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COMPARATIVE FAULT AND SETTLEMENT IN JOIN T O R T F E A S O R CASES: A PLEA FOR PRINCIPLE OVER POLICY

In American Motorcycle v. Superior Court, the California Supreme Court failed to extend the "pure" system of comparative negligence to multiple tortfeasor cases. California's system of comparative negligence remains "pure" only from a plaintiff's point of view. This Comment discusses how liability could, and why liability should, remain in proportion to fault among all parties in any negligence case.

INTRODUCTION

In Li v. Yellow Cab Co., the California Supreme Court replaced the antiquated rule of contributory negligence with the doctrine of comparative negligence. This decision presented numerous collateral issues, the most significant of which concerns cases with multiple parties. Li, however, involved only a single plaintiff and a single defendant, thus enabling the court to conclude that it was "neither necessary nor wise" to address such multiple party questions at that time. The issue became ripe in American Motorcycle Association v. Superior Court.

The first problem facing the court in American Motorcycle was whether to extend the doctrine of comparative negligence to mul-

2. The contributory negligence doctrine totally barred an injured person from recovering damages whenever his own negligence had contributed in any degree to the injury.
3. Under the rule of comparative negligence an injured individual's recovery is proportionately diminished, rather than completely eliminated, when he is partially responsible for the injury. Although Li abolished the legal doctrine of contributory negligence, the phrase or concept of "contributory negligence" is still allowed as a designation of the plaintiff's own degree of fault. Wittenbach v. Ryan, 63 Cal. App. 3d 712, 718, 134 Cal. Rptr. 47, 50 (1976).
5. Id. at 826, 532 P.2d at 1241, 119 Cal. Rptr. at 873.
tiple-defendant cases while upholding the spirit of *Li*, which distributes losses in proportion to fault. The majority of the court in *American Motorcycle*, rather than correcting the present extor-tive contribution system, merely created a second one.8

Second, the court attempted to avoid undermining the strong public policy in favor of encouraging settlement of litigation embodied in section 877 of the Code of Civil Procedure.9 However, *American Motorcycle* fails, in large part, to do this. Additionally, the decision places counsel for insurance defense in an extremely vulnerable position for liability based on bad faith settlement.

This Comment contends that in a “pure”10 comparative negligence system, liability cannot always be in proportion to fault if the policy of encouraging settlement is to be promoted for both plaintiffs and defendants. This Comment suggests that the principle of liability in proportion to fault should control over the mere policy of encouraging settlements whenever the two necessarily conflict. Moreover, consistency and fairness in the administration

7. California legislation empowers a plaintiff, armed with a strong and lucrative claim, to settle with his antagonists one by one, preserving for the jury the opponent with the most money and the least sympathy. In a multi-party case, the threat of an unshared judgment against the last remaining defendant—diminished only by meager settlements with his eager fellows—permits a plaintiff to create acute financial pressures bordering on extortion.


8. The comparative indemnity doctrine created by *American Motorcycle* appears to have replaced contribution as it exists in California statutes because the California Supreme Court extended the comparative fault concepts of *Li* and *American Motorcycle* to actions containing either or both negligent and strictly liable defendants. Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978); Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

9. CAL. CIV. PROC. CODE § 877 (West Supp. 1978) provides:

Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort—

(a) It shall not discharge any such other tortfeasor from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of consideration paid for it whichever is greater; and

(b) It shall discharge the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors.

10. A "pure" form of comparative negligence apportions liability in direct proportion to fault in all cases. The other basic form of comparative negligence apportions fault up to the point at which the plaintiff's negligence is equal to or greater than that of the defendant. When this point is reached, the plaintiff is barred from recovery. In *Li*, the California Supreme Court adopted the "pure" form of comparative negligence. 13 Cal. 3d at 827-29, 532 P.2d at 1242-43, 119 Cal. Rptr. at 874-75.
of a system of liability in proportion to fault require the abolition of the doctrine of joint and several liability.

**American Motorcycle's Repudiation of the Li Principles**

*American Motorcycle* permits a joint tortfeasor who pays all or part of a plaintiff's recovery to assert a cross-complaint against other tortfeasors to obtain contribution from them in proportion to their fault. However, *American Motorcycle* exempts from partial indemnity liability a tortfeasor who has entered into a good faith settlement with the plaintiff. The settling tortfeasor is, nevertheless, assigned a fault percentage even though he is not a party. The plaintiff's damages are then reduced by the dollar amount of the settlement, not by the per-

11. *American Motorcycle* specifically held that, with certain exceptions, the California Civil Procedure Code generally authorizes a defendant to file a cross-complaint against a concurrent tortfeasor for partial indemnity on a comparative fault basis even when the concurrent tortfeasor has not been named a defendant in the original complaint. 20 Cal. 3d at 591, 578 P.2d at 917, 146 Cal. Rptr. at 200.


13. 20 Cal. 3d at 591, 578 P.2d at 907, 146 Cal. Rptr. at 190.

