Chapter 6
Multiple Tortfeasors

§ A. Overview and Statutory Excerpts

Introductory Note. The application of comparative fault principles is complicated enough when the plaintiff sues only one defendant. However, it is quite common (probably more common than not, particularly in cases where large dollar amounts are at stake) for the plaintiff to sue multiple defendants. In Chapter Two we looked at mass tort cases (e.g., the DES cases) in terms of the causation problems. Even where causation questions can be answered satisfactorily, there are numerous problems associated with allocating liability among multiple defendants, particularly when one or more of the defendants is immune, or has settled, or is insolvent, or is beyond the jurisdiction of the court. Although full coverage of these issues cannot be hoped for, an appreciation of some of the problems is essential for an understanding of modern tort law.

This chapter focuses heavily on using statutes to determine how joint tortfeasors are to be treated. The discussion begins with excerpts from three different statutes: two are actual statutes, and the third is a model statute drafted by the American Law Institute.

Idaho Code (1990 Supplement)
§§ 6-801 to 6-806

§ 6-801. Comparative negligence or comparative responsibility — Effect of contributory negligence.
Contributory negligence or comparative responsibility shall not bar recovery in an action by any person or his legal representative to recover damages for negligence, gross negligence or comparative responsibility resulting in death or in injury to person or property, if such negligence or comparative responsibility was not as great as the negligence, gross negligence or comparative responsibility of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence or comparative responsibility attributable to the person recovering. Nothing contained herein shall create any new legal theory, cause of action, or legal defense.

§ 6-802. Verdict giving percentage of negligence or comparative responsibility attributable to each party.
The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence or comparative responsibility attributable to each party; and the court shall then reduce the amount of such damages in proportion to the amount of negligence or comparative responsibility attributable to the person recovering. Nothing contained herein shall create any new legal theory, cause of action, or legal defense.

§ 6-803. Contribution among joint tortfeasors — Declaration of right — Exception — Limited joint and several liability.
(1) The right of contribution exists among joint tortfeasors, but a joint tortfeasor is not entitled to a money judgment for contribution until he has by
payment discharged the common liability or has paid more than his pro rata share thereof.

(2) A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement.

(3) The common law doctrine of joint and several liability is hereby limited to causes of action listed in subsections (5), (6) and (7) of this section. In any action in which the trier of fact attributes the percentage of negligence or comparative responsibility to persons listed on a special verdict, the court shall enter a separate judgment against each party whose negligence or comparative responsibility exceeds the negligence or comparative responsibility attributed to the person recovering. The negligence or comparative responsibility of each such party is to be compared individually to the negligence or comparative responsibility of the person recovering. Judgment against each such party shall be entered in an amount equal to each party’s proportionate share of the total damages awarded.

(4) As used herein, "joint tortfeasor" means one (1) of two (2) or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them.

(5) A party shall be jointly and severally liable for the fault of another person or entity or for payment of the proportionate share of another party where they were acting in concert or when a person was acting as an agent or servant of another party.

(6) Any cause of action arising out of violation of any state or federal law or regulation relating to hazardous or toxic waste or substances or solid waste disposal sites.

(7) Any cause of action arising from the manufacture of any medical devices or pharmaceutical products.

§ 6-804. Common law liabilities preserved.

Nothing in this act affects: (1) The common law liability of the several joint tortfeasors to have judgment recovered and payment made from them individually by the injured person for the whole injury shall be limited to causes of action listed in section 6-803, Idaho Code. However, the recovery of a judgment by the injured person against one (1) joint tortfeasor does not discharge the other joint tortfeasors.

§ 6-805. Effect of release of one tortfeasor on liability of others.

(1) A release by the injured person of one (1) joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides, but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if such amount or proportion is greater than the consideration paid.

(2) A release by the injured person of one (1) or more tortfeasors who are not jointly and severally liable to the injured person, whether before or after judgment, does not discharge another tortfeasor or reduce the claim against another tortfeasor unless the release so provides and the negligence or comparative responsibility of the tortfeasor receiving the release is presented to and considered by the finder of fact, whether or not the finder of fact apports responsibility to the tortfeasor receiving the release.

§ 6-806. Effect of release of one tortfeasor on his liability for contribution to others — Limits on application of section.

A release by the injured person of one (1) joint tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person’s damages recoverable against all the other tortfeasors. This section shall apply only if the issue of proportionate fault is litigated between joint tortfeasors in the same action.
Oregon Revised Statutes
Title 18 (1989)

§ 18.455. Covenant not to sue; effect; notice.
(1) When a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death or claimed to be liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but the claimant’s claim against all other persons specified in ORS 18.470 (2) for the injury or wrongful death is reduced by the share of the obligation of the tortfeasor who is given the covenant, as determined under ORS 18.480 and 18.485; and

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

(2) When a covenant described in subsection (1) of this section is given, the claimant shall give notice of all of the terms of the covenant to all persons against whom the claimant makes claims.

§ 18.470. Contributory negligence not bar to recovery; comparative negligence standard; third party complaints.
(1) Contributory negligence shall not bar recovery in an action by any person or the legal representative of the person to recover damages for death or injury to person or property if the fault attributable to the claimant was not greater than the combined fault of all persons specified in subsection (2) of this section, but any damages allowed shall be diminished in the proportion to the percentage of fault attributable to the claimant. This section is not intended to create or abolish any defense.

(2) The trier of fact shall compare the fault of the claimant with the fault of any party against whom recovery is sought, the fault of third party defendants who are liable in tort to the claimant, and the fault of any person with whom the claimant has settled. The failure of a claimant to make a direct claim against a third party defendant does not affect the requirement that the fault of the third party defendant be considered by the trier of fact under this subsection. Except for persons who have settled with the claimant, there shall be no comparison of fault with any person:

(a) Who is immune from liability to the claimant;

(b) Who is not subject to the jurisdiction of the court; or

(c) Who is not subject to action because the claim is barred by a statute of limitation or statute of ultimate repose.

(3) A defendant who files a third party complaint against a person alleged to be at fault in the matter, or who alleges that a person who has settled with the claimant is at fault in the matter, has the burden of proof in establishing:

(a) The fault of the third party defendant or the fault of the person who settled with the claimant; and

(b) That the fault of the third party defendant or the person who settled with the claimant was a contributing cause to the injury or death under the law applicable in the matter.

(4) Any party to an action may seek to establish that the fault of a person should not be considered by the trier of fact by reason that the person does not meet the criteria established by subsection (2) of this section for the consideration of fault by the trier of fact.

(5) This section does not prevent a party from alleging that the party was not at fault in the matter because the injury or death was the sole and exclusive fault of a person who is not a party in the matter.

§ 18.475. Doctrines of last clear chance and implied assumption of risk abolished.
(1) The doctrine of last clear chance is abolished.

(2) The doctrine of implied assumption of the risk is abolished.
§ 18.480. Special questions to trier of fact; jury not to be informed of settlement.

(1) When requested by any party the trier of fact shall answer special questions indicating:

(a) The amount of damages to which a party seeking recovery would be entitled, assuming that party not to be at fault.

(b) The degree of fault of each person specified in ORS 18.470 (2). The degree of each person’s fault so determined shall be expressed as a percentage of the total fault attributable to all persons considered by the trier of fact pursuant to ORS 18.470.

(2) A jury shall be informed of the legal effect of its answer to the questions listed in subsection (1) of this section.

(3) The jury shall not be informed of any settlement made by the claimant for damages arising out of the injury or death that is the subject of the action.

(4) For the purposes of subsection (1) of this section, the court may order that two or more persons be considered a single person for the purpose of determining the degree of fault of the persons specified in ORS 18.470 (2).

§ 18.485. Liability of defendants several only; determination of defendants' shares of monetary obligation; reallocation of uncollectible obligation; parties exempt from reallocation.

(1) Except as otherwise provided in this section, in any civil action arising out of bodily injury, death or property damage, including claims for emotional injury or distress, loss of care, comfort, companionship and society, and loss of consortium, the liability of each defendant for damages awarded to plaintiff shall be several only and shall not be joint.

(2) In any action described in subsection (1) of this section, the court shall determine the award of damages to each claimant in accordance with the percentages of fault determined by the trier of fact under ORS 18.480 and shall enter judgment against each party determined to be liable. The court shall enter a judgment in favor of the plaintiff against any third party defendant who is found to be liable in any degree, even if the plaintiff did not make a direct claim against the third party defendant. The several liability of each defendant and third party defendant shall be set out separately in the judgment, based on the percentages of fault determined by the trier of fact under ORS 18.480. The court shall calculate and state in the judgment a monetary amount reflecting the share of the obligation of each person specified in ORS 18.470 (2). Each person’s share of the obligation shall be equal to the total amount of the damages found by the trier of fact, with no reduction for amounts paid in settlement of the claim or by way of contribution, multiplied by the percentage of fault determined for the person by the trier of fact under ORS 18.480.

(3) Upon motion made not later than one year after judgment has become final by lapse of time for appeal or after appellate review, the court shall determine whether all or part of a party’s share of the obligation determined under subsection (2) of this section is uncollectible. If the court determines that all or part of any party’s share of the obligation is uncollectible, the court shall reallocate any uncollectible share among the other parties. The reallocation shall be made on the basis of each party’s respective percentage of fault determined by the trier of fact under ORS 18.480. The claimant’s share of the reallocation shall be based on any percentage of fault determined to be attributable to the claimant by the trier of fact under ORS 18.480, plus any percentage of fault attributable to a person who has settled with the claimant. Reallocation of obligations under this subsection does not affect any right to contribution from the party whose share of the obligation is determined to be uncollectible. Unless the party has entered into a covenant not to sue or not to enforce a judgment with the claimant, reallocation under this subsection does not affect continuing liability on the judgment to the claimant by the party whose share of the obligation is determined to be uncollectible.

(4) Notwithstanding subsection (3) of this section, a party’s share of the obligation to a claimant may not be increased by reason of reallocation under subsection (3) of this section if:

(a) The percentage of fault of the claimant is equal to or greater than the percentage of fault
of the party as determined by the trier of fact under ORS 18.480; or

(b) The percentage of fault of the party is 25 percent or less as determined by the trier of fact under ORS 18.480.

(5) If any party’s share of the obligation to a claimant is not increased by reason of the application of subsection (4) of this section, the amount of that party’s share of the reallocation shall be considered uncollectible and shall be reallocated among all other parties who are not subject to subsection (4) of this section, including the claimant, in the same manner as otherwise provided for reallocation under subsection (3) of this section.

(6) This section does not apply to:

(a) A civil action resulting from the violation of a standard established by Oregon or federal statute, rule or regulation for the spill, release or disposal of any hazardous waste, as defined in ORS 466.005, hazardous substance, as defined in ORS 453.005 or radioactive waste, as defined in ORS 469.300.

(b) A civil action resulting from the violation of Oregon or federal standards for air pollution, as defined in ORS 468A.005 or water pollution, as defined in ORS 468B.005.

§ 18.490. Setoff of damages not allowed.
Setoff of damages shall not be granted in actions subject to ORS 18.470 to 18.490.

Uniform Comparative Fault Act
Uniform Law Commissioners (1977)

Section 1. [Effect of Contributory Fault]
(a) In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant’s contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant’s contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

(b) "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Section 2. [Apportionment of Damages]
(a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under Section 6, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating:

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under Section 6. For this purpose the court may determine that two or more persons are to be treated as a single party.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under Section 6, and enter judgment against each party liable on the basis of rules of joint-and-several liability. For purposes of contribution under Sections 4 and 5, the court also shall determine and state in the judgment each party’s equitable share of the obligation to each claimant in accordance with the respective
percentages of fault.

(d) 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 the claimant on the judgment.

Section 3. [Set-off]

A claim and counterclaim shall not be set off against each other, except by agreement of both parties. On motion, however, the court, if it finds that the obligation of either party is likely to be uncollectible, may order that both parties make payment into court for distribution. The court shall distribute the funds received and declare obligations discharged as if the payment into court by either party had been a payment to the other party and any distribution of those funds back to the party making payment had been a payment to him by the other party.

Section 4. [Right of Contribution]

(a) A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death, or harm, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution is each person’s equitable share of the obligation, including the equitable share of a claimant at fault, as determined in accordance with the provisions of Section 2.

(b) Contribution is available to a person who enters into a settlement with a claimant only (1) if the liability of the person against whom contribution is sought has been extinguished and (2) to the extent that the amount paid in settlement was reasonable.

Section 5. [Enforcement of Contribution]

(a) If the proportionate fault of the parties to a claim for contribution has been established previously by the court, as provided by Section 2, a party paying more than his equitable share of the obligation, upon motion, may recover judgment for contribution.

(b) If the proportionate fault of the parties to the claim for contribution has not been established by the court, contribution may be enforced in a separate action, whether or not a judgment has been rendered against either the person seeking contribution or the person from whom contribution is being sought.

(c) If a judgment has been rendered, the action for contribution must be commenced within [one year] after the judgment becomes final. If no judgment has been rendered, the person bringing the action for contribution either must have (1) discharged by payment the common liability within the period of the statute of limitations applicable to the claimant’s right of action against him and commenced the action for contribution within [one year] after payment, or (2) agreed while action was pending to discharge the common liability and, within [one year] after the agreement, have paid the liability and commenced an action for contribution.

Section 6. [Effect of Release]

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.

Section 7. [Uniformity of Application and Construction]

This Act shall be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.

Section 8. [Short Title]

This Act may be cited as the Uniform Comparative
Fault Act.

Section 9.  [Severability]
If any provision of this Act or application of it to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

Section 10.  [Prospective Effect of Act]
This Act applies to all [claims for relief][causes of action] accruing after its effective date.

Questions and Notes
1. The Uniform Comparative Fault Act has not been adopted in its entirety by any state; it has, however, served as a template for comparative fault systems in a number of states. For example, the reallocation provisions for joint and several liability, contained in § 2(d), have been adopted in Florida (Fla. Stat. § 768.59), Michigan (Mich. Stat. § 600.6304), Minnesota (Minn. Stat. Ann. § 604.02), and Missouri (Mo. Stat. § 537.067). Washington and Iowa have comparative fault systems that adopted the percentage method of calculating settlement credit. For a survey of each state, see Henry. Woods & Beth Deere, Comparative Fault (3d ed. 1996).

§ B. Joint and Several Liability

LAUBACH v. MORGAN
588 P.2d 1071 (Okla. 1978)

DOOLIN, Justice

This appeal arose out of a suit for damages resulting from a three car collision. The circumstances surrounding the accident itself are immaterial to the appeal. Plaintiff Laubach sued defendants Morgan and Martin. Defendant Martin cross-petitioned against defendant.1 The case was tried to a jury under 23 O.S. 1975 Supp. §§ 11, 12, Oklahoma's version of comparative negligence. The jury returned a verdict in favor of plaintiff, finding he was damaged in the amount of $4,000.00. The jury apportioned the negligence of the parties in the following manner:

Plaintiff's negligence ........... 30 percent
Defendant Martin's
negligence .................. 50 percent
Defendant Morgan's
negligence .................. 20 percent

The trial court entered judgment giving plaintiff recovery against defendants Morgan and Martin in the amount of $4,000.00, reduced by plaintiff's negligence in the amount of 30%, for a total of $2,800.00. Morgan appeals.

Martin also filed a brief as appellant. However, she did not file a petition in error and her brief takes a contrary position to Morgan's. We will therefore consider her as an appellee.

