Total Equitable Indemnity Under Comparative Negligence: Anomaly or Necessity?

Under current California law, a tort defendant who settles in good faith with the plaintiff is generally relieved of all further liability in the case, whether to the plaintiff or to other, nonsettling defendants. This foreclosure of liability provides the principal incentive for defendants to settle civil suits. The foreclosure of liability is implemented under section 877.6 of the California Code of Civil Procedure, which authorizes a hearing on the issue of the good faith of settlements. Section 877.6 further provides that:

[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.

Under the terms of the statute, only good faith settlements preclude claims for indemnity or contribution from nonsettling defendants. Consequently, nonsettling codefendants have argued that settlements were not reached in good faith and that their claims for indemnity from the settling defendant should not be barred. As a result, California courts have developed a body of case law defining the standard of good faith.

1. See CAL. CIV. PROC. CODE § 877.6 (West Supp. 1986).
2. Other incentives include the saving of time and costs of litigation, and the security of a negotiated fixed sum as compared to the risk of an unpredictable jury award. See infra notes 182-83 and accompanying text.
3. CAL. CIV. PROC. CODE § 877.6(a) (West Supp. 1986).
4. CAL. CIV. PROC. CODE § 877.6(c) (West Supp. 1986).


6. The lower California courts had developed conflicting criteria to test the good faith of a settlement under section 877.6. See Roberts, The "Good Faith" Settlement: An Accommodation of
Additionally, the terms of section 877.6 bar only claims for "comparative indemnity, based on comparative negligence or comparative fault." This wording has prompted nonsettling defendants whose liability is vicarious to argue that section 877.6 does not foreclose their right to total equitable indemnity from actively negligent defendants who have settled with the plaintiff. The argument has a certain appeal when made by a vicariously liable defendant who remains exposed to a large judgment in favor of the plaintiff because his more culpable codefendants have settled for a small sum. On the other hand, if a right to total indemnity survives a good faith settlement, the risk of continued liability to codefendants after settlement would create a powerful disincentive for defendants to settle.

The California courts have addressed defendants' arguments regarding the proper definition of good faith and the continued right to total equitable indemnity. In doing so, they have treated the two issues as unrelated. Moreover, they generally decide the total-indemnity issue on the basis of either a historical analysis of the law or the equities of the individual case.

This Comment argues that the courts' treatment of the issues of good faith and total indemnity under section 877.6 is flawed. First, policy considerations, not historical accidents of judicial development, should dictate whether total indemnity survives a good faith settlement. A decision to allow total indemnity might further the goal of equitable loss allocation, but the risk of continued liability to codefendants even after settlement would discourage settlements. An interpretation of section 877.6 that would subsume the total indemnity doctrine and therefore bar

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7. CAL. CIV. PROC. CODE § 877.6(c) (West Supp. 1986).
9. See supra notes 6, 8, and cases cited therein.
all claims after settlement would encourage settlement, but could leave a nonsettling defendant exposed to liability disproportionate to his fault.

Second, the question of permitting or denying a continued right to total indemnity cannot properly be divorced from the definition of good faith adopted by the courts. In fact, the California Supreme Court has recently undercut the need for total indemnity by redefining the standard of good faith. In *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*, the court embraced a “reasonable range” standard under which a settlement, to be declared in good faith, must approximate the amount of the settling defendant’s estimated liability. This test reduces the possibility that nonsettling defendants will remain exposed to liability inequitably disproportionate to their fault because the liability of these defendants is reduced by the amount of any previous equitable settlement.

By obliging courts to apply the reasonable-range standard in determining the good faith of settlements, the *Tech-Bilt* decision has largely mitigated the concern that nonsettling defendants may be exposed to inordinate liability. Thus, this Comment concludes that the doctrine of total indemnity should be subsumed in California under the doctrine of comparative indemnity. In providing that good faith settlements bar all cross-complaints for indemnity, both total and partial, California will continue to provide a strong incentive for settlements.

To evaluate fully the argument in favor of retaining a right to total indemnity, it is necessary to understand the genesis of the doctrine. Because the doctrine of indemnity developed largely in response to the inequities inherent in the common law, it is also necessary to review briefly the common law governing loss allocation among defendants. Therefore, Part I of this Comment reviews the common law and traces the development of the right of indemnity. It also discusses the adoption of comparative negligence in California and the resulting changes wrought in the area of civil tort liability and loss distribution among defendants. Part Two examines and rejects a reading of section 877.6 based on arguments of statutory interpretation and construction. It asserts that an approach toward total equitable indemnity that requires case-by-case examination of individual equities is undesirable because it discourages settlements. Rather, this Part argues, the proper approach recognizes that the issue is the result of a conflict of the competing policies of promoting settlements and of distributing losses equitably among defendants. Finally, in Part III, this Comment argues that the *Tech-Bilt* reasonable-range standard minimizes the conflict between these policies by reducing the likelihood that nonsettling defendants will be exposed to

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12. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985); see infra notes 177-83 and accompanying text.

13. See id. at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263.
liability disproportionate to their degree of fault. Thus, Part III concludes that the right of total equitable indemnity can be abolished, preserving the incentive to settle without imposing inequitable liability upon nonsettling defendants. Part III also discusses examples of the reasonable-range standard as applied, illustrating its desirability and workability in even the most difficult cases.

I

LEGAL BACKGROUND

A. Loss Allocation Before Comparative Negligence: The Common Law

I. Early Rejection of Indemnity in Tort

Under the common law, allocation of the loss among tort defendants was left to the discretion of the plaintiff. A plaintiff could sue one or several defendants and could recover the entire judgment against any one or more of the defendants held liable. Thus, a defendant only slightly at fault could be forced to pay a large judgment, while a more culpable codefendant, although found liable, would never have to pay any part of the judgment. Under the common law, no mechanism existed to reapportion damages among joint tortfeasors.

The rule denying defendants the right to sue among themselves to recover a share of the judgment paid was first clearly articulated by the California courts in 1912 in the Dow v. Sunset Telephone & Telegraph Co. litigation. In Dow I, the plaintiff suffered injuries when the telephone wire he was repairing touched a high voltage wire strung by the lighting company. The court determined that both the telephone company and the lighting company were liable. After the plaintiff recovered the full amount of his judgment from the lighting company, the lighting company brought suit in Dow II against the telephone company,

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14. See infra notes 22, 23, and accompanying text.
15. See infra note 24 and accompanying text.
16. Dow v. Sunset Tel. & Tel. Co., 157 Cal. 182, 188, 106 P. 587, 589-90 (1910); Dow v. Sunset Tel. & Tel. Co., 162 Cal. 136, 139-40, 121 P. 379, 380-81 (1912). In the first Dow case, Dow I, the court found both defendants negligent and liable to the plaintiff. Dow I, 157 Cal. at 188, 106 P. at 589-90. In the second decision, Dow II, the court denied one defendant's claim to contribution from the other. Dow II, 162 Cal. at 139-40, 121 P. at 380-81.
17. The telephone company was held liable for stringing its wires too close to the lighting company's wires. The lighting company was held liable for failing to maintain or replace the worn insulation on its wires. Dow I, 157 Cal. at 185-87, 106 P. at 589.
seeking contribution for one-half of the judgment paid. The California Supreme Court affirmed the trial court's denial of the motion. Discussing California law as it related to joint tortfeasors, the court noted that:

[A]ny such wrongdoer cannot . . . insist that any or all of his associates in the act shall bear with him the burden of defending against the claim of the injured party or of compensating him for the injury. There is no right of contribution among them. They are all jointly and severally liable, as the injured party may elect. The injured party may sue all or any of them jointly, or each separately, or, having secured a joint judgment against all, enforce such judgment by execution against one only . . . .

This strict rule echoed the Latin maxim \textit{ex turpi causa non oritur actio}, “[o]ut of a base [illegal or immoral] consideration, an action does [can] not arise.” In other words, under the common law, a defendant found liable to the plaintiff was by definition a wrongdoer, and the courts would not intervene to improve the lot of wrongdoers.

The common law rule precluding loss allocation among defendants differs markedly from California's present rule, but was justified as entirely consistent with the policy goal of deterrence. Because no defendant in a pool of liable codefendants could know in advance if the plaintiff would choose to demand payment from him or from another, each arguably had an incentive to avoid or prevent accidents. Stated less charitably, the very harshness of the rule, coupled with its capricious application, served to provide an effective deterrent.

The common law rule barring contribution among codefendants, together with other common law rules which governed civil suits, led to several inequities. First, the plaintiff retained exclusive control over the number and identity of defendants in the suit; a defendant was not permitted to join other defendants who might have been more negligent. Second, even if the plaintiff sued several defendants, he retained the power to choose who would pay the judgment. Thus, the defendant

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18. Dow II, 162 Cal. at 137, 121 P. at 380.
19. Id. at 139, 121 P. at 380 (quoting Fowden v. Pacific Coast S.S. Co., 149 Cal. 151, 157, 86 P. 178, 180 (1906)).
20. \textit{BLACK'S LAW DICTIONARY} 529 (5th ed. 1979) (bracketed words in original). The same idea is reflected in another maxim: \textit{in pari delicto potior est conditio possessidens}, “[w]here the fault is mutual, the law will leave the case as it finds it.” Id. at 711.
22. See Reed v. Wing, 168 Cal. 706, 712, 144 P. 964, 967 (1914) (cross-complaint not permitted to join a new party not necessary to the decision of the matter before the court); Alpers v. Bliss, 145 Cal. 565, 570, 79 P. 171, 173 (1904) (cross-complaint not permitted for affirmative relief against one who is not already a party to the action).
23. For example, former California Civil Procedure Code section 414 provided: “When the action is against two or more defendants jointly or severally liable on a contract, and the summons is served on one or more, but not all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants.” \textit{CAL. CIV. PROC. CODE} § 414 (Kerr 1922).
who paid the judgment was not necessarily the defendant best able to prevent plaintiff’s injuries or the one most at fault, and loss allocation under the common law did not necessarily promote either equity or the policy of efficiently deterring tortious behavior. Finally, in the absence of an indemnity contract, a joint tortfeasor could not bring an action to recover any of the judgment she had paid, regardless of her share of the fault. Thus, the original, sometimes capricious, decision of the plaintiff as to loss allocation could not be remedied after the original suit.

2. Tort Indemnity in Contractual Settings

In reaction to the harsh consequences of the common law rule denying contribution among codefendants, the preexisting doctrine of contractual indemnity was extended to the tort setting to allow loss sharing among defendants who had a contractual relationship. As early as 1908, in Bradley v. Rosenthal, a California court recognized the right of indemnity between a principal who becomes liable for the negligent acts of his agent and the negligent agent. Although shifting of loss seems antithetical to the rule barring contribution among joint tortfeasors, the court viewed its holding as entirely consistent with the common law rule. It explained that “in such kind of cases where there have been no express instructions for the doing of the act complained of in the particular way, the principal and agent, master and servant, are not joint tort-feasors as the law employs that term.”

In 1944, a similar right of indemnity was recognized between an


25. Preexisting law recognized indemnity in contractual settings between parties who had bargained for an express agreement to distribute liability. California’s original Civil Code, enacted in 1872, contained several sections defining the permissible scope of indemnity clauses and the rules that courts should use in their interpretation. CAL. CIV. CODE §§ 2772-2781 (Springer 1872). These sections are currently codified at CALIFORNIA CIVIL CODE §§ 2772-2779 (West 1974). For a general survey of the law of indemnity in 1932 see Lefiar, supra note 21, at 146-59. Courts extended this indemnity principle to the tort setting by recognizing implied contractual agreements to indemnify. See Conley & Sayre, Rights of Indemnity As They Affect Liability Insurance, 13 HASTINGS L.J. 214, 215 (1961); Comment, Allocation of Loss, supra note 16, at 738; see also infra notes 26-39 and accompanying text.

26. 154 Cal. 420, 97 P. 875 (1908).

27. Id. at 423-24, 97 P. at 876-77.

28. Id. at 423, 97 P. at 876.

29. Id. This distinction figures prominently in subsequent cases expanding the scope of indemnity beyond the principal/agent context. See cases cited infra at notes 57-66 and accompanying text.
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automobile owner and a negligent driver/bailee. In Baugh v. Rogers, one defendant (bailee) had borrowed a car from another defendant (bailor). Bailee then negligently struck bailee's own employee while entering a driveway. The employee sued both the negligent driver/employer and the bailor of the car. The trial court determined that, because the accident was governed by the rule of workman's compensation insurance, the employee had no independent cause of action against her employer. The court apparently reasoned further that any liability of the bailor would be dependent upon the liability of the bailee. Because the bailee could not be held liable to his employee, the lower court dismissed the case against both defendants.

On appeal, the California Supreme Court agreed that the employee had no civil cause of action against her employer. The court disagreed, however, with the lower court's decision regarding the liability of the bailor. Under California's Vehicle Code, the bailor of an automobile was liable to any third party injured as a result of the bailee's negligent operation of the vehicle. Thus, the court held that under the provisions of the Vehicle Code, the employee had a cause of action against the bailor of the car even if the negligent bailee could not be reached in a civil suit.

The supreme court then turned to the issue of indemnity as between the two defendants. Starting with the premise that a bailee is liable to the bailor for any damage to bailed property resulting from the bailee's negligence, the court noted that the bailee would have been liable to the bailor for damage done to the car. Believing it irrelevant to liability whether the damage was sustained by the bailed property or by the bailee's employee, the court extended the rule of bailee liability. It held that the employer/bailee was obliged to indemnify the bailor for any damages paid to the plaintiff. The effect of this holding was to permit a statutory modification of the law of bailments of automobiles. Specifically, the provisions of the Vehicle Code were deemed to have inserted an implied indemnity clause into every contract of bailment of an automobile.

