statutory language:

> Where recovery is allowed against more than one defendant each

145. 605 P.2d at 432-35.

146. 605 P.2d at 435.

> In light of Alaska's existing pro rata legislative scheme for apportionment or damages among joint tortfeasors and the public policies implemented by the legislation, we hold that the common law rule of joint and several liability should not be judicially modified.

Id. [footnotes omitted]; *see* State v. Guinn, 555 P.2d 530, 547 n.42 (Alaska 1976) (recognizing that judicial adoption of the doctrine of comparative negligence will require legislative amendment).

147. 20 Cal. 3d at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189.

148. *See supra* note 116 and accompanying text.

> defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributable to all the defendants against whom recovery is allowed.[149]

In Kansas, this language was challenged on the grounds that, since the term "joint and several liability" was not mentioned, the statute did not really abolish the doctrine. The Supreme Court of Kansas met this challenge with the unequivocal statement that

> [U]nder the provisions of K.S.A. 60-258a the concept of joint and several liability between joint tort-feasors previously existing in this state no longer applies in comparative negligence actions. The individual liability of each defendant for payment of damages will be based on proportionate fault, and among joint judgment debtors is no longer required in such cases.[150]

Several states have modified the doctrine of joint and several liability. Texas has limited the doctrine by a statute which states that a defendant who is less liable than the plaintiff will only be liable for his proportional share.[151] This modification has been held by the courts to apply only to situations in which the defendants have all been negligent and not to situations in which one defendant was strictly liable.[152] Nevada has adopted an approach similar to that of Texas,[153] although it is interesting to note that prior to 1979 the Nevada comparative negligence statute took an even stronger position, holding that multiple defendants were severally liable.[154] Finally, Minnesota has adopted the Uniform Comparative Fault Act with its provisions for sharing the burdens of the settling or insolvent tortfeasor between culpable plaintiff and the other defendants.[155]

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149. VT. STAT. ANN. tit. 12, §1036 (1973); N.H. REV. STAT. ANN. §507:7-a (1977); KAN. STAT. ANN. §60-258b (1976) (substantially identical to the quoted language).

150. Brown v. Keill, 224 Kan. 195, 204, 580 P.2d 867, 875 (1978); *accord*, Wilson v. Probst, 224 Kan. 459, 581 P.2d 380 (1978).

151. TEX. REV. CIV. STAT. ANN. art. 2212a, §2(c) (Vernon 1982-83) provides that:
> Each defendant is jointly and severally liable for the entire amount of the judgment awarded the claimant, except that defendant whose negligence is less than that of the claimant is liable to the claimant only for that portion of the judgment which represents the percentage of the negligence attributable to him.

152. Lubbock Mfg. Co. v. Perez, 591 S.W.2d 907 (Tex. Civ. App. 1979) Pyramid Derrick and Equip. Co. v. Mason, 617 S.W.2d 727 (Tex. Civ. App. 1981).

153. NEV. REV. STAT. §41.141.

154. 1979 NEV. STAT. c. 629, § 6, at 1356-57 stated in part that:
> Where recovery is allowed against more than one defendant in such an action:
> (a) The defendants are severally liable to the plaintiff.
> (b) Each defendant's liability shall be in proportion to his negligence as determined by the jury, or judge if there is no jury. The jury or judge shall apportion the recoverable damages among the defendants in accordance with the negligence determined.

155. MINN. STAT. ANN. §604.02(a) provides in part that:
> Upon motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party and shall reallocate any uncollectible amount among the other par-

V. The Methods of Modification: The Uniform Comparative Fault Act

The fairness principle requires that loss should be apportioned according to the percentage of fault.[156] Because of the changes which have been made in the law in *Li* and *American Motorcycle*, this principal is very much embodied in California tort law.[157] However, because of the existence of joint and several liability, the embodiment of this is not complete. Defendants still unfairly bear the burden of that portion of the loss attributable to settling tortfeasors beyond the amount of their settlements or to insolvent tortfeasors.

