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James A. Gash

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Rethinking Principles of Comparative Fault in Light of California's Proposition 51

I. INTRODUCTION

Apportionment of fault and damages between responsible plaintiffs and defendants has recently been the topic of much debate. Legislatures and courts alike have carved out new laws, overriding traditional common law decisions. The doctrine of joint and several liability is currently being closely scrutinized and was the target of a recent California Resolution. In 1986, California voters enacted Proposition 51, appropriately dubbed "The Deep Pockets Initiative."¹

1. Proposition 51 was codified as CAL. CIV. CODE § 1431-1431.5 (West Supp. 1991). Sections 1431.1 and 1431.2 are the operative sections and read as follows:

The People of the State of California find and declare as follows:

(a) The legal doctrine of joint and several liability, also known as "the deep pocket rule," has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers.

(b) Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault. Under joint and several liability, if they are found to share even a fraction of the fault, they often are held financially liable for all the damage. The People—taxpayers and consumers alike—ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums.

(c) Local governments have been forced to curtail some essential police, fire and other protections because of the soaring costs of lawsuits and insurance premiums.

Therefore, the People of the State of California declare that to remedy these inequities, defendants in tort actions shall be held financially liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable.

The People of the State of California further declare that reforms in the liability laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses.

CAL. CIV. CODE § 1431.1 (West Supp. 1991).

(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

(b)(1) For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of earn-

Proposition 51 retains joint and several liability for economic damages, but adopts only several liability, based on an equitable apportionment of fault, for noneconomic damages.² The precise and full effect of Proposition 51 is yet to be determined.³ The initiative was found to be constitutional and nonretroactive by the Supreme Court of California,⁴ but beyond that one can only speculate.

Although courts are limited by justiciability principles and thus can only address cases or controversies, authors of law review articles are not similarly constrained. Therefore, this Comment will act as an advisory opinion detailing the applicability of Proposition 51 to a hypothetical fact situation. The background of Proposition 51 will be discussed, and a test will be developed to determine precisely when a Proposition 51 analysis should be employed. Then, applying the three-prong test developed by this author, the hypothetical fact situation will address whether a derivatively liable retailer⁵ is entitled to a Proposition 51 apportionment in strict products liability stream of commerce actions when the manufacturer of the defective product is insolvent. The key issue to be determined is whether *principles of comparative fault* apply in strict products liability chain of distribu-

ings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.

(b)(2) For purposes of this section, the term "non-economic damages" means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.

CAL. CIV. CODE § 1431.2 (West Supp. 1991).

2. *Id.* at § 1431.2(a).

3. One appellate court succinctly set forth its interpretation of what Proposition 51 intended to accomplish. See *Green v. Franklin*, 235 Cal. Rptr. 312, 321 (Cal. Ct. App. 2d Dist. 1987).

[T]he very wording of Proposition 51 evidences a legislative wish to curtail personal injury recoveries against defendants not primarily to blame for plaintiffs' injuries; to reduce the financial burden of injury claims on those defendants and on their liability carriers; and to confer a financial benefit on the public at large, who, the statute declares, 'ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums,' and suffer a resulting reduction in essential government and nongovernment services. The enactment seeks to accomplish these aims, very wisely we think, by preventing a defendant from being liable for more than his proportionate share of noneconomic damages.

Id.

The *Green* court addressed the general areas that the statute was enacted to cover; this Comment will propose a three-prong test to be used to interpret the statute and will apply the test to a specific issue that may or may not be encompassed by the statute.

4. See *infra* notes 33-61 and accompanying text.

5. The retailer's liability derives from his place in the chain of distribution of the defective product produced by the manufacturer. The retailer acts merely as a conduit connecting the manufacturer with the consumer. Therefore, the retailer's liability can in some senses be classified as derivative. On the other hand, the retailer's liability is, in some senses, direct. See *infra* notes 223-28 and accompanying text.

tion actions. Furthermore, this Comment proposes a possible standard for apportioning fault/responsibility between retailers and manufacturers. Finally, this Comment presents a review of the methods by which other states have resolved the issue, and a brief impact discussion follows.