31. Id. at 204, 148 P.2d at 636.
32. Id. at 207-14, 148 P.2d at 638-41.
33. Id. at 214, 148 P.2d at 641.
34. Id. at 215, 148 P.2d at 641-42.
35. Id.
36. As the court stated: "the right of an owner to recover from the negligent operator . . . becomes an element of every contract of bailment of a motor vehicle in this state". Id. at 215, 148 P.2d at 642 (footnotes omitted). The reasoning and result of Baugh were later affirmed by the United States Supreme Court. See Weyerhauser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563 (1958); Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956).

It might be noted parenthetically that the Baugh court's allocation of liability undercut the exclusivity of workman's compensation as an employee's remedy against his employer. Because the
Finally, in 1946, a California court recognized a right of indemnity as between a freight forwarder and a negligent common carrier. In *Merchant Shipper's Association v. Kellogg Express & Draying Co.*, the plaintiff, a freight forwarder, had paid a consignee compensation for damage done to a machine during shipping. The plaintiff then sued the common carrier whose negligence caused the damage. On appeal, the court allowed the plaintiff to recover from the common carrier the amount it had paid the consignee for the damage. Thus, once again, the court allowed loss shifting between two parties in a contractual relation even though their contract contained no express indemnity clause.

These three cases—*Bradley, Baugh,* and *Merchant Shipper's*—illustrate the expansion of the doctrine of indemnity which took place in the first half of the century. During this period, California courts began to allow loss allocation between joint-tortfeasor defendants in a contractual relation, even when their contract contained no explicit indemnity clause. This right of indemnity was still limited in scope and was typically characterized as indemnity arising under an implied contract. Starting in 1958, however, California courts went further and extended the right of indemnity in tort cases to defendants without any preexisting contractual relation.

3. *Total Equitable Indemnity*

*City of San Francisco v. Ho Sing* has been cited as the first California case allowing total equitable indemnity, that is, indemnity without any contractual relation. The case involved a pedestrian who had suffered injuries in an accident caused by the negligence of another. The pedestrian received workman's compensation benefits for her injuries, but she could not sue her employer directly. Yet, allowing her to sue the bailor of the car and then allowing the bailor to recover in indemnity against the employer/bailee produced much the same result. Perhaps because of this result, the rule of *Baugh* was subsequently abrogated by statute. In 1959, the California Legislature passed Labor Code § 3864, which provides:

> If an action as provided in this chapter prosecuted by the employee, the employer, or both jointly against a third person results in judgment against such third person, or settlement by such third person, the employer shall have no liability to reimburse or hold such third person harmless on such judgment or settlement in absence of a written agreement so to do executed prior to the injury.

CAL. LAB. CODE § 3864 (West 1971). Thus, an employer can be held liable for indemnity in favor of a third party only when an express contract exists.

37. 28 Cal. 2d 594, 170 P.2d 923 (1946).
38. *Id.* at 597-99, 170 P.2d at 925-26.
40. 51 Cal. 2d 127, 330 P.2d 802 (1958).
41. See Molinari, *Tort Indemnity in California,* 8 SANTA CLARA L. REV. 159, 162 (1968); Note, *Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants,* 50 S. CAL. L. REV. 73, 82 (1976). Although the development of noncontractual indemnity is often attributed to this single case, the language and holdings of earlier California cases suggest a more gradual shift. Indeed, several that were described as contractual in fact involved remedies for tortious damage. See, e.g., *Baugh v. Rogers,* 24 Cal. 2d 200, 148 P.2d 633 (1944) (employer sued for injury caused by negligent operation of motor vehicle must pay "contractual")
ferred injury after tripping over a crack in the sidewalk. In a prior suit, the plaintiff recovered from both Ho Sing, the owner of the building adjoining the sidewalk, and the city of San Francisco. In Ho Sing, the city sued the building owner for indemnity, claiming that a city has the right to be indemnified by a landowner in the event it is compelled to pay damages resulting from a dangerous condition that the landowner created or maintained. The court reviewed the case law from California and other jurisdictions and concluded that:

where an adjoining property owner . . . places in a public street or sidewalk some artificial structure and a city is compelled to pay compensation in damages to a member of the public injured thereby the city has a right to recover the amount so paid from the property owner by way of indemnity.

Although the court allowed indemnity, the scope of its holding was unclear. The parties in Ho Sing were not in a contractual relation. Thus, at a minimum, the case allowed indemnity without requiring a contract. Unfortunately, in reviewing the arguments of the parties, the California Supreme Court described several doctrines developed in other states, but failed to identify the rationale upon which it relied in allowing indemnity. For example, the court cited earlier California cases allowing indemnity between parties in a "special relationship." This language would imply a reading of Ho Sing under which a limited excep-

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42. Ho Sing, 51 Cal. 2d at 128-29, 330 P.2d at 802-03. The plaintiff recovered a final judgment in the amount of $15,000, of which the city paid $5,000 (plus $102.03 costs), and Ho Sing paid $10,000. Id. at 129, 330 P.2d at 802-03.
43. Id. at 130-31, 330 P.2d at 803-04.
44. Id. at 138, 330 P.2d at 808.
45. As examples of cases allowing contribution among tortfeasors and indemnity from a property owner to a municipality, the court cited Salt Lake City v. Schubach, 108 Utah 266, 159 P.2d 149 (1945) and City of Tuscaloosa v. Fair, 232 Ala. 129, 167 So. 276 (1936). It also quoted extensively from Washington Gaslight Co. v. District of Columbia, 161 U.S. 316 (1896). See Ho Sing, 51 Cal. 2d at 132, 330 P.2d at 804-05. Additionally, the court quoted from Lowell v. Boston & Lowell R.R., 40 Mass. (23 Pick) 24 (1839), a case allowing indemnity based on the distinction between moral delinquency or turpitude and offenses which are merely mala prohibita. See Ho Sing, 51 Cal. 2d at 133, 330 P.2d at 805. Finally, the court cited City of Spokane v. Crane Co., 98 Wash. 49, 167 P. 63 (1917), and Schubach, 108 Utah 266, 159 P.2d 149, to illustrate the availability of indemnity between actively and passively negligent tortfeasors. See Ho Sing, 51 Cal. 2d at 133, 330 P.2d at 806.
47. Ho Sing, 51 Cal. 2d at 130-31, 330 P.2d at 804 (citing Morrison v. Avoy, 7 Cal. Unrep. 37, 70 P. 626 (1902); Rider v. Clark, 132 Cal. 382, 64 P. 564 (1901); Runyon v. City of Los Angeles, 40 Cal. App. 383, 180 P. 837 (1919); Hirsch v. James S. Remick Co., 38 Cal. App. 764, 177 P. 876 (1918)). The court also noted that "the city seeks indemnity from defendants because of the special licensor-licensee relationship existing between them with respect to the use of the public ways." Ho Sing, 51 Cal. 2d at 137, 330 P.2d at 808.
tion is carved out for municipalities because of their special relationship to landowners. In other parts of its opinion, however, the court distinguished between "active" and "passive" negligence, primary and secondary duties, and direct and derivative liability. Finally, the court referred broadly to the interests of equity and justice, stating that: "The rule against contribution between joint tort feasors admits of some exceptions, and a right of indemnification may arise as a result of contract or equitable considerations and is not restricted to situations involving a wholly vicarious liability . . . ."51

Whatever rationale the court intended to adopt in Ho Sing, the resulting "all-or-nothing" indemnity between parties not involved in a contractual relation came to be known as total equitable indemnity.52 It then fell to the appellate courts to define and limit the scope of this new type of indemnity. Even after many lower court decisions, however, the ambiguities in Ho Sing regarding the rationale underlying the right to total indemnity have never been resolved.

It remains unclear what preconditions must exist before one defendant may recover total equitable indemnity from another. The test was stated in general terms by the court in Alisal Sanitary District v. Kennedy.53

The right of indemnity . . . is a right which enures to a person who, without active fault on his part, has been compelled by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable. The difference between primary and secondary liability is not based on a difference in degrees of negligence or on any doctrine of comparative negligence . . . . It depends on a difference in the character or kind of the wrongs which cause the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured person. . . . [S]econdary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties, or arising from some positive rule of common or statutory law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible.54

Although the test articulated in Alisal seems straightforward on its

48. See Ho Sing at 133, 330 P.2d at 806.
49. See id. at 134, 330 P.2d at 806.
50. See id. at 130, 330 P.2d at 803.
51. Id. at 130, 330 P.2d at 803-04 (emphasis in original) (quoting Peters v. City of San Francisco, 41 Cal. 2d 419, 430-31, 260 P.2d 55, 61 (1953)).
52. After Ho Sing, total equitable indemnity became an accepted mechanism of loss allocation. See, e.g., Cahill Bros. v. Clementina Co., 208 Cal. App. 2d 367, 375, 25 Cal. Rptr. 301, 305 (1962) (right to indemnity, while relatively recent in the law of California, is now well established).
54. Id. at 75, 4 Cal. Rptr. at 383 (emphasis in original) (quoting Builders Supply Co. v. McCabe, 366 Pa. 322, 325-28, 77 A.2d 368, 370-71 (1951)).
face, it is subject to differing interpretations. A basic rule was established in *Pierce v. Turner,*55 decided in 1962. *Pierce* held that the affirmative negligence of a defendant barred the right to indemnity.56 This holding suggests that, at a minimum, a defendant’s negligence must have been passive for indemnity to be available.

However, even if passive negligence is a necessary condition, the question still remains whether it is a sufficient condition. Some courts indicated that passive negligence alone is *not* a sufficient basis for the granting of total equitable indemnity, interpreting the language from *Alisal* regarding “some legal relation between the parties” to mean that indemnity is available only as between parties in some kind of a “special relationship.”57 Later cases, however, held that a right to indemnity exists even without a special relationship.58

Another criterion for the availability of total equitable indemnity is found in *Alisal’s* mention of “fault that is imputed . . . from some positive rule of common or statutory law.”59 The concept was never analyzed or defined in the cases following *Alisal,* yet the language was sometimes used as if it described a separate category of cases in which total equitable indemnity is available. In fact, liability that is imputed without fault would seem, by definition, to be passive. Thus, it is not clear whether the imputed-by-law criteria defines any cases not already covered by the active/passive distinction.60

Whether the characterization of the indemnitee’s negligence as passive is alone a sufficient basis to award indemnity has never been conclusively resolved. For several years, courts continued to quote the language from *Alisal,* perhaps because it glossed over difficult doctrinal

56. Id. at 268-69, 23 Cal. Rptr. at 118.
57. American Can Co. v. City of San Francisco, 202 Cal. App. 2d 520, 523-25, 21 Cal. Rptr. 33, 35-36 (1962) (emphasizing that parties in *Ho Sing* were involved in special licensor-licensee relationship and stating that distinction between “active” and “passive” negligence is not, of itself, sufficient basis for implied duty to indemnify). See *also* San Martin Vineyards v. R. & W. Floor Coverings, 204 Cal. App. 2d 677, 22 Cal. Rptr. 628 (1962) (disallowing indemnity because no special relationship alleged).
59. Although the concept is never defined, respondeat superior, the liability of a principal for the negligent acts of his agent, and the liability of a retailer for damages done by a defective product are all presumably examples of liability imputed by a positive rule of law.
60. If, for example, an employer or principal or retailer has been negligent, then its liability is not imputed, but is original. In these cases, the rule of *Pierce* would bar indemnity. In contrast, if the fault is imputed, the employer, principal, or retailer is, by hypothesis, only passively negligent. In this case, total equitable indemnity would be available even without a separate criterion “imputed . . . from some positive rule of common or statutory law.” Thus, the “imputed fault” standard, when analyzed, collapses into the broader distinction between active and passive negligence. *But see* Horn & Barker, Inc. v. Macco Corp., 228 Cal. App. 2d 96, 39 Cal. Rptr. 320 (1964).
Decisions allowing or disallowing total equitable indemnity focused on the active/passive distinction, mentioning the other criteria in support of their conclusions.

Even the active/passive distinction proved difficult to define, however. For example, passive negligence was occasionally defined to exclude acts but to include omissions or failures to act when the indemnitee was under an affirmative duty to act. Applying this definition, *Cobb v. Southern Pacific Co.* allowed total indemnity where liability was based solely on failure to discover a dangerous condition created by an actively negligent codefendant. In *Pearson Ford Co. v. Ford Motor Co.*, however, the court determined that failure to act could be treated as active negligence. In that case, the court remanded the issue of the indemnification of a combined Ford dealer and service center when the

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61. For a list of cases quoting *Alisal*, see Ford Motor Co. v. Robert J. Poeschl, Inc., 21 Cal. App. 3d 694, 697 n.1, 98 Cal. Rptr. 702, 704 n.1 (1971). *Atchison, Top. & S.F. Ry. v. Lan Franco*, 267 Cal. App. 2d 881, 886-87, 73 Cal. Rptr. 660, 664 (1968), criticized earlier cases and developed an alternative two-pronged test: first, the claimant must have been held liable as a result of some legal obligation to the injured party; second, the claimant must not have actively or affirmatively participated in the wrong. This test was followed in *Pearson Ford Co. v. Ford Motor Co.*, 273 Cal. App. 2d 269, 273, 78 Cal. Rptr. 279, 282 (1969), but was rejected later in *Gardner v. Murphy*, 54 Cal. App. 3d 164, 169, 126 Cal. Rptr. 302, 305 (1975) (characterizing the two requirements as merely a restatement of the single condition that the wrongs of the two tortfeasors differ in character or kind). Alternative verbal formulations of the test can also be found in *Cahill Bros. Inc. v. Clementina Co.*, 208 Cal. App. 2d 367, 375-82, 25 Cal. Rptr. 301, 305-09 (1962).

