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Total Equitable Indemnity: Can It Pierce a Pretrial Settlement

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TOTAL EQUITABLE INDEMNITY: CAN IT PIERCE A PRETRIAL SETTLEMENT?

I. INTRODUCTION

The common law doctrine of indemnity allows shifting of loss from one legally responsible party to another when certain relationships exist between co-tortfeasors.[1] As with other forms of allocation of loss,[2] the goal of indemnity is to provide a fair allocation of the ultimate burden of a tort recovery among those legally responsible. Unlike the other doctrines of allocation, however, the indemnity doctrine evolved in a haphazard manner and courts, in applying the doctrine, developed inconsistent criteria and standards. As a result, varying judicial formulas emerged, along with a lack of certainty about when a particular formula would operate or why the loss should be shifted.[3]

Historically, the doctrine was applied in those situations where courts deemed it the most equitable alternative to the harsh rule preventing contribution among tortfeasors.[4] Liability for damages was shifted 100% from the less culpable tortfeasor to the more culpable,[5] or from one whose liability derived solely from his legal relationship with a tortfeasor who was the proximate cause of the injury.[6] In the latter instance, the tortfeasor whose liability arose as a result of a legal relationship with the wrongdoer, not as a result of any active participation in the wrongdoing, was said to be vicariously or derivatively liable. This too

1. Alisal Sanitary Dist. v. Kennedy, 180 Cal. App. 2d 69, 75, 4 Cal. Rptr. 379, 383 (1960).

2. Examples of other forms of loss allocation are contribution where co-tortfeasors share the loss on a pro rata basis and comparative fault, where losses are distributed among tortfeasors according to their percentages of fault.

3. Atchison, T. & S.F. Ry. Co. v. Lan Franco, 267 Cal. App. 2d 881, 886, 73 Cal. Rptr. 660, 664 (1968). Attempts to classify conduct of the indemnitor as "active" or "primary" and to characterize the conduct of the indemnitee as "passive" or "secondary" "lack[ ] the objective criteria desirable for predictability in the law." *Id.* For a discussion of the inconsistent application of such labels, see *infra* notes 38-53 and accompanying text.

4. *Alisal*, 180 Cal. App. 2d at 75, 4 Cal. Rptr. at 383. *See generally* Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 140, 146-58 (1932). See *infra* notes 54-62 and accompanying text for a discussion of the contribution doctrine.

5. *See, e.g.*, United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964). In *Wiener*, a commercial airliner collided mid-air with a military training jet. Both United Airlines and the government were found to be negligent. However, the party that was less at fault (United) was granted total indemnification from the government. *Id.* at 402.

6. *See, e.g.*, Continental Casualty Co. v. Phoenix Constr. Co., 46 Cal. 2d 423, 428, 296 P.2d 801, 804 (1956) (employer held liable under *respondeat superior*).

was a total shifting of financial responsibility from one tortfeasor to another.

In California, the supreme court first articulated partial or comparative indemnity among concurrent tortfeasors in *American Motorcycle Association v. Superior Court*.[7] Employing the doctrine of joint and several liability, the court imposed upon each multiple tortfeasor total responsibility for the entire amount of a judgment.[8] According to the indemnity rule set forth in *American Motorcycle*, concurrent tortfeasors can seek from each other partial indemnification on a comparative fault basis, sharing the responsibility for the damages according to their respective percentages of fault.[9] However, subsequent to *American Motorcycle*,

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7. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

8. *Id.* at 587, 578 P.2d at 904, 146 Cal. Rptr. at 187. The policy underlying joint and several liability stresses full compensation to a victim. Therefore, all joint tortfeasors are not only collectively liable for the total judgment, but each tortfeasor is also individually liable for the whole. Thus, if tortfeasor *A* is judgment proof (without assets or means to pay), the entire burden for the total judgment falls upon tortfeasor *B*, regardless of his degree of fault. See *infra* notes 65-66 and accompanying text for further discussion of joint and several liability.

The doctrine of joint and several liability in California was severely modified by The Fair Responsibility Act of 1986 ("Proposition 51"), approved by California's voters on June 3, 1986. Proposition 51 amended section 1431 and added sections 1431.1-1431.5 to the California Civil Code pertaining to joint or several obligations. *See* 1986 Cal. Legis. Serv. 6 (West). Now, joint and several liability is only applicable to economic damages (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). However, liability for non-economic damages is several only. Non-economic damages means subjective, non-monetary losses, e.g., pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation. Thus, while a tortfeasor remains jointly and severally liable for economic damages, he is now liable for only the amount of non-economic damages ascribed to his share of allocable fault.

For example, assume joint tortfeasors *A* and *B* are allocated 60% and 40%, respectively, of the fault in a personal injury action. Assume medical expenses (economic damages) are $20,000 and pain and suffering (non-economic damages) are valued at $100,000. Assume *A* is insolvent. Under the pre-Proposition 51 doctrine of joint and several liability, defendants *A* and *B* would be individually and collectively liable for the entire award of $120,000. If *A* was insolvent, then *B* would be liable for the entire $120,000, less any amount contributed by *A*. However, after the passage of Proposition 51, *A* and *B* are individually and collectively responsible only for the economic damages of $20,000. As to the non-economic damages of $100,000, *A* and *B* are only individually liable for the amount which represents their percentage share of allocable fault. Accordingly, *A* who is 60% negligent is liable for only $60,000 of the non-economic damages and *B* who is 40% negligent is liable for only $40,000 of the non-economic damages. If *A* is insolvent, *B* is not responsible for *A's* portion of the non-economic damages. Thus, assuming *A* is insolvent and cannot pay any part of the judgment, *B* is liable for only $60,000, which represents 100% of the economic damages ($20,000) and 40% of the non-economic damages ($40,000). Unless the plaintiff can recover from *A* sometime in the future, the plaintiff will never collect the balance ($60,000) of the non-economic damages.

9. *American Motorcycle*, 20 Cal. 3d at 583, 578 P.2d at 902, 146 Cal. Rptr. at 185. For example, assume a plaintiff obtains a $100,000 judgment in damages against defendant *A* who

concurrent tortfeasors have been statutorily barred from seeking partial indemnification from a tortfeasor who enters into a pretrial, good faith settlement with the plaintiff.[10] As a result, a defendant who settles for considerably less than his comparative allocation of fault is free from cross-claims for partial indemnification by a nonsettling defendant who must bear the burden of paying the balance of the judgment.

The rule set forth in *American Motorcycle* was codified by the California Legislature in Civil Procedure Code section 877.6 which states that good faith settlements preclude cross-complaints for "*partial* or *comparative* indemnity."[11] Thus, a tortfeasor who has been adjudged only partially at fault cannot seek any kind of indemnification from a tortfeasor settling in good faith. The statutory language is unclear, however, and leaves open the question of whether a nonsettling tortfeasor who is only vicariously liable is similarly barred from seeking *total* indemnification from a settling tortfeasor. California courts disagree when addressing this issue. Their confusion stems not only from the ambiguous language in *American Motorcycle*, but also from the nebulous definition of the indemnity doctrine and its equally imprecise application.[12] This Comment discusses this conflict and concludes that, despite the language of section 877.6, total indemnification survives in a situation where the nonsettling tortfeasor is only vicariously liable.

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was found to be 20% negligent, defendant *B* who was found to be 50% negligent and defendant *C* who was determined to be 30% negligent. Each defendant is liable for 100% of the judgment but, as to each other, they can cross-complain for indemnification for any amount in excess of their respective percentages of responsibility. Thus, if defendant *A* pays the judgment, he is entitled to seek partial indemnity from defendants *B* and *C* up to the limits of their percentages of fault, to wit: $50,000 from defendant *B* and $30,000 from defendant *C*.

Even though defendant *A* is the less culpable party, he is entitled to partial indemnification from the other parties only to the extent of their comparative fault allocation. Such a system differs from total indemnification wherein defendant *A* can shift the total burden to *B* and/or *C*.

10. CAL. CIV. PROC. CODE § 877.6 (West Supp. 1986). In response to *American Motorcycle*, the California Legislature in 1980 enacted Civil Procedure Code § 877.6, which specifically codified the *American Motorcycle* dicta regarding the effects of a pretrial "good faith" settlement between the plaintiff and a tortfeasor. *See American Motorcycle*, 20 Cal. 3d at 604, 578 P.2d at 915, 146 Cal. Rptr. at 198. Section 877.6(c) provides that a "good faith" settlement between a plaintiff and a joint tortfeasor shall bar the other joint tortfeasors from "any further claims against the settling tortfeasor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault." CAL. CIV. PROC. CODE § 877.6(c) (West Supp. 1986).

11. CAL. CIV. PROC. CODE § 877.6(c) (West Supp. 1986).

12. See *infra* notes 25-53 and accompanying text for a discussion of the various applications of the indemnity doctrine.

II. HISTORICAL BACKGROUND OF ALLOCATION OF FAULT

Allocation of fault involves the determination of the extent of culpability of all tortfeasors and the plaintiff. How much the tortfeasor pays of the total damages assessed is based on the extent of his fault.

An historical perspective of the evolving standards for allocation of fault in California is necessary to confront the more specific issue of whether total indemnity remains a viable remedy against a defendant who has made a pretrial settlement. This section will review those standards, from the early punitive doctrine preventing contribution and the ameliorating doctrine of total indemnity, through the doctrines of pro rata contribution, comparative negligence and comparative (partial) indemnity.

A. Definitions of Indemnity

Various forms of indemnity exist and these must be distinguished. Moreover, some forms of indemnity have been labelled differently by various jurisdictions and even among different courts in the same jurisdiction.[13] An overview of the various types of indemnity and their labels is provided below for clarity and to establish consistent terminology.

Generally, indemnity evolved as a common law doctrine. It is the right of a tortfeasor, who has been forced to pay a common liability, to compel another tortfeasor to compensate him for the entire amount he has paid.[14] Historically indemnity did not involve a sharing of loss among tortfeasors. Instead, it was a mechanism employed by courts for shifting the total loss from one tortfeasor to another.[15] The right to indemnification may arise from an express contract between tortfeasors[16]

13. *See infra* note 53 and accompanying text.

14. Rossmoor Sanitation, Inc. v. Pylon, Inc., 13 Cal. 3d 622, 628, 532 P.2d 97, 100, 119 Cal. Rptr. 449, 452 (1975) ("[i]ndemnity may be defined as the obligation resting on one party to make good a loss or damage another party has incurred").

15. Indemnity is essentially a judicially created doctrine. Conversely, the right of contribution is primarily a statutory creature which provides for a pro rata sharing of a common liability among tortfeasors. See *infra* notes 55-62 and accompanying text for a discussion of the contribution doctrine.

16. California recognized express contractual indemnity in 1872 when the legislature enacted Civil Code § 2772. "Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person." CAL. CIV. CODE § 2772 (West 1974). Express contractual indemnity results when one party expressly promises to indemnify another for future damages. The most common forms of contractual indemnification are liability insurance policies and exculpatory clauses. The extent of the indemnitor's obligation is determined solely from the contract provisions without reference to the separate doctrine of implied (equitable) indemnity. Herman Christensen & Sons v. Paris Plastering Co., 61 Cal. App. 3d 237, 132 Cal. Rptr. 86 (1976). California courts have consistently required that such contractual provisions be specific in their terms. *Rossmoor Sanitation,*

or may be a right specifically provided by statute.[17] Additionally, it can also be implied in either contractual or noncontractual settings.[18]

Implied contractual indemnity[19] arises where a promise to indemnify can be inferred from an existing contract.[20] Although the basis of the right is contractual, equitable considerations are also necessarily involved. For example, if an indemnitee is found to have been actively negligent, or somehow participated in the wrongdoing, recovery will be barred despite the indemnitor's breach of an implied agreement.[21]

Implied non-contractual indemnity[22] arises in tort where there is no contractual basis for permitting indemnity, but equitable principles require a shifting of loss. A common example of such indemnity occurs when an employer, held vicariously liable for his employee's negligence, obtains full indemnification from the employee.[23] This Comment will refer to such indemnity as total indemnity or total equitable indemnity.

Partial or comparative indemnity is a more recent development in the indemnity doctrine. This concept allows one tortfeasor to recover

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13 Cal. 3d at 628, 532 P.2d at 100, 119 Cal. Rptr. at 452 ("general" indemnity clause construed to provide indemnity for loss resulting from indemnitee's "passive" negligence, but not construed as encompassing indemnitee's "active" negligence without specific language to that effect); Goldman v. Ecco-Phoenix Elec. Corp., 62 Cal. 2d 40, 44, 396 P.2d 377, 379, 41 Cal. Rptr. 73, 75 (1964) ("although the cases [hold] that one may provide by agreement for indemnification against his own negligence . . . , the agreement for indemnification must be clear and explicit; the agreement must be strictly construed against the indemnitee"). Such provisions will be enforced, giving effect to the intent of the parties, so long as that intent is not contrary to public policy. Markley v. Beagle, 66 Cal. 2d 951, 429 P.2d 129, 59 Cal. Rptr. 809 (1967).

17. *See, e.g.*, CAL. VEH. CODE § 17153 (West 1971) (where automobile owner is held liable for injury caused by driver of owner's car, owner is permitted to recover from driver total amount of judgment owner was required to pay).

18. *See* Cahill Bros. v. Clementina Co., 208 Cal. App. 2d 367, 376, 25 Cal. Rptr. 301, 305 (1962).

19. An implied indemnity cause of action can lie in contract or in tort. *See* Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517, 537-38 (1952).

20. *See* San Francisco Unified School Dist. v. California Bldg. Maintenance Co., 162 Cal. App. 2d 434, 328 P.2d 785 (1958). In *San Francisco Unified*, the school district, which had been held liable for injuries to defendant's employee which occurred while he was washing windows at the school, sought indemnity from the maintenance company. The court held that the window washing contract carried an implied agreement to indemnify the school district for injuries resulting from a breach of the agreement. *Id.* at 448-49, 328 P.2d at 794.

21. *See* Rodriguez v. McDonnell Douglas Corp., 87 Cal. App. 3d 626, 671-76, 151 Cal. Rptr. 399, 424-27 (1978); Cahill Bros. v. Clementina Co., 208 Cal. App. 2d 367, 382, 25 Cal. Rptr. 301, 309 (1962).

22. Implied noncontractual indemnity has been referred to as common law indemnity, implied indemnity, equitable indemnity, total indemnity, and total equitable indemnity.

23. *See, e.g.*, Continental Casualty Co. v. Phoenix Constr. Co., 46 Cal. 2d 423, 296 P.2d 801 (1956) (employer entitled to recoup loss from employee arising out of judgment against employer for unauthorized negligent act of employee).

from a co-tortfeasor a portion of what he has paid to the plaintiff.[24] Thus, he is seeking partial, not total, indemnification. The amount that the indemnitee is entitled to obtain from the indemnitor cannot exceed the indemnitor's percentage of fault (or comparative negligence) as determined relative to the other tortfeasor's fault and any fault imputed to the plaintiff. Thus, partial indemnity is also called comparative indemnity. This Comment will refer to such indemnity as partial indemnity or partial equitable indemnity.

B. The Indemnity Doctrine

In early English and American common law there was no right of contribution or indemnification among co-tortfeasors.[25] All tortfeasors were liable for an injured person's total damages, and a plaintiff's release of one tortfeasor constituted a release of all others.[26] The tortfeasor who settled with the plaintiff or who paid the judgment could not seek contribution from other tortfeasors regardless of the disparity in fault. Neither could the paying tortfeasor implead for contribution another party not sued by the plaintiff.[27] The purpose of this policy was punitive in nature and presumably deterred wrongdoing by not allowing a tortfeasor to profit from his wrongful actions.[28]

American courts retained these early prohibitions, but developed exceptions which permitted a tortfeasor to recover a loss from a co-tortfeasor or implead a party under certain circumstances. Recovery was allowed under the doctrine of equitable indemnity.[29] Because courts pro-

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24. *See supra* note 9 and accompanying text.

