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Pure Comparative Negligence: Set-Offs, Multiple Defendants and Loss Distribution

Neil M. Levy*

INTRODUCTION

When the Supreme Court of California adopted pure comparative negligence in *Li v. Yellow Cab*,¹ it did so mindful that its decision left unresolved many difficult problems.² This article will address the questions that arise when comparative negligence theory is applied in multiple party litigation. Since these questions were not presented by the facts of *Li*, nor ruled on by the court,³ the California lower courts for two years have tread in this area without direct guidance.⁴ Recently, however, the Supreme Court of California has granted hearings in two cases⁵ which present multiple party

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1. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). In *Li*, plaintiff motorist had been injured in a routine traffic accident at an intersection. Judgment had been entered against her because she was found to have been contributorily negligent. The Supreme Court of California followed the lead of the Florida supreme court and abolished the long standing common law rule of contributory negligence. *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973).

2. The *Li* court quoted with approval an assumption made by the Florida supreme court when it adopted pure comparative negligence in *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973): "We feel that the trial judges of this State are capable of applying [a] comparative negligence rule without our setting guidelines in anticipation of expected problems." 13 Cal. 3d at 826, 532 P.2d at 1242, 119 Cal. Rptr. at 874 (1975).

3. *Id.* at 826, 532 P.2d at 1241, 119 Cal. Rptr. 873.


problems. It is the thesis of this article that if those problems are analyzed with basic tort principles in mind, practical and socially desirable solutions can be achieved.

Two types of multiple party problems will be specifically addressed: set-off problems; and multiple defendant problems. Set-off problems may arise when more than one party is injured. Most two car accidents present problems of this type since each driver will probably claim that the negligence of the other driver at least con-

Oct. 25, 1976) and Daly v. Gen. Motors, L.A. 30687 (2 Civ. 46925), appeal docketed, No. 76-124 (Cal. Sup. Ct. Oct. 18, 1976). A discussion of the issues presented by these cases is beyond the scope of this article. However, for references dealing with some of the problems they present see note 8 infra.


tributed to causing the accident.\(^8\) Multiple defendant problems arise when an injured person is claiming that more than one other party negligently caused his injury. An example is the case of a pedestrian struck by flying glass when two cars collide. Of course, both types of multiple party problems can arise in one factual setting. An automobile accident in which at least three cars are involved and at least two drivers are injured is, perhaps, the most typical example.

Two cases now before the Supreme Court of California illustrate specific multiple defendant problems which the lower courts have had to consider.\(^9\) In *American Motorcycle Association v. Superior Court*,\(^10\) the court of appeal allowed a defendant in a negligence action to implead by cross-complaint plaintiff’s parents who, it was alleged, had been negligent in supervising the minor plaintiff. Citing *Li*, the court held that multiple defendant liability should only be several, rather than joint and several.\(^11\) Thus, the court presumably would not allow plaintiff to execute judgment against the named defendant for the total amount of plaintiff’s compensable injury. Plaintiff’s potential recovery instead would be reduced by the percentage of negligence caused by his parent.\(^12\) The other case,
Safeway Stores Inc. v. Nest-Kart,\textsuperscript{13} raised an issue of contribution. There the court of appeal ruled that despite \textit{Li}, California statutory law requires that contribution between judgment debtors be by equal share rather than based upon a comparison of fault between them.\textsuperscript{14}

Part I of this article will discuss the policy of loss distribution as the key to understanding the \textit{Li} decision. Part II will analyze whether loss distribution would be discouraged by permitting set-offs in a pure comparative negligence jurisdiction. Part III addresses multiple defendant problems, with particular attention on the effect pure comparative negligence theory should have on joint and several liability, contribution, and impleader. The article concludes that the beneficial policy of loss distribution is best forwarded by prohibiting set-offs and by refusing to alter present rules regarding joint and several liability, contribution, and impleader in negligence actions.

I

THE POLICY OF LOSS DISTRIBUTION

To resolve these cases and other multiple party issues arising out of \textit{Li}, the \textit{Li} opinion must be read in its jurisprudential and economic setting. It is a mistake to analyze these problems as mere intellectual puzzles.\textsuperscript{15} \textit{Li}, placed in proper perspective, is merely one of many cases in the last thirty years in which the Supreme Court of California has used tort law to distribute more broadly the loss occasioned by a particular injury. Certainly many of these cases do shift losses from injured parties to injuring parties.\textsuperscript{16} However, it is derivative claim under comparative negligence see V. Schwartz, supra note 6, at § § 13.1- .6.


14. \textit{Nest-Kart} was treated by the court of appeal as if the two parties, a shopping cart manufacturer and a grocery store, were each held liable for fault and thus in a case appropriate for discussion within this article. This is a most curious decision because the jury appears to have found \textit{Nest-Kart} liable only on a theory of strict products liability. The California supreme court, however, has scheduled \textit{Nest-Kart} to be argued subsequent to rehearing in other strict liability multiple party cases. For the difficulties of attempting to compare one party held liable on the basis of fault to one party held liable without a finding of fault, see note 8 supra.

15. For example, \textit{California: Multiple Party Litigation}, supra note 6 devotes forty pages to a discussion of multiple party litigation, yet virtually ignores the practical reality of the existence of liability insurance in tort practice.

16. For a criticism of the frequent over-simplification of the concept of causation in the
more accurate to view these cases as encouraging the distribution of losses from injured individuals to institutions which can better distribute those losses among a large sector of society.\textsuperscript{17} For purposes of this article then, a loss is \textit{shifted} when liability is assumed solely by an individual defendant; a loss is \textit{distributed} when liability costs are likely to be passed on by the named defendants.