II. BACKGROUND OF PROPOSITION 51

The perceived insurance crisis of the 1980s⁶ fueled a growing discontent with the doctrine of joint and several liability.⁷ The insurance industry deemed joint and several liability as one of the primary culprits responsible for the crisis.⁸ A vigorous and expensive campaign was launched both in favor of and in opposition to Proposition 51 (The Fair Responsibility Act).⁹ The aim of Proposition 51 was to abrogate joint and several liability for noneconomic damages¹⁰ and to replace it with a system of several liability based upon equitable apportionment of fault.¹¹ Joint and several liability was, however, to be retained as to economic damages.¹²

Prior to Proposition 51, the burden of collecting from an insolvent

6. See generally Robert L. Habush, *The Insurance "Crisis": Reality or Myth? A Plaintiffs' Lawyer's Perspective*, 64 DENV. U. L. REV. 641 (1988). The author claims that the "crisis" was invented by the insurance companies to bolster an already strong and healthy industry. *Id.* at 648. Habush further asserts that any financial difficulties the insurance industry may have is the direct result of portfolio mismanagement. *Id.* at 646. See also Jonathan L. Kirsch, *Prop. 51 Shakes (barely) the House of Torts*, 6 CAL. LAW. 69, 70 (June 1986) (according to the plaintiffs' bar, the crisis was manufactured by the insurance industry. But according to the insurance industry, the crisis was the result of rising litigation costs, the over-generosity of juries, and the propensity of appellate courts to create new theories for liability for damages).

7. See generally Larry Pressler & Kevin V. Shieffler, *Joint and Several Liability: A Case for Reform*, 64 DENV. U. L. REV. 651 (1988).

8. See *Evangelatos v. Superior Court*, 753 P.2d 585, app. at 614 (Cal. 1988) (Argument in Favor of Proposition 51).

9. Both sides of the ballot fight raised more than ten million dollars to wage the campaign. Approximately 4,543,000 voters turned out to vote—400,000 more than voted in either the gubernatorial or U.S. Senate races. John Spano, *Lawsuit Over Death Pinpoints Confusion on Prop. 51 Timing*, L.A. TIMES, June 6, 1986, at 1.

10. Non-economic damages are "subjective non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation." CAL. CIV. CODE § 1431.2(b)(2) (West Supp. 1991).

11. *Id.* at § 1431.2(a).

12. *Id.* Economic damages include "objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities." *Id.* See also *Evangelatos v. Superior Court*, 753 P.2d 585, 590 (Cal. 1988).

defendant was placed upon the solvent defendant through a cross-complaint or subsequent action for equitable comparative indemnity.¹³ The jury would then apportion fault among all the parties in the indemnity action according to relative culpability.¹⁴ Thus, the practical effect of Proposition 51 was to shift the burden of collection from the defendant to the plaintiff. No longer could the plaintiff sue only the "deep pocket" defendant who was only fractionally responsible. Rather, the plaintiff would be forced to name all the potential defendants in order to ensure a judgment for her entire damages.¹⁵

Proponents of Proposition 51 based their campaign on issues of "fairness" and "dollars."¹⁶ They dubbed joint and several liability the "deep pocket law," arguing that "[n]othing is more unfair than forcing someone . . . to pay for damages that are someone else's fault."¹⁷ They further pointed out that consumers ultimately bear the burden of a judgment against a municipality or private enterprise through higher taxes, higher insurance rates, and higher prices for consumer goods.¹⁸ Proposition 51 proponents promised that liability insurance would again be available to cities and counties; private sector insurance rates could drop ten to fifteen percent; and the "glut" of unmeritorious lawsuits would be significantly reduced.¹⁹ Proponents also portrayed trial lawyers associations as the greedy bad

13. *Evangelatos*, 753 P.2d at 590 (Cal. 1988).

14. *Id.*

15. Consider the following hypothetical situation: The plaintiff is injured and suffers \$10,000 in economic damage and \$100,000 in noneconomic loss. At trial, the jury finds that the plaintiff is 0% responsible, Defendant #1 is 10% responsible, and Defendant #2 is 90% responsible. Assume that Defendant #1 is wealthy and that Defendant #2 is insolvent.