14. The court in *American Motorcycle* recognized that the common-law equitable indemnity doctrine suffered from the same "all-or-nothing" deficiency as the discarded contributory negligence doctrine. Thus, the court concluded that the doctrine should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis. Id. However, by allowing a settling tortfeasor to escape this liability and by requiring the nonsettling tortfeasor to pay the plaintiff the share of damages originally allocated to the settling defendant, the present rule merely shifts the inequities of the "all-or-nothing" rule from the plaintiff to the defendant. See notes 19-26 and accompanying text infra. See also *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d at 616, 578 P.2d at 924, 146 Cal. Rptr. at 207 (Clark, J., dissenting).


The California Supreme Court in *Li* stated that the damages awarded a person shall be diminished in proportion to the amount of negligence attributable to the person recovering. 13 Cal. 3d at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875. In addition to this "negligence percentage" reduction, a judgment may also be reduced by the dollar amount of any settlement received by the plaintiff. The issue left undecided by *American Motorcycle* is whether the percentage reduction is to be made before or after the dollar amount reduction. If the amount of the settlement is
percentage of fault assigned to the settling tortfeasor.\textsuperscript{16} American Motorcycle allows the plaintiff to recover the remainder of his damages from the nonsettling defendant, regardless of his degree of fault, on the theory of joint and several liability.\textsuperscript{17} Simultaneously, American Motorcycle gives this nonsettling defendant the right to bring a bad faith settlement claim against the settling defendant in the initial action.\textsuperscript{18} The undesirable result of American Motorcycle is liability disproportionate to fault, the discouragement of settlement, and the encouragement of bad faith claims.

\textbf{Liability Is Ultimately Not in Proportion to Fault}

\textit{Li} eliminated the doctrine of contributory negligence as a total bar to a plaintiff's cause of action because "it fails to distribute responsibility in proportion to fault."\textsuperscript{19} In many cases, the partial indemnity doctrine created by American Motorcycle will also fail to accomplish this goal.

A tortfeasor who is allowed to avoid implied indemnity liability by settling with the plaintiff\textsuperscript{20} will frustrate the liability in proportion to fault spirit of \textit{Li} if the settlement is lower than the tortfeasor's responsibility for damages based on his degree of fault. The following hypothetical situation illustrates the problem. Assume a plaintiff is ultimately found twenty percent at fault, defendant $D_1$ seventy percent, and defendant $D_2$ ten percent. Thus, the plaintiff is entitled to a judgment of eighty percent deducted first, the plaintiff will receive a higher total recovery because the negligence percentage will then be applied to a smaller sum. See Lemos v. Eichel, 83 Cal. App. 3d 110, 147 Cal. Rptr. 603 (1978). See also Peyrat, Comparative Fault: Principles and Problems Three Years After \textit{Li}, in \textit{CALIFORNIA CONTINUING EDUCATION OF THE BAR, COMPARATIVE NEGLIGENCE PRACTICE I}, 58-62 (1978).

\textsuperscript{16} The relative merits of pro-rata or dollar-amount reduction were not briefed or argued by the parties or by any of the numerous amici in American Motorcycle. Moreover, the overwhelming weight of authority, contrary to American Motorcycle, supports pro-rata reduction rather than settlement amount reduction. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d at 609 n.1, 578 P.2d at 919 n.1, 146 Cal. Rptr. at 202 n.1 (Clark, J., dissenting). See also Uniform Comparative Fault Act, reprinted in Knoll, Comparative Fault: A New Generation in Products Liability, 1977 Ins. L.J. 492 n.1.

\textsuperscript{17} A concurrent tortfeasor whose negligence is a proximate cause of an indivisible injury remains liable for the total amount of damages, diminished only in proportion to the amount of negligence attributable to the person recovering. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d at 590, 578 P.2d at 907, 146 Cal. Rptr. at 189-90. However, American Motorcycle left undecided the question of whether cross-defendants are jointly and severally liable to a plaintiff who did not name them. The Court of Appeal, Second District, in a case decided after American Motorcycle, held that they are. Sears, Roebuck & Co. v. International Harvester Co., 82 Cal. App. 3d 492, 147 Cal. Rptr. 262 (1978).

\textsuperscript{18} 20 Cal. 3d at 605, 578 P.2d at 916, 146 Cal. Rptr. at 199.

\textsuperscript{19} 13 Cal. 3d at 810, 532 P.2d at 1230, 119 Cal. Rptr. at 862.

\textsuperscript{20} See note 14 and accompanying text \textit{supra}.
cent of the loss against either defendant.21 From the outset, $D_1$ knows from discovery he will be liable for a substantial portion of the plaintiff's damages should the case proceed to trial. $D_1$ also realizes that the plaintiff is eager to settle quickly to avoid the long delay incident to trial and is capable of pursuing the co-defendant.22 Thus, $D_1$ will be prompted to offer settlement in a sum substantially below his share of fault. $D_2$, wishing to limit his liability,23 will be required to compete with $D_1$'s offer by offering the plaintiff an amount substantially in excess of his ten-percent share of the loss.24

Hence, the policy of $Li$ is frustrated in three ways. First, that $D_2$ is compelled to offer a sum above his degree of fault is contrary to the liability in proportion to fault principle. Second, if $D_2$'s attempt to settle fails and $D_1$'s offer is successful,25 $D_2$ will ultimately be liable for a large percentage of the loss instead of an amount in accordance with his ten percent of fault.26 Third, $D_2$ is compelled to pay plaintiff damages when the plaintiff himself was more responsible than $D_2$ for his injuries.