In implementing the concept of loss distribution, the Supreme Court of California has sometimes denied fault principles and at other times, relied on them. Thus, the court used a strict liability doctrine rather than liability for negligence to increase the percentage of injuries caused by products for which there would be loss distribution.\textsuperscript{18} On the other hand, the court increased the number of injured plaintiffs who could recover by invoking fault liability when it abrogated immunities,\textsuperscript{19} changed the basis for landowner’s liability,\textsuperscript{20} and extended liability for emotional harm.\textsuperscript{21} Naturally, the court has not been completely consistent in its movement towards greater distribution of losses;\textsuperscript{22} practical considerations and judicial restraint have limited the movement. The court’s thrust, however, is clear.

Seen in this light, the significance of \textit{Li} lies in the fact that it greatly increases the number of plaintiffs who will be allowed to distribute at least some of their losses.\textsuperscript{23} Prior to \textit{Li}, injured plaintiffs, who were judged to be in some degree at fault were unable to

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\textsuperscript{17} Modern tort law assumes that loss distribution can usually best be accomplished through third party liability rather than through first party insurance. This assumption was not accepted in some early cases. See \textit{e.g.}, \textit{Ryan v. New York Central R.R. Co.}, 35 N.Y. 210 (1866). Nor is it accepted by automobile no-fault plans. Much recent theoretical work also rejects this assumption. For an analytic review of much of the recent literature, see Steiner, \textit{Economics, Morality and the Law of Torts}, 26 U. of Toronto L.J. 227 (1976). Multiple party pure comparative negligence problems, however, cannot be dealt with in a vacuum. They must be solved within the parameters of our present tort system.


\textsuperscript{23} Some commentators have argued that juries in contributory negligence jurisdictions have always applied comparative negligence despite instructions given to them by the court. For citation of such material \textit{see Blame and Reparation}, supra note 6, at 7 n.15.
shift any of their losses.\textsuperscript{24} After \textit{Li}, these plaintiffs are able to shift losses, although the shifting may not be complete since their damages "shall be diminished in proportion to the amount of negligence attributable to the person recovering."\textsuperscript{25} The all-or-nothing approach of the common law was rejected so that less serious consequences flow from a finding that plaintiff was at fault. \textit{Li} rejected \textit{modified}\textsuperscript{26} comparative negligence in favor of pure comparative negligence, in part, because to adopt the former would merely shift "the lottery aspect of the contributory negligence rule to a different ground."\textsuperscript{27} \textit{Li} is thus premised not upon a growing confidence in a jury's ability to accurately assess fault, but on a realization of the difficulties of that determination,\textsuperscript{28} and a conclusion that fault determinations should not completely frustrate the policy of loss distribution.\textsuperscript{29}

Tort compensation acts as a loss distributing, rather than a loss shifting device, because most defendants are insured—or sufficiently economically sound to be viewed as self-insured.\textsuperscript{30} While the Supreme Court of California refuses to allow the trier of fact to know whether a particular defendant is insured,\textsuperscript{31} it frequently has stated that rules of law must take account of the realities of the institution

\textsuperscript{24} Even the exceptions to plaintiff's negligence being a bar to recovery, such as the last clear chance doctrine, remained within the all-or-nothing rule of the common law. Plaintiff's recovery either would be barred or not, but never merely reduced because of fault. \textit{See Comment, Last Clear Chance—Trend in California,} 13 HASTINGS L.J. 141 (1961).

\textsuperscript{25} 13 Cal. 3d at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875.

\textsuperscript{26} The term "modified comparative negligence" is used in this article to describe comparative negligence systems in which negligence on the part of the plaintiff can still totally prevent recovery. Fifty percent systems are perhaps the most common form of modified comparative negligence. Under such systems, the plaintiff must prove himself less negligent than the defendant. \textit{See V. SCHWARTZ, supra} note 6, at 73-82.

\textsuperscript{27} 13 Cal. 3d at 827, 532 P.2d at 1242, 119 Cal. Rptr at 874.

\textsuperscript{28} Justice Thompson perceived \textit{Li} as being based on a new confidence in juries' ability to accurately determine fault. \textit{See American Motorcycle Assn. v. Superior Court,} 135 Cal. Rptr. 497 at 501 (1977). He thus reached conclusions markedly at variance with those suggested by this article.

\textsuperscript{29} Justice Sullivan, unlike other recent members of the California supreme court, was not totally comfortable with the rhetoric of loss distribution. \textit{See Traynor, The Ways and Meanings of Defective Products and Strict Liability,} 32 TENN. L, REV. 363 (1965)). He therefore included in \textit{Li} inconsistent dicta which sounds solely fault based. For example, he states "in a system in which liability is based on fault, the extent of fault should govern the extent of liability." 13 Cal. 3d at 811, 532 P.2d at 1231, 119 Cal. Rptr. at 863.

\textsuperscript{30} In California, automobile liability insurance is virtually compulsory. \textit{See CAL. VEH. CODE} § 16020 (West 1968). The code defines "self-insurers" and allows them to prove financial responsibility pursuant to \textit{CAL. VEH. CODE} §§ 16050-16060 (West 1968).