Prior to Proposition 51, Plaintiff could sue only Defendant #1 and collect 100% of both economic and non-economic damages, the full \$110,000. Defendant #1 would then be forced to cross-complain or later file a suit for indemnity against Defendant #2. Because Defendant #2 is poor and possibly cannot provide full indemnity, Defendant #1 thus bears the burden/risk of Defendant #2's inability to pay.

After Proposition 51, if Plaintiff sued only Defendant #1, the plaintiff would recover all of her economic damages, but only 10% of her non-economic damages, (\$10,000 + \$10,000 = \$20,000). The burden/risk of Defendant #2's inability to pay non-economic damages has thus shifted from Defendant #1 to the plaintiff. The plaintiff will thus have an incentive to also name Defendant #2 in the lawsuit in order to maximize the recovery.

16. *Evangelatos*, 753 P.2d app. at 614 (Argument in Favor of Proposition 51).

17. *Id.* See also James M. Galbraith, *Deep-Pockets System: Welfare, Not Justice*, L.A. TIMES, May 30, 1986, at Metro 5 (Part 2).

18. *Evangelatos*, 753 P.2d app. at 614 (Argument in Favor of Proposition 51).

19. *Id.* Some commentators, however, believe that the elimination of joint and several liability will actually result in an increase in insurance rates and transaction costs. See, e.g., Ralph Nader, *The Corporate Drive to Restrict Their Victims' Rights*, 22 GONZ. L. REV. 15, 16 n.8 (1986); Philip A. Talmadge and N. Clifford Petersen, *In Search of a Proper Balance*, 22 GONZ. L. REV. 259, 264-65 (1986). Other commentators believe that predictability is absolutely essential to the control of insurance costs and the minimization of risk. See Basil L. Badley, *Why Tort Reform Was Needed in Washington*, 22 GONZ. L. REV. 3, 11-12 (1986).

guys²⁰ and provided a long and diverse list of supporters of the initiative.²¹

On the other hand, opponents of Proposition 51 also claimed to promote principles of fairness and economic efficiency.²² They portrayed the initiative as a fraud perpetrated by the insurance and toxic waste companies in order to shirk responsibilities and increase earnings at the expense of innocent tort victims.²³ Opponents also accused local governments of not doing what the taxpayers elected them to do: "[protect] the people by maintaining efficient police and fire services and safe roads."²⁴ They further claimed that fairness demanded that the burden of the economic shortfall caused by an insolvent party fall on the guilty (tortious) parties and not the innocent victims.²⁵ Opponents also argued that the initiative would remove "a crucial incentive for companies and local governments to protect the public from injury accidents."²⁶

The voters were, in essence, asked to make a priority judgment. On the one hand, they were asked to consider the interests of an often innocent²⁷ plaintiff in fully recovering both economic and non-economic damages,²⁸ even if it meant an increase in taxes, insurance premiums, and prices of consumer goods.²⁹ On the other hand, the voters were asked to weigh the interests of individuals and entities,

20. *Evangelatos*, 753 P.2d app. at 614-15 (Argument in Favor of Proposition 51).

21. *Id.* at 616 (Rebuttal to Argument Against Proposition 51). Included in the list of supporters were: County Supervisors Association of California, League of California Cities, California Taxpayers' Association, California State PTA, California Chamber of Commerce, California Peace Officers Association, Consumer Alert, California Medical Association, California District Attorneys Association, California Defense Counsel, Association for California Tort Reform, California Hospital Association, Association of California School Administrators, all 58 counties, and virtually every city in California. *Id.*

22. *Evangelatos*, 753 P.2d app. at 615 (Rebuttal to Argument in Favor of Proposition 51). Opponents to Proposition 51 argued that welfare rolls would increase as the number of persons confined to wheelchairs and respirators increased. Consumer advocate Ralph Nader echoed their sentiments when he declared, "The insurance industry is using its current massive premium gouging and arbitrary cancellations as a political battering ram to further bloat profits." *Id.*

23. *Id.*

24. *Id.*

25. See *Evangelatos*, 753 P.2d app. at 615 (Argument Against Proposition 51).

26. Myrna Oliver, *Prop. 51 Foes Say It Will Also Cut Safety Incentives*, L.A. TIMES, April 29, 1986, at Metro 1.

27. The plaintiff does not have to be completely innocent. Under *Li v. Yellow Cab*, 532 P.2d 1226 (Cal. 1975), the plaintiff can still recover even if comparatively negligent. See *infra* note 100 and accompanying text.