21. See note 17 and accompanying text supra.

22. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d at 610, 578 P.2d at 920, 146 Cal. Rptr. at 203 (Clark, J., dissenting). See note 17 and accompanying text supra. See also Comment, Comparative Negligence, Multiple Parties and Settlements, 65 Calif. L. Rev. 1264, 1280 (1977).

23. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d at 610, 578 P.2d at 920, 146 Cal. Rptr. at 203 (Clark J., dissenting). Either defendant could be held severally liable for as much as 80% of the judgment if the other defendant was insolvent, unable to pay for some other reason, or immune from payment. With respect to immunity, see Baxter v. Scottish Rite Temple Ass'n, 86 Cal. App. 3d 492, 150 Cal. Rptr 511 (1978); Arbaugh v. Proctor & Gamble Mfg. Co., 80 Cal. App. 3d 500, 145 Cal. Rptr. 608 (1978).

24. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d at 610, 578 P.2d at 920, 146 Cal. Rptr. at 203 (Clark, J., dissenting). Although the plaintiff could settle with both parties, in practice the plaintiff accepts the best settlement offer and brings an action against the remaining tortfeasors. See also note 7 supra. For a discussion of avoiding responsibility for the fault of others as a motivation for settlement, see Davis, Comparative Negligence, Comparative Contribution, and Equal Protection in the Trial and Settlement of Multiple Defendant Product Cases, 10 Ind. L. Rev. 831, 858 (1977).


26. For a discussion of the practical difficulty of enforcing the good faith requirement in settlements, see Comment, Comparative Negligence, Multiple Parties and Settlements, 65 Calif. L. Rev. 1264, 1268 (1977). See also American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d at 614, 578 P.2d at 922, 146 Cal. Rptr. at 205 (Clark, J., dissenting).
Defendants Are Not Encouraged to Settle

The law strongly discourages litigation and strongly favors compromise of doubtful rights and controversies, either in or out of court. Settlement agreements are highly favored as productive of peace and goodwill in the community and as reducing the expense and persistency of litigation. The application of American Motorcycle in many instances does not promote this policy. First, the availability of comparative contribution eliminates co-defendants' concern with proving the plaintiff's assumption of risk or contributory negligence in order to have their liability extinguished. This fact alone will cause many defendants to avoid settlement. Second, a nonsettling tortfeasor has a civil claim for damages under California Civil Procedure Code section 877 against either the victim of the tort who exercised bad faith in making a settlement or the settling defendant. The nonsettling tortfeasor may set off this claim against the victim's tort action recovery and may receive pro rata, rather than pro tanto, credit against any judgment rendered in that action against the nonsettling tortfeasor. Moreover, American Motorcycle allows the nonsettling defendant to file this claim of bad faith in the initial action instead of waiting until his claim of indemnity against the settling defendant has been upheld. Hence, the claim of bad faith will discourage D1 from settling because his settlement will not ordinarily prevent his participation in the litigation of the issues of damages and relative fault.

28. Id.
29. Under American Motorcycle, a defendant will, of course, attempt to establish the plaintiff's degree of fault to reduce the plaintiff's recovery. However, this burden is much less formidable than that of proving the plaintiff's assumption of risk or contributory negligence.
30. See text accompanying notes 38-41 infra. For the text of § 877, see note 9 supra.
32. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d. at 605, 578 P.2d at 916, 146 Cal. Rptr. at 199.
33. Id. at 610 n.2, 578 P.2d at 920 n.2, 146 Cal. Rptr. at 203 n.2 (Clark, J., dissenting). Nonsettling defendants will routinely file bad faith claims against settling defendants because no deterrent exists to prevent them from doing so. See notes 62-80 and accompanying text infra. "Few things would be better calculated to frustrate [§ 877's] policy, and to discourage settlement of disputed tort claims, than knowledge that such a settlement lacked finality and would . . . lead to further litigation with one's joint tortfeasors, and perhaps further liability." Stambaugh v. Superior Court, 62 Cal. App. 3d 231, 236, 132 Cal. Rptr. 843, 846 (1976).
Bad Faith Claims by Nonsettling Defendants Are Encouraged

If one pursues the foregoing illustration and principles, the following sequence of events demonstrates how bad faith claims are encouraged. Plaintiff will settle with \( D_1 \) in an amount below \( D_1 \)'s seventy-percent degree of fault. \( D_2 \) will then be liable for the amount of plaintiff's damages less the amount of plaintiff's own degree of fault and less the dollar amount of the settlement. \( D_2 \)'s liability will be in an amount greater than his ten-percent degree of fault. Thus, \( D_2 \) will exercise his immediate right to file a bad faith claim against \( D_1 \) because no other way exists to obtain contribution from \( D_2 \).