\textsuperscript{31} CAL. EVID. CODE § 1155 (West 1968).
of insurance.\textsuperscript{32} For example, in \textit{Brown v. Merlo},\textsuperscript{33} although the court recognized that abrogation of the guest statute might facilitate collusive lawsuits at the insurer's expense, it reasoned that even the possibility of fraud being perpetrated against some insurers did not justify rules which prevented automobile guests from recovering compensation for injuries.\textsuperscript{34}

It is also important to remember that the \textit{Li} court was aware that tort law in California is preeminently concerned with compensation to automobile accident victims.\textsuperscript{35} The overwhelming bulk of all negligence cases involve injuries suffered in automobile accidents.\textsuperscript{36} We do not necessarily need different rules for automobile injuries and other negligently caused injuries. However, general rules of negligence are useless unless they work reasonably well for determining compensation to the automobile accident victim. One of the realities in automobile litigation is that uninsured defendants do not compensate injured victims, whatever our rules of law. This has always been true for poor defendants, and increasingly middle-class judgment debtors choose bankruptcy rather than paying large judgments.\textsuperscript{37} Thus, the general rules of compensation for negligence, 

\begin{itemize}
\item \textsuperscript{33} 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973). The court recognized the possibility of collusive law suits but felt that Insurance Code section 556, and Penal Code sections 118, 126 and 132-137 and the scrutiny of the trier of fact were sufficient to prevent a proliferation of collusive law suits. 8 Cal. 3d at 877 n.18, 506 P.2d at 228 n.18, 106 Cal. Rptr. at 404 n.18.
\item \textsuperscript{35} Since this article focusses primarily upon automobile litigation, its suggestions would need to be re-examined if California were to adopt an automobile no fault plan. Furthermore, discussion in this article is limited to physical torts. Realities of practice may require differing rules for purely economic torts. For a fascinating discussion, see James, \textit{Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal}, 25 VAND. L. REV. 43 (1972).
\item \textsuperscript{36} The vast majority of personal injury cases which reach the judicial system are the result of auto accidents: "Of all civil filings 70\% are auto actions. . . ." L.A. Times, Feb. 24, 1977, pt. IV at 1, col. 6. Obviously the percentage of tort litigation that concerns automobile accidents is even greater.
\item \textsuperscript{37} Two factors limit these conclusions. First, with the upward spiral of the cost of professional negligence insurance, an increasing number of professionals capable of paying even fairly large judgments are now uninsured. It is, however, too soon to tell whether doctors will continue in large numbers to go "bare." Additionally, even with the boom in malpractice suits, automobile accidents remain the overwhelming bulk of tort litigation. See note 36 \textit{supra}. Secondly, when insurance companies are seeking subrogation, marginally solvent judgment debtors become more relevant. Because insurance companies have a high volume of subrogation claims, they have an economy of scale and thus can pursue claims that would not ordinarily be pursued by individual victims.
\end{itemize}
including the "multiple party" rules discussed herein, must take into account the practical fact that compensation, by and large, comes from insurance companies.

Given the above, Li must be viewed as one step in a jurisprudence that seeks to expand the number of plaintiffs and increase the number of defendants in order to facilitate loss distribution. With this policy perspective in mind, we can begin to analyze particular multiple party problems raised by the Li decision.

II
SET-OFFS

In a pure comparative negligence jurisdiction, set-off problems will arise in many two-party accidents. Assume that A and B are each driving their own cars, that the cars collide and both drivers are injured. If A sues B for damages, B will wish to cross-complain for his own losses. If the case goes to trial and the jury finds that A suffered $10,000 damage and was sixty percent at fault while B suffered $5,000 damage and was forty percent at fault, pure comparative negligence mathematics presents two alternative solutions. Either the judgment should read that A shall have judgment against B for $4,000 and B against A for $3,000 or that A shall have judgment against B for $1,000. In the latter solution, the court will have subtracted A's award from B's award before entering judgment. However, courts in California should never order such a set-off. Analysis begins by positing the potential insurance status of A and B.

A. BOTH PARTIES UNINSURED

It is unlikely that both A and B will be uninsured. Since approximately eighty-four percent of all California drivers are insured, less than three percent of all accidents will involve two non-

38. It is, of course, possible that the percentage of negligence will be different for each party's injuries. For example, the failure of one party to wear a seatbelt may affect a jury's determination of the degree of his fault in regard to his own injuries, whereas, it would not enter into consideration in analyzing the injuries to the other driver in a collision.


40. In California there are 11,123,878 registered motorists. Of this number, 9,322,701 or 83.3% are currently insured. Telephone conversation with Mr. Russ Smith, California Unassigned Risk Division, Western Ass'N of Auto Ins. Plans, (March 4, 1977).
insured drivers. In those cases it will usually be uneconomical for lawyers to pursue claims since chances to execute judgments are small. But if the parties do pursue claims against each other, their attorneys can assure the appropriate result without the benefit of a court ordered set-off. For example, A's attorney would transfer no funds to B, but would issue a satisfaction to B in return for $1,000. A would then not have to run the risk of B receiving $3,000 and absconding with it, or placing it beyond execution of judgment.

B. BOTH PARTIES INSURED

If both A and B are insured, tort principles and insurance contract law mandate that no set-off be permitted. The hypothetical example set out above can be used again to illustrate this conclusion. Assuming that A and B each have sufficient liability insurance to cover the losses, if A receives $4,000 from B's insurance company, he is receiving that which Li dictates, recovery for his losses diminished by the percentage of negligence attributable to him. If the $3,000 is additionally set-off from his recovery, he receives only ten percent rather than forty percent of his damages, creating a windfall for B's insurance carrier. The amount of his recovery would then be dependent on the happenstance of damage he causes another. But clearly the primary purpose in purchasing liability insurance is to prevent an economic loss because of injury inflicted on another. Usually, the feared loss is an out-of-pocket expense. However, it is equally as great an economic loss to have potential compensation for one's own losses reduced. Another hypothetical example may be of use. Let us assume that in an automobile accident A suffers $10,000 damage and is adjudged 66 2/3% at fault, and B suffers $5,000 damage and is adjudged 33 1/3% at fault. The common law would have disallowed recovery for either party, since each would be deemed contributorily negligent. Such a result is, of course, incompatible with pure comparative negligence philosophy. The fact remains, however, that this exact result is produced if courts order set-off since each party would have a judgment of $3333.33 to set-off against the other.