Those arguments which were used in *American Motorcycle* to justify the continued existence of the doctrine of joint and several liability do not negate the argument that the inequitable effects of the doctrine should be modified. Indeed, some of the reasons given in *American Motorcycle* against abolition actually favor modification. Moreover, as demonstrated in the previous section, a number of jurisdictions have seen fit to change the law in this area because of the fairness principle. And, in this section which deals primarily with the form that modification should take, it will be apparent that there is additional persuasive authority in support of modification.

Whatever new form the law takes, it must fairly apportion the burden of the unsatisfied portion of the loss between the defendants and the culpable plaintiff. If this is not entirely possible, the law must find other trade-offs which help to balance any inequity which remains. Fortunately, suggestions for new approaches which more fully embody the fairness principle have been made, and if the Supreme Court of California was unimpressed by the persuasive authority in favor of abolishing joint and several liability, the reverse should be true here. These suggestions have been made by the commissioners of the National Conference of Commissioners on Uniform Laws and notable

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ties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

156. *See supra* note 66 and accompanying text.

157. The current status of the law of comparative fault in California may be summarized as follows: (1) the doctrine of comparative fault will be applied to a single plaintiff-single defendant situation, including products liability cases; (2) comparative fault principles will be utilized to ascertain percentages of fault in situations involving multiple tortfeasors; (3) equitable indemnity will in fact provide proportionate contribution between or among multiple defendants; (4) named defendants may file a cross-complaint against unnamed potential defendants for partial indemnity; (5) the concept of joint and several liability has been retained; and (6) good faith settlements will be given *pro tanto* or dollar-for-dollar effect. It is unfortunate that some of these rules fail to carry out the "fairness" principle of *Li*.

Adams, *Settlements After Li: But Is It "Fair"?* 10 Pac. L.J. 729, 742-43 (1979).

scholars[158] in the form of the Uniform Comparative Fault Act[159] which proposed changes in the tort system resolving the problems of both the insolvent and the settling tortfeasors.

A. The Problem of the Insolvent Tortfeasor

The Uniform Comparative Fault Act corrects the problem of insolvency by having the culpable plaintiff and the solvent tortfeasors share the burden of the damages which would be apportioned to the insolvent tortfeasor. Section 2(d) of the Uniform Comparative Fault Act states as follows:

> Upon motion made not later than [one year] after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to claimant on the judgment.[160]

In practice, the statute would work something like this. Assume there is a judgment of $100,000 and the relative fault of the parties is as follows:

Plaintiff =20%
Defendant A=20%
Defendant B=20%
Defendant C=40%

If defendant A was insolvent, any of the other defendants could move for a reallocation of the judgment among the two remaining defendants *and plaintiff*. The liability of A would be apportioned according to the relative fault of the remaining parties. Plaintiff would have to absorb ¼, defendant B ¼, and defendant C ½ of the $20,000 liability of A. $5,000 will be allocated to plaintiff, $5,000 to B, and $10,000 to C. Plaintiff's total recovery will be $75,000. Each one of the defendants may be subject to pay the entire judgment under the doctrine of joint and several liability, but each may seek contribution from the other. There has been an equitable apportionment of the burden of the insolvent tortfeasor.

Since the jury will determine the proportional fault of all the parties, the motion for reallocation can be made at the time of the trial if the insolvency of a defendant is known then or when this insolvency comes

158. *See* Adams, *supra* note 157; Fleming, *supra* note 94.
159. UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 35 (Supp. 1983).
160. *Id.* §2(d), at 37 (Supp. 1982).

to light but not later than one year after the judgment is entered.[161]

The rationale for the reallocation is simple: reallocation requires plaintiff and defendants to share the burden of the loss attributable to an insolvent tortfeasor. In the Comment to the Uniform Comparative Fault Act, the Commissioners make the following statement: "Reallocation . . . avoids the unfairness both of the common law rule at joint-and-several liability, which would cast the total risk of uncollectibility upon the solvent defendants, and a rule abolishing joint-and-several liability which would cast the total risk of uncollectibility upon the claimant."[162]