Moreover, if \( D_2 \) establishes that the settlement between plaintiff and \( D_1 \) was made in bad faith, *River Garden Farms, Inc. v. Superior Court* suggests the detriment to \( D_2 \) (possibly the amount by which the judgment against him exceeds his assigned degree of fault) may be set off against the judgment. The plaintiff, under this procedure, assumes the full burden of a disproportionately low settlement. *Lareau v. Southern Pacific Transportation*

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34. See notes 11-26 and accompanying text supra.
35. See Davis, *Comparative Negligence, Comparative Contribution, and Equal Protection in The Trial and Settlement of Multiple Defendant Product Cases*, 10 Ind. L. Rev. 831, 849 (1977); Comment, *Comparative Negligence, Multiple Parties and Settlements*, 65 Calif. L. Rev. 1264, 1268 (1977). However, a few courts have disagreed that settlement takes place in this proportion and have speculated that defendants generally contribute to the settlement in rough proportion to what they think their negligence is. Bielski v. Schulze, 16 Wis. 2d 1, 12, 114 N.W.2d 105, 111 (1962). See also Gomes v. Brodhurst, 394 F.2d 465 (D.V.I. 1967).
36. See notes 15-16 and accompanying text supra.
37. Peyrat, *Comparative Fault: Principles and Problems Three Years After Li*, in *California Continuing Education of the Bar, Comparative Negligence Practice 1, 41* (1978). See note 14 and accompanying text supra. \( D_2 \)'s argument for bad faith settlement will be based on the discrepancy between the amount \( D_2 \) settled for and the amount \( D_2 \) should be liable for based on his degree of fault. "In the decisions involving wrongful refusal to settle, price is the immediate signal for the inquiry into good faith, but only one of the many factors influencing the finding." *River Garden Farms, Inc. v. Superior Court*, 26 Cal. App. 3d 986, 997, 103 Cal. Rptr. 498, 506 (1972).
Co.\textsuperscript{40} suggests, however, a recovery from both the plaintiff and the settling defendant.\textsuperscript{41} Regardless of which method is used, a plaintiff's or a defendant's desire to settle a case would be inhibited.

Rights of the Settling Defendant

The foregoing situations assume that the settling defendant will settle in an amount less than his degree of fault. \textit{American Motorcycle}, however, leaves undecided the issue of whether a settling co-defendant has a right to pursue his cross-complaint for partial indemnity after settling with the plaintiff for an amount greater than the amount of loss for which he is ultimately found responsible.\textsuperscript{42} Obviously, if defendants could not recover this difference, they would be reticent to settle cases in which their proportion of liability was difficult to estimate.\textsuperscript{43} This uncertainty will be a common occurrence given the inconsistency among juries and the complexities of multi-party litigation.\textsuperscript{44}

A settling concurrent tortfeasor should be allowed to pursue his right of equitable partial indemnity against other concurrent tortfeasors. This rule would not detract from the plaintiff's recovery because the plaintiff is still entitled to receive compensation from the nonsettling defendants in amounts according to their degrees of fault.\textsuperscript{45} Furthermore, this rule encourages defendants to settle and effectuates the policy of equitable apportionment of the loss among joint tortfeasors.\textsuperscript{46}

41. "Thus, the judgment against Southern Pacific (non-settling joint tortfeasor) and in favor of Mrs. Lareau (plaintiff) has given Southern Pacific an accrued cause of action against the plaintiff and the settling defendants for an alleged past wrong . . . ." \textit{Id.} at 798, 118 Cal. Rptr. at 846 (emphasis added).
42. Subsequent to \textit{American Motorcycle} the California Court of Appeal, Second District, held that in a case with a single plaintiff and a single defendant, a settling concurrent tortfeasor may continue to pursue his right of partial indemnity asserted by a pre-settlement cross-complaint against a party not named by the plaintiff. Sears, Roebuck & Co. v. International Harvester Co., 82 Cal. App. 3d 492, 147 Cal. Rptr. 262 (1978).
43. However, a rule to the contrary arguably would discourage the plaintiff from settling the case. Theobald v. Angelos, 44 N.J. 228, 208 A.2d 129 (1965). \textit{See also} Comment, \textit{Comparative Negligence, Multiple Parties and Settlements}, 65 \textit{CALIF. L. REV.} 1264, 1279 (1977). However, this should not be a significant concern. \textit{See notes} 103-07 and accompanying text \textit{infra}.
44. Prosser states that because each case involving comparative fault must turn upon all the circumstances, "there can be no definite rules, and cases which on their face appear to involve more or less identical conduct on each side quite frequently have come out with quite different results." W. PROSSER, \textit{THE LAW OF TORTS} § 67, at 438 (4th ed. 1971).
46. \textit{Id.}
THE DILEMMA OF COUNSEL FOR INSURANCE DEFENSE