41. Assuming that insured drivers and uninsured drivers have accidents in the same proportion of fault, in any two-car accident the chance of each driver being uninsured is 16 in 100. Thus the chance that both are uninsured is 16/100 X 16/100 or 2.56%. Therefore, an estimate of 3% allows a margin of error to balance any assumption that uninsured drivers have accidents more frequently than insured drivers.

42. But see note 37 supra.
C. ONE PARTY INSURED

Difficult problems do arise if one of the two parties (assume A) carries liability insurance but the other does not. One additional variable must then be considered; A may or may not also carry uninsured motorist protection. 43 This provision, which is commonly attached to automobile liability insurance, allows the insured to pursue a claim against his own insurance company when injured by an uninsured driver.44 Assume A has no such coverage and is sued by B. If A consults an attorney to bring his claim, A's lawyer may reason as follows. Even though B is indigent, if B is likely to recover damages from A, then that recovery will create a fund of money which A might then be able to pursue.45

Because of the prevalence of uninsured motorist coverage, this situation will seldom arise.46 Moreover, plaintiffs' lawyers seldom will be interested in cases involving such speculative chances for recovery. To recover for A, the lawyer would have to prove not only decedent's negligence, but also, that of his own client. Yet unless the law enforces a mandatory set-off it will remain theoretically possible for A to effect some recovery from his own liability policy. This result, however, particularly considering its infrequency, seems preferable to a general rule requiring set-offs in all cases. Under the rule disallowing set-offs, B's recovery in this limited fact situation will be reduced by the damage to A for which he is responsible, a fair result since B has chosen not to insure against this risk.47 In any event, this rule is preferable to a general set-off rule which would give insurance companies a windfall.

Turning to the statistically more likely alternative, that A does carry uninsured motorist coverage, A will pursue his claim for damage against his own insurance company. Current law allows the

43. The problem is analytically the same, though much more complicated to calculate, if a party has uninsured motorist coverage, but in an amount insufficient to cover all his damages.
45. This hypothetical example is dealt with through theoretical models in Blame and Reparation, supra note 6.
46. In California, purchasers of automobile liability insurance must be offered uninsured motorist protection coverage. See CAL. INS. CODE § 11580.2 (West Supp. 1977). Approximately ninety percent of insured drivers accept the coverage. Telephone conversation supra note 40.
insurance company, after settling with its insured, to subrogate its claim to the rights of the insured. In this particular factual situation, policy dictates that this insurance practice be permitted to continue. Although fostering loss distribution argues against subrogation, if insurance companies could never subrogate, they would have incentive to delay settlement of uninsured motorist claims to force A to attempt to collect directly from B.

In conclusion, courts should refrain from requiring set-offs. An insurance company, however, that has paid its insured under an uninsured motorist policy, may be allowed to subrogate to the extent it has made payment.

III
MULTIPLE DEFENDANTS

Frequently, an injured person will claim that more than one other person negligently caused his injury. Assume A, B, and C, are each driving their own cars. The three cars collide, and A is injured. If it is arguable that B and C were negligent, a number of legal issues are raised: 1) what rights does A have against B and C, when A sues both B and C; 2) what rights would B and C then have against each other; and 3) assuming A sues only B, what are B's rights against C.

A. PLAINTIFF'S RIGHTS AGAINST JOINT TORTFEASORS

Prior to Li v. Yellow Cab, if a plaintiff successfully sued more
than one tortfeasor for an indivisible injury, each defendant was held liable for the entire amount of the injury,\textsuperscript{54} and the plaintiff could collect that amount from either. It was reasoned that since the plaintiff was the blameless party and each defendant's behavior had been deemed negligent, all conveniences in executing judgment should be afforded to the plaintiff.\textsuperscript{55} Even after \textit{Li v. Yellow Cab}, this rationale is applicable if the plaintiff is found not to have been negligent. Because the purpose of \textit{Li} was to foster loss distribution, such distribution should, of course, not be curtailed absent a finding of plaintiff's fault.\textsuperscript{56}

Furthermore, common law rules requiring joint and several liability should also continue to govern after \textit{Li}, even if plaintiff is found negligent.\textsuperscript{57} The court of appeal in \textit{American Motorcycle Association v. Superior Court},\textsuperscript{58} however, reached the opposite conclusion. The court reasoned that a plaintiff may be found to be more at fault than a particular solvent defendant. It therefore argued that it would be unjust under comparative negligence theory to require the defendant to pay a share of the judgment which reflected the degree of another defendant's negligence minus only a discount for plaintiff's fault.\textsuperscript{59} Several liability, rather than joint and several, was utilized by the court to reach its result.\textsuperscript{60}

The court's reasoning, however, is not consistent with the loss distribution policy of \textit{Li}. By adopting pure, rather than modified, comparative negligence, the Supreme Court of California in \textit{Li} concluded that there is no basic inconsistency with our tort system to

