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**COMPARATIVE FAULT AND THE INSOLVENT
DEFENDANT: A CRITIQUE AND
AMPLIFICATION OF *AMERICAN
MOTORCYCLE ASSOCIATION v.
SUPERIOR COURT***

By
*Harry N. Zavos**

I. INTRODUCTION

This article examines problems suggested by *American Motorcycle Association v. Superior Court*¹ that are associated with an insolvent defendant in multiple party litigation, within the context of California's system of comparative negligence and partial equitable indemnity based on comparative fault. It takes the position that California's formulation of comparative negligence, absent overriding considerations, requires that the insolvent defendant's share of a loss be borne by *all* of the remaining parties in direct ratio to their comparative fault, regardless of whether they are plaintiff or defendant.

Sections II through IV provide background and an analysis of the problems posed by the doctrines of comparative fault and joint and several liability. Section V examines, critiques, and finds wanting the considerations proffered by the California Supreme Court in support of its holding that the risk of the insolvent defendant must be borne solely by the remaining solvent defendants. The supreme court's major contention that a party's status as plaintiff or defendant results from a fundamental difference in the character of the negligent conduct is examined and rejected. Section VI examines and critiques the appellate court's considerations in support of its holding that the risk of the insolvent defendant should fall solely on the plaintiff. The appellate court's emphasis on the need to protect the social fund is examined in detail.

Sections VII and VIII deal with an amplification of the theory of partial equitable indemnity which may include a culpable plaintiff. They set out an approach to deal with those situations in which parties

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1. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

pay more than their proportionate share of a judgment. Section VII indicates how the rights and liabilities of all the parties should be affected each time such a party is able to recover against any other party. Section VIII outlines a practical manner in which the theory developed in Section VII might be implemented.

II. BACKGROUND

In *Li v. Yellow Cab Co.*,² the California Supreme Court rejected the traditional "all or nothing"³ defense of contributory negligence. In so doing, the court caused tort law to veer in courses previously uncharted by the state's legal system. In place of the "harsh"⁴ and "inequitable"⁵ "all or nothing" defense, the court established the principle that "liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault."⁶ This new doctrine did not spring forth as did Athena from the head of Zeus, fully clothed in armour and unanswerable to higher authority—not fully armoured, because the court recognized that the adoption of the new principle of comparative fault involved numerous problem areas to be addressed by future cases;⁷ not immune to higher authority, because the court recognized that comparative negligence was mandated by

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

3. *Id.* at 810-11, 812-13, 828-29, 532 P.2d at 1230-31, 1232, 1243, 119 Cal. Rptr. at 862-63, 864, 875.

4. *Id.* at 810, 532 P.2d at 1230, 119 Cal. Rptr. at 862.

5. *Id.*

6. *Id.* at 813, 532 P.2d at 1232, 119 Cal. Rptr. at 864. The original formulation was worded in terms of liability for damages "borne by those whose negligence caused it in direct proportion to the extent of their causal responsibility." *Id.* at 812-13 n.6a, 532 P.2d at 1232 n.6a, 119 Cal. Rptr. at 864 n.6a. The court then substituted the words "respective fault" for "causal responsibility" and indicated that by the use of "fault" the court meant nothing more than "negligence" in the accepted legal sense. *Id.* The court thus seemed to focus on the relative negligent character of the conduct, rather than on its relative causative contribution. See Comment, 21 VAND. L. REV. 938 (1968) (part of a symposium on comparative negligence). In *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978), the court sought to blend the new principle of comparative negligence with claims involving strict liability for products. It recognized that "fault" should include acts or omissions that subject a person to strict tort liability, *id.* at 741-42, 575 P.2d at 1171-72, 144 Cal. Rptr. at 389-90, and that the principle might be better described as "equitable apportionment of loss" rather than as comparative fault or negligence. *Id.* at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390. In this article, the word "negligence" applies equally to *Daly*-type situations where "fault" presumes liability predicated on strict liability as well as to ordinary negligence. And, to the extent that the supreme court applies comparative fault to wilful conduct, "negligence" as used in this article is intended to cover such conduct. See *infra* note 106.

7. 13 Cal. 3d at 828-29, 532 P.2d at 1243, 119 Cal. Rptr. at 875.

logic, practical experience, and fundamental justice.⁸

One of the questions left unanswered by the court in *Li* is whether the traditional common law doctrine of joint and several liability is to remain unaffected by comparative fault. Under this doctrine, if two or more negligent defendants, acting either independently or jointly, are the proximate cause of an indivisible injury, each defendant is liable to the plaintiff for the entire injury.⁹ The basis for joint and several liability is the absence of any logical basis for apportioning loss.¹⁰ With the advent of *Li*, a specific percentage figure could be found which would represent the proportion of fault of each of the parties causing an injury. Not only could this figure serve as a logical basis for apportioning the loss among the parties, but the court's formulation of the "pure" comparative standard suggested that in multiple party litigation a defendant should have his liability limited in direct proportion to his negligence. The court concluded:

[T]he "all-or-nothing" rule of contributory negligence as it presently exists in this state should be and is herewith superseded by a system of "pure" comparative negligence, the fundamental purpose of which shall be to assign responsibility and liability for damage in direct proportion to the amount of negligence of each of the parties.¹¹

Some California courts did not see in *Li* any basis for altering the

8. *Id.* at 810-13, 532 P.2d at 1230-32, 119 Cal. Rptr. at 862-64. Without distorting the court's opinion, it could be added that the greatest of these factors is "fundamental justice." A fair reading of *Li* is consistent with the statement that the major precept guiding the court was that of fairness or justice. The pervasiveness of that fundamental precept is evident in *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978). There the court held that plaintiff's negligent conduct could diminish recovery against a defendant whose liability was founded on strict liability. Faced with the conceptual difficulty of comparing conduct based on fault with liability not based on fault, the court stated that "[f]ixed semantic consistency . . . is less important than the attainment of a just and equitable result." *Id.* at 736, 575 P.2d at 1168, 144 Cal. Rptr. at 386. In fact, the court characterized the *Li* principle as an equitable one when it suggested that the principle might be best described as "equitable apportionment of loss" rather than as comparative fault or negligence. *Id.* at 736-37, 575 P.2d at 1168-69, 144 Cal. Rptr. at 386-87. The court also characterized the holding in *Li* as announcing the principle that "loss should be assessed equitably in proportion to fault." *Id.* Finally, the court, in extending the principle of *Li* to strict liability cases, spoke in terms of "logic, justice and fundamental fairness" and indicated that "[t]he law consistently seeks to elevate justice and equity above the exact contours of a mathematical equation." *Id.* at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390.

9. *Apodaca v. Haworth*, 206 Cal. App. 2d 209, 213, 23 Cal. Rptr. 461, 463 (1962).

10. *Id.*, 23 Cal. Rptr. at 463-64; *Finnegan v. Royal Realty Co.*, 35 Cal. 2d 409, 433-34, 218 P.2d 17, 32 (1950).

11. 13 Cal. 3d at 829-30, 532 P.2d at 1243, 119 Cal. Rptr. at 875; *see also id.* at 810-13, 532 P.2d at 1230-32, 119 Cal. Rptr. at 862-64.

traditional doctrine of joint and several liability.¹² Other courts, including some trial courts and one court of appeal,¹³ concluded that the court's formulation of comparative negligence in *Li* meant that judgment against each of several defendants was limited to the percentage of the damages assigned to each defendant.¹⁴ In effect, these courts viewed *Li* as eliminating joint and several liability in a multiparty setting and, in its place, instituting several liability based on the extent of each party's fault. Thus, if plaintiff *A*, who suffered a \$100,000 loss, were herself 30% negligent, and defendant *B* were 10% negligent, and defendant *C*, 60% negligent, then the plaintiff could only get a \$10,000 judgment against defendant *B* and a \$60,000 judgment against defendant *C*. The Second Appellate District, Division One, gave expression to this understanding of the law in *American Motorcycle Association v. Superior Court*.¹⁵

The posture of *American Motorcycle* as it reached the appellate court was as follows:

1. Plaintiff had sued several defendants in connection with injuries suffered in a motorcycle event.
2. Defendant American Motorcycle Association (AMA) answered, denying plaintiff's allegations and raising certain affirmative defenses, including a claim that plaintiff's own negligence was a proximate cause of the injury.
3. AMA sought to file a cross-complaint against plaintiff's parents, seeking (a) indemnity from plaintiff's parents if AMA were found liable; and (b) a declaration of relative negligence, so that any award against AMA might be reduced by the percentage of damages allocable to the parents' negligence.¹⁶
4. The trial court denied AMA's motion to file the cross-complaint. The matter was then brought before the appellate court on a writ of mandate to order the trial court to vacate its order, and to enter a new order allowing the cross-complaint to be filed.

The appellate court granted relief by allowing the cross-complaint,

12. See, e.g., *Stambaugh v. Superior Ct.*, 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976).

13. *American Motorcycle Ass'n v. Superior Ct.*, 135 Cal. Rptr. 497 (1977), *vacated*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

14. See Comment, *Comparative Fault—Three Years After Li*, 12 CENTER FOR CAL. JUDGES, JUD. ED. & RESEARCH J., § 18 at p. C-137 (Spring 1978).

15. 135 Cal. Rptr. 497 (1977), *vacated*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

16. *Id.* at 499-500. In the first cause of action, AMA sought to shift the entire loss to the parents. In the second cause of action, AMA sought to bring in the parents to reduce AMA's potential share of the damage in the event that there was several liability.

including the cause of action founded on the proposition of several liability. In so doing, the court explicitly affirmed several liability. The court justified rejection of joint and several liability in two ways. First, the court indicated that the foundation of the doctrine had been eliminated by *Li*.¹⁷ Second, the court propounded positive arguments for its elimination based on the language of *Li* and on the social costs of retaining joint and several liability.¹⁸

The California Supreme Court reversed the appellate court. The supreme court held that (1) *Li* did not require any modification of the doctrine of joint and several liability among independent concurrent tortfeasors; (2) *Li* required that partial equitable indemnity be available to defendants so that any joint tortfeasor who paid more than his share of a judgment could obtain partial indemnity from fellow defendants based on comparative fault; and (3) AMA could file a cross-complaint in order to seek such indemnity.¹⁹

Justice Clark, dissenting, stated that the majority of the court, by retaining joint and several liability, had rejected the *Li* principle. He made his point by using an example involving a 30% at fault plaintiff, *A*, a 10% at fault solvent defendant, *B*, and a 60% at fault insolvent²⁰ defendant, *C*. Under the majority opinion, *A* could recover the entire damage from *B*, reduced only by *A*'s proportion of negligence—that is, *A* could recover 70% of the damages from a 10% at fault defendant.²¹ The majority did not deny Justice Clark's figures. Instead, it relied upon three rationales to indicate that the joint and several liability concept is not inconsistent with the doctrine announced in *Li*.

This article examines the majority's rationales, as well as those of the lower court in support of several liability, and compares them with the wellspring of the *Li* principle of comparative fault—logic, practical experience, and fundamental justice. This examination shows that *Li* demands a rejection of the solution of both courts and requires a solution similar to that suggested by Justice Clark and Professor Fleming,²² a solution in which the risk of the insolvent defendant is borne by *all*

17. *Id.* at 500.

18. *Id.* at 500-03.

19. *American Motorcycle Ass'n v. Superior Ct.*, 20 Cal. 3d 578, 582-84, 578 P.2d 899, 901-02, 146 Cal. Rptr. 182, 184-85 (1978).

20. The word "insolvent" in this article is not used in any technical sense. It merely refers to a judgment debtor whose available assets are insufficient to satisfy the judgment.

21. 20 Cal. 3d at 609, 578 P.2d at 919, 146 Cal. Rptr. at 202 (Clark, J., dissenting).

22. See Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Association v. Superior Court*, 30 HASTINGS L.J. 1465, 1466, 1494-98 (1979).

the parties, including the plaintiff, in direct proportion to their relative fault.

Once the proposition that the risk of the insolvent defendant should be borne by all the parties legally responsible for the injury is accepted, questions remain as to how that insolvency should be distributed among the parties and what rights and liabilities should be created as a result of that distribution. These general questions are addressed in Sections VII and VIII of this article.

III. THE PROBLEM

If all defendants are financially viable and accessible, the *Li* principle is easily satisfied regardless of whether liability is several, as the lower court held, or joint and several, as the supreme court held.

Following Justice Clark's example, let us assume that *A* is a 30% at fault plaintiff who suffers a loss of \$100,000; *B*, a 10% at fault defendant; and *C*, a 60% at fault defendant. The loss resulting from the combined fault of *A*, *B*, and *C* is initially borne by *A*. Under the lower court's decision, *A* could shift part of the loss by recovering 10% from *B* and 60% from *C*. If *B* and *C* are financially solvent and accessible to *A*, each of the three parties would ultimately bear the loss in direct proportion to his respective fault. *A* would receive \$70,000 from *B* and *C*, relieving him of all but 30% of the loss that he initially suffered. *B* would pay \$10,000 and *C* the remaining \$60,000. Under the supreme court's view of joint and several liability, *A*, who initially bore 100% of the loss, could recover 70% from either *B* or *C*. Assuming both *B* and *C* are solvent, *A* could collect \$70,000 from *B*. At that point, *A* bears a loss in direct proportion to his negligence, but *B* bears 70% of the loss although he is only 10% at fault. Given the court's announced doctrine of partial equitable indemnity and *C*'s financial viability, *B* can then recover \$60,000 from *C*. Ultimately, the parties bear the loss in direct proportion to their respective fault. In either case, the parties arrive at the same destination, albeit by different routes.

The problem arises when one of the parties, *C*, for example, is insolvent.²³ Under these circumstances, both the lower court's solution

23. This article focuses on the problem of a defendant in a multiparty litigation who is not answerable in damages due to ostensible insolvency. See *supra* note 20. It also covers those situations where an at fault party is not answerable in damages because he was not named in the suit by the plaintiff nor was he brought in by any of the defendants. However, a defendant may also be unanswerable to pay that part of the loss corresponding to his proportionate fault for other reasons. For example, he could be unavailable to answer in damages because of a prior settlement with the plaintiff in which the settlement figure was less than his proportionate share of the judgment. 20 Cal. 3d at 604, 578 P.2d at 915, 146

of several liability and the high court's solution of joint and several liability are contrary to the proposition that liability for damages should be borne by the parties in direct proportion to their respective fault. The courts differ only as to who should bear the disproportionate share, i.e., the burden of *C*'s insolvency. With the lower court's "several liability," *A* initially bears 100% of the loss and can only be reimbursed by *B* for \$10,000, leaving \$60,000 unsatisfied and borne by *A* in excess of *A*'s proportionate fault. Under the supreme court's "joint and several liability," *A* initially bears 100% of the loss and can recover \$70,000 from *B*. *A* bears a loss in direct proportion to his negligence, but *B* bears \$70,000 of loss, \$60,000 in excess of the amount attributable to his 10% proportionate share of fault.

In one sense, if any one defendant is insolvent, the *Li* principle cannot apply to all the remaining parties because a portion of the damage attributable to the insolvent defendant's fault would have to be borne by someone else. The lower court would insure that a defendant's liability would not exceed his proportionate fault, placing the burden on the plaintiff; the supreme court's solution would favor the plaintiff at the expense of the solvent defendant.

A third alternative suggested by Professor Fleming²⁴ and endorsed by Justice Clark²⁵ would have the negligent plaintiff²⁶ and a solvent defendant bear the \$60,000 loss according to the *Li* principle—in direct proportion to their respective fault. In this way, plaintiff and defendant would be treated evenhandedly as to the unrecoverable \$60,000. Such a solution mirrors the primal concept that in a system where liability is based on fault, the extent of fault should govern the extent of liability or loss.²⁷ Since *C* cannot be made to answer for the portion of damage attributable to his fault, the total loss of \$100,000 remains to be borne by the 30% at fault plaintiff, *A*, and the 10% at fault defendant, *B*. Under the *Li* principle, the total loss should be borne in direct propor-

Cal. Rptr. at 198. Furthermore, in a workers' compensation setting, if one of the parties at fault was an employer, that employer's liability would be determined by the worker's compensation award. If the award was less than his proportionate share of the judgment under comparative negligence principles, he would be unavailable for the difference. See CAL. LABOR CODE §§ 3601(a), 3864 (West 1971 & Supp. 1981); *Arbaugh v. Proctor & Gamble Mfg. Co.*, 80 Cal. App. 3d 500, 145 Cal. Rptr. 608 (1978); *E.B. Wills Co. v. Superior Ct.*, 56 Cal. App. 3d 650, 128 Cal. Rptr. 541 (1976). This article does not deal with such situations.

24. Fleming, *Foreword: Comparative Negligence at Last—By Judicial Choice*, 66 CALIF. L. REV. 239, 251-52, 267-68 (1976).

25. 20 Cal. 3d at 614, 578 P.2d at 922, 146 Cal. Rptr. at 205 (Clark, J., dissenting).

26. Fleming and Justice Clark would retain joint and several liability when the plaintiff was without fault, a position consistent with the thesis developed in this article.

27. *Li*, 13 Cal. 3d at 811, 532 P.2d at 1231, 119 Cal. Rptr. at 863.

tion to *A*'s and *B*'s relative fault—that is, in a 3 to 1 ratio (30% to 10%), with plaintiff absorbing \$75,000 of the loss and defendant *B* absorbing \$25,000 of the loss.²⁸

The result is the same if *A* and *B* absorb their share of the \$100,000 loss attributable to their respective fault (\$30,000 for *A* and \$10,000 for *B*)²⁹ and, on a ratio of 3 to 1, absorb the \$60,000 portion of the loss attributable to the insolvent defendant, *C* (\$45,000 by *A* and \$15,000 by *B*).³⁰ This method of calculation is useful when *C* is partially solvent and is able to respond in damages for a portion, but not for all, of his share of the loss. It is also more in keeping with the conceptual formulation of the comparative fault principle: *A* and *B* each absorb the loss attributable to their respective fault and between them they share the amount attributable to the insolvent defendant based on a ratio of their fault.

This solution might be viewed as a modified form of joint and several liability coupled with the supreme court's doctrine of partial equitable indemnity. It is modified because plaintiff, when at fault, would be considered, for purposes of joint and several liability, as a concurrent joint tortfeasor along with the defendants. Thus, in our example, *A*, *B*, and *C* are concurrent tortfeasors jointly and severally liable for the entire loss of \$100,000.³¹ *A*, as plaintiff, initially has borne the loss in excess of his proportional share while the concurrent tortfeasors *B* and *C* have not borne any loss. Therefore, on the basis of the supreme court's principle of partial equitable indemnity, *A* should be compensated by his fellow tortfeasors based on their comparative fault. This would appear to be the solution required by the *Li* principle

28. In effect, when *C* is totally insolvent, one could ignore *C* for the purposes of fixing the proportion of loss to be borne by other parties whose fault is causally implicated in the loss. That is, while *C* may be 60% at fault, his insolvency would result in his acts being treated as an act of God. The total fault then would be allocated between *A* and *B*. Since *A* was 30% at fault and *B* 10%, the ratio of comparative fault between the two is 3:1. The entire \$100,000 amount would then be divided according to this ratio. As a result, *A* would absorb \$75,000 of the loss and *B* \$25,000.