_American Motorcycle_ has created a particularly delicate situation for defense counsel of an insurance company. The implied covenant of good faith and fair dealing imposes a duty on an insurer to settle a claim against its insured within policy limits whenever a substantial likelihood exists that a claim in excess of those limits may be upheld. Indicia of bad faith do not include a showing of dishonesty, fraud, or concealment; rather, the test is whether a prudent insurer without policy limits would have accepted the offer. The insurer is liable when the most reasonable manner of disposing of the claim would have been to accept the settlement. In other words, liability is imposed on the insurer

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In deciding whether the insurer's refusal to settle constitutes a breach of its duty to exercise good faith, the following factors should be considered: the strength of the injured claimant's case on the issues of liability and damages; attempts by the insurer to induce the insured to contribute to a settlement; failure of the insurer to properly investigate the circumstances so as to ascertain the evidence against the insured; the insurer's rejection of advice of its own attorney or agent; failure of the insurer to inform the insured of a compromise offer; the amount of financial risk to which each party is exposed in the event of a refusal to settle; the fault of the insured in inducing the insurer's rejection of the compromise offer by misleading it as to the facts; and any other factors tending to establish or negate bad faith on the part of the insurer.


51. _Id._ at 429, 426 P.2d at 176-77, 58 Cal. Rptr. at 16.

52. _Id._ at 430, 426 P.2d at 176-77, 58 Cal. Rptr. at 16-17.
ipso facto for failure to meet the duty to accept reasonable settlement.\textsuperscript{53}

If an insurer breaches this duty to settle within policy limits,\textsuperscript{54} the insured may recover the excess award over policy limits, as well as consequential\textsuperscript{55} and punitive\textsuperscript{56} damages. Moreover, if a primary liability insurer breaches its duty to settle within policy limits and such breach of duty causes economic loss to an excess liability insurer, the primary liability insurer is liable to the excess liability insurer for the amount the excess carrier is obliged to pay in discharge of its insured's liability.\textsuperscript{57}

The following example illustrates the new problem caused by American Motorcycle. A jury has found that plaintiff is entitled to an $80,000 judgment against $D_1$ and $D_2$. Plaintiff was found twenty percent at fault for a $100,000 total loss, and his judgment was reduced accordingly.\textsuperscript{58} $D_1$ and $D_2$ are found twenty percent and sixty percent at fault respectively. $D_2$ has a primary insurance carrier for claims within $30,000 and has an excess carrier for amounts beyond this limit. If plaintiff offers $D_2$ a settlement within the $30,000 limit\textsuperscript{59} and $D_2$'s primary insurance carrier refuses it, $D_2$'s primary insurance carrier could be held liable to the excess carrier for a judgment awarded plaintiff against $D_2$ in excess of the $30,000 policy limits. Obviously, this result is plausible on these facts because $D_2$ is responsible for $60,000 damages.\textsuperscript{60}

Alternatively, if $D_2$'s primary insurance carrier accepts the settle-

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{53} Id. at 430, 426 P.2d at 176-77, 58 Cal. Rptr. at 17.
  \item \textsuperscript{54} The insurer will be liable for failure to settle even if the refusal is based on a bona fide belief that the policy does not provide coverage. Gibb v. State Farm Mut. Ins. Co., 544 F.2d 423 (1976); Johansen v. California State Auto. Ass'n Inter-Ins. Bureau, 15 Cal. 3d 9, 538 P.2d 744, 123 Cal. Rptr. 288 (1973); Communale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958).
  \item \textsuperscript{58} See note 15 supra.
  \item \textsuperscript{59} This offer to settle an excess claim within policy limits is a necessary element in a wrongful refusal to settle cause of action. Merritt v. Reserve Ins. Co., 34 Cal. App. 3d 858, 877, 110 Cal. Rptr. 511, 523-24 (1973).
  \item \textsuperscript{60} An insurer, in a practical sense, is strictly liable for refusal to settle on
\end{itemize}
\end{footnotesize}
ment offer, it could be found liable to $D_1$ for a bad faith settlement because of the discrepancy between the settlement (less than $30,000) and the amount for which he should be liable based on his relative fault ($60,000). Hence, the primary insurance carrier for $D_2$ will be faced with a bad faith claim regardless of whether it accepts or rejects the settlement offer.

**The Malicious Prosecution Counterclaim**

Assuming the doctrine of joint and several liability is not abolished, bad faith claims by nonsettling tortfeasors will proliferate because no deterrent exists to prevent those tortfeasors from filing them. These claims not only will undermine the policies of $Li$ but will also add confusion to an already complex case. The question then becomes one of how to limit bad faith claims.

Ironically, *American Motorcycle* suggests a possible solution. Arguably, a settling defendant now faced with a bad faith claim may bring a counterclaim of its own for malicious prosecution in the initial action. This threat may act as a deterrent to the practice of routinely filing a bad faith claim whenever a codefendant settles with the plaintiff. In the first example mentioned above, $D_2$ (ten percent at fault), who is ultimately held liable for a large percentage of the loss because $D_1$ (seventy percent at fault) settled with the plaintiff, will likely file a bad faith claim against the settling defendant. The settling defendant in turn probably will seek to file a claim for malicious prosecution against $D_2$.