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\item \textsuperscript{54} Courts have occasionally apportioned damages between defendants because one defendant's acts had no causal relationship to some of plaintiff's damages. See, e.g., \textit{Herrero v. Atkinson}, 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (1964).
\item \textsuperscript{55} See discussion in \textit{California: Multiple Party Litigation}, supra note 6, at 777.
\item \textsuperscript{56} Even \textit{American Motorcycle Ass'n v. Superior Court}, 135 Cal. Rptr. 497 (1977), was ambiguous on the issue of whether liability should be several only, if plaintiff was not deemed to be at fault. The court merely stated that its proposed rules should be coextensive with \textit{Li}. 135 Cal. Rptr. at 503. It was thus unclear as to whether the court intended its rule to apply absent a finding that plaintiff was at fault.
\item \textsuperscript{57} An argument based on judicial economy also can be presented. If it is accepted that liability should remain joint and several when plaintiff is not deemed to have been at fault, and if a different rule is used when plaintiff is at fault, the court would not know which rule to apply until after a jury returned its verdict. Then it would be too late to exclude time-consuming evidence which would only be relevant if the jury found plaintiff to be at fault.
\item \textsuperscript{58} 135 Cal. Rptr. 497 (1977), appeal docketed, No. 77-25 (Cal. Sup. Ct. Feb. 7, 1977).
\item \textsuperscript{59} The court's reasoning was only dicta because the facts of \textit{American Motorcycle}, dealt with the analogous problem of an unnamed potential defendant rather than an insolvent named defendant. \textit{Id}. See text accompanying 81-96 infra.
\item \textsuperscript{60} \textit{Id}. at 504.
\end{itemize}
require occasionally that one more at fault pay money to one judged to have been less at fault. Yet the court of appeal in *American Motorcycle Association* would end joint and several liability because of fears of distributing loss in an analogous fact situation. The loss distribution policies underlying *Li*, however, should cause retention of joint and several liability to assure compensation from a solvent defendant for the plaintiff's injuries.

The abolition of joint and several liability would in addition greatly complicate trials. In the hypothetical examples we have dealt with, we have been assuming a known percentage of fault for the plaintiff and each of the defendants. However, to the degree that joint and several liability is retained, such a percentage determination need not be made as to each defendant. Thus, a jury could be required by special verdict or by computation merely to subtract from plaintiff's total damages the percent of plaintiff's fault, if any, in having caused the injury. The jury then would have only the tasks of deciding if each defendant were negligent and the total fault of all defendants, not the exact proportion of fault of each of them. Pure comparative negligence is premised, in part, upon a belief that accurate determination of fault is a difficult process. Certainly this difficult determination should not be made more complex when the primary purpose of distributing losses of an injured person can be accomplished without requiring the jury to determine the exact degree of negligence of each of the defendants.

The doctrine of joint and several liability may in practice even inure to the benefit of defendants. This is because under comparative negligence plaintiff at trial attempts to maximize the fault of each defendant and to minimize his own fault. However, if joint and several liability is abolished, a careful defendant, fearing possible insolvency on the part of a co-defendant, also would try to increase the apparent negligence of the co-defendant. Each defendant would have not only the plaintiff's attorney, but also the co-defendant's attorney trying to show his fault. In practice with this added effort, juries might find the total proportion of plaintiff's fault to be smaller. Thus it can be argued that unless joint and several liability is maintained, defendants might be placed in the anomalous position of helping to increase plaintiff's total recovery.

In conclusion, several, rather than joint and several liability of

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61. That is, if the suggestions in the text accompanying notes 62-78 *infra* are also followed.
tortfeasors is at variance with the rationale of pure comparative negligence. Such a rule would increase the complexities of litigation. Furthermore, it is at variance with the loss distribution philosophy which underlies California tort law. Finally abolition of joint and several liability may not even benefit multiple defendants as a class.

B. THE RIGHTS OF TORTFEASORS AGAINST EACH OTHER

Assume that plaintiff A has sued defendants B and C and that a jury would find A to be thirty percent negligent, B twenty percent negligent and C fifty percent negligent. If the doctrine of joint and several liability is applied, B and C are jointly and severally liable and A could execute judgment for the full amount against either. If A were to collect the entire judgment from B, the question becomes what rights should B have against C.

The common law gave B no rights against C, reasoning that since both defendants are blameworthy, court time should not be wasted in apportioning losses between them. That position, however, had been modified in California before Li, by both the courts and the legislature. The courts, drawing an analogy from agreements for indemnification, created the doctrine of implied indemnity to allow one defendant to shift the entire burden to another in certain cases. Indemnification, however, was regarded as an all-or-nothing proposition; either a defendant would have to fully indemnify a joint tortfeasor or not at all. Although courts struggled to define exactly when to allow indemnification, they agreed that it should be allowed only when certain relationships exist between the defendants. In contrast, the California legislature has passed a law which provides for contribution between joint tortfeasors only...
when one such tortfeasor has paid more than a *pro rata* share of the judgment. That defendant, then, is given a cause of action against the others, so that assuming all are solvent, they share the burden of the judgment equally.

*Li v. Yellow Cab* raises new facets of the question of rights among joint tortfeasors. Those who view *Li* as a significant step towards the goal of assessing liability completely on the basis of fault argue comparative contribution should also be adopted by the courts. This they argue would mean that rights of contribution should be based on a comparison of fault among joint tortfeasors. The leading case relied upon by the proponents of comparative contribution is *Dole v. Dow Chemical.* There the New York Court of Appeals, even before the New York legislature adopted comparative negligence, used a strained interpretation of a New York contribution statute, similar to the California statute, to conclude that a doctrine functionally equivalent to comparative contribution was the law in New York. The proponents of comparative contribution argue that the tools of indemnification and *pro rata* contribution are not alone sufficiently flexible to apportion loss justly among tortfeasors.

(c) Such right of contribution may be enforced only after one tortfeasor has, by payment, discharged the joint judgment or has paid more than his *pro rata* share thereof. It shall be limited to the excess so paid over the *pro rata* share of the person so paying and in no event shall any tortfeasor be compelled to make contribution beyond his own *pro rata* share of the entire judgment.

