

Masthead Logo

**McGeorge Law Review**

Volume 18 | Issue 1

Article 16

1-1-1986

# Indemnity in California: Is It Really Equitable after American Motorcycle and Section 877.6?

Thomas P. Quinn Jr.

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>

Part of the [Law Commons](#)

## Recommended Citation

Thomas P. Quinn Jr., *Indemnity in California: Is It Really Equitable after American Motorcycle and Section 877.6?*, 18 PAC. L. J. 201 (1986).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol18/iss1/16>

This Comments is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact [mgibney@pacific.edu](mailto:mgibney@pacific.edu).

# Indemnity in California: Is it Really Equitable After *American Motorcycle* and Section 877.6?

The 1975 California Supreme Court decision in *Li v. Yellow Cab*<sup>1</sup> represented a major shift from the then existing principles of joint tort liability in California. Although the *Li* decision was aimed at eliminating the harshness of contributory negligence by adopting comparative fault,<sup>2</sup> the decision also spawned new thought in the area of contribution and indemnity.<sup>3</sup> In *American Motorcycle Association v. Superior Court*, the California Supreme Court sought to modify<sup>4</sup> the principles of equitable indemnity to bring them into line with the comparative fault principles adopted in *Li*.<sup>5</sup> The decision in *American Motorcycle* provided for indemnity among multiple defendants according to their proportionate fault,<sup>6</sup> a major departure from the "all-or-nothing" approach to total indemnity that existed previously in California.<sup>7</sup> In addition, the court suggested that the settlement release provisions that existed in California<sup>8</sup> be modified to allow a defendant who settles in good faith to be released from any claims for partial indemnity based on comparative fault.<sup>9</sup> Two years after the

---

1. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). See *infra* notes 72-80 and accompanying text.

2. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 810, 532 P.2d. 1226, 1230, 119 Cal. Rptr. 858, 862 (1975).

3. See Adams, *Settlements After Li: But is it "Fair?"* 10 PAC. L.J. 729, 729 (1979); see also Comment, *Loss Sharing Among Contract Defendants: English Parts For American Motorcycle*, 12 PAC. L.J. 893, 898 (1981).

4. *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 591, 146 Cal. Rptr. 182, 192, 578 P.2d 899, 907 (1978).

5. *Li*, 13 Cal. 3d at 810, 532 P.2d at 1230, 119 Cal. Rptr. at 862.

6. *American Motorcycle*, 20 Cal. 3d at 591, 578 P.2d at 907, 146 Cal. Rptr. at 192.

7. *Id.* The California Supreme Court recognized that the all-or-nothing character of total indemnity was the same deficiency suffered by the "discarded contributory negligence doctrine" and fell short of "fulfilling *Li's* goal." *Id.* See *San Francisco v. Ho Sing*, 51 Cal. 2d 127, 130, 330 P.2d 802, 804 (1958); *Peters v. City and County of San Francisco*, 41 Cal. 2d 419, 431, 260 P.2d 55, 62 (1953) (examples of the operation of total indemnity prior to *Li*).

8. CAL. CIV. PROC. CODE § 877. Section 877 provides:

[W]here a release, dismissal, with or without prejudice, or a covenant not to sue is given in good faith before a judgment to one or more of a number of tortfeasors claimed to be liable for the same tort.

.....

(b) it shall discharge the tortfeasor to whom it is given from all liability for any contribution from any other tortfeasors.

*Id.*

9. *American Motorcycle*, 20 Cal. 3d at 604, 578 P.2d at 199, 146 Cal. Rptr. at 917.

decision in *American Motorcycle*, the California Legislature enacted section 877.6 of the California Code of Civil Procedure, providing for a pretrial hearing on the issue of the good faith settlement, and expressly providing for a release from partial indemnity based upon comparative fault once good faith is established.<sup>10</sup>

Although both *American Motorcycle* and section 877.6 brought change to the existing system of equitable indemnity in California, neither dealt specifically with the continuing vitality of the traditional total indemnity<sup>11</sup> that had existed in California prior to *American Motorcycle*. The language of the *American Motorcycle* opinion raises the question of whether or not total indemnity survives the decision in situations in which justice requires shifting the burden of the entire judgment to the party whose act caused the damage or injury to the plaintiff.<sup>12</sup> This issue arises most frequently in cases in which a tortfeasor brings an action for total indemnity against a cotortfeasor who has entered into a good faith settlement under section 877.6.<sup>13</sup> Section 877.6 expressly permits a release from all claims for comparative contribution or partial indemnity based on comparative fault, upon determination of good faith settlement.<sup>14</sup> Section 877.6 does not provide for a release from claims for total indemnity.<sup>15</sup>

Recent cases have recognized that the viability of a total indemnity claim following a good faith settlement is an issue left unanswered both by the California Supreme Court and the California Legislature.<sup>16</sup>

---

10. CAL. CIV. PROC. CODE § 877.6. *see infra* notes 101-06 and accompanying text.

11. *See infra* notes 87-104 and accompanying text. *American Motorcycle* modified the existing principles of total indemnity to provide for indemnity based upon comparative fault. With the adoption of partial indemnity, a defendant could obtain indemnity from a cotortfeasor without having to prove that justice demanded a shift of the entire judgment to one party. This approach was a major departure from the "all-or-nothing" approach of total indemnity. *American Motorcycle*, 20 Cal. 3d at 604, 578 P.2d at 915, 146 Cal. Rptr. at 915.

12. *See infra* notes 105-229 and accompanying text. *See also* E.L. White v. City of Huntington Beach, 138 Cal. App. 3d 366, 375, 187 Cal. Rptr. 879, 885 (1982); *Standard Pacific v. A.A. Baxter Corp.*, 176 Cal. App. 3d 577, 582, 222 Cal. Rptr. 106, 108 (1986).

13. *See, e.g., Standard Pacific*, 176 Cal. App. 3d at 580, 222 Cal. Rptr. at 107; *Angelus Associates Corp. v. Neonex Leisure Products, Inc.*, 167 Cal. App. 3d 532, 542, 213 Cal. Rptr. 403, 407 (1985); *Torres v. Union Pac. R.R.*, 157 Cal. App. 3d 499, 510, 203 Cal. Rptr. 825, 830 (1984); *Huizar v. Abex Corp.*, 156 Cal. App. 3d 534, 542, 203 Cal. Rptr. 47, 50 (1984). Some courts, however, have discussed the issue of the existence of total indemnity without regard to the settlement provisions of § 877.6. *See Kohn v. Superior Court*, 142 Cal. App. 3d 323, 330, 191 Cal. Rptr. 78, 83 (1983); *City of Sacramento v. Gemsch*, 115 Cal. App. 3d 869, 876, 171 Cal. Rptr. 764, 767 (1981).

14. CAL. CIV. PROC. CODE § 877.6.

15. *Id.*

16. *See, e.g., Standard Pacific*, 176 Cal. App. 3d at 582, 222 Cal. Rptr. at 108; *Angelus*, 167 Cal. App. 3d at 542, 213 Cal. Rptr. at 407 (1985); *Huizar*, 156 Cal. App. 3d at 542, 203 Cal. Rptr. at 50 (1984).

Attempts at resolving the issue at the appellate level have resulted in decisions finding that total indemnity was replaced by the partial indemnity of *American Motorcycle*,<sup>17</sup> thus barring any claim for total indemnity regardless of whether or not a cotortfeasor has entered into a good faith settlement under section 877.6.<sup>18</sup> Others find that total indemnity still is appropriate in cases in which liability is vicarious or derivative.<sup>19</sup> Those cases that allow a claim for total indemnity reason that the precise language of section 877.6 does not bar a total indemnity claim, even after a good faith settlement.<sup>20</sup>

This comment will examine whether total indemnity should exist in California in spite of the "modifications" made by *American Motorcycle* and the release provisions of section 877.6. In analyzing this controversy, an examination will be made of the history of California tort law governing liability among joint tortfeasors prior to the *Li* decision.<sup>21</sup> In addition, this comment will review the decision of *Li v. Yellow Cab* and the resulting changes in California tort law.<sup>22</sup> *American Motorcycle* will then be examined, with particular consideration of the effect of this decision on California joint tort liability.<sup>23</sup> This comment also will review the legislation affecting contribution and indemnity.<sup>24</sup> With this foundation, the case law subsequent to *American Motorcycle* will be discussed.<sup>25</sup> These cases will reveal that the issue of the existence of total indemnity has been framed from two perspectives. Some of the cases have focused only on the *American Motorcycle* decision.<sup>26</sup> These cases have struggled with the question of whether *American Motorcycle* abolished total indemnity in Califor-

---

17. See *infra* notes 119-73 and accompanying text. See *Standard Pacific*, 176 Cal. App. 3d at 587, 222 Cal. Rptr. at 111; *Kohn*, 142 Cal. App. 3d at 330, 191 Cal. Rptr. at 83; *Gemsch*, 115 Cal. App. 3d at 876, 171 Cal. Rptr. at 767.

18. See *infra* notes 119-73 and accompanying text; see *Standard Pacific*, 176 Cal. App. 3d at 587, 222 Cal. Rptr. at 111.

19. An example of a person held vicariously liable would be a principle held liable for the tortious conduct of an agent. An example of a person held derivatively liable would be a retailer held liable for the defective product of the manufacturer. See *infra* notes 174-229 and accompanying text. See *Angelus*, 167 Cal. App. 3d at 542, 213 Cal. Rptr. at 407; *Torres*, 157 Cal. App. 3d at 511, 203 Cal. Rptr. at 830; *Huizar*, 156 Cal. App. 3d at 542, 203 Cal. Rptr. at 50 (1984).

20. See *Angelus*, 167 Cal. App. 3d at 542, 213 Cal. Rptr. at 407; *Huizar*, 156 Cal. App. 3d at 542, 213 Cal. Rptr. at 50; *White*, 138 Cal. App. 3d at 376, 187 Cal. Rptr. at 885.

21. See *infra* notes 39-75 and accompanying text.

22. See *infra* notes 76-86 and accompanying text.

23. See *infra* notes 87-104 and accompanying text.

24. See *infra* notes 105-18 and accompanying text.

25. See *infra* notes 119-229 and accompanying text.

26. See *Gemsch*, 115 Cal. App. 3d at 876, 171 Cal. Rptr. at 769; *Kohn*, 142 Cal. App. 3d at 330, 191 Cal. Rptr. at 83; *White*, 138 Cal. App. 3d at 376, 181 Cal. Rptr. at 885.

nia.<sup>27</sup> Other cases have focused on section 877.6.<sup>28</sup> These cases have struggled with the question of whether or not a claim for total indemnity may be brought against a settling tortfeasor despite the release provisions of section 877.6.<sup>29</sup> An examination of the reasoning and analysis of these cases will reveal the necessity of the continued existence of total indemnity in California in instances in which the liability of a defendant is vicarious or derivative, despite the existence of a good faith settlement under section 877.6.<sup>30</sup> Initially, this comment will explore the state of current law in order to understand the sources of the controversy.