62. In addition to the active/passive distinction, the “special relationship” criterion, and the “liability imputed by law” criterion, the *Alisal* decision contains a list of factors which a jury could consider in determining the availability of indemnity. The list includes:

*Alisal*, 180 Cal. App. 2d at 79-80, 4 Cal. Rptr. at 386 (1960). Examples of cases which cite all or some of these criteria and factors include *Muth v. Urricelqui*, 251 Cal. App. 2d 901, 60 Cal. Rptr. 166 (1967); *Aerojet Gen. Corp. v. D. Zelinsky & Sons*, 249 Cal. App. 2d 604, 57 Cal. Rptr. 701 (1967); *Pierce v. Turner*, 205 Cal. App. 2d 264, 23 Cal. Rptr. 115 (1962). If in fact all these factors were considered, it is difficult to see how the availability of total equitable indemnity was based on anything other than an assessment of the totality of the circumstances.


> the negligent conduct of active operations. It is conduct which may consist either of affirmative participation in an act or omission negligent in character. It is to be distinguished from passive negligence which is the omission or failure to perform a legal duty but not involving any affirmative act or active operation. Negligence is active not only if such person participates in another's affirmative act of negligence, but also if such person is physically connected with the negligent act of another by knowledge or acquiescence on his part.

261 Cal. App. 2d at 624-25, 68 Cal. Rptr. at 129.

64. 251 Cal. App. 2d 929, 59 Cal. Rptr. 916 (1967).

dealer's negligence consisted only of its failure to notice a defective brake pedal assembly just minutes before a serious accident. The court concluded that the dealer's "failure to discover the defect would be 'active negligence' if, under all the circumstances and in the exercise of ordinary care, it should have made that discovery."66

As one court frankly noted, the question of whether a party's negligence is active or passive involves more a characterization of the facts than truth finding.67 As the body of case law grew, the unprincipled nature of the active/passive distinction became more evident. Thus, in the late 1960's and early 1970's several courts criticized the distinction even as they applied it.68

The doctrine of total equitable indemnity could be applied while remaining poorly defined and understood for at least two reasons. First, uncertainty about just what conditions are required remained unresolved because the facts of the cases in which the questions arose could often be characterized as fulfilling two, or even all three, of the criteria described above. For example, indemnity was sometimes sought by an owner forced to pay damages for injuries caused by the negligent acts of an independent contractor.69 In such cases, the owner's negligence is passive, the relationship between the owner and independent contractor is easily characterized as "special," and the owner's liability attaches by a special rule of positive (common) law. When all three criteria are fulfilled, it is unnecessary to determine just what combination is required before indemnity becomes available.

The doctrine could also remain poorly defined because eligibility for total equitable indemnity was treated as a fact question to be submitted to the jury.70 On appeal, courts applied a deferential standard of review,

66. Id. at 276, 78 Cal. Rptr. at 284; cf. O'Melia, 261 Cal. App. 2d 618, 68 Cal. Rptr. 125 (1968) (owner cannot recover total indemnity from independent contractor after failing to provide a safe place to work and expressly directing the activities which culminate in an accident). But cf Ferrel v. Vegetable Oil Prods. Co., 247 Cal. App. 2d 117, 55 Cal. Rptr. 589 (1966) (failure of an owner to supervise independent contractor does not rise to the level of active negligence).


68. See Kerr Chems. Inc. v. Crown Cork & Seal Co., 21 Cal. App. 3d 1010, 1014, 99 Cal. Rptr. 162, 164 (1971) (attempts to state the dividing line between primary and secondary liability are often difficult at best); Pearson Ford Co. v. Ford Motor Co., 273 Cal. App. 2d 269, 272, 78 Cal. Rptr. 279, 282 (1969) (attempts to classify the conduct of the indemnitor as "active," "primary," or "positive" and to characterize the conduct of the indemnitee as "passive," "secondary," or "negative" have not been successful and do not satisfactorily cover all the cases); Atchison, Top. & S.F. Ry. v. Lan Franco, 267 Cal. App. 2d 881, 886, 73 Cal. Rptr. 660, 664 (1968) (tests used in applying indemnity doctrine are vague).


upholding the jury's findings unless clearly erroneous. Appellate courts were not required to explain precisely the tests for determining the availability of total indemnity. Rather, they had only to decide whether the facts of the case fell so obviously outside the hazy contours of the doctrine that the jury's findings required reversal.

Finally, to complete the confusion, two California cases allowed indemnity between actively negligent but successive tortfeasors and thus effectively rejected what other courts had apparently accepted as a basic tenet—that a party's active negligence bars his claim for total equitable indemnity. In the first case, Herrero v. Atkinson, defendant and cross-complainant Herrero had been involved in an accident with Lorenzo. Eighteen months later, as a result of the accident, Lorenzo underwent surgery in the course of which she died. The executor of Lorenzo's estate filed a wrongful death action against Herrero, the hospital, and several doctors. The complaint alleged that defendants other than Herrero had negligently administered a blood transfusion during Lorenzo's operation, and that, as a result of the negligence of all defendants, Lorenzo had died.

Defendant Herrero filed a cross-complaint against the hospital for declaratory relief and indemnity. He alleged that his liability for wrongful death attached only by reason of the negligence of the doctors and that therefore the hospital was bound to indemnify him for any such liability. On appeal, the court noted that the right to indemnity depends upon the equitable principle that each person is responsible for the consequences of his own wrong. Relying on this principle, the court held that Herrero could recover indemnity from the hospital for any damages he paid that were not attributable to his original negligence. Appar-


73. Id. at 72-73, 38 Cal. Rptr. at 492.
74. Id. at 74, 38 Cal. Rptr. at 493.
75. Id. at 75, 38 Cal. Rptr. at 493. The court explained:

Although the original negligence [of the party seeking indemnity] may be regarded in law as a proximate cause of the damages flowing from the subsequent malpractice of the cross-defendants...there is no reason why the ultimate burden of damages should not be distributed among the various defendants, and each made to bear that portion which in equity and good conscience should be borne by him.

Id.

In addition to allowing indemnity between two actively negligent tortfeasors, the court in Herrero used the language of the doctrine of total equitable indemnity to distribute loss between tortfeasors. This result was in marked contrast to earlier applications of indemnity which had shifted the entire burden of the judgment from one defendant to another. In effect, Herrero allocated loss between defendants in proportion to fault, even before California adopted comparative negligence.
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ently, the court believed that the disparity between Herrero's negligence and the doctor's negligence entitled Herrero to receive indemnity.

The Herrero case established an equitable exception to the general rule barring an actively negligent tortfeasor from recovering indemnity from codefendants. A second case, Niles v. City of San Rafael,76 followed Herrero in allowing indemnity where the original negligence of one party was compounded by the egregious negligence of treating doctors. Thus, as characterized by the later case of Niles, Herrero stands for the proposition that when (a) a plaintiff's injury is proximately caused by two negligent acts, (b) the first tortfeasor has no control over the second tortfeasor's negligent conduct, and (c) the first tortfeasor's liability is imputed by a rule of positive law, then the first tortfeasor is entitled to indemnity from the second.77 Within these narrow confines, even an actively negligent tortfeasor can recover indemnity as against a subsequent tortfeasor. Insofar as Herrero rejected limitations imposed by other courts on the application of the indemnity principle, it represents a purely equitable indemnity whose application depends solely upon an appreciation of the equities of the individual case.

Niles and Herrero provide striking illustrations of the equitable results which became possible through the use of the total indemnity doctrine. However, the subsequent change in the rules governing civil liability have made unnecessary the use of the total indemnity doctrine in situations like those in Niles and Herrero. Under California's present system of comparative negligence, a jury would allocate the fault between the two actively negligent defendants who would each be required to pay in proportion to their percentage of fault.78 In light of this present sys-

76. 42 Cal. App. 3d 230, 116 Cal. Rptr. 733 (1974). The suit in Niles resulted from a head injury which Kelly Niles suffered on a school playground during a fight. Niles's father took the boy to a hospital where Niles was properly diagnosed, but then negligently released. Although Niles could have been successfully treated if he had remained at the hospital, he ultimately suffered permanent paralysis from the neck down. Id. at 239, 116 Cal. Rptr. at 738.

Niles's father successfully sued the city and school district for actively negligent failure to provide proper supervision at the playground. In the same suit, Niles's father also successfully sued the hospital and doctor for active negligence in treating Niles. Id. at 234, 116 Cal. Rptr. at 734. After returning a large verdict, the jury determined that the hospital and doctors should pay over 99% of the judgment. The hospital and doctors appealed, but, relying on Herrero, the court affirmed the trial court's ruling. Id. at 239-40, 116 Cal. Rptr. at 738.

Like Herrero, the plaintiff in Niles suffered a single injury from two distinct and successive acts of negligence. Also like Herrero, the liability of the first tortfeasor for the damage done by the subsequent negligent medical treatment stemmed from the rule of Ash v. Mortensen, 24 Cal. 2d 654, 150 P.2d 876 (1944), which held that a tortfeasor is liable for all damages even if compounded by subsequent negligent medical treatment. Thus, the court in Niles held that the rule propounded in Herrero applied to limit the liability of the city and school district to the damages proximately caused by their negligence alone. 42 Cal. App. 3d at 240, 116 Cal. Rptr. at 738.


tern, the need to revive a doctrine which originally developed as a means of mitigating the harsh consequences of the no-contribution rule is questionable.

The foregoing review of the law of equitable indemnity should suffice to demonstrate the confusing variety of principles adduced to justify its application. As the product of a gradual and uncoordinated development, the doctrine of total equitable indemnity was never clearly defined. Indeed, the variety of labels developed and the inability to forge a coherent doctrine suggest that the factors and considerations listed by the courts merely justified individual equitable results. In evaluating the desirability of retaining the doctrine of total indemnity, the confusion and poor definition of the doctrine must weigh heavily against its continued application.

Despite the doctrine's lack of clarity, it is possible to make some generalizations about total equitable indemnity as it existed before the adoption of comparative negligence. First, with the exception of Herrero and Niles, equitable indemnity operated in an all-or-nothing fashion to shift the entire burden of liability from one party to another. Second, like implied contractual indemnity in tort settings, equitable indemnity was awarded only if the underlying equities of the case militated in its favor. Finally, and most generally, by 1977 the law of indemnity had evolved from a principle obliging courts to give effect to contractual indemnity clauses to one "which permit[ted] one of two tortfeasors to shift the entire loss to the other when, without active fault on the claimant's part, he ha[d] been compelled by reason of some legal obligation to pay damages occasioned by the immediate fault of the other."

79. See American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 594, 578 P.2d 899, 909, 146 Cal. Rptr. 182, 192 (1978); Conley & Sayre, supra note 25, at 216; Comment, Allocation of Loss, supra note 16, at 731.

80. See supra notes 25-39 and accompanying text.

81. Sanders v. Atchison, Top. & S.F. Ry., 65 Cal. App. 3d 630, 637, 135 Cal. Rptr. 555, 558 (1977). At roughly the same time that California courts were expanding the doctrine of indemnity to encompass multiple tortfeasor defendants, the California Legislature passed a set of contribution statutes. See CAL. CIV. PROC. CODE §§ 875-880 (West 1980). Like the judicially developed doctrine of indemnity, these statutes were designed to ameliorate the harsh effects of the common law rule barring contribution among defendants. See Fourth Progress Rep. to the Legis. by the Sen. Interim Comm. on Judiciary, 129-30, 1 Appen. to Sen. J. (1957 Reg. Sess.) ("Under the common law there is no contribution between joint tortfeasors.... The purpose of this bill is to lessen the harshness of that doctrine."). See generally UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 63 (1955). Unlike indemnity, however, the contribution statutes provided that codefendants against whom a joint judgment had been rendered were each liable for a pro rata share of the total judgment. See CAL. CIV. PROC. CODE § 876 (West 1980). Thus, if a judgment is rendered jointly against two defendants, each is liable for half of the judgment; if a judgment is rendered against three defendants, each is liable for one-third; and so forth. Pro rata contribution is in marked contrast to the all-or-nothing operation of indemnity, which shifts the entire liability from one defendant to another.
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B. Loss Allocation After Comparative Negligence

I. The Adoption of Comparative Negligence in California

In *Li v. Yellow Cab Co.*, the California Supreme Court abrogated the doctrine of contributory negligence and adopted a pure form of comparative negligence. Subsequent cases, including *Stambaugh v. Superior Court* and *American Motorcycle Association v. Superior Court*, dealt with the corresponding revisions in the rules of civil procedure necessitated by this sweeping change in the law governing civil liability. The issue of whether a right of total indemnity survives a good faith settlement is only one of the many questions created by this fundamental change in the rules of civil litigation.

a. *Li v. Yellow Cab Co.*

The *Li* case arose from a taxicab accident in which plaintiff Nga Li suffered injuries. The trial court, sitting without a jury, found that Li's negligence had contributed to the accident. Because California was then a contributory negligence state, Li's contributory negligence barred her recovery. The trial court accordingly dismissed her suit.

On appeal, the California Supreme Court reversed. Although conceding that the negligence statute enacted by the state legislature in 1872 embodied a rule of contributory negligence, the court rejected the argument that the statute necessarily precluded further judicial development of the concept. Instead, examining both the policies underlying the law of negligence and developing case law of other jurisdictions, the court adopted a system of comparative negligence. In its reasoning, the court criticized the doctrine of contributory negligence as “inequitable in its operation because it fails to distribute responsibility in proportion to fault.”