(d) There shall be no right of contribution in favor of any tortfeasor who has intentionally injured the injured person.

(e) A liability insurer who by payment has discharged the liability of a tortfeasor judgment debtor shall be subrogated to his right of contribution.

(f) This title shall not impair any right of indemnity under existing law, and where one tortfeasor judgment debtor is entitled to indemnity from another there shall be no right of contribution between them.

(g) This title shall not impair the right of a plaintiff to satisfy a judgment in full as against any tortfeasor judgment debtor.


68. The Court termed their doctrine "partial indemnification". Id. at 148, 282 N.E.2d at 291, 331 N.Y.S.2d at 386.
They point to the possibility of an impoverished defendant, scarcely at fault, having to pay an entire judgment and then being able to recoup only fifty percent from a more blameworthy defendant, or even worse, the more blameworthy defendant, paying a judgment and then recouping fifty percent from a less blameworthy defendant. Despite these apparent inequities, there are sound reasons why comparative contribution should be rejected by the Supreme Court of California, just as it was most recently rejected in Safeway Stores, Inc. v. Nest-Kart by the court of appeal. The theory is at odds with the words of the California contribution statute which clearly states that contribution shall only be pro rata. Even commentators who approve of the result of Dole v. Dow Chemical have referred, sometimes in awe, to its strained construction of a statute similar to California's. Additionally, policy considerations favor rejecting comparative contribution.

If comparative contribution is rejected, and B and C are to remain jointly and severally liable, the time-consuming process of comparing the fault of the defendants as between each other can be avoided. Requiring the jury to determine the comparative fault of each defendant can only be justified by other policy considerations, usually referred to by advocates of comparative contribution as fairness. But this "fairness" must be considered in light of the usual circumstance that one or both defendants are insured. If both defendants are insured, the feared unfairness of pro rata contribution is illusory. Fairness does not demand contribution according to fault between insurance companies in each individual case. Since there are only a limited number of insurance companies in California, and they insure a large number of drivers who are involved in many accidents, the law of averages will accomplish the same result much more efficiently. In the long run, loss patterns will be the same whether or not contribution in each case is comparative. By not allowing it, however, litigation costs and court time

70. See, e.g., Forward, supra note 6, at 254-55; The Aftermath of Li, supra note 6, at 37.
71. Parallel arguments offered in the text accompanying notes 59-61 supra, are relevant also to rejecting comparative contribution.
72. See, e.g., The Aftermath of Li, supra note 6 at 40.
73. See note 37 supra, and text accompanying note 40 supra.
74. This conclusion will be correct even if some insurance companies insure drivers who get into fewer accidents than others, unless the safer drivers also are determined, on the average, to have a lesser degree of fault in accidents in which they do become involved while
will be saved.

On the other hand, if one but not both of the defendants is insured, plaintiff, or at least plaintiff's lawyer will almost certainly attempt to collect the money from the insured, since collection will be easier. Using similar reasoning, Professor James argued in the 1940's that our legal system should never allow contribution since it shifts a loss from a superior to an inferior risk distributor.\textsuperscript{75} California's statute represents a partial rejection of this argument.\textsuperscript{76} But, surely the complications of litigation required by comparative contribution should not be encouraged merely to allow an insurance company a larger recovery against an uninsured joint tortfeasor than is already available under \textit{pro rata} contribution.

There might be benefit to a rule which would allow comparative contribution only when the insured is more at fault then the non-insured. In this situation, the insured will have paid \textit{more} than his \textit{pro rata} share and thus fault concepts would be in accord with loss distribution concepts in limiting the amount of contribution. But even this result hardly seems worth the time-consuming factual determinations that would then be necessary in all cases to determine which defendant was more at fault.\textsuperscript{77}

In conclusion, adoption of comparative contribution would be not only contrary to California statute, but also would be extremely costly for the courts to administer. Its superficial veneer of fairness would not, in practice, often produce the most desirable result. Furthermore, by continuing to develop the doctrines of implied total

to some degree at fault. If this relevant differentiation occurs at all, it is doubtful it will occur frequently enough for any insurance company to overcome the added costs of litigation involved in a system of comparative contribution.

\textsuperscript{75} James, \textit{Contribution among Joint Tortfeasors: A Pragmatic Criticism}, 54 \textit{Harv. L. Rev.} 1156 (1941).

\textsuperscript{76} See note 65 supra for the text of the statute. Contribution in California is a limited statutory right. The statute was a compromise between those who argued that a named defendant should always be able to seek contribution against joint tortfeasors and those who wished that contribution never be allowed. For elegant debate of the issue, see James, \textit{Contribution Among Joint Tortfeasors: A Pragmatic Criticism}, 54 \textit{Harv. L. Rev.} 1156 (1941); Gregory, \textit{Contribution Among Joint Tortfeasors: A Defense}, 54 \textit{Harv. L. Rev.} 1170 (1941); James, \textit{Contribution among Joint Tortfeasors: Replication}, 54 \textit{Harv. L. Rev.} 1178 (1941).