25. Atchison, T. & S.F. Ry. Co. v. Lan Franco, 267 Cal. App. 2d 881, 885, 73 Cal. Rptr. 660, 663 (1968) (citing Merryweather v. Nixan, 8 Term. Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799); San Francisco Unified School Dist. v. California Bldg. Maintenance Co., 162 Cal. App. 2d 434, 328 P.2d 785 (1958)). *See also* Leflar, *supra* note 4, at 130-33.

26. *See* Leflar, *supra* note 4, at 130-33.

27. Comment, *Contribution and Indemnity in California*, 57 CALIF. L. REV. 490, 503-04 (1969). *See also infra* note 60.

28. Leflar, *supra* note 4, at 131-32.

29. In its early stages, equitable indemnity was generally confined to vicarious liability situations. Oldham & Maynard, *Indemnity and Contribution Between Strictly Liable and Negligent Defendants*, 28 FED. INS. COUNS. Q. 139, 139-40 (1978).

Vicarious or derivative liability presupposes a special or legal relationship between the parties, *e.g.*, principal/agent, master/servant, employer/employee, manufacturer/retailer, automobile owner/driver.

The expansion of equitable indemnity into other areas was influenced by the need to ameliorate the harsh effects of the inflexible rules prohibiting contribution among tortfeasors. This objective led the law of indemnity into the generally obscure areas of active and passive negligence, acts of omission and commission, primary and secondary wrongdoers and ultimately into esoteric evaluations of degrees of fault of tortfeasors. These rationalizations evolved from the quest to shift total responsibility for wrongs to those who were most culpable. These often

hibited contribution, indemnity emerged as an all or nothing doctrine. Under such standards, a co-defendant was totally indemnified by the defendant whose conduct was deemed more blameworthy. Equitable principles of restitution and the prevention of unjust enrichment were applied[30] and courts found either equitable grounds for shifting 100% of the loss, or the loss was not shifted at all.[31]

Indemnity in American jurisdictions evolved into three broad categories: situations involving liability by operation of law, situations where there was negligible fault, and situations where one tortfeasor was less at fault than any other co-tortfeasor.[32]

1. Liability by operation of law

A person who, absent any fault on his part, is held liable solely by operation of law, is entitled to indemnification from the actor who caused the injury.[33] Such liability is labeled vicarious or derivative. For example, an employer is held liable for the acts of his employee under the doctrine of *respondeat superior.* The employer is entitled to total indemnification from the employee, assuming the employer did not participate

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strained efforts to mold equitable indemnity into a mechanism for adjusting the equities among joint tortfeasors obscured the doctrine's traditional focus and generated considerable confusion among judges and attorneys. *See infra* notes 38-53 and accompanying text.

30. Leflar, *supra* note 4, at 134.

31. The Restatement (Second) of Torts sets forth the areas into which indemnity expanded:

> Indemnity Between Tortfeasors
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> (1) If two persons are liable in tort to a third person for the same harm and one of them discharges the liability of both, he is entitled to indemnity from the other if the other would be unjustly enriched at his expense by the discharge of the liability.
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> (2) Instances in which indemnity is granted under this principle include the following:
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> (a) The indemnitee was liable only vicariously for the conduct of the indemnitor;
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> (b) The indemnitee acted pursuant to directions of the indemnitor and reasonably believed the directions to be lawful;
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> (c) The indemnitee was induced to act by a misrepresentation on the part of the indemnitor, upon which he justifiably relied;
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> (d) The indemnitor supplied a defective chattel or performed defective work upon land or buildings as a result of which both were liable to the third person, and the indemnitee innocently or negligently failed to discover the defect;
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> (e) The indemnitor created a dangerous condition of land or chattels as a result of which both were liable to the third person, and the indemnitee innocently or negligently failed to discover the defect;
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> (f) The indemnitor was under a duty to the indemnitee to protect him against the liability to the third person.

RESTATEMENT (SECOND) OF TORTS § 886B (1979).

32. Comment, *supra* note 27, at 494.

33. Pearson Ford Co. v. Ford Motor Co., 273 Cal. App. 2d 269, 272, 78 Cal. Rptr. 279, 282 (1969).

in the wrong.[34]

2. Liability where there is negligible fault

This category includes defendants found liable despite their negligible fault. Generally, these situations involve a failure to discover or remedy a dangerous condition created by another. The person seeking indemnity has been held liable for the "nondelegable" duty toward the person injured, even though it would have been practically impossible for him to have inspected thoroughly enough to have removed the danger created by the indemnitor's action. For example, in *City & County of San Francisco v. Ho Sing*,[35] a municipality was held liable to the plaintiff for a hazardous condition existing on city streets. The court based its holding on the municipality's nondelegable duty to maintain safe streets. But the city was permitted indemnification against a private citizen who created the hazard.[36]

3. Liability with lesser fault

The third situation arose where two or more tortfeasors each participated in the wrong. Although each was at fault, the less culpable tortfeasor could seek full indemnification from those who were more negligent. Under this rule, one who was clearly at fault could shift the entire burden of liability by locating someone even more culpable. This form of indemnity was generally acknowledged in jurisdictions which barred any form of contribution, and arose to ameliorate that inflexible doctrine.[37]

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34. Continental Casualty Co. v. Phoenix Constr. Co., 46 Cal. 2d 423, 296 P.2d 801 (1956) (employer vicariously liable for tort of servant). *See also* Broome v. Kern Valley Packing Co., 6 Cal. App. 2d 256, 44 P.2d 430 (1935) (owner of automobile held vicariously liable for conduct of driver).

35. 51 Cal. 2d 127, 330 P.2d 802 (1958).

36. City of San Francisco v. Ho Sing, 51 Cal. 2d 127, 138, 330 P.2d 802, 808-09 (1958). *Ho Sing* was the first California case to recognize a non-contractual right to indemnity among tortfeasors. In that case a pedestrian received a judgment against the City of San Francisco for injuries received when she fell over a defective skylight in a sidewalk abutting the property of the landowner who owned the skylight. *Id.* at 128-29, 330 P.2d at 802-03. *See also* Cobb v. Southern Pac. Co., 251 Cal. App. 2d 929, 59 Cal. Rptr. 916 (1967) (employer liable for failure to discover dangerous condition; granted indemnity from person who created dangerous working condition leading to employee's injury); Great Am. Ins. Co. v. Evans, 269 F. Supp. 151 (N.D. Cal. 1967) (owner/occupier liable for failure to provide safe premises granted indemnity from creator of hazard).

37. Comment, *supra* note 27, at 497; *see also* United Air Lines, Inc. v. Wiener, 335 F.2d 379, 398 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964) ("In order to effect equity and justice in certain circumstances the rule [barring contribution or indemnity] has been relaxed to permit exceptions . . . .").

California courts rejected indemnity in situations where a culpable tortfeasor sought indemnification based on a difference in degree of actual fault. Kerr Chems., Inc. v. Crown Cork

4. Lack of consistent standards

California courts have used various methodologies to determine whether equitable indemnity was permissible between tortfeasors.[38] Indemnity analysis has been couched in terms of active versus passive negligence, primary versus secondary liability, or a combination of both concepts.[39] The definitions of these tests have been vague and the application of the individual tests by courts has been inconsistent.[40]

a. active-passive test

The active-passive negligence test purported to distinguish actual degrees of fault or proximate causation. Courts focused on degrees of fault, allowing the party with less culpability (the "passive" party) to be indemnified by the person held to be more negligent (the "active" party).[41] Often, such a test produced inequitable results.[42] The net effect was that courts contrasted degrees of fault to determine who should bear the total burden. The result allowed a tortfeasor substantially at fault to be relieved of any liability by pointing to a more culpable tortfeasor.[43]

& Seal Co., 21 Cal. App. 3d 1010, 99 Cal. Rptr. 162 (1971). Since the doctrines of implied contractual and noncontractual indemnity arose in California in 1958, the same year as the contribution statutes, it has been argued that California courts did not permit such indemnity where parties shared some degree of fault because contribution was already available. Comment, *supra* note 27, at 497, 505. However, applying arbitrary labels to degrees of negligence without consistent standards (e.g., active versus passive, primary versus secondary) resulted in California courts permitting total indemnity in some circumstances between culpable parties. *See infra* text accompanying note 52 and note 158 and accompanying text.

38. This was true whether the courts were considering a legal relationship between the parties which was created by statute or operation of law; whether they were considering the extent of a tortfeasor's actual participation in the wrong; or whether they were comparing degrees of fault of obviously negligent parties.

39. Indemnity was granted when the indemnitee's negligence was "passive" as compared to the indemnitor's "active" negligence. Alternatively, if the liability of one defendant was deemed "secondary", he was entitled to indemnity from the party found "primarily" responsible.

40. Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 S. CAL. L. REV. 728, 738 (1968). *See also supra* note 3.

41. *See, e.g.*, Banks v. Central Hudson Gas & Elec. Corp., 224 F.2d 631, 634 (2d Cir. 1955) (active/passive test essentially a question of comparative negligence of the two actors to be decided by a jury); Slattery v. Marra Bros., 186 F.2d 134, 138 (2d Cir. 1951) (where court stated in dictum that "[t]he temptation is strong if the faults differ greatly in gravity, to throw the whole loss upon the more guilty of the two.")

42. *See, e.g.*, Cohen v. Noel, 165 Tenn. 600, 56 S.W.2d 744 (1933) (garage owner held "actively" negligent for having dim lights in his garage, while person who drove his car into a ladder in the dimly-lit garage was "passively" negligent).

43. *See, e.g.*, United Air Lines v. Wiener, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964) ("In view of . . . the clear disparity of culpability . . . there is such difference in the contrasted character of fault as to warrant indemnity in favor of United . . . ."). *Id.* at 402.

California courts purportedly rejected such balancing in implied non-contractual indemnity and chose instead the primary-secondary approach.[44]

b. primary-secondary test

In the area of implied noncontractual indemnity, California courts followed the primary-secondary liability standard, relying on the Pennsylvania case of *Builders Supply Co. v. McCabe*.[45] Under this approach, a secondary tortfeasor is liable solely by means of his legal relationship with the primary tortfeasor, the one who committed the wrong. The secondary tortfeasor is entitled to indemnity from the primary tortfeasor.[46]

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44. California courts generally rejected the practice of balancing and comparing degrees of fault through the use of the active-passive dichotomy in cases of implied non-contractual indemnity. Cahill Bros. v. Clementina Co., 208 Cal. App. 2d 367, 381-82, 25 Cal. Rptr. 301, 309 (1962). The *Cahill* court stated that:

> [In the area of implied indemnity one who] personally participates in an affirmative act of negligence, or is physically connected with an act or omission by knowledge or acquiescence in it on his part, or fails to perform some duty in connection with the omission which he may have undertaken by virtue of his agreement [cannot obtain indemnification].

Id. at 382, 25 Cal. Rptr. at 309.

However, the courts gave limited application to the active-passive balancing approach in cases involving implied contractual indemnity. Thus, a court would consider the negligent participation of the person claiming implied contractual indemnity and then decide whether he was barred from recovery because of his active participation in causing the damage. *See, e.g.*, Rodriguez v. McDonnell Douglas Corp., 87 Cal. App. 3d 626, 671-75, 151 Cal. Rptr. 399, 424-27 (1978) (general contractor's and employer's negligence passive thus affording them indemnification from actively negligent subcontractor); Goldman v. Ecco-Phoenix Elec. Corp., 62 Cal. 2d 40, 44-45, 396 P.2d 377, 379-80, 41 Cal. Rptr. 73, 75-76 (1964) (general contractor not permitted indemnification from subcontractor for damages sustained by subcontractor's employee because general contractor's negligence was active, not passive).

In other jurisdictions, the active-passive test had been used literally to find a right to non-contractual indemnity between co-tortfeasors by comparing degrees of fault. *See supra* notes 41-43 and accompanying text.

45. 366 Pa. 322, 77 A.2d 368 (1951).

46. The following language from *McCabe* has frequently been quoted by California courts when applying the primary-secondary test:

> The right of indemnity rests upon a difference between the primary and the secondary liability of two persons each of whom is made responsible by the law to an injured party. It is a right which inures to a person who, *without active fault on his own 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*,—a doctrine which, indeed, is not recognized by the common law. [citation omitted] *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*. . . .
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> . . . But the important point to be noted in all the cases is that secondary 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

California's allowance of equitable indemnity in non-contractual situations was not based on a "lesser degree of fault" analysis. Rather, the secondary tortfeasor's right to indemnity was established by: (1) examining the character of his conduct in order to establish whether his liability was derivative; (2) examining the legal relationship between him and the defendant through whose conduct he was being held liable; and (3) determining whether the one claiming indemnity participated in some manner in the conduct or omission which caused the injury.[47] Relying on this primary-secondary analysis, courts have allowed indemnification of a party whose duty to the victim stemmed from a legal relationship between the tortfeasors,[48] a rule of law,[49] or some negligible conduct.[50]

California courts, however, often went a step beyond these parameters. First, they permitted indemnity even where a special or legal relationship between the tortfeasors was absent.[51] Second, although framing

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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.

Id. at 325-28, 77 A.2d at 370-71 (emphasis added). *See, e.g.*, Ford Motor Co. v. Robert J. Poeschl, Inc., 21 Cal. App. 3d 694, 696-97, 697 n.1, 98 Cal. Rptr. 702, 703-04, 704 n.1 (1972); Muth v. Urricelqui, 251 Cal. App. 2d 901, 908-09, 60 Cal. Rptr. 166, 170 (1967). *See also Cahill Bros.*, 208 Cal. App. 2d at 381-82, 25 Cal. Rptr. at 309 (issue related to implied contractual indemnity but court acknowledged the *McCabe* rule as controlling in implied noncontractual indemnity).

47. *See, e.g.*, *Muth*, 251 Cal. App. 2d at 911-12, 60 Cal. Rptr. at 171-72 (general contractor held to secondary liability for failure to supervise worksite because there was no duty to supervise; therefore general contractor entitled to indemnity from subcontractor whose primary negligence arose out of its duty to supervise); Pierce v. Turner, 205 Cal. App. 2d 264, 268, 23 Cal. Rptr. 115, 118 (1962) (employer not entitled to indemnity from employee for damages paid to third party because employer failed in its duty to supervise its employee in the cutting and felling of trees, which made the employer's fault primary, not secondary).

48. *See* Bradley v. Rosenthal, 154 Cal. 420, 97 P. 875 (1908) (*respondeat superior*); Gardner v. Murphy, 54 Cal. App. 3d 164, 126 Cal. Rptr. 302 (1975) (real estate broker had cause of action for indemnity against seller arising out of broker's reliance on seller's misrepresentations to broker).

49. *See* City of San Francisco v. Ho Sing, 51 Cal. 2d 127, 330 P.2d 802 (1958) (city held to have a nondelegable duty to maintain its streets and sidewalks).

50. *See* Cobb v. Southern Pac. Co., 251 Cal. App. 2d 929, 59 Cal. Rptr. 916 (1967) (failure to discover or correct a dangerous condition absent a duty to discover or correct).

51. *See, e.g.*, *Cobb*, 251 Cal. App. 2d at 932-33, 59 Cal. Rptr. at 918. In *Cobb*, a railroad employee sued his employer and also sued a third party who had left a flatcar in an unsafe condition, causing injuries to Cobb. The employer's failure to discover or correct a dangerous condition resulted in only secondary liability. The employer was entitled to seek indemnity from the unrelated third party who had left the flatcar in an unsafe condition. *Id.* at 933, 59 Cal. Rptr. at 918. *See also* Herrero v. Atkinson, 227 Cal. App. 2d 69, 74, 38 Cal. Rptr. 490, 493 (1964). In *Herrero*, all defendants, a motorist, a hospital and several doctors, were held liable for concurrent negligence. The motorist was entitled to indemnity from the doctors and the hospital to the extent of the amount of damages arising out of the separate negligence of the doctors and the hospital. *Id.* at 75, 38 Cal. Rptr. at 494.

their reasoning in terms of active versus passive or primary versus secondary standards, in many situations courts recognized indemnity on the basis of the disparity in the degree of fault.[52] This result conflicted with the California courts' general reluctance to use the indemnity doctrine to relieve a culpable party of liability.