Moreover, as pointed out by Justice Clark in his dissent in *American Motorcycle*, any other approach besides reallocation will distort the fact finding process. Often the insolvency of one defendant will be known at the trial; this defendant may be absent from the suit entirely or, because of insolvency, unrepresented at trial. Under the present system plaintiff will seek to increase the portion of liability apportioned to the insolvent defendant because plaintiff knows that the solvent defendant will be responsible for the damages attributable to the insolvent one. If joint and several liability was abolished, the opposite would be true: defendant would seek to enlarge the portion of fault attributable to the insolvent defendant knowing plaintiff will be responsible. Reallocation would put an end to this process. There would be no incentive to inflate the liability of the insolvent defendant.[163]

The rule of reallocation may not appeal to members of the plaintiffs' bar because at present plaintiffs can always recover the full amount of the judgment as long as there is one solvent judgment debtor. However, this solution would provide the Supreme Court of California an opportunity to further embue the personal injury system with the fairness principle. In *American Motorcycle*, the court significantly advanced the fairness principle, however, it stopped short when further change meant shifting the entire burden of the uncollectible judgment to the plaintiff. Reallocation is a moderate solution, and it completely embodies the fairness principle.[164]

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161. This concept of reallocation is not new; indeed it has been adopted in some common law jurisdictions. Professor John G. Fleming credits Gregory in C. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS 77-79 (1936), as the originator of reallocation and cites two common law jurisdictions which use some form of reallocation. Republic of Ireland's Civil Liability Act of 1961, 1961 Acts of the Oiregchtas, ch. 41 §38; *cf.* South Africa's Apportionment of Damages Act of 1956, ch. 2, § 8(ii) (redistribution between solvent joint wrongdoers). Flemming, *supra* note 94, at 1492.

162. UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 35, 40 (Supp. 1983) (commissioners' comment to section 2).

163. *American Motorcycle*, 20 Cal. 3d at 614, 578 P.2d at 923, 146 Cal. Rptr. at 206 (Clark, J., dissenting).

164. In establishing the reallocation principle of the Uniform Act it would be possible to ex-

B. The Settling Tortfeasor

At present a non-settling tortfeasor must bear the burden of that portion of loss attributable to a settling tortfeasor which exceeds the amount of the settlement. A release given in return for a settlement will bar any further recovery from the settler. Only the amount of a good faith settlement is deducted from the judgment regardless of the settler's proportional fault.[165] The doctrine of joint and several liability requires that the non-settling defendants pay the entire remainder of the judgment. A plaintiff who settles risks nothing as long as there is another solvent defendant.

The fairness principle requires that liability be apportioned according to fault. There are a number of ways the fairness principle could be applied to remove this burden from the exclusive responsibility of non-settling defendants. However, in this situation, the fairness principle must be balanced against the policy which favors settlement between the parties as the most efficient way to resolve disputes.

1. Shifting Burden to Settler

One possible way to implement the fairness principle is to shift the burden to the settling tortfeasor. The Uniform Contribution Among Tortfeasors Act of 1939[166] took this approach: a settling tortfeasor "remained liable for contribution in the amount by which his share exceeded the dollar value of the settlement."[167]

Although the 1939 Act did not contemplate a comparative fault system, its approach would work, and indeed this approach would best embody the fairness principle. For example, if the judgment was for $100,000 and defendant A, who had settled for $20,000, was 40 percent at fault, defendant B who had satisfied $80,000 of the judgment ($100,000 less the $20,000 settlement) could receive a $20,000 contribution from A. Ultimately both would be liable for the loss in proportion to their fault. If such a system were established today, there would be no injustice created by joint and several liability. A non-settling defendant who had to satisfy the entire judgment would have an action

empt from reallocation those situations in which one defendant would be vicariously liable for the damage caused by another under agency principles. The policies which make a master responsible for the conduct of the servant do not conflict with the fairness principle. The fairness principle is most applicable to situations in which defendants and plaintiffs are all the concurrent cause of plaintiff's injury.

165. 20 Cal. 3d at 602-04, 578 P.2d at 914-16, 146 Cal. Rptr. at 197-99.