In 1973, the 34th Legislature of the State of Oklahoma enacted comparative negligence statutes (23 O.S. 1977 Supp. §§ 11, 12) based on an Arkansas statute2 which provided for a "modified"

1 On Martin's cross-petition, the jury found her damages to be $530.15, 40 percent attributable to her negligence and 60 percent to co-defendant Morgan. This portion of the award is not appealed.

2 23 O.S. 1977 Supp. § 11 provides:
Contribution negligence shall not bar recovery of damages for any injury, property damage or death where the negligence of the person injured or killed is of lesser degree than the negligence of any person, firm, or corporation causing such damage.
In all actions hereafter accruing for negligence resulting in personal injuries or wrongful death or injury to property, contributory negligence shall not prevent a recovery where any negligence of the person so injured, damaged, or killed is of lesser degree than any negligence of the person, firm, or corporation causing such damage; provided that where such contributory negligence is shown on the
comparative negligence system, thereby abolishing the common law doctrine that contributory negligence of a plaintiff will preclude his recovery. The theory of contributory negligence originated in 1809 in England with the case of Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (K.B. 1809). By 1940, England had decided the doctrine no longer met present day needs and contributory negligence was abandoned and overruled. At present in the United States, around thirty-three states have adopted, either judicially or by statute, some type of comparative negligence system.

Oklahoma’s very general comparative negligence statute is admittedly ambiguous in reference to situations involving multiple parties such as we have here. When two or more defendants are involved, its application becomes unclear and the need for definitive guidelines from this court is readily apparent.

The first problem concerns whether a negligent plaintiff will or will not be allowed to recover, under the language of § 11. Is a plaintiff’s negligence to be compared with the combined negligence of all defendants, or should it be compared to each defendant’s individually? The first issue submitted by Morgan in his appeal is that under our statute, because he was found to be less negligent than plaintiff, there should be no judgment entered against him. In the alternative he suggests he should be responsible only for 20% of the award.

Under Morgan’s first theory of comparison of negligence, as the number of defendants increases, the likelihood of a plaintiff’s recovery may diminish. For example assume a plaintiff is found to be 40 percent negligent. If only one defendant is involved, plaintiff will recover 60 percent of his damages. If two more defendants are liable and the 60 percent negligence is equally distributed among them, plaintiff would recover nothing because he was more negligent than each defendant. We believe this is an unsatisfactory construction.

Two state courts in decisions cited to us by the parties have come to opposite conclusions. In Wisconsin in the above situation, plaintiff recovers nothing. In Arkansas, he would be entitled to judgment.

In Walton v. Tull, 234 Ark. 882, 356 S.W.2d 20, 8 A.L.R.3d 708 (1962), the Arkansas Supreme Court interpreted its statute, to allow a plaintiff’s negligence to be compared to the Combined negligence of all defendants. In Walton this principle entitled the plaintiff, determined by a jury to be only ten percent negligent, to recover from one of the defendants who was also ten percent negligent. The Arkansas court stated the basic purpose of the comparative negligence statute was to distribute the total damages among those who cause them. It was convinced the Legislature, in enacting comparative negligence did not mean to go any further than to deny a plaintiff recovery, when his negligence was at least 50 percent of the cause of damages. We agree.

We are not unmindful that this interpretation is not of universal acceptance. As indicated above, Wisconsin has come to a different conclusion. We believe the Arkansas approach is the better view. A plaintiff’s recovery is not thereby jeopardized by the fact that multiple tortfeasors are involved. Further, if one state adopts a statute from another, it is presumed to adopt the construction placed

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2 (...continued)
part of the person injured, damaged or killed, the amount of the recovery shall be diminished in proportion to such contributory negligence. (Emphasis supplied).

The Arkansas statute, from which this statute was patterned, is virtually identical to Oklahoma’s. It has since that time been repealed and replaced by a statute based upon fault. See Ark. Stats. Ann. §§ 27-1763-1765.

3 Under Oklahoma’s “modified comparative negligence” system a plaintiff may recover if his negligence is less than the defendant’s. Under “pure comparative negligence” a plaintiff is allowed to recover something regardless of the percentage of his fault.

4 See generally Heft and Heft, Comparative Negligence Manual (1971) and 1977 Supp.
upon that statute by the highest court of the other state. Accordingly we adopt the rationale of Walton v. Tull, supra, and hold, in an action based on comparative negligence, a plaintiff's percentage of negligence is to be compared with the aggregate negligence of all defendants combined, and if the plaintiff is less than 50 percent negligent he shall be entitled to recovery from each negligent defendant. Plaintiff here is entitled to recover from both Morgan and Martin.

This brings us to a second problem involved concerning multiple tortfeasors. Historically, if the negligence of two or more tortfeasors caused a single and indivisible injury, the concurrent tortfeasors would be liable "in solidum," each being liable for the total amount of the award, regardless of his percentage of responsibility. Each defendant was jointly and severally liable for the entire amount of damages. This principle of entire liability is of questionable soundness under a comparative system where a jury determines the precise amount of fault attributable to each party.

In the present case, under the theory of joint and several liability, plaintiff may collect his entire award from Morgan. The unfairness of this approach is magnified where, as in Oklahoma, no contribution is available among joint tortfeasors. In states where contribution is allowed, by judicial decision or through the Uniform Contribution Among Tortfeasors Act, this inequity is somewhat relieved.

Some jurisdictions have taken care of the multiple party problems through various, but by no means uniform, statutory provisions in conjunction with their comparative negligence statutes. Absent specific legislation, this court must augment our statutory scheme to meet the intent and underlying principle of comparative negligence, which is founded on attaching total responsibility to each person whose lack of care contributed to the damages. We therefore must make one of two possible decisions.

1. Allow "comparative contribution" among joint tortfeasors in proportion to the party's negligence.

2. Do away with the "entire liability rule" and provide that multiple tortfeasors are severally liable only, thus each defendant will be liable only for the percentage of the award attributable to him.

We opt for the second solution. This in effect drastically changes the theory of joint-tortfeasors. So be it.

Under the common law system of contributory negligence, a plaintiff who was guilty of even slight negligence, could recover nothing. The law balanced this possible inequity by allowing a plaintiff who was found to be legally "pure" because he was not even slightly negligent, to

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8 12 O.S. 1971 § 831 dealing with contracts has not been applied to joint tortfeasors. See National Trailer Convoy, Inc. v. Oklahoma Turnpike Authority, 434 P.2d 238 (Okla. 1967).

9 Arkansas has retained the concept of joint and several liability. See Walton v. Tull, supra; Wheeling Pipe Line, Inc. v. Edrington, 535 S.W.2d 225 (Ark. 1976). However, Arkansas has adopted a version of the Uniform Contribution Among Tortfeasors Act which allows prorata contribution. See 9 U.L.A. 235.

10 For example Texas adopted its comparative negligence statutes at the same time as Oklahoma, but it provides answers to a variety of issues. The Texas statute provides each defendant is jointly and severally liable for entire amount, except that a defendant whose negligence is less than that of the plaintiff is liable only for that portion of the judgment which represents the percentage of negligence attributable to him. Our statute results in more uncertainty and thus more litigation. See Keeton "Comparative Negligence the Oklahoma Version," 10 Tul. L. R. 19 (1975).

11 This is Wisconsin's solution. See Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (Wis. 1962).

12 See Fleming, Comparative Negligence at Last By Judicial Choice, 64 Cal. L. R. 239 (1976).

13 We do not deal here with such problems as imputed or vicarious liability, where negligence of two or more tortfeasors is treated as a unit, so that so far as the comparative negligence doctrine is concerned it is the same as if only one defendant is involved. Neither do we attempt to discuss problems involved when a plaintiff does not sue all those who are potentially responsible for injuries, such as situations involving hit and run.
collect his entire judgment from any defendant who was guilty of "even slight negligence". The adoption of comparative negligence, even in the modified form, gives judgment to any plaintiff whose negligence is less than 50 percent. There is no longer a need to compensate a "pure" plaintiff. By doing away with joint liability a plaintiff will collect his damages from the defendant who is responsible for them.

This solution does not affect our rules against contribution which will continue to control when the proportion of negligence attributable to each defendant is not determined, for example where negligence is imputed. Under our comparative negligence system, a jury sets liability in a precise manner. If a jury is capable of apportioning fault between a plaintiff and defendant, it should be no more difficult for it to allocate fault among several defendants. Holding a defendant tortfeasor, who is only 20 percent at fault, liable for entire amount of damages is obviously inconsistent with the equitable principles of comparative negligence as enacted by the Legislature. We should allow a jury to apportion fault as it sees fit. Joint and several liability then will only exist where, for some reason, damages cannot be apportioned by the jury. By abrogating joint liability, a simple general verdict between plaintiff and each defendant may be made. In this situation no problem of contribution arises, because no defendant has a basis upon which to seek contribution from a co-defendant.

It is argued this could work a hardship on a plaintiff if one co-defendant is insolvent. But the specter of the judgment-proof wrongdoer is always with us, whether there is one defendant or many. We decline to turn a policy decision on an apparition. There is no solution that would not work an inequity on either the plaintiff or a defendant in some conceivable situation where one wrongdoer is insolvent.

An examination of the law of other jurisdictions shows no two statutory or judicial schemes to be identical or even similar to ours. There appears to be no pattern related to the consequences of the elimination of the bar of contributory negligence upon the question of joint versus several liability of co-defendants. We call your attention to an appellate California decision on this subject, American Motorcycle Association v. Superior Court, 65 Cal. App. 3d 694, 135 Cal. Rptr. 497 (1977). Although the decision in this case was recently overruled its rationale is very persuasive. Further the appendix to that decision is an exhaustive compilation as to each jurisdiction's treatment of multiple tortfeasors under its comparative negligence system.

Our comparative negligence statutes are incomplete both in scope and detail as to how it should be applied to multiple parties. The underlying principle of comparative negligence is founded on attaching liability in direct proportion to the respective fault of each person whose negligence caused the damage. The logical extension of this doctrine would apply it as among multiple tortfeasors as well as between plaintiff and defendant. If liability attaches to each tortfeasor in proportion to his comparative fault, there will be no need for added litigation by defendants seeking contribution. The adoption of the theory of comparative fault satisfies the need to apportion liability without invading the Legislature's power to grant contribution. "The only completely satisfactory method of dealing with the situation is to bring all parties into court in a single action to determine the damages sustained by each, and to require that each bear a proportion of the total loss according to his fault."

We therefore REVERSE and REMAND the proceeding to trial court with directions to enter judgment against each defendant in accordance with his degree of negligence as found by the jury, Martin for 50% And Morgan 20% Of total damages of $4,000.00.

WILLIAMS, IRWIN, BERRY, BARNES and

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17 Prosser, Comparative Negligence, 51 MICH. L. R. 465 (1953).
Questions and Notes

1. An important prerequisite for a finding of joint and several liability is a finding that there was a single (indivisible) injury to the plaintiff. In general, indivisible injuries are those in which multiple tortfeasors are responsible for a single result. On the other hand, divisible injuries (as the term implies) can be caused by multiple tortfeasors, but result in distinguishable injuries. For example, if two cars collide in an intersection, causing one of the cars to jump the curb and hit a pedestrian on the sidewalk, the pedestrian can sue both drivers for the indivisible injuries caused by the collision. On the other hand, if two cars are driven negligently in unrelated incidents, and one runs over the plaintiff’s leg, while the other runs over the plaintiff’s arm, each defendant can claim that the injuries are divisible, and each should be liable only for the damage caused by his or her negligent act. For a general discussion, see Prosser and Keeton, § 52.

BOYLES v. OKLAHOMA NATURAL GAS CO.
619 P.2d 613 (Okla. 1980)

OPALA, Justice

The issues presented by these appeals are: (1) Did the trial court err in sustaining Oklahoma Natural Gas Company’s (ONG) demurrer to plaintiff’s evidence? (2) Did the trial court err in refusing to instruct the jury that it apportion liability among the defendants in proportion to the percentage of causal negligence it finds attributable to each? (3) Was it error to instruct the jury on defendant’s violation of a local municipal ordinance? (4) Did refusal of a requested jury instruction that liability cannot be supported by one inference placed upon another constitute reversible error? (5) Did the trial court err in allowing testimony of a city mechanical inspector as to certain custom and usage in the trade? (6) Is the jury’s verdict tainted by an inconsistency in finding both the building owner and its contractor-plumber negligent?

We hold that: (1) ONG’s demurrer was properly sustained; (2) there was no error in refusing to instruct the jury to apportion the several defendants’ liability; (3) the jury instruction with respect to the ordinance was free from error; (4) the refusal to submit the requested instruction was not prejudicial and reversible error; (5) specific allegation of custom was not a necessary predicate for the admitted testimony as to certain trade practice; and (6) the jury verdict is not inconsistent since there was evidentiary basis upon which the jury could find both codefendants-owner and plumber-negligent by reason of separate acts.

A passerby [Plaintiff] was injured in an explosion which leveled a building owned by Canteen Corporation [Owner], one of four codefendants. The building had been occupied as a restaurant. It was equipped with a “fire suppression system”. The device, attached to the structure’s gas pipes directly above the cooking equipment, functioned in conjunction with a gas valve that, in the event of a fire, would automatically shut off the gas.

Owner engaged Accurate Fire Equipment Company [Accurate], another codefendant, to install three identical fire suppression systems at a different location. The system that was in place in the vacant restaurant was to be dismantled and used as one of the three to be installed. An employee of Accurate, who had removed the fire suppression system, did not take out the automatic gas valve which was a part of it. Later, when other employees of Accurate were waiting to begin installation of the system at the new location, they were instructed to “pick up” the missing gas valve from the vacant building. They then removed the valve. In the process they left uncapped the gas pipe they had cut for this purpose. Several months later, during the winter, water froze in the vacant building and its pipes burst. The Owner engaged Carder Plumbing Company (Carder), a third codefendant, to restore heat and prevent
refreezing. One of Carder’s plumbers turned on the gas into the building and within an hour an explosion occurred in which plaintiff was injured. Plaintiff brought suit against the Owner, ONG, Carder and Accurate to recover damages for injuries sustained in the gas explosion alleged to have been caused by defendants’ negligence. The trial court sustained ONG’s demurrer to plaintiff’s evidence and a jury verdict found against the remaining three defendants. Accurate did not appeal. Owner and Carder brought separate appeals which stand consolidated for decision.

**II**

**ERROR IN JURY’S FAILURE TO ASSESS PERCENTAGE OF NEGLIGENCE ATTRIBUTABLE TO EACH DEFENDANT**

The Owner and Carder assert error in trial court’s refusal to instruct the jury separately to assess against each of the defendants the percentage of negligence found attributable to each. Both the Owner and Carder argue that *Laubach v. Morgan*, Okl., 588 P.2d 1071 (1978), should have been applied here to the multiple tortfeasors in a negligence action. If apposite, *Laubach* would require that the negligence of each party be separately assessed.

*Laubach* was a comparative negligence case, within the meaning of 23 O.S. Supp. 1978 § 11, Repealed by Okla. Sess. L. 1979, c. 38 § 4 and replaced by 23 O.S. Supp. 1979 § 13, in which the plaintiff was found partially at fault in producing his injury. Here, we are concerned not with comparative negligence, but rather with an admittedly blame-free plaintiff seeking recovery from multiple tortfeasors whose negligence is said to have "concorded, commingled and combined" to produce the harm.