29. These damages may be termed *A*'s and *B*'s "culpable damages." See *infra* text accompanying notes 54-98.

30. These damages may be termed *A*'s and *B*'s "innocent damages." See *infra* text accompanying notes 54-98.

31. To refer to a plaintiff as a "concurrent tortfeasor jointly and severally liable for the entire loss along with other defendants" is obviously an artificial use of the language, for what sense does it make to say that *A* is jointly and severally liable for the loss? To whom is plaintiff liable? To himself? Obviously, what is meant by saying that plaintiff could be viewed as a concurrent tortfeasor jointly and severally liable with *B* and *C* for the loss is that *A* is as legally responsible for the loss as are *B* and *C*—that *A* is as much a proximate cause of the loss as are *B* and *C*, and must share in the loss in the same way as do *B* and *C*.

unless those midwives of *Li*—logic, practical experience, and fundamental justice—require that the law favor either plaintiffs or defendants. The supreme court, however, offered several rationales to justify favoring plaintiffs at the expense of defendants and refused to apply the *Li* principle to that portion of loss attributable to an insolvent defendant; the lower court, in contrast, favored defendants over plaintiffs. Before the adequacy of those rationales can be evaluated, an exposition of the joint and several liability concept is required.

IV. JOINT AND SEVERAL LIABILITY

The term “joint and several liability,” as commentators have pointed out, has had a variety of meanings depending upon the contexts in which it has been used.³² Its early history is embedded in the notion of “joint” tortfeasors.³³ Since each joint tortfeasor was responsible for the other’s tort, his liability to the plaintiff was considered joint and several. Some commentators point out that historically there was confusion between the procedural and substantive aspects of “joint torts” or “joint tortfeasors.”³⁴

Procedurally, the question of whether a tort was joint determined whether the plaintiff could sue two or more defendants in the same action.³⁵ Substantively, defendants whose tort was joint could each be liable to a plaintiff for the entire injury.³⁶ Joint torts occurred when the tort of one defendant was a tort of the other. Such joint torts have been roughly classified into three categories: (1) where defendants acted in concert or from a common design;³⁷ (2) where the tortious conduct of one (for example, a servant) was vicariously attributed to another (for

32. 1 F. HARPER & F. JAMES, *THE LAW OF TORTS*, 692-714 (1956) [hereinafter cited as HARPER & JAMES]; Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413 (1937) [hereinafter cited as Prosser]; Comment, *Joint Torts and Several Liability*, 17 TEX. L. REV. 399, 403-04 (1939) [hereinafter cited as *Joint Torts*]; Comment, *Recent Developments in Joint & Several Liability*, 24 SYRACUSE L. REV. 1319, 1319-33 (1973) [hereinafter cited as *Recent Developments*].

33. See Prosser, *supra* note 32, at 414-18.

34. See, e.g., 1 HARPER & JAMES, *supra* note 32, at 694-97; *Joint Torts*, *supra* note 32, at 404.

35. 1 HARPER & JAMES, *supra* note 32, at 595-97; Prosser, *supra* note 32, at 414-18.

36. 1 HARPER & JAMES, *supra* note 32, at 595-97; Prosser, *supra* note 32, at 418-21.

37. Where two individuals acted in concert by a common design, causing injury, the act of one became the act of both as far as the law was concerned. Indeed, where there was agreement, the acts of one would become the acts of the other even if the other did not act at all. *Tide Water Assoc. Oil Co. v. Superior Ct.*, 43 Cal. 2d 815, 827, 270 P.2d 35, 42-43 (1955); RESTATEMENT OF TORTS, § 876, Comment on clause (a) (1939) [hereinafter cited as RESTATEMENT].

example, the master),³⁸ and (3) where two defendants breached a common duty.³⁹ Joint tortfeasors were each liable for the entire injury because one was held responsible for the tortious conduct of the other—the tortfeasors shared the same tortious conduct. Since there was an identity of tortious conduct or of duty breached, the rigid rules of procedural joinder were relaxed, and all the tortfeasors could be joined in one action.

Two or more individuals' liability for the entire injury, however, did not necessarily make them joint tortfeasors who could be joined in one action.⁴⁰ Courts early recognized that entire liability for a given injury may be traceable to the tortious conduct of two or more defendants even when the tort was not "joint." They recognized that the tortious conduct of a defendant, separate and distinct from that of another, might combine with another's tortious conduct to proximately cause injury to a plaintiff.⁴¹ In such an instance, the tort would not be "joint," because the conduct of each defendant was independent of the other.⁴² The first party was not able to insulate himself from liability

38. The very statement of the principle of vicarious liability is a statement that the act giving rise to liability is coextensive and indistinguishable as between employee and employer or agent and principal. Agents or servants are held liable for their tortious acts; the principal or master is not held liable for his own act, but only for the act of his agent or servant. The acts of the agent or servant vis-a-vis the plaintiff are made the acts of the principal or master for the purposes of liability to the plaintiff.

39. See Prosser, *supra* note 32, at 429-31; 1 HARPER & JAMES, *supra* note 32, at 692-94, 697-702; *Recent Developments*, *supra* note 32, at 1319. Harper and James indicate that the concert-of-action and breach-of-duty situations are examples of the conduct of one becoming the conduct of another. 1 HARPER & JAMES, *supra* note 32, at 692. In the concert-of-action situation, the conduct of one defendant becomes the conduct of the other regardless of whether the other acts. In the breach of a common duty situation, however, there is obviously conduct by two individuals—for example, failure to maintain a common wall which, as a result, collapses and injures plaintiff. In this latter situation, both defendants act or fail to act and do so independently of one another; however, that action or inaction is identical or coextensive vis-a-vis the plaintiff's injury, thereby providing the unity to make the tort a joint tort. In the common duty situation, the defendants' breaches of the common duty are indistinguishable. Thus, in *Doeg v. Cook*, 126 Cal. 213, 58 P. 707 (1899), two sets of defendants were under the same duty to maintain a street. Both breached that duty, causing plaintiff's injury. While the court recognized that joinder, the procedural aspect of joint and several liability, required concert of action, it nevertheless allowed joinder in this case in the absence of such concerted action. In doing so, the court stated that joinder would be allowed when the concurrent negligence of the parties causing an injury occurred "at one and the same time." *Id.* at 218, 58 P. at 708. The concurrent negligence of the parties was coextensive and indistinguishable.

40. 1 HARPER & JAMES, *supra* note 32, at 692-93; Prosser, *supra* note 32, at 414-15.

41. See, e.g., *Lacy v. Pacific Gas & Elec. Co.*, 220 Cal. 97, 98-99, 29 P.2d 781, 782 (1934); *Carrol v. Central Counties Gas Co.*, 74 Cal. App. 303, 308, 240 P. 53, 55 (1925).

42. 1 HARPER & JAMES, *supra* note 32, at 693. Such defendants were called "independent concurrent tortfeasors."

by referring to the second party's conduct.⁴³ In other words, if the nature of two defendants' conduct was such that in legal effect they were both the proximate cause of the injury, the fact that their actions concurred to proximately cause that injury did not relieve either of liability for the entire damage.

In such a case, the source of liability for each of the defendants is not based on an identity of the tortious conduct, nor is it based on the breach of an identical duty. Each defendant's tort is his own and the duty breached by one defendant is not identical to that of the other. Liability for the entire injury rests on the principle that each defendant is liable for all of the injury proximately caused by his tortious conduct, even though other factors, innocent or culpable, may have causally combined with that conduct to bring about plaintiff's loss.⁴⁴ An obvious requisite for holding each of two or more such defendants liable for the entire injury is that the injury be indivisible—that is, the harm cannot be apportioned by reference to the causative contribution of the defendants.⁴⁵ If the injury could be apportioned among two or more defendants based upon their causal contribution, then to hold them each liable for the entire injury would amount to holding both liable for more damage than was proximately caused by each.

Thus, liability of two or more individuals for the same injury arose from two different sources. The first was based on the individuals being joint tortfeasors; this in turn depended on whether there was a unity of plaintiff's cause of action against each.⁴⁶ The second source was based on a radically different principle in which there was no coextensiveness or identity of action on the part of the defendants; the acts of one defendant were not made the acts of the other. In its early evolution, the concept of joint tortfeasors was reserved for those situations where the conduct of one could be made the conduct of the other, and was not based on substantive liability for the entire injury. Later, joint liability for the entire injury became synonymous with being a "joint tortfeasor."⁴⁷

43. *Urland v. French*, 141 Cal. App. 2d 278, 284, 296 P.2d 568, 572 (1956).

44. *Merrill v. Los Angeles Gas & Elec. Co.*, 158 Cal. 499, 503-05, 111 P. 534, 536-37 (1910); *Pastene v. Adams*, 49 Cal. 87, 90 (1874).

45. See RESTATEMENT (SECOND) OF TORTS § 433A (1976) [hereinafter cited as RESTATEMENT (SECOND)]; RESTATEMENT, *supra* note 37, at § 879.

46. *Ash v. Mortensen*, 24 Cal. 2d 654, 658, 15 P.2d 876, 878 (1944); *Butler v. Ashworth*, 110 Cal. 614, 618-19, 43 P. 4, 5 (1895); *Alexander v. Hammarberg*, 103 Cal. App. 2d 872, 879, 230 P.2d 399, 404 (1951).

47. Compare *Butler v. Ashworth*, 110 Cal. 614, 620, 43 P. 4, 5 (1895) with *Watson v. McEwen*, 225 Cal. App. 2d 771, 775, 37 Cal. Rptr. 677, 680 (1964); *Guy F. Atkinson Co. v. Consani*, 223 Cal. App. 2d 342, 346, 35 Cal. Rptr. 750, 752 (1963); *Apodaca v. Haworth*, 206

In *American Motorcycle*, the California Supreme Court confined its holding on joint and several liability to those circumstances where the defendants were independent concurrent tortfeasors.⁴⁸ This article explores the relationship of comparative negligence to joint and several liability within that same narrow scope. The discussion developed herein is not necessarily applicable to joint tortfeasors where there is an identity or coextensiveness of the acts or duties giving rise to their liability.⁴⁹

V. THE SUPREME COURT RATIONALE

The majority articulated four arguments supporting the retention of joint and several liability: (a) other jurisdictions which have adopted comparative negligence have retained joint and several liability; (b) while fault can be apportioned, the injury remains indivisible, and the defendants' negligent conduct is the proximate cause of that indivisible injury; (c) joint and several liability is necessary to serve the policy of making the plaintiff whole; and (d) elimination of joint and several liability would be unfair to innocent plaintiffs, and, even when plaintiffs are at fault, the character of their fault warrants preferring them over defendants when allocating the risk of an insolvent defendant.

Cal. App. 2d 209, 213-14, 23 Cal. Rptr. 461, 463-64 (1962); *Holahan v. McGrew*, 111 Cal. App. 443, 446, 295 P. 1059, 1060 (1931). In the latter cases, the court blurred the distinction between independent concurrent tortfeasors and joint tortfeasors, describing both as joint tortfeasors. *But see* *Ash v. Mortensen*, 24 Cal. 2d 654, 658, 150 P.2d 876, 878 (1944); *Weck v. Los Angeles County Flood Control Dist.*, 104 Cal. App. 2d 599, 612, 232 P.2d 293, 300 (1951); *Alexander v. Hammarberg*, 103 Cal. App. 2d 872, 879, 230 P.2d 399, 404 (1951). In these cases, liability for the entire injury did not render defendants "joint tortfeasors." According to these decisions, the "joint tortfeasors" classification requires a unity of the cause of action.

48. 20 Cal. 3d at 588, 578 P.2d at 905, 146 Cal. Rptr. at 188.

49. For example, assume that a plaintiff is injured as a result of the negligence of an employee acting within the scope of his employment. Furthermore, assume that plaintiff obtains a joint judgment against the employee and employer. The judgment against the employer reflects the fact that the employer was held vicariously liable for the conduct of his employee. In that instance, it makes little sense to talk about apportioning fault between employee and employer. The employer has breached no duty. His liability to plaintiff stems from the fact that the law fastens upon him the consequences of his employee's breach of duty. If the plaintiff collected the entire judgment from the employer it would be difficult to see how the court's doctrine of partial equitable indemnity based on proportionate fault would be a basis for the employer to recover only part of the paid judgment from his employee. In that instance, the original notion of equitable indemnity which would shift the entire loss from one party to the other would be more appropriate.

A. Other Jurisdictions' Treatment of Joint and Several Liability

The court, by way of a vindicating patina, points out that other state courts have retained joint and several liability after the adoption of comparative fault.⁵⁰ Justice Clark argues that of the four jurisdictions (Mississippi, New York, Wisconsin, and Georgia) cited by the majority, only one, Georgia, is on point.⁵¹ And, even in Georgia, the statutory provision does not allow joint and several liability when the injury involved is one to property.⁵²

One major distinction between the four jurisdictions and California not mentioned in the opinion is that, in the other jurisdictions, the courts were responding to a legislative abolition of the contributory negligence defense.⁵³ The courts did not abandon that defense and alter tort law by rallying around the standard of logic, practical experience, and fundamental justice. These jurisdictions were not committed to working out problem areas related to comparative fault in terms of that standard. Indeed, an examination of the decisions cited by the majority reveals little, if any, rationale other than "we see no reason to change." This "inertia" rationale can hardly give support to a court that, in *Li*, overcame the inertia of legal tradition dating back to the beginning of California law to lurch forward in new directions, guided by the principles of logic and fundamental justice. It cannot provide a justificatory patina for a court that, again in *Li*, indicated that problems attendant to the new system of comparative fault should be worked out in a manner consistent with those guiding principles.

B. Indivisibility of Injury

Defendant AMA relied on *Finnegan v. Royal Realty Co.*⁵⁴ to argue that *Li* required abandonment of joint and several liability as to concurrent tortfeasors. It argued that, in *Finnegan*, concurrent tortfeasors were held jointly and severally liable because (1) there existed no basis for dividing damages and (2) the law was loath to permit an innocent plaintiff to suffer as against a wrongdoing defendant.⁵⁵ AMA argued that plaintiffs no longer need be innocent to recover and that apportioned fault under the *Li* principle could serve as a basis for dividing

50. 20 Cal.3d at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189.

51. *Id.* at 613, 578 P.2d at 922, 146 Cal. Rptr. at 205 (Clark, J., dissenting).

52. *Gazaway v. Nicholson*, 190 Ga. 345, 348, 9 S.E.2d 154, 156 (1940).

53. GA. CODE ANN. § 105-603 (1968); MISS. CODE ANN. § 11-7-15 (1972); N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976); WIS. STAT. § 895.045 (Supp. 1980-81).

54. 35 Cal. 2d 409, 218 P.2d 17 (1950).

55. *Id.* at 434-35, 218 P.2d at 32.

damages.⁵⁶

One of the arguments that the court relied on in rejecting the contention that the "fault figure" sanctioned by *Li* could be used to apportion damages was predicated on the "indivisibility" of the *injury*.⁵⁷ The court correctly stated that the rationale underlying joint and several liability among concurrent tortfeasors was that each of the tortfeasors was proximately liable for all the damage he or she caused as long as that damage was single or indivisible.⁵⁸ From this point the majority reasoned that, although *Li* provided for apportionment of *fault* among the parties, this was not tantamount to apportioning the *injury*.⁵⁹ The court seemed to draw a clear distinction between fault which could be apportioned and the damages resulting from the fault which remain indivisible.

At first blush, the court's statement of indivisibility of the injury appears as an independent ground against apportioning liability. The court never discusses what renders an injury "divisible" or "indivisible." Indeed, once "indivisibility of the injury" is analyzed, the court's point evaporates and becomes a mere restatement of its conclusion.⁶⁰ The illusory or tautological character of the court's argument is clear when one remembers that most actions in tort are at law for money damages. Consequently, regardless of the injury's character, for the purposes of a lawsuit the injury will be expressed in quantitative

56. 20 Cal. 3d at 588, 578 P.2d at 905, 146 Cal. Rptr. at 188. Of course, as the court points out, the possibility of a culpable plaintiff does not mean that in all cases the plaintiff will be culpable. *Id.* at 589, 578 P.2d at 905, 146 Cal. Rptr. at 188. In those cases where the plaintiff is not culpable, the AMA argument is undercut. In instances where one of the two defendants is judgment-proof, AMA's position of several liability would have the law favor a solvent wrongdoer over an innocent plaintiff.

57. *Id.* at 588-89, 578 P.2d at 905, 146 Cal. Rptr. at 188.

58. *Id.* at 588, 578 P.2d at 905, 146 Cal. Rptr. at 188.

59. *Id.*

60. The argument is like the story of the child who asked his father why homing pigeons always fly home. The father responded by saying that they flew home because they had a homing instinct. On the surface, the response seemed to indicate something new regarding the homing behavior of pigeons. However, when the child pressed the father as to what a homing instinct was, the father replied, "the ability to always fly home." What appeared as an independent ground for explaining the pigeons' homing behavior turned out, upon analysis, to be merely a restatement of the behavior. This is an example of an analytic statement being passed off as a material or synthetic statement. For a discussion of this notion, see J. RAY & H. ZAVOS, *Reasoning and Argument: Deduction and Induction, and Reasoning and Argument: Some Special Problems and Types*, PERSPECTIVES OF ARGUMENTATION 55-58, 88-93 (Miller & Nilsen eds. 1966). In this case, the court is offering the statement as an independent reason justifying its thesis; in the homing pigeon example, the analytic statement is offered as an independent cause explaining given behavior. For a discussion of the distinction, see *id.* at 51-52.

terms—in dollars and cents.⁶¹ Once the injury or damage is expressed in quantitative terms, it certainly is divisible. In fact, the court's application of the principle of comparative negligence to the plaintiff in *American Motorcycle* involved an actual dividing or apportioning of damages vis-a-vis that plaintiff.⁶² According to the court, the damages, no matter what their source, as expressed in dollars and cents, should be divided according to the proportionate fault of the plaintiff vis-a-vis all other culpable individuals and the judgment reduced by that amount. When it came to the court's formulation of partial equitable indemnity among defendants, the court continued to insist on the indivisibility of the injury but nevertheless provided for division or apportionment of the damages among the defendants in proportion to their degree of fault.⁶³

It is clear that "divisibility of the injury," once the injury is expressed in quantitative terms, is not a matter of impossibility; rather, it is a matter of the availability of some logical or equitable basis of apportionment vis-a-vis the causative conduct of the parties who are at fault. Consequently, the majority's statement, that joint and several liability must be retained and damages cannot be apportioned merely by characterizing the injury as "indivisible," is an assertion, and not an argument. To say that the injury is indivisible is not a descriptive statement of impossibility of division; rather, it is a restatement of the conclusion that the damages expressed in quantitative terms will not be apportioned according to proportionate fault. The majority merely asserts that "a defendant has no equitable claim vis-a-vis an injured plaintiff to be relieved of liability for damages which he has proximately caused simply because some other tortfeasor's negligence may also have caused the same harm."⁶⁴

The court, by its decisions in *Li* and *American Motorcycle*, denied apportionment, between a negligent plaintiff and a solvent defendant, of damages attributable to the fault of an insolvent defendant. But, by these same decisions, the court: (1) under the doctrine of comparative fault, allowed apportionment of the amount of damage attributable to the proportionate negligence of a plaintiff; and (2) under its doctrine of partial equitable indemnity, allowed apportionment among defendants of their joint liability to plaintiff. The court never explains what equi-

61. See *Collier v. Merced Irr. Dist.*, 213 Cal. 554, 566, 2 P.2d 790, 794 (1931).

62. 20 Cal. 3d at 589 n.2, 578 P.2d at 906 n.2, 146 Cal. Rptr. at 189 n.2; see 13 Cal. 3d at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875.

63. 20 Cal. 3d at 598, 578 P.2d at 912, 146 Cal. Rptr. at 195.