28. See *supra* notes 10, 12 and accompanying text.

29. See CAL. CIV. CODE § 1431.1(a).

both public and private, in having to pay only their proportional share of the noneconomic damages, even if it meant that a plaintiff would not be made legally whole.³⁰ The California voters balanced these interests in favor of the latter, adopting Proposition 51 with a sixty-four percent approval rate on June 3, 1986.³¹ Litigation concerning the proposition's constitutionality and retroactivity soon followed.³²

Evangelatos v. Superior Court

The constitutionality and retroactivity questions were answered by the California Supreme Court in *Evangelatos v. Superior Court*.³³ In *Evangelatos*, the plaintiff was seriously injured while attempting to make homemade fireworks with chemicals bought at a retail store.³⁴ The plaintiff subsequently filed an action against the retailer, the wholesaler, and four manufacturers of the chemicals under theories of negligence and strict liability.³⁵ Five years after the accident and three weeks after the approval of Proposition 51, the case was assigned for trial.³⁶ The plaintiff contended that Proposition 51 was unconstitutional and should not apply retroactively to cases *accruing* prior to its effective date.³⁷ The trial court disagreed on both points, concluding that Proposition 51 was both constitutional and that it applied retroactively to all cases that *came to trial* after its effective date.³⁸ The court of appeal, disagreeing with a previous appellate court decision as to the initiative's retroactivity,³⁹ affirmed the trial court's rulings on both issues.⁴⁰ The California Supreme Court granted review in order to resolve the conflict in the appellate courts⁴¹ and subsequently upheld the trial court's ruling that Proposition 51 was constitutional.⁴² However, the court overruled the trial

30. "Legally whole" is a term of art meaning that the plaintiff is theoretically placed in the same position she would have been in had the injury not occurred.

31. *Consumerists Hit Limit On Damages*, CHI. TRIB., July 12, 1986, at C35. For a critical and historical analysis of voter initiatives, see Cynthia L. Fountaine, *Lousy Lawmaking: Questions the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733 (1988).

32. See, e.g., *Russell v. Superior Court*, 230 Cal. Rptr. 102 (Cal. Ct. App. 1986). *Russell* was the first case to reach the appellate level.

33. *Evangelatos v. Superior Court*, 753 P.2d 585 (Cal. 1988).

34. *Id.*

35. *Id.* The suit against the four manufacturers was dismissed prior to trial.

36. *Id.*

37. *Id.* at 586-87.

38. *Id.* at 587.

39. The court in *Russell v. Superior Court*, 230 Cal. Rptr. 102 (Cal. Ct. App. 1986), had previously concluded that Proposition 51 did not apply retroactively to causes of action arising prior to the initiative's effective date. *Evangelatos*, 753 P.2d at 587.

40. *Evangelatos*, 753 P.2d at 587.

41. *Id.*

42. *Id.* at 595.

court's finding of retroactivity.⁴³

As to the issue of constitutionality, the plaintiff first contended that the initiative was " 'too vague and ambiguous' to satisfy the due process requirements of either the state or federal Constitutions."⁴⁴ The court rebutted the due process claim by asserting that most statutes are to some extent ambiguous, but should not necessarily be invalidated "[so] long as a statute does not threaten to infringe on the exercise of First Amendment or other constitutional rights."⁴⁵ The court then pointed out that in order to overturn a statute on vagueness grounds, a plaintiff must demonstrate that the statute is " 'impermissibly vague in *all* of its applications.' "⁴⁶ Therefore, because the plaintiff was not able to satisfy this burden of proof,⁴⁷ the court determined that his due process complaint was without merit.⁴⁸

Arguing in the alternative, the plaintiff contended that Proposition 51 was unconstitutional because it violated state and federal equal protection clauses "by establishing classifications that are not rationally related to a legitimate state interest."⁴⁹ In particular, the plaintiff claimed that the initiative discriminated between injured persons who suffered economic harm and those who suffered only noneconomic harm, thereby affording more protection to the former group.⁵⁰ Plaintiff further claimed that the statute discriminated among those who suffered only noneconomic harm, differentiating between those who are injured by solvent tortfeasors and those who are injured by insolvent tortfeasors, once again providing more protection to the former category of plaintiffs.⁵¹

The court disagreed, likening the plaintiff's argument to an earlier challenge of a provision of MICRA,⁵² where the court determined

43. *Id.* at 611.