The demarcation between the application of the active-passive test and the application of the primary-secondary test superficially seems explicit. The active-passive test is concerned with degrees of culpability. Courts label the more culpable party actively negligent and the less culpable party passively negligent. The primary-secondary test is concerned with whether there is solely vicarious liability. Courts hold the tortfeasor proximately causing the wrong primarily liable while the tortfeasor whose liability is derivative is held secondarily liable. The two tests are distinct. Yet courts often used the labels interchangeably and applied them inconsistently, producing inequitable results. The tests emerged as mere conclusions, not offering guidance in determining whether indemnity should or should not be granted.[53]

C. Contribution

Total equitable indemnity and contribution are doctrines differing in

52. See *infra* note 158 and accompanying text for an example of this application of the indemnity doctrine.

53. Muth v. Urricelqui, 251 Cal. App. 2d 901, 60 Cal. Rptr. 166 (1967). In *Muth*, a general contractor obtained indemnification from his subcontractor who had improperly graded a lot, even though the general contractor was itself negligent in failing to supervise the grading. The court labeled the general contractor's conduct "passive" and that of the subcontractor "active" and thus the general contractor was granted total indemnification by the subcontractor. *Id.* at 909-12, 60 Cal. Rptr. at 170-72. As one commentator noted, the general contractor's conduct could have been termed either "active" negligence in staying away from the site, or as "passive" negligence in failing to go to the site and inspect. On the other hand, did the subcontractor either passively fail to grade in the proper manner, or actively grade in an improper manner? *See* Comment, *supra* note 40, at 738.

The language used in some cases suggests that the California courts lumped the various tests for indemnity together. *See, e.g.*, Aerojet Gen. Corp. v. D. Zelinsky & Sons, 249 Cal. App. 2d 604, 610, 57 Cal. Rptr. 701, 705 (1967) ("plant owner's omission was secondary and passive, while the contractor's was immediate and active"); San Francisco Examiner Div., Hearst Publishing Co. v. Sweat, 248 Cal. App. 2d 493, 497, 56 Cal. Rptr. 711, 714 (1967) (equitable indemnity "involves the equitable considerations of primary and secondary liability, or . . . concepts of active and passive conduct").

The courts themselves were sometimes victims of their own vagueness. At one point, for example, a court became so frustrated after reviewing the various inconsistent standards utilized in the equitable indemnity area that it rejected any notion of an objectively definable test. It concluded that whether indemnity should be allowed depended upon the facts of each case and should be allowed where in "equity and good conscience" the burden of the judgment should be shifted. Herrero v. Atkinson, 227 Cal. App. 2d 69, 74, 38 Cal. Rptr. 490, 493 (1964).

distinct and important ways. Total equitable indemnity seeks to transfer the *entire* loss imposed upon one tortfeasor to another who in justice and equity should bear the burden.[54] Contribution distributes the loss *equally* among all tortfeasors, each bearing his pro rata share.[55] Contribution becomes an issue when one of the tortfeasors pays more than his pro rata share for the injuries caused. He may then seek reimbursement from the other tortfeasor(s) to the extent of his overpayment.[56]

In reaction to the harsh consequences of rules barring contribution,[57] and to counteract the equally inequitable "all or nothing" application of common law indemnity, American jurisdictions gradually allowed contribution among tortfeasors by legislative action.[58] California adopted statutory contribution laws in 1958.[59] Under this rule, a tortfeasor paying an entire judgment could seek contribution from other tortfeasors pro rata. This resulted in all defendants sharing equally in the payment of the judgment. However, this right existed only if certain statutory conditions were met, including the requirement that a joint judgment be rendered before the court recognized a right to contribution.[60] The California contribution statutes, however, expressly recognized the existence of the right of indemnity[61] and did not supplant the

54. See *supra* notes 29-37 and accompanying text for a discussion of the equitable indemnity doctrine.

55. The right to contribution presupposes that joint tortfeasors are *in pari delicto* or equally at fault. Herrero v. Atkinson, 227 Cal. App. 2d 69, 73, 38 Cal. Rptr. 490, 492 (1964).

56. California's contribution statutes are encompassed in Civil Procedure Code §§ 875-880 and provide, in part, that where a money judgment has been rendered against multiple defendants in a tort action, a tortfeasor can obtain contribution from his co-defendants if he has discharged the joint judgment or has paid more than his pro rata share. The amount for which he is entitled to be reimbursed is limited to the excess he paid over his pro rata share. In the event he is entitled to equitable indemnity from another tortfeasor, contribution principles do not apply and he is entitled to indemnity. CAL. CIV. PROC. CODE § 875(f) (West 1980). The pro rata share of each tortfeasor is determined by dividing the entire judgment equally among all of them. CAL. CIV. PROC. CODE § 876 (West 1980).

57. See *supra* text accompanying notes 25-28 for a discussion of the "no contribution" rules.

58. *See* Comment, *supra* note 27, at 499.

59. CAL. CIV. PROC. CODE §§ 875-880 (West 1980 & Supp. 1986); see *supra* note 56 for a summary of the contribution statutes.

60. CAL. CIV. PROC. CODE § 875(a) (West 1980).

The common law rule prohibiting a defendant from impleading a party for contribution was still viable. In order to implead a co-tortfeasor whom the plaintiff chose not to enjoin, a defendant in California had to fashion his cross-claim in terms of indemnity rather than contribution. Thus, the contribution remedies remained restricted, e.g., without a joint judgment a payor could not enforce contribution either on appeal or in a subsequent action against his co-tortfeasors. *See* Comment, *supra* note 27, at 503-04.

61. The statute provides that the contribution statutes "[s]hall not impair any right of indemnity under existing law, and where one tortfeasor judgment debtor is entitled to indem-

indemnity doctrine. Accordingly, where a tortfeasor could show that he was entitled to total indemnification, the contribution laws did not apply, and the entire burden for the damages was shifted to the indemnifying tortfeasor.[62]

D. Comparative Negligence, Partial Indemnity and Joint and Several Liability

In 1975, the California Supreme Court adopted a system of comparative negligence in order to equitably apportion loss among the plaintiff and tortfeasors according to their allocated fault.[63] Soon thereafter, in *American Motorcycle Association v. Superior Court*,[64] the California Supreme Court extended the doctrine of comparative negligence to joint tortfeasors. The court reaffirmed the doctrine of joint and several liability among joint and concurrent tortfeasors[65] which had the effect of having each tortfeasor contribute to a damage award an amount coinciding with the percentage of fault allocated to each of them.[66] The court also adopted the doctrine of comparative partial indemnity. This decision profoundly affected the equitable indemnity doctrine. The decision did not reject total equitable indemnity, as some courts have claimed. Rather, it introduced *partial* equitable indemnity as a more equitable doctrine in situations where a shift of 100% of the loss from one tortfeasor to another would be patently unfair.

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nity from another there shall be no right of contribution between them." CAL. CIV. PROC. CODE § 875(f) (West 1980).

62. The doctrines of implied contractual indemnity and implied non-contractual indemnity developed in California simultaneously with the contribution statutes. *See* San Francisco Unified School Dist. v. California Bldg. Maintenance Co., 162 Cal. App. 2d 434, 328 P.2d 785 (1958) (implied contractual indemnity); City of San Francisco v. Ho Sing, 51 Cal. 2d 127, 330 P.2d 802 (1958) (implied noncontractual indemnity).

63. Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (comparative negligence introduced into California tort law).

64. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

65. The doctrine of joint and several liability provides that each defendant is separately liable for the entire judgment and all defendants collectively are liable for the entire judgment. The doctrine embodies the common law principle that each tortfeasor is personally liable for any indivisible injury of which his negligence is a proximate cause regardless of what other parties or forces may also have contributed to the injury. *Id.* at 586-87, 578 P.2d at 904, 146 Cal. Rptr. at 187. See *supra* note 8 for a discussion of the recent enactment of Proposition 51 and its effect on the doctrine of joint and several liability.

66. Under the contribution statutes, defendants *A* and *B* would each pay 50% of a judgment regardless of the extent each was at fault. However, under principles of joint and several liability, if *A* was adjudicated 20% at fault and *B* was adjudicated 80% negligent, *A* and *B* would be responsible for 20% and 80% of the damages awarded, respectively. However, if *A* were judgment proof, *B* would have to pay the deficiency, for a total of 100% of the judgment. See *supra* note 8 for a discussion of the effect the recent enactment of Proposition 51 has on joint and several liability.

In *American Motorcycle*, a teenage boy sought to recover damages for injuries he incurred while participating in a cross-country motorcycle race. The organizations sponsoring the race and collecting the entry fees were named as defendants. One of the defendants, American Motorcycle Association (AMA), sought to implead the plaintiff's parents by way of a cross-complaint. AMA claimed that it was entitled to total indemnity from the parents, alleging that its negligence was passive and that the parents' negligence was active.[67] AMA also asked for a declaration of the allocable negligence of the victim's parents so that damages awarded against AMA could be reduced accordingly. AMA based its request on the assumption that *Li v. Yellow Cab Co.*[68] abrogated joint and several liability and established in its stead a rule whereby each tortfeasor who proximately caused an indivisible harm may be held liable only for a portion of plaintiff's recovery, determined on a comparative fault basis.[69]

In rejecting this argument, the court held that each tortfeasor was jointly and severally liable for the plaintiff's total recovery;[70] however, as to each other, they were entitled to seek *partial* indemnity on a comparative fault basis.[71] The court concluded that the all-or-nothing nature of the total indemnity doctrine precluded courts from reaching an equitable and just resolution in the majority of cases. Equity and fairness called for an apportionment of loss between the tortfeasors in proportion to their relative culpability, rather than shifting the entire loss upon one or the other tortfeasor.[72] Thus, AMA could not seek total indemnity, but it could pursue partial indemnification from the plaintiff's parents, whether or not they were named as defendants in the original complaint.[73]

The court further concluded that California's contribution statutes did not preclude the judicial extension of the statutory apportionment concept through the adoption of a common law partial indemnification doctrine.[74] In fact, the court noted that the California contribution statutes specifically preserved the right of indemnity.[75] The court concluded

67. AMA's cross-complaint alleged that the plaintiff's parents negligently failed to exercise proper supervision over their minor child.

68. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

69. *American Motorcycle*, 20 Cal. 3d at 585-86, 578 P.2d at 903, 146 Cal. Rptr. at 186.

70. *Id.* at 590, 578 P.2d at 906-07, 146 Cal. Rptr. at 189-90.

71. *Id.* at 598, 578 P.2d at 912, 146 Cal. Rptr. at 195.

72. *Id.* at 595, 578 P.2d at 910, 146 Cal. Rptr. at 193.

73. *Id.* at 607, 578 P.2d at 916, 146 Cal. Rptr. at 200-01.

74. *Id.* at 602, 578 P.2d at 914, 146 Cal. Rptr. at 197.

75. *See supra* note 61. At the time the contribution statutes were enacted, California case law had clearly established that "a right of indemnification may arise as a result of contract *or equitable considerations.*" *Id.* (emphasis added by court) (quoting Peters v. City of San Francisco, 41 Cal. 2d 419, 431, 260 P.2d 55, 62 (1953)).

that equitable considerations justified modification of the equitable indemnity rules to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors in proportion to their comparative fault.[76]

E. Good Faith Settlements as a Bar to Partial Indemnity

Civil Procedure Code section 877, a provision in the statutory contribution scheme, provides that a tortfeasor entering a good faith settlement with the plaintiff is discharged from any liability for contribution to any other tortfeasor.[77] The California Supreme Court in *American Motorcycle*, extended section 877 to insulate a settling tortfeasor from any claims by concurrent tortfeasors for partial or comparative indemnity.[78] The court stated that such a rule was necessary in order to promote the important policy goal of encouraging settlements by ensuring their finality.[79]

In response to the court's ruling in *American Motorcycle*, the California Legislature enacted Civil Procedure Code section 877.6 which sets forth procedural guidelines for a hearing on the issue of the good faith of a settlement.[80] Additionally, it provides that once the good faith of a settlement has been established, any nonsettling tortfeasors are barred from asserting claims against the settling tortfeasor for "equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault."[81]

However, settlements not meeting good faith standards do not shield the settlor from claims for reimbursement. Neither the *American Motorcycle* court nor the legislature set forth the elements of a good faith settlement. Instead, lower courts were left to decide this issue. In early cases, a minority of courts suggested that the proper test of good faith focused primarily on whether the settlement figure reasonably reflected the settling tortfeasor's range of potential liability.[82] A majority of the

76. *Id.* at 598, 604, 578 P.2d at 912, 916, 146 Cal. Rptr. at 195, 199.

77. CAL. CIV. PROC. CODE § 877(b) (West 1980). Section 877 also provides that the plaintiff's ultimate award against any other tortfeasor is diminished only by the actual amount of the settlement rather than by the settling tortfeasor's pro rata share of the judgment. *Id.* § 877(a).

78. *American Motorcycle*, 20 Cal. 3d at 604, 578 P.2d at 915, 146 Cal. Rptr. at 198.

79. *Id.* at 604, 578 P.2d at 915-16, 146 Cal. Rptr. at 198-99.

80. CAL. CIV. PROC. CODE § 877.6 (West Supp. 1986).

81. *Id.* § 877.6(c).

82. River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972). The "reasonable range" definition of good faith originated with this case within the context of the contribution statutes. The *River Garden Farms* court stated: "Applied to strike a balance between the dual statutory objectives [of encouraging settlements by insuring their

courts, on the other hand, concluded that a good faith settlement is simply one which is free of tortious or collusive conduct between the plaintiff and the settling tortfeasor.[83] Under this more liberal test, a nonsettling tortfeasor could show lack of good faith only by proving that the settling parties engaged in tortious conduct towards him or her.[84]

Recently, the California Supreme Court in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*,[85] rejected the tortious conduct test as the sole determinant of whether a settlement was made in good faith. Instead, the court embraced the reasonable range test. Under the supreme court's definition of good faith, a settlement is valid if it is accomplished in light of a determination of relative liabilities.[86] The *Tech-Bilt* court set forth a skeletal framework for determining good or bad faith, primarily dependent upon factors showing that the settlement was within a reasonable range of the tortfeasor's potential liability.[87]

Thus, the settling party remains liable for partial indemnity if the challenger shows the pretrial settlement amount to be unreasonable in light of various factors or if he shows tortious conduct on the part of the

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finality and a fair allocation of liability], the good faith clause should not invalidate a settlement within a reasonable range of the settlor's fair [proportional] share [of relative liability]." *Id.* at 998, 103 Cal. Rptr. at 506. *See also* Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 499-501, 698 P.2d 159, 166-68, 213 Cal. Rptr. 256, 263-65 (1985) (settlement should bear some relation to settling defendant's relative culpability); Torres v. Union Pac. R.R., 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984) (settlement sum should not be grossly disproportionate to the settling defendant's fair share of the damages); Roberts, *The "Good Faith" Settlement: An Accommodation of Competing Goals*, 17 LOY. L.A.L. REV. 841, 855-58 (1984).

83. *See, e.g.*, Dompeling v. Superior Court, 117 Cal. App. 3d 798, 809-10, 173 Cal. Rptr. 38, 44-45 (1981), *disapproved*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985). The *Dompeling* court stated that:

> A settling defendant does not owe a legal duty to adverse parties, the nonsettling defendants, to pay the plaintiff more so that the adverse parties may pay the plaintiff less .... The settling parties owe the nonsettling defendants a legal duty to refrain from tortious or other wrongful [e.g., collusive] conduct; absent conduct violative of such duty, the settling parties may act to further their respective interests without regard to the effect of their settlement upon other defendants.