64. *Id.* at 589, 578 P.2d at 906, 146 Cal. Rptr. at 189.

table grounds mandating apportionment are present in the latter situations, but that are absent in the prior situation, precluding apportionment of damages.⁶⁵

Commentators who have written about joint and several liability for an "indivisible" injury appear to agree that "indivisibility" is not fixed metaphysically with regard to the character of a given injury. Rather, they indicate that indivisibility flows from the absence of a reasonable, logical or equitable basis for apportioning damages among the defendants.⁶⁶ One court succinctly analyzed the problem when it stated that entire liability in cases of concurrent negligence rests on the fact that there is no "yardstick" with which to measure the two acts of negligence, nor is there a "scale" with which to weigh them; thus, in the absence of a logical basis for apportionment, all defendants are held jointly and severally liable.⁶⁷ Dean Prosser indicates that in general, entire liability will be imposed only where there is no reasonable alternative.⁶⁸ It has been suggested that, wherever some rational and possible basis can be found, courts will apportion damages and that the courts' predisposition might be due in part to the old common law rule of lack of contribution among tortfeasors.⁶⁹ This concept of indivisibility of injury requires additional analysis if we are to understand the logical insufficiency in the supreme court's rationale supporting the retention of an unaltered joint and several liability doctrine along with comparative fault.

Cases of independent concurrent joint tortfeasors have been categorized into three classes where: (1) the conduct of each defendant could account for the entire injury independent of the other defendants' conduct; (2) the conduct of any one defendant separate from the concurrent conduct of the others would be incapable of causing any injury; and (3) the conduct of each defendant could cause some of plaintiff's injury but not all of it.⁷⁰ Harper and James indicate that the judicial trend is to apply joint and several liability to the entire injury in the first two categories, but that in the latter category, no uniform rule has been applied by the courts.⁷¹

65. Granted, such an attempt is made in the other two arguments of the majority opinion. They will be analyzed later in this article. See *infra* text accompanying notes 99-119.

66. Prosser, *supra* note 32, at 430, 442; 1 HARPER & JAMES, *supra* note 32, at 701-02.

67. *Arnst v. Estes*, 136 Me. 272, 276, 8 A.2d 201, 203 (1939).

68. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 52, at 313-14 (4th ed. 1971) [hereinafter cited as LAW OF TORTS].

69. *Id.* at 317-18.

70. 1 HARPER & JAMES, *supra* note 32, at 702.

71. *Id.* at 702-09.

Conceptually, the difference between the first two categories and the last can be rationalized on the basis of necessary or sufficient legal causes. If each defendant's conduct apart from the conduct of the other defendants could cause the entire injury (first category), then his conduct is a sufficient, although not necessary, cause of the injury. If the conduct of each of several defendants *alone* could not account for *any* of the injury (second category), then each defendant's conduct is a necessary causal condition, although apart from the other defendants' conduct it is not a sufficient causal condition for plaintiff's injury. In both instances the defendant's conduct is a cause, necessary or sufficient, of the entire injury. If, however, the conduct of each causes a portion of the injury but is not sufficient or necessary to cause the entire injury (third category), then there is a portion of that injury for which each defendant's conduct is not a causal condition. Thus, to hold a defendant in this last category liable for the entire injury would be tantamount to holding him liable for a portion of the injury for which his conduct is not causally implicated.

With respect to individual defendants whose conduct is a sufficient but not a necessary cause of the injury (first category), additional arguments can be given for finding them jointly and severally liable. One argument is that such a defendant, quite apart from the other defendants' conduct, is being held liable only for injury that would nevertheless be attributed to him. This argument merely restates the fact that his conduct was a sufficient cause of plaintiff's injury. Furthermore, commentators have stated that no rational basis exists for apportioning damages between the two defendants.⁷² Finally, in the event of an insolvent defendant, to apportion the damages between the defendants on some ratio and make each severally liable for his portion would leave an innocent plaintiff partially uncompensated for an injury in which his conduct was not culpable. Equity and justice, therefore, would dictate that when a culpable defendant's conduct is sufficient for

72. See, e.g., Prosser, *supra* note 32, at 434. Given the *Li* principle of comparative fault, it would be interesting to determine empirically what a jury would do with a classic case in the category of independent concurrent tortfeasors, where two independent but simultaneous sources of loud noises are each sufficient alone to frighten an animal that in turn causes injury. One would suspect that as between the two sources each would be held equally at fault—at fault on a one-to-one basis. In fact, it would be interesting to reflect on whether any other division could be justified. This question would depend on what is being compared between the two defendants: the degree to which each individual's conduct causally contributed to the injury or the relative degree of negligence that characterizes the conduct? The California courts have not squarely addressed the question of what is being compared when the jury fixes comparative fault. For a brief discussion of the problem, see H. WOODS, *COMPARATIVE FAULT*, § 5:5 (1978). See also *supra* note 6.

the entire injury, an innocent plaintiff should not run the risk of being only partially compensated—a possible result should such a defendant be held only severally liable for a portion of the injury.

When the conduct of each of several defendants would by itself be incapable of causing any injury (second category), then, in the absence of comparative negligence, there is obviously no rational basis for apportioning the damages among them. The traditional tort remedy is to restore plaintiff to the position he would have been in had he not been injured by the culpable conduct of the defendants.⁷³ Since, absent the culpable conduct of any one defendant, the plaintiff would not have suffered the injury, each such defendant should be liable for the entire damage.

In the situation where each defendant's conduct would have caused some, but not all, of the injury (third category), a given defendant's conduct is not causally implicated in some portion of the damage. Consequently, if plaintiff cannot recover his entire damages from that given defendant, it would not necessarily do violence to the general tort principle that the plaintiff should be restored to the position he would have been in absent defendant's tortious conduct. That portion of the damage not causally attributable to a given defendant would have been suffered by the plaintiff regardless of that defendant's tortious conduct; and, absent the conduct of the other defendants, that portion of the loss would not have occurred despite the conduct of the given defendant. Conversely, if the law holds each of several defendants—whose conduct is sufficient to account for some but not all of plaintiff's damages—liable for the entire injury, then an injustice is worked on a given defendant: he is held liable for a portion of the damage for which his conduct is neither a sufficient nor a necessary causal condition.

Nevertheless, some commentators and courts have suggested that concurrent tortfeasors falling in this latter category should be held liable for the entire injury unless they can prove the portion of the injury which is not attributable to their conduct.⁷⁴ In effect, when apportionment of the damages is theoretically possible because a given defendant's conduct cannot account for all of the damage, some courts would shift the burden from plaintiff to defendant to prove which portion of the damages cannot be accounted for by reference to that defendant's

73. CAL. CIV. CODE § 3333 (West 1970); *Alphonzo E. Bell Corp. v. Listle*, 74 Cal. App. 2d 638, 650, 169 P.2d 462, 469 (1946).

74. *See, e.g.*, 1 HARPER & JAMES, *supra* note 32, at 706-08.

conduct.⁷⁵ This certainly appears to be the trend in California, although it was not always the rule.

In the 1891 case of *Miller v. Highlands Ditch Co.*,⁷⁶ several sources of water merged and flowed onto plaintiff's property, depositing sand and debris. The court held that procedurally all the parties contributing to the plaintiff's damage could not be joined in one action at law for damages (procedural joint tort). The court recognized that its holding created a burden for plaintiff in terms of proving those damages attributable to any one given defendant (substantive liability). Furthermore, the court indicated that even if procedural joinder were allowed, the judgment as to each defendant would have to be *several*, based on each defendant's *proportional participation* in the joint damage.⁷⁷

Forty years later, in *Slater v. Pacific American Oil Co.*,⁷⁸ plaintiff's property was damaged by oil, salt, and hydrocarbons carried by runoff to plaintiff's land from the land of several defendants. The court cited a prior appellate court case, *California Orange Co. v. Riverside Portland Cement Co.*,⁷⁹ in which plaintiff's property was damaged by dust from two separate sources. Consistent with the *Miller* case, the *California Orange Co.* court held that plaintiff could recover an apportioned amount of damage based on the quantity of dust contributed by the defendant. The *Slater* court indicated that *California Orange Co.* stood for the proposition that where there is difficulty in determining the exact amount of damage attributable to each defendant, the burden is still on the *plaintiff* to produce some evidence (albeit inexact) upon which the court could exercise a liberal hand in arriving at a judgment.⁸⁰ The *Slater* court held that to recover damages at law, it was not enough for plaintiff to show that defendant participated causally in the injury. Although such proof would be sufficient to bring an action in equity for injunctive relief, to recover damages, plaintiff also had to produce some evidence upon which apportionment could be made.⁸¹ In *Slater*, the plaintiff had produced no evidence of what portion of the total of oil,

75. *Michie v. Great Lakes Steel Div.*, 495 F.2d 213, 218 (6th Cir. 1974); *Finnegan v. Royal Realty Co.*, 35 Cal. 2d 409, 434, 218 P.2d 17, 32 (1950).

76. 87 Cal. 430, 25 P. 550 (1891).

77. *Id.* at 434, 25 P. at 552.

78. 212 Cal. 648, 300 P. 31 (1931).

79. 50 Cal. App. 522, 195 P. 694 (1920); see *infra* notes 91-95 and accompanying text for further discussion of the case.

80. 212 Cal. at 653, 300 P. at 33.

81. *Id.* at 654-55, 300 P. at 34.

salt, and hydrocarbons deposited were defendant's. Consequently, the court held that no money judgment could be given.

Ten years after the *Slater* decision, in *City of Oakland v. Pacific Gas & Electric Co.*,⁸² a party allowed steam to escape, damaging plaintiff's books. Sometime after the escape of the steam, defendant breached its duty and allowed the escape of steam to continue. Defendant argued that since some of the damage to the books took place prior to the breach of its duty, it should be held liable only for the damage occasioned after its breach, and that it was *incumbent upon plaintiff to prove what portion of such damage was due to appellant's breach of duty*. The court disagreed, holding that plaintiff had proven that it was damaged by appellant's conduct and that, "[i]f the damages proven could be reduced proportionately, that burden rested upon [defendant]."⁸³ In effect, the court concluded that, if defendant's tortious conduct was implicated in proximately causing some, but not all, of plaintiff's damages, the burden of proving what portion of those damages could not be attributed to defendant rested with defendant.

Finnegan v. Royal Realty Co.,⁸⁴ citing *City of Oakland*, approved this shift in the burdens associated with proving causation.⁸⁵ These cases did not reflect a judicial change in the substantive law of apportioning damages where possible; rather, they merely altered the burden of proving causation so as to insure that negligent defendants would not escape liability at the expense of an innocent and injured plaintiff.⁸⁶

82. 47 Cal. App. 2d 444, 118 P.2d 328 (1941).

83. *Id.* at 450, 118 P.2d at 331.

84. 35 Cal. 2d 409, 433-34, 218 P.2d 17, 32 (1950).

85. In *Finnegan*, as in *City of Oakland*, plaintiff's damages were exacerbated by the defendant's subsequent conduct. The line of reasoning adopted by both those cases was also favorably commented upon in *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948).

86. *Summers v. Tice* illustrates an interesting shift in the concept of joint and several liability. Before *Summers*, defendants were found jointly and severally liable for damage only when their conduct had been found to be causally implicated in the injury. In *City of Oakland*, the concept was used to fix causal liability. 47 Cal. App. 2d at 450, 118 P.2d at 331. In *Summers*, the plaintiff was blinded by a shotgun pellet. Two defendants negligently fired their guns in the direction of plaintiff at the same time. Since only one pellet caused the plaintiff's injury, only one defendant was both the necessary and sufficient cause of that injury. See *supra* notes 69-72 and accompanying text. The other defendant's conduct was not causally implicated in the injury. Yet the court held both defendants liable. 33 Cal. 2d at 88, 199 P.2d at 5. Thus, one defendant was held liable for damages he could not possibly have caused.

The reasoning in *Summers* is an extension of *City of Oakland* and *Finnegan v. Royal Realty Co.*, 35 Cal. 2d 409, 433-34, 218 P.2d 17, 32-33 (1950). In *Finnegan*, the court found the defendant, who exacerbated an existing injury, jointly and severally liable for the entire injury because of (1) the difficulty of apportioning the damages between the independent tortfeasors and (2) a reluctance to permit an innocent plaintiff to suffer as against a wrong-

As suggested earlier, apportionment when each of several defendants' conduct can account for some, but not all, of the damage (regardless of who has the burden of proving facts that would allow such apportionment) might be explained by there being a portion of the damage for which each defendant's conduct is neither a necessary nor sufficient causal condition. The holding in the cases cited thus far might be explained accordingly. The courts' willingness to apportion does not always appear, however, to be predicated on this conceptual touchstone. Rather, the courts appear prepared to apportion damages when each defendant's conduct, apart from the other defendants' conduct, is a sufficient causal condition for plaintiff's injury and when each defendant's conduct is a necessary but not sufficient condition of the injury. The primary consideration that emerges from the decisions as a guide to the courts' determination of whether apportionment will be made is whether the conduct of the defendants is capable of quantification—that quantification serving as the basis for measuring or apportioning damages. Comparability in quantifiable terms is the decisive factor.

In *Griffith v. Kerrigan*,⁸⁷ plaintiff's fruit trees were damaged when the water table rose above its normal level, soursapping the tree roots. The amount of rise over the normal water table sufficient to cause the damage resulted from three sources: one-half of the water was attributable to seepage from the canals owned by defendant Sutter Butte Canal Co.; one-third was attributable to seepage from defendant Kerrigan's rice field; and one-sixth was attributable to other sources. Sutter Butte Canal Co.'s demurrer was sustained without leave to amend, and judgment was entered in favor of plaintiff against defendant Kerrigan for one-third of plaintiff's total loss. The court recognized that the seepage from Sutter Butte Canal Co., as well as the seepage from Kerrigan's property, was a "but-for" cause of plaintiff's dam-

doer who might not be causally implicated in the entire injury. Thus, the judgment, as against the exacerbating defendant, contained an amount attributable to his conduct and a portion that was not attributable to his conduct. Any other judgment would have allowed that defendant to escape all liability at the expense of the innocent plaintiff.

Summers merely took *Finnegan* one step further and applied its reasoning to a negligent defendant who was not causally implicated in the injury at all. As to this one defendant, the entire judgment reflected damages for injuries not caused by him. Any other result would have allowed the defendant to escape all liability at the expense of the innocent plaintiff. Thus, the court chose to favor the innocent plaintiff over the negligent defendant. However, the theory that evolved from *Summers*, that the burden shifts to the negligent parties to prove lack of causation, is a topic beyond the scope of this article.

87. 109 Cal. App. 2d 637, 241 P.2d 296 (1952).

age,⁸⁸ making the conduct of each defendant a necessary but not sufficient cause of plaintiff's injury. Nevertheless, citing *California Orange Co.*, the court upheld the apportionment of damages.⁸⁹ The similar character of the defendants' conduct (runoff and seepage of water) and the ability to quantify the amount of runoff apparently gave the court a logical basis for deeming the injury divisible and apportioning the damages suffered by plaintiff.⁹⁰

*California Orange Co.*⁹¹ involved a plaintiff who sought damages for injuries to his orchard caused by cement dust from defendant's cement mill. During the period in question, 150 tons of cement dust per year had settled on plaintiff's 168 acres: one-fourth of the dust had come from the California-Portland Cement Co. and the remainder had come from the cement plants of appellant, Riverside-Portland Cement Co. The settling dust combined with dew and created an encrustation on the leaves which could not be washed off. The encrustation seriously damaged the productive capacity of the trees. It is unclear whether the 112 tons of cement dust attributable to Riverside-Portland Cement Co. were sufficient to damage the trees,⁹² however, some testimony suggested that the dust from appellant's plant may indeed have been sufficient to account for the entire injury.⁹³

88. *Id.* at 639, 241 P.2d at 298.

89. *Id.* at 640, 241 P.2d at 299.

90. The court's decision does not satisfy the theory that a tort remedy should put plaintiff in the position he would have been in had he not been injured by defendant's wrongful conduct. Here, had defendant's wrongful conduct not occurred, plaintiffs would have suffered no damage because that conduct was a necessary condition for the injury to occur. Consequently, defendant Kerrigan should have been held for the entire injury. This criticism of the case does not turn on whether the injury was capable of division. Obviously, it was divisible by reference to the relative amount of water that Kerrigan contributed to cause the water table to rise to a level where it could damage the tree roots. Rather, the criticism is based on the equitable nature of such an apportionment and its consistency with the underlying theory of tort recovery. In this case, the outcome is not justified. Defendant was required to pay only two-thirds of the damages even though, absent defendant's conduct, plaintiff would have suffered no damage. *See* *Alfonzo E. Bell Corp. v. Listle*, 74 Cal. App. 2d 638, 650, 169 P.2d 462, 469 (1946); CAL. CIV. CODE § 3333 (West 1970).

91. 50 Cal. App. 522, 195 P. 694 (1920).

92. The court did not address whether each cement company's dust was a cause of some but not all the damage or whether the dust of each was sufficient to cause the entire damage. That this issue was not raised in the opinion should indicate that the question of whether the dust of both cement companies was a cause of some but not all of the damage or whether the dust from each was sufficient to cause the entire damage was not significant to the court's decision.

93. One witness testified that even a slight coating of the dust on the orange trees' leaves would cause serious injury and that any discernable amount of cement dust, by its inevitable interference with sunlight on the leaves, would cause appreciable damage to the trees. 50 Cal. App. at 527-28, 195 P. at 696.

A fair reading of the case is not inconsistent with the conclusion that appellant's 112 tons of cement dust falling on plaintiff's trees were sufficient to cause the injury apart from the remaining forty tons from the other cement plant.⁹⁴ Nevertheless, the appellate court approved and upheld the trial court's apportionment of damages between the two cement companies. Again, the crucial consideration was not whether defendant's conduct was a necessary or sufficient causal condition for the entire injury, but whether the defendants' conduct was qualitatively the same and capable of quantitative comparison—that quantitative comparison being the "yardstick" enabling the apportionment of damages.⁹⁵

Damages should not remain unapportioned merely because the injury can be characterized as "indivisible." It is clear that a tort injury expressed in dollars and cents damages is divisible. The crucial question is whether or not there is anything in the character of several defendants' conduct which can serve as a logical, reasonable, or equitable basis for dividing damages. In any division there is a numerator, a denominator, and a quotient. The numerator is the plaintiff's injury expressed in dollars and cents, capable of being divided. The quotient is the apportioned damage attributable to any given defendant. What makes the damage divisible or indivisible is the presence or lack of a denominator which is logical, reasonable, or equitable and which serves the policies of tort law.

When the California Supreme Court announced the comparative negligence principle in *Li* it provided a quantitative numerator in the form of a jury's finding of proportionate fault on the part of all parties. In effect, the court indicated that if there is a claim against a given party for injury there are two questions to be determined. The first is whether that party's conduct was the proximate cause of the injury. If a given party's conduct is a proximate cause of the injury, then that injury vis-a-vis that party consists of two elements: (1) the culpable portion of the damages as reflected by the party's proportionate fault, and (2) the innocent damages or that portion of the damages which exceeds the party's proportionate fault. In other words, a given party may be the cause of the entire injury (in the sense that the party's conduct is a necessary or sufficient causal condition of the injury), but that injury may be made up of a culpable portion of damages as well as an innocent portion of damages. If the culpable conduct of each of several independent parties is a proximate cause of a given injury and if the

94. *Id.* at 529, 195 P. at 697.

95. *Id.* at 527-28, 195 P. at 696.

proportionate fault of each is determined in quantitative terms, then the damages are certainly capable of being apportioned or divided by reference to that proportionate fault. The remaining question is whether the guiding principles of *Li*—logic, practical experience, and justice—are served by such a division. To resolve the issue merely by characterizing the injury as “indivisible” gives the illusion that a tautology is an independent ground justifying no apportionment.