\textsuperscript{77} If the rules were different depending upon which defendant was determined to be more negligent, juries would of course, always be required to make the fact determination of the relative negligence of each defendant in order that the court would know which rule to apply. Additionally, one suspects that doctors, the one class of defendants that may be worth pursuing when uninsured, will frequently be able to apportion damages on the basis of causation, when it is alleged that a doctor negligently exasperbated an injury caused by a prior negligent third party. See notes 37 and 54 supra.
indemnity, and by utilizing *pro rata* contribution, the California courts already have sufficient tools to allocate losses among defendants.\(^7\) 

C. **MISSING DEFENDANTS**

The plaintiff may not choose to sue all persons who negligently contribute to causing his injury. The courts must then decide whether the doctrine of pure comparative negligence should be developed so as to allow a named defendant to cross-complain against the absent party. The named defendant may of course wish to do so in order to establish rights to contribution.\(^7\) This article urges, however, that the named defendant should not be allowed to cross-complain. If this position is accepted a subsidiary question arises as to whether a plaintiff's fault, if any, should be compared only to the named defendants or, alternatively, to all tortfeasors.\(^6\)

1. **Should the defendant be allowed to implead a joint tortfeasor?**

Prior to *Li*, California did not allow a defendant in a negligence action to implead by cross-complaint against a joint tortfeasor, except if the defendant's claim was for total indemnification.\(^8\) Courts explained that it was preferable to allow a plaintiff seeking compensation to control litigation than to allow that litigation to become complicated by subsidiary issues.\(^9\) Tort compensation must have as a goal, the encouragement of prompt settlement of claims, but if a

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\(^7\) Thus the court in *Safeway Stores, Inc. v. Nest-Kart*, 134 Cal. Rptr. 150 (1976), *appeal docketed*, No. 77-24 (Cal. Sup. Ct. Feb. 7, 1977), has the choice of shifting all, none or fifty percent of the loss from Safeway to Nest-Kart. The Supreme Court of Wisconsin in *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W. 2d 105 (1962), thought comparative contribution a necessary additional tool. This article, of course, would reject that conclusion. However, one might also distinguish *Bielski* from *Safeway Stores* since Wisconsin is a modified comparative negligence jurisdiction. Its system is therefore based on different assumptions than is California's.

\(^8\) One may conjecture that defense counsel may occasionally wish to bring in additional defendants for purely tactical reasons. For example, in a given case defense counsel may feel that a jury is more likely to find his or her client to be totally blameless if the jury focuses its attention on the extreme fault of another defendant.

\(^9\) Problems may also arise if a plaintiff attempts in a subsequent law suit, to sue a defendant not named in the original suit. However, because of delays in court calendars, the first action will seldom be completed before the statute of limitations runs. For a discussion of the difficult issues of res judicata and collateral estoppel which may on occasion arise, see *California: Multiple Party Litigation* supra note 6, at 789-803.


nonsettling defendant has power to cross-complain against other tortfeasors, an incentive for settlement is removed, since settlement by the other tortfeasor would not guarantee the avoidance of further litigation for him.\textsuperscript{83}

These policy considerations justify reaching similar results after \textit{Li}. If comparative contribution is rejected, the problem remains the same after \textit{Li} as before and the same result should therefore be reached. If comparative contribution is accepted by the courts, cross-complaints for comparative contribution would be even more complex than would have been cross-complaints before \textit{Li}. These cross-complaints would place in issue the fault of one defendant as compared to another and would thus entail difficult fact finding. To a greater degree than with cross-complaints for total indemnity, plaintiff would be frustrated in attempting to control the litigation geared for his compensation. Therefore, allowing comparative contribution impleader after \textit{Li} can only be justified by new policy considerations.\textsuperscript{84} But, as shown below, the “missing defendant” problem will arise most frequently in fact situations where the loss distribution policy of \textit{Li} militates for a continuation of present rules.

For example, plaintiff’s attorney may choose not to name a potential defendant because chances of recovering compensation from that person are minimal.\textsuperscript{85} Presumably the named defendant also would have little incentive, then, to pursue a claim against that person even if given a right to do so. Little purpose would then be served by complicating litigation to aid such pointless attempts.\textsuperscript{86}

On the other hand, there are also situations in which the plaintiff does not name as defendant a solvent person against whom a jury is likely to return a verdict of liability. That potential defendant might be exempt from suit by a plaintiff, as when a worker is injured within the scope of employment.\textsuperscript{87} Presumably, the same

\textsuperscript{83} See also note 94 infra.

\textsuperscript{84} Although, Code of Civil Procedure section 386 generally allows for third-party cross-complaints, California’s courts have ruled that Code of Civil Procedure sections 875-880 establish no cause of action for contribution unless there has been a joint judgment. CAL. CODE CIV. PROC. §§ 386, 875-880 (West 1968). See, e.g., General Elec. Co. v. California, 32 Cal. App. 3d 918, 108 Cal. Rptr. 543 (1973). Thus to now allow impleader for contribution would be against the weight of present authority.

\textsuperscript{85} If joint and several liability is retained plaintiff’s attorney has an additional incentive to sue all possible defendants because the judgment could be executed against any.

\textsuperscript{86} But see note 37 supra.

\textsuperscript{87} See, CAL. LAB. CODE § 3600 (West 1971). See generally Comment, Workmen’s Compensation: Meaning of the Phrase “Arising Out of Employment” as Used in the California
policy considerations which established the tort exemption for the employer are also applicable if a third party were to try to accomplish the same result through a cross-complaint.88 Thus for example, if a worker is injured on the job through the combined negligence of the employer and a third person, the third person should be given no cause of action against the employer for contributing to the third person’s economic loss in having to pay a judgment to the worker.89

With the decline of immunity doctrines in California,90 a plaintiff also will frequently choose not to sue a potential uninsured defendant because the plaintiff has mutual economic interests with that person. The facts of American Motorcycle Association91 illustrate this. Presumably, the parent who it is alleged was negligent in supervising the child, was not insured for the loss since if the parent were insured, one can safely assume that the child would have sued the parent.92 To allow the named defendant to cross-complain against the parent thus would encourage a shift of a portion of the loss from a superior to an inferior risk distributor.