Id. at 809-10, 173 Cal. Rptr. at 44-45. *See also* Roberts, *supra* note 82, at 864-67.

84. The inequities of the settlement, such as a tortfeasor settling just for costs, were irrelevant to the determination of good faith. Settlement was favored over equitable apportionment of loss. Dompeling v. Superior Court, 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981), *disapproved*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985).

85. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985). There, the settling tortfeasor settled for only a waiver of costs, which the court determined to be disproportionate to his relative liability and therefore not in good faith.

86. *Id.* at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263.

87. *Id.* See *infra* note 220 for a list of factors suggested by the court.

settling parties. The question remains whether a settlement can be challenged on grounds of unreasonableness by a vicariously liable defendant; or, alternatively, whether the settlement, although determined to be in good faith, is still subject to a challenge by a vicariously liable defendant seeking total, not partial, indemnification.

III. DO PRETRIAL SETTLEMENTS PRECLUDE TOTAL EQUITABLE INDEMNITY?

A justifiable basis for challenging a pretrial settlement should result when a nonsettling joint tortfeasor claims total indemnification. If a tortfeasor's liability to a plaintiff is completely vicarious or derivative, under California's common law equitable indemnification doctrine, total indemnity should shift the entire burden of payment back to the settling tortfeasor.[88]

Decisions of the lower courts reflect opposing views regarding this issue.[89] The conflict centers around the question of whether total equitable indemnity survives *American Motorcycle Association v. Superior Court*[90] and whether, under the good faith settlement statutes, pretrial settlements preclude total equitable indemnity. The next two sections of this Comment set forth the primary cases espousing the opposing views regarding the effect of good faith settlements on total indemnity under circumstances involving vicarious or derivative liability.

A. American Motorcycle *Subsumed Total Equitable Indemnity*

The case most often cited by courts in support of the proposition that total equitable indemnity does not survive a pretrial settlement made in food faith is *City of Sacramento v. Gemsch Investment Co.*[91] In *Gemsch*, the plaintiff slipped and fell on some debris left on a sidewalk over which the City of Sacramento had an easement. She subsequently sued the city and the private owners and tenants of the adjacent property. The debris had fallen from trees over which the city asserted ownership. A city ordinance required the adjacent owners to keep the sidewalk free from debris. With the exception of the city, all of the de-

88. *See* Simmons, *The Effect of Comparative Fault on California Contribution/Indemnification Rights and How to Employ and Avoid the New Tortious Quicksand*, 19 SAN DIEGO L. REV. 773, 778 (1982).

89. *See, e.g.*, Standard Pac. v. A.A. Baxter Corp., 176 Cal. App. 3d 577, 222 Cal. Rptr. 106 (1986).

90. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

91. 115 Cal. App. 3d 869, 171 Cal. Rptr. 764 (1981).

fendants entered a pretrial settlement with the plaintiff.[92]

The city cross-complained against all defendants for total indemnity on the theory of implied contract, i.e., that the ordinance placed the responsibility for sidewalk maintenance completely on the settling defendants.[93] The city argued that Civil Procedure Code section 877.6 was not a bar to cross-complaints for total indemnity. The appellate court, in affirming the trial court's dismissal of the city's cross-complaint, stated that an implied contract did not exist and that the city had breached its duty to inspect and trim the trees. The court also held that this could not be unilaterally shifted to private citizens through ordinances.[94] Thus, the court concluded that the city did not have a right to total indemnity.[95]

The court based its conclusion on several grounds. First, it determined that the facts did not demonstrate that a contractual relationship existed between the defendants, thus creating a right to total indemnity.[96] Second, the city had a duty to inspect and maintain the trees from which the debris fell. The city also had a duty to prevent a dangerous condition of which it had notice. Employing the old terms of active versus passive negligence and primary versus secondary negligence, the court concluded that the city's conduct was primary, although arguably passive.[97] The city's passive conduct was its failure to inspect. Such a negligent omission translated into primary conduct because the city had a duty to inspect the sidewalk.

The court did determine, however, that such labels were unnecessary and rejected the active-passive and primary-secondary distinction between the negligence or fault of the indemnitor and indemnitee. It stated that although *American Motorcycle* "may not have completely abolished implied equitable indemnity in its traditional sense . . . it severely modified . . . the passive/active, primary/secondary approach[es] . . . [which were] absorbed into the new comparative indemnity of [*American Motorcycle*]."[98] The court further stated that there was no evident equitable reason to grant the city total indemnity because the city had a separate but concurrent duty to trim or remove the trees and to prevent a

92. *Id.* at 871-72, 171 Cal. Rptr. at 765.

93. *Id.* at 873, 171 Cal. Rptr. at 766.

94. *Id.* at 875, 171 Cal. Rptr. at 767.

95. *Id.* at 875-76, 171 Cal. Rptr. at 767-68.

96. *Id.* at 875, 171 Cal. Rptr. at 768.

97. *Id.* at 875-76, 171 Cal. Rptr. at 768. The city argued that if total indemnity did not stand on implied contract, it was justified under the city's alternative allegation—that its conduct was passive-secondary and not active-primary. *Id.* at 875-76, 171 Cal. Rptr. at 767-68.

98. *Id.* at 877, 171 Cal. Rptr. at 768. The court referred to the Restatement (Second) of Torts § 886B for examples of when total indemnity would lie. See *supra* note 31 for an excerpt from the Restatement (Second) of Torts § 866B.

dangerous condition of which it had notice.[99]

Finally, the court concluded that pertinent language in section 877 precluded recovery by the city. The court stated that the statute was not exclusionary but encompassed all types of tortfeasors, whether joint or concurrent, whether active or passive, whether primary or secondary. Therefore, the conduct of the city was and should be measurable under *American Motorcycle* and, as such, the pretrial settlement made in good faith precluded the city from seeking indemnity.[100]

In summary, the *Gemsch* court, while appearing to reject total indemnity, left open the possibility that under certain conditions (i.e., where the alleged indemnitee is without negligence or fault) indemnity

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99. *Gemsch*, 115 Cal. App. 3d at 876, 171 Cal. Rptr. at 768.

100. *Id.* at 877, 171 Cal. Rptr. at 769.

It is unclear in the *Gemsch* opinion whether the city argued that it was not a "true" joint tortfeasor and therefore it fell outside the parameters of Civil Procedure Code § 877. Apparently such an argument would have proven futile given the *Gemsch* court's expansive interpretation of § 877 encompassing all categories of tortfeasors.

California Civil Procedure Code § 877 is entitled "Release of one or more *joint tortfeasors*; effect upon liability of others". It provides in pertinent part that where a good faith pretrial settlement is given to "one or more of a number of tortfeasors *claimed to be liable for the same tort* . . . (b) it shall discharge the tortfeasor to whom it was given from all liability for any contribution to any other tortfeasors." CAL. CIV. PROC. CODE § 877 (West 1980) (emphasis added).

California Civil Procedure Code § 877.6 is entitled "Determination of good faith of settlement with one or more tortfeasors . . . ." It provides at subsection (c) 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." CAL. CIV. PROC. CODE § 877.6 (West Supp. 1986) (emphasis added).

Courts have generally refused to give a narrow construction to the language in Civil Procedure Code §§ 877 and 877.6. The California Supreme Court looked at the language in § 877 and determined that the statute was meant to "eliminate the distinction between joint tortfeasors and concurrent or successive tortfeasors . . . and to permit broad application of the statute." Mesler v. Bragg Mgmt. Co., 39 Cal. 3d 290, 302, 702 P.2d 601, 607-08, 216 Cal. Rptr. 443, 449-50 (1985). See *infra* note 164 for a discussion of the facts of the *Mesler* case.

The same expansive interpretation has been given to the term "joint tortfeasors" as used in § 877.6. *See* Turcon Constr., Inc. v. Norton-Villiers, Ltd., 139 Cal. App. 3d 282, 188 Cal. Rptr. 580 (1983). In *Turcon*, the nonsettling defendant (Turcon Construction) sought indemnity from the settling defendants and contended that it was not a joint tortfeasor because it did not act in concert with the tortfeasors who caused the injury to the plaintiff. Turcon claimed it was a concurrent or successive tortfeasor and as such it was not barred by § 877.6 from seeking indemnity. *Id.* at 282, 188 Cal. Rptr. at 581. The *Turcon* court stated that modern usage of the term "joint tortfeasors" did not lend itself to such a narrow construction. *Id.* The court recognized that Turcon's construction of the term "joint tortfeasor" is the historical definition of that term, but careless usage over the years by lawyers and the judiciary expanded its meaning to include concurrent and successive tortfeasors. *Id.* at 283, 188 Cal. Rptr. at 582. The court presumed that the Legislature at the time it drafted § 877.6 was aware of the modern use of the term "joint tortfeasors" as embracing joint, concurrent and successive tortfeasors. *Id.* See *infra* text accompanying notes 192-98 for a discussion of the *Turcon* case.

might still be permitted.[101] Mysteriously, the *Gemsch* case has been incorrectly cited as authority for the rule that *all* forms of indemnity are barred by *American Motorcycle* and section 877.6.[102]

In *Lopez v. Blecher*,[103] the court denied a claim for total indemnity by a vicariously liable defendant, holding that total indemnity was subsumed by *American Motorcycle*. There, defendant Blecher, while driving an automobile, came upon an overturned van on the highway. The van was driven by defendant Gonzales and registered to defendant Lopez. Blecher's vehicle struck the van, and then struck the plaintiff, Joseph, a "good samaritan" who had stopped to render assistance.[104] The plaintiff, Joseph, sued Blecher and Lopez. Prior to trial, Blecher entered into a good faith settlement with the plaintiff. Lopez cross-complained against Blecher for indemnity stating that her liability was secondary in nature, being imputed from the negligence of the van's driver.[105] The court rejected this claim, holding that it was precluded by the good faith settlement.[106]

The court reasoned that to distinguish between parties primarily and secondarily liable would thwart the legislative goal of encouraging finality of settlements, thereby decreasing prolonged litigation.[107] However, the court did not make clear whether Lopez sought partial or total indemnity. The court framed its conclusion in terms of partial or compara-

101. *See supra* note 98 and accompanying text.

102. Such a conclusion was propounded by the court in Kohn v. Superior Court, 142 Cal. App. 3d 323, 191 Cal. Rptr. 78 (1983). There, the plaintiffs discovered concealed fire damage after purchasing a house. They sued the sellers, the real estate broker, the agent and the business entities that had been hired to repair and inspect the premises, including a pest control company and a contractor. *Id.* at 325-26, 191 Cal. Rptr. at 80. Both the pest control company and contractor made pretrial good faith settlements with the plaintiffs pursuant to sections 877 and 877.6, and the nonsettling parties then cross-complained against the settling parties for total indemnity. *Id.*

Relying on *Gemsch*, the court concluded that a good faith settlement barred *all* forms of indemnity between co-tortfeasors. *Id.* at 330, 191 Cal. Rptr. at 83. In the court's view, under *American Motorcycle*, the "older type" of equitable indemnity (active-passive) had been absorbed into the new comparative indemnity, leaving no equitable indemnity from a co-defendant who had settled in good faith. *Id.*

103. 143 Cal. App. 3d 736, 192 Cal. Rptr. 190 (1983).

104. *Id.* at 737-38, 192 Cal. Rptr. at 191.

105. *Id.* at 738, 192 Cal. Rptr. at 191. Lopez's liability was imputed by statute under Vehicle Code §§ 17150-17159. Under those statutes, both the owner and permissive operator of a vehicle are deemed joint tortfeasors and are jointly and severally liable for the same damages, although the owner's liability is expressly limited in dollar amount. However, Vehicle Code § 17153 authorizes indemnification of the owner by the vehicle operator. CAL. VEH. CODE §§ 17150-17159 (West 1971 & Supp. 1986).

106. *Lopez*, 143 Cal. App. 3d at 740, 192 Cal. Rptr. at 192.

107. *Id.* at 740, 192 Cal. Rptr. at 192.

tive indemnity.[108]

It is also unclear whether the *Lopez* decision would have been different had Lopez cross-complained against Gonzales, the driver of her vehicle, who was apparently never sued. Blecher, the settling defendant against whom Lopez cross-claimed for indemnity, was the driver of the automobile which struck her overturned van. There was no legal or special relationship between Blecher and Lopez which was recognized in either decisional or statutory law.[109] Thus, Lopez's liability did not derive from the settling defendant.[110]

Similarly, in *Torres v. Union Pacific Railroad Co.*,[111] the effect of a pretrial settlement on claims for total indemnity was again considered. In *Torres*, both defendants entered into separate pretrial settlement agreements with the plaintiff, who was injured while using his employer's jack to change a tire on his own car. The plaintiff sued his employer, and the manufacturer and distributor of the jack, claiming that the jack was defective. Each settling defendant challenged the good faith of the other's settlement, and each sought equitable indemnity from the other. The trial court determined that both settlements were made in good faith and that actions for equitable indemnity by the defendants were therefore barred.[112]

Affirming the lower court's decision, the *Torres* court pointed out that there was convincing evidence that the manufacturer/distributor was responsible for the jack's defective condition. Conversely, there was substantial doubt that the employer had any liability for the defect, because he had only bought the jack and loaned it to the plaintiff. However, the employer was not entitled to indemnification from its co-defendant, according to the court, because it was primarily liable to the plaintiff under another cause of action—its wrongful refusal to rehire the

108. *Id.* at 741, 192 Cal. Rptr. at 193.

109. See *supra* notes 29, 31, 34 & 105 for examples of liability derived from a legal or special relationship.

110. In a case involving a similar situation, Turcon Constr., Inc. v. Norton-Villiers, Ltd., 139 Cal. App. 3d 280, 188 Cal. Rptr. 580 (1983), an appellate court affirmed the dismissal of a nonsettling party's cross-complaint for total indemnity where the party cross-claimed against someone with whom it did not possess a legal relationship. In *Turcon*, the plaintiff was injured when the gas tank on his motorcycle exploded after it collided with an automobile. He sued the automobile owner and the manufacturers of the motorcycle and gas tank. The manufacturers settled with the plaintiff and the vehicle owner cross-complained against the manufacturers for total indemnity. *Id.* at 282-83, 188 Cal. Rptr. at 581. However, the owner's liability did not derive from the manufacturer's liability and thus total indemnity was precluded. *Id.* at 284, 188 Cal. Rptr. at 583.

111. 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984).

112. *Id.* at 503, 203 Cal. Rptr. at 828.

plaintiff after the accident. Thus, the employer could not claim total indemnity.[113]

The above cases indicate that total indemnity has been subsumed by *American Motorcycle* and section 877.6. However, those cases all involve situations where the defendants who did not settle were either negligent or cross-claimed against a party with whom no legal relationship could be established. Although the claimants framed their claims in terms of total indemnity, the courts generally concluded they were really seeking partial indemnity by virtue of their comparative negligence or by virtue of their non-derivative status with regard to the settling defendants from whom they sought indemnification.[114] Because partial indemnity is barred in the face of a good faith settlement, their cross-complaints were dismissed. However, the courts included total indemnity in their discussion of the effect of *American Motorcycle* and section 877.6, claiming that it was subsumed.

A more recent appellate court opinion, *Standard Pacific of San Diego v. A. A. Baxter Corp.*,[115] followed the *Gemsch* rationale. In *Baxter*, various homeowners whose homes were damaged by the subsidence of landfill sued the builders and the retailers of their homes, the contractors who had done the grading and compacting of the soil, and the original land owner. The contractors settled with the plaintiffs. The builders and retailers who did not settle sued the settling defendants for partial indemnity, claiming that the settlements were not made in good faith because the settlements were not reasonable given the potential exposure of the settling defendants. One of the builders/retailers also alternatively cross-complained against the settling co-tortfeasors for total indemnity based on strict liability.[116]

The *Baxter* court followed the reasonable range standard enunciated in *Tech-Bilt Inc. v. Woodward-Clyde & Associates*.[117] The court, focusing on the settling defendants' potential liability, found that the settlements were too low and refused to certify them as good faith settlements.[118] Thus, the nonsettling defendants could seek partial indemnity. However,

113. *Id.* at 510-11, 203 Cal. Rptr. at 833.