The bankruptcy of the “indivisible injury in spite of divisible fault” argument becomes clear when the rationale underlying the all or nothing contributory negligence defense, rejected in *Li*, is examined. In his *American Motorcycle* dissent Justice Clark states that the argument proves too much, for if plaintiff’s negligence is also a proximate cause of the entire indivisible injury, then that argument, if meritorious, would warrant repudiation of *Li* not only in multiple-party cases but in all cases.⁹⁶ His criticism gains added force when one examines the California rationale which supported the contributory negligence doctrine; that rationale was explicated in *Needham v. San Francisco & San Jose Railroad*.⁹⁷ The *Needham* court indicated that the effect of the “all or nothing” rule of contributory negligence was not based on the proposition that the negligence of plaintiff justified or excused the negligence of the defendant. Rather, the court found it difficult to hold a negligent defendant liable where the conduct of both parties was a proximate cause of the indivisible injury in the absence of a standard for apportioning damages.⁹⁸ Therefore, a defendant who was “legally and morally to blame” escaped the consequences of his actions because the indivisible injury could not be made divisible.

In *Li*, the court wielded the Alexandrian sword of proportionate fault and severed the knot that tied both plaintiff *and* defendant to the entire injury proximately caused by both. Plaintiff and defendant both may be the proximate cause of the entire injury (a necessary or sufficient causal condition for the injury) but, nevertheless, that injury may be divided with respect to each party’s liability according to his proportionate fault. Of course, divisibility of the injury by reference to the proportionate fault of each of the parties does not necessarily require several judgments against each defendant. That such divisions can be made is not tantamount to proving that they ought to be made.

However, the court’s very determination in *Li* is a repudiation of the majority’s argument that the injury is indivisible. The court in *Li*

96. 20 Cal. 3d at 611, 578 P.2d at 920, 146 Cal. Rptr. at 203 (Clark, J., dissenting).

97. 37 Cal. 409 (1869).

98. *Id.* at 419.

in fact allowed division vis-a-vis a negligent plaintiff and negligent defendant and, in *American Motorcycle*, allowed apportionment among joint tortfeasor defendants so that one who pays more than his proportionate share of a judgment may seek contribution. This fact suggests that the court's actual position is that, while divisibility according to fault is possible, such divisibility should not apply among negligent plaintiffs and defendants when one of the defendants is insolvent. Such a choice, if not arbitrary, must rest on some rationale of justice, practical experience, or logic which allows division for a negligent plaintiff vis-a-vis the defendants and allows division among the defendants, but does not allow such a division collectively among all negligent parties, including plaintiff.

C. Requirement that Plaintiff be Made Whole

The court's third rationale for fixing the entire risk of an insolvent defendant totally on other defendants and not on a negligent plaintiff rests on its perception that fairness dictates that a negligently injured person receive adequate compensation for his injuries.⁹⁹

The majority cites *Summers v. Tice*¹⁰⁰ in support of its reasoning. However, the formulation of joint and several liability in California and the rationale articulated in *Summers* presuppose that an innocent injured plaintiff should be favored over a negligent defendant.¹⁰¹ Jus-

99. 20 Cal. 3d at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189.

100. 33 Cal. 2d 80, 199 P.2d 1 (1948). Reliance on the *Summers* decision for the proposition that fairness dictates a pragmatic policy of holding independent concurrent tortfeasors jointly and severally liable in order that plaintiff not be precluded from his right of redress is inappropriate. *Summers* does not even deal with concurrent tortfeasors. In *Summers*, one of the defendants could not have caused the eye injury. Thus, the two defendants were not independent concurrent tortfeasors. The problem addressed in *Summers* was the inequity arising from the plaintiff's difficulty in causally tracing the eye injury to either of the two negligent defendants. Absent proof of causation, the innocent plaintiff would be deprived of any recovery and the one defendant who was the legal cause of the injury would escape any liability. *Summers* insured that an innocent plaintiff would recover even at the expense of a negligent defendant who was not the cause of the injury. See *supra* note 86. The court determined that the equities favor the innocent plaintiff over the negligent defendant. However, the issues addressed by the *Summers* court were those of proof, not of execution of a judgment when one or more of the joint judgment debtors are insolvent. In fact, with respect to the proof issue, one of the two *Summers* defendants theoretically could escape liability if he proved that the other actually caused the injury, and that would be the case even if the other defendant were insolvent.

101. See *supra* notes 86 & 100; see also *Thornton v. Luie*, 209 Cal. App. 2d 542, 552, 26 Cal. Rptr. 393, 399 (1962) ("The 'equities' thus considered are those of the wrongdoers among themselves and at all times are subject to the greater 'equity' existing in favor of the innocent injured party. . . . The rights of the innocent injured party always do, and always should, remain paramount."); *Wouldridge v. Zimmerman*, 21 Cal. App. 3d 656, 659, 98 Cal.

tice Clark, in his *American Motorcycle* dissent, suggests that the court's rationale does not apply where the plaintiff, at least in the *American Motorcycle* situation, is an alleged wrongdoer.¹⁰² Justice Clark's criticism is implicitly based on the supposition that joint and several liability is necessary to safeguard an injured but *innocent* plaintiff.

Let us return to our initial example of a \$100,000 loss, with a 30% negligent plaintiff, a solvent 10% negligent defendant, and an insolvent 60% negligent defendant. Even under the majority's ruling as to joint and several liability, plaintiff can never be made entirely whole—he cannot be restored to the position he was in prior to the tortious conduct. The damages initially suffered are \$100,000. Under *Li*, plaintiff's damages must be discounted by \$30,000 in accordance with his proportionate fault (his culpable damages), leaving him a maximum recovery of only \$70,000 (his innocent damages). If plaintiff is to be made whole by way of a satisfied judgment for his innocent damages of \$70,000, he will be made whole at the expense of defendants. If both defendants are solvent, it would be at the expense of \$10,000 for one defendant and \$60,000 for the other defendant. This expense to each defendant merely reflects each one's proportion of culpable damages. However, in our example, the 60% negligent defendant was insolvent. Therefore, plaintiff can only be made whole for his innocent damages at the expense of the solvent defendant who must pay \$70,000, \$10,000 of which represents his culpable damages and \$60,000 of which reflects innocent damages as to him.

This analysis demonstrates that in order to make plaintiff whole, the court must inflict an injury on the solvent defendant in excess of his proportionate fault. It is equally clear that plaintiff's negligent conduct is causally implicated in inflicting this injury on defendant.

It is essential to a proper understanding of the problem to go beyond the labels of "plaintiff" and "defendant" and to recognize that culpable conduct on the part of several parties concurred to proximately cause a given injury, and that each party was a necessary causal condition for the injury. The label "plaintiff" is affixed to that party who must initially bear the cost of an injury. The label "defendant" is affixed to the party to whom the plaintiff looks to shift a portion or all of the loss. With respect to each of the parties, the entire loss that they concur to bring about is made up of two elements: a portion of the damage that reflects their share of fault or culpability (culpable dam-

Rptr. 778, 779 (1971) (quoting *Thornton v. Luce*, 209 Cal. App. 542, 522, 26 Cal. Rptr. 393, 399 (1962)).

102. 20 Cal. 3d at 511, 578 P.2d at 921, 146 Cal. Rptr. at 204 (Clark, J., dissenting).

ages), and a portion that reflects the fault of others and consequently is faultless or innocent with respect to the given party (innocent damages).

The plaintiff initially bears the entire loss—that portion which reflects his fault and that portion which constitutes plaintiff's innocent damages and defendants' culpable damages. Under the majority's position, all of the plaintiff's innocent damages can be shifted to the solvent defendant in order to make plaintiff whole (at least to the extent of his innocent damages). In shifting that loss, plaintiff's negligent conduct—through the intermediary of judicial action—inflicts injury upon the solvent defendant, only a part of which reflects culpable damages of that solvent defendant. At this juncture, the solvent defendant finds himself in a position very similar to that of the plaintiff prior to satisfaction of the judgment—he has suffered a \$70,000 loss (as opposed to the \$100,000 initially suffered by plaintiff) as a result of the concurrent negligence of himself, the insolvent defendant and plaintiff. Of this amount, \$10,000 reflects his culpable damages, and \$60,000 his innocent damages. *At this point the solvent defendant's position is no different than was the plaintiff's with respect to the need to make him whole as to his innocent damages.*¹⁰³ Conceptually, the solvent defendant has been forced to bear \$60,000 worth of innocent damages for which plaintiff was, in part, the legal cause, just as initially the plaintiff was required to bear \$70,000 worth of initial innocent damages for which the solvent defendant was, in part, the legal cause.

The majority opinion presents no equitable or rational basis for determining that a negligent plaintiff should be made entirely whole as to his innocent damages at the expense of making a solvent defendant suffer that portion of his innocent damages which constitutes the insolvent defendant's entire culpable damages.¹⁰⁴

103. *See infra* text accompanying note 137. Additionally, the 10% defendant must bear *all* of *C's* insolvency even though the trier of fact has judged the 10% defendant only one-third as negligent as plaintiff.

104. One might suggest that at least to the extent that plaintiff's damages reflect personal injury, such a rationale can be supplied. Plaintiff loses an arm as a result of defendants' negligence, which is translated into \$100,000 of damages; plaintiff in one sense would never be made whole even if he were to recover the entire \$100,000 and not merely the \$70,000. The \$100,000 would never replace the arm. That amount of money would, at best, be imperfect compensation for plaintiff. But, when a 10% negligent defendant must bear \$60,000 worth of innocent damages in order to insure that plaintiff recovers \$70,000, all that that defendant has lost is money. This argument is not without a certain amount of emotional appeal. It is worth noting that in one comparative negligence jurisdiction, Georgia, joint and several liability is retained for personal injuries while it is not retained for injuries to property, albeit the distinction was not a matter of conscious choice resulting from the kind of analysis made in this footnote. *See supra* text accompanying note 52. The difficulty with

It would appear that the "must make plaintiff whole" rationale of the majority is predicated on the temporal sequence in which the parties suffer a given loss. This proposition is hardly calculated to appeal to the midwives of the *Li* principle—logic, practical experience, and basic fairness. Indeed, it restores to the evolving doctrine of comparative negligence the lottery element which the court was at pains to eliminate in *Li*¹⁰⁵ because whether a negligent party is labeled "defendant" or "plaintiff" is, in many cases, determined by chance rather than by equitable considerations regarding the culpability of the parties' conduct.

D. Lack of Comparable Culpability Between Plaintiff and Defendant

In its remaining rationale, the majority does not resort to the temporal sequence in which the parties suffer loss; rather, it focuses on the character of the parties' conduct and assumes that the conduct of the plaintiff (who initially suffers loss) is less blameworthy than the negligent conduct of the defendants (those to whom the loss is shifted in whole or in part).¹⁰⁶

This final rationale breaks down into two parts. First, the court points out that while *Li* allows a negligent plaintiff to recover, it does not follow that in all cases the negligent conduct of plaintiff will be causally implicated in the loss.¹⁰⁷ Justice Clark finds no fault with this rationale; he merely indicates that it is no basis for retaining joint and several liability in those instances where plaintiff's conduct is so implicated.¹⁰⁸

this rationale in terms of the majority decision in *American Motorcycle* is that that decision covers injuries other than personal injuries. Even if it were used to apply to personal injuries, the fact remains that an individual, under the law, can be compensated by money damages, and the money he receives from his judgment is in full compensation for the injury. This is true despite the fact that, from the individual's point of view, a money award may not be adequate compensation. Furthermore, given this rationale, it is difficult on an analytical level to see why the judgment should be reduced by \$30,000 in the first place. See *infra* text accompanying note 118 for a discussion regarding lack of differentiation between personal injuries and property damage.

105. 20 Cal. 3d at 589-90, 578 P.2d at 906, 146 Cal. Rptr. at 189.

106. 13 Cal. 3d 804, 827, 532 P.2d 1226, 1249, 119 Cal. Rptr. 858, 881 (1975). Interestingly, *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 880 (1978); *Southern Pac. Trans. Co. v. California*, 115 Cal. App. 3d 116, 171 Cal. Rptr. 187 (1981); and *Sorensen v. Allred*, 112 Cal. App. 3d 717, 169 Cal. Rptr. 441 (1980), could be read as requiring a 10% at fault, solvent defendant who is liable on the theory of strict liability to bear the risk of an insolvent, 60% at fault defendant who is liable on the theory of negligence even when the 30% at fault plaintiff's conduct is characterized as willful.

107. 20 Cal. 3d at 589, 578 P.2d at 905, 146 Cal. Rptr. at 188.

108. *Id.* at 611, 578 P.2d at 921, 146 Cal. Rptr. at 204 (Clark, J., dissenting).

The second portion of the rationale asserts that where plaintiff's negligent conduct concurs with that of defendants' to cause a loss, the retention of joint and several liability is justified because plaintiff's culpability is not equivalent in fault to that of the defendants.¹⁰⁹ From that major premise, the court essentially argues that, within the fault system, the more blameworthy character of a defendant's conduct justifies insulating a negligent plaintiff from the risk of an insolvent defendant. This is done at the expense of leaving the remaining solvent defendants exposed to that very same risk.

At the heart of the majority's premise is the notion that plaintiff's conduct is self-directed while the defendant's is other-directed; or, in the words of the court, "a plaintiff's negligence relates *only* to a failure to use due care for his *own* protection, while a defendant's negligence relates to the lack of due care for the safety of *others*."¹¹⁰ This characterization of the relative culpability of risk-creating conduct of plaintiffs and defendants leads the court to state that "insofar as the plaintiff's conduct creates only risk of self-injury, such conduct, unlike that of a negligent defendant, is not tortious."¹¹¹ This "plaintiff only hurts himself while defendant hurts others" distinction might have some immediate appeal. It is true that an intuitive sense of fairness suggests that conduct which is only self-directed is less "blameworthy" than conduct that creates risks for others. Furthermore, the majority's attempt to differentiate qualitatively between the negligent conduct of plaintiff and defendant appears to find support in the Restatement and in Dean Prosser's writings. Both define "negligent" conduct as that which creates an unreasonable risk of harm to others, and "contributory negligence" as conduct which creates an unreasonable risk of harm to the actor.¹¹²

Seductive though it may be, the majority's definitional distinction and justification for differential treatment between plaintiffs and de-

109. *Id.* at 589-90, 578 P.2d at 905-06, 146 Cal. Rptr. at 188-89. Justice Clark interprets the majority's statement of the difference in quantitative terms. *Id.* at 612, 578 P.2d at 921, 146 Cal. Rptr. at 204 (Clark, J., dissenting). He assumes that the majority is indicating that the percentage figure of fault attributable to plaintiff will be less than that attributable to defendants. This does not seem to do justice to the majority position because the matter did not reach the Supreme Court after trial on the merits and the court had no basis for knowing what percentage figure would be assigned by the jury to each party's conduct. Rather, the majority speaks of a qualitative difference expressly explicated in other cases. See *Rossman v. La Grega*, 28 N.Y.2d 300, 308, 270 N.E.2d 313, 317, 321 N.Y.S.2d 588, 595 (1971).

110. 20 Cal. 3d at 589, 578 P.2d at 906, 146 Cal. Rptr. at 189 (emphasis added).

111. *Id.* at 589-90, 578 P.2d at 906, 146 Cal. Rptr. at 189.

112. RESTATEMENT (SECOND), *supra* note 45, at § 463, comment (b), § 464, comment (f); LAW OF TORTS, *supra* note 68, at 416-22.

endants is unsound. Within the context of the "all or nothing" rule of contributory negligence, one might wink at an uncritical acceptance of this argument, for the purpose was to obviate the harshness of the "all or nothing" rule and to allow injured plaintiffs to reach the jury with their claims for recovery.¹¹³ With the advent of the *Li* decision, the majority's justification, relying as it does upon this major premise, cannot hold up under analytic scrutiny.

The court confuses a general linguistic formulation that may describe an *aspect* of a concrete situation with an accurate description of the *totality* of that situation; that is, the court mistakenly believes that if the application of one definition (contributory negligence) can be accurately made to describe the conduct of an individual, it necessarily excludes the application of the other (negligence).

It is patently clear that negligent conduct by an individual may result not only in a loss to himself but also in a loss to others.¹¹⁴ Thus, it would be appropriate to characterize such conduct as both "negligent" as well as "contributorily negligent"; the application of one characterization without the other would be incomplete as a description of the totality of the risk-creating conduct of that individual. The following hypotheticals serve as illustrations of this point.

For example, assume that (1) Mr. *A*, Mr. *B*, and Ms. *C* all arrive in the middle of a three-way "Y" intersection at the same time, (2) all three are negligently speeding, (3) all three attempt to avoid a collision by veering in different directions, (4) as a result, Mr. *B* and Ms. *C* avoid a collision but Mr. *A* smashes into Mr. *D*'s parked car, (5) the only damages that occur are to Mr. *A*'s and Mr. *D*'s automobiles, and (6) Mr. *B* is solvent and Ms. *C* is not. In a suit by Mr. *A* (plaintiff) against Mr. *B* and Ms. *C* (defendants), the court's decision would shield Mr. *A* from the risk of Ms. *C*'s insolvency by placing that risk entirely on Mr. *B*. Why? The court's rationale is that there is a qualitative difference between the culpability of Mr. *A*'s conduct (contributory negligence) and that of Mr. *B* and Ms. *C* (negligence). But, in

113. 13 Cal. 3d at 811-12, 532 P.2d at 1231, 119 Cal. Rptr. at 863; Fleming, *Contributory Negligence*, 62 YALE L. REV. 690, 723-24 (1955). The *Li* majority suggests that in the harsh "all or nothing" jurisdictions once the dual standard is applied to the character of plaintiff's and defendant's conduct so that the case may reach the jury, then the jury in fact does consider the plaintiff's negligent conduct, not as a bar to recovery, but as a basis for reducing his recovery. 13 Cal. 3d at 811-12, 532 P.2d at 1231, 119 Cal. Rptr. at 863.

114. See *Lemos v. Eichel*, 83 Cal. App. 3d 110, 147 Cal. Rptr. 603 (1978), decided shortly after *American Motorcycle*, where the court applied joint and several liability to a plaintiff whose comparative fault was causally implicated in an accident that also resulted in an injury to some of the defendants.

addition to being contributorily negligent, Mr. *A* was negligent; his negligent conduct was causally implicated in Mr. *D*'s loss and may have created a risk of loss to Mr. *B* and Ms. *C*, although those risks were not realized. The qualitative differences in the culpability of Mr. *A*'s (plaintiff's) conduct and Mr. *B*'s and Ms. *C*'s (defendants') conduct, upon which the majority opinion relies in *American Motorcycle*, can only be maintained by wearing linguistic blinders.¹¹⁵

The majority's distinction does not survive analysis even in cases where the only one suffering a loss is the plaintiff. For example, assume (1) Ms. *A* negligently drives her heavy duty truck by going 45 miles an hour in a 20 mile an hour speed zone, (2) Mr. *B* is negligent in that he is crossing the street against the red light, (3) Ms. *A* and Mr. *B* arrive at the same intersection at approximately the same time, (4) if Mr. *B* were not in the intersection no harm would have occurred despite Ms. *A*'s speeding, and (5) if Ms. *A* were not speeding she could have controlled her truck without any injury, albeit Mr. *B* was negligently in the intersection. Based upon these assumptions, two scenarios could be written. Each would differ as to who is defendant and who is plaintiff but would in no way alter the character of risks created by Ms. *A* and Mr. *B*. Ms. *A* could fortuitously swerve, avoid striking Mr. *B* by a fraction of an inch, but in the process wreck her truck. In that event, she would be plaintiff and Mr. *B*, defendant; Ms. *A*'s conduct would be contributory negligence and Mr. *B*'s negligence. It is equally plausible that Ms. *A*, due to fortuitous circumstances could veer, but still not miss Mr. *B*. Rather, she could strike him, severely injure him, but, due to the heavy construction of her truck, suffer no initial loss. In that event, Ms. *A* would be defendant and Mr. *B*, plaintiff; Ms. *A*'s conduct would be negligence and Mr. *B*'s contributory negligence.