The common-law negligence liability concept may be described as "all or nothing" to the plaintiff. If he be blame-free "all" is due him; if he be at fault, however slightly, "nothing" is his due. The statutory comparative negligence approach allows the victim at fault to secure some, but not all, of his damages. The raison d’être and rationale of comparative negligence are tied, hand-and-foot, to the narrow parameters of a blameworthy plaintiff’s claim. McNichols, *Judicial Elimination of Joint and Several Liability Because of Comparative Negligence — A Puzzling Choice*, 32 Okla. L. Rev. 1, 11 and 12 (1979). We hold that neither the rationale nor the holding of *Laubach* applies to that class of negligence litigation in which the plaintiff is not one among several negligent co-actors.

Several liability, fashioned in *Laubach*, was held applicable in a comparative negligence context where the plaintiff was found to be one of several negligent co-actors. There is absolutely nothing in *Laubach* to negate the continued force of the common-law rule of joint and several liability in those negligent torts which fall completely outside the purview of our comparative negligence legislation. Although some of the language in *Laubach* appears sweeping at first blush, it is to be viewed as limited to cases in which the trier is called upon to compare between the plaintiff’s want of care on the one hand, and that of one or more defendants on the other hand. Several reasons militate in favor of this conclusion. No foundation exists for extending *Laubach*'s proportionate-fault-assessment doctrine to multiple negligent tortfeasors in all cases. The states which have abrogated joint and several liability have done so — if at all — only within the context of comparative negligence and quite limitedly at that. Absent an

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2. The pertinent language in *Laubach*, supra note 5 at 1074, provides: "2. Do away with the ‘entire liability rule’ and provide multiple tortfeasors are severally liable only,... This in effect drastically changes the theory of joint-tortfeasors." At page 1075 the opinion states: "Joint and several liability then will only exist where, for some reason, damages cannot be apportioned by the jury." See also McNichols, *Judicial Elimination of Joint and Several Liability Because of Comparative Negligence — A Puzzling Choice*, supra note 7 at 27.

3. Arkansas has retained the concept of joint and several liability, *Walton v. Tull*, 356 S.W.2d 20, 26 (Ark. 1962); *Wheeling Pipe Line, Inc. v. Edrington*, 535 S.W.2d 225, 226 (Ark. 1976). California also retained joint and several liability rule, finding, along with the great majority of jurisdictions, that it does not conflict with comparative negligence theory. See *American Motorcycle Ass’n v. Superior Court*, 578 P.2d 899, 901 (Cal. 1978). Texas' comparative negligence statute provides that each defendant is jointly and severally liable for the entire amount, except that a defendant whose negligence is less (continued...)
express legislative abrogation, no jurisdiction has found it necessary completely to abolish the common-law liability rule. Except as modified in Laubach for comparative negligence cases, the common-law rule of joint and several tortfeasors' liability remained unaltered and in force when the claim here under review arose and at the time it came for adjudication. That rule casts—not on the blameless victim—but on each of the legally vanquished wrongdoers the risk of an insolvent tortfeasor. Because of the recognized difficulty in apportioning fault in most instances, the common-law rule allocates liability as an integrity. In so doing it strives to afford an injured plaintiff full and just satisfaction of the adjudged obligation.


In the instant case there was but a single injury. Implicit in the jury's verdict is its finding that the separate and independent acts of negligence on the part of the codefendants concurred and combined to produce the harmful result for which damages were sought. Even though concert among the tortfeasors was lacking and the act of one codefendant alone may not have brought about the result, each is at common law responsible for the entire damage. There is no statutory warrant for a conclusion that the common-law rule was to be scuttled in order to alter the legal obligation owed by negligent co-actors to a fault-free tort claimant.

We hold Laubach does not apply to tort litigation in which the injured party is not a negligent co-actor.

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AMERICAN MOTORCYCLE ASS'N v. SUPERIOR COURT
578 P.2d 899 (Cal. 1978)

TOBRINER, Justice

Three years ago, in Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226, we concluded that the harsh and much criticized contributory negligence doctrine, which totally barred an injured person from recovering damages whenever his own negligence had contributed in any degree to the injury, should be replaced in this state by a rule of comparative negligence, under which an injured individual's recovery is simply proportionately diminished, rather than completely eliminated, when he is partially responsible for the injury. In reaching the conclusion to adopt comparative negligence in Li, we explicitly recognized that our innovation inevitably raised numerous collateral issues, "[t]he most serious [of which] are those attendant upon the administration of a rule of comparative negligence in cases involving multiple parties." (13 Cal. 3d at p. 823, 119 Cal. Rptr. at p. 87, 532 P.2d at p. 1239.) Because the Li litigation itself involved only a single plaintiff and a single defendant, however, we concluded that it was "neither necessary nor wise" (13 Cal. 3d at p. 826, 119 Cal. Rptr. 858, 532 P.2d 1226) to address such multiple party questions at that juncture, and we accordingly postponed consideration of such questions until a case directly presenting such issues came before our court. The present mandamus proceeding presents such a case, and requires us to resolve a number of the thorny multiple party problems to which Li adverted.

For the reasons explained below, we have reached the following conclusions with respect to the multiple party issues presented by this case. First, we conclude that our adoption of comparative negligence to ameliorate the
inequitable consequences of the contributory negligence rule does not warrant the abolition or contraction of the established "joint and several liability" doctrine; each tortfeasor whose negligence is a proximate cause of an indivisible injury remains individually liable for all compensable damages attributable to that injury. Contrary to petitioner's contention, we conclude that joint and several liability does not logically conflict with a comparative negligence regime. Indeed, as we point out, the great majority of jurisdictions which have adopted comparative negligence have relied on the joint and several liability rule; we are aware of no judicial decision which intimates that the adoption of comparative negligence compels the abandonment of this long-standing common law rule. The joint and several liability doctrine continues, after Li, to play an important and legitimate role in protecting the ability of a negligently injured person to obtain adequate compensation for his injuries from those tortfeasors who have negligently inflicted the harm.

Second, although we have determined that Li does not mandate a diminution of the rights of injured persons through the elimination of the joint and several liability rule, we conclude that the general principles embodied in Li do warrant a reevaluation of the common law equitable indemnity doctrine, which relates to the allocation of loss among multiple tortfeasors. As we explain, California decisions have long invoked the equitable indemnity doctrine in numerous situations to permit a "passively" or "secondarily" negligent tortfeasor to shift his liability completely to a more directly culpable party. While the doctrine has frequently prevented a more culpable tortfeasor from completely escaping liability, the rule has fallen short of its equitable heritage because, like the discarded contributory negligence doctrine, it has worked in an "all-or-nothing" fashion, imposing liability on the more culpable tortfeasor only at the price of removing liability altogether from another responsible, albeit less culpable, party.

Prior to Li, of course, the notion of apportioning liability on the basis of comparative fault was completely alien to California common law. In light of Li, however, we think that the long-recognized common law equitable indemnity doctrine should be modified to permit, in appropriate cases, a right of partial indemnity, under which liability among multiple tortfeasors may be apportioned on a comparative negligence basis. As we explain, many jurisdictions which have adopted comparative negligence have embraced similar comparative contribution or comparative indemnity systems by judicial decision. Such a doctrine conforms to Li's objective of establishing "a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault." (13 Cal. 3d at p. 813, 119 Cal. Rptr. at p. 864, 532 P.2d at p. 1232.)

Third, we conclude that California's current contribution statutes do not preclude our court from evolving this common law right of comparative indemnity. In Dole v. Dow Chemical Company (1972) 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288, the New York Court of Appeals recognized a similar, common law partial indemnity doctrine at a time when New York had a contribution statute which paralleled California's present legislation. Moreover, the California contribution statute, by its own terms, expressly subordinates its provisions to common law indemnity rules; since the comparative indemnity rule we recognize today is simply an evolutionary development of the common law equitable indemnity doctrine, the primacy of such right of indemnity is expressly recognized by the statutory provisions. In addition, the equitable nature of the comparative indemnity doctrine does not thwart, but enhances, the basic objective of the contribution statute, furthering an equitable distribution of loss among multiple tortfeasors.

Fourth, and finally, we explain that under the governing provisions of the Code of Civil Procedure, a named defendant is authorized to file a cross-complaint against any person, whether already a party to the action or not, from whom the named defendant seeks to obtain total or partial indemnity. Although the trial court retains the authority to postpone the trial of the indemnity question if it believes such action is appropriate to avoid unduly complicating the plaintiff's suit, the court may not preclude the filing of such a cross-complaint altogether.

In light of these determinations, we conclude that a writ of mandate should issue, directing the trial court to permit petitioner-defendant to file a
cross-complaint for partial indemnity against previously unjoined alleged concurrent tortfeasors.

1. The facts

In the underlying action in this case, plaintiff Glen Gregos, a teenage boy, seeks to recover damages for serious injuries which he incurred while participating in a cross-country motorcycle race for novices. Glen’s second amended complaint alleges, in relevant part, that defendants American Motorcycle Association (AMA) and the Viking Motorcycle Club (Viking) the organizations that sponsored and collected the entry fee for the race negligently designed, managed, supervised and administered the race, and negligently solicited the entrants for the race. The second amended complaint further alleges that as a direct and proximate cause of such negligence, Glen suffered a crushing of his spine, resulting in the permanent loss of the use of his legs and his permanent inability to perform sexual functions. Although the negligence count of the complaint does not identify the specific acts or omissions of which plaintiff complains, additional allegations in the complaint assert, inter alia, that defendants failed to give the novice participants reasonable instructions that were necessary for their safety, failed to segregate the entrants into reasonable classes of equivalently skilled participants, and failed to limit the entry of participants to prevent the racecourse from becoming overcrowded and hazardous.1

AMA filed an answer to the complaint, denying the charging allegations and asserting a number of affirmative defenses, including a claim that Glen’s own negligence was a proximate cause of his injuries. Thereafter, AMA sought leave of court to file a cross-complaint, which purported to state two causes of action against Glen’s parents. The first cause of action alleges that at all relevant times Glen’s parents (1) knew that motorcycle racing is a dangerous sport, (2) were "knowledgeable and fully cognizant" of the training and instruction which Glen had received on the handling and operation of his motorcycle, and (3) directly participated in Glen’s decision to enter the race by signing a parental consent form. This initial cause of action asserts that in permitting Glen’s entry into the race, his parents negligently failed to exercise their power of supervision over their minor child; moreover, the cross-complaint asserts that while AMA’s negligence, if any, was "passive," that of Glen's parents was "active." On the basis of these allegations, the first cause of action seeks indemnity from Glen’s parents if AMA is found liable to Glen.

In the second cause of action of its proposed cross-complaint, AMA seeks declaratory relief. It reasserts Glen's parents' negligence, declares that Glen has failed to join his parents in the action, and asks for a declaration of the "allocable negligence" of Glen’s parents so that "the damages awarded [against AMA], if any, [may] be reduced by the percentage of damages allocable to cross- defendants' negligence." As more fully explained in the accompanying points and authorities, this second cause of action is based on an implicit assumption that the Li decision abrogates the rule of joint and several liability of concurrent tortfeasors and establishes in its stead a new rule of "proportionate liability," under which each concurrent tortfeasor who has proximately caused an indivisible harm may be held liable only for a portion of plaintiff’s recovery, determined on a comparative fault basis.

The trial court, though candidly critical of the current state of the law, concluded that existing legal doctrines did not support AMA’s proposed cross-complaint, and accordingly denied AMA’s motion for leave to file the cross-complaint. AMA petitioned the Court of Appeal for a writ of mandate to compel the trial court to grant its motion, and the Court of Appeal, recognizing the recurrent nature of the issues presented and the need for a speedy resolution of these multiple party questions, issued an alternative writ; ultimately, the court granted a peremptory writ of mandate. In view of the obvious statewide importance of the questions at issue, we ordered a hearing in this case on our own motion. All parties concede that the case is properly before us.

2. The adoption of comparative negligence

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1 Glen’s second amended complaint is framed in six counts and names, in addition to AMA and Viking, numerous individual Viking officials and the Continental Casualty Company of Chicago (AMA’s insurer) as defendants. In addition to seeking recovery on the basis of negligence, plaintiff claims that various defendants (1) were guilty of fraud and misrepresentation in relation to the race, (2) acted in bad faith in refusing to settle a medical reimbursement claim allegedly covered by insurance and (3) intentionally inflicted emotional distress upon him. Only the negligence claim, however, is relevant to the present proceeding.
in *Li* does not warrant the abolition of joint and several liability of concurrent tortfeasors.

In evaluating the propriety of the trial court's ruling, we begin with a brief review of the established rights of injured persons vis a vis negligent tortfeasors under current law. Under well-established common law principles, a negligent tortfeasor is generally liable for all damage of which his negligence is a proximate cause; stated another way, in order to recover damages sustained as a result of an indivisible injury, a plaintiff is not required to prove that a tortfeasor's conduct was the sole proximate cause of the injury, but only that such negligence was a proximate cause. (See generally *4* WITKIN, *SUMMARY OF CAL. LAW* (8th ed. 1974) *Torts*, § 624, pp. 2906-2907 and cases cited; REST. 2D *TORTS*, §§ 432, subd. (2), 439.) This result follows from Civil Code section 1714's declaration that "[e]very one is responsible ... for an injury occasioned to another by his want of ordinary care or skill...." A tortfeasor may not escape this responsibility simply because another act either an "innocent" occurrence such as an "act of God" or other negligent conduct may also have been a cause of the injury.

In cases involving multiple tortfeasors, the principle that each tortfeasor is personally liable for any indivisible injury of which his negligence is a proximate cause has commonly been expressed in terms of "joint and several liability." As many commentators have noted, the "joint and several liability" concept has sometimes caused confusion because the terminology has been used with reference to a number of distinct situations. (See, e.g., *PROSSER, LAW OF TORTS* (4th ed. 1971) §§ 46, 47, pp. 291-299; 1 HARPER & JAMES, *LAW OF TORTS* (1956) § 10.1, pp. 692-709.) The terminology originated with respect to tortfeasors who acted in concert to commit a tort, and in that context it reflected the principle, applied in both the criminal and civil realm, that all members of a "conspiracy" or partnership are equally responsible for the acts of each member in furtherance of such conspiracy.

Subsequently, the courts applied the "joint and several liability" terminology to other contexts in which a preexisting relationship between two individuals made it appropriate to hold one individual liable for the act of the other; common examples are instances of vicarious liability between employer and employee or principal and agent, or situations in which joint owners of property owe a common duty to some third party. In these situations, the joint and several liability concept reflects the legal conclusion that one individual may be held liable for the consequences of the negligent act of another.

In the concurrent tortfeasor context, however, the "joint and several liability" label does not express the imposition of any form of vicarious liability, but instead simply embodies the general common law principle, noted above, that a tortfeasor is liable for any injury of which his negligence is a proximate cause. Liability attaches to a concurrent tortfeasor in this situation not because he is responsible for the acts of other independent tortfeasors who may also have caused the injury, but because he is responsible for all damage of which his own negligence was a proximate cause. When independent negligent actions of a number of tortfeasors are each a proximate cause of a single injury, each tortfeasor is thus personally liable for the damage sustained, and the injured person may sue one or all of the tortfeasors to obtain a recovery for his injuries; the fact that one of the tortfeasors is impecunious or otherwise immune from suit does not relieve another tortfeasor of his liability for damage which he himself has proximately caused.