114. *See e.g., Turcon*, 139 Cal. App. 3d at 284, 188 Cal. Rptr. at 583. The situation in *Turcon* was identical to that in *Lopez*. The *Turcon* court stated that because the party seeking indemnity cross-claimed against a party with whom a legal relationship did not exist, the complaint contained no allegations which could provide the basis for shifting total liability. *Id.*

115. 176 Cal. App. 3d 577, 222 Cal. Rptr. 106 (1986).

116. *Id.* at 581, 222 Cal. Rptr. at 107.

117. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985). See *supra* text accompanying notes 85-87 for the holding in *Tech-Bilt*.

118. *Baxter*, 176 Cal. App. 3d at 585, 222 Cal. Rptr. at 110.

the court refused the retailer's claim for total indemnity, stating that comparative fault encompasses the concept of equitable allocation of loss.[119] Therefore, comparative fault subsumes total indemnity which is nothing more than the equitable allocation of all of the loss to another party.[120] Comparative equitable indemnity includes the entire range of possible apportionments, from no right to any indemnification to a right to complete indemnification. Total indemnification is just one end of the continuum of comparative equitable indemnification.[121]

The *Baxter* court further stated that the *Tech-Bilt* good faith standard required the settlement amount be reasonable in light of the settling tortfeasor's proportionate share of liability. This procedure required accounting for the comparative lack of fault of a vicariously liable defendant.[122] Since *Tech-Bilt* did not require a precise proportionate allocation of liability, the *Baxter* court concluded that a good faith settlement can result in a factually innocent party assuming some degree of liability. The court indicated that such an approach strikes a balance between the competing policy goals of allocation of fault and the encouragement of settlements.[123]

B. Total Equitable Indemnity Survives American Motorcycle

Other courts have found that *American Motorcycle Association v. Superior Court*[124] did not abrogate total indemnity in situations involving vicarious or derivative liability. Rather, the belief is that *American Motorcycle* modified the equitable indemnity doctrine to permit partial indemnification among tortfeasors where there was apportionable fault.[125] This position is reflected in the recent case of *Angelus Associates Corp. v. Neonex Leisure Products*,[126] where a victim of an explosion brought a products liability action against a manufacturer and retailer. The court held that, under Civil Procedure Code section 877.6[127]the non-

119. *Id.* at 587-88, 222 Cal. Rptr. at 112.
120. *Id.* at 588-89, 222 Cal. Rptr. at 112-13.
121. *Id.* at 587-88, 222 Cal. Rptr. at 112.
122. *Id.* at 589, 222 Cal. Rptr. at 112-13.
123. *Id.* at 589, 222 Cal. Rptr. at 113.
124. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).
125. Angelus Assocs. Corp. v. Neonex Leisure Prods., 167 Cal. App. 3d 532, 213 Cal. Rptr. 403 (1985); Huizar v. Abex Corp., 156 Cal. App. 3d 534, 203 Cal. Rptr. 47 (1984).
126. 167 Cal. App. 3d 532, 213 Cal. Rptr. 403 (1985).
127. *Id.* at 534, 213 Cal. Rptr. at 403-04. In *Angelus*, the victims were injured in a motor home explosion caused by a propane gas leak in a defective heating unit. They sued the manufacturer of the motor home, the manufacturer of the heating unit, the supplier of the heating unit and the retailer (Angelus). All defendants cross-complained against each other for implied indemnity and contribution. Prior to trial the motor home manufacturer and supplier

settling retailer was entitled to pursue a cross-complaint for total equitable indemnity against the manufacturer despite the manufacturer's good faith settlement with the plaintiff. According to the court, total indemnity based on common law equitable principles still exists in situations where the indemnitee's liability is merely vicarious or derivative.[128] The court reasoned that *American Motorcycle*, and the subsequent section 877.6, only barred cross-complaints against a good faith settling tortfeasor for partial indemnity based on comparative fault.[129] In *Angelus*, the retailer was without comparative fault, and therefore did not meet the court's definition of "wrongdoer."[130] The retailer's liability stemmed solely from its relationship with the manufacturer in the context of the manufacturing and marketing chain.[131] Thus, the court concluded, "[a]s to the person or entity ultimately responsible for the defective product, the retailer is neither a wrongdoer nor a tortfeasor. And where there is no wrongdoing to *apportion*, the principles of comparative fault cannot apply."[132] The *Angelus* court based its holding primarily on the strength of three cases.[133] Two of the cases, *Safeway Stores, Inc. v. Nest-Kart*[134] and *E.L. White, Inc. v. City of Huntington Beach*,[135] involved post-judgment, as opposed to post-settlement, actions for indemnity. In *Nest-Kart*, the California Supreme Court deferred ruling on whether the comparative indemnity doctrine should be applied in a situation in which a tortfeasor's liability is solely derivative or vicari-

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settled with the victims under Civil Procedure Code section 877.6. The victims proceeded to trial against the manufacturer of the heating unit and the retailer. Judgment was for the defendants and the plaintiffs appealed. This case involved a separate appeal by the retailer in which it attacked the judgment in favor of the manufacturer on its cross-complaint for total indemnity which the retailer claimed was not barred by Civil Procedure Code § 877.6. *Id.* at 534-35, 213 Cal. Rptr. at 404.

128. *Id.* at 542, 213 Cal. Rptr. at 409. The court stated that the retailer was entitled to total indemnity. Under the doctrine of strict products liability, all persons and entities in the manufacturing and marketing chain are liable to a plaintiff even if they are not responsible for a defect proximately causing the loss. However, as between themselves, equitable principles require that those who are *not at fault* for the defect are entitled to indemnity from those who are. *Id.* at 535, 213 Cal. Rptr. at 404-05.

129. *Id.* at 536, 213 Cal. Rptr. at 405.

130. *Id.* at 541, 213 Cal. Rptr. at 409 (quoting BLACK'S LAW DICTIONARY 1335 (5th ed. 1979)). The court noted Black's Law Dictionary defines "tortfeasor" as a wrong-doer; one who commits or is guilty of a tort. *Id.* at 541, 213 Cal. Rptr. at 409.

131. *Id.* at 541, 213 Cal. Rptr. at 409 (retailers are factually innocent of any wrongdoing, but are held legally culpable).

132. *Id.* at 541-42, 213 Cal. Rptr. at 409.

133. Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978); Huizar v. Abex Corp., 156 Cal. App. 3d 534, 203 Cal. Rptr. 47 (1984); E.L. White, Inc. v. City of Huntington Beach, 138 Cal. App. 3d 366, 187 Cal. Rptr. 879 (1982).

134. 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978).

135. 138 Cal. App. 3d 366, 187 Cal. Rptr. 879 (1982).

ous. There, both Nest-Kart, the supplier of the grocery cart which allegedly broke and injured a Safeway customer, and Safeway were sued by the victim. The court found that Safeway had a duty to maintain the carts. Thus, its liability arose out of its negligence and not out of its standing as a vicariously or derivatively liable party. The court concluded that the comparative fault doctrine should apply to apportion liability between Nest-Kart and Safeway. Safeway was adjudicated eighty percent at fault for the accident and therefore should bear eighty percent of the damages awarded the plaintiff.[136] The *Angelus* court also relied on *E.L. White, Inc. v. Huntington Beach*[137] to support the premise that total indemnity survived the comparative fault principles set forth in *American Motorcycle*.[138] In *E.L. White*, a judgment was rendered in a wrongful death action against a construction company and the city. White, the construction company, produced evidence that it was only vicariously liable under the peculiar risk doctrine, which imposes vicarious liability on the employer of an independent contractor for the independent contractor's negligence. White's vicarious liability arose not only from the negligence of one of its subcontractors, but also from that of the city. The city had been monitoring the entire construction process. It had personnel at the site and it was aware of the open trench into which the victim fell. White, on the other hand, did not have any of its own personnel at the site.[139] White sought total indemnity from the city after paying its portion of the personal injury judgment.

The court found that while White's negligence was vicarious, the city's was actual.[140] It concluded that in appropriate cases "where one is held liable solely on account of the negligence of another, indemnification, not contribution, principles apply to shift the entire liability to the one who was negligent."[141]

The third case on which the *Angelus* court relied was *Huizar v. Abex*

136. *Nest-Kart*, 21 Cal. 3d at 332 n.5, 579 P.2d at 446 n.5, 146 Cal. Rptr. at 555 n.5.

137. 138 Cal. App. 3d 366, 187 Cal. Rptr. 879 (1982).

138. *Angelus*, 167 Cal. App. 3d at 542, 213 Cal. Rptr. at 409.

139. *E.L. White*, 138 Cal. App. 3d at 376, 187 Cal. Rptr. at 886.

140. *Id.*

141. *Id.* at 375-76, 187 Cal. Rptr. at 885-86 (quoting D'Ambrosio v. City of New York, 55 N.Y.2d 454, 462, 435 N.E.2d 366, 369, 450 N.Y.S.2d 149, 152 (1982)). Citing another New York case, the *E.L. White* court stated that:

> [t]o conclude otherwise would counter basic "principles of common law indemnification between vicariously liable tortfeasors and tortfeasors guilty of the acts and omissions causing the harm. In short, the apportionment rule applies to those who in fact share responsibility for causing the accident or harm, and does not extend further to those who are only vicariously liable . . . ."

Id. at 376, 187 Cal. Rptr. at 886 (quoting Rogers v. Dorchester Assocs., 32 N.Y.2d 553, 566, 300 N.E.2d 403, 410, 347 N.Y.S.2d 22, 31-32 (1973)).

Corp.[142] In *Huizar*, the injured party sued the product manufacturer and its distributor for hand injuries received from a defective punch press. Both defendants entered into pretrial settlements with the plaintiff under section 877.6. The manufacturer then cross-complained against the distributor for partial indemnification. The distributor cross-complained against the manufacturer for total indemnification based on the distributor's status as a derivative tortfeasor. The trial court determined that the settlements were in good faith and dismissed each party's cross-complaint for indemnity. Both defendants appealed the dismissals.[143]

The appellate court concurred in the dismissal of the manufacturer's cross-complaint because the manufacturer did "not contend that its liability to plaintiff was premised *solely* upon any act or omission of [the distributor]. . . ."[144] Therefore, the manufacturer was seeking partial indemnity, which was precluded. However, because the distributor sought *total* indemnification on the grounds that its liability was *solely* attributable to its status as a mere conduit in the marketing chain, the *Huizar* court reversed the dismissal of the distributor's cross-complaint.[145] The court stated that, absent statutory language to the contrary, the doctrine of total equitable indemnity exists separate and distinct from that of comparative indemnity.[146] The court summarized that "justice demands total indemnity where the liability of a completely blameless party is premised solely upon the tortious act or omission of another."[147]

According to the *Huizar* court, if the legislature had intended section 877.6 to bar total indemnity, it would have included specific language in the statute to that effect.[148] Instead, the statute "presupposes a situation involving a claim '. . . for equitable comparative contribution, or partial or comparative indemnity, based on *comparative negligence or comparative fault.*' "[149] The *Huizar* court also concluded that had the supreme court intended to abolish the total indemnity doctrine, it could have specifically done so in *American Motorcycle*. Instead, the *American Motorcycle* court only *modified* the equitable indemnity doctrine to allow a concurrent tortfeasor to obtain *partial* indemnity based on equitable

142. 156 Cal. App. 3d 534, 203 Cal. Rptr. 47 (1984).

143. *Id.* at 537-38, 203 Cal. Rptr. at 48-49.

144. *Id.* at 540, 203 Cal. Rptr. at 50 (emphasis added).

145. *Id.* at 540-42, 203 Cal. Rptr. at 50-51.

146. *Id.* at 542, 203 Cal. Rptr. at 51.

147. *Id. See also Angelus*, 167 Cal. App. 3d at 537-38, 213 Cal. Rptr. at 406.

148. *Huizar*, 156 Cal. App. 3d at 541, 203 Cal. Rptr. at 50-51.

149. *Id.* at 541, 203 Cal. Rptr. at 51 (citing CAL. CIV. PROC. CODE § 877.6(c)) (emphasis in original).

allocation of fault.[150]

The *Huizar* court, while stating that it was not ruling on the merits of the distributor's claims for total indemnity, held that the distributor had a right to a trial on the merits of such claims. The court further held that if the trier of fact were to find that the distributor was actively negligent *in any degree* in contributing to the plaintiff's injuries, the principles of comparative indemnity would apply, thus barring any claims for total or partial indemnity.[151]

In summary, the *Angelus* court, citing the *Nest-Kart* case, concluded that the issue of the survival of total equitable indemnity had not been determined in *American Motorcycle*,[152] and that total equitable indemnity survives a judgment where the indemnitee's liability is derivative. The *Angelus* court took the *E.L. White* court's position one step further and stated that the underlying equitable considerations did not change simply because the indemnity action was brought post-settlement and not post-judgment.[153] Therefore, the *Angelus* court agreed with the *Huizar* holding that *American Motorcycle* only modified the all-or-nothing equitable indemnity doctrine to allow partial indemnity, instead of total indemnity, in cases where the fault is apportioned among the parties.

According to the *Angelus* court, the comparative indemnity doctrine evolved to *supplement* the total indemnity doctrine in order to avoid injustice. Therefore, a negligent tortfeasor could no longer hide behind the all-or-nothing shield of total indemnity, but would have to share in the damages according to his degree of fault. Alternatively, the court suggested that total indemnity remained available to a faultless tortfeasor either post-settlement or post-judgment.

C. Analysis

Two competing policy goals underlie the entire issue of good faith settlements and their effect upon indemnity. One is the policy of encouraging settlements by guaranteeing their finality and the other is the policy of equitable apportionment of loss according to proportion of fault.[154] The court in *American Motorcycle Association v. Superior Court*[155] fur-

150. *Id.* at 541-42, 203 Cal. Rptr. at 51.

151. *Id.* at 542, 203 Cal. Rptr. at 51.

152. *Angelus*, 167 Cal. App. 3d at 537, 213 Cal. Rptr. at 406.

153. *Id.* at 542, 213 Cal. Rptr. at 409.

154. River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 997, 103 Cal. Rptr. 498, 506 (1972). *See also* Roberts, *supra* note 82, at 883, 891 & 895.

155. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

thered the policy of equitable apportionment of loss by introducing partial equitable indemnity among tortfeasors. By advocating the indestructability of good faith settlements, the court also promoted the policy of encouraging settlements by guaranteeing their finality.

The incongruous nature of these goals becomes clear when applied to the nonsettling tortfeasor who is without fault yet is denied indemnification by the culpable settling tortfeasor. While settlements are encouraged because of their finality, the policy of equitable apportionment of loss is nevertheless dealt a destructive blow. For where there is a faultless party, there is no wrongdoing to apportion.[156] Allowing a culpable tortfeasor to escape full liability through a settlement with the plaintiff produces an unjust result—the faultless party is faced with a judgment to satisfy and no remedy against the party at fault.

The *American Motorcycle* decision supplanted the all-or-nothing total equitable indemnity doctrine in the case of tortfeasors who bore some degree of fault. However, it is doubtful that the *American Motorcycle* court meant to substitute an equally unjust policy of denying equity to an innocent party simply because the culpable party has settled.

1. Survival of the total equitable indemnity doctrine

Contrary to the reasoning exemplified in *City of Sacramento v. Gemsch Investment Co.*,[157] *American Motorcycle* did not reject total indemnity in cases where there is only vicarious or derivative liability.

In *American Motorcycle*, the court briefly surveyed the development of the equitable indemnity doctrine as an "all-or-nothing" proposition. This inequitable result often shifted the entire burden of liability from the less negligent tortfeasor to the one who was more culpable, even when their relative culpability was almost equal.[158] By applying the principles

156. Angelus Assocs. Corp. v. Neonex Leisure Products, Inc., 167 Cal. App. 3d 532, 541-42, 213 Cal. Rptr. 403, 409 (1985).