The point is that who will be plaintiff or defendant is not based on the qualitative difference in the culpability of the parties' conduct (the degree of risks created and the object of risks); rather, it is based on fortuitous circumstances. Thus, to decide in a multiparty litigation to shield parties labeled "plaintiff" from the risk of insolvency and to place that risk on others labeled "defendants" is to reintroduce the lottery aspect of tort law which the *Li* court sought to eliminate by the adoption of a pure comparative negligence system.¹¹⁶

The *American Motorcycle* majority blurred the difference between characterizing conduct as negligence (contributory or otherwise) on the

115. The sterility of deciding these matters on a narrow linguistic basis was expressed in the *Daly* case, see *supra* note 8.

116. 13 Cal. 3d at 827-28, 532 P.2d at 1242-43, 119 Cal. Rptr. at 874-75.

basis of risks created as opposed to risks realized. The difference between Mr. *X*, who speeds through a residential zone and injures somebody and Ms. *Y*, who might speed through the same zone without injuring anybody, is *not* that Mr. *X* is negligent and Ms. *Y* is not. Rather, both are equally negligent in creating unreasonable risks to others (as well as to themselves). The difference is that Mr. *X*'s negligence is actionable and Ms. *Y*'s is not; that is, one of the risks created by Mr. *X* actually materialized while none of the risks created by Ms. *Y* did. Which, if any, of the unreasonable risks created by the negligent conduct of a given party materializes may not be due to the character of the conduct but due, rather, to fortuitous circumstances.

The extent to which fortuitous circumstances, rather than qualitative differences in culpability of conduct, determine who is plaintiff and who is defendant might be illustrated by the following permutations involving four individuals (*A*, *M*, *E* and *D*) who are traveling at the same speed and who arrive in the middle of the same intersection at the same time after each negligently runs a four-way stop sign. *A* is traveling in an armored car; *M* on a moped; *E* in a borrowed and badly dilapidated Edsel; and *D* in a rare, fully restored and expensive Duesenberg. Let us first assume that the Duesenberg, Edsel and Moped were totally demolished; only *M* received personal injuries, and *A* and his armored car came out unscathed. In any action among the four parties, *A*, who was uninjured, would be a defendant and not a plaintiff; *E*, who suffered no personal injury and borrowed the Edsel, also would only be a defendant; and both *M* and *D* would be plaintiffs (or cross-complainants) and defendants (or cross-defendants), having both suffered injury as well as having inflicted injury on others. If we play a game of musical chairs and move *A* into *D*'s vehicle, *D* into *E*'s, *E* into *M*'s, and *M* into *A*'s, then *M* and *D* become defendants only and *A* and *E* become plaintiffs (or cross-complainants) as well as defendants (or cross-defendants). The reversal in the labels attached to the parties does not occur because the qualitative character of their conduct changes, but rather depends on the fortuitous circumstance of the type of vehicle each happened to be driving.¹¹⁷

Now let us vary the facts so as to eliminate *M* and his moped from the situation; to make the armored car company and its driver, *A*, financially insolvent; to have the driver of the Edsel own a rare and

117. Obviously, the risks created by a moped running a stop sign may be less than those created by the armored car. Those differences might support a *quantitative* difference in the proportion of fault attributed by the jury to *A* and *M*, rather than the qualitative difference suggested by the majority.

expensive Pierce Arrow which on the day of the accident was being serviced so that *E* was driving an Edsel loaner worth \$2,000; and to value both the Duesenberg and the Pierce Arrow at \$100,000 each. Thus, in our example, the total loss suffered because of the concurrent negligence of the three parties is \$102,000. Assume further that a jury found each of the three drivers equally negligent. Because there is now no source of recovery from the insolvent armored car company and its driver, *A*, the only parties left to bear the loss are *D* and *E*. Clearly, each contributed equally to the loss. Yet, under *American Motorcycle*, *D* would have his loss reduced by one-third (\$33,333.33) and could recover the remaining two-thirds from *E* (\$66,666.67). The owner of the Edsel loaner could recover the \$2,000 from either *D* or *E*. If one assumes that *D* and *E* are equally responsible for the loss and pay the owner of the Edsel \$1,000 each, the total loss of \$102,000 is borne between *D* and *E* as follows: *D*, \$34,333.33 or a little more than one-third of the total loss; and *E*, \$67,666.67 or a little less than two-thirds of the total loss. This distribution of the loss would occur under the majority's holding in spite of the fact that *D* and *E* were equally at fault and their conduct indistinguishable except for the fortuitous circumstance of the value of the vehicles driven.¹¹⁸

The lottery aspect of such a result becomes more apparent if we assume that both *D* and *E* had their antique motor cars serviced at the same garage and drove Edsel loaners. If, on the day of the accident, the Duesenberg was being serviced instead of the Pierce Arrow so that *D* instead of *E* was driving the Edsel loaner and *E* was driving the Pierce Arrow, the total loss would be unaffected. The character of their conduct also would be unchanged as would be the amount of fault (one-third) attributed to both. The proportion of the damage borne by

118. The result is no different when personal injuries are incurred as well as property damage. For instance, in our example, let us substitute *M* on his moped for *E* and his Edsel loaner. Let us assume that the Duesenberg is totalled but that *D* receives no personal injuries and that *A* and the armored car escape unharmed. Further assume that *M*, in trying to avert the crash, is thrown from his moped and suffers personal injuries, the value of which a jury fixes at \$60,000; however, *M*'s moped is not damaged. With *A* and the armored car company insolvent, the resolution of how the \$160,000 of total damages is to be borne between *D* and *M* is the same as in the earlier examples in spite of the fact that \$100,000 represents property damage and \$60,000 represents personal injuries. See *supra* note 104. *D*'s \$100,000 damages would be reduced by one-third (\$33,333.33) and the remaining amount would be recoverable from *M* (given the insolvency of *A* and the armored car company); *M*'s \$60,000 damages would be reduced by one-third (\$20,000.00) and the remaining two-thirds would be collectable from *D* (\$40,000.00). *E* would bear \$53,333.33 (or one-third) of the loss and *M* would bear \$106,666.67 (or two-thirds). Thus, while the fault of *E* relative to that of *D* is the same, *E* bears a greater portion of the total loss despite the fact that *E*'s loss consists of personal injuries and *D*'s of property damage.

each, however, would be reversed; just under two-thirds would be borne by *D* and just over one-third by *E*. This dramatic reversal would not result from a qualitative or quantitative change in the culpability of the parties' conduct. Rather, it would result from the fortuitousness of which party had his motor car serviced on that particular day.

While additional variations could be generated, those sketched out above should dramatically illustrate the fact that, in most cases, whether a negligent party will wear the label of plaintiff or defendant, and thus bear the burden of insolvent defendants, turns on fortuitous circumstances rather than the qualitative or quantitative difference in the culpability of their conduct.

One might argue that, since in some instances the conduct of the plaintiff might only injure plaintiff without raising unrealized risks of injury to others, the attack launched in this article represents too wide a net. Such an argument, however, also logically implies that the supreme court's formulation of joint and several liability is too broad in that it would catch in its net both plaintiffs whose negligent conduct poses risks to others, as well as those plaintiffs whose negligent conduct creates risks only to themselves. Furthermore, given the *Li* principle, if the plaintiff's negligent conduct causes injury only to himself and if the plaintiff is given recourse through the courts to have a negligent defendant share that loss, then it is not possible to argue that plaintiff creates risks only to himself and not to others. Clearly, the negligent defendant who must share the loss with a negligent plaintiff suffers the risk of loss in tort due to plaintiff's negligent conduct. In creating the risk of loss and insisting upon judicial redress from at fault defendants, a negligent plaintiff's conduct does not operate in a restrictive area of risk, that is, one which encompasses only risks to the plaintiff.

As the illustrations demonstrate, use of the labels "plaintiff" and "defendant" to determine who in a multiparty litigation is to bear the risk of an insolvent defendant is not dictated by the principles of logic, practical experience, or fundamental justice. Once one goes below the surface of the definition of "negligence" and "contributory negligence," one begins to fathom that there is no qualitative difference in the character of the negligent conduct of a party based on whether that party was the "defendant" or "plaintiff." In *Li*, the court sought to bury the lottery aspect of tort by the adoption of pure comparative negligence;¹¹⁹ in *American Motorcycle* the court resurrects that lottery aspect by mak-

119. 13 Cal. 3d at 827, 532 P.2d at 1242, 119 Cal. Rptr. at 874.

ing the label "defendant" or "plaintiff" the touchstone of who is to suffer the risk of the insolvent defendant.

VI. THE LOWER COURT'S OPINION

The court of appeal opted for a solution diametrically opposed to that formulated by the California Supreme Court. The lower court held that the risk of the insolvent defendant must be borne by the plaintiff.¹²⁰ The court concluded that after *Li* there was no longer joint and several liability; the judgments against each of the defendants should represent a portion of the total loss—that portion to be determined by each defendant's proportionate fault.¹²¹ The court supported its conclusion with three arguments: (a) its decision was more in keeping with the *Li* principle of liability in proportion with fault; (b) the theoretical underpinnings of joint and several liability were eroded by *Li*; and (c) the holding was fair because it placed the risk of the insolvent defendant on the plaintiff rather than on the "social fund."

A. *Several Liability as Consistent with the Li Principle*

The lower court, in its unanimous opinion, asserted without argument that several liability is more in keeping with the *Li* principle of liability according to proportionate fault.¹²² On examination, this assertion holds true only if the problem is seen from the defendants' point of view. If there is a \$100,000 injury involving a 30% negligent plaintiff, a 10% negligent, solvent defendant, and a 60% negligent, insolvent defendant, then from the 10% negligent defendant's viewpoint a judgment in the amount of \$10,000 is in keeping with the *Li* principle. However, from the perspective of the plaintiff who only recovers \$10,000 of his \$70,000 of innocent damages, the lower court's decision is contrary to the *Li* principle. The plaintiff would be forced to bear 90% of the loss even though his proportionate causal fault was only 30%.

120. In 1979, two bills were introduced in the California State Legislature that would have, in essence, rejected the California Supreme Court's position and adopted that of the appellate court. Those bills, S.B. 463 and A.B. 1784, provided that in an action for personal injury, property damage, or death, when an indivisible injury is caused by two or more persons, damages will be equitably apportioned among them by the trier of fact. Furthermore, each person would be liable "only for the percentage of the total compensable damages allocated to him and separate judgment shall be rendered against him for that amount." S.B. 463 § 2 (1979); A.B. 1784 § 2 (1979). Both bills failed to pass.

121. *American Motorcycle Ass'n v. Superior Ct.*, 135 Cal. Rptr. 497, 503 (1977), *vacated*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

122. *Id.*

The lower court's decision arises, as does that of the supreme court, from a failure to view the entire loss as separate from the particular label affixed to the parties ("defendant" or "plaintiff"). When the entire loss is viewed in terms of all the parties whose fault is causally implicated in the loss, the lower court's position is not in keeping with *Li*. In the above example, the *Li* principle would dictate that the \$100,000 loss should be borne by all parties in proportion to their fault, and if \$60,000 is uncollectable from one of the defendants, then that \$60,000 should be borne by the plaintiff and the solvent defendant in a ratio corresponding to their proportionate fault, that is, in the manner outlined in Section VII of this article. That method would require both *A* and *B* to share the \$60,000 uncollectable from *C* on a 3 to 1 ratio (*A* being 30% negligent and *B* being 10% negligent).

B. Basis of Joint and Several Liability Eliminated by Li

The lower court argued that joint and several liability rested on the assumptions that (1) the plaintiff was innocent, (2) the plaintiff's damages were caused by a negligent defendant, (3) defendant's negligent conduct could not be apportioned, and (4) the legal system could not consider proportionate negligence in allocating responsibility.¹²³ The court argued that these assumptions were shattered by *Li*.¹²⁴ A negligent plaintiff may recover damages, juries may determine proportionate fault, and the *Li* principle itself supports the proposition that the proportion of fault must be considered in assessing damages. This article agrees with the lower court that *Li* requires a revision of joint and several liability; however, that revision does not necessarily require the adoption of the lower court's "several liability."

The difficulty with the lower court's argument is that it goes too far. It may discredit traditional notions of joint and several liability (affirmed by the supreme court in *American Motorcycle*), but it does not, thereby, necessarily support the "several liability" position adopted by the lower court. *Li* did destroy the "all or nothing" principle of tort law whereby each party (negligent plaintiff along with negligent defendants) bore the full legal responsibility for damages apart from the degree to which the other parties' negligent conduct concurred in the loss. The principle that now allows a *negligent* plaintiff to recover might have destroyed the basis for arguing that in all cases the risk of the insolvent defendant must be borne by solvent defendants

123. *Id.* at 501.

124. *Id.*

and only by them (at least in those cases in which the plaintiff's conduct was causally implicated in the loss). However, it does not necessarily follow from that principle that in all cases the risk of the insolvent defendant must be borne by the plaintiff regardless of whether the plaintiff's conduct was negligent and, if negligent, regardless of the proportionate fault of plaintiff vis-a-vis that of the solvent defendant.

In short, the lower court assumes that there are only two alternatives with regard to who is to bear the risk of the insolvent defendant: (1) joint and several liability whereby solvent defendants bear the burden of the insolvent defendant to the exclusion of plaintiffs; and (2) the lower court's notion of several liability whereby only plaintiffs bear that burden. From this assumption the lower court establishes the second alternative by process of elimination. Essentially, the court argues that since the first alternative is not in keeping with *Li* we are left with the second. However, the second alternative vis-a-vis the *Li* principle is merely the flip side of the first alternative. Both are equally out of step with *Li* and discrediting one does not validate the other by process of elimination. A third alternative, outlined in Section VII of this paper, not only would appear to be in keeping with *Li* but would seem to be dictated by it.

C. Policy Considerations Regarding Loss Shifting

The court's final argument deals with the effect of loss shifting on the "social fund," although it never precisely defines that term. The court argues that its position must be adopted because placing the burden of the insolvent defendant on the solvent defendants would be tantamount to placing an additional charge on the "social fund" which also must be available to provide education, to enhance the quality of opportunity for the disadvantaged, to lessen the burden of local property taxation, and to serve a multitude of other growing fiscal needs of the government.¹²⁵

The argument made by the lower court may be summarized as follows: First, loss shifting occurs from the plaintiff to someone else (ostensibly defendants), and generally from that someone to still others (taxpayers, consumers, or purchasers of insurance).¹²⁶ This second shifting occurs through intermediaries such as social security funds, public aid, private insurance companies, workers' compensation funds

125. *Id.* at 502.

126. *Id.*

and insured automobile liability.¹²⁷

Second, if joint and several liability is retained, ultimately the burden of the insolvent defendant would be shifted to taxpayers, consumers, or purchasers of insurance, and would thereby constitute a charge on the already strained "social fund." Such a charge would divert resources from serving the subsidiary ends of education, equality of opportunity for the disadvantaged, reduction of crime, and reduction of property tax and the fiscal needs of government.

Third, impliedly, the court assumes that if its concept of several liability is adopted, the burden of the insolvent defendant will be borne by the plaintiff alone and will not constitute a charge on the "social fund" and a diversion of funds from it.

Finally, plaintiff cannot complain that his recovery is limited only to solvent defendants, for prior to *Li* he could recover nothing. Consequently, since *Li* put the negligent plaintiff in the position of being able to recover where heretofore he could not, that plaintiff cannot complain because his recovery would be limited to the proportion of fault represented by the solvent defendants.¹²⁸

There are several pertinent observations to be made regarding this argument. First, even if one assumes that joint and several liability will increase the charge on the "social fund," it is not entirely clear that such an increase would be significant. For example, there is some evi-

127. The court refers to Keeton and O'Connell, but actually it is citing Conard, *Remarks*, in *CRISIS IN CAR INSURANCE* 90 (1968) [hereinafter cited as Conard].

128. As a subsidiary argument, the court, relying on Conard's statistical analysis, *see supra* note 127, argues that the fixed costs of shifting losses to the public fund is between two and three dollars for each dollar distributed to cover loss. The implication left is that each dollar representing an insolvent defendant's share of the loss paid by the solvent defendant will be a tax on the social fund with an additional surcharge of two or three dollars representing costs of administration.

Conard indicates, however, that for the various sources of socializing the costs of loss, the administrative costs vary from 3% to 125% of every dollar paid, depending on the source tapped—social security, workers' compensation, etc., rather than two or three dollars as the lower court states. Beyond this inaccuracy, it is not clear that, for each additional dollar paid from one of the social fund sources, there would be a commensurate increase in fixed administrative costs on the two or three dollar basis or on a basis more in keeping with Conard's figures of three cents to one dollar and twenty-five cents. That is, it is entirely conceivable that the total administrative costs in absolute dollars would remain the same or would rise very slightly in the face of additional amounts paid. Thus, if the total administrative dollars spent remains constant and the amount of dollars paid out increases, the ratio of administrative costs to dollars paid would decrease. This article does not assert that that would be the case; it merely points out that it is a possibility. What will in fact occur cannot be determined from the content of the lower court's decision nor by its reliance on Conard. It is the kind of question more appropriately addressed by the legislature with its resources for general fact finding.

dence that in jurisdictions adopting comparative negligence, insurance premiums have not increased.¹²⁹ If one were to engage in the “arm-chair empiricism” of the lower court, one would anticipate that the adoption of comparative negligence (and the elimination of the all or nothing contributory negligence doctrine) would afford greater recovery by plaintiffs against defendants, and that to the extent that there was such greater access by plaintiffs to defendants, the increased charge on the social fund would be reflected by increased insurance premiums to insureds.

Even if there were such an increase in the absolute amount of dollars charged on the “social fund,” it is not entirely clear that, when these dollars are spread among the “taxpayers, consumers, or purchasers of insurance,” they will represent anything other than a minuscule amount, or will in any way seriously impair the availability of the “social fund” for the purposes outlined by the court.¹³⁰ Further, even if joint and several liability were such a drain on the “social fund” that some of the other needs served by that fund remained unmet, it is not clear that those unmet needs would be more socially desirable than compensating plaintiffs for their innocent damages. Moreover, because the court is not in the position to perform the complex weighing of priorities among the large number of socially desirable outcomes—many of which are not before it, that judgment is better left to the legislature.

Second, it does not necessarily follow that when defendants bear the burden of insolvency, the costs will in all cases be shifted to the “social fund,” and that when that burden is placed on plaintiff such a shift will not occur. In those instances where solvent defendants are uninsured or are insured yet face judgments in excess of policy limits, the defendant might be forced to bear the loss without shifting it to the “social fund.” To the extent that the defendant is unable to pass the loss on to the “social fund,” the lower court’s rationale is not a basis for determining whether the plaintiff or the solvent defendant is to bear the burden of the insolvent defendant.

Third, in many instances, the plaintiff’s inability to recover full compensation for his innocent damages from the defendants may in fact result in a burden on the “social fund.” Two cases illustrate this

129. Todd, *The Prospect for Automobile Insurance Rate Changes Under Comparative Negligence*, 38 TEX. B.J. 1153 (1973). Todd’s analysis indicates that one cannot merely focus on trial outcome in analyzing insurance cost due to substantive law changes. For example, one must also focus on the effect that such changes might have on the assertion of claims.