166. UNIF. CONTRIBUTION AMONG TORT FEASORS ACT (1939).

167. Fleming, *supra* note 94, at 1494. Three states presently follow this approach: Arkansas, Hawaii, and South Dakota. However, five other states adopted this approach at one time: Delaware, Maryland, New Mexico, Pennsylvania, and Rhode Island. Adams, *supra* note 157, at 744 n.104.

against the settler for the amount of the settler's liability exceeding the settlement.

The problem with this approach is that it discourages settlement. Why should any defendant settle if there is nothing to prevent him from being responsible for the full amount of the judgment that he would have to pay if he did not settle?[168] It would seem that the need to encourage settlements is as great today, especially in terms of overcrowded court calendars, as it was in 1955 when the Commissioner of the Uniform Laws rejected this approach in favor of the present system which provides for complete discharge of the settling tortfeasor and reduces plaintiff's recovery against other defendants by the amount of the settlement.[169]

2. Shifting the Burden to Plaintiff

The approach of the Uniform Comparative Fault Act is to shift the burden of the outstanding portion of the settling tortfeasor's liability to the plaintiff. The Act uses its provisions governing release to shift the burden:

> A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. *However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of Section 2.*[170]

If a $100,000 judgment is apportioned with plaintiff 25% at fault, with defendant A, (who had settled for $5,000) 25% at fault, and with defendant B 50% at fault, plaintiff may recover only $50,000 from B. A is completely discharged, and his or her equitable share of the liability, $25,000, is subtracted from the total amount, $75,000, which plaintiff can recover.

Beyond the fact that this approach is supported by the Commissioners, the rationale for the Uniform Act is appealing even though it does not completely embody the fairness principle. Plaintiff is the master of his or her fate free to settle or not depending upon the value he or she places on the suit. Joint and several liability will still be available to

168. One small benefit might be that the settling defendant would not be jointly liable for the other defendant's share; however, this would hardly provide the encouragement that is now given defendants who know they will suffer no liability beyond the amount of the settlement.

169. UNIF. CONTRIBUTION AMONG TORT FEASORS ACT §4(b), 12 U.L.A. 63, 98 (1975). *See* CAL. CIV. CODE §877(a).

170. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT §6, 12 U.L.A. 35, 44 (Supp. 1983) (emphasis added).

assist plaintiff to recover the loss, and the tortfeasor who is "entirely liable" can seek contribution on a comparative basis against anyone but the settling tortfeasor. Moreover, there is no reason for a collusive settlement. As Professor Fleming has noted, "this self-regulatory incentive is clearly more effective than the requirement of 'good faith' under the current California statute and the Uniform Contribution Act."[171]

However, this form of apportionment does not fulfill the requirements of the fairness doctrine that liability should be apportioned according to fault. Plaintiff will bear a disproportionate share of the loss, and indeed, an innocent plaintiff may have to bear a portion of the loss where now he would not bear any loss. While it is true that plaintiff "has bought his peace,"[172] this approach seems harsh, especially on the innocent plaintiff since it is the innocent plaintiff who is least able to protect against loss.

Plaintiff, knowing that he or she will have no opportunity to recover the entire amount of loss after settlement, will certainly be more reluctant to settle. However, the disincentive to settle is somewhat mitigated under the Uniform Comparative Fault Act since plaintiff will be able to keep any portion of the settlement which is above the actual liability of the settler. Yet, the possibility that plaintiff may lose a portion of damages will insure the opposition of the plaintiffs' bar to any legislated change in the law.

However, taking into account all the policies that are relevant to this subject, the approach of the Uniform Act is better than either the present system or a regression to the 1939 version of the Uniform Contribution Among Tortfeasors Act. The present system encourages settlement, but it flys in the face of the fairness principle. The position of the 1939 Act, if used in a comparative system, would completely embody the fairness principle; however, it would strongly discourage settlement. The Uniform Act balances the two positions in that it maintains the incentive for defendant to settle and it embodies the fairness principle at least to the degree that plaintiff does not have to swallow any more of his own loss than he bargained for.[173]

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171. Fleming, *supra* note 94, at 1496.