Prior to *Li*, of course, a negligent tortfeasor's liability was limited by the draconian contributory negligence doctrine; under that doctrine, a negligent tortfeasor escaped liability for injuries which he had proximately caused to another whenever the injured person's lack of due care for his own safety was also a proximate cause of the injury. In *Li*, however, we repudiated the contributory negligence rule, recognizing with Dean Prosser that "[p]robably the true explanation [of the doctrine's development in this country was] that the courts [of the 19th century] found in this defense, along with the concepts of duty and proximate cause, a convenient instrument of control over the jury, by which the liabilities of rapidly growing industry were curbed and kept within bounds." (13 Cal. 3d at p. 811, fn. 4, 119 Cal. Rptr. at p. 863, 532 P.2d at p. 1231 (quoting *Prosser, Comparative Negligence* (1953) 41 CAL.}
L. Rev. 1, 4)); cf. Dillon v. Legg (1968) 68 Cal. 2d 728, 734-735, 69 Cal. Rptr. 72, 441 P.2d 912.) Concluding that any such rationale could no longer justify the complete elimination of an injured person's right to recover for negligently inflicted injury, we held in Li that "in all actions for negligence resulting in injury to person or property, the contributory negligence of the person injured in person or property shall not bar recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the person recovering." (13 Cal. 3d at p. 829, 119 Cal. Rptr. at p. 875, 532 P.2d at p. 1243.)

In the instant case AMA argues that the Li decision, by repudiating the all-or-nothing contributory negligence rule and replacing it by a rule which simply diminishes an injured party's recovery on the basis of his comparative fault, in effect undermined the fundamental rationale of the entire joint and several liability doctrine as applied to concurrent tortfeasors. In this regard AMA cites the following passage from Finnegan v. Royal Realty Co. (1950) 35 Cal. 2d 409, 433-434, 218 P.2d 17, 32: "Even though persons are not acting in concert, if the results produced by their acts are indivisible, each person is held liable for the whole. ... The reason for imposing liability on each for the entire consequences 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. This liability is imposed where each cause is sufficient in itself as well as where each cause is required to produce the result." (Emphasis added.) Focusing on the emphasized sentence, AMA argues that after Li (1) there is a basis for dividing damages, namely on a comparative negligence basis, and (2) a plaintiff is no longer necessarily "innocent," for Li permits a negligent plaintiff to recover damages. AMA maintains that in light of these two factors it is logically inconsistent to retain joint and several liability of concurrent tortfeasors after Li. As we explain, for a number of reasons we cannot accept AMA's argument.

First, the simple feasibility of apportioning fault on a comparative negligence basis does not render an indivisible injury "divisible" for purposes of the joint and several liability rule. As we have already explained, a concurrent tortfeasor is liable for the whole of an indivisible injury whenever his negligence is a proximate cause of that injury. In many instances, the negligence of each of several concurrent tortfeasors may be sufficient, in itself, to cause the entire injury; in other instances, it is simply impossible to determine whether or not a particular concurrent tortfeasor's negligence, acting alone, would have caused the same injury. Under such circumstances, a defendant has no equitable claim vis a vis an injured plaintiff to be relieved of liability for damage which he has proximately caused simply because some other tortfeasor's negligence may also have caused the same harm. In other words, the mere fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury.

Second, abandonment of the joint and several liability rule is not warranted by AMA's claim that, after Li, a plaintiff is no longer "innocent." Initially, of course, it is by no means invariably true that after Li injured plaintiffs will be guilty of negligence. 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.

Moreover, even when a plaintiff is partially at fault for his own injury, a plaintiff's culpability is not equivalent to that of a defendant. In this setting, a plaintiff's negligence relates only to a failure to use due care for his own protection, while a defendant's negligence relates to a lack of due care for the safety of others. 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,^2

^2 A question has arisen as to whether our Li opinion, in mandating that a plaintiff's recovery be diminished in proportion to the plaintiff's negligence, intended that the plaintiff's conduct be compared with each individual tortfeasor's negligence, with the cumulative negligence of all named defendants or with all other negligent conduct that contributed to the injury. The California BAJI Committee, which specifically addressed this issue after (continued...)
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. (See Prosser, Law of Torts, supra, § 65, p. 418.)

Finally, from a realistic standpoint, we think that AMA’s suggested abandonment of the joint and several liability rule would work a serious and unwarranted deleterious effect on the practical ability of negligently injured persons to receive adequate compensation for their injuries. 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. In such a case the rule recognizes that fairness dictates that the “wronged party should not be deprived of his right to redress,” but that “[t]he wrongdoers should be left to work out between themselves any apportionment.” (Summers v. Tice (1948) 33 Cal. 2d 80, 88, 199 P.2d 1, 5.)

The Li decision does not detract in the slightest from this pragmatic policy determination.

For all of the foregoing reasons, we reject AMA’s suggestion that our adoption of comparative negligence logically compels the abolition of joint and several liability of concurrent tortfeasors.

3. Upon reexamination of the common law

equitable indemnity doctrine in light of the principles underlying Li, we conclude that the doctrine should be modified to permit partial indemnity among concurrent tortfeasors on a comparative fault basis.

Although, as discussed above, we are not persuaded that our decision in Li calls for a fundamental alteration of the rights of injured plaintiffs vis-à-vis concurrent tortfeasors through the abolition of joint and several liability, the question remains whether the broad principles underlying Li warrant any modification of this state’s common law rules governing the allocation of loss among multiple tortfeasors. As we shall explain, the existing California common law equitable indemnity doctrine while ameliorating inequity and injustice in some extreme cases suffers from the same basic "all-or-nothing" deficiency as the discarded contributory negligence doctrine and falls considerably short of fulfilling Li’s goal of "a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault." (13 Cal. 3d at p. 813, 119 Cal. Rptr. at p. 864, 532 P.2d at p. 1232.) Taking our cue from a recent decision of the highest court of one of our sister states, we conclude in line with Li’s objectives that the California common law equitable indemnity doctrine should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis.

In California, as in most other American jurisdictions, the allocation of damages among multiple tortfeasors has historically been analyzed in terms of two, ostensibly mutually exclusive, doctrines: contribution and indemnification. In traditional terms, the apportionment of loss between multiple tortfeasors has been thought to present a question of contribution; indemnity, by contrast, has traditionally been viewed as concerned solely with whether a loss should be entirely shifted from one tortfeasor to another, rather than whether the loss should be shared between the two. (See, e.g., Alisal Sanitary Dist. v. Kennedy (1960) 180 Cal. App. 2d 69, 74-75, 4 Cal. Rptr. 379; Atchison, T.& S.F. Ry. Co. v. Franco (1968) 267 Cal. App. 2d 881, 886, 73 Cal. Rptr. 660.) As we shall explain, however, the dichotomy between the two concepts is more
formalistic than substantive, and the common goal of both doctrines, the equitable distribution of loss among multiple tortfeasors, suggests a need for a reexamination of the relationship of these twin concepts. (See generally Werner, Contribution and Indemnity in California (1969) 57 CAL. L. REV. 490.)

Early California decisions, relying on the ancient law that "the law will not aid a wrongdoer," embraced the then ascendant common law rule denying a tortfeasor any right to contribution whatsoever. (See, e.g., Dow v. Sunset Tel. & Tel. Co. (1912) 162 Cal. 136, 121 P. 379.) In 1957, the California Legislature enacted a bill to ameliorate the harsh effects of that "no contribution" rule; this legislation did not, however, sweep aside the old rule altogether, but instead made rather modest inroads into the contemporary doctrine, restricting a tortfeasor's statutory right of contribution to a narrow set of circumstances. We discuss the effect of the 1957 contribution legislation in more detail below; at this point it is sufficient to note that the passage of the 1957 legislation had the effect of foreclosing any evolution of the California common law contribution doctrine beyond its pre-1957 "no contribution" state. Over the past two decades, common law developments with respect to the allocation of loss between joint tortfeasors in this state have all been channeled through the equitable indemnity doctrine.

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Because of the all-or-nothing nature of the equitable indemnity rule, courts were, from the beginning, understandably reluctant to shift the entire loss to a party who was simply slightly more culpable than another. As a consequence, throughout the long history of the equitable indemnity doctrine courts have struggled to find some linguistic formulation that would provide an appropriate test for determining when the relative culpability of the parties is sufficiently disparate to warrant placing the entire loss on one party and completely absolving the other.


As one Court of Appeal has charitably stated: "The cases are not always helpful in determining whether equitable indemnity lies. The test[s] utilized in applying the doctrine are vague. Some authorities characterize the negligence of the indemnitor as "active," "primary," or "positive," and the negligence of the indemnitee as "passive," "secondary," or "negative." [Citations.] Other authorities indicate that the application of the doctrine depends on whether the claimant's liability is "primary," "secondary," "constructive," or "derivative." [Citations.] These formulations have been criticized as being artificial and as lacking the objective criteria desirable for predictability in the law. [Citations.]" (Atchison, T. & S.F. Ry. Co. v. Franco, supra, 267 Cal. App. 2d 881, 886, 73 Cal. Rptr. 660, 664.)

Indeed, some courts, as well as some prominent commentators, after reviewing the

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3 As Judge Learned Hand observed more than a quarter of a century ago: "[I]ndemnity is only an extreme form of contribution." (Slattery v. Marra Bros. (2d Cir. 1951) 186 F. 2d 134, 138.)

4 Dean Prosser was at a loss in attempting to state the applicable standard: "Out of all this, it is extremely difficult to state any general rule or principle as to when indemnity will be allowed and when it will not. It has been said that it is permitted only where the indemnitor has owed a duty of his own to the indemnitee; that it is based on a "great difference" in the gravity of the fault of the two tortfeasors; or that it rests upon a disproportion or difference in character of the duties owed by the two to the injured plaintiff. Probably none of these is the complete answer, and, as is so often the case in the law of torts, no one explanation can be found which will cover all the cases. Indemnity is a shifting of responsibility from the shoulders of one person to another; and the duty to indemnify will be recognized in cases where community opinion would consider that in justice the responsibility should rest upon one rather than the other. This may be because of the relation of the parties to one another, and the consequent duty owed; or it may be because of a
welter of inconsistent standards utilized in the equitable indemnity realm, have candidly eschewed any pretense of an objectively definable equitable indemnity test. 

[The court also addressed complaints by amici curiae that adoption of apportioned liability would undermine public policy favoring settlements. The court concluded "that a plaintiff's recovery from nonsettling tortfeasors should be diminished only by the amount that the plaintiff has recovered in a good faith settlement," rather than reducing the amount according to the settling tortfeasor's proportion of responsibility. The implications of this position are considered below in Justice Clark's dissent. - ed. ]

6. Conclusion

In *Li v. Yellow Cab Co.*, *supra*, this court examined and abandoned the time-worn contributory negligence rule which completely exonerated a negligent defendant whenever an injured plaintiff was partially at fault for the accident, recognizing with Dean Prosser the indefensibility of a doctrine which "places upon one party the entire burden of a loss for which two are, by hypothesis, responsible." (13 Cal. 3d at p. 810, fn. 3, 119 Cal. Rptr. at p. 862, 532 P.2d at 1230 (quoting PROSSER, LAW OF TORTS, *supra*, § 67, p. 433).)

In the instant case we have concluded that the force of *Li*'s rationale applies equally to the allocation of responsibility between two or more negligent defendants and requires a modification of this state's traditional all-or-nothing common law equitable indemnity doctrine. Again, we concur with Dean Prosser's observation in a related context that "[t]here is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were ... unintentionally responsible, to be shouldered onto one alone, ... while the latter does scot free." (PROSSER, LAW OF TORTS, *supra*, § 50, p. 307.) From the crude all-or-nothing rule of traditional indemnity doctrine, and the similarly inflexible per capita division of the narrowly circumscribed contribution statute, we have progressed to the more refined stage of permitting the jury to apportion liability in accordance with the tortfeasors' comparative fault.

Accordingly, we hold that under the common law equitable indemnity doctrine a concurrent tortfeasor may obtain partial indemnity from cotortfeasors on a comparative fault basis.

Let a peremptory writ of mandate issue directing the trial court (1) to vacate its order denying AMA leave to file its proposed cross-complaint, and (2) to proceed in accordance with the views expressed in this opinion. Each party shall bear its own costs.

BIRD, C.J., and MOSK, RICHARDSON, MANUEL and SULLIVAN (Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council), JJ., concur.

CLARK, Justice, dissenting

I

Repudiating the existing contributory negligence system and adopting a system of comparative negligence, this court in *Li v. Yellow Cab Co.* (1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226, repeatedly like the tolling bell enunciated the principle that the extent of liability must be governed by the extent of fault. Thus, the court stated, "the extent of fault should govern the extent of liability" (*id.*, at p. 811, 119 Cal. Rptr. at p. 863, 532 P.2d at p. 1231), "liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault" (*id.*, at p. 813, 119 Cal. Rptr. at p. 864, 532 P.2d at p. 1232), and "the fundamental purpose of (the rule of pure comparative negligence) shall be to assign responsibility and liability for damage in direct proportion to the amount of negligence of each of the parties" (*id.*, at p. 829, 119 Cal. Rptr. at p. 875, 532 P.2d at p. 1243). And in a cacophony of emphasis this court explained that the "basic objection to the doctrine (of contributory negligence) grounded in the primal concept that in a system in which liability is based on fault, the extent of fault should govern the extent of liability remains irresistible to reason and all intelligent notions of fairness." (*Id.*, at p. 811, 119 Cal. Rptr. at p. 863, 532 P.2d at p. 1231.)
Now, only three years later, the majority of my colleagues conclude that the Li principle is not irresistible after all. Today, in the first decision of this court since Li explaining the operation of the Li principle, they reject it for almost all cases involving multiple parties.

The majority reject the Li principle in two ways. First, they reject it by adopting joint and several liability holding that each defendant including the marginally negligent one will be responsible for the loss attributable to his codefendant's negligence. To illustrate, if we assume that the plaintiff is found 30 percent at fault, the first defendant 60 percent, and a second defendant 10 percent, the plaintiff under the majority's decision is entitled to a judgment for 70 percent of the loss against each defendant, and the defendant found only 10 percent at fault may have to pay 70 percent of the loss if his codefendant is unable to respond in damages.

The second way in which the majority reject Li's irresistible principle is by its settlement rules. Under the majority opinion, a good faith settlement releases the settling tortfeasor from further liability, and the "plaintiff's recovery from nonsettling tortfeasors should be diminished only by the amount that the plaintiff has actually recovered in a good faith settlement, rather than by an amount measured by the settling tortfeasor's proportionate responsibility for the injury." (Ante, p. 199 of 146 Cal. Rptr.) The settlement rules announced today may turn Li's principle upside down the extent of dollar liability may end up in inverse relation to fault.

Whereas the joint and several liability rules violate the Li principle when one or more defendants are absent or unable to respond in damages, the settlement rules will ordinarily preclude effecting the majority's principle in cases when all defendants are involved in the litigation and are solvent. To return to my 30-60-10 illustration and further assuming both defendants are solvent, the plaintiff is ordinarily eager to settle quickly to avoid the long delay incident to trial. Further, he will be willing to settle with either defendant because under the majority's suggested rules, he may then pursue the remaining defendant for the balance of the recoverable loss (70 percent) irrespective whether the remaining defendant was 10 percent at fault or 60 percent at fault. The defendants' settlement postures will differ substantially. Realizing the plaintiff is eager for quick recovery and is capable of pursuing the codefendant, the defendant 60 percent liable for the loss will be prompted to offer a sum substantially below his share of fault, probably paying 20 to 40 percent of the loss. The defendant only 10 percent at fault will be opposed to such settlement, wishing to limit his liability. To compete with his codefendant in settlement offers he will be required to offer substantially in excess of his 10 percent share of the loss, again frustrating the Li principle that the extent of liability should be governed by the extent of fault. Should he fail to settle, the 10 percent at fault defendant runs the risk that his codefendant will settle early for perhaps half of his own liability, while the lesser negligent person must eventually pay the remainder, not only frustrating the Li principle but turning it upside down. In any event, it is extremely unlikely he can settle for his 10 percent share.  