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82. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).
83. Under “pure” comparative negligence, a plaintiff can recover damages from a defendant even if the plaintiff's negligence was greater than that of the defendant. The alternative “Wisconsin rule” bars recovery if the plaintiff is more negligent than (or in some cases, as negligent as) the defendant. For a discussion of both rules, see Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Association v. Superior Court*, 30 Hastings L.J. 1465, 1468-70 (1979).
85. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).
86. *Li*, 13 Cal. 3d at 809, 532 P.2d at 1229-30, 119 Cal. Rptr. at 861-62.
87. The court explained that “the peculiar nature of the 1872 Civil Code as an avowed continuation of the common law has rendered it particularly flexible and adaptable in its response to changing circumstances and conditions.” *Id.* at 821, 532 P.2d at 1238, 119 Cal. Rptr. at 870 (emphasis in original).
88. See *id.* at 809-13, 532 P.2d at 1230-32, 119 Cal. Rptr. at 862-64.
89. *Id.* at 810, 532 P.2d at 1230, 119 Cal. Rptr. at 862 (footnote omitted).
more equitable distribution of liability.\textsuperscript{90}

Although the \textit{Li} court's adoption of comparative negligence was clear, the court's decision left many important questions unanswered.\textsuperscript{91} In particular, the continued validity of the rules which had previously governed multiparty litigation was uncertain, because \textit{Li} implicitly undercut much of the rationale underlying these rules. For example, the rules which governed apportionment of liability among joint tortfeasors often operated mechanically to defeat the court's newly articulated goal of apportioning liability according to fault.\textsuperscript{92} The court recognized in \textit{Li} that these rules might have to be reevaluated, but determined that reevaluation would be premature given the facts presented.\textsuperscript{93}

b. Stambaugh v. Superior Court

Shortly after \textit{Li} transformed California into a comparative negligence jurisdiction, but before the supreme court's decision in \textit{American Motorcycle},\textsuperscript{94} a California court of appeal addressed the issue of indemnity under the newly adopted regime of comparative negligence. In \textit{Stambaugh v. Superior Court},\textsuperscript{95} petitioner Stambaugh had been involved in a vehicle accident which caused another's death. After settling with Stambaugh for the full amount of his insurance, the decedent's heirs sued other alleged joint tortfeasors, including Pacific Gas & Electric Company (PG & E). PG & E cross-complained against Stambaugh, arguing that \textit{Li} requires each contributing joint tortfeasor to bear responsibility proportionate to his share of the total negligence. Disclaiming any purpose to seek indemnity or contribution from Stambaugh, PG & E sought to join Stambaugh so that the finder of fact could better determine PG & E's proportionate share of the total liability.\textsuperscript{96}

The trial court denied Stambaugh's motion for summary judgment.\textsuperscript{97} Taking the case on a writ of mandate, the court of appeal acknowledged that the release of a joint tortfeasor might place a disproportionate burden upon nonsettling joint tortfeasors contrary to the rationale of the \textit{Li} decision.\textsuperscript{98} But, the court recognized, California has a

\textsuperscript{90} \textit{Id.} at 829-30, 532 P.2d at 1243-44, 119 Cal. Rptr. at 876.
\textsuperscript{91} See, \textit{e.g.}, Fleming, \textit{Foreword: Comparative Negligence At Last—By Judicial Choice}, 64 \textit{CALIF. L. REV.} 239, 250-58 (1976); Note, \textit{supra} note 41, at 74.
\textsuperscript{92} See Comment, \textit{Contribution and Indemnity Collide With Comparative Negligence—The New Doctrine of Equitable Indemnity}, 18 \textit{SANTA CLARA L. REV.} 779, 787-91 (1978); Note, \textit{supra} note 41, at 89-98.
\textsuperscript{93} \textit{Li}, 13 Cal. 3d at 826-27, 532 P.2d at 1241-42, 119 Cal. Rptr. at 873-74.
\textsuperscript{94} \textit{American Motorcycle Ass'n. v. Superior Court}, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).
\textsuperscript{95} 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976).
\textsuperscript{96} \textit{Id.} at 234-35, 132 Cal. Rptr. at 845.
\textsuperscript{97} \textit{Id.} at 234, 132 Cal. Rptr. at 845.
\textsuperscript{98} \textit{Id.} at 235, 132 Cal. Rptr. at 846. The court stated: "At least debatably, the release of a
strong policy in favor of settlements. Thus, the court held that a joint
tortfeasor who had settled in good faith with the plaintiff "is forever dis-
charged of further obligation to the claimant, and to his joint tortfeasors,
by way of contribution or otherwise." 99

As Stambaugh indicates, even before the California Supreme
Court's landmark decision in American Motorcycle, at least one Califor-
nia court had wrestled with the conflict in policies created when some
tortfeasors settle, leaving other tortfeasors liable to the plaintiff. The
decision in Stambaugh, favoring the policy of encouraging settlements
over that of apportioning liability in proportion to fault, was subse-
quently embraced by the supreme court in American Motorcycle. 100

However, the broad language of Stambaugh—indicating that a settling
defendant should be free of obligations to joint tortfeasors "by way of
contribution or otherwise"—was conspicuously absent from the Ameri-
can Motorcycle decision.

c. American Motorcycle Association

In American Motorcycle Association v. Superior Court, 101 the Califor-
nia Supreme Court first addressed the question of indemnity between
codefendants in a multiparty civil litigation. American Motorcycle
involved a teenage boy who had been injured in a motorcycle race. The
boy brought suit against the organizations which had sponsored and
organized the race, alleging that their negligent design, supervision, and
administration of the race proximately caused his injuries. One of the
codefendants, American Motorcycle Association, sought to cross-com-
plain against the plaintiff's parents, but the trial court denied the
motion. 102

On appeal, the supreme court held that defendants in a civil suit can
file cross-complaints against third-party defendants who had not previ-
ously been joined. 103 In deciding the indemnity issue, the court reached
four important conclusions. First, it determined that the adoption of
comparative negligence does not require rejection of the common law

99. Id. at 235, 132 Cal. Rptr. at 845-46 (footnote omitted). The court further explained: "Few
things would be better calculated to frustrate this policy, and to discourage settlement of disputed
tort claims, than knowledge that such a settlement lacked finality and would but lead to further
litigation with one's joint tortfeasors, and perhaps further liability." Id. at 236, 132 Cal. Rptr. at
846.

100. 20 Cal. 3d at 603-04, 578 P.2d at 915-16, 146 Cal. Rptr. at 198-99. See infra notes 109-10,
116-17, and accompanying text.


102. Id. at 584-86, 578 P.2d at 902-03, 146 Cal. Rptr. at 185-86.

103. Id. at 604-07, 578 P.2d at 916-18, 146 Cal. Rptr. at 199-201.
rule of joint and several liability. Thus, each defendant in a multiparty suit remains liable to the plaintiff for the full amount of damages. Second, reviewing both California's contribution statutes and developing case law in other states, the court stated that California statutes do not preclude the right to partial indemnity. Third, the court created a right to "comparative indemnity," that is, partial indemnity from other concurrent tortfeasors proportionate to their comparative fault. The court reasoned that comparative indemnity is necessary because the doctrine of equitable indemnity unfairly imposes the entire burden on one defendant.

Finally, the court preserved the rule that a good faith settlement by one tortfeasor will preclude any claims by concurrent tortfeasors for contribution or partial or comparative indemnity. It recognized that the new right of partial indemnity potentially conflicts with the state's strong policy of encouraging defendants to settle litigation. Thus, a rule precluding indemnity after settlement in good faith was necessary to balance the competing policies. But because the rule potentially discouraged a plaintiff from accepting a proffered settlement, the court further provided that recovery against nonsettling defendants would be reduced only by the amount that the plaintiff actually recovered in settlement. The plaintiff would not be charged with the settling tortfeasor's proportionate share of liability.

*American Motorcycle* balanced several competing, and sometimes conflicting, policies. Two later cases elucidated these policies and placed them in a hierarchy that helps to explain the rationale underlying the *American Motorcycle* decision. As stated by the court in *Sears Roebuck & Co. v. Int'l Harvester Co.*, 82 Cal. App. 3d 492, 147 Cal. Rptr. 262 (1978).

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104. *Id.* at 586-90, 578 P.2d at 903-07, 146 Cal. Rptr. at 186-90. The apparent conflict between the common law rule of joint and several liability and the doctrine of comparative negligence is discussed in Comment, *supra* note 92, at 788-801.


106. *Id.* at 591-98, 578 P.2d at 907-12, 146 Cal. Rptr. at 190-95.

107. *Id.* at 595-98, 578 P.2d at 910-12, 146 Cal. Rptr. at 193-95.

108. *Id.* at 603-04, 587 P.2d at 915-16, 146 Cal. Rptr. at 198-99. The court stated:

> Although section 877 reflects a strong public policy in favor of settlement, this statutory policy does not in any way conflict with the recognition of a common law partial indemnity doctrine but rather can, and should, be preserved as an integral part of the partial indemnity doctrine that we adopt today. Thus, while we recognize that section 877, by its terms, releases a settling tortfeasor only from liability for contribution and not partial indemnity, we conclude that from a realistic perspective the legislative policy underlying the provision dictates that a tortfeasor who has entered into a "good faith" settlement... 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 603-04, 578 P.2d at 915, 146 Cal. Rptr. at 198.

109. *Id.* at 603, 578 P.2d at 915, 146 Cal. Rptr. at 198. It is important to note, however, that the court failed to mention the effect of settlement on a codefendant's claim for *total* indemnity.

110. *Sec. id.* at 604, 578 P.2d at 916, 146 Cal. Rptr. at 199.

buck & Co. v. International Harvester Co.: "First in the hierarchy is maximization of recovery to the injured party for the amount of his injury to the extent fault of others has contributed to it. . . . Second is encouragement of settlement of the injured party’s claim. . . . Third is the equitable apportionment of liability among the tortfeasors."112

Application of this hierarchy to the American Motorcycle opinion explains the supreme court’s decision to retain the common law rule of joint and several liability. Because it allows a plaintiff to recover the entire damages award from one defendant, joint and several liability is inconsistent with the goal of making each defendant liable in proportion to fault, yet this liability does serve the policy of assuring full compensation to the injured plaintiff. Under the hierarchy, this latter policy must prevail.113

112. 82 Cal. App. 3d at 496, 147 Cal. Rptr. at 264 (footnotes omitted); accord Teachers Ins. Co. v. Smith, 128 Cal. App. 3d 862, 865, 180 Cal. Rptr. 701, 703 (1982).

The Sears Roebuck court also mentioned a fourth policy consideration, “that of reduction of the transactional cost through simplification of the litigation process.” 82 Cal. App. 3d at 497, 147 Cal. Rptr. at 264.

113. As the American Motorcycle court explained:

[Aband]onment 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.

20 Cal. 3d at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189. For a criticism of this compromise see Comment, Comparative Fault and Settlement in Joint Tortfeasor Cases: A Plea for Principle over Policy, 16 SAN DIEGO L. REV. 833, 845-50 (1979) (arguing that principles underlying liability in proportion to fault are more important than the policies served by the rule of joint and several liability).

On June 3, 1986, Californians passed Proposition 51, the multiple defendants tort damage liability initiative statute (to be codified at CAL. CIV. CODE §§ 1431-1431.5). Proposition 51 abrogates the joint and several liability rule with respect to noneconomic damages, but leaves it intact with respect to economic damages. Economic damages are defined as “objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.” Noneconomic losses are defined as “subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.” Under Proposition 51, each defendant is liable only for that percentage of plaintiff’s noneconomic damages that corresponds to that defendant’s percentage of fault in creating plaintiff’s injury.

Proposition 51 addresses the problem of inequity to defendants who are minimally at fault. It does so, however, at the expense of the policy of full compensation to injured plaintiffs. This Comment argues that the “reasonable range” standard of good faith minimizes the inequities to defendants who are only slightly at fault while preserving the policy of full compensation to injured plaintiffs. See infra notes 173-205 and accompanying text.

Proposition 51 reduces the importance of a possible total indemnity exception to the foreclosure of contribution and indemnity claims provided for in CAL. CIV. PROC. CODE § 877.6 (West Supp. 1986) because, under Proposition 51, nonsettling defendants cannot be held liable for that portion of plaintiff’s noneconomic damages attributable to the fault of others. Although this will reduce inequities to nonsettling defendants in dollar terms, the fact that nonsettling defendants remain jointly
Similarly, the primacy of the policy favoring full recovery to injured plaintiffs explains the court's decision to reduce a plaintiff's judgment against nonsettling defendants only by the amount actually received from settling defendants. The alternative rule would have required that the plaintiff's judgment against nonsettling defendants be reduced by the proportion of fault of the settling defendant. This alternative would have furthered the goal of equitable allocation of liability, but the overriding policy of full recovery would have suffered.

Finally, the court's ruling that a good faith settlement bars all claims against the settling defendant for partial contribution or indemnity reflects a balance between the two policies of encouraging settlements and of distributing losses equitably among defendants. The alternative rule would have allowed nonsettling defendants to seek partial indemnity or contribution from settling defendants. This rule would have furthered the goal of allocating liability in proportion to fault at the expense of the overriding policy of encouraging settlements. Thus, in rejecting this alternative, the court implicitly favored encouragement of settlements over proportional allocation of liability among tortfeasors.

2. Aftermath of American Motorcycle: Civil Procedure Code Section 877.6

Although some commentators have criticized the court for its drastic revision of California's law of negligence, the California Legislature acquiesced in the changes wrought by Li and American Motorcycle. In 1980 it passed California Civil Procedure Code section 877.6(c), effectually and severally liable for all of plaintiff's economic damages assures continued litigation regarding the rights of vicariously liable nonsettling defendants as against settling defendants.

114. One California court did adopt this alternative. See Baget v. Shepard, 128 Cal. App. 3d 433, 180 Cal. Rptr. 396 (1982). However, the decision was officially depublished pursuant to CAL. CR. R. 976(d). Thus, the decision cannot be cited as authority and is presumably an aberration from the general rule stated above.

115. The related problem of insuring that a settling defendant's settlement in fact approximates his possible liability is the basis of the dispute involving the proper definition of "good faith." See infra notes 173-80 and accompanying text.

116. Several courts have noted the conflict between these two policies. See, e.g., Torres v. Union Pacific R.R., 157 Cal. App. 3d 499, 504, 203 Cal. Rptr. 825, 829 (1984); River Garden Farms v. Superior Court, 26 Cal. App. 3d 986, 997, 103 Cal. Rptr. 498, 506 (1972) ("A potential defendant's desire for settlement is blunted when he cannot close his file on the case. . . . The goals of equitable sharing and settlement finality compete with each other."); see also infra notes 164-71 and accompanying text.