#### CURRENT STATUS OF THE LAW

An example of a situation in which contribution and indemnity may arise is an auto collision in which the negligent acts of two or more tortfeasors combine to produce injury to the plaintiff. If a suit is brought by the plaintiff against the two negligent tortfeasors, the fault of the plaintiff and the defendants will be assessed under comparative fault and the judgment will be reduced by a proportionate amount equal to a percentage of the total damages attributable to the fault of the plaintiff.<sup>31</sup> Each defendant may be liable to the plaintiff for the balance of the judgment under joint and several liability.<sup>32</sup> Any defendant who pays an amount greater than the fault assessed to that defendant is entitled to reimbursement from cotortfeasors. This reimbursement may be in the form either of contribution or indemnity. Contribution may be obtained only from codefendants,<sup>33</sup> each paying an equal share of the judgment.<sup>34</sup> Indemnity, however, may be obtained from any tortfeasor, whether or not joined as a defendant by the plaintiff.<sup>35</sup> Prior to *American Motorcycle*, indemnity could be

---

27. *Gemsch*, 155 Cal. App. 3d at 876, 171 Cal. Rptr. at 769; *Kohn*, 142 Cal. App. 3d at 330, 191 Cal. Rptr. at 83; *White*, 138 Cal. App. 3d at 376, 181 Cal. Rptr. at 885.

28. *Lopez*, 143 Cal. App. 3d at 741, 192 Cal. Rptr. at 193; *Standard Pacific*, 176 Cal. App. 3d at 589, 222 Cal. Rptr. at 113; *Angelus*, 167 Cal. App. 3d at 542, 213 Cal. Rptr. at 407; *Huizar*, 156 Cal. App. 3d at 542, 203 Cal. Rptr. at 50.

29. *Lopez*, 143 Cal. App. 3d at 741, 192 Cal. Rptr. at 193; *Standard Pacific*, 176 Cal. App. 3d at 589, 222 Cal. Rptr. at 113; *Angelus*, 167 Cal. App. 3d at 542, 213 Cal. Rptr. at 407; *Huizar*, 156 Cal. App. 3d at 542, 203 Cal. Rptr. at 50.

30. See *infra* notes 244-58 and accompanying text.

31. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 827, 532 P.2d 1226, 1242, 119 Cal. Rptr. 858, 874 (1975).

32. Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 414 (1932).

33. CAL. CIV. PROC. CODE § 875.

34. *Id.*

35. *Id.* Although § 875 limited the right of contribution to defendants, the statute expressly left unaffected the already existing right of indemnity. *Id.*

obtained only if the tortfeasor seeking indemnity had a right of reimbursement<sup>36</sup> for all damages paid. An example of this right of full reimbursement arose in cases in which a principal sought reimbursement from an agent for liability assessed to the principal under the doctrine of respondeat superior. This right of full reimbursement is referred to as total indemnity. After *American Motorcycle*, however, partial indemnity, which allowed indemnity based on comparative fault, may be obtained from a cotortfeasor.<sup>37</sup> In addition, a tortfeasor may settle in good faith with the plaintiff and obtain a release from further claims for contribution or partial indemnity brought by other tortfeasors.<sup>38</sup>

#### HISTORICAL BACKGROUND OF CALIFORNIA JOINT TORT LIABILITY

Though current law provides a means of reimbursement for the defendant forced to pay a disproportionate share of the judgment, reimbursement was not always available in California. Until 1957, California applied the common law view of joint tort liability.<sup>39</sup> Under the common law view, the rights and liabilities of a defendant in a multiple defendant action were governed by the application of two principles. First, all defendants in a multiple defendant action were subject to joint and several liability.<sup>40</sup> Second, the defendants had no right of contribution among each other.<sup>41</sup> The courts refused to allow contribution in these instances because all of the tortfeasors were wrongdoers.<sup>42</sup>

36. W. PROSSER & W. KEETON, PROSSER & KEETON ON TORTS § 51 (5th ed. 1984).

37. *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 595, 578 P.2d 899, 910, 146 Cal. Rptr. 182, 193 (1978).

38. CAL. CIV. PROC. CODE § 877.6.

39. See, e.g., *Thornton v. Luce*, 209 Cal. App. 3d 542, 550, 26 Cal. Rptr. 393, 398 (1962); see Comment, *Contribution and Indemnity Collide with Comparative Negligence The New Doctrine of Equitable Indemnity*, 18 SANTA CLARA L. REV. 779, 780 (1978).

40. See Prosser, *supra* note 32, at 414. Joint and several liability historically was limited to cases in which defendants were said to have acted in concert, each sharing a common purpose. In these cases, a plaintiff had only one cause of action for injury. Thus the plaintiff was entitled to judgment only once, whether one or all of the tortfeasors were joined as defendants. *Id.* Joinder of defendants as joint tortfeasors was limited at common law to situations in which each acted in concert with the other defendants to produce a single injury to the plaintiff. *Sir John Heydon's Case*, 11 Co. Rep. 5, 77 Eng. Rep. 1150 (1613); *Adams v. White Bus Line*, 184 Cal. 710, 712, 195 P. 389, 391 (1921). The traditional common law definition of joint tortfeasor has since expanded to include those whose conduct combines to produce an injury whether acting jointly or in succession. All joint tortfeasors under this expanded definition are subject to joint and several liability. V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 252 (1974). See also W. PROSSER & W. KEETON, *supra* note 36, § 51.

41. *Merryweather v. Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799); *Thornton*, 209 Cal. App. 2d at 550, 26 Cal. Rptr. at 398.

42. See, e.g., *Dow v. Sunset Telephone & Telegraph Co.*, 162 Cal. 136, 138, 121 P. 379,

As a result of the operation of these principles, the plaintiff could dictate the fate of any tortfeasor potentially liable for the judgment.<sup>43</sup> The plaintiff could do this by choosing to sue the tortfeasors most able to satisfy the judgment without considering the respective fault of the parties involved in causing the injury.<sup>44</sup> The burden of the judgment was borne only by the defendants chosen by the plaintiff, despite the existence of other tortfeasors not joined in the action.

In 1957, the California Legislature mitigated some of the harsh results produced by these common law principles.<sup>45</sup> The legislature enacted sections 875 through 877 of the California Code of Civil Procedure.<sup>46</sup> The effect of these additions was twofold. First, the common law principle that barred contribution among multiple defendants was abandoned in favor of a new provision allowing contribution among joint tortfeasor defendants.<sup>47</sup> Section 875 provides for a right of contribution in instances when one defendant has satisfied the judgment in total or has paid more than the required pro rata share.<sup>48</sup> In these instances, however, the right of contribution is limited to contribution from other tortfeasors joined by the plaintiff as defendants.<sup>49</sup> The statute further assumes equal fault among defendants, allowing only pro rata contribution.<sup>50</sup> Second, section 877 abandoned the common law release provisions that provided that a release of one tortfeasor acted to release all tortfeasors<sup>51</sup> from liability.<sup>52</sup> Sec-

---

380 (1912); *see also* *River Garden Farms, Inc. v. Superior Court*, 26 Cal. App. 3d 986, 993 n.5, 103 Cal. Rptr. 498, 503 n.5 (1972).

43. Adams, *supra* note 3, at 734; *see also* Comment, *supra* note 39, at 781.

44. Adams, *supra* note 3, at 734.

45. CAL. CIV. PROC. CODE §§ 875-877.

46. These statutes are often collectively referred to as the Contribution Statute. *See, e.g., Molinari, Tort Indemnity in California*, 8 SANTA CLARA L. REV. 159, 161 (1968).

47. Code of Civil Procedure § 875:

(a) Where a money judgment has been rendered jointly against two or more defendants in a tort action, there shall be a right of contribution among them as hereinafter provided.

(b) Such a right shall be administered in accordance with the principles of equity.

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

CAL. CIV. PROC. CODE § 875.

48. CAL. CIV. PROC. CODE § 875(c).

49. *Id.*

50. *Id.*

51. At common law, the operation of a release on all tortfeasors was based upon the recognition that the plaintiff had only one cause of action against all tortfeasors, which was surrendered by releasing one from liability. W. PROSSER & W. KEETON, *supra* note 36, § 49.

52. *See* CAL. CIV. PROC. CODE § 877(a).

tion 877 provides that a release discharges from liability only the defendant to whom the release was given.<sup>53</sup> Section 877 provides that a release of a defendant also discharges that defendant from any further claims by the other defendant tortfeasors for contribution.<sup>54</sup> The judgment against the other defendant tortfeasors is reduced by the amount stipulated in the release or by the amount of consideration paid for the release.<sup>55</sup>

Although the enactment of sections 875 through 877 reduced some of the harshness of the common law treatment of joint tortfeasors, the plaintiff still has the ability to dictate the exercise of this new right of contribution.<sup>56</sup> A plaintiff still can choose to sue those best able to satisfy the judgment or those most vulnerable to suit. Joint and several liability was retained expressly so that one defendant still could be forced to satisfy the entire judgment.<sup>57</sup> The right of contribution exists only against those joined as defendants in the original action.<sup>58</sup> Further, each defendant is liable only for a pro rata share of the judgment.<sup>59</sup> Potentially, a less culpable defendant could be forced to pay a share of the judgment equal to that of a more culpable defendant.<sup>60</sup>

The only remedy available to a defendant against a tortfeasor not joined in the action by the plaintiff is to join that party in a third party claim for indemnity or bring an indemnity claim in a separate action.<sup>61</sup> The concept of indemnity remained unaffected by the 1957

53. *Id.*

54. *Id.* See *supra* note 8 for the statutory release provisions of § 877.

55. CAL. CIV. PROC. CODE § 877(a).

56. See Adams, *supra*, note 3, at 734. See also Comment, *Contribution and Indemnity*, 57 CALIF. L. REV. 490, 513 (1969), arguing for extension of the principles of indemnity to provide allocation of the judgment among all tortfeasors whether or not joined as parties. This extension would allow the burden of damages to be spread among all culpable parties, not just those joined as defendants by the plaintiff. *Id.* *American Motorcycle* provided substantially what the comment advocated. See *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 604, 578 P.2d 899, 915, 146 Cal. Rptr. 182, 198 (1978).

57. California Code of Civil Procedure § 875(g) provides: "This title shall not impair the right of a plaintiff to satisfy a judgment in full as against any tortfeasor judgment debtor." CAL. CIV. PROC. CODE § 875(g).

58. California Code of Civil Procedure § 875(a) provides: "Where a money judgment has been rendered jointly against two or more defendants in a tort action, there shall be a right of contribution among them." CAL. CIV. PROC. CODE § 875(a).

59. See *supra*, note 34 (text of California Code of Civil Procedure § 875). Pro rata division of the judgment amounts to equal shares among all defendants. See CAL. CIV. PROC. CODE § 875.

60. See Comment, *supra* note 3, at 896 (suggesting that the statutory contribution provisions provide an equal, though perhaps not equitable sharing of liability).