Questions and Notes

1. The rule of joint and several liability received severe criticism by the proponents of tort reform. As of 1986, fifteen states had modified the rule of joint and several liability. See PROSSER & KEETON, § 84 (1988 Supp.). Similar issues are raised in the next section on joint tortfeasors.

5 In addition, the policy in favor of settlement will be frustrated by the majority's rule that the plaintiff's recovery against nonsettling tortfeasors should be diminished only by the amount recovered in a good faith settlement rather than by settling tortfeasor's proportionate responsibility. (Ante, p. 604.) As the majority recognize: "Few things would be better calculated to frustrate (section 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." (Id.) Settlement by one tortfeasor is not going to compel the other tortfeasor to withdraw his cross-complaint for total or partial indemnity. Rather there will be a claim of bad faith because if the jury awards the plaintiff all of the damages sought and concludes that the settling tortfeasor should bear the lion's share of the responsibility for the laws, the settling tortfeasor would have escaped for a small fraction of his actual liability. This alone, although not determinative, would indicate bad faith. (River Garden Farms, Inc. v. Superior Court (1973) 26 Cal. App. 3d 986, 997, 103 Cal. Rptr. 498 ("price is the immediate signal for the inquiry into good faith").)

3. Another resource you may wish to consult is DeWolf, Several Liability and the Effect of Settlement on Claim Reduction, 23 Gonz. L. Rev. 37, 38-45 (1987/88).

§ C. The Effect of Settlement

TECH-BILT, INC. v. WOODWARD-CLYDE & ASSOCIATES

38 Cal.3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985)

GRODIN, Justice.

This case requires us to consider the meaning of the phrase "settlement ... made in good faith" as used in Code of Civil Procedure section 877.6, and to determine whether a plaintiff's decision to dismiss a claim barred by the statute of limitations in return for a waiver of costs is sufficient to insulate the dismissed tortfeasor/defendant against claims in equitable indemnity asserted by a nonsettling codefendant.

I

Tech-Bilt, Inc. (Tech-Bilt) appeals from a judgment which granted a motion for summary judgment and dismissed its cross-complaint against Woodward-Clyde & Associates (Woodward-Clyde). Plaintiffs in the underlying action, Mr. and Mrs. Andrew Fabula (hereinafter referred to as the plaintiffs), owners of a residential property, brought this action against Tech-Bilt (the developer), Woodward-Clyde (soils engineers), and others on various theories to recover damages for structural defects in their residence.

During informal discovery in the early stages of litigation, counsel for Woodward-Clyde informed counsel for plaintiffs that Woodward-Clyde had completed its services on the subject development more than 10 years before plaintiffs filed their complaint in this action. Plaintiffs' action against Woodward-Clyde was therefore barred by the applicable 10-year statute of limitations under section 337.15. Woodward-Clyde's counsel expressed his intention to file a motion for summary judgment based on this statute of limitations, but also offered plaintiffs an alternative. If plaintiffs agreed to dismiss their claim against Woodward-Clyde with prejudice, Woodward-Clyde would waive any claim against plaintiffs for costs incurred in defending the action. Plaintiffs agreed to this proposal and dismissed their claim against Woodward-Clyde in March 1981.

In April 1981, Tech-Bilt filed an amended cross-complaint for indemnity and declaratory relief, and in June named Woodward-Clyde as a party cross-defendant. Woodward-Clyde then brought motions for an order to confirm its agreement with the plaintiffs as a good faith settlement under the terms of section 877.6 and for summary judgment as to Tech-Bilt's cross-complaint. After a hearing, the court found the settlement to be in good faith and entered summary judgment dismissing Tech-Bilt's cross-complaint against Woodward-Clyde.

As a preliminary matter, it should be noted that, had Woodward-Clyde obtained a summary judgment on plaintiffs' claim on the basis of section 337.15, this would not have barred Tech-Bilt's cross-complaint against Woodward-Clyde.

All statutory references, unless otherwise noted, are to the Code of Civil Procedure.

Woodward-Clyde's costs evidently amounted to $55 for an answer fee.
Woodward-Clyde for equitable indemnity. "[A] cross-complaint for indemnity may be filed more than 10 years after the alleged indemnitor has substantially completed his services, provided that the underlying action was itself brought within the 10-year limitation period of the statute." (Valley Circle Estates v. VTN Consolidated, Inc. (1983) 33 Cal.3d 604, 609, 189 Cal. Rptr. 871, 659 P.2d 1160.) In this case, plaintiffs' action against Tech-Bilt was brought within the 10-year limitation period of section 337.15. The question presented is thus whether Tech-Bilt's right to cross-complain for equitable indemnity is substantially affected by the fact that plaintiffs' underlying action against Woodward-Clyde was terminated by a dismissal in return for waiver of costs rather than through a summary judgment motion.

II

The statutes which govern this case are sections 877 and 877.6. Section 877 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 other such 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 the consideration paid for it whichever is the greater; and [¶] (b) It shall discharge the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors."

Section 877.6 states, in pertinent part: "(a) Any party to an action wherein it is alleged that two or more parties are joint tortfeasors shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors.... [¶] (c) A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor from any further claims against the settling tortfeasor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault. [¶] (d) The party asserting the lack of good faith shall have the burden of proof on that issue."

To fully appreciate the meaning of section 877.6 a brief review of the legislative and decisional history preceding its enactment is appropriate. At common law, there was no right of contribution among tortfeasors. "The ancient basis of the rigid rule against contribution in this type of case is the policy that the law should deny assistance to tortfeasors in adjusting losses among themselves because they are wrongdoers and the law should not aid wrongdoers." (Fourth Progress Rep. to the Legis. by the Sen. Interim Com. on Judiciary, p. 130, 1 Appen. to Sen. J. (1957 Reg. Sess.) [hereafter Jud. Com. Rep.].)

At the same time, the common law provided a powerful disincentive to settlements between plaintiffs and individual tortfeasors in a multiple defendant action since the plaintiff's release or dismissal of one joint tortfeasor for consideration released all the others. The theory behind this rule was that there could be only one compensation for a joint wrong and since each joint tortfeasor was responsible for the whole damage, payment by any one of them satisfied plaintiff's claim against all. Whether this rule applied also to concurrent tortfeasors was open to question. (See 4 Witkin, SUMMARY OF CAL. LAW (8th ed. 1974) TORTS, § 38, pp. 2336-2337.)

California's tort contribution legislation (pt. 2, tit. 11, in which §§ 877 & 877.6 now appear) was sponsored by the State Bar and originally introduced in 1955 as Senate Bill No. 412. The primary purpose of the bill was the equitable objective of ameliorating the punitive effect of the no-contribution rule upon joint tortfeasors.3

It is significant that, as originally proposed, the bill did not address the effect of a release or a covenant not to sue given to one of several joint tortfeasors. Section 877, providing for such settlements, was added to the bill at the suggestion of the Senate Committee on Judiciary. (Jud. Com.

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3 The State Bar explanation accompanying the bill, which was adopted by the Senate Committee on Judiciary, read in pertinent part: "Under the common law there is no contribution between joint tortfeasors. One of several joint tortfeasors may be forced to pay the whole claim for the damages caused by them yet he may not recover from the others their pro rata share of the claim. California follows this rule. [Citations.] The purpose of this bill is to lessen the harshness of that doctrine." (Jud.Com.Rep., op. cit. supra, at p. 130, emphasis added.)
As the Court of Appeal in River Garden Farms, Inc. v. Superior Court observed, "[t]he major goals of the 1957 tort contribution legislation are, first, equitable sharing of costs among the parties at fault, and second, encouragement of settlements." (River Garden Farms, Inc. v. Superior Court (1972) 26 Cal. App. 3d 986, 993, 103 Cal. Rptr. 498 [hereafter River Garden Farms ].)

In interpreting this legislation, the courts therefore properly attempted to accommodate both objectives, even though the goals of equitable sharing and encouragement of settlements are not always necessarily harmonious. "[I]f the policy of encouraging settlements is permitted to overwhelm equitable financial sharing, the possibilities of unfair tactics are multiplied. Neither statutory goal should be applied to defeat the other." (Id., at p. 998, 103 Cal. Rptr. 498.)

The good faith provision of section 877 mandates that the courts review agreements purportedly made under its aegis to insure that such settlements appropriately balance the contribution statute's dual objectives.4 "Lack of good faith encompasses many kinds of behavior. It may characterize one or both sides to a settlement. When profit is involved, the ingenuity of man spawns limitless varieties of unfairness. Thus, formulation of a precise definition of good faith is neither possible nor practicable. The Legislature has here incorporated by reference the general equitable principle of contribution law which frowns on unfair settlements, including those

4 As originally introduced, the bill (Sen. Bill No. 1510 (1957 Reg. Sess.)) did not include a good faith provision. The phrase was inserted into section 877 by a committee amendment during the legislative session. (3 Assem. J. (1957 Reg.Sess.) p. 4716.) As noted by the court in River Garden Farms, California's statute, as amended, substantially parallels the language of section 4 of the proposed Uniform Contribution Among Tortfeasors Act as revised in 1955. The commissioners' comment to section 4 clearly indicates that the good faith language was added to give the courts occasion to review settlements between a plaintiff and one of several tortfeasors to determine whether they prejudiced the interests of a nonsettling tortfeasor. (See id., at pp. 995-996, 103 Cal. Rptr. 498.) which are so poorly related to the value of the case as to impose a potentially disproportionate cost on the defendant ultimately selected for suit." (Id., at p. 997, 103 Cal. Rptr. 498, emphasis added.)

By their terms, the tort contribution statutes applied only to tortfeasors against whom a money judgment had been jointly rendered. (§ 875, subd. (a.) In American Motorcycle Assn. v. Superior Court, however, we articulated a related remedial theory of partial indemnity which is broadly applicable to all multiple tortfeasors. (American Motorcycle Assn. v. Superior Court (1978) 20 Cal.3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 [hereafter American Motorcycle ].)

Our primary concern in American Motorcycle was the equitable objective of allocating the cost of loss appropriately among multiple tortfeasors. "[I]n the great majority of cases ... equity and fairness call for an apportionment of loss between the wrongdoers in proportion to their relative culpability, rather than the imposition of the entire loss upon one or the other tortfeasor." (Id., at p. 595, 146 Cal. Rptr. 182, 578 P.2d 899.) Thus, "to attain ... a system, in which liability for an indivisible injury caused by concurrent tortfeasors will be borne by each individual tortfeasor 'in direct proportion to [his] respective fault,' ... 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., at p. 598, 146 Cal. Rptr. 182, 578 P.2d 899.)

"The legislative history of the 1957 contribution statute quite clearly demonstrates that the purpose of the legislation was simply 'to lessen the harshness' of the then prevailing common law no contribution rule. Nothing in the legislative history suggests that the Legislature intended by the enactment to preempt the field or to foreclose future judicial developments which further the act's principal purpose of ameliorating the harshness and inequity of the old no contribution rule." (Id., at p. 601, fn. omitted, 146 Cal. Rptr. 182, 578 P.2d 899.)

In addition, we noted that the 1957 legislation contains a specific provision which explicitly mandates that the "right of contribution shall be administered in accordance with the principles of equity." (§ 875, subd. (b.) In American Motorcycle, several amici argued that we should
decline to adopt the partial indemnity doctrine because it would assertedly undermine the public policy in favor of encouraging settlement of litigation embodied in section 877. To this concern, we responded that section 877 should also apply to discharge a settling tortfeasor from claims for partial or comparative indemnity.

Nothing in our discussion on this point, however, suggested a departure from the interpretation of section 877 offered in River Garden Farms. In fact, we cited River Garden Farms to explicate the meaning of the phrase "good faith' settlement" under section 877. (American Motorcycle, at p. 604, 146 Cal. Rptr. 182, 578 P.2d 899.)

The Legislature responded to American Motorcycle in 1980 by its enactment of section 877.6. That section codifies the American Motorcycle result by providing that a section 877 settlement bars claims for partial or comparative indemnity as well as for contribution. (§ 877.6, subd. (c).) It also specifically reiterates the proviso that a settlement must be made in good faith before it will operate as a bar and clarifies the procedures for judicial determination of the good faith issue.

This background strongly suggests that the Legislature intended the term "good faith' in section 877.6 to bear the meaning ascribed to that term in section 877 by the Court of Appeal's decision in River Garden Farms and by this court in American Motorcycle.

The United States Court of Appeals for the Ninth Circuit, applying California law, reached that conclusion in Commercial U. Ins. Co. v. Ford Motor Co. (9th Cir.1981) 640 F.2d 210. Plaintiff in that case, complaining of injuries allegedly caused by a defective Ford automobile, dismissed Ford Motor Company as a defendant for tactical reasons (he wished to avoid their expert witnesses) and proceeded against the retail dealer alone. Ford evidently offered no consideration for this "settlement." Citing River Garden Farms and American Motorcycle, the court concluded that "the expansion of § 877 to prevent a party from seeking indemnification from another should apply only when the policy of settlement has been furthered and a settlement is made in good faith. [¶ ] In determining whether the policy of settlement has been furthered, we look to the conduct of the parties. When a plaintiff dismisses an action, the policy is furthered only when the dismissal resulted from a mutual decision to settle the dispute. At that stage of the inquiry, the testimony of counsel recounting the basis for dismissal is relevant. [¶ ] Section 877 applies to settlement [sic ] made in good faith only. Individuals not participating in the settlement are barred from seeking contribution only if the settling parties acted in good faith with respect to them. Hence, good faith of the dismissal alone is not sufficient. The dismissal must represent a settlement which is a good faith determination of relative liabilities. Only in this situation are both policies behind § 877--equity and settlement--furthered." (640 F.2d at p. 213.)

Applying this standard to the case before it, the court observed that "[t]he record reveals that the decision to dismiss was substantially a tactical maneuver by plaintiff’s attorneys. It does not reflect the cooperative decision-making between parties which is the earmark of settlement. Nor does it reflect a consideration of relative liability. This case involves $3,250,000 in damages. Even a slight probability of liability on Ford’s part would warrant significant contribution. There was at least one expert prepared to testify that there was a design defect. [¶ ] Moreover, a settlement, ... the extent that it is dictated by the tactical advantage of removing a deep-pocket defendant because of the experts it could produce and the skilled trial attorneys it could retain, is not made in ‘good faith’ consideration of the relevant liability of all parties. Accordingly, the court erred in finding that the settlement absolving Ford of any liability to Meyers was made in good faith." (640 F.2d at pp. 213-214.)

5 "[T]he legislative policy underlying ... [section 877] dictates that a tortfeasor who has entered into a 'good faith' settlement (see River Garden Farms, Inc. v. Superior Court, supra, 26 Cal. App.3d 986 [103 Cal. Rptr. 498] ) with the plaintiff must also be discharged from any claim for partial or comparative indemnity that may be pressed by a concurrent tortfeasor." (Id., at p. 604, 146 Cal. Rptr. 182, 578 P.2d 899.)