130. 135 Cal. Rptr. at 502.

point. In the first case, assume a plaintiff who is injured in the scope of his employment as a result of his own, and two defendants', concurrent negligence. Assume further that the bulk of the fault is that of an insolvent defendant and the remaining defendant is uninsured for that particular risk but has funds available to make the plaintiff whole. Plaintiff could collect workers' compensation, thereby shifting the loss to one of the sources of the "social fund" as outlined by Conard. If both defendants were solvent, the workers' compensation carrier would have a separate action against the defendants or could recover in the employee's action for the amount paid in the compensation award.¹³¹ To the extent that the burden of the insolvent defendant is borne by the solvent defendant, the "social fund" is in a position to be compensated for that portion of plaintiff's loss paid by the compensation carrier. If in fact the burden of the insolvent defendant is borne solely by the plaintiff, then the opportunity for the compensation carrier to be reimbursed is reduced, thereby placing the burden on the "social fund."

In the second case, assume the same set of facts except that workers' compensation is unavailable. Under the lower court's decision, the plaintiff would have to bear the burden of the insolvent defendant. However, the nature of the injury may be such as to incapacitate the plaintiff from gainful employment. If the plaintiff were allowed to recover the entire judgment (reduced by plaintiff's amount of fault) from the solvent defendant, that award might provide for needed financial support to the plaintiff. Absent access to the solvent defendant for the satisfaction of the judgment, the plaintiff might have to resort to state or federal aid programs for subsistence—a resort that would most directly be a charge on the "social fund."

131. CAL. LAB. CODE §§ 3852-3857 (West 1970); *Burum v. State Ins. Fund*, 30 Cal. 2d 575, 184 P.2d 505 (1947). The difficulty with the majority's position, which is predicated on the status of the parties, is illustrated by suits that could be brought by the employer or his carrier. Prior to *Li*, negligence on the part of the employer precluded him from prevailing in an action against a third party whose negligence contributed to the injury of the employee. See *Tate v. Superior Ct.*, 213 Cal. App. 2d 238, 249, 28 Cal. Rptr. 548, 554 (1963). Under *Li*, such an action by a negligent employer or his carrier is not precluded; the recovery is merely reduced. *Rodriguez v. McDonnell Douglas Corp.*, 87 Cal. App. 3d 626, 669-70, 151 Cal. Rptr. 399, 432-24 (1979); see also *Associated Constr. & Eng'r Co. v. Workers' Comp. Appeals Bd.*, 22 Cal. 3d 829, 844-46, 587 P.2d 684, 693-94, 150 Cal. Rptr. 888, 897-98 (1978) (employer entitled to credit for amount by which its compensation liability exceeds its degree of negligence). For example, assume that an employee collected a \$100,000 workers' compensation award due to an injury suffered at the hands of his 30% negligent employer, a solvent 10% negligent third party, and an insolvent 60% negligent third party. When the employer pursues his statutory action against the third parties, must the solvent third party totally bear the insolvency of the other third party because he is a defendant and the employer a plaintiff?

Thus, whatever the lower court means by shifting the loss to the "social fund," the proposition cuts both ways: uncompensated innocent damages borne by the plaintiff might be shifted to the "social fund" and a solvent defendant's liability for a fellow insolvent defendant's culpable damages might not be shifted.

Another weakness in the lower court's argument becomes apparent when the term "social fund" is critically examined. The court never defines the term but, based on its reliance on *Conard*, the aggregate of social security, public aid, private insurance companies, workers' compensation funds and insured automobile liability policies¹³² would appear to constitute the "social fund."

All of these sources of funds may be considered part of the "social fund" because they are required by statute for the benefit of members of the public who suffer loss. While these statutory schemes mandate the existence of a given source of funds, not all of these sources are financed by the government. Consequently, the charge upon the "social fund" will not necessarily diminish the dollars available to government for the realization of the salutary objectives outlined by the lower court.

For example, let us assume that a plaintiff is injured as a result of the concurrent negligence of himself, his employer, and two other individuals. Part of his injury would be compensated through workers' compensation, a statutorily mandated program maintained through private insurance carriers or by an individual employer who is self-insured for that purpose. Premiums paid to an insurance company by the employer (or money paid out by a self-insured employer) would account in part for employee-plaintiff's compensation. Theoretically, this cost of compensating the employee is passed on to the consuming public in increased prices for the employer's goods or services. To the extent that prices of goods subject to the sales tax are increased, there would be a concomitant increase in state revenue. Consequently, when the workers' compensation program bears the burden of a loss there may be an immediate drain on employers and insurance companies, but there would not necessarily be a drain on the public funds.¹³³

132. Other governmental programs designed to alleviate the burden of innocent damages suffered by victims of disaster, such as disaster relief loans at low interest rates, might also be included.

133. If the increased rates are not passed on to the consumer of the employer's goods or services, they may cut into profit margins, and to that extent may adversely affect revenues from income tax or local business taxes; if the employer passes the costs on in increased prices for goods, the revenue from sales taxes may actually *increase*. What would in fact occur is beyond the scope of "arm chair" economics. What is suggested, however, is that the

In this example, if the employer were self-insured and bankrupt and the other two defendants were insolvent, then plaintiff would have to absorb the cost of the injury. If the injury were such that it reduced or eliminated plaintiff's capacity to earn a living, then he might need to resort to public aid, which would constitute a drain on monies collected by state revenues. If, however, one of the defendants were fully insured and able to compensate plaintiff for all of his innocent damages, then there would be no drain on state resources. Instead, the compensation would be passed on to all of the insurance company's insureds in the form of increased premiums.¹³⁴ Other examples could be generated to illustrate this proposition.¹³⁵

This article does not suggest that the lower court's decision will necessarily increase the strain put on state or federal resources. It takes no position on that issue. What in fact will or will not occur is too complex a problem to be addressed within the confines of a given appellate court case and requires expertise beyond the ken of the ordinary tort lawyer. Indeed, the long range economic consequences, not only in terms of the availability of public funds, but also of the ripple effect that either court's decision might have on the economy in general, involve a study requiring extensive data analyzed by economists. What is suggested is that the argument by the lower court cannot carry the burden of overriding the *Li* principle, which dictates that losses should be borne according to fault and not according to which label ("plaintiff" or "defendant") a party might happen to wear.

Even if for the moment we were to accept the lower court's argu-

lower court's "arm chair" economics regarding the potential burden on the social fund does not hold up when subjected to an "arm chair" critique.

134. Again, one might argue that the increased premiums are a business expense reducing the amount of income that could be taxed. On the other hand, if the insured can pass the increase to the consumer, keeping profits intact, the increase in premiums would not affect income tax revenues, but might increase sales tax revenues. See *supra* note 133 and accompanying text.

135. For example, let us assume that in our example plaintiff is injured, that the relative fault of his employer, himself and the fully insured defendant is 5% each and that the liability of the remaining defendant, who happens to be insolvent, is 85%. Furthermore, let us assume that plaintiff is totally disabled and that the jury returns a \$500,000 verdict. Under the lower court's decision, granting that the employer was self-insured and bankrupt, the total compensation which would be received by the plaintiff would be \$25,000. It is not difficult to anticipate that with severe injuries rendering plaintiff disabled he would need to resort to some sort of public aid, thus causing a drain on federal or state resources. On the other hand, assuming that the defendant was insured up to \$500,000, if the burden of the bankrupt employer and insolvent defendant were borne by the fully insured defendant, then the drain would be on the resources of the insurance company, and passed on to its insureds, and no drain would necessarily be made on the resources of the state.

ment regarding a drain on the "social fund," there is no basis for saying that the outlined social fund purposes are more worthy of those dollars than the compensation of plaintiffs for innocent damages. On the contrary, the history of both statutory and decisional law in California shows a deep commitment to the compensation of victims for innocent damages even though that compensation may increase the cost of government or of doing business for the private sector.¹³⁶ The provision of medicaid, the provision for uninsured motorists coverage, the requirement for unemployment compensation, the requirement for workers' compensation, and the concept of strict liability for defective products, are all established programs and doctrines. Their existence signifies that there is a state commitment to a direction diametrically opposed to that which the lower court would adopt.

VII. THE SOLUTION

The thesis of this article is that all solvent parties whose culpable conduct is causally implicated in an injury should bear the burden of an insolvent defendant according to their relative proportionate fault. The principle is more simply stated than implemented. The next two sections develop a scheme for implementation of the position taken in this article, yet is equally applicable if the doctrine of joint and several liability as announced in *American Motorcycle* is retained. Under such circumstances it could be used to determine the rights and liabilities of the remaining defendants under *American Motorcycle's* doctrine of partial equitable indemnity when one of the defendants is unable, in whole or in part, to pay his culpable damages due to insolvency.

For example, let us assume an innocent plaintiff suffers a \$100,000 loss at the hands of three defendants whose fault is found to be as follows: solvent defendant *A*, 30%; solvent defendant *B*, 10%; insolvent defendant *C*, 60%. The respective liabilities among the defendants for the \$100,000 judgment would be: *A* \$30,000; *B* \$10,000; and *C* \$60,000. Furthermore, let us assume that plaintiff levies against *A's* bank account for the full amount of the judgment, \$100,000. Two questions arise under the court's doctrine of partial equitable indemnity: (1) What are the specific rights of *A* against *B* and *C* under the doctrine

136. The following statement from A.B. 550 § 1 (1979) is an apt recitation of that tendency in the California courts:

[V]irtually all Tort law involves decisions as to the extent to which loss of the injured person will be shifted to someone else. . . . [I]n California, the announced judicial policy has been to increasingly shift those losses to purchasers of insurance, as well as to all California taxpayers and consumers, through the expansion of available tort theories and recoverable damages.

of partial equitable indemnity, and (2) What are the correlative liabilities of *B* and *C* to *A*? In practical terms, the sole question is whether *A* should be allowed to recover only \$10,000 from *B* (the portion of the judgment representing *B*'s culpable damages)? If *A* could recover only \$10,000 from *B*, then *A* would be forced to bear the entire burden of the insolvent defendant, *C*, while *B* would bear none of that risk, although both of them wear the identical label of "defendant." The inequity of the situation is obvious. It is equally possible that plaintiff could have extracted full satisfaction of the judgment by levying against *B*'s bank account for the entire \$100,000. In that instance, *B* could recover only \$30,000 from *A*, and the entire burden of the insolvent defendant, *C*, would fall on *B*. Who would carry the burden of *C*'s insolvency would turn on whether the plaintiff sought to execute against *A* or *B*, hardly an equitable basis for determining who among solvent defendants must bear the burden of the insolvent defendant.

If, on the other hand, *A*, having satisfied the entire judgment, were allowed to recover more than \$10,000 from *B*, the question becomes "how much more?" And, after having recovered that amount, whatever it might be, then what should be the liabilities and rights of *A* and *B* against *C* should *C* become solvent? The generality and pervasiveness of these questions can be illustrated by three different situations which appear in Table I, all of which can be subsumed and resolved with respect to mutual liabilities and rights using the scheme to be outlined.

The first situation involves a jurisdiction which adopts the position advocated in this article—one in which all culpable parties are required to participate in the loss according to their proportionate fault. It assumes a 30% negligent plaintiff, *A*, who suffers a \$100,000 injury at the hands of a 10% negligent, solvent defendant, *B*, and a 60% negligent, insolvent defendant, *C*.

The second situation involves a jurisdiction like California which has: (1) adopted comparative fault, (2) retained joint and several liability unchanged, and (3) adopted partial equitable indemnity among defendants based upon proportionate fault. It assumes a 50% negligent plaintiff who has suffered a \$200,000 loss and received a judgment against the following defendants: *A*, 15% negligent and solvent; *B*, 5% negligent and solvent; and *C*, 30% negligent and insolvent. Plaintiff's judgment is reduced by \$100,000, to account for his proportion of fault. Of the remaining \$100,000, \$30,000 represents *A*'s culpable damages; \$10,000, *B*'s culpable damages; and \$60,000, *C*'s culpable damages. Plaintiff collects the entire judgment from *A*.

TABLE I

	Amount of Loss	Relative Fault	Amount Suffered	Amount of Culpable Damages
Situation I (All culpable parties share total loss proportionate to fault)	\$100,000	πA 30%	\$100,000	\$30,000
		ΔB 10%	-0-	\$10,000
		ΔC 60%	-0-	\$60,000 (insolvent)
Situation II (California-type partial equitable indemnity)	\$200,000 (π collects \$100,000 from ΔA)	π 50%	\$100,000	\$100,000
		ΔA 15%	\$100,000	\$30,000
		ΔB 5%	-0-	\$10,000
		ΔC 30%	-0-	\$60,000 (insolvent)
Situation III (hybrid)	\$100,000 (π collects \$100,000 from ΔA)	π 0%	-0-	-0-
		ΔA 30%	\$100,000	\$30,000
		ΔB 10%	-0-	\$10,000
		ΔC 60%	-0-	\$60,000 (insolvent)

The final situation could arise in a jurisdiction which adopts either of the two positions set forth in the two previous situations. An innocent plaintiff suffers a \$100,000 injury and receives a judgment against the following: a 30% negligent, solvent defendant, *A*; a 10% negligent, solvent defendant, *B*; and a 60% negligent, insolvent defendant, *C*. Plaintiff collects the entire judgment from *A*.

In all three situations, *A* vis-a-vis *B* and *C* initially suffers a \$100,000 loss of which only \$30,000 represents his culpable damages; the remaining \$70,000 suffered represents his innocent damages, the total of *B*'s and *C*'s culpable damages (\$10,000 and \$60,000 respectively). The issues involved in all three situations are identical and can be answered by the same scheme.¹³⁷ In all cases, *A* initially pays his as well as *B*'s and *C*'s culpable damages. The right of *A* to recover the culpable damages of *B* and *C* suffered by him, the right of *A* against *B* (or *C*) to be reimbursed for *A*'s payment of *C*'s (or *B*'s) culpable damages, and other similar problems all can be answered in the same manner for all three situations. Thus, while the scheme presented here is developed as a handmaiden to a jurisdiction described in Situation I, it could easily serve a jurisdiction which adopts the position announced in *American Motorcycle* to the extent that a scheme is necessary to work out the court's doctrine of partial equitable indemnity (Situations II and III).

The scheme's controlling principle is that each party whose conduct is proximately implicated in causing an injury, including plaintiff, shall bear the loss according to his proportionate fault; and, this sharing shall include sharing the culpable damages of an insolvent party (to the extent of that insolvency) by the solvent parties on the same basis of proportionate fault. Each party's proportionate share will be determined on the basis of the relative proportionate fault of the remaining parties. Thus, in Situation I, the three parties (30% at fault *A*, 10% at fault *B*, and 60% at fault *C*), in addition to their culpable damages, would be potentially liable for a proportionate share of the remaining parties' culpable damages.¹³⁸ Each of the three parties has a minimum liability as well as a maximum liability. Each party's minimum liability consists of his own culpable damages. In addition, each party has a potential liability to bear the insolvency of each of the other parties. This amount along with his culpable damages fixes his maximum liability. For example, assume that although *A* initially bears the entire loss of \$100,000, only \$30,000 represents *A*'s culpable damages. As-

137. See *supra* text accompanying note 103.

138. The relative liabilities of the parties is fully illustrated and explained in Appendix I.

sume that *C* is insolvent. Under those circumstances, *B* is first liable to *A* in the amount of \$10,000, that \$10,000 representing *B*'s culpable damages initially suffered by *A*. In addition, *A* and *B* remain potentially liable for the culpable damages of *C* unpaid by *C*; their maximum potential liability for these damages is divided between them on a 3:1 ratio, or \$45,000 for *A* and \$15,000 for *B*. Thus, under these circumstances *B*'s minimum liability is \$10,000, and his maximum liability is \$25,000.

When a given party has suffered innocent damages, he may look to the other parties for reimbursement. As he receives that reimbursement, the liabilities and rights of the parties must be continually adjusted. The adjustment should be made in accordance with the proportionate fault of the various parties. The principle may be illustrated by taking a simple case where *A* initially suffers the entire loss and is unable to collect from *C*. Using our example of a \$100,000 loss with *A* 30% at fault, *B* 10% at fault and *C* 60% at fault, Table II illustrates five possible variations. In all five, *A* initially bears the entire \$100,000 loss and does not collect from *C*.

In the first variation, *A* collects nothing from either *B* or *C*. Under these circumstances, *B*'s potential liability to *A* is \$25,000, \$10,000 of which represent *B*'s culpable damages and \$15,000, his innocent damages, or his share of *C*'s culpable damages unpaid by *C*. Since *A* and *B*'s relative fault was 30% and 10%, they share *C*'s culpable damages unpaid by *C* on a 3:1 ratio, *B* bearing \$15,000 of those damages and *A* \$45,000. By the same token, *C*'s potential liability to *A* is \$66,666.67, \$60,000 representing *C*'s culpable damages and the remainder representing *C*'s share (on a ratio of 30%:60% or 1:2) of *B*'s culpable damages unpaid by *B*; *A*'s share of *B*'s culpable damages unpaid by *B* based on this same ratio would be \$3,333.33.

In the second variation, *A* recovers \$7,000 from *B*. In all such cases, any monies paid by *B* to *A* should be applied first to satisfy *B*'s liability for his culpable damages, and only after it has been entirely discharged should any monies be applied to reduce his liability to *A* for *C*'s culpable damages unpaid by *C*. In this variation, *B*'s potential liability to *A* is \$18,000, \$3,000 of which represents *B*'s unpaid culpable damages suffered by *A*. The remaining \$15,000 represents *B*'s share of *C*'s culpable damages unpaid by *C*. The ratio in which *A* and *B* must bear *C*'s culpable damages unpaid by *C* is no different in variation 2 than in variation 1. Payment of the \$7,000 by *B* to *A*, however, does change *C*'s potential liability to *A*; that liability now consists of only \$62,000 as compared to \$66,666.67 in variation 1. It is clear that *C*'s

TABLE II

If <i>A</i> initially suffers the entire \$100,000 loss (either because <i>A</i> is the plaintiff or <i>A</i> is one of three defendants and plaintiff executes for the full \$100,000 against <i>A</i>), then the liability of <i>B</i> and <i>C</i> to <i>A</i> when <i>A</i> collects nothing from <i>C</i> and collects from <i>B</i> :				
1.	-0-	<i>B</i> 's liability \$25,000	{ \$10,000 CD \$15,000 ID	{ <i>B</i> 's ratio of <i>C</i> 's unpaid CD (<i>A</i> 's ratio \$45,000)
		<i>C</i> 's liability \$66,666.67	{ \$60,000 CD \$ 6,666.67	{ ID <i>C</i> 's ratio of <i>B</i> 's unpaid CD (<i>A</i> 's ratio \$3,333.33)
2.	\$7,000	<i>B</i> 's liability \$18,000	{ \$ 3,000 CD \$15,000 ID	{ <i>B</i> 's ratio of <i>C</i> 's CD (<i>A</i> 's ratio \$45,000)
		<i>C</i> 's liability \$62,000	{ \$60,000 CD \$ 2,000 ID	{ <i>C</i> 's ratio of <i>B</i> 's unpaid CD (<i>A</i> 's ratio is \$1,000)
3.	\$10,000	<i>B</i> 's liability \$15,000	{ -0- CD \$15,000 ID	{ <i>B</i> 's ratio of <i>C</i> 's unpaid CD (<i>A</i> 's ratio is \$45,000)
		<i>C</i> 's liability \$60,000	{ \$60,000 CD -0- ID	
4.	\$18,000	<i>B</i> 's liability \$ 7,000	{ -0- CD \$ 7,000 ID	{ <i>B</i> 's ratio of <i>C</i> 's unpaid CD (<i>A</i> 's ratio is \$45,000)
		<i>C</i> 's liability \$52,000	{ \$52,000 CD -0- ID	{ *\$8,000 of <i>C</i> 's CD owed <i>A</i> paid by <i>B</i>
		[*Note: <i>C</i> would be liable to <i>B</i> for this \$8,000; when added to the \$52,000 owed <i>A</i> it would equal <i>C</i> 's total CD of \$60,000.]		
5.	\$25,000	<i>B</i> 's liability -0-	{ \$45,000 CD -0- ID	{ **\$15,000 of <i>C</i> 's CD owed <i>A</i> paid by <i>B</i>
		<i>C</i> 's liability \$45,000		
		[**Note: <i>C</i> would be liable to <i>B</i> for this \$15,000; when added to the \$45,000 owed <i>A</i> it would equal <i>C</i> 's total CD of \$60,000.]		