Under traditional malicious prosecution principles, $D_1$ is barred from this action until he can base his claim on a final judgment.

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61. See notes 29-37 and accompanying text supra.
62. See notes 103-07 and accompanying text infra.
63. See notes 20-41 and accompanying text supra.
64. See notes 29-41 and accompanying text supra.
65. Id.
rendered in his favor.\textsuperscript{66} $D_I$ could argue, however, that because 
\textit{American Motorcycle} extended the contravention of a traditional 
rule\textsuperscript{67} and allows $D_2$ to file a cross-complaint for implied indem-
nity prior to the time its claim for indemnity has been upheld,\textsuperscript{68} $D_I$ should be allowed to file a malicious prosecution claim prior to the 
time its good faith settlement has been upheld.

The primary obstacle to $D_I$'s malicious prosecution counter-
claim argument is \textit{Babb v. Superior Court}.\textsuperscript{69} The California 
Supreme Court in \textit{Babb} found three principal reasons for denying 
the malicious prosecution counterclaim in the original suit. First, 
a possibility existed that the malicious prosecution counterclaim 
would be used merely to harass the other parties in the action.\textsuperscript{70} 
This reason is not very persuasive in a joint tortfeasor case\textsuperscript{71} in 
light of \textit{American Motorcycle} because the same rationale could be 
used to forbid defendants such as $D_2$ from filing bad faith claims 
against codefendants. Certainly, the law under \textit{American Motor-
cycle} encourages them to do just that.\textsuperscript{72}

The second argument made by the \textit{Babb} court was that the at-
torney filing the bad faith claim could become a potential adver-
sary of his client if his client was sued for malicious 
prosecution.\textsuperscript{73} In other words, if $D_2$'s attorney filed a bad faith 
claim against $D_I$ in the initial action, $D_2$'s attorney would be sued 
by his own client if $D_I$ were allowed to file its malicious prosecu-
tion counterclaim in the initial action against $D_2$. The attorney 
would have a potential conflict of interest with his client and 
could not bring the bad faith claim and stay in the action.\textsuperscript{74} 
Again, however, this same rationale could be used to deny a non-

\begin{thebibliography}{99}
\bibitem{67} The rule once was that an action for indemnity could not be maintained 
until the person seeking indemnity had paid the claim in question and that any 
try to involve the alleged indemnitor in the original action was premature. 
\bibitem{68} \textit{American Motorcycle Ass'n v. Superior Court}, 20 Cal. 3d at 695, 578 P.2d at 916, 146 Cal. Rptr. at 193.
\bibitem{69} 3 Cal. 3d 841, 479 P.2d 379, 92 Cal. Rptr. 179 (1971).
\bibitem{70} \textit{Id.} at 849, 479 P.2d at 383, 92 Cal. Rptr. at 183.
\bibitem{71} \textit{Babb} involved a single plaintiff and a single defendant. \textit{Id.} at 841, 479 P.2d at 379, 92 Cal. Rptr. at 179.
\bibitem{72} \textit{See} notes 20-41 and accompanying text \textit{supra}.
\bibitem{73} Babb v. Superior Court, 3 Cal. 3d at 849, 479 P.2d at 383, 92 Cal. Rptr. at 183.
\bibitem{74} The ABA \textit{Code of Professional Responsibility} § 5-102(B) provides:
\begin{quote}
If, after undertaking employment in contemplated or pending litigation, 
a lawyer learns, or it is obvious that he or a lawyer in his firm may be 
called as a witness other than on behalf of his client, he may continue the 
representation until it is apparent that his testimony is or may be prejudic-
al to his client.
\end{quote}
\end{thebibliography}
settling defendant the right to file a bad faith claim because attorneys for settling defendants could also become adversaries of their clients when the clients were sued for bad faith settlements. Moreover, a conflict of interest would exist between the attorney and his client whether the cross-complaint for malicious prosecution was asserted during or after the initial trial.

The third argument given by the California Supreme Court in Babb was that because an indemnity claim usually arises out of the same transaction as the principal action at issue, the same evidence is relevant to both. However, in a cross-action for malicious prosecution, the evidence would be aimed at the motives and state of mind of the original plaintiff rather than at the substantive issues of that original action. This argument is not persuasive in cases where the bad faith claim and the malicious prosecution counterclaim are between nonsettling and settling defendants. The substantive issue involved in both cross-complaints is basically the nature of the settlement between the plaintiff and the settling defendant. Thus, the “same evidence” would be relevant to both, and no significant complexity would be added to the case. Moreover, not to allow malicious prosecution counterclaims in the initial action may cause unreasonable delay in the ultimate resolution of cases similar to that found in “bad faith” insurance cases. Case law indicates, however, that the malicious prosecution counterclaim argument will probably continue to fail and that the routine filing of bad faith claims will continue to discourage settlement.