172. *Id.* at 1498.

173. It is also possible to modify the present system so that it can embody the fairness principle even more than under the Uniform Comparative Fault Act yet not reduce plaintiff's incentive to settle. the approach would be very similar to that used by the Uniform Act to apportion the liability of an insolvent tortfeasor except there would be no need of the one year waiting period. Since the amount of any settlement is known at the time the judgment is pronounced, the portion of the settling defendants' liability which exceeds the settlement could be apportioned among all parties who are at fault including plaintiff.

For example, assume the proportionate liability was as follows:

VI. CONCLUSION

After *Li* and *American Motorcycle Association*, the California tort system has embodied the principle that plaintiff's loss should be apportioned among all parties, including a culpable plaintiff. However, because of the doctrine of joint and several liability upheld in *American Motorcycle*, the fairness principle does not control situations involving settling or insolvent tortfeasors. In those situations defendants are presently required to satisfy any portion of plaintiff's loss which are outstanding because of insolvency or settlement. The present system can be easily modified so that any unsatisfied loss can be apportioned between a culpable plaintiff and defendants.

Plaintiff =20%
Defendant A=40%
Defendant B=40%

If the judgment was $100,000, defendant A's proportional share would be $40,000. However, if A had settled for $25,000, there would be $15,000 which would fall upon the shoulders of one of the other parties. Because of the doctrine of joint and several liability under present California law, B could be required to pay both his $40,000 and the $15,000 which A avoided by settlement. Under the approach of the Uniform Contribution Act of 1939, B, he satisfied the entire $55,000, could seek contribution from A for $15,000. In contrast, the Uniform Comparative Fault Act would require plaintiff to bear this burden. A would be discharged from all further liability and B would be liable only for his own $40,000.

But the most equitable method of resolving this situation is for the $15,000 to be apportioned between the plaintiff and defendant B. The ratio of B's liability to plaintiff's is two to one. Therefore, defendant B would have to pay for two-thirds of A's proportional liability—$10,000. Defendant B's liability would total $50,000. Plaintiff would have to absorb $5,000 of the loss as the price of settlement. As noted above, this apportionment could be made at trial, since the amount of the settlement is known then.

Of all the methods of solving the problem of the settling tortfeasor this one best embodies the fairness principle while still encouraging settlement. Joint and several liability still exists to assist the plaintiff in recovering judgment, but the inequity created by the doctrine will be greatly lessened. All culpable parties except the settling defendant are liable in proportion to fault. It is possible to establish a system in which a settling defendant would also have to share in the division of the portion of his liability which exceeds the settlement. In the hypo discussed above defendant A would be responsible for 2/5 of the outstanding $15,000 or $6,000, defendant B would also be responsible for 2/5 or $6,000. Plaintiff's share would be 1/5 or $3,000. The disadvantage of this method is that it would discourage settlement. Defendants settle not only to avoid greater liability but also to avoid the costs of defense. If the settling defendant may still be liable for some damages, both plaintiff and the remaining defendant will attempt to increase the settler's liability, and they may be successful since the settler will not be present to defend himself. In this situation a defendant may not want to be absent from trial. The settling defendant is completely discharged only to preserve the incentive to settle.

Both plaintiffs and defendants will be encouraged to settle under this system. Although plaintiffs will not benefit as much as they do under the present system, they will know that they will not be responsible for the entire amount of damages which exceeds the amount of the settlement. Since in most cases plaintiff will be less culpable than remaining defendants, the plaintiff's share will be small. Defendants will want to settle because of the complete discharge which results. Moreover, as each defendant settles, the pressure will be on the remaining defendants to settle since they will be partially responsible for the outstanding portion of the settler's share. Also, the Supreme Court in *American Motorcycle* established that it valued the rationale of favoring the innocent plaintiff over the culpable defendant, 20 Cal. 3d at 589-90, 578 P.2d at 906, 146 Cal. Rptr. at 189, the form of apportionment suggested here embodies this rationale since the innocent plaintiff will not have to bear any portion of the loss attributable to a settling defendant.