Plaintiff will frequently also choose not to sue a tortfeasor in return for a cash settlement from that person. The courts must continue to refuse to allow the named defendant to cross-complain against a settling tortfeasor.93 To allow the cross-complaint removes an incentive for defendant to settle unless plaintiff also promises not

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90. See note 19 supra.
92. It is even curious that Li is being relied upon by the defendant in American Motorcycle to urge that a cross-complaint against the parent be permitted. The same arguments that the defendant is presenting in American Motorcycle could also have been raised in cases prior to Li to allow named defendants to cross-complain against joint tortfeasors. But they had been rejected. See note 81 supra. Li, when read as a loss distributing decision, does not rationalize a change of the old rules. Allowing a cross-complaint in this fact situation today would still reintroduce imputation of negligence.
to bring suit against any defendants. Plaintiffs would thus be prevented from receiving immediate compensation by partial settlement. Since any such settlement of course inures to the benefit of named defendants, failure to allow the current process to continue can only be rationalized by a desire to prevent partial settlements in tort action.

In conclusion, allowing named defendants to cross-complain against unnamed tortfeasors for contribution not only would complicate settlement procedures, but also would lead to inappropriate imputation of negligence. Li provides no rationale for changing current practice. Rather, the loss distribution thrust of Li is further authority for continuing these rules.

2. With whose fault should plaintiff's fault be compared?

If a named defendant is not allowed to implead a joint tortfeasor, with whose fault should plaintiff's fault be compared? For example, assume that a jury would find that plaintiff has ten measures of fault, that the named defendant has sixty and an unnamed defendant thirty. Should plaintiff's damages be reduced by 10/70 or 10/100 in rendering judgment against the named defendant? Neither position would appear to present overly difficult administrative problems. There is nothing unique, or even surprising about two parties litigating a third party's conduct when that third person's rights are not being affected by the litigation. Some urge that plaintiff's negligence be compared only to the smaller sum of the negligence of the parties to the action, because of the following

94. The only practical alternative for plaintiff is to reach settlement with all defendants. But such multi-party negotiations are always difficult to consummate.
97. For example, in both Kingston v. Chicago & N.W Ry. Co., 191 Wis. 610, 211 N.W. 913 (1927), and Cook v. Minn., St. P. & S.S.M. Ry. Co., 98 Wis. 624, 74 N.W. 561 (1898), the Wisconsin supreme court held that liability of a named defendant who had negligently started a fire would depend upon proof of the source of causation of another fire.
98. The plaintiff would of course prefer his damages to be reduced merely by 10/10+10+60 rather than 10/10+60. See also Richards, Parties or Persons? supra note 6, which cogently discounts any significance in the California supreme court's having changed the word "persons" to "parties" in its final published opinion in Li.
hypothetical example. Assume plaintiff is found to have twenty measures of fault, the named defendant only five such measures and the unnamed defendant seventy-five. Would it be fair, they ask, to have the named defendant liable for eighty percent of plaintiff's damage, rather than merely twenty percent?

Professor Schwartz has recently stated that the situation represented by this type of hypothetical example does not frequently occur.99 One might conjecture that juries (or courts) will merely discount the named defendant's fault in such situation. But a rule of law which attempts to avoid the feared unfairness by limiting the plaintiff to comparing his fault solely to the fault of named defendants would reintroduce the undesirable elements of several rather than joint and several liability.100 For example, if American Motorcycle Association is reversed by the Supreme Court of California, and if plaintiff were then allowed only to compare his fault to that of the named defendants, plaintiff would, in fact, lose compensation because of any fault found in his parent's action. Refusing to allow the defendant to implead a third-party defendant thus would lose much of its effectiveness unless the plaintiff can compare his fault to that of all tortfeasors.

CONCLUSION

Multiple party problems which arise in pure comparative negligence jurisdictions can be solved by reliance on the policies which dictated that pure comparative negligence be adopted. Pure comparative negligence is based not upon a belief that fault can be accurately determined, but upon a lack of faith in that determination. Loss distribution will no longer be denied merely because the injured party is deemed at fault. Loss distribution, not fault principles, lie at the core of a system which allows one more at fault to collect money damages from one less at fault. Thus, it is inconsistent while solving subsidiary questions to demand that the system

100. Professor Fleming discusses a number of intermediary solutions in which plaintiff and defendant apportion the negligence of missing defendants. Foreword, supra note 6, at 251-59. These approaches are inconsistent with the loss distribution basis of Li. One is wise to remember a caveat from Professor Prosser: "Such complex solutions may not be feasible with American jury trials, even if they are desirable in other common law countries that have limited trial by jury." Prosser, Comparative Negligence, 41 CALIF. L. REV. 1, 33-34 (1953).
adhere strictly to liability in proportion to fault. One can easily be seduced by the imponderables of comparative negligence mathematics, to seek symmetrical answers rather than answers which are workable in a vast percentage of the cases. The conclusions reached by this article can be summarized. First, when more than one party is injured, losses should not be set off against each other. Next, when more than one person injures another negligently, if the injured person sues all tortfeasors, their liability should continue to be joint and several and their rights of contribution should continue to be pro rata. Finally, a defendant in a negligence action should now be allowed to implead a third party; but, that third party's negligence must be added to the named defendants' negligence to arrive at the plaintiff's damages to be recovered from the named defendants.

101. Such seems to be the case with Professors George and Walkowiak who purport to be neutral as to comparative negligence, see Blame and Reparation, supra note 6, at 1n.1, but reach conclusions that belie such a position. They state that pure comparative negligence "will prove inherently unstable and will accelerate the advent of pure no-fault, first party compensation systems." Id. at 60. This conclusion does not reach the more critical question of whether pure comparative negligence is better or worse than other proposed compensation schemes all of which can also be shown to be fraught with administrative detractions.