ABOLITION OF JOINT AND SEVERAL LIABILITY

As the preceding three sections illustrate, holding nonsettling

75. 3 Cal. 3d at 949, 479 P.2d at 383, 92 Cal. Rptr. at 183.
76. Id. at 849, 479 P.2d at 384, 92 Cal. Rptr. at 184.
77. Babb did not involve settlement between a plaintiff and a joint tortfeasor. The defendant in Babb sought to counterclaim against the plaintiff in the original action. Id.
78. Id. at 849, 479 P.2d at 383, 92 Cal. Rptr. at 183.
defendants liable for all of plaintiff's damages allocates damages disproportionately to fault. This result has the concurrent effect of encouraging bad faith claims. Fairness, as well as consistency, dictates that the system allocate liability in proportion to fault to all the parties without exception. However, to facilitate this objective, the policy of encouraging settlement must sometimes take second priority.

**Pure Liability in Proportion to Fault**

As discussed above, when a joint tortfeasor settles for an amount below his degree of fault as ultimately determined, the nonsettling defendant will be held liable for damages greater than his own degree of fault. Joint and several liability mandates that the nonsettling defendant pay his unjust proportion of damages regardless of whether the plaintiff is as much or more at fault for his own injuries. Therefore, at the settlement stage of the litigation, the "slightly" negligent defendant is compelled to settle or be faced with disproportionate liability. The contribution system of the Civil Procedure Code also works to the disadvantage of the "slightly" negligent defendant when he is faced with a possibly high pro-rata contribution.

Despite these apparent disadvantages, the California Supreme Court in *American Motorcycle* chose to uphold the doctrine of joint and several liability for three principal reasons. First, the court believed that in some instances the individual actions of concurrent tortfeasors would be inseparable from the proximate causation of plaintiff's injury or would be sufficient in and of themselves to have caused the plaintiff's injuries. Theoretically, each defendant could be said to have severally caused the injury and therefore should be held severally liable for redress. How-

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83. *See notes 11-24 and accompanying text supra.*

84. *See notes 21-24 and accompanying text supra.*

85. *See note 9 supra.*

86. *See note 7 supra.*

87. 20 Cal. 3d at 588-89, 578 P.2d at 905-06, 146 Cal. Rptr. at 188-89.

88. *Id.*

89. The rule adopted by the *American Motorcycle* majority seems logically applicable only to a relatively few cases. It is unlikely that many cases will arise in which the defendants carry inadequate insurance coverage and the defendant's
ever, the only time the plaintiff would not receive full compensation for his injuries under a system without joint and several liability would be when one or more of the tortfeasors were financially unable to satisfy their proportionate share of the damages. The majority of the court believed the defendant should pay the balance of plaintiff's injuries in this instance merely because of his status as a defendant.\textsuperscript{90}

The majority of the court should not abandon the liability in proportion to fault principle so eagerly.\textsuperscript{91} A solution would be to give the jury a special instruction that if the facts indicate that each defendant's actions alone would have been sufficient to cause the plaintiff's injury, the jury must designate each defendant's proportion of fault at one hundred percent. The defendants would then share the fault on a pro-rata basis unless one was financially unable to do so. In this case, the other defendant(s) would be required to pay the remainder because his fault would dictate he pay it.

Second, the \textit{American Motorcycle} majority insisted that "fairness"\textsuperscript{92} dictates that joint and several liability be upheld to assist a completely faultless plaintiff in receiving full redress from "wrongdoing defendants"\textsuperscript{93} when any one of the tortfeasors is financially unable to satisfy his proportionate liability.\textsuperscript{94} Again, however, the court's rationale was not based on any concept of negligence law but rather the defendant assumed the burden merely because he happened to be the defendant. Under present actions are indivisible causes of, or sufficient causes to be responsible for, the whole of plaintiff's injuries.

\textsuperscript{90} In many instances a plaintiff will be completely free of all responsibility for the accident, and yet, under the proposed abolition of joint and several liability, such a completely faultless plaintiff, rather than a wrongdoing defendant, would be forced to bear a portion of the loss if any one of the concurrent tortfeasors should prove financially unable to satisfy his proportioned share of the damages. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d at 589, 578 P.2d at 905, 146 Cal. Rptr. at 188.


\textsuperscript{92} 20 Cal. 3d at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189.

\textsuperscript{93} \textit{Id}. at 589, 578 P.2d at 905, 146 Cal. Rptr. at 189.

\textsuperscript{94} \textit{Id}.
law, the court not only asks defendants to take plaintiffs as they find them but also to take codefendants as they find them. This situation is inequitable.

Finally, in pushing the disparity to its furthest extreme, the court suggested that even when the plaintiff is at fault for his own injuries, the defendants must pay for what they did not cause. The plaintiff is not held responsible because his wrong is not tortious in character. True as this may be, the fact remains that both faults were proximate causes of the plaintiff's injuries. Thus, the plaintiff should be responsible in like manner for the injuries the law seeks to redress.