6 In a more recent case the Ninth Circuit, noting the conflict between the approach taken in Commercial U. Ins. Co. and that taken by the California Court of Appeal in subsequent cases (post, pp. 262 - 263 of 213 Cal. Rptr., at pp. 165-166 of 698 P.2d) adhered to its view in Commercial U. Ins. Co., predicting that this court would do the same. (Owen v. United States (9th Cir.1983) 713 (continued...)}
A competing interpretation of the "good faith" requirement was suggested by the Court of Appeal in *Dompeling v. Superior Court* (1981) 117 Cal. App.3d 798, 173 Cal. Rptr. 38. Plaintiff in that case, complaining of injuries from an automobile accident, sued two defendants, Dompeling and Chatom, who in turn each cross-complained against the other for partial indemnity. Plaintiff settled with Dompeling for $100,000, the limit of his insurance policy, and Chatom challenged the settlement as being in bad faith. The question before the Court of Appeal was whether Chatom should be permitted to depose Dompeling as to his personal and business assets in order to demonstrate that the plaintiff’s prospective recovery against Dompeling was in excess of the settlement amount. In rejecting Chatom's claim, the court reasoned: "Bad faith is not established by a showing that a settling defendant paid less than his theoretical proportionate or fair share of the value of plaintiff's case.... [¶] Where plaintiff settles with fewer than all defendants, the defendants are clearly adverse parties. A settling defendant does not owe a legal duty to adverse parties, the nonsettling defendants, to pay the plaintiff more so that the adverse parties may pay the plaintiff less. Plaintiff and defendants are also adverse parties; the plaintiff does not owe a legal duty to the nonsettling defendants to seek more from a settling defendant so that the nonsettling defendants may pay less. [¶] The settling parties owe the nonsettling defendants a legal duty to refrain from tortious or other wrongful conduct; absent conduct violative of such duty, the settling parties may act to further their respective interests without regard to the effect of their settlement upon other defendants." (Id., at pp. 809-810, 173 Cal. Rptr. 38, emphasis added.)

But the Dompeling every-person-for-himself approach is capable of producing harsh results, as the Fifth District Court of Appeal which decided Dompeling soon recognized. In *Cardio Systems, Inc. v. Superior Court* (1981) 122 Cal. App.3d 880, 176 Cal. Rptr. 254, plaintiffs filed an action in medical malpractice and products liability after their decedent died on the operating table, allegedly as a result of incorrect use of a heart-lung machine. Prior to trial, plaintiffs dismissed the action against Cardio, the machine’s distributor, in return for a waiver of costs. Plaintiffs' attorney testified that the decision to dismiss was a tactical one: "'I had no desire ... to complicate a clear liability, relatively simple medical malpractice case by bringing in a products case....' " (Id., at pp. 884-885, 176 Cal. Rptr. 254.)

Though the Court of Appeal ruled that this dismissal was a good faith settlement under the terms of section 877, and therefore barred claims for equitable partial indemnity by other defendant tortfeasors, the court noted that this outcome was inequitable. "The result is unsatisfactory. The rule permits a plaintiff to insulate a defendant (Cardio) from being liable to a codefendant (Hospital) for comparative indemnity by dismissing against Cardio in consideration of a waiver of costs where the dismissal is motivated by plaintiffs' tactical considerations having little relationship to the potential liability of Cardio. The facts show that plaintiffs' counsel was of the opinion that plaintiffs had a fairly good liability case against Cardio and the reason for the dismissal against Cardio, according to the testimony of plaintiffs' counsel, was to avoid complicating plaintiffs' 'clear liability, relatively simple medical malpractice case' against Hospital. The result is fundamentally unfair, and cannot be what the Legislature intended." (122 Cal. App.3d at pp. 890-891, 176 Cal. Rptr. 254, emphasis added.) Nonetheless the court felt obliged to follow the definition of good faith which it had earlier articulated in Dompeling.

That the Legislature intended the term "good faith" in section 877.6 to have the narrow meaning ascribed by the Dompeling approach--i.e., the absence of tortious conduct--seems highly improbable, in light of the fact that the section represents a codification of our opinion in *American Motorcycle*. In that opinion, as we have already observed (ante, p. 261 of 213 Cal. Rptr., at p. 164 of 698 P.2d), we made specific reference to *River Garden Farms* in connection with the term "good faith." Moreover, the equitable policies expressed in *American Motorcycle*, and implicitly adopted by the Legislature, include both the encouragement of settlements and the equitable allocation of costs among multiple tortfeasors.

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6 (...continued)

F.2d 1461, 1465.)

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TECH-BILT, INC., v. WOODWARD-CLYDE & ASSOCIATES
Those policies would be disserved by an approach which emphasizes one to the virtual exclusion of the other. (See Roberts, The "Good Faith" Settlement: An Accommodation of Competing Goals (1984) 17 Loyola L.A.L. Rev. 841, 899 et seq.)

A more appropriate definition of "good faith," in keeping with the policies of American Motorcycle and the statute, would enable the trial court to inquire, among other things, whether the amount of the settlement is within the reasonable range of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries. This is not to say that bad faith is "established by a showing that a settling defendant paid less than his theoretical proportionate or fair share." (Cf. Dompling, supra, 117 Cal. App.3d at p. 809, 173 Cal. Rptr. 38.) Such a rule would unduly discourage settlements. "For the damages are often speculative, and the probability of legal liability therefor is often uncertain or remote. And even where the claimant's damages are obviously great, and the liability therefor certain, a disproportionately low settlement figure is often reasonable in the case of a relatively insolvent, and uninsured, or underinsured, joint tortfeasor." (Stambaugh v. Superior Court (1976) 62 Cal. App.3d 231, 238, 132 Cal. Rptr. 843.) Moreover, such a rule would tend to convert the pretrial settlement approval procedure into a full-scale mini-trial (cf. Dompling, supra, 117 Cal. App.3d at p. 810, 173 Cal. Rptr. 38).

But these considerations do not lead to the conclusion that the amount of the settlement is irrelevant in determining good faith. Rather, the intent and policies underlying section 877.6 require that a number of factors be taken into account including a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial. Other relevant considerations include the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants. (See In re MGM Grand Hotel Fire Litigation (D. Nev. 1983) 570 F. Supp. 913, 927.) Finally, practical considerations obviously require that the evaluation be made on the basis of information available at the time of settlement. "[A] defendant's settlement figure must not be grossly disproportionate to what a reasonable person, at the time of the settlement, would estimate the settling defendant's liability to be." (Torres v. Union Pacific R.R. Co. (1984) 157 Cal. App.3d 499, 509, 203 Cal. Rptr. 825.) The party asserting the lack of good faith, who has the burden of proof on that issue (§ 877.6, subd. (d)), should be permitted to demonstrate, if he can, that the settlement is so far "out of the ballpark" in relation to these factors as to be inconsistent with the equitable objectives of the statute. Such a demonstration would establish that the proposed settlement was not a "settlement made in good faith" within the terms of section 877.6.

We doubt that such an approach will be detrimental to the settlement process, though ultimately that is a judgment that should be made on the basis of experience rather than speculation. The plaintiff, of course, will have at least the same incentive to settle as under the nontortious conduct rule; indeed, to the extent that the settling defendant is induced to offer more in order to bring the settlement within the bounds of fairness, the plaintiff's incentive to settle may be greater. Since the "reasonable range" test which we adopt leaves substantial latitude to the parties and to the discretion of the trial court, defendants will still have an incentive to get out of the litigation for a reduced amount. (See Roberts, The "Good Faith" Settlement: An Accommodation of Competing Goals, supra, 17 Loyola L.A.L.Rev. 841, 928-929.) Moreover, from the standpoint of the public interest and the legal process, a prime value in encouraging settlement lies in "remov[ing] [the case] from the judicial system, and this occurs only when all claims relating to the loss are settled." (Id., at pp. 888-889, emphasis added; see also Fleming, Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle v. Superior Court (1979) 30 Hastings L.J. 1464, 1495; Note, Settlement in Joint Tort Cases (1966)

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7 We disapprove of Dompling and its progeny, including Cardio Systems, supra, and Burlington Northern R.R. Co. v. Superior Court (1982) 137 Cal. App.3d 942, 187 Cal. Rptr. 376, to the extent that those cases are inconsistent with this opinion.
Nor should this approach unduly burden the parties or the trial court. Section 877.6 contemplates that the determination of good faith may be made by the court on the basis of affidavits (subd. (b)), and as the court observed in River Garden Farms, "The price levels are not as unpredictable as one might suppose. Despite the uncertainties, generalized valuation criteria are recognized by the personal injury bar, insurance claims departments and pretrial settlement courts. When testing the good faith of a settlement figure, a court may enlist the guidance of the judge's personal experience and of experts in the field. Represented by knowledgeable counsel, settlement negotiators can predict with some assurance whether a settlement is within the reasonable range permitted by the criterion of good faith. The danger that a low settlement violates the good faith clause will not impart uncertainty so long as the parties behave fairly and the courts maintain a realistic awareness of settlement imponderables." (26 Cal. App.3d at p. 998, fn. omitted, 103 Cal. Rptr. 498.)

Several recent Court of Appeal opinions, while paying verbal service to Dompling, have in fact engaged in such an analysis. In Kohn v. Superior Court (1983) 142 Cal. App.3d 323, 328, 191 Cal. Rptr. 78, the Court of Appeal quoted from Dompling with approval, but held that the trial court "was within its discretion in finding the settlement to be in good faith" since "[a]lthough the sums paid may be grossly disproportionate to the sums prayed for in the complaint, they are not out of proportion to what the trial court might have considered the probable recovery of plaintiffs should they prove their case."

In Widson v. International Harvester Co. (1984) 153 Cal. App.3d 45, 200 Cal. Rptr. 136, a plaintiff settled with a joint tortfeasor, Louetto, against whom his cause of action had been tolled by the statute of limitations, as here, but received in return the sum of $30,000. In affirming the trial court's decision that the settlement was in good faith within the meaning of section 877.6, the court found: "Substantial evidence supports the trial court's determination the amount of the settlement is in fact fair. Evaluations of Louetto's potential liability ranged from zero to 10 percent of plaintiff's recovery. Counsel for Louetto expressed the view that in the worst case Louetto's exposure would tally 25 percent. Evaluations of plaintiff's total recovery ranged from $200,000 to $750,000. In such a factual context, it cannot be said the $30,000 paid by Louetto was unreasonable." (Id., at p. 58, 200 Cal. Rptr. 136; see also Wysong & Miles Co. v. Western Industrial Movers (1983) 143 Cal. App.3d 278, 290, 191 Cal. Rptr. 671; Roberts, The "Good Faith" Settlement: An Accommodation of Competing Goals, supra, 17 LOYOLA L.A. L. REV. 841, 924-928.)

In this case, by contrast, plaintiffs received nothing in return for the dismissal of their action against Woodward-Clyde except relief from having to pay Woodward-Clyde's costs because they were wrongfully sued. The same net situation would have existed if, mindful of the running of the statute of limitations against them, plaintiffs had not sued Woodward-Clyde in the first place. To say that section 877.6 cloaks Woodward-Clyde with immunity from liability to joint tortfeasors under these circumstances would not serve the goal of encouraging settlement, and it would frustrate the goal of allocating costs equitably among multiple tortfeasors.

Ordinarily, a determination as to whether a settlement is in good faith must be left to the discretion of the trial court. In this case, however, the exercise of discretion on the basis of the criteria we have identified as appropriate could yield but one conclusion: this was not a settlement in good faith within the meaning of section 877.6.

The judgment is reversed.
MOSK, KAUS, BROUSSARD, REYNOSO and LUCAS, JJ., concur.

BIRD, Chief Justice.

I respectfully dissent.

The new rule adopted by the majority will require trial courts to apply an unworkable standard to every settlement. It will clog our trial courts with unnecessary hearings, discourage the settlement of legitimate claims, and severely strain the resources of the parties and the trial and appellate courts of this state.

The majority hold that in determining whether a settlement was made in good faith within the meaning of Code of Civil Procedure section 877.6, the trial court must inquire "whether the amount of the settlement is within the reasonable range of the settling tortfeasor’s proportional share of comparative liability for the plaintiff’s injuries." (Maj. opn., ante, at p. 263 of 213 Cal. Rptr., at p. 166 of 698 P.2d.)

Such a rule will not only discourage settlements, but will place an intolerable burden on our trial courts. Moreover, the Legislature never intended to impose a legal duty upon settling parties to protect the interests of adverse parties at the expense of their own mutual benefit. In accordance with a long line of California appellate court decisions, I would hold that a settlement satisfies the good faith requirement if it is free of corrupt intent, i.e., free of intent to injure the interests of the nonsettling tortfeasors. A settlement is made in bad faith only if it is collusive, fraudulent, dishonest, or involves tortious conduct. (See, e.g., Ford Motor Co. v. Schultz (1983) 147 Cal. App.3d 941, 950, 195 Cal. Rptr. 470; Burlington Northern R.R. Co. v. Superior Court (1982) 137 Cal. App.3d 942, 945-946, 187 Cal. Rptr. 376; Dompeling v. Superior Court (1981) 117 Cal. App.3d 798, 809-810, 173 Cal. Rptr. 38.)

The majority’s proportionate liability test of good faith originated in River Garden Farms, Inc. v. Superior Court (1972) 26 Cal. App.3d 986, 103 Cal. Rptr. 498. Although River Garden Farms discusses the "danger that a low settlement violates the good faith clause" (id., at p. 998, 103 Cal. Rptr. 498), that discussion is mere dictum. River Garden Farms did not involve settlements that were inordinately low, but settlements that were allegedly unfairly allocated among the plaintiffs' claims. "River Garden Farms did not involve the usual objection that the settlement entered into was too low and, therefore, should not be determined to be in 'good faith.' The charge of lack of 'good faith' was aimed at the plaintiff alone, and was based upon the plaintiff's allocation of certain settlement proceeds among various claims so as to increase the potential liability of the nonsettling defendant, River Garden Farms." (Roberts, The "Good Faith" Settlement: An Accommodation of Competing Goals (1984) 17 LOYOLA L.A. L. REV. 841, 855; see also River Garden Farms, supra, 26 Cal. App.3d at p. 992, 103 Cal. Rptr. 498.)

The court in River Garden Farms purported to base its interpretation of the good faith clause upon the legislative history of section 877. (Id., at p. 995, 103 Cal. Rptr. 498.) However, there is nothing in the legislative history of section 877 to indicate the meaning to be given to the clause. Therefore, the court in River Garden Farms speculated that section 877 was based upon section 4 of the proposed Uniform Contribution Among Tortfeasors Act as revised in 1955.10 (Id., at pp. 995-996, 103 Cal. Rptr. 498.)

The commissioners’ notes to section 4 explained that the purpose of the good faith clause was a narrow one. The clause was intended only to give the court "occasion to determine whether the transaction was collusive...." (12 Uniform Laws Annot. (Master ed. 1975) p. 99.) However, the court in River Garden Farms contended that the good faith requirement was designed to prohibit "many kinds of behavior" other than collusive conduct "aimed to injure the interests of an absent tortfeasor." (River Garden Farms, supra, 26 Cal.

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10 Section 4 provides as follows:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: [¶] (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and, [¶] (b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.
App. 3d at pp. 996, 997, 103 Cal. Rptr. 498.) The court cited no authority for this conclusion, but suggested that section 4 was revised to include the good faith clause because the "plaintiff should not be permitted to release one tortfeasor from his fair share of liability and mulct another instead, from motives [of] sympathy or spite, or because it might be easier to collect from one than from the other...." (Id., at pp. 995-996, 103 Cal. Rptr. 498; 12 Uniform Laws Annot. (Master ed. 1975) p. 99, comrs. com. to § 4.)

While the above-quoted passage appears in the comments to section 4 of the 1955 revision of the uniform act, it actually refers to the rationale behind section 5 of the 1939 version of the act. Section 5 provided that a settling tortfeasor was not released from liability unless the release provided that plaintiff's ultimate recovery would be reduced to the extent of the released tortfeasor's pro rata share of the damages.