157. 115 Cal. App. 3d 869, 171 Cal. Rptr. 764 (1981). See *supra* text accompanying notes 90-100 for a discussion of the facts and reasoning of the court.

158. *American Motorcycle*, 20 Cal. 3d at 594, 578 P.2d at 909, 146 Cal. Rptr. at 192. The court discussed Ford Motor Co. v. Robert J. Poeschl, Inc., 21 Cal. App. 3d 694, 98 Cal. Rptr. 702 (1971) as an example of the inequitable workings of the total indemnity doctrine. *American Motorcycle*, 20 Cal. 3d at 595-97, 578 P.2d at 910-11, 146 Cal. Rptr. at 193-94. In *Poeschl*, Ford sent a recall notice to its dealers requesting the recall of designated automobiles for servicing of the cars' rear brake lights. A dealer and leasing agency failed to recall one such car which had been leased to a customer and shortly thereafter the defect in the rear brake light caused an accident. The victim sued Ford, the dealer and the leasing agency. Ford settled with the plaintiff and subsequently sought indemnity from the dealer and leasing agency. *Poeschl*, 21 Cal. App. 3d at 696, 98 Cal. Rptr. at 703.

Analyzing Ford's claim in terms of the elusive "active-passive" and "primary-secondary" standards utilized by prior decisions, the *Poeschl* court determined that Ford was not entitled

of comparative negligence to indemnity and introducing the concept of partial indemnity among tortfeasors who shared in fault, the *American Motorcycle* court attempted to curtail this inequitable result.

Although the *American Motorcycle* decision favored partial indemnity in situations of shared fault, the court never specifically addressed the issue of total indemnity when liability is premised on some legal relation between the parties or arises from a rule of common or statutory law. Instead, the court recognized that there remained situations where a total shifting of liability would be appropriate.[159] However, it did not specifically explain when full indemnification would apply, probably because the dispute in the case involved the right of a *culpable* party to seek indemnity from another potentially culpable party.[160] The dispute did not involve a vicariously or derivatively liable tortfeasor.

Subsequent opinions from the California Supreme Court imply that

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to obtain total indemnification. *Id.* at 698-99, 98 Cal. Rptr. at 705. The *Poeschl* court reasoned:

> Ford's production of the defective car, coupled with its failure to attempt direct notice to the customer, breached a direct obligation it owed to the latter. Ford had a "last clear chance" to avert injury and failed to use it. Its fault is primary, not secondary, and not imputed to it as a consequence of the dealer's or leasing agency's fault. Under the pleaded circumstances, the latter are not liable for indemnification of the manufacturer.

Id. at 699, 98 Cal. Rptr. at 705.

The *Poeschl* court revealed its misgivings with the existing total indemnity doctrine which sanctioned the inequitable result of permitting the dealer and leasing agency to escape all liability whatsoever. The court reasoned that the dealer and leasing agency shared Ford's duty to reach the customer before an accident occurred. If the dealer and leasing agency knew of the danger and yet did nothing, they should not escape financial responsibility. However, to shift the entire loss to them would result in Ford's escaping all financial liability. The court suggested that a wiser rule of law would require both parties to share the loss. A rule of contribution or partial indemnity would permit that result. *Id.*

159. *American Motorcycle*, 20 Cal. 3d at 597, 578 P.2d at 911, 146 Cal. Rptr. at 194 (citing Dole v. Dow Chem. Co., 30 N.Y.2d 143, 147, 282 N.E.2d 288, 291, 331 N.Y.S.2d 382, 386 (1972)).

One of the New York cases upon which the California Supreme Court relied in modifying the equitable indemnity doctrine was quoted as stating " '[t]here are situations when the facts would in fairness warrant what [the named defendant] here seeks—passing on to [a concurrent tortfeasor] all responsibility that may be imposed on [the named defendant] for negligence, a traditional full indemnification.' " *Id.* (quoting Dole v. Dow Chem. Co., 30 N.Y.2d 143, 147, 282 N.E.2d 288, 291, 331 N.Y.S.2d 382, 386 (1972)).

160. In *American Motorcycle*, the minor plaintiff sued the promoters of a motorcycle race for injuries sustained during the race. The defendant motorcycle association (promoter) cross-claimed against the minor's parents, alleging that they had been actively negligent in allowing their son to enter the race. *Id.* at 584-85, 578 P.2d at 903, 146 Cal. Rptr. at 185-86. The court held that the promoter had a right to seek partial indemnity on a comparative negligence basis and could seek partial indemnity from a tortfeasor not named as a co-defendant by the plaintiff. *Id.* at 604, 578 P.2d at 916, 146 Cal. Rptr. at 199.

American Motorcycle did not abolish total equitable indemnity.[161] For example, the court in *Safeway Stores, Inc. v. Nest-Kart*[162] acknowledged the ambiguity but declined to consider the question because derivative or vicarious liability was not an issue in the case.[163]

In the more recent case of *Mesler v. Bragg Management Co.*,[164] the court recognized that the contribution statutes preserve the right of total indemnity and permit a vicariously liable judgment debtor to seek full indemnity from the primary tortfeasor.[165] In the context of a good faith settlement, the supreme court stated in *Mesler* that it had not yet addressed the question of whether a vicariously or derivatively liable judgment debtor has a right to obtain indemnification from a primary tortfeasor who has settled with a plaintiff. The court stated that "to the extent such a right exists, '[i]n light of the clear legislative expression, . . . we must assume that this contingency was foreseen, and that this result was felt desirable.' "[166]

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161. *See* Mesler v. Bragg Management Co., 39 Cal. 3d 290, 305, 702 P.2d 601, 609-10, 216 Cal. Rptr. 443, 451-52 (1985); Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 332 n.5, 579 P.2d 441, 446 n.5, 146 Cal. Rptr. 550, 555 n.5 (1978).

162. 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978). See *supra* text accompanying note 136 for a discussion of the case.

163. *Nest-Kart*, 21 Cal. 3d at 332 n.5, 579 P.2d at 446 n.5, 146 Cal. Rptr. at 555 n.5.

164. 39 Cal. 3d 290, 702 P.2d 601, 216 Cal. Rptr. 443 (1985). In *Mesler*, an employee sustained injuries while operating a bulldozer. He sued his employer and the bulldozer's previous owner, both wholly owned subsidiaries of a third corporation, Bragg Management Company. The plaintiff settled with the previous owner, a subsidiary of Bragg. Bragg contended that the release of the subsidiary, its alter ego, also released Bragg. *Id.* at 295-96, 702 P.2d at 603, 216 Cal. Rptr. at 444-45. The court disagreed and ruled that a plaintiff in a tort action may sue one party as the alter ego of another, and that the alter ego is not released by a settlement and release of the claim against the other party. *Id.* at 306, 702 P.2d at 610, 216 Cal. Rptr. at 452. The court reasoned that Civil Procedure Code § 877, which provides that a release of one tortfeasor does not release any other tortfeasor, applied to all tortfeasors, including parties alleged to be vicariously liable. *Id.* at 303, 702 P.2d at 608, 216 Cal. Rptr. at 450. The court stated that the goal of maximization of plaintiff's recovery and equity among defendants is best served by such a policy. *Id.* at 305, 702 P.2d at 609, 216 Cal. Rptr. at 451-52. However, regarding the competing goal of early and final settlement of claims, a problem could arise in vicarious liability situations because the contribution statutes (specifically Civil Procedure Code § 875(f)) preserve the right of full indemnity. Thus, it appeared to the court that total indemnity was available to a defendant sued under a theory of vicarious liability. *Id.* at 305, 702 P.2d at 609, 216 Cal. Rptr. at 452. However, the court did not address this potential problem in *Mesler* because the parent company was not seeking total indemnity from its subsidiary. It is significant that the court acknowledged the existence of total indemnity and the potential for problems under the circumstances of a pretrial settlement where there is a nonsettling tortfeasor who is only vicariously liable.

165. *Id.* at 305, 702 P.2d at 609-10, 216 Cal. Rptr. at 451-52.

166. *Id.* (quoting Ritter v. Technicolor Corp., 27 Cal. App. 3d 152, 155, 103 Cal. Rptr. 686, 687 (1972)). In *Ritter*, the plaintiff settled with co-defendants who were agents of the nonsettling defendant. The settlement agreement between the agents and the plaintiff did not serve to release the principal. The court stated that in light of the clear legislative intent in the contri-

Such a position is in line with the appellate court's statements in *Huizar v. Abex Corp.*[167] There, the court was of the opinion that, had the legislature intended that a cause of action seeking total indemnification be barred by a pretrial settlement under Civil Procedure Code section 877.6(c), the legislature could have included in the statute language to that effect.[168] Instead, the statute presumes a situation involving a claim " 'for equitable comparative contribution, or partial or comparative indemnity, based on *comparative negligence or comparative fault.*' "[169] In summary, the legislature is presumed to be aware of existing judicial decisions.[170] The legislature was aware of the total indemnity doctrine as it was applied in vicarious situations but did not make a provision to limit that right. Thus, by codifying *American Motorcycle*'s holding in Civil Procedure Code section 877.6, the legislature did not supplant the right to total indemnity. Instead, it merely modified the contribution statutes to conform to the *American Motorcycle* decision permitting comparative indemnity in situations where tortfeasors share in the culpability.

Additionally, the *Huizar* court stated that had the supreme court in *American Motorcycle* desired to abolish the total indemnity doctrine, it could have so stated. Instead, the *American Motorcycle* court explicitly held that it was *modifying* the all-or-nothing equitable indemnity doctrine to account for situations involving tortfeasors sharing in fault.[171] The doctrine of total indemnity was not supplanted and it exists separate and distinct from that of comparative indemnity.[172] Likewise, the court extended the new partial indemnity doctrine to good faith pretrial settlements. Settling defendants are discharged from "any claim for partial or comparative indemnity . . . ."[173] The court did not include a statement regarding total indemnity in situations warranting full indemnification.

It appears the *American Motorcycle* decision and section 877.6 do not supplant total indemnity with a comparative indemnity doctrine. In-

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bution statutes to preserve the right of indemnification, the principal could seek indemnity from the settling agents if the principal were faced with a judgment. The court stated that by retaining the right to equitable indemnity, the legislature must have foreseen that contingency and deemed it desirable. *Ritter*, 27 Cal. App. 3d at 155, 103 Cal. Rptr. at 687.

167. 156 Cal. App. 3d 534, 203 Cal. Rptr. 47 (1984).

168. *Id.* at 541, 203 Cal. Rptr. at 50-51.

169. *Id.* (quoting CAL. CIV. PROC. CODE § 877.6(c) (West Supp. 1986)) (emphasis added by court).

170. *Mesler*, 39 Cal. 3d at 303, 702 P.2d at 608, 216 Cal. Rptr. at 450.

171. *American Motorcycle*, 20 Cal. 3d at 598, 578 P.2d at 912, 146 Cal. Rptr. at 195.

172. *Huizar*, 156 Cal. App. 3d at 542, 203 Cal. Rptr. at 51. *See also Angelus*, 167 Cal. App. 3d at 542, 213 Cal. Rptr. at 409.

173. *American Motorcycle*, 20 Cal. 3d at 604, 578 P.2d at 915, 146 Cal. Rptr. at 198 (emphasis added).

stead, they expand the equitable indemnity doctrine to allow partial indemnity based on the relative negligence of the parties. Since the contribution statutes already contained a provision that parties settling in good faith were immune from suits for contribution, the statute was judicially expanded to bar suits by a comparatively negligent tortfeasor for partial indemnity as well.[174] In contrast, the cases holding that total indemnity no longer survives are distinguishable on their facts, and are more properly viewed as having misconstrued the intent underlying *American Motorcycle* and section 877.6.

2. Breach of a duty bars total indemnity

Courts asserting the premise that total indemnity was completely subsumed into comparative indemnity under *American Motorcycle* most often cite *City of Sacramento v. Gemsch Investment Co.*[175] as authority in support of their proposition. The City of Sacramento, which sought indemnity from other tortfeasors who had settled with the plaintiff, attempted to obtain total indemnification by drawing a distinction between active and passive negligence. It argued that because of its passive role it was entitled to full indemnity.[176] In rejecting this argument, the court correctly observed that while *American Motorcycle* did not expressly repudiate equitable indemnity under the old active-passive and primary-secondary tests, it made clear that where a defendant shared in fault it would not be able to take advantage of total indemnity.[177]

The *Gemsch* court pointed out that the city had the primary duty to inspect and maintain the trees and to prevent a dangerous condition on its property. While the city's breach of this duty was a passive rather than an affirmative act, the court concluded that "there is no reason to make such distinctions [between active versus passive negligence]. Whatever the nature of the relative faults, whatever the quantum, it is measurable under *American Motorcycle*."[178]

Thus, where a tortfeasor has breached a duty, the *Gemsch* court stated that there will be no analysis considering degrees of fault or of the character or kind of wrong attributed to the tortfeasor under the old

174. See *supra* text accompanying notes 64-79 for the *American Motorcycle* court's holding and its rationale.

175. 115 Cal. App. 3d 869, 171 Cal. Rptr. 764 (1981).

176. *Id.* at 875-76, 171 Cal. Rptr. at 768. The city also argued an alternative theory of implied contract which would allow the city indemnity against the private property owners. The court dismissed this theory on the grounds that such an implied contract did not exist. *Id.* at 875, 171 Cal. Rptr. at 767.

177. *Id.* at 876, 171 Cal. Rptr. at 768.

178. *Id.*

active-passive and primary-secondary standards. A negligent defendant can no longer shift his loss to a more culpable party under the standards of *American Motorcycle*.[179] By couching its reasoning in terms of the city's negligence, and by acknowledging that traditional equitable indemnity was still viable,[180] the *Gemsch* court implied that equitable principles would allow total indemnity in certain situations *not* guided by contract or statute.[181] It can be concluded that the good faith settlement in *Gemsch* precluded any kind of indemnification due to the city's share in the fault and not because total equitable indemnity has been completely subsumed by principles of partial indemnity articulated by the court in *American Motorcycle*.[182] Thus, *Gemsch* would not appear to be controlling in the case of a factually innocent party who seeks total indemnity.

Similarly, in *Kohn v. Superior Court*,[183] the nonsettling defendants who allegedly committed fraud in misrepresenting the value of a house, sought indemnification. The settling defendants allegedly failed to properly repair or inspect the residence. The nonsettling defendants, sellers of the house, argued that they were not seeking partial indemnity from the settling defendants but rather sought the "older type" of total indemnity based upon the distinction between active and passive negligence. Alternatively, they sought total indemnity based upon an implied contractual condition that the settling defendants would perform in a workmanlike manner.[184]

The *Kohn* court, relying on *Gemsch*, disagreed with the nonsettling defendants' claim that a good faith settlement by some of the cotortfeasors did not bar all forms of indemnity. The court concluded that *American Motorcycle* merged the older type of equitable indemnity into the new doctrine of comparative indemnity and made equitable indemnity unavailable from a co-defendant who has settled in good faith.[185]

179. *Id.* at 876-77, 171 Cal. Rptr. at 768.

180. *See supra* note 98 and accompanying text.

181. The *Gemsch* court stated that total indemnity remained viable only in claims with a contractual or statutory basis.

182. Judge Paras dissented from the majority opinion in *Gemsch*, arguing that it incorrectly concluded that *American Motorcycle* abrogated total indemnity in the case of a factually innocent party. He stated that *American Motorcycle* simply modified the equitable indemnity doctrine to permit partial indemnity on a comparative fault basis, but he did not address the issue of the city's breach of duty. *Id.* at 878-79, 146 Cal. Rptr. at 769 (Paras, J., dissenting).

183. 142 Cal. App. 3d 323, 191 Cal. Rptr. 78 (1983). See *supra* note 102 for a discussion of the facts of the case.