61. *Id.* The right of contribution provided by § 875 is limited to those parties joined as defendants. Contribution does not extend to tortfeasors not joined as defendants by the plaintiff. CAL. CIV. PROC. CODE § 875.



additions to the Code of Civil Procedure.<sup>62</sup> Since indemnity, however, was an "all-or-nothing" principle which required the entire burden of the judgment to be shifted to one party, despite a judgment against the party bringing the claim for indemnity,<sup>63</sup> only a few situations were recognized as proper cases for total indemnity.<sup>64</sup>

In an effort to simplify the application of common law indemnity, California courts began distinguishing defendants as primarily or secondarily liable or as actively or passively negligent.<sup>65</sup> In theory, the right of indemnity was available only to the passively or secondarily negligent defendant against an actively or primarily negligent defendant.<sup>66</sup> The California courts, however, were inconsistent in both the choice of labels and the meaning that was applied to these labels, adding to the difficulty of exercising the right of indemnity.<sup>67</sup> A few courts stressed that the key to proper application of these terms was in understanding that the purpose of the terms was not to assess the respective degrees of negligence of tortfeasors, but to identify different types of negligence by tortfeasors.<sup>68</sup> Thus, a secondarily negligent tortfeasor, one to whom a right of indemnity was traditionally available, was a party to whom liability was imputed either by statute or through some common law mechanism.<sup>69</sup> The passively or secondarily negligent defendant was thus held liable for the negligence of the party whose act resulted in injury to the plaintiff.<sup>70</sup> Secondary negligence occurs most often in situations in which liability is based on the doctrine

62. Comment, *supra* note 39, at 783.

63. See *American Motorcycle*, 20 Cal. 3d at 595, 578 P.2d at 909, 146 Cal. Rptr. at 193. The court suggested that total indemnity, the shifting of the entire burden to one tortfeasor, does not provide the just result in a "great majority" of situations. *Id.*

64. See Comment, *supra* note 56, at 505.

65. See, e.g., *General Electric Co. v. State ex rel. Department of Public Works*, 32 Cal. App. 3d 918, 923, 108 Cal. Rptr. 543, 545 (1973); *Cahill Bros. v. Clementina Co.*, 208 Cal. App. 2d 367, 382, 25 Cal. Rptr. 301, 307 (1962); see Comment, *supra* note 39, at 783. Initially, the right of indemnity required some legal relationship, such as a contract. The right today is recognized in favor of an innocent defendant against a culpable tortfeasor. These active/passive, primary/secondary distinctions were an effort to recognize these situations. *Id.*

66. See Comment, *supra* note 56, at 508 (suggesting that California courts used the primary versus secondary distinction in noncontractual implied indemnity cases and used the active versus passive distinction in implied contractual indemnity cases); but see Comment, *supra* note 39, at 783 (suggesting that the cases do not indicate that a consensus was reached by the California courts on the proper application of the distinctions). Compare *City of San Francisco v. Ho Sing*, 51 Cal. 2d 127, 330 P.2d 802 (1958) with *Cahill Bros. v. Clementina Co.*, 208 Cal. App. 2d 367, 25 Cal. Rptr. 301 (1962).

67. Comment, *supra* note 39, at 783.

68. *American Can Co. v. City and County of San Francisco*, 202 Cal. App. 2d 520, 525, 21 Cal. Rptr. 33, 36 (1962) (citing *Builders Supply Co. v. McCabe*, 77 A.2d 368, 370 (Pa. 1951)).

69. *American Can*, 202 Cal. App. 2d at 525, 21 Cal. Rptr. at 36.

70. *Id.*; see also *Molinari, supra* note 46, at 163 (quoting *Builders Supply Co. v. McCabe*, 77 A.2d 368, 370 (Pa. 1951)).

of respondeat superior<sup>71</sup> or in products liability actions when a dealer or retailer, though not guilty of producing the injury-causing defect, is nonetheless held liable for a defect that was caused by the manufacturer.<sup>72</sup> A secondarily negligent defendant thus did not act to cause injury to the plaintiff. The primarily or actively negligent defendant, on the other hand, was one who did act to cause the injury to the plaintiff.

Unlike the right of contribution, the right of a tortfeasor to indemnity has never been dependent on the choice of defendants sued by the plaintiff. A tortfeasor may pursue a claim for indemnity against a cotortfeasor not joined by the plaintiff in the original action. Prior to *American Motorcycle*, however, the right of indemnity was unavailable in a majority of situations,<sup>73</sup> because in most cases, the liability of the defendant was based on active fault. In these cases, equity did not demand that all liability be shifted to another party. Further, even when available, the application of indemnity was a source of great confusion for the courts.<sup>74</sup> Thus, though indemnity allowed the tortfeasor the ability to bring an action against any tortfeasor, not limited to those tortfeasors joined by the plaintiff as defendants, indemnity was unavailable to the majority of tortfeasors. The tortfeasor-defendant could exercise a right of contribution with much greater ease, but was able to receive only a pro rata share of the judgment from each of the tortfeasors joined as parties against whom a judgment had been rendered.

Thus, California courts did not allocate fault among joint tortfeasors not joined by the plaintiff as defendants. The reluctance to allocate fault among joint tortfeasors was abandoned by the Supreme Court holding in *American Motorcycle Association v. Superior Court*.<sup>75</sup> The Supreme Court, however, did not recognize this fault allocation between tortfeasors until after the court recognized fault allocation between a plaintiff and a defendant. This fault allocation between a plaintiff and a defendant was first recognized in the much celebrated case of *Li v. Yellow Cab*.

---

71. See Comment, *supra* note 56, at 495.

72. *Id.*

73. See *American Motorcycle*, 20 Cal. 3d at 595, 578 P.2d at 910, 146 Cal. Rptr. at 193. The California Supreme Court recognized that the "great majority" of cases do not require "the imposition of the entire loss upon one or another tortfeasor." *Id.*

74. *Id.* at 594, 578 P.2d at 909, 146 Cal. Rptr. at 193; *Atchison, T. & S. Fe R.R. v. LanFranco*, 267 Cal. App. 2d 881, 886, 73 Cal. Rptr. 660, 664 (1968).

75. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

LI V. YELLOW CAB: AN ATTEMPT TO BRING ABOUT FAIRNESS

In 1975, the California Supreme Court decided *Li v. Yellow Cab*,<sup>76</sup> which established comparative negligence in California.<sup>77</sup> In deciding *Li*, the court abandoned the principle of contributory negligence that previously had acted as a bar to recovery by plaintiffs found responsible for acts contributing in any degree to their own injury.<sup>78</sup> Though the intent of *Li* was merely to mitigate harshness toward plaintiffs by the operation of contributory negligence, the case has had great effect on California law governing joint tort liability.<sup>79</sup>

In *Li*, the plaintiff and the defendant were involved in an automobile accident at an intersection.<sup>80</sup> Both the plaintiff and the defendant were found negligent by the trial court.<sup>81</sup> The trial court found that the negligence of the plaintiff, a proximate cause of the injury, barred any recovery under the principles of contributory negligence.<sup>82</sup> The supreme court, however, adopted a system of "pure" comparative negligence<sup>83</sup> in which liability is assessed in proportion to the respective fault of each of the parties.<sup>84</sup>

The comparative fault standard adopted by the supreme court in *Li* requires that the fault of both plaintiff and defendant parties be determined as a fraction of the total cause of the injury.<sup>85</sup> Though the intent of the standard was to provide a means of reducing the recovery of the plaintiff according to fault without completely barring recovery, comparative fault principles also provide a means of assessing the respective liabilities of multiple tortfeasor defendants.<sup>86</sup>

---

76. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

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

78. *Id.* at 808, 532 P.2d at 1229, 119 Cal. Rptr. at 861.

79. Adams, *supra* note 3, at 729.

80. *Li*, 13 Cal. 3d at 809, 532 P.2d at 1229, 119 Cal. Rptr. at 861.

81. *Id.*

82. *Id.*

83. *Id.* at 827, 532 P.2d at 1242, 119 Cal. Rptr. at 874. The court adopted this "pure" form of comparative negligence, which permits some recovery no matter how great the fault of the plaintiff, expressly over the "50 percent" form. The "50 percent" form is one of the two other principle systems of comparative fault employed presently in American jurisdictions. Adams, *supra* note 3, at 735. This form, also called the "greater than" system, bars recovery to the plaintiff if his fault be judged greater than the combined fault of the defendants. The "less than" system bars recovery to the plaintiff unless his fault is less than the combined total fault of the defendants. *Id.*

84. *Li*, 13 Cal. 3d at 810, 532 P.2d at 1230, 119 Cal. Rptr. at 858.

85. *Id.* at 808, 532 P.2d at 1229, 119 Cal. Rptr. at 861.

86. *Id.* at 823, 532 P.2d at 1239, 119 Cal. Rptr. at 871. Though the California Supreme Court recognized the potential effect that the decision would have on the assessment of fault among multiple defendants, especially in situations in which all responsible parties were not brought before court, this effect was never discussed thoroughly. The court instead chose not to address the effect on multiple parties because the issue was "not involved in the case" before the court. *Id.* at 826, 532 P.2d at 1241, 119 Cal. Rptr. at 873.

This means of determining the respective liabilities of multiple tortfeasors opened the door for modifications in the existing principles of contribution and indemnity among tortfeasors in California. These modifications to the existing principles of contribution and indemnity were made through the adoption of partial indemnity in *American Motorcycle*.

*AMERICAN MOTORCYCLE ASSOCIATION V. SUPERIOR COURT:  
BRINGING INDEMNITY IN LINE WITH THE PRINCIPLES OF LI*

In 1978, the California Supreme Court decided *American Motorcycle Association v. Superior Court*.<sup>87</sup> In *American Motorcycle*, a teenage boy was injured while participating in a novice cross-country motorcycle race. The sponsoring organizations were joined as defendants in the suit.<sup>88</sup> American Motorcycle Association, one of these parties, sought leave to file a cross-complaint against the parents of the boy alleging negligent supervision and seeking indemnity in the event the association was found liable.<sup>89</sup> The trial court denied the motion for leave to file the cross-complaint and the appellate court affirmed. The supreme court recognized that the traditional principles of contribution and indemnity were inconsistent with the principles of comparative fault adopted in *Li*.<sup>90</sup> Pro rata contribution<sup>91</sup> and "all-or-nothing"<sup>92</sup> indemnity did not make sense when, in most instances, the responsibility for the injury was neither shared equally by all parties nor was the injury entirely the fault of one party.<sup>93</sup>

In response to finding that neither contribution nor indemnity was consistent with comparative fault, the court referred to the "logic, practical experience and fundamental justice" upon which *Li* was based<sup>94</sup> and called for a modification of existing indemnity principles to allow partial indemnity.<sup>95</sup> The court took notice of the difficulty of applying the active versus passive, primary versus secondary distinc-

---

87. 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978).

88. *Id.* at 584, 578 P.2d at 902, 146 Cal. Rptr. at 185.

89. *Id.*

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

91. *See supra* notes 47-60 and accompanying text.

92. *See supra* notes 61-74 and accompanying text.

93. *American Motorcycle*, 20 Cal. 3d at 591, 578 P.2d at 907, 146 Cal. Rptr. at 190. Recognizing that neither contribution nor total indemnity was consistent with the principles of comparative fault, the court stated: "[T]he common goal of both doctrines, the equitable distribution of loss among multiple tortfeasors, suggests a need for a reexamination of these twin concepts." *Id.*

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

95. *Id.*

tions previously used in evaluating indemnity claims and ultimately rejected these distinctions as "artificial."<sup>96</sup> Further, the court found that the all-or-nothing approach of total indemnity did not provide a means for achieving a fair result in a "great majority" of cases.<sup>97</sup> In an attempt to provide a means for producing a fair result, the court adopted a new system of partial indemnity based upon comparative fault.<sup>98</sup>

The *American Motorcycle* court, however, did not expressly abandon total indemnity. The adoption of partial indemnity was the response to the recognition that total indemnity simply was inapplicable in the majority of cases in which each defendant was guilty of at least some active fault.<sup>99</sup> The partial indemnity adopted in *American Motorcycle* is a means of providing indemnification among defendants whose fault precludes total indemnity. The few cases in which total indemnity does have proper application presumably remain untouched by *American Motorcycle*.