Liability in proportion to fault demands that when the plaintiff has settled with one or more joint tortfeasors, a subsequent judgment against co-tortfeasors should be reduced by the proportion of the plaintiff's damages attributable to the fault of the settled tortfeasor. When one of the joint tortfeasors is financially unable to assume his proportionate share of the damages, the other joint tortfeasors must pay the unsatisfied share only when their fault dictates that they should regardless of whether the plain-

96. The legislature has stated explicitly that contribution law is to be administered in accordance with the principles of equity. CAL. CIV. PROC. CODE § 875(b) (West Supp. 1978). See also note 101 infra.
97. Although we recognized in Li that a plaintiff's self-directed negligence would justify reducing his recovery in proportion to his degree of fault for the accident, 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. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d at 589-90, 578 P.2d at 906, 146 Cal. Rptr. at 189.
100. The legislature considered making this change by a bill introduced on March 28, 1978, as S.B. 1959. This bill would have placed the burden of an inequitably low settlement on the plaintiff by providing that a plaintiff's claim is discharged as against the other nonsettling defendants by the greatest of the amount stipulated in the release, the amount paid for it, or the amount of the released tortfeasor's equitable share based on his fault. This bill died in committee on Nov. 30, 1978. See also American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d at 615, 578 P.2d at 923, 146 Cal. Rptr. at 206 (Clark, J., dissenting).
101. An alternative solution advocated by some commentators would apportion the burden of an insolvent defendant among all parties, including plaintiffs, in pro-
tiff contributed to his own injury.\textsuperscript{102}

\textit{Elimination of Bad Faith Claims}

Bad faith claims typically arise in joint tortfeasor cases for one principal reason—the nonsettling defendant has been compelled to pay more damages than his degree of fault suggests he should.\textsuperscript{103} Adherence to the suggested rules would eliminate bad faith claims because a joint tortfeasor would never be liable for more than his proportionate share of the damages regardless of the settlement. Also, eliminating bad faith claims conveniently solves the malicious prosecution counterclaim problem.

The abolition of joint and several liability and the adoption of a pure liability in proportion to fault system would also eliminate the dilemma of defense counsel for insurance carriers.\textsuperscript{104} When the primary insurance carrier is offered settlement at or within policy limits, he can accept the offer without exposing himself to a bad faith claim because the nonsettling defendant will pay the plaintiff only in accordance with his degree of fault. Hence, the degree of fault for which the settling defendant is ultimately found responsible is immaterial. The primary insurance carrier’s acceptance of the offer also prevents the excess carrier’s bad faith claim.\textsuperscript{105}

The only question remaining is the extent to which a plaintiff will be discouraged from settlement when he knows that a settlement

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\textsuperscript{102} See Comment, \textit{Comparative Negligence, Multiple Parties and Settlements}, 65 CALIF. L. REV. 1264, 1274 (1977). \textit{See also note 101 supra.}

\textsuperscript{103} See notes 34-37 and accompanying text supra.

\textsuperscript{104} See notes 58-61 and accompanying text supra.

\textsuperscript{105} Id.
ment below the settling defendant's degree of fault will preclude the plaintiff from a "full recovery." This concern should not be significant because equity in comparative negligence mandates the subordination of the policy of encouraging settlement to the principle of liability in proportion to fault. In this instance the plaintiff may be discouraged from settlement. However, some commentators contend that this may be an infrequent occurrence.

CONCLUSION

The present system of comparative negligence and contribution in California is anything but "pure." In many cases, damages are allocated disproportionately to fault, thereby encouraging bad faith claims and discouraging settlement. Both statutory and case law contribution systems tend to extort the "slightly" negligent, nonsettling defendant by compelling him to settle or be faced with liability heavily in excess of his degree of fault. Equity, consistency, and logic require the adoption of a system of pure liability in proportion to fault. The doctrine of joint and several liability should be abolished.

When necessary, the principle of liability in proportion to fault should control over the policy of encouraging settlement. However, settlement should continue to be promoted whenever possible. Settling defendants should remain immune from claims of contribution and should be allowed to recover any amount paid in settlement in excess of their proportionate share of fault. Prior to legislative implementation of a system of pure liability in proportion to fault, settling defendants should be allowed to file malicious prosecution counterclaims when faced with a claim of bad faith in the original suit. No significant complexity would be added to the cases because the same evidence is relevant to both claims. The interests of judicial efficiency and economy might also be promoted.

Comparative negligence is currently so confusing that one California Supreme Court justice has found cause to exclaim: "Because the majority of this court continue compounding the incomprehensible, we can only hope that the legislature will reclaim its rightful role in determining basic issues of social pol-

106. See notes 42-46 and accompanying text supra.
108. See note 9 supra.
icy.”

The legislative changes necessary in the areas of contribution and joinder could be accomplished without difficulty and could accompany the implementation of a pure liability in proportion to fault system. Hence, the time is ripe for the legislature to act.

J. Adam Sarancik


110. Several liability is simple in application in the Li setting . . . .

The substantive rules which we have here articulated require procedural companions. Once the principle of allocation of liability among defendants based upon their respective degrees of negligence is accepted, there is a patent interest in having all persons whose fault contributed to the injury before the court in one action. One set of findings of fact or one set of special jury verdicts can then determine the entire matter as to all who are involved. Multiple litigation can be avoided.