184. *Id.* at 329, 191 Cal. Rptr. at 83. The court dismissed the implied contract theory because the sellers had not properly presented that issue to the trial court. *Id.* at 330, 191 Cal. Rptr. at 83.

185. *Id.* at 330, 191 Cal. Rptr. at 83 (citing City of Sacramento v. Gemsch Inv. Co., 115 Cal. App. 3d 869, 171 Cal. Rptr. 764 (1981)).

However, the *Kohn* court failed to realize that the "older type" of equitable indemnity on which the *American Motorcycle* court focused was the active-passive theory of equitable indemnity as applied to tortfeasors who, to some degree, each *shared responsibility for the plaintiff's damages*. As indicated above, *Gemsch* also involved defendants who were all negligent to some degree.[186]

Therefore, *Kohn* is incorrect in its interpretation of *American Motorcycle* and *Gemsch*. Neither of those opinions discussed total indemnity in terms of a party who was only vicariously or derivatively liable. Both courts admitted that total indemnity still exists in appropriate cases.[187] *Kohn* more appropriately stands for the premise that the notions of fairness enunciated in *American Motorcycle* and *Gemsch* require that a tortfeasor *who shares in fault* is barred from seeking indemnity from settling co-defendants. The parties seeking indemnity in *Kohn* appeared to be culpable in failing to properly repair the house and in misrepresenting the value of the house. Thus, the court's statement in *Kohn* that comparative indemnity absorbed *all* forms of indemnity exceeded the parameters of those earlier decisions.

There are other decisions in which courts have denied total indemnity to a nonsettling defendant.[188] Although these courts couch their

186. *See supra* text accompanying notes 96-99 and 178.

187. *See supra* notes 98 and 159 and accompanying text.

188. *See, e.g.*, Torres v. Union Pac. R.R., 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984). See *supra* text accompanying notes 111-13 for a discussion of the *Torres* case.

See also IRM Corp. v. Carlson, 179 Cal. App. 3d 94, 224 Cal. Rptr. 438 (1986). The issue in *IRM* was whether a landlord (IRM), allegedly liable under theories of strict liability and negligence for a tenant's injuries arising out of a fall through a defective glass shower door, could claim partial or total indemnity from co-tortfeasors who entered into a pretrial settlement agreement with the plaintiff tenant. IRM was not the original owner of the apartment building when the shower door was installed. IRM was a subsequent purchaser and cross-claimed for indemnity against the contractor who built the apartment complex, the manufacturer and the installer of the shower door. *Id.* at 100-01, 224 Cal. Rptr. at 440. IRM based its cross-claim against the settling contractor and shower door installer upon four theories: (1) comparative equitable contribution; (2) total equitable indemnity arising out of its "passive" negligence versus the "active" negligence of the settling tortfeasors; (3) total indemnity based on cross-defendant's breach of express and implied warranties; and (4) total indemnity "by operation of law." *Id.* at 100, 224 Cal. Rptr. at 440.

The appellate court upheld the trial court's determination that the settlement was made in good faith and the dismissal of IRM's cross-complaint for indemnity. First, the settlement barred any claim for equitable comparative contribution. *Id.* at 102, 224 Cal. Rptr. at 442. Regarding the remaining theories presented by IRM, the court adhered to the reasoning in the *Gemsch* line of cases. The court concluded that total equitable indemnity and its concomitant active-passive analysis was no longer viable in light of *American Motorcycle*. *Id.* at 109, 224 Cal. Rptr. at 446. Further, the court found that IRM's allegations regarding contractual indemnity based on breach of express and implied warranties failed because there was no express contract of warranty or express agreement regarding indemnity between the parties. *Id.* at

reasoning in the language of *American Motorcycle*, the factual circumstances reveal tortfeasors who, by virtue of their own culpability, could never hope to obtain either partial or total indemnity. It follows that they were barred from seeking indemnification by virtue of their culpability, not by virtue of their vicarious or derivative status. Thus, these cases are not apposite regarding the subsumation of total indemnity by *American Motorcycle* and section 877.6.

3. Total indemnity denied when defendants cross-complained against the wrong party

Still other decisions exist in which a co-defendant sought relief on a theory of vicarious liability claiming that a legal or special relationship such as *respondeat superior* existed between himself and the settling defendant. While the courts in such cases denied the claims on the grounds that total indemnity was no longer available, those cases can be analyzed on the basis that the claimants cross-complained for indemnification against the wrong parties.

For example, in *Lopez v. Blecher*,[189] the owner of one of two vehicles involved in an accident did not seek indemnity from the driver of her vehicle, the party with whom she had a legal relationship. Instead, she sued the driver of the other vehicle, with whom no legal relationship existed.[190] The *Lopez* court did not deal with the fact that, for indemnification purposes, the owner had cross-complained against the wrong party. Instead, it admitted that the owner's liability was statutorily vicarious, but did not state the source of that liability. The court concluded

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109, 224 Cal. Rptr. at 447. Nor could implied contractual indemnity be granted because, as a form of equitable indemnity, it was abrogated by *American Motorcycle*. *Id.* at 109-10, 224 Cal. Rptr. at 447. Finally, IRM's cross-complaint also failed in its claim for indemnity "by operation of law" because IRM allegedly shared in the fault. *Id.* at 110-11, 224 Cal. Rptr. at 448.

In fact, IRM was held to be liable on theories of strict liability and negligence in the underlying case of Becker v. IRM Corp., 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985). There, the court found that IRM negligently failed to discover the defective glass shower door under its duties to examine the condition of the property and to maintain the rental property in a safe and habitable condition. *Id.* at 468, 698 P.2d at 125, 213 Cal. Rptr. at 222. Thus, IRM shared in the fault and its liability was thereby measureable under a comparative negligence standard and not under a theory of vicarious or derivative liability.

189. 143 Cal. App. 3d 736, 192 Cal. Rptr. 190 (1983). See *supra* text accompanying notes 103-10 for a discussion of the *Lopez* case.

190. Under California law, the permissive owner and driver of a vehicle are considered joint tortfeasors. CAL. VEH. CODE § 17150 (West 1971). Under the principles of joint and several liability, as reinforced in *American Motorcycle*, they are jointly and severally liable for plaintiff's injuries. However, the owner's liability is limited in dollar amount and the owner has a statutory right to total indemnity against the driver of the owner's car. CAL. VEH. CODE §§ 17151, 17153 (West 1971).

that the policy of encouraging settlement would be damaged if a vicariously liable defendant were to retain the right to claim partial indemnity against a co-defendant who has made a good faith settlement.[191] However, a vicariously liable defendant has a claim for *total*, not partial, indemnity. By the express terms of Civil Procedure Code section 877.6, even a vicariously liable tortfeasor can not seek partial indemnity. But why would such a defendant claim partial indemnity when he has a right to total indemnity at common law or by statute? Thus, the *Lopez* case is distinguishable on its facts and does not establish that total indemnity was subsumed by *American Motorcycle*.

Turcon Construction, Inc. v. Norton-Villiers, Ltd.[192] can be distinguished for the same reason. There, the plaintiff was injured when the gas tank on his motorcycle exploded in a collision with an automobile. The automobile was driven by an employee of Turcon Construction. Plaintiff sued the automobile owner and the manufacturers of the allegedly defective motorcycle and gas tank. All parties settled separately with the plaintiff. Subsequently, defendant Turcon Construction, the owner of the automobile involved in the accident, sought indemnity not from the driver of its vehicle but from the manufacturers of the motorcycle and gas tank. In *Turcon*, as in *Lopez*, there was no special or legal relationship between the potential indemnitor and potential indemnitee.[193]

The nonsettling defendant's cross-complaint was couched in terms of active versus passive negligence. The court determined that Turcon Construction affirmatively shared in the negligence vis-a-vis its employee and was seeking partial indemnity, which was precluded because a good faith settlement had been negotiated.[194] Concluding that the active-passive distinction no longer provided a basis for indemnity, the *Turcon* court denied the request.[195] The court did, however, suggest circumstances under which total indemnity might still be allowed. For example, if a cross-complaint rested on a theory of contractual indemnity or alleged that the cross-complainant's liability vis-a-vis the settling defendant was one imposed as a matter of law, such indemnity might still exist.[196] However, in *Turcon*, the court found that the cross-complaint did

191. *Lopez*, 143 Cal. App. 3d at 739-40, 192 Cal. Rptr. at 192.

192. 139 Cal. App. 3d 280, 188 Cal. Rptr. 580 (1983).

193. *Id.* at 284, 188 Cal. Rptr. at 583.

194. *Id.* at 283-84, 188 Cal. Rptr. at 582-83.

195. *Id.* at 284, 188 Cal. Rptr. at 583.

196. *Id.* Thus, if Turcon's employee had been named as a defendant and had entered into a pretrial settlement with the plaintiff, the court implied that a claim by Turcon for total indemnity against its employee might be more viable.

not contain allegations sufficient to justify shifting total liability to the settling defendant.[197]

These cases clearly indicate that liability which is predicated upon a legal relationship between indemnitor and indemnitee is still viable as a basis for allowing total indemnification. In fact, as suggested by one court, a two-pronged test exists to determine whether a cross-complaint for total indemnity survives a pre-trial settlement. First, "[t]he cross-complainant's liability must be vicarious" and second, "the cross-complainant must also have a special 'relationship' with the cross-defendant which makes it equitable for the former to shift *all* liability to the latter."[198] In both *Lopez* and *Turcon*, the vicariously liable defendants owned vehicles involved in accidents. Their liability did not arise from negligence on their part; but rather liability was imposed by statute.[199] However, the owners did not seek indemnity against the defendants with whom a legally recognized special relationship existed. Thus, any observations made by the *Lopez* and *Turcon* courts concerning the demise of total equitable indemnity are not applicable to a case involving vicarious or derivative liability.

4. Total indemnity denied because it is part of comparative fault analysis

The court in *Standard Pacific of San Diego v. A.A. Baxter Corp.*[200] denied total indemnity to a nonsettling vicariously liable tortfeasor.[201] It stated that although a vicariously liable tortfeasor is not a tortious wrongdoer, its liability rests on public policy. Therefore, its liability is subjected to a comparative negligence analysis and, as such, it must come within the purview of *American Motorcycle Association v. Superior Court*[202] and Civil Procedure Code section 877.6.[203] Total indemnity is "just one end of the spectrum of comparative equitable indemnification."[204] The *Baxter* court felt that under the reasonable range requirement of *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*,[205] the procedure for determining whether a settlement is in good faith requires accounting

197. *Id.*

198. *Angelus*, 167 Cal. App. 3d at 540, 213 Cal. Rptr. at 408 (emphasis in original).

199. CAL. VEH. CODE § 17150 (West 1971). See *supra* note 190 discussing this.

200. 176 Cal. App. 3d 577, 222 Cal. Rptr. 106 (1986).

201. See *supra* notes 115-23 and accompanying text for a discussion of the facts and the court's reasoning.

202. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

203. *Baxter*, 176 Cal. App. 3d at 589, 222 Cal. Rptr. at 113.

204. *Id.* at 588-89, 222 Cal. Rptr. at 112.

205. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985).

for the comparative lack of fault of a vicariously liable defendant.[206]

The supreme court in *Tech-Bilt* did not specify what constituted a reasonable range of proportionate liability in specific circumstances. That determination was left to the lower courts on a case-by-case basis.[207] The question that remains is what settlement amount would be reasonable under the *Baxter* rationale in a case involving issues of vicarious liability? Would a settlement by the negligent tortfeasor for fifty percent of his projected proportionate share of liability be reasonable? Would sixty percent or seventy percent be reasonable? Such allocation of liability does not conform to the historical purpose of restitution and unjust enrichment underlying equitable indemnity;[208] nor can such an allocation be deemed an equitable apportionment of loss. It may encourage settlements by negligent defendants; however, under *Tech-Bilt*, the good faith of settlements is subject to attack on grounds of unreasonableness by both vicarious and non-vicarious tortfeasors. Thus, under the *Baxter* approach, neither of the two competing policy goals of promoting settlement and equitable allocation of loss are advanced, much less brought into balance.

IV. PROPOSAL

Equitable indemnity is a common law doctrine which historically has been adjudicated on a case-by-case basis. As such, its application has often led to inconsistent results. The California Supreme Court's extension of the principles of comparative negligence to equitable indemnity in *American Motorcycle Association v. Superior Court*[209] took the uncertainty out of the application of the equitable indemnity doctrine, modifying it in terms of allocation of fault. In doing so, the policy goal of equitable apportionment of loss was served. By barring co-defendants from challenging the good faith of settlements, the *American Motorcycle* court met the second goal of encouraging settlements by ensuring their finality.

Unfortunately, drawn into the wake of this fundamental alteration of the equitable indemnity doctrine was the concept of total indemnity arising out of vicarious or derivative liability. In a situation where there is no wrongdoing to ascribe to a party, the principles of comparative fault

206. *Baxter*, 176 Cal. App. 3d at 589, 222 Cal. Rptr. at 113.

207. *Tech-Bilt*, 38 Cal. 3d at 499-501, 698 P.2d at 166-68, 213 Cal. Rptr. at 263-64.

208. The historical purpose of equitable indemnity is restitution and the prevention of unjust enrichment. See *supra* note 30 and accompanying text.

209. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

simply cannot apply.[210] A different standard must be utilized.

A challenge to a settlement by a defendant whose liability is solely vicarious or derivative should be judicially recognized. Total indemnification should be permitted when the following factors exist. First, the party seeking total indemnity should be required to show that a special or legal relationship existed with the acting defendants and that this relationship resulted in vicarious or derivative liability being imposed by statutory or decisional law. Special relationships of this type would include, among others, master/servant, principal/agent, manufacturer/retailer and *respondeat superior.*

Second, there must be no participation or negligent omission on the part of the party seeking total indemnity. For example, the owner of an automobile involved in an accident must not have loaned his car to a drunken driver whom the owner knew to be drunk and who subsequently caused an accident. Where the special relationship is principal/agent, for example, the principal must not have prior knowledge of the agent's tortious acts because such prior knowledge would be tantamount to participation.[211]

Similarly, in the area of products liability, a non-negligent retailer or distributor who sells a defective product and is subsequently found liable should be indemnified by the manufacturer in post-settlement situations. The same principle should apply in a situation where the indemnitor is the one who performed defective work on an owner's or lessee's property and, as a result, all are liable to the injured plaintiff. If the owner/lessee fails to discover the defect or dangerous conditions created by the indemnitor, then he or she should be totally indemnified, as long as there was no notice of the defect or dangerous condition and no duty to discover the defect or remedy the dangerous condition.

As long as a special or legal relationship exists between the indemnitor and the indemnitee and the indemnitee did not participate in the fault, equity and fairness, the theoretical basis of partial and total indemnity, demand recognition of a total indemnity challenge to a pretrial settlement.

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210. Angelus Assocs. Corp. v. Neonex Leisure Prods., Inc., 167 Cal. App. 3d 532, 541-42, 213 Cal. Rptr. 403, 409 (1985).

211. Conversely, the agent should be entitled to indemnification if the agent acted pursuant to the direction of the principal and reasonably believed the direction to be lawful. Also, indemnity should result if the agent was induced to act by a principal's misrepresentation upon which the agent reasonably relied.

A. Total Indemnity Pierces Pretrial Settlements

Total indemnity survives pretrial settlements in some situations. For example, a nonsettling tortfeasor can obtain indemnification from a settling defendant where the latter was under a contractual obligation to protect the nonsettling defendant against liability to a third person.[212] The right of parties to contract and to reap the benefits of their contract is thus preserved. Such indemnification would be partial or total, depending upon the contract terms. Further, if a plaintiff and a defendant have entered into a collusive settlement agreement, then the nonsettling defendant can challenge the good faith of a settlement and seek partial or total indemnity, depending upon whether the nonsettling defendant shared in the fault or was faultless.[213]

An interesting twist has evolved enabling a *settling* defendant to seek indemnity from a *nonsettling* defendant. Courts have recognized the right of a settling tortfeasor less at fault or not at fault, to be indemnified for any excess paid above the amount which represents his proportionate share of liability.[214] This view is justified in light of the policy goal of equitable distribution of loss according to relative fault.