In addition to the silence of *American Motorcycle* on the issue of the existence of total indemnity, another important aspect of *American Motorcycle* was the decision of the court not to reinterpret the statutory rules of contribution in California.<sup>100</sup> Although the respective liability of multiple defendants is not likely to be equal under comparative fault principles, the supreme court did not suggest a modification of these statutory contribution provisions. Thus, the court in *American Motorcycle* modified indemnity in California, not because total indemnity was in greater need of alteration than contribution, but because, as between the two, the court retained greater freedom to change decisional law than to change statutory law.<sup>101</sup>

The court in *American Motorcycle* also dealt with the argument that partial indemnity would defeat the settlement release provisions of section 875<sup>102</sup> of the Code of Civil Procedure.<sup>103</sup> The court recog-

---

96. *Id.*

97. *Id.* at 594, 578 P.2d at 909, 146 Cal. Rptr. at 192.

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

99. *Id.* at 608, 578 P.2d at 918, 146 Cal. Rptr. at 201.

100. Miller, *Extending the Fairness Principle of Li and American Motorcycle: Adoption of the Uniform Comparative Fault Act*, 14 PAC. L.J. 835, 847 (1981). The author suggests that *American Motorcycle* circumvented the contribution statute. *Id.*

101. *American Motorcycle*, 20 Cal. 3d at 602, 578 P.2d at 914, 146 Cal. Rptr. at 197. The California Supreme Court expressly left undecided the question of whether the same provisions in the statute which justified the modification of indemnity would permit the court to interpret the statute as providing for comparative rather than per capita contribution. *Id.*

102. *Id.* at 603, 578 P.2d at 915, 146 Cal. Rptr. at 198.

103. *Id.* At the time *American Motorcycle* was decided, § 877 of the Code of Civil Procedure provided a release from claims for contribution. See CAL. CIV. PROC. CODE § 877.

nized the importance of maintaining this protection, and reasoned that the release provisions logically ought to extend to protect the settling tortfeasor from partial indemnity as well as from contribution.<sup>104</sup> The California Legislature reacted to this suggestion made by the court by enacting section 877.6 of the Code of Civil Procedure.

CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 877.6: A  
CODIFICATION OF *AMERICAN MOTORCYCLE*

In 1980, the California Legislature enacted section 877.6 of the Code of Civil Procedure which codified that portion of *American Motorcycle* which provided a settling tortfeasor a release from claims for partial indemnity.<sup>105</sup> Section 877.6 further compounded the issue of the continued existence of total indemnity. The statute expressly provides that the settling tortfeasor is released from claims for "equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault."<sup>106</sup> Although section 877.6 bars claims for partial indemnity against a settling tortfeasor, the statute does not expressly bar claims for total indemnity.<sup>107</sup>

In point of fact, the statute was not intended to address the existence of total indemnity, but to provide for a pretrial hearing of the issue of good faith in a settlement.<sup>108</sup> Prior to the enactment of section 877.6, no mechanism for determining good faith existed.<sup>109</sup> Thus, neither the express language nor the apparent intent of section 877.6 addresses the continued existence of total indemnity. With the passage of section 877.6 in 1980, however, the issue of the status of total indemnity in California was fully framed and began to ap-

---

Several amicae argued that the incentives to settle provided by this section would be thwarted if a settling tortfeasor were still vulnerable to future claims for partial indemnity. *American Motorcycle*, 20 Cal. 3d at 603, 578 P.2d at 915, 146 Cal. Rptr. at 198.

104. *American Motorcycle*, 20 Cal. 3d at 603, 578 P.2d at 902, 146 Cal. Rptr. at 185.

105. See *Angelus Associates Corp. v. Neonex Leisure Products, Inc.*, 167 Cal. App. 3d 532, 537, 213 Cal. Rptr. 403, 407 (1985).

106. 20 Cal. 3d at 604, 578 P.2d at 917, 146 Cal. Rptr. at 200.

107. California Code of Civil Procedure § 877.6 provides:

(a) Any party to an action wherein it is alleged that two or more parties are joint tortfeasors shall be entitled to a hearing on the issue of the good faith settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors.

. . . .  
(c) The determination by the court that the settlement was made in good faith shall bar any other tortfeasor from any further claims against the settling tortfeasor for equitable comparative contribution, or partial or comparative indemnity based on comparative negligence or comparative fault.

CAL. CIV. PROC. CODE § 877.6.

108. *Id.* See *Review of Selected 1980 California Legislation*, 12 PAC. L.J. 290, 290 (1980).

109. *Review of Selected 1980 California Legislation*, 12 PAC. L.J. 290 (1980).

pear in the courts of appeal.<sup>110</sup> Though *American Motorcycle* modified existing principles of indemnity to allow partial indemnity,<sup>111</sup> confusion arose in the lower courts, first regarding whether this modification was, in fact, an abolition of total indemnity,<sup>112</sup> and second, if total indemnity did survive *American Motorcycle*, whether a claim for total indemnity may be brought against a settling tortfeasor despite section 877.6.<sup>113</sup>

In some decisions the courts have addressed these questions by focusing on the intent of section 877.6. Although section 877.6 does not expressly provide a settling tortfeasor with a release from claims for total indemnity, some appellate courts have concluded that the legislature intended also to provide settling tortfeasors with immunity<sup>114</sup> from total indemnity. Other courts, however, have limited the impact of section 877.6 to the express provisions of the statute, holding that total indemnity is still available against a settling tortfeasor.<sup>115</sup>

In other decisions, the judicial intent of *American Motorcycle* has been the point of focus.<sup>116</sup> Some courts have held that the intent of *American Motorcycle* was to abolish total indemnity altogether.<sup>117</sup> Other courts have reached the opposite result, reasoning that the principles of comparative fault, upon which *American Motorcycle* is based, are inapplicable to the typical cases in which a claim for total indemnity is brought, namely, cases involving vicarious or derivative liability.<sup>118</sup>

---

110. See *infra* notes 119-229 and accompanying text.

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

112. See *Kohn v. Superior Court*, 142 Cal. App. 3d 323, 330, 191 Cal. Rptr. 78, 83 (1983); *E.L. White v. City of Huntington Beach*, 138 Cal. App. 3d 366, 376, 187 Cal. Rptr. 879, 885 (1982); *City of Sacramento v. Gemsch*, 115 Cal. App. 3d 869, 876, 171 Cal. Rptr. 764, 769 (1981).

113. See *Angelus Associates v. Neonex Leisure Products, Inc.*, 167 Cal. App. 3d 532, 542, 213 Cal. Rptr. 403, 407 (1985); *Huizar v. Abex Corp.*, 156 Cal. App. 3d 534, 542, 203 Cal. Rptr. 47, 50 (1984); *Lopez v. Blecher*, 143 Cal. App. 3d 736, 741, 192 Cal. Rptr. 190, 193 (1983).

114. See *Standard Pacific v. A.A. Baxter Corp.*, 176 Cal. App. 3d 577, 589, 222 Cal. Rptr. 106, 113 (1986).

115. See *Angelus*, 167 Cal. App. 3d at 542, 213 Cal. Rptr. at 407; *Huizar*, 156 Cal. App. 3d at 542, 203 Cal. Rptr. at 50; *White*, 138 Cal. App. 3d at 376, 181 Cal. Rptr. at 885.

116. See *White*, 138 Cal. App. 3d at 376, 181 Cal. Rptr. at 885; *Gemsch*, 115 Cal. App. 3d at 876, 171 Cal. Rptr. at 769.

117. See *Standard Pacific*, 176 Cal. App. 3d at 587, 222 Cal. Rptr. at 111; *City of Sacramento v. Gemsch*, 115 Cal. App. 3d at 877, 171 Cal. Rptr. at 768; *Gemsch* concedes that *American Motorcycle* did not fully repudiate total indemnity, but contends that total indemnity has been restricted after *American Motorcycle* to cases in which total indemnity is provided by contract. *Id.*

118. See *Angelus*, 167 Cal. App. 3d at 542, 213 Cal. Rptr. at 407; *White*, 138 Cal. App. 3d at 376, 181 Cal. Rptr. at 885.

## POST AMERICAN MOTORCYCLE DECISIONS

The California Supreme Court has not addressed the issue of whether or not total indemnity exists after *American Motorcycle*, nor has the court addressed the issue of whether a claim for total indemnity brought against a settling tortfeasor is consistent with the intent of section 877.6. The court, however, expressly has left undecided the question of whether comparative indemnity is even applicable to situations in which the liability of a defendant is vicarious or derivative.<sup>119</sup> Some appellate courts have noted the express decision of the supreme court to leave this issue open in support of the contention that total indemnity still is available in appropriate instances, even against a settling tortfeasor.<sup>120</sup> Other courts have reasoned that total indemnity has been greatly limited, if not abolished, by both *American Motorcycle*, and the subsequent enactment of section 877.6.<sup>121</sup>

#### A. The Cases Against the Continued Existence of Total Indemnity

In *City of Sacramento v. Gemsch*,<sup>122</sup> the city brought a claim for total indemnity against a landowner after both were joined as defendants in a personal injury suit.<sup>123</sup> The plaintiff in *Gemsch* suffered injuries in a fall on the sidewalk adjacent to the property of the landowner. The landowner, who had a statutory duty to keep the sidewalk free from debris, settled with the plaintiff before trial.<sup>124</sup> The city attempted to base an indemnity claim on an implied contract between the city and the landowner based on city code sections which imposed the duty on the landowner.<sup>125</sup>

The *Gemsch* court denied the claim brought by the city for total indemnity.<sup>126</sup> The court conceded<sup>127</sup> that *American Motorcycle* did not

119. *Safeway Stores, Inc. v. Nest-Kart*, 21 Cal. 3d 322, 332, 579 P.2d 441, 446, 146 Cal. Rptr. 550, 555.

120. See, e.g., *Angelus Associates v. Neonex Leisure Products, Inc.*, 167 Cal. App. 3d 532, 537, 213 Cal. Rptr. 403, 406 (1985).

121. *Standard Pacific*, 176 Cal. App. 3d at 593, 222 Cal. Rptr. at 115; *Lopez v. Blecher*, 143 Cal. App. 3d 736, 741, 192 Cal. Rptr. 190, 193 (1983); *Kohn v. Superior Court*, 142 Cal. App. 3d 323, 330, 191 Cal. Rptr. 78, 83 (1983); *City of Sacramento v. Gemsch*, 115 Cal. App. 3d 869, 876, 171 Cal. Rptr. 764, 767 (1981); see *infra* notes 122-73 and accompanying text.

122. 115 Cal. App. 3d 869, 171 Cal. Rptr. 764 (1981).

123. *Id.* at 871, 171 Cal. Rptr. at 765.

124. *Id.*

125. 115 Cal. App. 3d at 873, 171 Cal. Rptr. at 766.