"ID" = Innocent Damages
 "CD" = Culpable Damages

liability for his culpable damages initially borne by *A* remains unchanged; however, in view of *B*'s payment of \$7,000, *C*'s share of *B*'s unpaid culpable damages must change. The \$3,000 of culpable dam-

ages unpaid by *B* must be borne by *A* and *C* on the ratio of 1:2 (*A* being 30% at fault and *C*, 60%). That is, *A* must bear \$1,000, and *C*, \$2,000.

Variation 3 shows the relative liabilities when *B* has paid all of his culpable damages but none of his share of *C*'s culpable damages unpaid by *C*. Variation 4 shows the relative liabilities when *B* has paid not only all of his own culpable damages but some of his share of *C*'s culpable damages unpaid by *C*. At this point, *C* also becomes indebted to *B*.

In the final variation, *A*, having initially suffered the entire \$100,000 loss, collects from *B* the maximum amount of *B*'s liability to *A*—\$25,000. That liability reflects \$10,000 of *B*'s culpable damages and his entire liability for *C*'s culpable damages unpaid by *C* (i.e., \$15,000 since the relative ratio of fault as between *A* and *B* for the \$60,000 is 3:1). As in the preceding variations, *C*'s liability to *A* will be reduced by the amount of his culpable damages paid to *A* by *B* (here from \$60,000 to \$45,000). Thus, in addition to being liable to *A* for \$45,000, *C* now would be liable to reimburse *B* for the \$15,000.

Suppose the heretofore insolvent *C* comes into possession of funds. What would be the competing claims of *A* and *B* with respect to those funds? The *Li* principle and equity demand that all amounts collected from *C* (whether collected by *A* or *B*) be so collected that, with respect to the burden of *C*'s insolvency, a ratio between *A* and *B* is maintained which reflects the relative fault of these solvent parties. For example, let us assume that in variation 4 after *B* pays *A* \$8,000 of *C*'s culpable damages, *C* comes into possession of \$8,000 which is then collected either by *A* or by *B*. How should the \$8,000 be distributed as between *A* and *B*? Since *C* has paid \$8,000, only \$52,000 of his culpable damages unpaid by him remain. That \$52,000 insolvency should be borne by *A* and *B* according to their relative fault; that is, on a ratio of 3:1. On that basis *A* should bear \$39,000 of the \$52,000 and *B* \$13,000 (hereinafter "theoretical ratio" or "TR"). Prior to *C*'s payment of \$8,000, *A* and *B* bore *C*'s insolvency on a 13:2 ratio which expressed in dollar amounts was \$52,000 to \$8,000 (hereinafter "actual ratio" or "AR"). Therefore, the entire \$8,000 collected from *C* should be distributed to *A*, thus altering the \$52,000 to \$8,000 actual ratio toward the requisite \$39,000 to \$13,000 theoretical ratio. Such a distribution will not achieve the requisite 3:1 ratio (or \$39,000 to \$13,000). The actual ratio will now be 23:4 (or \$46,000 to \$8,000). However, any distribution other than allocating the entire \$8,000 to *A* would tend to move the actual ratio away from the 3:1 theoretical ratio.

Assume the same facts as outlined in the prior paragraph except that \$32,000 instead of \$8,000 is collected from *C*. In that event, *C*'s remaining culpable damages unpaid by *C* would be \$28,000. Based on the 3:1 ratio, *A* should bear \$21,000 of the \$28,000 and *B* \$7,000. Immediately prior to collecting the \$32,000, *A* bore \$52,000 of *C*'s culpable damages, and *B* bore \$8,000. Consequently, \$31,000 should be distributed to *A* and \$1,000 to *B*. Such a distribution achieves the 3:1 theoretical ratio. Once the theoretical ratio is achieved, all monies collected by *A* or by *B* from *C* should be distributed to *A* and *B* on the basis of the 3:1 ratio.

Table II represents the simplest situation in which solvent parties must bear the burden of an insolvent defendant. As the insolvent defendant becomes a source of satisfaction for judgments paid (or losses suffered by the solvent parties), payment by that heretofore insolvent defendant should materially alter the rights and liabilities of all the parties. Those rights and liabilities ought to be continually adjusted according to the limiting factor of the relative proportionate fault of the parties, according to the theoretical ratio. In order to illustrate how the principle would work, variation 5 is examined in the remaining portion of this section. A hypothetical scenario of payments will illustrate how changing rights and liabilities theoretically would occur. Appendix II presents similar scenarios for variations 2 through 4. The scenario dealing with variation 5 is given in Table III.

In the first row of the Table, *A* has received \$25,000 from *B*, \$10,000 of which are *B*'s culpable damages and \$15,000 of which represent *B*'s share of *C*'s culpable damages unpaid by *C*. The theoretical ratio in which *A* and *B* should bear the burden of *C*'s \$60,000 unpaid culpable damages is \$45,000 to \$15,000. Column 5 indicates that the actual ratio in which *A* and *B* bear the burden of *C*'s insolvency is identical to the theoretical ratio; therefore, *B* no longer has any liability to *A* resulting from the need to bring the actual ratio in accordance with the theoretical ratio. In spite of the fact that *C* has paid none of his culpable damages, his obligation to *A* is only \$45,000, since \$15,000 of *C*'s culpable damages initially borne by *A* were paid to *A* by *B*. However, by virtue of *B*'s payment to *A* of \$15,000 of *C*'s culpable damages (innocent damages as to *B*), *C* incurs a liability of \$15,000 to *B* (Col. 13).

In the second step of the scenario (Row 2), *A* collects \$16,000 from *C* in addition to the \$25,000 already collected from *B*. Of the total of \$41,000 collected by *A* from *B* and *C*, \$10,000 represents *B*'s culpable damages and \$31,000 *C*'s culpable damages. The payment of \$16,000

TABLE III

	1	2	3	4	5	6	7	8	9	10	11	12	13
	Amounts collected*	Amount paid to A	Amount of CD owed A	TR of A to B of CD unpaid by C (3:1)	AR of A to B of CD unpaid by C	Liability of B to A to bring AR to TR	Amount owed C due to C's payment of B's CD	Amount paid to A	Amount of CD owed A	TR of A to C of CD unpaid by B (1:2)	AR of A to C of CD unpaid by B	Liability of C to A to bring AR to TR	Amount owed B due to B's payment of C's CD
1.	A collects: 25(B) 10 CD (B) 15 CD (C)	25	-0-	45:15	45:15	-0-	-0-	-0-	45 [15 of 60 paid to A by B]	— [All of B's CD paid by B]	— [All of B's CD paid by B]	— [All of B's CD paid by B]	15 [See Row 1, Col. 9]
2.	A collects: 25(B) 16(C)	Same	Same	33:11	29:15	-4	Same	16	29	Same	Same	Same	15
	10 CD (B) 31 CD (C)					[should be collected from C by A on behalf of B]							
2a.				33:11	33:11	-0-		16	33				11
3.	A collects: 25(B) 16(C)	Same	Same	30:10	33:7	3	Same	16	33				7
	10 CD (B), 31 CD (C)					[should be collected from C by B on behalf of A]							
	B collects: 4 (C) 1 retained by B and 3 collected and paid to A												
3a.				30:10	30:10	-0-		16	30				10

* All amounts expressed in thousands of dollars. Letters in brackets indicate from whom monies are collected. Letters in parentheses indicate on whose behalf monies are paid.

CD = Culpable Damages

ID = Innocent Damages

TR = Theoretical ratio of CD unpaid by a given party to be borne by the remaining parties

AR = Actual ratio of CD unpaid by a given party borne by the remaining parties

Note that from Row 2a on, all monies collected by either A or B from C should be collected on behalf

of both A and B on a 3:1 ratio.

B's maximum liability: 25 CD

10 ID

15 CD

66.67 CD

6.67 ID

reduces *C*'s culpable damages unpaid by *C* from \$60,000 to \$44,000. Based on the 3:1 ratio of *A* to *B*'s fault, that \$44,000 should be borne \$33,000 by *A* and \$11,000 by *B* (Row 2, Col. 4). However, the \$44,000 of *C*'s culpable damages unpaid by *C* and borne by *A* has been reduced by the \$16,000 to \$29,000. As a result, the actual ratio in which *A* and *B* bear *C*'s culpable damages unpaid by *C* is \$29,000 to \$15,000 (Row 1, Col. 5). Thus, to restore the actual ratio to the theoretical ratio, *A* should pay *B* \$4,000; or, the \$16,000 collected by *A* should be viewed as consisting of a portion (\$4,000) collected by *A* on behalf of and paid over to *B*. The results of the transaction prior to *A* paying *B* the \$4,000 appear in Row 2; Row 2a reflects the adjustments which would occur after *A* pays *B* the \$4,000. As a result of the first part of the transaction, *C* has paid *A* \$16,000 (Row 2, Col. 8) and only \$29,000 of the culpable damages are owed by *C* to *A* (Row 2, Col. 9); this is because *A* has received \$31,000 of *C*'s culpable damages, \$16,000 having been paid by *C* and \$15,000 by *B*. As a result of the second part of the transaction, *A* has paid to *B* \$4,000 of the \$16,000 collected by *A*, thus reducing *C*'s liability to *B* to \$11,000 and increasing the amount owed by *C* to *A* from \$29,000 to \$33,000 (Row 2a, Cols. 13 and 9).

To recapitulate, *C*, initially having paid *A* \$16,000, only owed *A* an additional \$29,000 of his (*C*'s) culpable damages. However, of the \$16,000 (which reduces *C*'s liability to *A* to \$29,000), *A* paid \$4,000 to *B* (Row 2, Col. 6). This should reduce *C*'s liability to *B* from \$15,000 to \$11,000 (Rows 2 and 2a, Col. 13). Therefore, in spite of the fact that *C* owed *A* only \$45,000 and paid \$16,000 (reducing the amount owed to \$29,000), *C*'s liability to *A* at the end of the entire transaction would be \$33,000 as a result of the \$4,000 paid by *A* to *B* in order to bring the actual ratio into compliance with the theoretical ratio (Row 2a, Col. 9).

At this juncture, \$44,000 of *C*'s culpable damages remain unpaid by *C* and should be paid by him on the basis of \$33,000 to *A* and \$11,000 to *B*. Assume at this point that *B* collects \$4,000 from *C* (Row 3, Col. 1), reducing the amount of *C*'s culpable damages unpaid by *C* to \$40,000—*C* having paid *A* \$16,000 and having paid *B* \$4,000. On a 3:1 ratio (*A*'s fault to *B*'s fault), that amount of *C*'s culpable damages unpaid by *C* should be borne by *A* and *B* on a ratio of \$30,000 to \$10,000 (Row 3, Col. 4).

At the outset of this last transaction, *C*'s insolvency was borne by *A* and *B* on the ratio of \$33,000 to \$11,000 (3:1). So at the point *B* collected the \$4,000 from *C* the ratio in which *C*'s insolvency is borne by *A* and *B* changes to \$33,000 and \$7,000, respectively; that is, the \$4,000 reduced the ratio from 33:11 to 33:7 (Rows 2a and 3, Col. 5).

Also this \$4,000 reduced *C*'s liability to *B* from \$11,000 to \$7,000 (Rows 2a and 3, Col. 13). Consequently, in order to bring the actual ratio in which *A* and *B* will bear *C*'s insolvency in line with the theoretical ratio, \$3,000 of the \$4,000 collected by *B* should have been collected by *B* on behalf of and paid over to *A* (Row 3, Col. 6). Once \$3,000 of the \$4,000 collected by *B* from *C* is paid over to *A* (Row 3a), the actual ratio in which *A* and *B* bear *C*'s insolvency changes from 33:7 to 30:10 (Rows 3 and 3a, Col. 5). By the same token, *C*'s liability to *B* must change to reflect *B*'s payment of the \$3,000 to *A*; *C*'s liability to *B* changes from \$7,000 to \$10,000 (Rows 3 and 3a, Col. 13); and, *C*'s liability to *A* changes from \$33,000 to \$30,000 (Rows 3 and 3a, Col. 9).

At this point, the amount of culpable damages unpaid by *C* is \$40,000. That sum is borne by *A* and *B* on a ratio of 3:1 (*A* has borne \$30,000 and *B* has borne \$10,000, Row 3a, Col. 5). Since the actual ratio in which *A* and *B* bear *C*'s insolvency at this point is identical with the theoretical ratio, every dollar collected from *C* representing *C*'s culpable damages, whether collected by *A* or *B*, should be collected on behalf of *A* and *B* on a 3:1 ratio.

Indeed, in Row 1, the actual ratio in which *A* and *B* bore *C*'s insolvency was identical to the theoretical ratio. What happened in terms of the adjustments required in Rows 2 and 3 (and reflected in Rows 2a and 3a) merely reflected the fact that the amounts collected from *C* by *A* (Row 2) or *B* (Row 3) were collected by them on behalf of both on a 3:1 ratio.

VIII. IMPLEMENTATION

The hypothetical scenarios of the prior section and in Appendix II are intended as a theoretical illumination of how the principle of partial equitable indemnity¹³⁹ should operate when one of the parties is insolvent. In practice, however, rigid adherence to the sequence of transactions of those scenarios raises many unresolved questions.

For example, *A* in the first transaction illustrated in Table III collected \$25,000 from *B*—\$15,000 of which was innocent damages as to *B* and represented his share of *C*'s insolvency. That in turn altered *C*'s liabilities to *B* and *A*. It also extinguished any potential liability *C* might have had to *A* for *B*'s unpaid culpable damages.¹⁴⁰ It also reduced *C*'s culpable damages (\$60,000) payable to *A* by \$15,000 and

139. For the purposes of this article, the principle has general applicability and encompasses those situations in which plaintiff's fault is causally implicated in the injury.

140. Compare variations 1 and 5 in Table II.

created an obligation on the part of *C* to pay that \$15,000 to *B*.¹⁴¹ Should *A* have to make a showing of an inability to collect culpable damages from *C* before he can collect the \$15,000 from *B*? While *C* is not part of the first transaction, it dramatically alters his liabilities; how is *C* to receive notice of this change? When *B* is able to collect from *C*, and *A* is not a party to that transaction, how is the effect of the transaction to be brought home to *A*? Under the scheme outlined in the prior section, this is particularly crucial when the funds collected by *B* from *C* should be collected on behalf of and paid to *A*. If in fact the money is paid over by *B* to *A* this alters all the parties' liability.¹⁴² How are the changes to be brought home to *C*? So long as a mechanism is available to insure correct disbursement, if *B* (or *A*) were to locate assets of *C* which would satisfy *C*'s entire obligation for his culpable damages, *B* (or *A*) should be able to collect that entire amount regardless of what *C*'s specific obligation is to him.

What follows is a proposal for the implementation of the prior section's scheme which would obviate the problems just suggested. It is capable of legislative implementation. Since partial equitable indemnity is an equitable doctrine created by the court,¹⁴³ the court also could fashion enforceable orders which would implement the proposal made herein. Indeed, the proposal is discussed from the point of view of judicial implementation.¹⁴⁴

Whenever a claim is made by one party that he has borne a disproportionate amount of loss, the court could fix the other parties' liability. If there were two remaining parties the court would fix for each one of them that portion which represented the culpable damages of each party, as well as the potential liability of each party for the other's unpaid culpable damages. By example, let us return to our now familiar example of the 30% at fault *A*, the 10% at fault *B*, and the 60% at fault *C*, with a \$100,000 loss. Given an initial loss of \$100,000 by any one party, we could specify the liability of the two remaining parties. That data appears in Table IV.¹⁴⁵

141. See Table III, columns 9 and 13 of Row 1.

142. Compare Cols. 6, 9 and 13 of Row 3 with those columns in Row 3a.

143. 20 Cal. 3d 573 at 591-98, 578 P.2d at 907-12, 146 Cal. Rptr. at 190-95.

144. The correct implementation is by way of an order. Money collection procedures in California Code of Civil Procedure §§ 681-724 are provided for judgment creditors. However, California Code of Civil Procedure § 1007 provides that an order for the payment of money may be enforced by execution, the same as judgments. Under that section parties to an order should have the same remedies as a judgment creditor.

145. Note that the total of the remaining parties' liability exceeds the amount of innocent damages borne by the party that initially paid the \$100,000. In fact, when *B* initially pays the entire \$100,000, the liability of *A* and *C* adds up to more than \$100,000. This is because

By reference to this Table, if *A* initially bore the \$100,000 loss, the court's order would indicate that *B*'s total liability would be \$25,000 made up of \$10,000 in culpable damages and \$15,000 in innocent damages; *C*'s total liability would be \$66,666.67 made up of \$60,000 in culpable damages and \$6,666.67 in innocent damages. If *B* initially bore the \$100,000 loss, *A*'s liability would be \$75,000 and *C*'s \$85,714.29. Finally, if *C* initially bore the \$100,000 loss, *A*'s liability would be \$33,333.33, and *B*'s liability would be \$14,285.71.

The order would fix liability as an obligation owed to all parties as a group rather than to a given party as was implied in the examples developed in the prior section. Thus, any one party could initiate collection from any other equal to that other party's total obligation rather than being limited by that party's liability to the collecting party. Furthermore, the order would provide that funds collected in discharge of each party's liability be paid into court and then disbursed within the conceptual framework outlined in the previous section. In other words, the monies collected would be treated in a manner similar to the way tenancy in common property would be treated if it were sold in a partition action. In that case, the proceeds would be disbursed in accordance with the proportion of each party's undivided interest. In this case, however, the monies disbursed would be used to defray the innocent damages borne by any given party and to insure that solvent parties bore an insolvent party's culpable damages according to the limiting factor of the relative ratio of proportionate fault of those solvent parties (TR).

Each party initiating collection of funds would be required to prepare a Partial Satisfaction of Judgment which would indicate how the sums paid into court should be disbursed and how that disbursement should alter the liability of the parties. The court order would require that copies of such Partial Satisfaction of Judgments be served on all parties and be executed by them unless a party made timely objections¹⁴⁶ by a Notice of Motion for Hearing. In absence of such a timely

a portion of the damages are counted twice. For example, when *B* pays \$100,000, *A*'s liability of \$75,000 is made up of his and *C*'s culpable damages; furthermore, \$25,714.29 of *A*'s \$30,000 of culpable damages again shows up as part of *C*'s liability (his liability for *A*'s potential insolvency), albeit that figure represents innocent damages to *C*. In short, \$25,714.29 gets counted twice: once as a portion of *A*'s culpable damages and second, as *C*'s share of *A*'s culpable damages unpaid by *A*. By the same token, \$45,000 also gets counted twice: once as a portion of *C*'s culpable damages, and second, as *A*'s share of *C*'s culpable damages unpaid by *C*. In point of fact, an amount in excess of \$100,000 would not be paid to *B* since each time *A* (or *B*) paid his share of the culpable damages, *B*'s (or *A*'s) liability for *A*'s (or *B*'s) unpaid culpable damages would correspondingly decrease.