118. See, e.g., Englard, Li v. Yellow Cab Co.—A Belated and Inglorious Centennial of the California Civil Code, 65 CALIF. L. REV. 4, 22-27 (1977) (historical basis of court's analysis is inaccurate); Fleming, supra note 91, at 273-82.
tively codifying the holding of *American Motorcycle*.\(^\text{119}\)

Section 877.6 provides for a noticed hearing to determine the good faith of a settlement.\(^\text{120}\) It authorizes an expedited hearing to permit the good faith issue to be heard before the commencement of the trial or, if settlement is made after trial has begun, before the verdict is rendered.\(^\text{121}\)

It also provides for expedited review when the court of appeal agrees to hear an aggrieved party’s petition.\(^\text{122}\)

**C. Total Equitable Indemnity Under Comparative Negligence**

Neither the *American Motorcycle* decision nor section 877.6 ever clarified what effect a good faith settlement should have on the traditional right to *total* indemnity. Instead, it was left to the lower courts to refine and develop the basic rule established by the California Supreme Court.

In the years following *American Motorcycle* and the passage of section 877.6, the few courts confronted with the issue uniformly rejected the suggestion that a right to total equitable indemnity survives a good faith settlement.\(^\text{123}\) The majority and dissenting opinions of *City of Sacramento v. Gemsch Investment Co.*\(^\text{124}\) address the various rationales applied by courts in deciding the question.

In *Gemsch*, the plaintiff suffered injury after slipping on a Sacramento sidewalk. She sued the adjoining landowner, both his tenant and subtenant, and the city of Sacramento. All defendants except the city

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\(^{119}\) CAL. CIV. PROC. CODE § 877.6 (West Supp. 1986). Unfortunately, § 877.6 parallels the language of *American Motorcycle*. Compare supra note 108 with text accompanying note 4. Consequently, it neither defines “good faith” nor states explicitly whether a right to total indemnity survives the right to partial indemnity.

Section 877.6 was intended to address the question of the timing of good faith settlement hearings. See CAL. CIV. PROC. CODE § 877.6 (West Supp. 1986). Passage of section 877.6 was apparently prompted by Fisher v. Superior Court, 103 Cal. App. 3d 434, 163 Cal. Rptr. 47 (1980), a case involving the question of the timing of a good faith hearing. See Cal. Assembly Comm. On Judiciary, Bill Digest A.B. 3425 (hearing date April 30, 1980); see also Cal. Senate Comm. On Judiciary, Report On A.B. 3425 (analysis of A.B. 3425 as amended May 7, 1980) (on file with author).

In Fisher, petitioners were defendants who had settled with the plaintiff and moved for a hearing to determine the good faith of their settlement. The trial court denied the motion, and petitioners appealed. The court of appeal reversed, holding that the issue of good faith should be tried separately and in advance of the trial of the tort issues. Fisher, 103 Cal. App. 3d at 442-43, 163 Cal. Rptr. at 52-53.

\(^{120}\) CAL. CIV. PROC. CODE § 877.6(a) (West Supp. 1986).

\(^{121}\) Id.

\(^{122}\) Id. § 877.6(e).


settled and, after receiving releases, were dismissed from the suit. On a cross-complaint filed by the city, the court granted summary judgment for the settling defendants. The city appealed the grant of summary judgment.\textsuperscript{125}

The city of Sacramento contended that American Motorcycle did not repudiate the right to total equitable indemnity. Thus, the city argued, its cross-complaint should be permitted on the theory of “total indemnity,” not equitable indemnity in its post-American Motorcycle form of comparative partial indemnity.\textsuperscript{126} The court, however, rejected this argument. It stated that “[w]hile it is true that [American Motorcycle] did not expressly repudiate the concept of equitable indemnity where the alleged indemnitor's negligence versus the indemnitee's fault was passive/active, negative/positive, or secondary/primary, nevertheless the court left little doubt where it stood.”\textsuperscript{127}

The court rested its decision on three grounds. First, a decision upholding a continued right of total indemnity would discourage settlements because the settling defendant would be faced with further litigation to determine whether or not he might remain liable to nonsettling codefendants for total indemnity.\textsuperscript{128} Second, the court stated that there was no evident equity in allowing the city full indemnity; the city had a separate but concurrent duty to trim or remove trees and otherwise prevent dangerous conditions of which it had notice.\textsuperscript{129} Finally, the court characterized the language of section 877 as broad and argued that, equitably interpreted, the statute should include alleged tortfeasors whose negligence is passive/negative/secondary.\textsuperscript{130}

Judge Paras dissented vigorously on two grounds. He argued, first, that if the California Supreme Court had intended to abrogate the equitable indemnity doctrine, it would have done so expressly. “Instead,” he noted, “the opposite was voiced.”\textsuperscript{131} Judge Paras further disagreed with the majority’s conclusion that the equities of the case militated in favor of denying total equitable indemnity. He argued that the same equitable considerations which originally brought the total indemnity principle into being compel its continuation as a doctrine sepa-

\begin{itemize}
\item \textsuperscript{125} \textit{Id.} at 871-73, 171 Cal. Rptr. at 765-66.
\item \textsuperscript{126} \textit{Id.} at 873, 171 Cal. Rptr. at 766.
\item \textsuperscript{127} \textit{Id.} at 875-76, 171 Cal. Rptr. at 768 (footnote omitted).
\item \textsuperscript{128} \textit{Id.} at 876-77, 171 Cal. Rptr. at 768.
\item \textsuperscript{129} \textit{Id.} at 877, 171 Cal. Rptr. at 769.
\item \textsuperscript{130} \textit{Id.} at 878, 171 Cal. Rptr. at 769 (Paras, J., dissenting).
\item \textsuperscript{131} \textit{Id.} at 878, 171 Cal. Rptr. at 769 (Paras, J., dissenting). The only support offered for this assertion was a quote from the American Motorcycle opinion: “we conclude that the current equitable indemnity rule should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis.” \textit{Gemsch} at 879, 171 Cal. Rptr. at 769 (quoting American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 598, 578 P.2d 899, 912, 146 Cal. Rptr. 182, 195 (1978)) (emphasis added in Gemsch decision).
\end{itemize}
rate and distinct from that of comparative indemnity. Where one who has committed no affirmative wrongful act is caused to incur liability by the act of another, justice demands total indemnity. The most simple and obvious example of course is that of a landowner whom the law holds liable for a dangerous condition on his property created by someone else. Why should equity not forthrightly continue to assess the full loss upon the latter? I do not read *American Motorcycle* as declaring otherwise; nor do I read its partial indemnity doctrine, with its ramifications, as achieving the same result.¹³²

Although holding that no indemnity was available to the city from the codefendants who had settled, the majority stopped short of asserting that traditional total indemnity had been absorbed into the new comparative indemnity. Instead, the court stated that the older indemnity *should* be absorbed into the newer rule.¹³³ Despite the cautious language, however, subsequent cases cited *Gemsch* for the proposition that pure comparative fault had subsumed the equitable indemnity concepts of primary versus secondary negligence and passive versus active negligence.¹³⁴

With this broad reading of *Gemsch*, it appeared for a time that traditional total indemnity *had* been subsumed into the newer comparative indemnity, whether by legislative act or by judicial interpretation. However, two recent court of appeal decisions, *Huizar v. Abex Corp.*¹³⁵ and *Angelus Associates Corp. v. Neonex Leisure Products*,¹³⁶ have reopened the question by recognizing a right to total equitable indemnity. Both cases allowed a defendant to assert the claim against codefendants who had already settled with the plaintiff.

In *Huizar*, the court reaffirmed the active/passive distinction as the basis of a claim for total equitable indemnity in the products liability context. Plaintiff Huizar, who had been injured as a result of a defective punch press, sued the manufacturer and the distributor of the punch press. Each defendant settled with Huizar and cross-complained against the other for indemnity. Whereas the manufacturer requested only partial indemnity, the distributor requested *total* equitable indemnity on grounds of warranty and the common law doctrine of active/passive neg-

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¹³³ The court stated: "*[American Motorcycle]* may not have completely abolished implied equitable indemnity in its traditional sense ... but it severely modified one application of it, namely, the passive/active, primary/secondary approach. The instant case shows why it should be absorbed into the new comparative indemnity of [American Motorcycle]." Id. at 877, 171 Cal. Rptr. at 768 (emphasis added).


ligence. At the 877.6 hearing, the judge determined that both settlements had been made in good faith and dismissed both cross-complaints. The manufacturer and distributor appealed.\textsuperscript{137}

The court of appeal first reaffirmed the trial court's determination that both settlements had been made in good faith; thus neither settlement was set aside.\textsuperscript{138} The court next held that the trial court had properly dismissed the manufacturer's cross-complaint for partial indemnity. However, the court reversed the dismissal of the total indemnity claim, concluding that the distributor was entitled to a hearing before his cross-complaint against the manufacturer for total equitable indemnity could be dismissed.\textsuperscript{139}

In reaching a decision, the \textit{Huizar} court did not refer to any of the cases which had discussed the right to total indemnity after \textit{American Motorcycle}. Instead, noting that California Civil Procedure Code section 877.6 presupposes a situation involving a claim “for equitable comparative contribution or partial or comparative indemnity based on comparative negligence or comparative fault,” the court concluded that if the legislature had intended good faith settlements to bar claims for total equitable indemnity, it would have incorporated the appropriate language.\textsuperscript{140} Thus, the court stated that “absent statutory authority to the contrary, justice demands total indemnity where the liability of a completely blameless party is premised solely upon the tortious act or omission of another. . . . [T]he doctrine of equitable or total indemnity continues to exist separate and distinct from that of comparative indemnity.”\textsuperscript{141}

One year later, \textit{Angelus Associates Corp. v. Neonex Leisure Products}\textsuperscript{142} followed \textit{Huizar} in reaffirming the vitality of the total indemnity doctrine, once again in the products liability context. Plaintiffs in the original action had been injured by an explosion in a motor home. They sued the manufacturers of several component parts, the manufacturer of the motor home itself, and the retailer who had sold them the motor home. The manufacturer of the motor home settled with the plaintiffs. The court found his settlement to have been made in good faith and dismissed all cross-complaints of codefendants. The retailer appealed the dismissal of its cross-complaint for total equitable indemnity.\textsuperscript{143}

The court of appeal reversed the trial court's dismissal of a cross-complaint for total indemnity. Unlike \textit{Huizar}, the court in \textit{Angelus con-}

\textsuperscript{137} \textit{Huizar}, 156 Cal. App. 3d at 537-38, 203 Cal. Rptr. at 48-49.
\textsuperscript{138} \textit{Id.} at 539, 203 Cal. Rptr. at 49.
\textsuperscript{139} \textit{Id.} at 540, 203 Cal. Rptr. at 49-50.
\textsuperscript{140} \textit{Id.} at 541, 203 Cal. Rptr. at 51.
\textsuperscript{141} \textit{Id.} at 542, 203 Cal. Rptr. at 51.
\textsuperscript{142} 167 Cal. App. 3d 532, 213 Cal. Rptr. 403 (1985).
\textsuperscript{143} \textit{Id.} at 534-35, 213 Cal. Rptr. at 404.
sidered and rejected California case law holding that the right to total equitable indemnity had been subsumed by the more recently created right to comparative indemnity.144

Clearly, the California courts of appeal are currently divided on the question of whether the right to total indemnity survives a codefendant's good faith settlement. While some courts have held that a good faith settlement bars cross-complaints for all forms of indemnity,145 others have concluded that a codefendant's right to total indemnity survives another defendant's good faith settlement.146 These latter courts are apparently striving to achieve equity on the individual facts, even at the expense of discouraging settlements generally. At the broadest level, the conflict that these latter courts are attempting to resolve is not a conflict of legal doctrines, but a conflict of competing policies.

II
INTERPRETIVE, EQUITY, AND POLICY ARGUMENTS

Parts A and B of this section will describe and criticize the arguments in favor of retaining a right of total indemnity that survives a good faith settlement. Part C will propose an understanding of the issue which emphasizes its link to the policies of equitable loss allocation and the promotion of settlements.

A. Arguments Based on Interpretation and Construction

Three arguments based on interpretation and construction can be made in favor of retaining a right to total equitable indemnity. All three, however, are inconclusive.

The first and perhaps most persuasive argument finds support in the

144. Id. at 536-41, 213 Cal. Rptr. at 405-08. The court reviewed the Huizar decision and Judge Paras's dissent in Gemsch (see supra text accompanying notes 131-32) and contrasted them with a number of other opinions, including Torres v. Union Pacific R.R., 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984); Kohn v. Superior Court, 142 Cal. App. 3d 323, 191 Cal. Rptr. 78 (1983); Lopez v. Blecher, 143 Cal. App. 3d 736, 192 Cal. Rptr. 190 (1983); and Turcon Constr., Inc. v. Norton-Villiers, Ltd., 139 Cal. App. 3d 280, 188 Cal. Rptr. 580 (1983). See Angelus, 167 Cal. App. 3d at 538-41, 213 Cal. Rptr. at 406-08. In determining that a right to total indemnity survives a good faith settlement, the court followed the first two cases and rejected the latter three. See id. at 541-42, 213 Cal. Rptr. at 409.


language of American Motorcycle. Instead of abrogating the all-or-nothing doctrine of indemnity, the court stated only that “the current equitable indemnity rule should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors.”147 Similarly, in considering the effect of settlement upon claims for contribution and indemnity, the court failed to define squarely the role of the older doctrine of all-or-nothing indemnity. Instead, the court wrote “legislative policy . . . dictates that a tortfeasor who has entered into a ‘good faith’ settlement with the plaintiff must also be discharged from any claim for partial or comparative indemnity that may be pressed by a concurrent tortfeasor.”148 Thus, whether the result of a conscious decision to avoid the question or a simple failure to recognize the issue, the court in American Motorcycle never explicitly abrogated the old all-or-nothing doctrine of equitable indemnity. Because the language of California Civil Procedure Code section 877.6 tracks the phraseology of American Motorcycle, it too does not expressly abrogate the doctrine.