126. *Id.* at 877, 171 Cal. Rptr. at 769. "There is no equitable indemnity available to the appellant because respondent's pre-trial settlement precludes it. There is no triable issue." *Id.*

127. 115 Cal. App. 3d at 875, 171 Cal. Rptr. at 767. The court conceded that claims for express contractual indemnity were not governed by *American Motorcycle*. *Id.* at 877, 171 Cal.



repudiate total indemnity expressly.<sup>128</sup> The court concluded, however, that the discussion of the active versus passive and primary versus secondary distinctions in *American Motorcycle* left "little doubt" where the supreme court stood on the issue of the continued practical existence of total indemnity.<sup>129</sup> On this basis, *Gemsch* limited the availability of total indemnity to those situations in which a contract or statute provided for indemnity.<sup>130</sup> In all other situations, according to *Gemsch*, the right of indemnity is properly subject to the "guidelines of *American Motorcycle*."<sup>131</sup> Though *Gemsch* set forth broad propositions rejecting the continued practical existence of total indemnity, the court also found Sacramento guilty of affirmative, or active negligence.<sup>132</sup> On the basis of this type of fault, the city would not have had a right of total indemnity if the case had occurred prior to *American Motorcycle*.<sup>133</sup> Therefore, the broad interpretations enunciated by *Gemsch* are properly seen as dicta. Thus, the case can be viewed as a decision properly based upon pre-*American Motorcycle* law and not inconsistent with the continued existence of total indemnity.

The dissent in *Gemsch*,<sup>134</sup> however, argued that *American Motorcycle* merely modified, but did not abolish, traditional principles of indemnity.<sup>135</sup> The dissent is based largely on the contention that if the supreme court had intended to do away with total indemnity, that intention would have been expressed more clearly in the language of *American Motorcycle*.<sup>136</sup> Further, the dissent contended that *American Motorcycle* did nothing to change the equitable considerations that traditionally had been the basis of total indemnity.<sup>137</sup> According to

---

Rptr. at 770. The right of indemnity should follow the guidelines of *American Motorcycle* unless a contract or statute provides otherwise. *Id.*

128. 115 Cal. App. 3d at 875, 171 Cal. Rptr. at 767.

129. *Id.*

130. *Gemsch*, 115 Cal. App. 3d at 877, 171 Cal. Rptr. at 769.

131. *Id.*

132. 115 Cal. App. 3d at 876, 171 Cal. Rptr. at 769.

133. California courts refused to allow indemnity between tortfeasors when each was guilty of some affirmative act of negligence. *Cahill Bros. v. Clementina Co.*, 208 Cal. App. 2d 367, 382, 25 Cal. Rptr. 301, 307 (1962).

134. *Gemsch*, 115 Cal. App. 3d at 878, 171 Cal. Rptr. at 769.

135. *Id.*

136. *Id.* See *Angelus Associates v. Neonex Leisure Products, Inc.*, 167 Cal. App. 3d 532, 542, 213 Cal. Rptr. 403, 409 (1985); *E.L. White v. City of Huntington Beach*, 138 Cal. App. 3d 366, 375, 187 Cal. Rptr. 879, 885 (1982); see *supra* notes 175-86, 207-25 and accompanying text.

137. *City of Sacramento v. Gemsch*, 115 Cal. App. 3d 869, 879, 171 Cal. Rptr. 764, 769 (Paras, J., dissenting). The dissent stated: "Where one who has committed no wrongful act is caused to incur liability for the act of another, justice demands total indemnity. . . . I do not read *American Motorcycle* as declaring otherwise; nor do I read its partial indemnity doctrine, with its ramifications, as achieving the same result." *Id.*

the dissent, total indemnity is available, despite *American Motorcycle* and section 877.6, to one "who has committed no wrongful act" but is caused "to incur liability by the wrongful act of another."<sup>138</sup>

*Kohn v. Superior Court*,<sup>139</sup> closely following *Gemsch*, also held that a claim for total indemnity which was not based on express or implied contractual provisions was barred by *American Motorcycle*.<sup>140</sup> In *Kohn*, a homebuyer brought suit against a real estate broker and a construction company for fraud in failing to disclose structural defects caused by a fire in the building.<sup>141</sup> The real estate broker cross-complained against the construction company for total indemnity.<sup>142</sup> When the construction company settled with the plaintiff, the cross-complaint was dismissed.<sup>143</sup> The court cited *Gemsch* in support of the dismissal of the cross-complaint.<sup>144</sup> The court, however, also found the real estate broker guilty of active negligence in causing the injury.<sup>145</sup> Once again, the equitable principles that support total indemnity were not present in the case.<sup>146</sup> Thus, *Kohn* is not necessarily inconsistent with the view that total indemnity still exists despite the provisions of *American Motorcycle* and section 877.6.

In 1983, a claim for indemnity brought by a defendant against a settling tortfeasor was again denied in *Lopez v. Blecher*.<sup>147</sup> In *Lopez*, a good samaritan who had stopped to render aid to passengers of an overturned van was hit by a car that careened off of the van.<sup>148</sup> The plaintiff-good samaritan brought suit against both the driver of the car and the owner of the van.<sup>149</sup> The van owner cross-complained against the driver of the car for total indemnity, but the cross-complaint was dismissed when a settlement was reached between the driver and the good samaritan.<sup>150</sup> In *Lopez* the court was most concerned with the policy of promoting settlement.<sup>151</sup> *Lopez* relied on

138. *Gemsch*, 115 Cal. App. 3d at 879, 171 Cal. Rptr. at 769.

139. 142 Cal. App. 3d 323, 191 Cal. Rptr. 78 (1983).

140. *Id.* at 330, 191 Cal. Rptr. at 83. The court in *Kohn*, following the reasoning in *Gemsch*, dismissed the claim for total indemnity because of the absence of any assertions of contractual indemnity rights. A good faith settlement having been reached, the court reasoned that all forms of indemnity other than contractual were barred under § 877.6. *Id.*

141. *Kohn v. Superior Court*, 142 Cal. App. 3d 323, 325, 191 Cal. Rptr. 78, 80 (1983).

142. *Id.*

143. *Kohn*, 142 Cal. App. 3d at 330, 191 Cal. Rptr. at 83.

144. *Id.*

145. *Id.*

146. *See supra* notes 68-70 and accompanying text.

147. *Lopez v. Blecher*, 143 Cal. App. 3d 736, 192 Cal. Rptr. 190 (1983).

148. *Id.* at 738, 192 Cal. Rptr. at 192.

149. *Id.*

150. *Id.*

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

the language in *American Motorcycle* calling for the release of a settling tortfeasor from claims for partial indemnity.<sup>152</sup> The *Lopez* court, however, did not address the issue completely. Instead, the court held that to allow a defendant to whom liability has been imputed to bring a claim for partial indemnity would undermine the statutory policy of section 877.6.<sup>153</sup> In failing to address the issue of whether total indemnity claims may be brought against a settling tortfeasor,<sup>154</sup> *Lopez* does nothing more than restate the express statutory provisions of section 877.6.

The most recent case to find total indemnity unavailable after *American Motorcycle* was *Standard Pacific of San Diego v. A.A. Baxter Corporation*<sup>155</sup> decided in January 1986. In that case, a group of homeowners brought suit against a development company and a soil grading company for property damage caused by soil subsidence. The soil grading company settled with the plaintiffs, and sought a dismissal, based on the good faith settlement, of the claim for total indemnity brought by the development company.<sup>156</sup> The trial court dismissed the indemnity claim upon a determination that the settlements were made in good faith.<sup>157</sup>

The court of appeal first remanded the case on the ground that the trial court used an improper standard in making a finding of good faith.<sup>158</sup> *Standard Pacific* addressed the issue of whether a claim for total indemnity still was available against the settling tortfeasor after a good faith settlement.<sup>159</sup> In concluding that the claim was barred after a good faith settlement, the court focused on three arguments.

The *Standard Pacific* court first reasoned that partial indemnity, based on comparative fault, effectively had abrogated the need for total indemnity after *American Motorcycle*.<sup>160</sup> The system of partial indemnity, according to the court, already allowed a defendant who was zero percent at fault to obtain full indemnity.<sup>161</sup> According to

---

152. *Lopez*, 143 Cal. App. 3d at 739, 192 Cal. Rptr. at 192. (citing *American Motorcycle*, 20 Cal. 3d at 604, 578 P.2d at 917, 146 Cal. Rptr. at 200.)

153. 143 Cal. App. 3d at 741, 192 Cal. Rptr. at 193.

154. In a later case, *Angelus Associates v. Neonex Leisure Products, Inc.*, the court recognized that *Lopez* did not even address the issue of a claim for total indemnity against a settling tortfeasor. *Angelus Associates v. Neonex Leisure Products, Inc.*, 162 Cal. App. 3d 532, 542, 213 Cal. Rptr. 403, 407 (1985). See also *infra* notes 207-25 and accompanying text.

155. 176 Cal. App. 3d 577, 222 Cal. Rptr. 106 (1986).

156. *Id.*

157. *Id.*

158. *Id.* at 242.

159. *Id.*

160. *Id.* See *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 595, 578 P.2d 899, 910, 146 Cal. Rptr. 182, 193 (1978).

161. *Id.*

this argument, total indemnity is at one end of the spectrum of indemnity adopted in *American Motorcycle*.<sup>162</sup> Although this argument is logically sound, the court did not cite any cases in which partial indemnity had been applied in this manner. Thus, though the argument is sound in theory, practical experience and prior case law do not offer support for the conclusion that partial indemnity as adopted by *American Motorcycle* subsumes traditional total indemnity.

The court next reasoned that section 877.6 takes into account the defendant whose liability is vicarious or derivative by requiring that all settlements be in good faith.<sup>163</sup> A good faith determination, according to the court, ought to consider the prospective liability of all defendants, both settling and nonsettling.<sup>164</sup> Again, this argument, though sound, runs counter to prior California case law.

In 1985, the California Supreme Court, in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*,<sup>165</sup> articulated the proper standard for determining good faith under section 877.6.<sup>166</sup> *Tech-Bilt* required that the trial court inquire whether the amount of the settlement reasonably reflects the proportional liability of the settling tortfeasor,<sup>167</sup> perhaps impliedly necessitating some inquiry into the liability of the other defendants. The court, however, diluted the strength of this standard by requiring that the party asserting lack of good faith show that the settlement amount was "so far out of the ballpark"<sup>168</sup> that the settlement is inconsistent with the objectives of section 877.6. In other words, *Tech-Bilt* articulates a heavy burden upon those asserting that the settlement was not made in good faith. Furthermore, section 877.6 places the burden of proof on the party asserting a lack of good faith.<sup>169</sup> Thus, although *Standard Pacific* asserts that the respective fault of the nonsettling defendants should be taken into account in determining good faith, the heavy burden on the nonsettling defendant articulated in *Tech-Bilt* seems to make the practicality of inquiry doubtful.

Finally, the court in *Standard Pacific* addressed the contention that a vicariously liable defendant is not a "tortfeasor" within the mean-

---

162. *Standard Pacific v. A.A. Baxter Corp.*, 176 Cal. App. 3d 577, 587, 222 Cal. Rptr. 106, 111 (1986).

163. *Id.*

164. *Id.*

165. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985).