However, as discussed previously in this Comment, the policy considerations shift when a nonsettling tortfeasor attacks the good faith of a pretrial settlement on grounds other than contract or tortious conduct, such as total indemnity. To encourage settlements, Civil Procedure Code section 877.6 guarantees that settling tortfeasors will be free from claims for partial or comparative indemnity from their nonsettling co-defend-

212. CAL. CIV. CODE § 2772 (West 1974); C.L. Peck Contractors v. Superior Court, 159 Cal. App. 3d 828, 205 Cal. Rptr. 754 (1984) (express contract claims for total indemnity not barred by CAL. CIV. PROC. CODE § 877.6); County of Los Angeles v. Superior Court, 155 Cal. App. 3d 798, 202 Cal. Rptr. 444 (1984) (implied contract claims not barred by statute).

213. Dompeling v. Superior Court, 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981) (tortious conduct test). *Dompeling* was disapproved by the California Supreme Court to the extent it was inconsistent with Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985). In *Tech-Bilt*, tortious conduct is deemed no longer the only basis on which a settlement can be attacked. Now, a settlement can also be attacked on the grounds of being outside the settling defendant's reasonable range of potential liability. *Tech-Bilt*, 38 Cal. 3d at 500, 698 P.2d at 167, 213 Cal. Rptr. at 264.

214. *See* Sagadin v. Ripper, 175 Cal. App. 3d 1141, 221 Cal. Rptr. 675 (1985) (tortfeasor who had paid in settlement more than its adjudicated comparative share of fault entitled to recover excess paid from nonsettling co-defendants); Bolamperti v. Larco Mfg., 164 Cal. App. 3d 249, 210 Cal. Rptr. 155 (1985) (co-tortfeasor who entered into good faith settlement allowed to pursue cause of action for indemnity against nonsettling co-tortfeasor); Burlington N. R.R. v. Superior Court, 137 Cal. App. 3d 942, 187 Cal. Rptr. 376 (1982), *disapproved on other grounds*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985) (railroad company which had entered into good faith settlement with plaintiff allowed to seek indemnity from other tortfeasor to the extent the railroad company was compelled to pay plaintiff).

ants. Some courts have indicated that the primary legislative intent behind this statute was to promote settlements by guaranteeing their finality.[215] However, in light of the "reasonable range" test espoused in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*,[216] the policy considerations of fair and equitable apportionment of loss and encouragement of settlements must be given equal importance.[217]

B. Settlements Must Be Within a Reasonable Range of a Settling Defendant's Liability

Proportionality of a settlement amount in relation to culpability has recently become a significant factor in the determination of what constitutes a good faith settlement and may profoundly affect the ability of a vicariously liable defendant to successfully challenge the good faith of a pretrial settlement. In *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*,[218] defendant Woodward-Clyde settled with the plaintiff for a waiver of costs. A nonsettling co-defendant, Tech-Bilt, challenged the pretrial settlement and cross-complained for indemnity. The trial court found the settlement to be in good faith and dismissed Tech-Bilt's cross-complaint for indemnity.[219] The supreme court reversed, holding that the settlement did not conform to good faith standards within the meaning of section 877.6 and thus did not immunize the settling defendant from liability to the other joint tortfeasors.[220]

Paying less in settlement than one would pay in a judgment encourages settlement. However, the *Tech-Bilt* court clearly stated that the settlement amount should bear some relation to the settling defendant's

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215. *See* Roberts, *supra* note 82, at 884.

216. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985). See *infra* note 220 and text accompanying note 221 for a discussion of what constitutes "reasonable range."

217. *Tech-Bilt*, 38 Cal. 3d at 498-99, 698 P.2d at 166, 213 Cal. Rptr. at 263. The court stated that "the equitable policies expressed in *American Motorcycle*, and implicitly adopted by the legislature, include both the encouragement of settlements and the equitable allocation of costs among multiple tortfeasors. Those policies would be disserved by an approach which emphasizes one to the virtual exclusion of the other." *Id.* (relying on Roberts, *supra* note 82, at 899-901).

218. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985).

219. *Id.* at 491-92, 698 P.2d at 161, 213 Cal. Rptr. at 258.

220. *Id.* at 498-99, 698 P.2d at 166, 213 Cal. Rptr. at 263. The court concluded that while bad faith is not established by showing that a settling defendant paid less than his theoretical proportionate or fair share, the amount of the settlement is not irrelevant in determining good faith. It held that certain factors must be considered, including a rough approximation of the plaintiff's total recovery and the settling defendant's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs and a recognition that a settling defendant should pay less in settlement than he would if he were found liable after trial. *Id.* at 499-500, 698 P.2d at 166-67, 213 Cal. Rptr. at 263-64.

relative culpability when considered in light of the plaintiff's potential recovery after a trial.[221] Otherwise, the settlement is subject to attack on the basis of bad faith because the settling party has bought his peace too cheaply.[222]

Since, under *Tech-Bilt*, a negligent party can obtain partial indemnity if the settling defendant has settled for an amount less than his reasonable share of potential liability, it would appear that a faultless party should be able to successfully challenge the good faith of a settlement on the ground of total indemnity. Allowing total indemnity would not abrogate California's tort law or its underlying policy considerations.

As noted previously, there are two competing goals underlying the issue of settlements.[223] First is the equitable allocation of loss among the parties according to relative fault. Second is the encouragement of settlements. Enveloping both of these policy considerations is the primary policy of maximizing the plaintiff's recovery.[224] Some courts concluded that the goal of encouraging settlements was more important than the goal of equitable allocation of loss.[225] Implementing this rationale, they justified their rejection of a nonsettling tortfeasor's cross-claim against a settling defendant for total or partial indemnity. This position is interesting in light of the legislative intent underlying section 877.6, where it appears an attempt was made to accommodate both goals.[226]

Whatever the ranking, permitting a vicariously liable tortfeasor to pierce a pretrial settlement will not abrogate the goals of maximizing the plaintiff's recovery, equitably apportioning liability or encouraging settlements. First, total indemnity will not affect the maximization of a victim's recovery under California law. All concurrent tortfeasors are

221. *Id.* at 499-501, 698 P.2d at 166-68, 213 Cal. Rptr. at 263-65.

222. For example, assume defendant *A* who is solvent and 80% at fault for the plaintiff's injuries, settles with the plaintiff for 20% of plaintiff's projected total recovery. That leaves the nonsettling defendant *B*, who is only 20% at fault, shouldering 80% of the damages. Under such a policy, pretrial settlements are indeed encouraged but it can hardly be said that they are equitable. A faultless party presents an even more compelling situation.

223. *See supra* note 154 and accompanying text.

224. The public policy considerations underlying multiparty tort litigation in decreasing order of priority are: (1) the maximization of recovery to the injured party; (2) settlement of the injured party's claim and (3) equitable apportionment of liability among concurrent tortfeasors. Sears, Roebuck & Co. v. International Harvester Co., 82 Cal. App. 3d 492, 496, 147 Cal. Rptr. 262, 264 (1978).

225. *Id. See also* Fisher v. Superior Court, 103 Cal. App. 3d 434, 447, 163 Cal. Rptr. 47, 56 (1980). *Cf.* River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972) (placing equitable allocation of loss before encouragement of settlements).

226. See *supra* note 217 for the supreme court's understanding of legislative intent in this area.

jointly *and* severally liable for a plaintiff's economic damages.[227] In the event a co-defendant is unable to pay his allocated share of a judgment, the other co-defendants must pay for the defaulting party's share of the economic damages as well as their own.[228] However, Proposition 51 has abrogated joint and several liability as to noneconomic damages in personal injury cases.[229] A plaintiff's recovery of noneconomic damages will no longer be maximized in the event of a defaulting or insolvent tortfeasor. Accordingly, the plaintiff cannot recover the amount defaulted upon from any other tortfeasor under any scenario.

When a defendant seeks total indemnity from the settling defendant, the issue is not how much the plaintiff is going to recover in economic damages. The nonsettling defendant must pay the plaintiff the amount of any judgment for economic damages.[230] However, he would be entitled

227. The Fair Responsibility Act of 1986, presented to California voters as "Proposition 51," defines economic damages as objectively verifiable losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repairs or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities. 1986 Cal. Legis. Serv. 6 (1986). *See also supra* note 8.

228. Paradise Valley Hosp. v. Schlossman, 143 Cal. App. 3d 87, 191 Cal. Rptr. 531 (1983) (defendant hospital and remaining solvent doctor liable for shortfall caused by bankruptcy of other defendant doctor in direct proportion to their respective degrees of culpability).

The general rule is stated in Sagadin v. Ripper, 175 Cal. App. 3d 1141, 221 Cal. Rptr. 675 (1985). There, the court stated:

> [t]he rule is that: (a) the solvent tortfeasors among themselves in an indemnity action must share in direct proportion to their respective degree of fault the liability of their judgment-proof coactors; and (b) this computation must be made as though the judgment-proof tortfeasors had not been involved in the accident.

Id. at 1174, 221 Cal. Rptr. at 696 (citing Lyly & Sons Trucking Co. v. State, 147 Cal. App. 3d 353, 358, 195 Cal. Rptr. 116, 118 (1983); 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, 1491-94 (1979)).

The rule contemplates not only the shortfall created by an insolvent or defaulting tortfeasor, but also a tortfeasor who made a good faith pretrial settlement with the plaintiff in an amount that represents less than his actual proportionate or comparative share of liability. Under Civil Procedure Code § 877.6, his good faith settlement renders him judgment-proof for the shortfall. Thus, in *Sagadin*, a settling tortfeasor paid less overall than the nonsettling defendants, even though more at fault. *Sagadin*, 175 Cal. App. 3d at 1174, 221 Cal. Rptr. at 696.

229. The Fair Responsibility Act of 1986 defines non-economic damages as subjective, nonmonetary 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. 1986 Cal. Legis. Serv. 6 (1986). *See also supra* note 8.

230. A release of one tortfeasor does not release any other tortfeasor, including one who is vicariously liable. Such a result would be contrary to the contribution statutes which were enacted to circumvent such an effect. Mesler v. Bragg Management Co., 39 Cal. 3d 290, 303, 702 P.2d 601, 608, 216 Cal. Rptr. 443, 449-50 (1985) (release of a subsidiary corporation did not effectuate a release of the vicariously liable parent corporation; holding extended to an employer-employee situation where the release of an employee did not act as a release of the employer). See *supra* note 164 for a discussion of the *Mesler* case.

to reimbursement from the settling defendant. To the extent the indemnitor was unable to reimburse the indemnitee the indemnitee would have to bear the burden, regardless of his status as a vicarious faultless party. Thus the goal of maximization of plaintiff's recovery is preserved as to economic damages.

Second, total indemnity will not have a chilling effect on pretrial settlements. As one court noted, total indemnity will deter *only* those settlements by defendants who are clearly at fault and who attempt to buy peace too cheaply at the expense of a faultless co-defendant.[231] In fact, total indemnity encourages a vicariously liable defendant to settle first because the defendant can then look to the one directly responsible for reimbursement.[232]

It has also been observed that recognizing the continued viability of total equitable indemnity will not foster uncertainty in settlements. The allegations of the complaint and cross-complaint for indemnity and an analysis of the facts of the particular action will permit the parties and the courts to determine whether a party is seeking total indemnity or partial indemnity.[233] Courts are presently conducting such an analysis, and are not allowing total indemnity when comparative fault is evident.[234]

Third, the policy of equitable apportionment of loss will not be abrogated by permitting continuation of total indemnity. There is nothing equitable about compelling a faultless party to bear any portion of the

231. Angelus Assocs. Corp. v. Neonex Leisure Prods., Inc., 167 Cal. App. 3d 532, 542, 213 Cal. Rptr. 403, 409 (1985).

232. Bolamperti v. Larco Mfg., 164 Cal. App. 3d 249, 255, 210 Cal. Rptr. 155, 159 (1985). *See supra* note 214 and accompanying text.

233. *Angelus*, 167 Cal. App. 3d at 542, 213 Cal. Rptr. at 410.

234. *See, e.g.*, Turcon Constr., Inc. v. Norton-Villiers, Ltd., 139 Cal. App. 3d 280, 188 Cal. Rptr. 580 (1983). The *Turcon* court determined that the cross-complaint for indemnity did not rest on any contractual indemnity nor did it allege that its liability was imposed as a matter of law because of its relationship with the other defendant. *Id.* at 284, 188 Cal. Rptr. at 583. The court noted that the cross-complaint could only be read as seeking indemnity on the basis of partial or comparative fault, which is precluded by Civil Procedure Code § 877.6. *Id. See also* New Hampshire Ins. Co. v. Sauer, 83 Cal. App. 3d 454, 147 Cal. Rptr. 879 (1978). In *Sauer*, the court stated that liability was properly apportioned between New Hampshire and Sauer. Because both defendants were liable for different torts against the same plaintiff, one could not seek indemnity from the other. In indemnity situations, two parties concur in fact or in law in one injury to a third party, and the question is who will pay the damages arising out of that single injury. Here, although New Hampshire framed its complaint in terms of indemnity, the case simply involved a cause of action against Sauer for negligence. *Sauer*, 83 Cal. App. 3d at 459-60, 147 Cal. Rptr. at 882. *See also* Torres v. Union Pac. 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); City of Sacramento v. Gemsch Inv. Co., 115 Cal. App. 3d 869, 171 Cal. Rptr. 764 (1981).

damages when indemnity can be obtained from the party directly responsible. Where there is no fault to apportion, the principles of comparative negligence should be inapplicable.[235] It is acknowledged that maximization of the plaintiff's recovery is a superior goal to that of equitable apportionment.[236] Thus, in the case of an insolvent judgment-debtor, for example, a vicariously liable, but solvent co-defendant would bear the liability. However, in cases where a settling defendant has the means to pay, equity demands that the vicarious tortfeasor be reimbursed by the party directly responsible, regardless of whether that party has settled with the plaintiff.

VI. CONCLUSION

The lower courts in California are not certain about the status of total equitable indemnity in the event of a pretrial settlement between the plaintiff and the culpable tortfeasor. However, the California Supreme Court has expressed concern over the matter and implied that total indemnity in such an instance has not been supplanted by *American Motorcycle Association v. Superior Court*[237] or Civil Procedure Code section 877.6.[238] California tort law historically has evolved in a manner indicating that its ultimate destination is a just and equitable solution for *all* parties in a multi-party tort action.[239] Therefore, total indemnification should be recognized as a viable doctrine not only in post-judgment situations and in cases where the settling party is entitled to total indemnity, but it should also be recognized where the culpable party has entered into a pretrial settlement with the plaintiff, leaving the faultless party to pay a judgment. Settlements may be discouraged, but only in the limited instance where a fully liable tortfeasor attempts to buy settlement too cheaply. The policy of the maximization of the injured party's recovery is not disturbed while the policy of equitable distribution of loss is elevated to equal status.

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235. *Angelus*, 167 Cal. App. 3d at 541-42, 213 Cal. Rptr. at 409.

236. *See supra* note 224. However, in light of Proposition 51, it appears that the maximization of a plaintiff's recovery of non-economic damages is now secondary to equitable apportionment of loss among tortfeasors. See *supra* note 8 for an explanation of Proposition 51.

237. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

238. Mesler v. Bragg Mgmt. Co., 39 Cal. 3d 290, 305, 702 P.2d 601, 609-10, 216 Cal. Rptr. 443, 451-52 (1985); Safeway Stores v. Nest-Kart, 21 Cal. 3d 322, 332 n.5, 579 P.2d 441, 446 n.5, 146 Cal. Rptr. 550, 555 n.5 (1978).

239. *See* Roberts, *supra* note 82, at 936; Daly v. General Motors Corp., 20 Cal. 3d 725, 736, 575 P.2d 1162, 1168, 144 Cal. Rptr. 380, 386 (1978).