The omission of any reference to total equitable indemnity in American Motorcycle and section 877.6 permits an argument that the doctrine remains viable in California despite the adoption of comparative negligence. The general rule of statutory interpretation requires that the intent of the legislature be ascertained and given effect.149 Because no mention was made of total indemnity, neither the court nor the legislature necessarily intended to abrogate the doctrine; if either had such an intent, it would have been made clear.

This argument by omission is inconclusive, however. Indeed, the same facts can be used to support the opposite conclusion. For example, opponents can contend that the question was intentionally left open.150 Alternatively, they can argue that the types of indemnity listed in section 877.6 were intended to include all forms of indemnity, including total equitable indemnity; the omission was merely an oversight by the legisla-

148. Id. at 604, 578 P.2d at 915, 146 Cal. Rptr. at 198.
149. CAL. CIV. PROC. CODE § 1859 (West 1983); see, e.g., People v. Aston, 39 Cal. 3d 481, 489, 703 P.2d 111, 114, 216 Cal. Rptr. 771, 774 (1985) (the fundamental rule of statutory interpretation is to ascertain the intent of the legislature so as to effectuate the purpose of the law); White v. County of Sacramento, 31 Cal. 3d 676, 681, 646 P.2d 191, 194, 183 Cal. Rptr. 520, 523 (1982) (where statute is capable of more than one construction, court must choose that which most comports with the intent of the legislature).
150. Arguments can be made both for and against a right of total indemnity which survives good-faith settlements. Thus, the court may well have recognized the question of the future status of total indemnity, but declined to rule on the issue until required to do so by the posture of a case before it. This reticence would be consistent with the scope of the Li decision, in which the court recognized the need for further reforms of the rules that structure multiparty litigation, but declined to establish new law not required by the facts of the case before it. See supra notes 91-93 and accompanying text.
ture, which adopted the language of American Motorcycle in the mistaken belief that the court's language encompassed all types of indemnity. While plausible, this argument, based on the ignorance of the legislature, is as weak as the argument by omission.

A second argument in favor of retaining the right to total indemnity emerges from a close analysis of the statutes contained in the same title as section 877.6. Title 11 of the California Code of Civil Procedure includes sections 875 through 880. Section 875(f) states: "This title shall not impair any right of indemnity under existing law." Since section 875(f) necessarily qualifies section 877.6, the expressed intention not to impair the right to indemnity under existing law provides support for the argument that section 877.6 does not abrogate the right to total equitable indemnity.

This argument is also inconclusive. Section 875(f) was designed to ensure that the newly created right to contribution would exist in addition to, not instead of, indemnity. Thus, when passed, section 875(f) was part of an attempt to mitigate the harsh effects of the common law rule which denied loss allocation among codefendants. It would be anomalous to construe the statute today so as to block the courts' attempt to complete the process of fashioning a more flexible and equitable system of loss allocation.

Finally, a third type of argument would rely on canons of statutory construction. Generally, unless a statute clearly and expressly changes

151. CAL. CIV. PROC. CODE §§ 875-880 (West 1980).
152. Id. § 875(f).
153. The court employed this reasoning in Winchester v. Barkheimer, 157 Cal. App. 3d 854, 204 Cal. Rptr. 71 (1984). The court agreed with the Huizar and Angelus courts that a continued right to total indemnity exists despite the adoption of comparative negligence and the passage of § 877.6. See 204 Cal. Rptr. at 73. However, the opinion was officially depublished pursuant to CAL. CT. R. 977(d). See CAL. CT. R. 977(d). The case therefore has no precedential value. CAL. CT. R. 977(d).
155. Canons of statutory interpretation are employed by the court to aid in ascertaining legislative intent or, where intent remains uncertain, in interpreting the statute. 58 CAL. JUR. 3D Statutes §§ 83, 100, 160 (1980).
the common law rule, the common law rule is presumed to remain effective; courts assume that the legislature is aware of existing laws and enacts statutes in light of them. Thus, "[i]he failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended." Applying this principle of statutory construction, proponents of total indemnity might argue that section 877.6 amended the common law to recognize partial indemnity, but did not change the law of total equitable indemnity. Under this reasoning, the fact that the legislature did not directly confront the issue of total indemnity when it enacted section 877.6 is irrelevant. The strong presumption in favor of the status quo would require the conclusion that Civil Procedure Code section 877.6 did not abrogate the common law doctrine of total indemnity as it existed before American Motorcycle.

This argument, however, is inapposite. Section 4 of the California Code of Civil Procedure states that the general rule requiring a narrow construction of statutes which derogate from the common law does not apply to the provisions of the Code of Civil Procedure. This statutory command overrides the presumption favoring retention of common law rules.

Yet section 4 does not necessarily require the rejection of total indemnity, because section 4 also affirmatively mandates that courts construe sections of the code liberally in order to "effect its objects" and "promote justice." Thus, the relevance of section 877.6's omitted reference to total indemnity requires examination of legislative goals and policies.

B. Arguments Based on Equity

A second category of arguments in favor of total indemnity emphasizes the equitable allocation of loss that will result. The equity of total

159. The Civil Procedure Code provides:
   The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice.
   CAL. CIV. PROC. CODE § 4 (West 1982).
160. Id.
indemnity is particularly apparent in cases like Huizar and Angelus. Both cases involved a retailer who was potentially liable to the plaintiff for products liability after the manufacturer had settled. A widely shared sense of justice would probably demand total indemnity in this type of situation.

The weakness of this equity argument is that the argument ignores the court's role in formulating rules of law that will apply to other cases with varying fact patterns. The appeal made in the individual case must be tempered by some understanding of the policy implications of the rule established.

Examination of policy implications is particularly important in the present context. If courts recognize a right to total indemnity that survives good faith settlements, many defendants will have less incentive to settle. After all, why should a defendant agree to settle with the plaintiff if she may subsequently be forced to indemnify a codefendant for the amount of the plaintiff's judgment? Uncritical acceptance of the equitable loss allocation argument would necessarily involve reducing the incentive to settle. Yet this result would invert the hierarchy of policies articulated by the court in Sears Roebuck. In short, the argument for equitable loss allocation must be assessed in terms of its effect upon California's policy of promoting settlements.

C. Loss Allocation & Settlements: Balancing Conflicting Policies

The court in Sears Roebuck identified three policies served by the law of civil liability, settlement, and release, as established in the American Motorcycle decision. Most important is the policy of assuring full recovery to the plaintiff; next is the policy of promoting settlement; and last is the policy of equitable allocation of loss among the tortfeasors. The question of preserving a right to total equitable indemnity does not implicate the overriding policy of assuring full recovery to the injured plaintiff, because all defendants remain jointly and severally liable to the plaintiff for the full amount of damages. The second and third poli-


162. See supra notes 108-10 and accompanying text.


164. Sears Roebuck, 82 Cal. App. 3d at 496, 147 Cal. Rptr. at 264; see supra text accompanying note 112.

165. Sears Roebuck, 82 Cal. App. 3d at 496, 147 Cal. Rptr. at 264; see supra text accompanying notes 112-15. But see supra note 113 (discussing effect of recently enacted Proposition 51).

166. An indemnity action never arises until the injured plaintiff has already been paid. The indemnity action merely determines which defendant pays how much of the plaintiff's judgment. See supra text accompanying note 113.
cies, however, are implicated. The policy of encouraging settlements is furthered by guaranteeing defendants that their settlement will bar future claims for indemnity. On the other hand, equitable allocation of loss among defendants requires that an inequitable settlement not bar further allocation of loss in proportion to fault. Thus, the policies of encouraging settlement and equitably allocating loss directly conflict.\footnote{As the court noted in Torres v. Union Pacific R.R., 157 Cal. App. 3d 499, 504-05, 203 Cal. Rptr. 825, 829 (1984), “the policy of promoting settlements and the policy of fairness conflict.... Thus, the first goal, that of promoting settlements, is hindered by any post settlement process designed to ensure the fairness of the settlement.”}

Generally, the conflict between these two policies is subdued. Any judgment paid by nonsettling defendants to the plaintiff is reduced by the amount of any earlier settlement between the plaintiff and settling defendants.\footnote{This is the rule established by the court in American Motorcycle Ass’n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978). The court there stated: \textit{[T]o preserve the incentive to settle which section 877 provides to injured plaintiffs, we conclude that a 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.} \textit{Id.} at 604, 578 P.2d at 916, 146 Cal. Rptr. at 199 (footnote omitted).} If the settling defendant pays in settlement a sum which approximates her potential liability, the amount paid by a nonsettling defendant must also correspond to his proportion of total fault.\footnote{The amount paid would be the total amount of plaintiff’s damages, reduced by an amount proportionate to plaintiff’s own fault and by the amount of any settlements reached with other defendants.} Of course, the nonsettling defendant who remains liable to the plaintiff might very well be at fault, at least to some degree. Thus it is often fair to make him pay the plaintiff’s judgment—reduced, of course, by the amount of any earlier settlement.

In both \textit{Huizar} and \textit{Angelus}, however, the conflict between the policies of encouraging settlement and equitably allocating loss was particu-
larly acute because the American Motorcycle rules left nonsettling defendants liable even though their liability attached only "by operation of a rule of positive or statutory law." In both cases, a retailer remained liable to the plaintiff for product defects after the manufacturer, who was responsible for the defects, had settled with the plaintiff. In terms of policy, then, the issue raised by Angelus and Huizar is whether, contrary to the hierarchy established in Sears Roebuck, the policy of equitable allocation of liability should take precedence over the policy of promoting settlements when a nonsettling defendant incurs liability without negligence.

Framing the question in terms of a policy conflict has several advantages. First, the all-or-nothing doctrine of total equitable indemnity was never adequately defined or clearly understood. Labels like primary/secondary liability or active/passive negligence have not produced, and cannot produce a coherent legal doctrine. During litigation, citation to the variety of poorly understood tests and labels will only serve to obscure the issues of the individual case. Moreover, these labels cannot further an understanding of policies involved in the tort setting.

Second, framing a contemporary legal question in terms of a judicial doctrine that developed under a rigid set of procedural rules, now rejected, does nothing to further understanding of the policies involved. Total equitable indemnity developed under the common law system which prohibited contribution among tortfeasors. Now, however, California routinely allows such loss allocation. Thus, the problem which originally led to the development of the doctrine of total equitable indemnity has now been more effectively addressed by California's flexible allocation of liability in proportion to fault. If the traditional total equitable indemnity doctrine is to be retained, it must first be shown that it serves some purpose or policy consistent with present California law.

Finally, because it implicates important policies, the ultimate decision of whether to grant total indemnity to a certain class of defendants,

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170. This phrase harks back to the tests used in administering the doctrine of total equitable indemnity. See supra text accompanying notes 55-60. It is used here merely to point out that, had these two cases arisen after Ho Sing but before Li and American Motorcycle, they could very possibly have fit within the requirements of the tests applied under the doctrine of total equitable indemnity.

171. Angelus Assocs. Corp. v. Neonex Leisure Prods., 167 Cal. App. 3d 532, 542, 213 Cal. Rptr. 403, 409 (1985); Huizar v. Abex Corp., 156 Cal. App. 3d 534, 540, 203 Cal. Rptr. 47, 49-50 (1984). See supra notes 135-44 and accompanying text. The products liability context provides perhaps the severest test for any resolution of the problem created by the present wording of § 877.6. If the retailer cannot sue for total indemnity from the manufacturer who has settled, and the plaintiff recovers a judgment greater than the amount of his settlement, then the retailer, whose liability accrues without fault, must pay the difference—no matter how large. For a fuller exposition of problems arising in the products liability context, see infra text accompanying notes 184-90; see also Note, supra note 41 (discussing the interface of comparative negligence, loss allocation, and strict liability as the law existed after Li but before American Motorcycle).

172. See supra notes 55-79 and accompanying text.
even as against settling codefendants, should not depend upon an omission in the wording of section 877.6. Reliance on legislative omissions is especially inappropriate since the reasons for omitting any mention of total indemnity in section 877.6 cannot be ascertained by a review of legislative history.

Retaining a right to total indemnity might further the policy in favor of equitably allocating loss in certain cases. But the reduced certainty surrounding the finality of settlements would necessarily undercut the policy of promoting settlements. By recognizing the source of the problem as the inherent conflict between these two policies, courts can free themselves to seek other, more suitable, means of minimizing the conflict.

III

THE "REASONABLE RANGE" STANDARD OF GOOD FAITH:
A MEANS OF MINIMIZING INEQUITY TO
NONSETTLING DEFENDANTS WHILE
PRESERVING THE INCENTIVE TO SETTLE

In Torres v. Union Pacific Railroad, a California court of appeal recognized that a redefined standard of good faith could minimize this policy conflict. It noted that the conflict between the policies of fairness and promoting settlements is most acute when a defendant's settlement is unreasonably low. Because the amount of a codefendant's settlement reduces the judgment paid by a nonsettling defendant, an unreasonably low settlement results directly in an increase of the nonsettling defendant's liability. The court concluded that the resulting inequity could best be avoided not by application of the traditional doctrine of total indemnity, but rather by incorporation into the definition of "good faith" a requirement that the settlement reached roughly approximate the total liability the settling defendant would pay if he remained in the suit.


Until 1984, California courts of appeal employed two inconsistent standards for judging the good faith of settlements. Recently, how-

174. The court observed: "[T]he Legislature did indeed strike a balance between the policy of fairness and the policy in favor of promoting settlements; the fulcrum of this balance is the requirement of good faith." Torres, 157 Cal. App. 3d at 506, 203 Cal. Rptr. at 830.
175. Id. at 506-07, 203 Cal. Rptr. at 830-31. For a discussion of the problems of valuation inherent in such an approach, see infra note 179 and accompanying text.
176. See Roberts, supra note 6, at 853-81.
ever, the California Supreme Court turned its attention to the problem created by the different standards of review used in different courts of appeal. In *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*, the court adopted a "reasonable range" test, which directs trial courts, in determining the good faith of a proposed settlement, to consider the amount offered in settlement, the total value of plaintiff's injuries, and the settling defendant's share of fault.