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

167. *Id.*

168. *Id.*

169. California Code of Civil Procedure § 877.6(d) provides: "The party asserting the lack of good faith shall have the burden of proof on the issue." CAL. CIV. PROC. CODE § 877.6(d).

ing of section 877.6, and thus is not barred from bringing a claim for total indemnity against a settling defendant.<sup>170</sup> The court reasoned that the trend toward broadening the term "joint tortfeasor" to include not only those defendants who acted in concert to cause injury, but also those defendants who acted jointly, concurrently, or simultaneously,<sup>171</sup> allows a vicariously liable defendant to be within the broad meaning of "tortfeasor" in section 877.6.<sup>172</sup> Although the term "joint tortfeasor" has been expanded to include all who act to cause the same injury,<sup>173</sup> the court suggested that the term should be extended to include those innocent of any wrongdoing. Thus, though *Standard Pacific* suggests that the defendant whose liability is vicarious or derivative is adequately protected under partial indemnity as adopted by *American Motorcycle* and section 877.6, the arguments are unconvincing and lack foundation in California case law.

### *B. The Cases in Support of the Continued Existence of Total Indemnity*

Though a number of cases have found that total indemnity has been replaced by the partial indemnity principles of *American Motorcycle* or the enactment of section 877.6, an almost equal number have reached the opposite result.<sup>174</sup> In *E.L. White v. City of Huntington Beach*,<sup>175</sup> a California appellate court addressed the issue of whether total indemnity existed after *American Motorcycle*. In *White*, a wrongful death action was brought by the representatives of an employee of a subcontractor against the City of Huntington Beach and a contractor hired by the city after the employee was killed when a trench collapsed. Two of the chief construction inspectors of the city were present at the site while the employee was working and noted the unsafe condition, but did nothing to correct the hazard. The contractor brought an action for total indemnity against the city.<sup>176</sup> The city argued that total indemnity had been abandoned by *American*

170. *Standard Pacific*, 176 Cal. App. 3d at 589, 222 Cal. Rptr. at 113.

171. See Schwartz, *supra* note 40, § 252.

172. *Id.*

173. Comment, *supra* note 39, at 780.

174. See *Angelus Associates v. Neonex Leisure Products, Inc.*, 167 Cal. App. 3d 532, 542, 213 Cal. Rptr. 403, 407 (1985); *Torres v. Union Pac. R.R.*, 157 Cal. App. 3d 499, 511, 203 Cal. Rptr. 825, 833 (1984); *Huizar v. Abex Corp.*, 156 Cal. App. 3d 534, 542, 203 Cal. Rptr. 47, 50 (1984); *Turcon v. Norton-Villiers, Ltd.*, 139 Cal. App. 3d 280, 284, 188 Cal. Rptr. 580, 583 (1983); *E.L. White v. City of Huntington Beach*, 138 Cal. App. 3d 366, 376, 187 Cal. Rptr. 879, 885 (1982); see *supra* notes 175-225 and accompanying text.

175. 138 Cal. App. 3d 366, 187 Cal. Rptr. 879 (1982).

176. *White*, 138 Cal. App. 3d at 374, 187 Cal. Rptr. at 885.

*Motorcycle*.<sup>177</sup> The court cited the holding of *American Motorcycle* recognizing that the decision sought to modify the all-or-nothing equitable indemnity to allow partial indemnity in appropriate cases.<sup>178</sup> The court in *White* reasoned that comparative negligence principles were intended to apportion fault and are applicable only to those defendants who share responsibility for causing the injury.<sup>179</sup> This category of defendants would not include those defendants who are free from any active fault, specifically those defendants whose liability is vicarious or derivative. The liability of these defendants is based not on fault but on public policy that requires that they be liable to the plaintiff for the acts of others.<sup>180</sup> The *White* court reasoned that since the partial indemnity of *American Motorcycle* is based on apportionment of fault principles, partial indemnity is not applicable to defendants who are liable as a result of public policy and not as a result of any shared active fault.<sup>181</sup>

*White*, however, did not discuss the validity of a claim for total indemnity brought against a settling tortfeasor under section 877.6. Later cases dealing with this issue do cite *White* for the proposition that partial indemnity based on comparative fault is inapplicable in instances of vicarious or derivative liability.<sup>182</sup> The later cases follow the reasoning of *White*, which suggests that vicarious or derivative liability does not fit within the framework of comparative fault principles.<sup>183</sup> According to this reasoning partial indemnity, based on comparative fault principles, is also inapplicable in cases in which the liability of a defendant is vicarious or derivative.<sup>184</sup> Section 877.6,

177. *Id.* at 375, 187 Cal. Rptr. 885.

178. *Id.* at 375, 187 Cal. Rptr. at 885. The *White* court further found that the supreme court in *American Motorcycle* relied on a New York appellate court case in modifying the equitable indemnity doctrine. *Id.* (citing *Dole v. Dow Chemical*, 282 N.E.3d 288 (N.Y. 1972)). That portion of the *Dole* opinion cited in *American Motorcycle* states: "There are situations when the facts would in fairness warrant what [named defendant] here seeks—passing on to [a concurrent tortfeasor] all responsibility for negligence, a traditional full indemnification." *American Motorcycle*, 20 Cal. 3d at 597, 578 P.2d at 911, 146 Cal. Rptr. at 194; *Dole v. Dow Chemical*, 282 N.E.3d 288, 291 (N.Y. 1972). *Dole* was a landmark decision in that partial indemnity was adopted though New York was not a comparative fault jurisdiction at the time of the decision. *American Motorcycle*, 20 Cal. 3d at 597, 578 P.2d at 911, 146 Cal. Rptr. at 194.

179. *White*, 138 Cal. App. 3d at 375, 187 Cal. Rptr. at 885.

180. *American Can Co. v. City and County of San Francisco*, 202 Cal. App. 2d 520, 525, 21 Cal. Rptr. 33, 36 (1962).

181. *White*, 138 Cal. App. 3d at 376, 187 Cal. Rptr. at 885.

182. *See, e.g., Angelus Associates v. Neonex Leisure Products, Inc.*, 167 Cal. App. 3d 532, 542, 213 Cal. Rptr. 403, 407 (1985); *Huizar v. Abex Corp.*, 156 Cal. App. 3d 534, 543, 203 Cal. Rptr. 47, 50 (1984).

183. *Angelus*, 167 Cal. App. 3d at 542, 213 Cal. Rptr. at 409; *Huizar*, 156 Cal. App. 3d at 543, 203 Cal. Rptr. at 51; *see E.L. White v. City of Huntington Beach*, 138 Cal. App. 3d 366, 376, 187 Cal. Rptr. 879, 885 (1982).

184. *White*, 138 Cal. App. 3d at 376, 187 Cal. Rptr. at 885.

which protects a settling defendant from claims for partial indemnity,<sup>185</sup> should thus afford the settling defendant no protection in cases in which partial indemnity<sup>186</sup> does not have proper application.

A year after the decision in *White*, the court in *Turcon v. Norton Villiers, Ltd.*,<sup>187</sup> articulated instances in which a claim for total indemnity might be brought against a joint tortfeasor despite the existence of a good faith settlement between that joint tortfeasor and the plaintiff.<sup>188</sup> In *Turcon*, the court denied the claim for total indemnity brought by the corporate owner of one vehicle involved in an accident against the manufacturer of the other vehicle.<sup>189</sup> The manufacturer had settled previously with the injured plaintiff. The court based the denial of the claim on the absence of any allegation that would provide a basis for shifting total liability.<sup>190</sup>

The *Turcon* court did not deny the claim for indemnity on the basis of a good faith settlement having been reached by the manufacturer with the plaintiff.<sup>191</sup> Nor did the court find that total indemnity had been abolished by *American Motorcycle*.<sup>192</sup> Instead, the court was unable to find the necessary circumstances present to allow total indemnity between the two defendants.<sup>193</sup>

A year after *Turcon*, the court in *Torres v. Union Pacific Railroad Co.*,<sup>194</sup> also recognized that instances still exist in which total indemnity claims may be brought despite good faith settlement.<sup>195</sup> In deciding *Torres*, the court stated that section 877.6 does not have claims for

---

185. CAL. CIV. PROC. CODE § 877.6(b).

186. *Id.*

187. 139 Cal. App. 3d 280, 188 Cal. Rptr. 580 (1983).

188. *Turcon*, 139 Cal. App. 3d at 284, 188 Cal. Rptr. at 583.

189. *Id.*

190. *Id.* The implication of the decision, however, was that had the party claiming indemnity alleged that liability was imputed as a result of some relationship with the settling tortfeasor, from whom indemnity was sought, the claim for total indemnity might have been allowed. *Id.*

191. *Id.* Though a settlement was reached, the court chose to base the holding on the absence of factors necessary to shift total liability to one party. Further, the party seeking indemnity admitted negligence, but contended that the negligent act occurred prior to the act of the defendant from whom indemnity was sought. The party sought total indemnity based on passive or secondary negligence. *American Motorcycle*, however, effectively abandoned the primary versus secondary and active versus passive distinctions. *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 579, 594, 578 P.2d 899, 905, 146 Cal. Rptr. 182, 189. The court, in *Turcon*, read the claim for total indemnity as a claim for partial indemnity based on the passive/secondary negligence admitted by the party seeking indemnity. *Turcon*, 139 Cal. App. 3d at 284, 188 Cal. Rptr. at 583.

192. *Id.*

193. *Id.*

194. 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984).

195. *Id.* at 511 n.5, 203 Cal. Rptr. at 833 n.5.

total indemnity within its purview.<sup>196</sup> *Torres* also rejected the interpretation of section 877.6 that barred claims for total indemnity against a settling tortfeasor, based on the harsh effects that resulted.<sup>197</sup> The denial of the claim for total indemnity, however, was based on the wrongful conduct alleged against the defendant asserting the claim.<sup>198</sup> Though the court recognized that situations existed in which a defendant might properly bring a claim for total indemnity, the case before the court was not an appropriate instance for this result.

Decided in the same year as *Torres*, *Huizar v. Abex Corp.*<sup>199</sup> held that absent statutory authority to the contrary, justice demands that total indemnity be available to a completely blameless party whose liability is premised solely upon the tortious act or omission of another.<sup>200</sup> The court held that total indemnity is available in these instances despite good faith settlement under section 877.6.<sup>201</sup> In support of the decision, the *Huizar* court stressed that neither *American Motorcycle* nor section 877.6 expressly abolished total indemnity.<sup>202</sup> *Huizar* reasoned that if the legislature intended to bar claims for total indemnity under section 877.6, that intent would have been reflected in the express language of the statute.<sup>203</sup> The court also concluded that the intent of the supreme court in *American Motorcycle* to replace total indemnity completely with partial indemnity would have been expressed clearly.<sup>204</sup> In further support of the decision, the *Huizar* court noted the later supreme court decision in *Safeway Stores v. Nest-Kart, Inc.*,<sup>205</sup> which expressly left open the question of whether par-

196. *Id.*

197. *Id.*

198. *Torres v. Union Pac. R.R.*, 157 Cal. App. 3d 499, 511, 203 Cal. Rptr. 825 (1984). In *Torres* an employee of Union Pacific was injured while using a jack owned by the company. When the plaintiff sued Union Pacific and the manufacturer of the jack, Union Pacific cross-complained against the manufacturer for indemnity. The court dismissed the cross-complaint because the original complaint against Union Pacific alleged wrongful conduct in failing to rehire the plaintiff. *Id.* The liability of Union Pacific was neither derivative nor vicarious, thus precluding any right of total indemnity.