The commissioners noted that "reports from the state where the Act is adopted appear to agree that [section 5] has accomplished nothing in preventing collusion." (Ibid.) Moreover, its effect "has been to discourage settlements in joint tort cases, by making it impossible for one tortfeasor alone to take a release and close the file. Plaintiff's attorneys are said to refuse to accept any release which contains the provision reducing the damages... because they have no way of knowing what they are giving up." (Ibid.)

Therefore, in 1955 the commissioners abandoned section 5 of the uniform act in favor of permitting release from contribution where the settlement is made in good faith. "It seems more important not to discourage settlements than to make an attempt of doubtful effectiveness to prevent discrimination by plaintiffs, or collusion in the suit. Accordingly [section 4(b)] provides that the release in good faith discharges the tortfeasor outright from all liability for contribution." (Id., at p. 100.) Thus, contrary to River Garden Farm's broad interpretation of the good faith clause, the 1955 revisions to the uniform act represented a policy decision to encourage settlement. The commissioners abandoned as unworkable their earlier attempt to protect nonsettling parties from inequity other than that caused by collusive conduct.

The court in River Garden Farms also based its "fair share" good faith test on an analogy to contract law. The court relied upon insurance cases holding that the implied covenant of good faith and fair dealing in an insurance contract requires the insurer to consider the insured's interests in deciding whether to settle. (Crisci v. Security Ins. Co. (1967) 66 Cal.2d 425, 430, 58 Cal. Rptr. 13, 426 P.2d 173; Critz v. Farmers Ins. Group (1964) 230 Cal. App.2d 788, 793-794, 41 Cal. Rptr. 401; see River Garden Farms, supra, 26 Cal. App.3d at p. 997, 103 Cal. Rptr. 498.) "The carrier's duty of good faith extends beyond fraud or dishonesty and encompasses any kind of unfair dealing." (Ibid.)

The obvious flaw in this analogy is that the relationship between the settling parties and the nonsettling parties is not contractual. Their relationship is simply not comparable to the fiduciary relationship between an insurance carrier and the insured who has contracted for the carrier's protection. In fact, the settling parties and the nonsettlers are adverse parties. (Dompeling v. Superior Court, supra, 117 Cal. App.3d at p. 809, 173 Cal. Rptr. 38.)

Absent a contractual or other special relationship, the settling parties do not have a duty to protect the interests of the nonsettling tortfeasors. They have a duty only to settle in good faith, i.e., with "honest, lawful intent" (People v. Nunn (1956) 46 Cal.2d 460, 468, 296 P.2d 813). "As understood in law the phrase "in good faith" has a settled and well-defined meaning, which generally imports that in any given case the transaction involved was honestly conceived and consumated without collusion, fraud or knowledge of fraud, without intent to assist in a fraudulent or otherwise unlawful design." (Appel v. Morford (1943) 62 Cal. App.2d 36, 40, 144 P.2d 95.)

I agree with the court in Dompeling that "the settling parties owe the nonsettling defendants a legal duty to refrain from tortious or other wrongful conduct; absent conduct violative of such duty, the settling parties may act to further their respective interests without regard to the effect of their settlement upon other defendants." (Dompeling v. Superior Court, supra, 117 Cal. App.3d at pp. 809-810, fn. omitted, 173 Cal. Rptr. 38.)

The persuasiveness of River Garden Farms is also undermined by the fact that in 1972, when the
case was decided, contribution applied only among joint judgment debtors to the extent of each debtor’s pro rata share of the judgment. (See § 875, subds. (a) & (c).) This court has since adopted the partial indemnity rule permitting a tortfeasor to seek indemnity from all joint tortfeasors to the extent of their comparative fault. (American Motorcycle Assn. v. Superior Court (1978) 20 Cal.3d 578, 583, 604, 146 Cal. Rptr. 182, 578 P.2d 899.) Therefore, River Garden Farms’ assurances that the "fair share" inquiry "will not impart uncertainty" is no longer convincing. (River Garden Farms, supra, 26 Cal. App.3d at p. 998, 103 Cal. Rptr. 498.)

Under a pro rata approach, once the court has estimated plaintiff’s damages, it need only divide that amount by the number of defendants to determine each defendant’s "fair share." The good faith inquiry is rendered much more complex by the added burden of determining the comparative fault of each defendant in order to decide if the settlement is within a "reasonable range" of the tortfeasor’s proportionate liability.

The majority rely on River Garden Farms for their conclusion that the proportionate liability test of good faith should not "unduly burden the parties or the trial court." (Maj. opn., ante, at p. 265 of 213 Cal. Rptr., at p. 168 of 698 P.2d.) I disagree. Under the majority’s rule, the trial court will have to make a pretrial determination of plaintiff’s potential recovery. "[R]elevant to this inquiry are the strengths of the plaintiff’s liability claim and defendant’s defenses, the seriousness of the injury ..., the out-of-pocket expenses incurred by the plaintiff as a result of the injury, whether the case will be tried by a judge or a jury and if by a jury, whether juries from that location are more apt to render high or low verdicts, and a subjective evaluation of the parties, their witnesses and their attorneys. This list is by no means exclusive." (Roberts, The "Good Faith" Settlement: An Accommodation of Competing Goals, supra, 17 Loyola L.A. L. Rev. at p. 922.)

In addition, the trial court must determine the comparative fault of the settling tortfeasor with reference to all the parties. "Thus, the court should not look merely to the settlor’s liability to the plaintiff, but also to the settlor’s liability to his fellow joint tortfeasors under a partial indemnity theory had there been no settlement." (Id., at p. 920.) Finally, in some situations the trial court will have to inquire into the financial condition of the settling defendant. (See maj. opn., ante, at p. 263 of 213 Cal. Rptr., at p. 166 of 698 P.2d.)

In a complicated case, the time, effort, and expense involved in presenting evidence on all these issues will be considerable. While the trial court has the discretion to determine the good faith issue on the basis of affidavits alone (§ 877.6, subd. (b)), this court cannot predict the percentage of cases in which live testimony will be necessary. The good faith hearings mandated by the majority’s decision promise to be lengthy, complex and hotly contested. In my view, they will overburden the courts and severely strain the resources of the parties. (See Dompeling v. Superior Court, supra, 117 Cal. App.3d at p. 810, 173 Cal. Rptr. 38.)

Moreover, when the majority acknowledge that an overly strict proportionate liability standard would "unduly discourage settlements," (maj. opn., ante, at p. 263 of 213 Cal. Rptr., at p. 166 of 698 P.2d, emphasis added) they impliedly concede that their rule will discourage settlements to some degree. Both plaintiffs and defendants will be discouraged from settling if faced with the spectre of an expensive and lengthy hearing on the good faith issue.

A defendant who settles gives up his right to contest his liability at trial and forgoes the possibility that a jury will find him completely blameless. If he must nonetheless pay plaintiff an amount "within the reasonable range of [his] proportional share of comparative liability" and defend the settlement amount in a lengthy pretrial proceeding, he may often decide that he has little to gain by settling. (See Burlington Northern R.R. Co. v. Superior Court, supra, 137 Cal. App.3d at p. 945, 187 Cal. Rptr. 376.)

As the cases and commentators note, settlement is dependent upon the degree to which the settling defendant can be assured of the settlement’s finality. (See River Garden Farms, supra, 26 Cal. App.3d at p. 993, 103 Cal. Rptr. 498; comrs. com. to § 4(b) of the Uniform Contribution Among Tortfeasors Act, 12 Uniform Laws Annot. (Master ed. 1975) pp. 99-100; Note, Settlement in Joint Tort Cases (1966) 18 STAN. L. REV. 486, 488-489.) However, the standard propounded by the court in River Garden Farms and adopted by the majority here does not promote finality because it is admittedly vague. (See River Garden Farms, supra, 26 Cal. App.3d at p. 997,
103 Cal. Rptr. 498.) It will be difficult for a settling defendant to predict whether the trial court will find his settlement to be in good faith. The imprecise nature of the test also produces the added risk that despite the deference paid to the trial court, a favorable good faith determination will be reversed by the appellate court.

Although the majority only briefly mention the policy favoring settlements, it is "[p]erhaps the principal and most often discussed policy relevant to the issue of a 'good faith’ settlement.…." (Roberts, The "Good Faith" Settlement: An Accommodation of Competing Goals, supra, 17 Loyola L.A. L. Rev. at p. 883.) The policy's importance is strongly reflected in section 877, subdivision (b), which releases a settling defendant from the liability claims of all parties to the litigation. (Id., at p. 884; American Motorcycle Assn. v. Superior Court, supra, 20 Cal.3d at p. 603, 146 Cal. Rptr. 182, 578 P.2d 899.) In American Motorcycle, this court stressed the importance of the policy of encouraging settlements and held that section 877 also applied to partial indemnity. (Id., at pp. 603-604, 146 Cal.Rptr. 182, 578 P.2d 899.)

Nevertheless, the majority argue that in American Motorcycle this court accepted the River Garden Farms definition of good faith despite its inhibitory effect on settlements. (See maj. opn., ante, at pp. 268 - 269 of 213 Cal. Rptr., at pp. 171-172 of 698 P.2d.) Indeed, the court in American Motorcycle cited River Garden Farms in holding that section 877 applied to claims for comparative indemnity. (American Motorcycle, supra, 20 Cal.3d at p. 604, 146 Cal. Rptr. 182, 578 P.2d 899.) However, the court also cited Stambaugh v. Superior Court (1976) 62 Cal. App.3d 231, 132 Cal. Rptr. 843, which limited River Garden Farms to its facts--tortious conduct on the part of a settling party--and held that "a joint tortfeasor should be permitted to negotiate settlement of an adverse claim according to his own best interests, whether for his financial advantage, or for the purchase of peace and quiet, or otherwise. His good faith will not be determined by the proportion his settlement bears to the damages of the claimant." (Id., at p. 238, 132 Cal. Rptr. 843.)


In sum, neither the decision in American Motorcycle nor the legislative history of the good faith clause supports the majority's conclusion that the clause requires a settlement to be "within the reasonable range of the settling tortfeasor's proportional share of comparative liability for plaintiff's injuries." (Maj. opn., ante, at p. 263 of 213 Cal. Rptr., at p. 166 of 698 P.2d.) Contrary to the majority's assertions, such a rule will unduly discourage settlements and severely burden the trial courts by "convert[ing] the pretrial settlement approval procedure into a full-scale mini-trial." (Maj. opn., ante, at pp. 263 - 264 of 213 Cal. Rptr., at pp. 166- 167 of 698 P.2d.)

Unlike the Legislature, this court lacks "the facilities and the forum to hear from all interested parties" and determine whether the inequity presented by this case is a common enough occurrence to warrant the decline in settlements and the burden on the legal system that the majority's rule will entail. (Cardio Systems, Inc. v. Superior Court (1981) 122 Cal. App.3d 880, 891, 176 Cal. Rptr. 254; see also Burlington Northern R.R. Co. v. Superior Court, supra, 137 Cal. App.3d at p. 946, 187 Cal. Rptr. 376.)

I would let the Legislature determine whether a departure from the tortious conduct test of good faith is warranted.

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11 Several cases decided after American Motorcycle have held that the policy favoring settlement is more important than the policy favoring "equitable apportionment of liability among the tortfeasors." (Sears, Roebuck & Co. v. International Harvester Co. (1978) 82 Cal. App.3d 492, 496-497, 147 Cal. Rptr. 262; accord American Bankers Ins. Co. v. Avco- Lycoming Division (1979) 97 Cal. App.3d 732, 736, 159 Cal. Rptr. 70.)
WASHBURN v. BEATT EQUIPMENT COMPANY
120 Wash.2d 246, 840 P.2d 860 (1992)

BRACHTENBACH, Justice.

This appeal by defendant is from a judgment rendered upon special jury verdicts. The plaintiffs are Norman Washburn and his wife Sharon. Mr. Washburn was extensively burned and permanently injured when a standby propane fuel system caught fire and exploded. The jury awarded plaintiff $6 million and his wife $2 million.

Plaintiffs' cross-appeal the calculation of the amount of judgment against defendant, Beatt Equipment Company, which was reduced to a total of $5,670,000. We affirm except to modify the amount of the judgment, for reasons explained hereafter.

We briefly summarize the defendant's contentions. (1) Defendant's principal argument on liability is that plaintiffs' action is barred by a statute of repose. The statute of repose does not protect a manufacturer. The jury was instructed on the definition of "manufacturer". That instruction was proposed by defendant. The jury, by special verdict, found as a matter of fact that defendant was a manufacturer, as defined by defendant. Further, by special verdict, the jury found that defendant's product was not reasonably safe, as defined in an instruction to which no exception was taken. (2) Defendant claims an abuse of discretion in admitting certain photographs. (3) Defendant attacks the size of the verdicts. (4) Defendant claims error in a pretrial procedural ruling.

On October 15, 1986, plaintiff Norman Washburn and a fellow Boeing employee, Scottie Holmes, were at a Boeing/Kent building to test a standby propane fuel system. The propane system had been in place since its construction and installation by defendant in 1969, but had never been put to regular use. Plaintiff turned on the propane and saw there was no pressure showing on the gauge. Before he could investigate, "everything just blew up." Verbatim Report of Proceedings (VRP) vol. 3, at 159.

The building caught fire. Automobiles in the adjacent parking lot caught fire and exploded. Fire was shooting out of the ground. There was a wall of fire. VRP vol. 3, at 88, 160. Plaintiff and Holmes were both on fire; Holmes was completely aflame. Plaintiff "had fire on his head, his hair, his back." VRP vol. 3, at 91. Plaintiff rolled on the ground, but Holmes ran in circles. Plaintiff ran to help Holmes but caught on fire again. Skin was falling off both of them. Plaintiff helped put out the fire on Holmes and yelled for someone to turn off the propane to prevent the storage tank from exploding. VRP vol. 3, at 160-63.

Holmes died 10 hours later. Plaintiff, with burns on 70 percent of his body, was hospitalized from October 15 to December 24. He underwent six surgeries during that confinement, and four additional surgeries over the next 16 months. His injuries will be described in the discussion of the damages award.

The defendant Beatt Equipment Company was known as Mid-Mountain Contractors when it contracted to construct the pipeline system. It specialized in pipeline excavation and construction in the 11 western states. It had experience in installing gas pipelines, having done about $150 million of work in Washington State alone. Defendant's president agreed that defendant held itself out as an expert in installing pipelines. VRP vol. 5, at 305. Defendant became involved in creation of the standby heating system when a subcontract was awarded to it by Petrolane, which had a contract with Boeing to install a standby propane fuel system at its Kent facility. Defendant was to supply all the piping material, do various finishing processes, and bury the pipeline. Exhibit 26.

There was substantial evidence that defendant did not comply with contract specifications and did not meet industry standards. One expert testified, without objection, that these failures by defendant caused the explosion. VRP vol. 6, at 215. There was expert testimony that the pipe was significantly thinner than called for in the specifications. VRP vol. 6, at 196; vol. 7, at 323. The pipe was not properly prepared before it was welded, wrapped and coated. As a result corrosion was inevitable. VRP vol. 7, at 322, 337-38. The coating which is applied to the welded and wrapped joints is critical

12 When we refer to plaintiff in the singular, it is in reference to Norman Washburn.

WASHBURN v. BEATT EQUIPMENT COMPANY
to protection against corrosion. The specifications called for a coal tar enamel; defendant used cheaper, less durable and more permeable asphalt coating, and applied a thickness roughly a third less than specified. VRP vol. 5, at 273-83. The thinner coating would "definitely decrease the life of the coating." VRP vol. 5, at 282-83.