The reasonable-range test can never be precise because of the problems of valuation. Estimation of the likely size of a jury verdict and of the proportion of a single defendant's fault must necessarily be inexact. Furthermore, amounts paid to plaintiffs by settling defendants are typically lower than liability imposed after judgment. The discrepancy between estimated liability and the settlement amount may be seen as a discount corresponding to the reduced legal expenses of the settling parties, the uncertainty of the jury verdict, and the time value of money given that settlements are often reached years before a jury verdict could


178. The court stated:

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.

Id. at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263. By adopting the reasonable-range standard, the court in effect approved the line of cases that includes Owen v. United States, 713 F.2d 1461 (9th Cir. 1983); Commercial Union Ins. Co. v. Ford Motor Co., 640 F.2d 210 (9th Cir. 1981); and River Garden Farms v. Superior Court, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972) (interpreting "good faith" as requiring the settling defendant to pay an amount proportionate to potential liability), and rejected the line that includes Wysong & Miles Co. v. Western Indus. Movers, 143 Cal. App. 3d 278, 191 Cal. Rptr. 671 (1983); Cardio Systems, Inc. v. Superior Court, 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981); and Dompeling v. Superior Court, 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981).

179. See Torres, 157 Cal. App. 3d at 508-09, 203 Cal. Rptr. at 832. The California Supreme Court minimized these problems in *Tech-Bilt*, where it stated:

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.

38 Cal. 3d at 500, 698 P.2d at 167, 213 Cal. Rptr. at 264 (quoting River Garden Farms v. Superior Court, 26 Cal. App. 3d 986, 998, 103 Cal. Rptr. 498, 506-07 (1972)).

be obtained and executed.\textsuperscript{180} Yet, disregarding the problems of valuation, courts can largely assure equitable results for nonsettling defendants by making the amount of a codefendant's settlement a criterion of good faith.

The reasonable-range standard of good faith adopted by the court in \textit{Tech-Bilt} promotes equitable loss allocation. Only "good faith" settlements bar claims from codefendants for indemnity or contribution.\textsuperscript{181} Therefore, a settlement for an amount disproportionately low in comparison to the potential liability of the settling defendant will not be in "good faith." If the settlement was not made in good faith, it will not bar claims from nonsettling defendants who are still liable to the plaintiff. Because the liability of a nonsettling defendant is increased by the extent to which the settling defendant's settlement was disproportionately small, this continued ability to sue for indemnity is consonant with the goal of equitable loss sharing.

More significantly, the reasonable-range standard promotes equitable loss allocation without significantly reducing a defendant's incentive to settle.\textsuperscript{182} Because the settlement size is an element of good faith, the motivation to settle will coexist with a desire to settle for an amount roughly equal to potential liability. Defendants will want to settle for roughly the amount of their expected liability so they can "close the books" on the case. Incentive to settle will come from the benefits of avoiding litigation and saving litigation expenses.\textsuperscript{183}

\textsuperscript{180} The supreme court addressed these realities in its list of additional factors which courts may consider in determining the good faith of a settlement. The court noted:

\textit{[T]he 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. Finally, practical considerations obviously require that the evaluation be made on the basis of information available at the time of settlement.}

\textit{Tech-Bilt}, 38 Cal. 3d at 499, 698 P.2d at 166-67, 213 Cal. Rptr. at 263 (footnote omitted).

\textsuperscript{181} See \textit{CAL. CIV. PROC. CODE} § 877 (West 1980).

\textsuperscript{182} The court in \textit{Tech-Bilt} stated:

\textit{We doubt that such an approach will be detrimental to the settlement process . . . . 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.}

38 Cal. 3d at 500, 698 P.2d at 167, 213 Cal. Rptr. at 264.

\textsuperscript{183} The court in \textit{Tech-Bilt} stated that "a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial" is one factor to consider in determining the good faith of a settlement. \textit{Id.} at 499, 698 P.2d at 166-67, 213 Cal. Rptr. at 263. It is unclear whether this recognition is necessary because of the other factors it listed, see supra note 180, or whether the court contemplated allowing an additional discount solely for the purpose of maintaining the incentive to settle. If the latter, defendants will have even more incentive to settle.
B. The "Reasonable Range" Standard Applied: Two Difficult Contexts

The operation and benefits of the reasonable-range standard of good faith are easy to imagine for the classic tort case involving more than one defendant, each actively negligent and liable to the plaintiff. However, there are two settings in which the operation of the reasonable-range standard is more difficult to imagine and in which the benefits of the reasonable-range standard are less immediately evident. The first is when a vicariously liable defendant is the only defendant left in the suit, the other defendants having settled. The second involves the unique case in which a defendant cannot be held liable to the plaintiff because the statute of limitations has run, but may nonetheless be found liable to other defendants in indemnity. The following two sections will describe the way the reasonable-range standard could apply in these two contexts and demonstrate that the reasonable-range standard would preserve the hierarchy of policies articulated in *Sears Roebuck* even in these most difficult cases.

1. Vicariously and Strictly Liable Defendants

It might be objected that the redefinition of good faith will not prevent the inequities which occur in cases like *Huizar* or *Angelus*, where a nonsettling defendant's liability accrues without fault. This objection in fact consists of two arguments. The first argument asserts that, because the vicariously liable defendant is liable without fault, it is impossible to allocate loss in proportion to fault. The response to this argument has been supplied by courts that have applied comparative negligence in the products liability setting. *Safeway Stores, Inc. v. Nest-Kart* \(^{184}\) posed the question of how a jury could compare the fault of two defendants when the law imposed strict liability on one defendant. Although recognizing the seeming anomaly, the supreme court characterized the problem as largely semantic. It left juries the task of apportioning fault between manufacturers and distributors of defective products in products liability cases.\(^{185}\)

The *Safeway* court's assertion was undoubtedly correct. The objection that it is impossible to allocate liability by fault in a strict liability context is premised on a faulty semantic distinction. As the California

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\(^{184}\) *21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978)*. The court in *Safeway* followed *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978), in which the court decided that principles of comparative fault should be applied in actions founded on strict liability in order to determine the liability of a defendant (manufacturer of a defective product) to a plaintiff whose own negligence contributed to his injuries.

\(^{185}\) *Safeway*, 21 Cal. 3d at 331-32, 579 P.2d at 445-46, 146 Cal. Rptr. at 554-55. Although one may wonder how, juries do routinely apportion fault in these cases.
Supreme Court stated: "the term 'equitable apportionment or allocation of loss' may be more descriptive than 'comparative fault.'" By substituting the word "loss" for the word "fault," the court illustrated the largely semantic nature of the objection.

Additionally, the objection fails to acknowledge that juries regularly apportion liability between actively negligent and vicariously liable defendants. The word "loss" more accurately reflects the considerations which motivate juries and judges when apportioning this liability. Our tort system accepts the results, even though the apportionment is made on the basis of unarticulated criteria. Thus, insofar as courts routinely do allocate damages in such cases, they should also be able to determine the potential liability of a settling defendant for the purposes of certifying the good faith of his settlement.

The second argument underlying the objection that the reasonable-range standard is unworkable in vicarious or strict liability cases is a restatement of the equity argument. Proponents of this argument might concede that the policy of promoting settlements generally takes priority, but they argue for an exception in a limited class of cases. Under this argument, the inequity to the nonsettling, vicariously liable defendant is so great, and the reduction in incentive to settle so small, that the normal hierarchy of policies should be reversed. Thus, proponents would argue, a limited exception that allows vicariously liable defendants to assert their claims for total indemnity even against settling defendants is justified.

This equity argument has some merit in a jurisdiction that has not adopted the reasonable-range standard for determining the good faith of settlements. Without the reasonable-range standard a disproportionately low settlement could be found to have been made in good faith. If the settlement were then to bar all cross-complaints, the nonsettling, vicariously liable defendants would be exposed to an inequitably large share of the liability.

With the reasonable-range standard, however, the equity argument is unpersuasive. The standard reduces the exposure of vicariously liable defendants to insure equity. Because the proportion of liability of a vicariously liable defendant is by hypothesis very small, a codefendant’s settlement will be found to have been made in good faith only if the codefendant pays the lion’s share of the potential liability. Thus, although a nonsettling, vicariously liable defendant may remain liable to the plain-

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187. In much the same way, juries used to distinguish between active and passive negligence, even as courts asked to review their decisions wrestled with the proper meaning of the distinction. See supra text accompanying notes 68-70.
tiff, the amount of damages he will actually have to pay will generally be small.\textsuperscript{188} Furthermore, many plaintiffs, having received compensation for most of their injuries, and recognizing that the vicariously liable defendant may elicit sympathy from a jury, may decide not to pursue their action after settling with the actively negligent tortfeasors.

Among the factors that the court in \textit{Tech-Bilt} listed as relevant to the determination of the good faith of a settlement are "the financial conditions and insurance policy limits of settling defendants."\textsuperscript{189} The inclusion of these factors implies that a settlement for an amount disproportionately low with respect to the settling defendant's reasonable range of potential liability might be found in good faith if the settling defendant does not have the resources to pay more. In this situation, a nonsettling, vicariously liable defendant might argue that, even with the reasonable-range standard, he is left exposed to an inequitably large percentage of plaintiff's total damages.

This result, however, is not inequitable. Rather, it results from the primacy of the policy in favor of assuring full recovery to the plaintiff. If the nonsettling, vicariously liable defendant does not pay the unreimbursed damages of the plaintiff, who will? And if the settling defendant has paid all he can, what is the equity in forcing him to indemnify the vicariously liable defendant for the amount of any judgment to the plaintiff? If the objection reduces to the assertion that vicariously liable defendants should never have to pay any of the liability, then the argument supports more than a continued right to total indemnity. It challenges such widely accepted legal doctrines as respondeat superior and products liability.\textsuperscript{190}

Vicariously liable defendants have urged courts to continue to recognize a right to total indemnity. Their argument has been strongest when disproportionately small settlements of actively negligent codefendants have left vicariously negligent defendants exposed to an inordinately large percentage of the plaintiff's total damages. But this result will

\textsuperscript{188} The payment will be small because the amount that the nonsettling defendant will actually have to pay the plaintiff equals the total judgment minus the amount received by the plaintiff in settlements. See \textit{supra} notes 168-69 and accompanying text.

\textsuperscript{189} \textit{Tech-Bilt}, Inc. v. \textit{Woodward-Clyde & Assocs.}, 38 Cal. 3d 488, 499, 698 P.2d 159, 166-67, 213 Cal. Rptr. 256, 263 (1985); see \textit{supra} note 180.

\textsuperscript{190} Some vicariously liable defendants have gone so far as to suggest that they should be dismissed from suits as soon as the actively negligent defendants settle with the plaintiffs. California courts, however, have consistently rejected this argument, both before and after \textit{American Motorcycle}. See, e.g., \textit{Mesler v. Bragg Management Co.}, 39 Cal. 3d 290, 299-306, 702 P.2d 601, 605-10, 216 Cal. Rptr. 443, 447-52 (1985) (plaintiff's settlement with corporation does not bar his suit against alter ego of settling corporation); \textit{Mayhugh v. County of Orange}, 141 Cal. App. 3d 763, 765-67, 190 Cal. Rptr. 537, 538-39 (1983) (settlement with municipal employee does not release municipality); \textit{Ritter v. Technicolor Corp.}, 27 Cal. App. 3d 152, 154-55, 103 Cal. Rptr. 686, 687-88 (1972) (settlement with agent does not release vicariously liable principal).
largely be precluded by the reasonable-range standard. In the few cases where a low settlement will be found in good faith because the settling defendant cannot pay more, the policies in favor of fully compensating the plaintiff and promoting finality of settlements will outweigh whatever equity may be furthered in allowing the vicariously liable defendant to pursue a right of total indemnity against the settling defendant. Thus, under the reasonable-range standard, an exception to the general rule that a settlement bars all cross-complaints is unjustified. Although the vicariously liable defendant may have to pay some small part of the plaintiff's damages, the system as a whole will benefit because all parties will be encouraged to settle.

2. Time-Barred Defendants Liable in Indemnity

The "reasonable range" of a defendant's liability is particularly difficult to determine in a second category of cases. In these cases, procedural rules operate to make a defendant liable to codefendants for indemnity even though she is no longer liable to the plaintiff. The most obvious example of these rules is the statute of limitations.

In People ex rel. Department of Transportation v. Superior Court, the California Supreme Court held that a defendant who cannot be reached in a direct action by the plaintiff because the statute of limitations has run may nevertheless be liable to other defendants in a subsequent action for indemnity. The court based its holding on its characterization of the codefendant's cause of action for indemnity. The cause of action for indemnity, the court held, is independent of the plain-

192. Id. at 751-52, 608 P.2d at 677-79, 163 Cal. Rptr. at 589-91; see also Sunset-Sternau Food Co. v. Bonzi, 60 Cal. 2d 834, 389 P.2d 133, 36 Cal. Rptr. 741 (1964) (agent can sue his principal for indemnification for acts undertaken within the scope of the agency, even though plaintiff's action against principal was barred by statute of limitations).

For a good illustration of the Department of Transportation rule in operation, see Valley Circle Estates v. VTN Consol., 33 Cal. 3d 604, 659 P.2d 1160, 189 Cal. Rptr. 871 (1983). In Valley Circle Estates, plaintiffs had purchased a home which later suffered damages because of soil subsidence. Plaintiffs brought suit against the developer (Valley Circle) and the civil engineer (VTN) responsible for the grading plan and the performance of surveying services. The applicable statute of limitations provided that no action could be brought against a real estate developer more than 10 years after completion of the development. Under the facts of the case, the plaintiffs' claim against Valley Circle was not barred, but the claim against VTN was barred. Id. at 606-08, 659 P.2d at 1161-63, 189 Cal. Rptr. at 872-74.