199. 156 Cal. App. 3d 534, 203 Cal. Rptr. 47 (1984).

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

201. 156 Cal. App. 3d 534, 537. In *Huizar*, the plaintiff was injured while using a defective punch press. He brought suit against the distributor and the manufacturer of the punch press for damages incurred in his injuries. The distributor and the manufacturer cross-complained against each other for indemnity. The manufacturer then settled with the plaintiff and the distributor's cross-complaint for indemnity was dismissed. *Id.*

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

203. *Id.* See also *City of Sacramento v. Gemsch*, 115 Cal. App. 3d 869, 878, 171 Cal. Rptr. 764, 769 (1982) (Paras, J., dissenting).

204. *Id.*

205. 156 Cal. App. 3d at 542, 203 Cal. Rptr. at 51.



tial indemnity applied to situations in which the liability of a defendant is vicarious.<sup>206</sup>

In July 1985, the court in *Angelus Associates v. Neonex Leisure Products*,<sup>207</sup> again confronted the question of whether total indemnity survived a good faith settlement under section 877.6. In *Angelus* the issue arose in a products liability action in which the manufacturer and retailer of a motorhome were joined as defendants after the motorhome exploded and caused injury to the plaintiff.<sup>208</sup> The retailer brought a cross-complaint against the manufacturer for total indemnity.<sup>209</sup> When the manufacturer settled with the plaintiff, the court granted the motion of the manufacturer for summary judgment on the cross-complaint.<sup>210</sup>

In attempting to resolve the issue on appeal, the *Angelus* court initially recognized the suggestion in *American Motorcycle* that the goal of apportioning liability according to fault should yield to the countervailing goal of pretrial settlement.<sup>211</sup> The court also realized the powerful incentive to settle provided by the release provisions in section 877.6.<sup>212</sup> The court, however, emphasized that the language of section 877.6 expressly provided a release *only* from further claims for partial indemnity based on comparative fault, and not from claims for total indemnity.<sup>213</sup> In light of these points, the court raised the question of whether total indemnity existed after *American Motorcycle*, and if so, whether a total indemnity claim might be brought against a tortfeasor who settles in good faith with the plaintiff under section 877.6.<sup>214</sup>

Furthermore, in framing the question on appeal, the court in *Angelus* found that the facts of the case did not fit within the intended application of section 877.6.<sup>215</sup> The court first defined a "tortfeasor," as used in section 877.6, as a "wrongdoer"<sup>216</sup> and suggested that a retailer of a defectively manufactured product does not fit within this

---

206. *Id.*

207. 167 Cal. App. 3d 532, 213 Cal. Rptr. 403 (1985).

208. *Id.*

209. *Id.*

210. *Id.*

211. 167 Cal. App. 3d at 537, 213 Cal. Rptr. at 405.

212. *Id.* See CAL. CIV. PROC. CODE § 877.6.

213. 167 Cal. App. 3d at 537, 213 Cal. Rptr. at 405.

214. *Id.*

215. *Id.* at 542, 213 Cal., Rptr. at 407.

216. The court cites *Black's Law Dictionary* for the definition of tortfeasor. *Id.* at 542, 213 Cal. Rptr. at 407. *Black's* defines tortfeasor as "A wrongdoer; one who commits or is guilty of a tort." BLACK'S LAW DICTIONARY 1661 (5th ed. 1979).

definition.<sup>217</sup> Instead, in the context of a products liability action, the liability of a retailer is imputed despite the lack of negligence of the retailer.<sup>218</sup> Products liability, according to the court, is premised on the public policy of protecting the plaintiff even if a faultless defendant is left to respond to the plaintiff in damages for the fault of another.<sup>219</sup> The *Angelus* court, citing *White*, suggested that in the absence of some type of actual wrongdoing on the part of the defendant, the principles of comparative fault, which provide a means of apportioning wrong among “wrongdoers,” cannot apply.<sup>220</sup> The court then reasoned that the release provisions of section 877.6, themselves based on apportionment principles, cannot act to bar claims for total indemnity in cases when fault cannot properly be apportioned.<sup>221</sup>

*Angelus* also addressed the contention that allowing claims for total indemnity despite a good faith settlement will produce a chilling effect, lessening the desirability of pretrial settlement.<sup>222</sup> The court conceded that the decision potentially might discourage settlements, but concluded that this chilling effect would be proper in the limited circumstances in which it would occur.<sup>223</sup> Presumably referring to situations similar to those in the case before the court, the opinion reasoned that this chilling effect would act to deter those to whom fault is solely attributable from “buying peace too cheaply”<sup>224</sup> at the expense of those defendants to whom liability might be imputed without fault.<sup>225</sup> The decision limits the policy of promoting settlement to situations in which no defendant who is innocent of wrongdoing is forced by the settlement to bear the burden of the fault of another.

In summary, California appellate courts have split on the issue of whether or not total indemnity is available against a tortfeasor who settles with the plaintiff in good faith under section 877.6. Some courts have held that *American Motorcycle* provided a system of indemnity that has overtaken the prior system of total indemnity.<sup>226</sup> These courts also have found that the release provisions of section 877.6 act to

---

217. 167 Cal. App. 3d at 542, 213 Cal. Rptr. at 407.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. 167 Cal. App. 3d at 543, 213 Cal. Rptr. at 408.

223. *Id.*

224. *Id.*

225. *Id.*

226. See *Standard Pacific v. A.A. Baxter Corp.*, 176 Cal. App. 3d 577, 587, 222 Cal. Rptr. 106, 111 (1986); *Kohn*, 142 Cal. App. 3d at 331, 191 Cal. Rptr. at 80; *Gensch*, 115 Cal. App. 3d at 876, 171 Cal. Rptr. at 766.

bar all claims for indemnity, partial or total.<sup>227</sup> Other courts have held that total indemnity is necessary in instances in which the liability of a defendant is vicarious or derivative.<sup>228</sup> These courts have also found that section 877.6 does not act to release a settling defendant from a claim for total indemnity.<sup>229</sup> The uncertainty felt by the defendant whose liability is vicarious or derivative requires resolution of this controversy to provide uniformity in this area of California law governing joint tortfeasors.

#### ANALYSIS OF THE CONFLICTING CASE LAW

As indicated by the cases faced with the issue of the continued existence of total indemnity indicate, the controversy is essentially two-pronged. First, the cases have questioned whether *American Motorcycle* replaced total indemnity with partial indemnity.<sup>230</sup> Second, cases have been faced with the issue of whether section 877.6 releases a settling tortfeasor from further claims for total indemnity.<sup>231</sup> In analyzing the arguments for and against the continued existence of total indemnity in California, the arguments focusing on the intent of the California Supreme Court will be discussed separately from the arguments focusing on the intent of the California Legislature.

##### A. *The Intent of the Supreme Court*

The cases at the appellate level in California have disagreed on the issue of whether or not the California Supreme Court intended to replace total indemnity with partial indemnity.<sup>232</sup> Although the supreme court has not addressed this question directly, the position of the supreme court can be drawn from the language of two opinions that

---

227. See *Standard Pacific*, 176 Cal. App. 3d at 589, 222 Cal. Rptr. at 113; *Kohn*, 142 Cal. App. 3d at 331, 191 Cal. Rptr. at 80.

228. See *Angelus*, 167 Cal. App. 3d at 542, 213 Cal. Rptr. at 409; *Huizar*, 156 Cal. App. 3d at 542, 203 Cal. Rptr. at 50; *White*, 138 Cal. App. 3d at 376, 187 Cal. Rptr. at 885.

229. See *Angelus*, 167 Cal. App. 3d at 542, 213 Cal. Rptr. at 409; *Torres*, 157 Cal. App. 3d at 511, 203 Cal. Rptr. at 833; *Huizar*, 156 Cal. App. 3d at 542, 203 Cal. Rptr. at 50.

230. *Standard Pacific*, 176 Cal. App. 3d at 589, 222 Cal. Rptr. at 113; *Angelus*, 167 Cal. App. 3d at 542, 213 Cal. Rptr. at 409; *Huizar*, 156 Cal. App. 3d at 542, 203 Cal. Rptr. at 50; *Kohn*, 142 Cal. App. 3d at 330, 191 Cal. Rptr. at 83; *White*, 138 Cal. App. 3d at 375, 187 Cal. Rptr. at 885; *Gemsch*, 115 Cal. App. 3d at 876, 171 Cal. Rptr. at 769; see *supra* notes 122-229 and accompanying text.

231. *Standard Pacific*, 176 Cal. App. 3d at 589, 222 Cal. Rptr. at 113; *Angelus*, 167 Cal. App. 3d at 542, 213 Cal. Rptr. at 409; *Torres*, 157 Cal. App. 3d at 511, 203 Cal. Rptr. at 833; *Lopez*, 143, Cal. App. 3d at 741, 192 Cal. Rptr. at 193.

232. Compare *Gemsch*, 115 Cal. App. 3d at 876, 171 Cal. Rptr. at 769 with *Huizar*, 156 Cal. App. 3d at 542, 203 Cal. Rptr. at 50.

addressed the issue tangentially. These cases are the seminal case of *American Motorcycle*, and the later case of *Safeway Stores*.

### 1. *The Language of American Motorcycle*

Cases which have argued that *American Motorcycle* did replace total indemnity with partial indemnity contend that though the California Supreme Court never indicated expressly that intention in the opinion, the implication of *American Motorcycle* was that total indemnity no longer had a useful purpose in California.<sup>233</sup> Instead, according to this line of reasoning, indemnity in California was to be governed by the partial indemnity in *American Motorcycle*.<sup>234</sup> The cases that argue that *American Motorcycle* replaced total indemnity with partial indemnity, however, do not have the support of the express language of the supreme court.<sup>235</sup> The cases that support the continued existence of total indemnity focus on the language of *American Motorcycle* and contend that at no point did the supreme court abolish total indemnity.<sup>236</sup> Instead, the court called for a modification of the existing principles of indemnity to allow partial indemnity in "appropriate" instances.<sup>237</sup> Though the court in *American Motorcycle* recognized that total indemnity does not provide a fair result in a "great majority"<sup>238</sup> of cases, the court implied that total indemnity does provide a just result in a minority of cases. This implication is supported by the language of the supreme court in *Safeway Stores*.

### 2. *The Language of Safeway Stores*

In addition to the express language of the court in *American Motorcycle*, the argument that total indemnity survives *American Motorcycle* is also supported by the express language of *Safeway Stores v. Nest-Kart, Inc.*<sup>239</sup> In that case, the supreme court expressly left open the question of whether partial indemnity was to apply to cases in

233. *Gemsch*, 115 Cal. App. 3d at 876, 171 Cal. Rptr. at 769.

234. *Id.*

235. *Id.* The court in *Gemsch* held that all indemnity except that governed by express contract was governed by *American Motorcycle*. The court also recognized that *American Motorcycle* did not expressly repudiate total indemnity, however. *Id.* at 877, 171 Cal. Rptr. at 770.

236. *Angelus*, 167 Cal. App. 3d at 542, 213 Cal. Rptr. at 409; *Huizar*, 156 Cal. App. 3d at 542, 203 Cal. Rptr. at 50; *Gemsch*, 115 Cal. App. 3d at 878, 171 Cal. Rptr. at 769 (Paras, J., dissenting).