146. A particular time period, such as 15 days, should be specified.

TABLE IV

		Remaining Party's Liability		
		<i>A</i>	<i>B</i>	<i>C</i>
Party Which Initially Bears Entire \$100,000 Loss	<i>A</i>	-0-	\$25,000	\$66,666.67
		\$3,333.33 ID (<i>A</i> 's share of <i>B</i> 's insolvency) \$45,000 ID (<i>A</i> 's share of <i>C</i> 's insolvency)	1) \$10,000 CD 2) \$15,000 ID (<i>B</i> 's share of <i>C</i> 's insolvency)	1) \$60,000 CD 2) \$6,666.67 ID (<i>C</i> 's share of <i>B</i> 's insolvency)
	<i>B</i>	\$75,000	-0-	\$85,714.29
		1) \$30,000 CD 2) \$45,000 ID (<i>A</i> 's share of <i>C</i> 's insolvency)	\$4,285.71 ID (<i>B</i> 's share of <i>A</i> 's insolvency) \$15,000 ID (<i>B</i> 's share of <i>C</i> 's insolvency)	1) \$60,000 CD 2) \$25,714.29 ID (<i>C</i> 's share of <i>A</i> 's insolvency)
<i>C</i>	\$33,333.33	\$14,285.71	-0-	
	1) \$30,000 CD 2) \$3,333.33 ID (<i>A</i> 's share of <i>B</i> 's insolvency)	1) \$10,000 CD 2) \$4,285.71 ID (<i>B</i> 's share of <i>A</i> 's insolvency)	\$25,714.29 ID (<i>C</i> 's share of <i>A</i> 's insolvency) \$6,666.67 ID (<i>C</i> 's share of <i>B</i> 's insolvency)	

"ID" = Innocent Damages
"CD" = Culpable Damages

motion, the clerk of the court would disburse the funds according to the Partial Satisfaction of Judgment signed by all parties. Signatures on that Partial Satisfaction of Judgment would also constitute a stipulation

by the parties as to the remaining liabilities. In this way such transactions as the two separate steps illustrated in Rows 2 and 2a of Table III could be collapsed into one step.

A final question remains: must a collecting party make a showing that he attempted and was unable to collect culpable damages from an "insolvent" party before initiating a collection of innocent damages from a "solvent" party? If in fact such a showing were required, it would surely complicate the administrative procedures necessary to implement the proposal outlined in the previous section. It would appear preferable to allow any of the parties to initiate collection against any other party up to the maximum liability of that other party without such a showing. For example, after *A* initially pays \$100,000 he should be able to initiate collection of \$25,000 from *B* without making a showing that he is unable to collect any of the \$60,000 from *C*. Under such circumstances, *A* would be motivated to locate assets of *C*, since *A* still remains uncompensated for \$45,000 uncollected from *C*. Consequently, *A*'s motivation to be fully compensated could insure good faith in trying to locate *C*'s assets. Furthermore, once those assets are located by *A*, collection is made through the courts. Consequently, those assets would be disbursed for the benefit of both *A* and *B*.

IX. CONCLUSION

The solution outlined in section VII and the implementation plan set out in section VIII would insure that losses are borne by all parties in proportion to their fault, including losses due to the insolvency of one of the parties. At the same time these proposals would minimize the amount of administrative inconvenience necessary to insure such a distribution of loss. They would insure that the parties legally at fault for a given loss would share that loss in accordance with the *Li* principle and consistent with the dictates of logic, practical experience, and fundamental justice.

APPENDIX I

The relative liabilities of each of the parties with respect to their culpable damages and that portion of their innocent damages which represents their potential liability for the insolvency of any other party is illustrated in the following Table, broken into Charts A, B, and C.

Chart A shows the situation using *A*'s damages as the point of departure. *A*'s culpable damages are \$30,000. If for some reason *A* were insolvent, that \$30,000 would represent innocent damages vis-a-vis *B* and *C*. However, *B* and *C* would be liable for part of *A*'s culpable damages based on their relative fault. Because *B* is 10% and *C* is 60% at fault, the ratio in which they would have to bear *A*'s unpaid culpable damages would be 1:6 or, translated into dollars and cents, *B* would have to pay \$4,285.71 of *A*'s unpaid culpable damages and *C*, \$25,714.29. If *A* in fact bore or paid his \$30,000 culpable damages, the remaining amount of the loss (\$70,000) would be innocent damages vis-a-vis *A*; that amount would be made up of \$10,000 of *B*'s culpable damages and \$60,000 of *C*'s culpable damages. Should either *B* or *C* be totally insolvent, the culpable damages of each would be borne by the remaining parties in proportion to their fault. Thus, if *B* were insolvent, his \$10,000 of culpable damages would be borne between *A* and *C* in proportion to their fault, or on a 1:2 ratio. As Chart A illustrates, that would translate into absolute figures of \$3,333.33 for *A* and \$6,666.67 for *C*. The liability of both *A* and *C* for this amount represents innocent damages as to them. By the same token, if *C* were insolvent, *A* and *B* would have to bear *C*'s unpaid culpable damages on a 3:1 ratio and, as Chart A indicates, that breaks down into \$45,000 by *A* and \$15,000 by *B*.

Chart B is merely an arrangement of the information contained in Chart A by beginning with *B*'s damages; Chart C contains the same information shown in Charts A and B but arranges it by beginning with *C*'s damages.

<p>\$100,000 loss; <i>A</i> 30% negligent; <i>B</i> 10% negligent; <i>C</i> 60% negligent; . "ID" = Innocent Damages; "CD" = Culpable Damages</p>			
<p>CHART A (Damages from <i>A</i>'s position)</p>			
<p><i>A</i>: \$30,000 CD</p>	$\left\{ \begin{array}{l} B \ \$ \ 4,285.71 \ \text{ID} \\ C \ \$25,714.29 \ \text{ID} \end{array} \right\}$		<p>1:6 ratio (10%:60%)</p>
<p>\$70,000 ID</p>	$\left\{ \begin{array}{l} B \ \$10,000.00 \ \text{CD} \\ C \ \$60,000.00 \ \text{CD} \end{array} \right\}$	$\left\{ \begin{array}{l} A \ \$ \ 3,333.33 \ \text{ID} \\ C \ \$ \ 6,666.67 \ \text{ID} \end{array} \right\}$	<p>1:2 ratio (30%:60%)</p>
		$\left\{ \begin{array}{l} A \ \$45,000.00 \ \text{ID} \\ B \ \$15,000.00 \ \text{ID} \end{array} \right\}$	<p>3:1 ratio (30%:60%)</p>
<p>CHART B (Damages from <i>B</i>'s position)</p>			
<p><i>B</i>: \$10,000 CD</p>	$\left\{ \begin{array}{l} A \ \$ \ 3,333.33 \ \text{ID} \\ C \ \$ \ 6,666.67 \ \text{ID} \end{array} \right\}$		<p>1:2 ratio (30%:60%)</p>
<p>\$90,000 ID</p>	$\left\{ \begin{array}{l} A \ \$30,000.00 \ \text{CD} \\ C \ \$60,000.00 \ \text{CD} \end{array} \right\}$	$\left\{ \begin{array}{l} B \ \$ \ 4,285.71 \ \text{ID} \\ C \ \$25,714.29 \ \text{ID} \end{array} \right\}$	<p>1:6 ratio (10%:60%)</p>
		$\left\{ \begin{array}{l} A \ \$45,000.00 \ \text{ID} \\ B \ \$15,000.00 \ \text{ID} \end{array} \right\}$	<p>3:1 ratio (30%:60%)</p>
<p>CHART C (Damages from <i>C</i>'s position)</p>			
<p><i>C</i>: \$60,000 CD</p>	$\left\{ \begin{array}{l} A \ \$45,000.00 \ \text{ID} \\ B \ \$15,000.00 \ \text{ID} \end{array} \right\}$		<p>3:1 ratio (30%:10%)</p>
<p>\$40,000 ID</p>	$\left\{ \begin{array}{l} A \ \$30,000.00 \ \text{CD} \\ B \ \$10,000.00 \ \text{CD} \end{array} \right\}$	$\left\{ \begin{array}{l} B \ \$ \ 4,285.71 \ \text{ID} \\ C \ \$25,714.29 \ \text{ID} \end{array} \right\}$	<p>1:6 ratio (10%:60%)</p>
		$\left\{ \begin{array}{l} A \ \$ \ 3,333.33 \ \text{ID} \\ C \ \$ \ 6,666.67 \ \text{ID} \end{array} \right\}$	<p>1:3 ratio (10%:30%)</p>

APPENDIX II

The following tables start with situations 2 through 4 illustrated in Table II in Section VII of the text. Each illustrates the changing liabilities among *A*, *B*, and *C* as varying amounts are collected. In all, the object in the disbursement of these funds is to bring the actual ratio in line with the theoretical ratio.

The first column of the tables indicates the amounts collected by the party identified as collecting. The letters in brackets indicate the party from whom monies are collected and the number preceding the brackets represents, in thousands, the amount collected. The sequence of collections in column 1 of each row recapitulates the prior transactions as well as indicating the transaction which occurs in that row. Column 1, by the use of "CD" and the letters in parentheses, shows the amount of each party's culpable damages paid through the transaction illustrated.

"CD" means culpable damages; "ID" means innocent damages; "TR" means the theoretical ratio of CD unpaid by a given party borne by the remaining parties; and, "AR" means the actual ratio of CD unpaid by a given party borne by the remaining parties.

In all the tables *B* and *C*'s maximum liability is as follows:

$$\begin{array}{l}
 B = \$25,000 \quad \left\{ \begin{array}{l} \$10,000 \text{ CD} \\ \$15,000 \text{ ID} \end{array} \right. \\
 \\
 C = \$66,666.67 \quad \left\{ \begin{array}{l} \$60,000 \text{ CD} \\ \$6,666.67 \text{ ID} \end{array} \right.
 \end{array}$$

In Tables 3A and 4A Row 3 involves a transaction whereby one party (*A* or *B*) collects monies from *C* and the collection is on behalf of the remaining party (*B* or *A*). Row 3a of the tables reflects the adjustments which occur once the money is paid to the party on whose behalf it is collected.

SITUATION 2

	B				C								
	1	2	3	4	5	6	7	8	9	10	11	12	13
	Amounts collected	Amount paid to A	Amount of CD owed A	TR of A to B of CD unpaid by C (3:1)	AR of A to B of CD unpaid by C	Liability of B to A to bring AR to TR	Amount owed C due to C's payment of B's CD	Amount paid to A	Amount of CD owed A	TR of A to C of CD unpaid by B (1:2)	AR of A to C of CD unpaid by B	Liability of C to A to bring AR to TR	Amount owed B due to B's payment of C's CD
1.	A collects: 7[B] 7 CD (B)	7	3	45:15	60:0	15	-0-	-0-	60	1:2	3:0	2	-0-
2.	A collects: 7[B] 12[C] 7 CD (B) 12 CD (C)	Same	Same	36:12	48:0	12	Same	12	48	Same	Same	Same	Same
3.	A collects: 7[B] 12[C] 11[B]	18	-0-	Same	40:8	4	Same	Same	40	-	-	-	8
	10 CD (B) 20 CD (C)								18 of 60 paid to A by B, 12 of 60 paid to A by B]				[See Col. 9, Row 3]
4.	A collects: 7[B] 12[C] 11[B] 8[C]	Same	Same	30:10	32:8	2	Same	20	32	Same	Same	Same	Same
	10 CD (B) 28 CD (C)								18 of 60 paid to A by B, 20 of 60 paid to A by C]				
5.	A collects: 7[B] 12[C] 11[B] 8[C] 8[C]	Same	Same	24:8	24:8	-0-	Same	28	24	Same	Same	Same	Same
	10 CD (B) 36 CD (C)								18 of 60 paid to A by B, 28 of 60 paid to A by C]				

All further sums collected from C by A or B are collected on behalf of both A and B on a 3:1 ratio.

SITUATION 2A
Alternative series of payments illustrating the changing liabilities when A collects from C part of B's obligation.

	C												
	B												
1	2	3	4	5	6	7	8	9	10	11	12	13	
Amounts collected	Amount paid to A	Amount of CD owed A	TR of A to B of CD unpaid by C (3:1)	AR of A to B of CD unpaid by C	Liability of B to A to bring AR to TR	Amount owed C due to C's payment of B's CD	Amount paid to A	Amount of CD owed A	TR of A to C of CD unpaid by B (1:2)	AR of A to C of CD unpaid by B	Liability of C to A to bring AR to TR	Amount owed B due to B's payment of C's CD	
1. A collects: $\frac{7}{7}$ [B] $\frac{60}{7}$ CD (B)	7	3	45:15	60:0	15	-0-	-0-	60	1:2	3:0	2	-0-	
2. A collects: $\frac{7}{9}$ [B] $\frac{60}{60}$ CD (C)	7	1	—	—	—	2	62	-0-	1:2	1:2	-0-	-0-	
		[7 of 10 paid to A by B, 2 of 10 paid to A by C]	[All of C's CD have been paid by C]	[All of C's CD have been paid by C]	[All of C's CD have been paid by C]								

All further sums collected from B by A or C are collected on behalf of A and C on a 1:2 ratio.

SITUATION 3

		B			C							
		4	5	6	7	8	9	10	11	12	13	
1	2	3	4	5	6	7	8	9	10	11	12	13
Amounts collected	Amount paid to A	Amount of CD owed A	TR of A to B of CD unpaid by C (3:1)	AR of A to B of CD unpaid by C	Liability of B to A to bring AR to TR	Amount owed C due to C's payment of B's CD	Amount paid to A	Amount of CD owed A	TR of A to C of CD unpaid by B (1:2)	AR of A to C of CD unpaid by B	Liability of C to A to bring AR to TR	Amount owed B due to B's payment of C's CD
1. A collects: 10(B) 10 CD (B)	10	-0-	45:15	600	15	-0-	-0-	60	[All of B's CD paid by B]	[All of B's CD paid by B]	-	-0-
2. A collects: 10(B) 12(C) 10 CD (B) 12 CD (C)	Same	Same	36:12	480	12	Same	12	48 [12 of 60 paid to A by C]	Same	Same	Same	Same
3. A collects: 10(B) 12(C) 44(C) 10 CD (B) 56 CD (C)	Same	Same	3:1	40	1	Same	56	4 [56 of 60 paid to A by C]	Same	Same	Same	Same
4. A collects: 10(B) 12(C) 44(C) 1(B) 10 CD (B) 57 CD (C)	11 [1 of the 11 applied to the CD's unpaid by C]	Same	3:1	3:1	-0-	Same	56	3 [1 of 10 paid to A by B, 56 of 60 paid to A by C]	Same	Same	Same	1 [See Col. 9, Row 4]

All further sums collected from C by A or B are collected on behalf of A and B on a 3:1 ratio.

SITUATION 3A
Alternative series of payments illustrating the changing liabilities when A collects more than already paid on C's behalf by B.

	B			C								
1	2	3	4	5	6	7	8	9	10	11	12	13
Amounts collected	Amount paid to A	Amount of CD owed A	TR of A to B of CD unpaid by C (3:1)	AR of A to B of CD unpaid by C	Liability of B to A to bring AR to TR	Amount owed C due to C's payment of B's CD	Amount paid to A	Amount of CD owed A	TR of A to C of CD unpaid by B (1:2)	AR of A to C of CD unpaid by B	Liability of C to A to bring AR to TR	Amount owed B due to B's payment of C's CD
1. Same as Situation 3												
2. A collects: 10(B) 12(B) 10 CD (B) 12 CD (C)	10	-0-	45:15	48:12	3	-0-	-0-	48 [12 of 60 paid to A by B]	-	-	-	12
3. A collects: 10(B) 12(B) 44(C)	Same	Same	12:4	4:12	-8	Same	44	4 [12 of 60 paid to A by B 44 of 60 paid to A by C]	Same	Same	Same	12
3a.	Same	Same	12:4	12:4	-0-	Same	44 [includes 8 paid by A to B—see Row 3, Col. 6]	12 [4 of 60 paid to A by B, 44 of 60 paid to A by C]	Same	Same	Same	4 [8 paid by A to B is reimbursement for monies collected in Row 2]

All further sums collected from C by A or B are collected on behalf of A and B on a 3:1 ratio.

SITUATION 4

		B				C						
1	2	3	4	5	6	7	8	9	10	11	12	13
Amounts collected	Amount paid to A	Amount of CD owed A	TR of A to B of CD unpaid by C (3:1)	AR of A to B of CD unpaid by C	Liability of B to A to bring AR to TR	Amount owed C due to C's payment of B's CD	Amount paid to A	Amount of CD owed A	TR of A to C of CD unpaid by B (1:2)	AR of A to C of CD unpaid by B	Liability of C to A to bring AR to TR	Amount owed B due to B's payment of C's CD
1. A collects: 18(B) 10 CD (B) 8 CD (C)	18	-0-	45:15	52:8	7	-0-	-0-	52 [8 of 60 has been paid by B to A]	-	-	-	8 [See Col. 9, Row 1]
2. A collects: 18(B) 12(C)	Same	Same	36:12	40:8	4	Same	12	40 [8 of 60 paid to A by B, 12 of 60 has been paid to A by C]	Same	Same	Same	8 [See Col. 9, Rows 1 and 2]
3. A collects: 18(B) 12(C) 8(C)	Same	Same	30:10	32:8	2	Same	20	32 [8 of 60 paid to A by B, 20 of 60 has been paid to A by C]	Same	Same	Same	Same
4. A collects: 18(B) 12(C) 8(C)	Same	Same	24:8	24:8	-0-	Same	28	24 [8 of 60 paid to A by B, 23 of 60 has been paid to A by C]	Same	Same	Same	Same

All further sums collected from C by A or B are collected on behalf of A and B on a 3:1 ratio.

SITUATION 4A
Alternative series of payments illustrating the changing liabilities when B collects.

	1	2	3	4	5	6	7	8	9	10	11	12	13
Amounts collected	Amount paid to A	Amount of CD owed A	TR of A to B of CD unpaid by C (3:1)	AR of A to B of CD unpaid by C	AR of A to B of CD unpaid by C	Liability of B to A to bring AR to TR	Amount owed C due to C's payment of B's CD	Amount paid to A	Amount of CD owed A	TR of A to C of CD unpaid by B (1:2)	AR of A to C of CD unpaid by B	Liability of C to A to bring AR to TR	Amount owed B due to B's payment of C's CD
1. Same as Situation 4													
2. A collects: 18[B] 12[C] 10 CD (B) 20 CD (C)	18	-0-	36:12	40:8	4	-0-	-0-	12	40	-	-	-	8
3. A collects: 18[B] 12[C] B collects: 8[C] 10 CD (B) 28 CD (C)	18	-0-	30:10	40:0	10	-0-	-0-	12	40	-	-	-	-0-
					[all 8 collected by B from C on behalf of A and paid over to A]								
3a.	18	-0-	30:10	32:8	2	-0-	-0-	12	32	-	-	-	8
4. A collects: 18[B] 12[C] B collects: 8[C] A collects: 8[C] 10 CD (B) 36 CD (C)	18	-0-	24:8	24:8	-0-	-0-	-0-	20	24	-	-	-	8

All further sums collected from C by A or B are collected on behalf of A and B on a 3:1 ratio.