Because plaintiff's claim against VTN was barred, the trial court granted VTN's motions for summary judgment against the plaintiff and against a cross-complaint for indemnity filed by codefendant Valley Estates. Valley Estates appealed. The California Supreme Court, citing Department of Transportation, held that Valley Circle's cross-complaint had been improperly dismissed. Id. at 611, 659 P.2d at 1165, 189 Cal. Rptr. at 876. It reasoned that Valley Circle's right to indemnity accrued only when it suffered a loss through payment of an adverse judgment or settlement. Id. Thus, even though VTN fell within the applicable statute of limitations, VTN was still liable in indemnity to codefendants who were, in turn, liable to the plaintiff.
tiff's cause of action and accrues only when the tort defendant has suffered actual loss through payment. Under this rule, a tort defendant does not lose his right to seek equitable indemnity from another tortfeasor simply because the original plaintiff's action against the additional defendant may be barred by the statute of limitations. The defendant's equitable indemnity action is independent of the plaintiff's action and a defendant is entitled to pursue his own indemnity action so long as the statute of limitations on that action has not expired.

This rule poses a serious problem when assessing the reasonable range of a defendant's potential liability in order to determine the good faith of a proposed settlement. The problem arises from the fact that the court must decide which parties are relevant to the determination of a defendant's potential liability. A defendant's liability to the plaintiff might be zero (because the plaintiff's claim is barred altogether by the statute of limitations), while the same defendant's potential liability to other defendants could remain substantial if they cross-complain for indemnity. Given that the defendant cannot be found liable to the plaintiff, can the defendant settle for a waiver of costs and then have his settlement adjudged a good faith settlement so as to bar indemnity claims from codefendants? Certainly, if the plaintiff's claim against the settling defendant is wholly barred by the statute of limitations, a waiver of costs falls within the reasonable range of potential liability with respect to the plaintiff. But is the good faith settlement with respect to the plaintiff also a bar to a cross-complaint from codefendants to whom the settling defendant might have been liable?

Clearly, the Department of Transportation rule creates problems in the context of Civil Procedure Code section 877.6. Fortunately, the California Supreme Court has already provided some guidance in Tech-Bilt, a case which involved precisely the scenario described here.

In Tech-Bilt, plaintiff homeowners sued both the developer (Tech-Bilt) and soil engineers (Woodward-Clyde) who had worked together to build plaintiffs' home. The statute of limitations barred the claim against Woodward-Clyde, since Woodward-Clyde had completed work on the

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193. The court explained that "[t]he indemnity action, unlike the plaintiff's claim, does not accrue for statute of limitations purposes when the original accident occurs, but instead accrues at the time that the tort defendant pays a judgment or settlement as to which he is entitled to indemnity." People ex rel. Dep't of Transp., 26 Cal. 3d at 748, 608 P.2d at 676, 163 Cal. Rptr. at 588; see also E.L. White, Inc. v. City of Huntington Beach, 21 Cal. 3d 497, 506, 579 P.2d 505, 510, 146 Cal. Rptr. 614, 619 (1978) (it is well settled that a cause of action for implied indemnity does not accrue or come into existence until the indemnitee has suffered actual loss through payment).

194. People ex rel. Dep't of Transp., 26 Cal. 3d at 748, 608 P.2d at 676, 163 Cal. Rptr. at 588.

195. "Waiver of costs" in this context means simply an agreement to dismiss a party if, in return, the dismissed party will agree to pay his own court costs.

lot more than ten years before.\textsuperscript{197} Tech-Bilt, however, was still subject to suit under the statute of limitations. Realizing that Woodward-Clyde could not be held liable to them, plaintiffs agreed to dismiss Woodward-Clyde with prejudice in return for a waiver of any claim for the costs incurred in defending the suit.\textsuperscript{198}

Shortly thereafter, Tech-Bilt filed a cross-complaint against Woodward-Clyde, seeking indemnity and declaratory relief. Woodward-Clyde requested a section 877.6 hearing on the good faith of its settlement and summary judgment as to Tech-Bilt's cross-complaint.\textsuperscript{199} Thus, the court had to decide whether dismissal in return for a waiver of costs, which clearly was within the reasonable range of Woodward-Clyde's liability to the plaintiff, constituted a good faith settlement which would bar the cross-complaint of a codefendant who could be reached by the plaintiff and whose liability could be large.

In its opinion, the court articulated a standard of good faith that requires comparison of the amount paid in settlement with the reasonable range of the settling defendant's potential liability.\textsuperscript{200} The context of the decision demonstrates that the supreme court intended the full range of the settling defendant's potential liability to be taken into account, for it found that Woodward-Clyde's settlement had \textit{not} been made in good faith.\textsuperscript{201} This finding makes sense only if the court was weighing Wood-

\begin{itemize}
\item \textsuperscript{197} \textit{Id.} at 491, 698 P.2d at 161, 213 Cal. Rptr. at 258. Section 337.15 of the Civil Procedure Code provides that the statute of limitations in actions brought against real estate developers for certain causes of actions is 10 years. \textsc{Cal. Civ. Proc. Code} § 337.15 (West 1982).
\item \textsuperscript{198} \textit{Tech-Bilt}, 38 Cal. 3d at 492, 698 P.2d at 161, 213 Cal. Rptr. at 258. Had Woodward-Clyde won a summary judgment motion to remove itself from the case, it would clearly have fallen within the rule announced in \textit{Department of Transportation}. See supra text accompanying notes 191-94. Woodward-Clyde could still have been liable to Tech-Bilt for indemnity; consequently, the dismissal of Tech-Bilt's cross-complaint would have been improper. See supra note 192. As noted by the court in \textit{Tech-Bilt}, the Tech-Bilt case differed from the archetypal \textit{Department of Transportation} case only in that Woodward-Clyde had obtained a dismissal in return for a waiver of costs, instead of summary judgment. \textit{Tech-Bilt}, 38 Cal. 3d at 492, 698 P.2d at 161-62, 213 Cal. Rptr. at 258-59.
\item \textsuperscript{199} \textit{Tech-Bilt}, 38 Cal. 3d at 492, 698 P.2d at 161, 213 Cal. Rptr. at 258.
\item \textsuperscript{200} \textit{Id.} at 499-500, 698 P.2d at 166-67, 213 Cal. Rptr. at 263-64; see also supra text accompanying notes 177-80.
\item \textsuperscript{201} See \textit{Tech-Bilt}, 38 Cal. 3d at 501-02, 698 P.2d at 168, 213 Cal. Rptr. at 265. The \textit{Tech-Bilt} decision is somewhat misleading in this regard because the court's discussion of the good faith of Woodward-Clyde's settlement focuses on the equity to the plaintiff, not on the potential inequity to the nonsettling defendant. As the court stated, "In this case . . . 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." \textit{Id.} at 501, 698 P.2d at 168, 213 Cal. Rptr. at 265.
\end{itemize}
EQUITABLE INDEMNITY

ward-Clyde's liability to both the codefendants and the plaintiff.

Although the court did not fully explain its reasoning, its quotation from *Commercial Union Insurance Co. v. Ford Motor Co.*[^202] is revealing: "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."[^203] In other words, in determining good faith for the purposes of section 877.6, the court examined the potential liability of the settling defendant to parties other than the plaintiff. Where the settling defendant's potential liability to the plaintiff and to nonsettling codefendants differed, the court reviewed both sources of liability to determine whether the settlement was made in good faith.

It might be objected that it is nonsensical to deny a defendant the possibility of settling for a nominal sum when, given the law and the facts, he is clearly not liable to the plaintiff. However, this objection is based on the erroneous assumption that defendants would have no incentive to settle because the settlement would have no preclusive effect. At a minimum, a settling defendant will benefit by foreclosing future liability to the plaintiff, thereby cutting his legal expenses and eliminating some of the risks inherent in litigation.

With respect to codefendants, the effect of a settlement for a nominal sum is more difficult to describe, but no less equitable or desirable. If the settling defendant's potential liability in the case, both to the plaintiff and to codefendants, is zero, a dismissal in return for waiver of costs will be judged to have been made in good faith.[^204] Thus, a defendant who is

[^202]: 640 F.2d 210 (9th Cir. 1981). In *Commercial Union*, plaintiff had, for tactical reasons, dismissed Ford Motor Co. and retained an auto dealer as defendant. *Id.* at 211-12. After settling with the plaintiff, the dealer's insurer brought an action against Ford for indemnification. As did the supreme court in *Tech-Bilt*, the Ninth Circuit in *Commercial Union* based its decision on the requirement that a settlement, to qualify as a good faith settlement for the purposes of § 877.6, must represent a good faith determination of relative liabilities. *Id.* at 213. The case differs from *Tech-Bilt*, however, in that plaintiff's claim against Ford was not barred, and plaintiff's agreement to dismiss Ford did not reflect a consideration of relative liability. *Id.* at 213-14.

[^203]: *Tech-Bilt*, 38 Cal. 3d at 496-97, 698 P.2d at 164, 213 Cal. Rptr. at 261 (quoting *Commercial Union Ins. Co. v. Ford Motor Co.*, 640 F.2d 210, 213 (9th Cir. 1981)) (emphasis added) (brackets in original); see also *Owen v. United States*, 713 F.2d 1461, 1466 (9th Cir. 1983) (to qualify as a good faith settlement, there must be more than a bargain with intent to foreclose indemnity suits).

[^204]: The amount paid (zero) falls within the reasonable range of potential liability (zero). This
liable to neither the plaintiff nor codefendants can successfully extricate himself from a suit by offering a nominal sum.

If the settling defendant is not liable to the plaintiff but may be found liable in a derivative suit brought by codefendants, then a dismissal by the plaintiff will not automatically bar cross-complaints by codefendants for indemnity. If the defendant wants to settle and thereby close his books on the case, he will first have to determine his potential liability, then make a settlement offer within the reasonable range of that potential liability. If he pays this sum to the plaintiff in settlement, his settlement will be judged to have been made in good faith with respect to his codefendants, and will therefore bar their cross-complaints. Thus, regardless of which parties receive payment initially, the reasonable-range standard leaves intact sufficient advantages to the settling defendant to preserve the state's policy in favor of promoting settlements.

In addition to protecting the policy in favor of promoting settlements, the reasonable-range standard achieves equity for both the settling and the nonsettling defendants. The settling defendant is arguably worse off under the reasonable-range standard than he would be if the court applied a narrower definition of good faith; under a narrower definition, even disproportionately small settlements would protect the settling defendant against cross-complaints by nonsettling defendants left exposed to the plaintiff. However, the disadvantage under the reasonable-range standard to the settling defendant results only from the requirement that he pay an amount reasonably related to his potential liability to nonsettling codefendants. Thus, the disadvantage to the settling defendant hardly seems inequitable.

The reasonable-range standard is also equitable with respect to nonsettling codefendants. Any judgment that the plaintiff may obtain against nonsettling codefendants will be reduced by the amount of the settling defendant's settlement. Of course, a defendant desiring to settle may move for summary judgment with respect to the plaintiff and settle with his codefendants for a sum which falls within the reasonable range of his potential liability to them. In either case, the amount paid by the nonsettling codefendants will be effectively reduced by the amount of the settling defendant's settlement.

Cases in which a defendant is not reachable by the plaintiff but is liable to codefendants arise only infrequently. Nonetheless, the preceding analysis is necessary to demonstrate that the reasonable-range test can be

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205. This was the case in *Tech-Bilt*, 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256; see supra text accompanying notes 200-03, and in *Valley Circle Estates v. VTN Consol.*, 33 Cal. 3d 604, 659 P.2d 1160, 189 Cal. Rptr. 871 (1983); see supra note 192.

Conclusion assumes, of course, that the other factors listed in the *Tech-Bilt* decision do not militate against this finding. See supra note 180.
applied even where a settling defendant’s potential liability to the plaintiff bears no relation to his potential liability to codefendants. Indeed, the test can be administered so as to accommodate the competing policies of promoting settlements and encouraging equitable loss allocation among tortfeasors.

CONCLUSION

Neither the California Supreme Court nor the Legislature has clearly indicated whether the right to total equitable indemnity survives a good faith settlement by a codefendant. Arguments based on textual and historical analysis are inconclusive and miss the point. The better analysis recognizes the problem as the result of a conflict between the competing policies of encouraging settlements and allocating loss fairly.

By making the amount of a settlement a criterion of good faith, *Tech-Bilt* provides a mechanism for balancing the competing policies. When defendants must settle for the amount of their estimated liability, equitable loss allocation among defendants necessarily results. Of course, a few cases may appear inequitable in denying a defendant total indemnity from a settling codefendant. But by making the reasonable range of potential liability a criterion of good faith, most inequities will be resolved at the stage of the section 877.6 good faith hearing.206

At the same time, the reasonable-range standard furthers the policy of promoting settlements. A defendant can preclude further liability by settling for a sum which falls within the reasonable range of his potential liability. The incentive to settle remains intact because settlement saves legal costs and eliminates the risk of an unpredictably high jury award. Additionally, incentive to settle is increased under the *Tech-Bilt* scheme because one factor to be considered when determining the good faith of a settlement is “a recognition that a settlor should pay less in settlement than he would if he were found liable at trial.”207

In making the amount of a settlement a criterion of the settling defendant’s good faith, the California Supreme Court has provided a means whereby courts can forestall injustice to nonsettling defendants without creating the uncertainty about finality of settlements which has followed in the wake of cases like *Huizar* and *Angelus*. This Comment has argued that the supreme court’s solution represents a much better means of reconciling these two competing policies than the revival of an

206. Notably, the *Tech-Bilt* decision, 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256, which announced the reasonable-range standard, involved just such facts. See supra notes 197-203 and accompanying text.

207. *Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263; see supra notes 180 & 183.
arcane and poorly understood doctrine, the doctrine of total equitable indemnity.

Daniel Waltz*