237. *American Motorcycle*, 20 Cal. 3d at 608, 578 P.2d at 918, 146 Cal. Rptr. at 201 (1978); see *supra* notes 87-104 and accompanying text.

238. *American Motorcycle*, 20 Cal. 3d at 595, 578 P.2d at 918, 146 Cal. Rptr. at 193.

239. *Safeway Stores*, 21 Cal. 3d at 332, 579 P.2d at 447, 146 Cal. Rptr. at 555.

which the liability of a defendant was vicarious or derivative.<sup>240</sup> This language indicates that the supreme court is unwilling to apply partial indemnity expressly to all cases. If partial indemnity, as the language of the court suggests, is not appropriate in all cases, presumably the court retained total indemnity in cases that the court intended to exclude from the scope of partial indemnity.

### 3. *The Intended Scope of Partial Indemnity*

*Standard Pacific of San Diego v. A.A. Baxter, Corp.* reasoned that total indemnity was one end of a broad spectrum of indemnity allowable under the partial indemnity adopted by *American Motorcycle*.<sup>241</sup> Thus, according to this argument, a separate doctrine of total indemnity no longer was necessary after *American Motorcycle*. As discussed earlier,<sup>242</sup> this interpretation makes logical sense, no other California court of appeal case has supported this interpretation. Further, the argument is weakened by the language of *Safeway Stores*, which indicates that the supreme court is not ready to extend partial indemnity to all cases, as *Standard Pacific* suggested.<sup>243</sup>

The cases that have concluded that partial indemnity was not meant to extend to cases in which the liability of a defendant is vicarious or derivative have supported this conclusion with the language in *Safeway Stores*.<sup>244</sup> These cases have further indicated that in instances of vicarious or derivative liability, the defendant has no wrong that can be apportioned properly under comparative fault, and thus partial indemnity based on comparative fault cannot be applied.<sup>245</sup> This argument makes sense, especially in light of the hesitancy of the supreme court to extend partial indemnity to cases of vicarious or derivative liability, in which the defendant is guilty of no fault.<sup>246</sup>

### B. *The Intent of Section 877.6*

Arguments for and against the continued existence of total indemnity based on the intended scope of section 877.6 generally have foc-

---

240. *Id.*

241. *Standard Pacific*, 176 Cal. App. 3d at 587, 222 Cal. Rptr. at 111.

242. See *supra* notes 160-62 and accompanying text.

243. See *Safeway Stores*, 21 Cal. 3d at 332, 579 P.2d at 447, 146 Cal. Rptr. at 555; see also *Standard Pacific*, 176 Cal. App. 3d at 587, 222 Cal. Rptr. at 111.

244. *Angelus*, 167 Cal. App. 3d at 537, 213 Cal. Rptr. at 405; *Huizar*, 156 Cal. App. 3d at 542, 203 Cal. Rptr. at 50.

245. *Angelus*, 167 Cal. App. 3d at 542, 213 Cal. Rptr. at 407; *Huizar*, 156 Cal. App. 3d at 542, 203 Cal. Rptr. at 50; *White*, 138 Cal. App. 3d at 376, 187 Cal. Rptr. at 885.

246. *Safeway Stores*, 21 Cal. 3d at 332, 579 P.2d at 447, 146 Cal. Rptr. at 555.

used on three issues. First, the courts have questioned whether a vicariously or derivatively liable defendant can be a "tortfeasor" within the meaning of section 877.6. Second, one court has argued that total indemnity is no longer needed since the good faith requirement for settlements under section 877.6 adequately protects the interests of the nonsettling defendant. Third, the courts have questioned whether the continued existence of total indemnity would frustrate the incentive to settle which section 877.6 provides.

### 1. *The Vicariously or Derivatively Liable Defendant as a Tortfeasor Under Section 877.6*

Section 877.6 bars those claims brought by "any tortfeasor" against the settling tortfeasor.<sup>247</sup> *Standard Pacific* contended that the meaning of "joint tortfeasor" under section 877.6 includes those defendants whose liability is vicarious or derivative.<sup>248</sup> *Angelus*, however, contended that a "tortfeasor" is a "wrongdoer," and that a defendant whose liability is vicarious or derivative has done no wrong, and is therefore not properly called a "tortfeasor."<sup>249</sup> Though historically the term "joint tortfeasor" has been expanded, the term has not yet been interpreted to include those who have not done any wrong.<sup>250</sup> An expansion to include blameless defendants would be contrary to the meaning historically attached to the term "tortfeasor."<sup>251</sup> Section 877.6, which bars claims brought by a tortfeasor against a settling tortfeasor, should not apply to a defendant whose liability is vicarious or derivative.

### 2. *The Requirement that the Settlement be in Good Faith*

*Standard Pacific* also reasoned that defendants whose liability is vicarious or derivative are adequately protected by the section 877.6 requirement that the settlement be in good faith.<sup>252</sup> Though this argument is plausible, the practical effect is cast into doubt by *Tech-Bilt* which placed the burden on the party asserting the lack of good faith.<sup>253</sup> After *Tech-Bilt*, the defendant whose liability is vicarious or

---

247. CAL. CIV. PROC. CODE § 877.6(c).

248. *Standard Pacific*, 176 Cal. App. 3d at 589, 222 Cal. Rptr. at 113.

249. *Angelus*, 167 Cal. App. 3d at 542, 213 Cal. Rptr. at 407.

250. See *supra* notes 34-37 and accompanying text.

251. See *Angelus*, 167 Cal. App. 3d at 537, 213 Cal. Rptr. at 405.

252. *Standard Pacific*, 176 Cal. App. 3d at 589, 222 Cal. Rptr. at 113.

253. *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal. 3d 488, 499, 698 P.2d 159, 167, 213 Cal. Rptr. 256, 263; see *supra* notes 163-69 and accompanying text.

derivative must meet the "out of the ballpark" standard in order to prove a lack of good faith.<sup>254</sup> The subjectivity of this burden casts doubt on whether the good faith requirement of section 877.6 provides any protection for the defendant whose liability is vicarious or derivative. Thus, the vicariously or derivatively liable defendant should be able to bring a claim for total indemnity despite the existence of a "good faith" settlement.

### 3. *The Policy of Promoting Settlement*

The cases that contend that section 877.6 should be construed to bar a total indemnity claim against a settling tortfeasor, reason that the policy of promoting settlement that underlies the statute, would be defeated if total indemnity claims were allowed against a settling tortfeasor.<sup>255</sup> In practice, however, allowing claims for total indemnity despite the release provisions of section 877.6 would discourage settlement only when two facts exist.<sup>256</sup> First, the party claiming a right of indemnity must be factually faultless, as in the case of a vicariously liable defendant. Only then will a right of total indemnity even exist.<sup>257</sup> Second, the party seeking to settle must be the tortfeasor upon whose fault the liability of the party seeking indemnity is based.<sup>258</sup> Should one of these factors be absent, a party may settle without fear of a subsequent claim for total indemnity. When both factors are present, however, the party seeking settlement should not be protected by the release provisions of section 877.6. If a settling party is released from subsequent claims for total indemnity when both factors are present, section 877.6 effectively encourages blameworthy defendants to escape liability at the expense of a blameless party.<sup>259</sup> Although section 877.6 was intended to promote settlements, the statute should not be construed to promote settlement when that construction would allow blameworthy defendants to escape liability at the expense of those defendants whose liability is only vicarious or derivative.

---

254. *Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 167, 213 Cal. Rptr. at 263.

255. *Lopez*, 143 Cal. App. 3d at 741, 192 Cal. Rptr. at 193; see also *Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 167, 213 Cal. Rptr. at 263. In *Tech-Bilt*, the supreme court recognized the goal of encouraging settlement implicit in § 877.6. *Id.*

256. W. PROSSER & W. KEETON, *supra* note 36, § 51.

257. See *American Motorcycle*, 20 Cal. 3d at 595, 578 P.2d at 909, 146 Cal. Rptr. at 192. *American Motorcycle* adopted a means of providing indemnity for the blameworthy defendant, thus eliminating the need for total indemnity except in instances in which the defendant is without fault. *Id.*

258. W. PROSSER & W. KEETON, *supra* note 36, § 51.

259. *Angelus*, 167 Cal. App. 3d at 542, 213 Cal. Rptr. at 409; see *supra* notes 222-25 and accompanying text.

The cases which reason that section 877.6 does not bar claims for total indemnity against a settling tortfeasor recognize the injustice that would result if total indemnity claims were barred by the statute.<sup>260</sup> These cases also focus on the express language of section 877.6, which only provides a settling tortfeasor with a release from further claims from *partial* indemnity.<sup>261</sup> The contention in these cases is that had the legislature intended to provide a release from claims for total indemnity, that intent would have been expressed on the face of the statute.<sup>262</sup> Since the policy of promoting settlement, which underlies section 877.6, would work an injustice if extended to bar a total indemnity claim brought by a defendant whose liability is vicarious or derivative, and the statute is explicit in providing a release from partial indemnity claims only,<sup>263</sup> section 877.6 should not be construed to bar claims for total indemnity. Allowing claims for total indemnity despite section 877.6 will not frustrate the policy of promoting settlement in most cases. Instead, allowing total indemnity claims will discourage those whose fault caused the injury to the plaintiff from seeking to use the policy of promoting settlement as a means to escape liability at the expense of a faultless party.

#### CONCLUSION

Though neither *American Motorcycle* nor section 877.6 expressly abandon the doctrine of total indemnity, the status of indemnity has been a source of controversy in the lower courts. In the absence of any express provisions repudiating the doctrine, however, and in light of the decision in *Safeway Stores* to leave the question undecided whether partial indemnity will apply to situations in which liability is vicarious, total indemnity must remain available to vicariously or derivatively liable defendants. Further total indemnity in these instances should not be affected by the release provisions of 877.6. To con-

---

260. *Torres*, 157 Cal. App. 3d at 511, 203 Cal. Rptr. at 830; *Angelus*, 167 Cal. App. 3d at 542, 213 Cal. Rptr. at 409. The plaintiff may still go to trial against the nonsettling defendant and obtain an award reduced by the amount of the settlement. CAL. CIV. PROC. CODE § 877. Should the nonsettling defendant be vicariously or derivatively liable, that defendant will not have to bear the entire burden of the judgment, but still must bear some of the burden caused by the fault of the settling party. *Id.*

261. *Angelus*, 167 Cal. App. 3d at 542, 213 Cal. Rptr. at 409; *Huizar*, 156 Cal. App. 3d at 542, 203 Cal. Rptr. at 50; *Gemsch*, 115 Cal. App. 3d at 878, 171 Cal. Rptr. at 769 (Paras, J., dissenting).

262. *Angelus*, 167 Cal. App. 3d at 542, 213 Cal. Rptr. at 409; *Huizar*, 156 Cal. App. 3d at 542, 203 Cal. Rptr. at 50; *Gemsch*, 115 Cal. App. 3d at 879, 171 Cal. Rptr. at 769.

263. CAL. CIV. PROC. CODE § 877.6(c).



clude otherwise would be contrary to the *Li* fairness principle, to which both the partial indemnity of *American Motorcycle* as well as 877.6 owe their existence.

*Thomas P. Quinn, Jr.*