A coatings expert testified, without objection, that the improper coating material, applied at less thickness than specified, contributed to the corrosion which caused the explosion. VRP vol. 5, at 283.

The coating was damaged before the pipe was buried. VRP vol. 6, at 204. The backfill material did not meet specifications; consequently chunks of asphalt material damaged the coating. This was a very important defect. VRP vol. 6, at 201-02, 205. The experts testified that the installation was substandard, and that the variations from the specifications and industry standards were "[g]reatly significant." VRP vol. 6, at 199, 211. The experts testified, without objection, that these deficiencies were the proximate cause of the explosion.

* * *

Share of Verdict to Be Paid

Prior to trial three defendants settled and were released by plaintiffs. Petrolane, Inc., paid $780,000 in settlement, Buckeye Gas Products Company paid $520,000, and Washington Natural Gas paid $210,000. As required by RCW 4.22.070(1), the jury in this case apportioned fault among all entities causing plaintiffs’ damages. The jury found that defendant Beatt was 80 percent at fault, and that Petrolane, Inc., was 20 percent at fault. The jury determined that Buckeye Gas Products Company, Washington Natural Gas, and other entities (expressly including Boeing) were not at fault.

In a cross appeal, plaintiffs contend that the trial court erred in calculating the amount of the judgment against defendant Beatt. This issue arises because there is a fault-free plaintiff, an at-fault nonsettling defendant, and both at-fault and fault-free settling defendants. It is a complex issue of first impression under RCW 4.22.070. The trial court entered judgment against defendant Beatt by calculating 80 percent of the total verdict of $8 million, with a result of $6,400,000, and then reducing that result by amounts paid by settling fault-free entities, $730,000, for a net amount of $5,670,000.

Initially, defendant contends that plaintiffs' argument should not be considered since it was not presented to the trial court. "The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). Arguments or theories not presented to the trial court will generally not be considered on appeal. Hansen v. Friend, 118 Wash.2d 476, 485, 824 P.2d 483 (1992); In re Marriage of Tang, 57 Wash. App. 648, 655, 789 P.2d 118 (1990).

Plaintiffs agree that they did not argue their interpretation of relevant statutes to the trial court, but maintain that the trial court recognized the interpretation as being a possible interpretation of the statute. Plaintiffs urge this court to consider the issue in that the purpose of argument is to apprise the court of an issue, that the trial court here recognized the issue, and that the bench and bar need this court's interpretation on this difficult issue.

While new arguments are generally not considered on appeal, the purpose of RAP 2.5(a) is met where the issue is advanced below and the trial court has an opportunity to consider and rule on relevant authority. Bennett v. Hardy, 113 Wash.2d 912, 917, 784 P.2d 1258 (1990). In order to decide how much defendant Beatt must pay, it is necessary to construe RCW 4.22.070. The record shows that plaintiffs clearly objected to the judgment and the trial judge's comments show he was aware of the construction of RCW 4.22.070 now advanced by plaintiffs. Moreover, despite plaintiffs' concession that they did not argue their present interpretation of the statute to the trial court, part of the argument they now make was advanced to the trial court (regarding whether the trial court erred by allowing a credit, or offset, against the judgment for the amount paid by settling fault-free entities). Clerk's Papers, at 1005-14. We conclude the argument was adequately presented to the trial court; we will review the issue.

Washington's rule before the tort reform act of 1986 was joint and several liability of concurrent and successive tortfeasors. Peck, Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability, 62 WASH.
L. REV. 233, 235-36 (1987). Where liability was joint and several, each tortfeasor was liable for the entire harm and the injured party could sue one or all of the tortfeasors to obtain a full recovery. Seattle-First Nat’l Bank v. Shoreline Concrete Co., 91 Wash.2d 230, 234-36, 588 P.2d 1308 (1978). The rule was codified at RCW 4.22.030, which prior to the tort reform act of 1986 provided that "[i]f more than one person is liable to a claimant on an indivisible claim for the same injury, death or harm, the liability of such persons shall be joint and several." See Laws of 1981, ch. 27, § 11.

The joint and several liability rule developed when another common law rule provided that contributory negligence on the part of the plaintiff, no matter how slight, was a complete bar to recovery. "Conceptually, the question was whether a totally innocent plaintiff should be permitted to recover the full amount of his or her damages from a wrongdoer whose conduct had concurred with that of another wrongdoer to produce a single and indivisible injury or causally unallocable harm." Peck, 62 WASH. L. REV. at 236.

At the common law, contribution was not allowed between joint tortfeasors; however, this rule was increasingly subject to criticism, and in 1981 the right to contribution was established in Washington with the basis for contribution being the comparative fault of the tortfeasors. RCW 4.22.040, .050, .060. However, where there was no joint and several liability, there was no right to contribution. RCW 4.22.050; George v. Parke-Davis, 107 Wash.2d 584, 601, 733 P.2d 507 (1987); Glass v. Stahl Specialty Co., 97 Wash.2d 880, 886-87, 652 P.2d 948 (1982).

The rule that plaintiffs’ contributory negligence was a complete bar to recovery, like the no-contribution rule, was also subject to criticism. In 1973 comparative negligence was adopted in Washington, under a "pure" comparative negligence scheme which allows a plaintiff to recover some damages even if plaintiff’s fault is greater than that of defendant’s. Peck, 62 WASH. L. REV. 233, 235-37 (summarizing development of the law).

Largely due to the adoption of the comparative negligence rule, an argument developed against joint and several liability. Given that plaintiff’s negligence was no longer a bar to recovery, it was argued that it was unjust to impose joint and several liability on a tortfeasor whose wrong combined with that of plaintiff and others to cause the harm. "In other words, responsibility for harm done should be distributed in proportion to the fault of all of the parties involved and not governed by concepts of causation." Peck, 62 WASH. L. REV. at 238.

In addition to this argument, concerns about affordable liability insurance were voiced to the Legislature. See Laws of 1986, ch. 305, § 100. As a result, RCW 4.22.030 was amended to provide that joint and several liability is the rule for liability on an indivisible claim where there are concurrent and successive tortfeasors "[e]xcept as otherwise provided in RCW 4.22.070 ...". RCW 4.22.070 was enacted as part of the tort reform act of 1986.

Thus, to decide how much of the $8 million verdict defendant Beatt must pay, we must examine RCW 4.22.070. Our goal is to construe the statute to give effect to the intent of the Legislature. Yakima v. International Ass’n of Fire Fighters, Local 469, 117 Wash.2d 655, 669, 818 P.2d 1076 (1991). We look for intent as it is expressed in the language of the statute. Draper Mach. Works, Inc. v. Department of Natural Resources, 117 Wash.2d 306, 313, 815 P.2d 770 (1991). Statutes should be read as a whole. Avlonitis v. Seattle Dist. Court, 97 Wash.2d 131, 138, 641 P.2d 169, 646 P.2d 128 (1982). Particularly in this case, the sections of RCW 4.22.070 must be carefully read together because terms of art found in some sections are explained in other sections.

RCW 4.22.070(1) and (1)(b) provide:

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant’s damages, including the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities immune from liability to the claimant and entities with any other individual defense against the claimant. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which
... (b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [sic] total damages.

From this part of RCW 4.22.070, it is clear that several liability is now intended to be the general rule. The statute evidences legislative intent that fault be apportioned and that generally an entity be required to pay that entity's proportionate share of damages only. The statute also evidences legislative intent that certain entities' share of fault not be at all recoverable by a plaintiff; for example, the proportionate shares of immune parties.

However, under RCW 4.22.070(1)(b), joint and several liability exists where there is a fault-free plaintiff. Significantly, however, the form of joint and several liability which exists where there is a fault-free plaintiff is not, under RCW 4.22.070, the same as the joint and several liability which existed prior to the tort reform act of 1986. Where, prior to the tort reform act of 1986, "pure" joint and several liability enabled a plaintiff to sue one tortfeasor and recover all of his or her damages from one of multiple tortfeasors, RCW 4.22.070(1) and (1)(b) do not permit that.

Under RCW 4.22.070(1)(b), only defendants against whom judgment is entered are jointly and severally liable and only for the sum of their proportionate shares of the total damages. A defendant against whom judgment is entered is specifically defined by RCW 4.22.070(1) as "each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense ...". Thus, settling, released defendants do not have judgment entered against them within the meaning of RCW 4.22.070(1), and therefore are not jointly and severally liable defendants.

The only jointly and severally liable defendant here is defendant Beatt. Petrolane, Inc., is not a jointly and severally liable defendant because it was released.

RCW 4.22.070(2) provides:

If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.

Defendant claims that RCW 4.22.070(2) applies here and directs that RCW 4.22.060 be applied. RCW 4.22.060(2) provides that a claim of a releasing person against other persons is reduced by the amount of the settlement if reasonable. Defendant argues for application of this provision for a credit, or offset, against what a nonsettling defendant has to pay of a total verdict.

Under RCW 4.22.070(2), however, if defendants are jointly and severally liable under subsection (1)(a) or (1)(b), then those defendants have rights of contribution as to each other, RCW 4.22.040, .050, and the effect of a settlement by such a jointly and severally liable defendant is to be determined under RCW 4.22.060. By its terms, RCW 4.22.070 restricts credits, or offsets, by amounts paid by settling defendants to amounts paid by jointly and severally liable settling defendants. In other words, where there is a fault-free plaintiff, RCW 4.22.070(1), (1)(b) and (2) direct application of RCW 4.22.060 only if there are jointly and severally liable defendants. Thus, under the plain language of the statute the effect of settlement statute (RCW 4.22.060) does not apply in the circumstances here because there are no settling jointly and severally liable defendants.

Plaintiffs argue, however, that RCW 4.22.070(2) is internally inconsistent with RCW 4.22.070(1)(b). They contend that by referring to
jointly and severally liable settling defendants, RCW 4.22.070(2) is inconsistent with that part of subsection (1)(b) which speaks only of joint and severally liability with respect to defendants against whom judgment is entered.

This argument simply overlooks the plain language of subsection (2). That subsection speaks of defendants who are jointly or severally liable under either RCW 4.22.070(1)(a) or (1)(b). If liability is under (1)(a) (not the case here), liability is imposed on parties who "were acting in concert or when a person was acting as an agent or servant of the party." Liability under subsection (1)(a) is joint and several. With this in mind, it is easy to see why RCW 4.22.070(2) refers to the possibility of jointly and severally liable settling defendants. Where liability is imposed on subsection (1)(a), one of two parties acting in concert, or in agency situations, can settle while still being a jointly and severally liable defendant. Further, plaintiffs appear to overlook the possibility of RCW 4.22.070(2) applying to postjudgment settlements.

There is thus no inconsistency between RCW 4.22.070(2) and subsection (1)(b), contrary to plaintiffs' position, and it is clearly possible to give meaningful effect to all the statutory language.

How much of the total verdict must defendant Beatt pay? Under RCW 4.22.070(1) judgment is entered against a defendant "in an amount which represents that party's proportionate share of the claimant's total damages." The jury found defendant 80 percent at fault. Beatt must pay 80 percent of the total verdict. There are no other jointly and severally liable defendants (those against whom judgment has been entered). Defendant Beatt is entitled to no credit or offset for any amounts paid by any settling entities, whether fault-free or at-fault, because none of those entities are jointly and severally liable defendants within the meaning of the express language of RCW 4.22.070. RCW 4.22.070(2) does not apply, and thus does not direct that RCW 4.22.040, .050, or .060 is to be applied. Had there been more than one defendant against whom judgment was entered according to RCW 4.22.070(1), then, as among those defendants, there would have been joint and several liability. If any settling defendants were jointly and severally liable, then RCW 4.22.070(2) would have been applicable.

As a policy matter, defendant argues that if there is no reduction from defendant's proportionate share for amounts paid by settling entities, plaintiff may recover more than plaintiff's actual damages, in contravention of policy favoring only one full recovery for plaintiff.

We note, however, first, that a plaintiff suing only one defendant is in the same position. If the plaintiff settles for more than what a trier of fact might ultimately determine total damages are, plaintiff has more than "one full recovery". Similarly, a plaintiff suing only one defendant may receive less than total damages as a result of the settlement, also a possibility under our holding here. While plaintiff has the possibility of obtaining a seeming windfall, plaintiff also bears the burden of the possibility of less than full recovery. Unlike the law existing before the tort reform act of 1986, under which a solvent jointly and severally liable tortfeasor might be required to bear the burden of insolvency of other tortfeasors, the law now puts a heavier burden on the plaintiff who settles with an entity for an amount less than that entity's share of fault as determined by the trier of fact.

The truth is, very few cases result in plaintiff obtaining exactly one full recovery, no more and no less, regardless of the method of crediting, or offsetting, used.

Second, defendant is not harmed and cannot complain that it is being asked to pay more than its share of damages resulting from its share of fault. See Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 431 (Tex.1984).

Amicus Washington State Trial Lawyers Association (WSTLA) argues that settlements should be encouraged, and that they will be encouraged if the sum of the proportionate shares in RCW 4.22.070(1)(b) includes the shares of settling at-fault entities, with judgment against nonsettling defendant(s) offset by the amount of any settlement with at-fault entities. WSTLA reasons that potentially fault-free plaintiffs will be inclined to settle because they will know in advance of trial the consequences of settlement and will not bear the entire risk of an adverse settlement. WSTLA also reasons that since nonsettling defendants will bear the risk of being responsible for the proportionate shares of at-fault settling entities, nonsettling defendants will have a stake in a reasonableness hearing in much the same way as before RCW 4.22.070 was enacted.
For three reasons, this argument is unconvincing. First, RCW 4.22.070(1) provides that "[j]udgment shall be entered against each defendant except those who have been released by the claimant ...". (Italics ours.) RCW 4.22.070(1)(b) provides that if the plaintiff is found to be fault-free, "the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [sic] total damages." Under these provisions, the proportionate share of a released entity is not part of the sum of proportionate shares referenced in RCW 4.22.070(1)(b). See Peck, 62 WASH. L. REV. 233, 243; Harris, Washington's 1986 Tort Reform Act: Partial Tort Settlements After the Demise of Joint and Several Liability, 22 GONZ. L. REV. 67, 91 (1986-1988).

Second, WSTLA's argument appears to put the cart before the horse, arguing the necessity of defendant's involvement in reasonableness hearings without demonstrating the necessity of the hearings themselves. We do not address the latter issue, but note that WSTLA's policy argument assumes their necessity. Deciding the necessity of reasonableness hearings must await another day.

Third, while it can be said in advance of trial that a plaintiff may be potentially fault free, that plaintiff may in fact be found by the trier of fact to be partially at fault. Should that be the case, and if RCW 4.22.070(1)(a) and (3) are inapplicable, then liability in the case of a single indivisible harm will be several only. In such circumstances a plaintiff will bear the risk of any adverse settlement (just as when there is only one defendant, as explained above) with considerable uncertainty about the ultimate recovery following a trial. Given such uncertainty built into RCW 4.22.070's "general rule" of several liability, and the fact that the question of plaintiff's fault is not determined by a trier of fact until close of trial, we have considerable doubt that the Legislature intended that the statute be construed according to the policy argued by WSTLA, particularly in the face of statutory language which contradicts that proposed construction. See generally Harris, 22 GONZ. L. REV. 82 (Legislature has shown by provisions of RCW 4.22.070 "that it is not concerned with claimant uncertainty regarding the effects of partial settlement").

We remand with directions to the trial court to modify the judgment entered against Beatt.

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DORE, C.J., and UTTER, ANDERSEN, SMITH, DURHAM and JOHNSON, JJ., concur.

DOLLIVER, Justice (concurring) (omitted).