44. *Id.* at 592. Plaintiff relied on the classic statement of the vagueness doctrine set forth by the Supreme Court of the United States in *Connally v. General Construction Co.*, 269 U.S. 385 (1926). The Court declared that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process law." *Id.* at 391.

45. *Evangelatos*, 753 P.2d at 592.

46. *Id.* at 592-93 (quoting *Hoffman Estates v. Flipside*, 455 U.S. 489, 497 (1982)) (emphasis added).

47. *Evangelatos*, 753 P.2d at 593.

48. *Id.*

49. *Id.* at 592.

50. *Id.* at 593-94.

51. *Id.* at 594.

52. See *Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal. 1985). The Medical Injury Compensation Reform Act of 1975 (MICRA) placed a limit on noneconomic

that there was "clearly a rational basis for distinguishing between economic and non-economic losses."⁵³ The court also pointed out that under any tort liability system, a plaintiff who is injured by a solvent tortfeasor will be better off than one injured by an insolvent tortfeasor and that such consequences have never been held to render the tort statutes unconstitutional.⁵⁴ Thus, the California Supreme Court ruled that Proposition 51 was not unconstitutional.⁵⁵

Next, the court addressed the plaintiff's contention that even if the statute was constitutional, it should not apply retroactively to causes of action that accrued prior to the effective date of the initiative.⁵⁶ The court declared that in determining the retroactivity of a statute, a general principle⁵⁷ must be followed: "[I]t is an established canon

damages which could be recovered in medical malpractice actions, but placed no similar restraints on the recovery of economic damages. CAL. CIV. CODE § 3333.2 (West 1991).

53. *Evangelatos*, 753 P.2d at 594 n.10. The text of footnote 10 reads as follows:

In *Fein*, the court pointed out that legal commentators had long questioned whether sound public policy supported the comparable treatment of economic and noneconomic damages explaining that "[t]houghtful jurists and legal scholars have for some time raised serious questions as to the wisdom of awarding damages for pain and suffering in any negligence case, noting, *inter alia*, the inherent difficulties in placing a monetary value on such losses, the fact that money damages are at best only imperfect compensation for such intangible injuries and that such damages are generally passed on to, and borne by, innocent consumers. While the general propriety of such damages is, of course, firmly embedded in our common law jurisprudence [citation], no California case of which we are aware has ever suggested that the right to recover for such noneconomic injuries is constitutionally immune from legislative limitation or revision."

Id. at 595.

54. *Id.* at 595.

55. *Id.*

56. *Id.* The effective date of Proposition 51 was June 4, 1986. *Id.* at 587 n.2. Numerous amicus briefs asserted that there was no reason to consider the retroactivity issue because causes of action which accrued prior to the initiative's effective date but did not come to trial until after the effective date, would constitute only prospective and not retroactive application. *Id.* at 595. The court disagreed, citing the leading California decision on the subject, *Aetna Casualty & Surety Co. v. Industrial Accident Comm'n.*, 182 P.2d 159 (Cal. 1947), where injured parties contended that a new workers' compensation statute should apply to awards after the effective date, even though the injuries had occurred prior to the enactment date. The *Evangelatos* court also cited the United States Supreme Court to confirm that applying a statute to causes of action which arose prior to the effective date of the statute, even if tried after the effective date, constitutes a retroactive application. See *Winfree v. Northern Pac. Ry. Co.*, 227 U.S. 296 (1913).

57. The court relied on the language of an opinion written by Chief Justice Rehnquist to succinctly set forth the general principles governing the issue of whether a statute should be applied retroactively or prospectively. *Evangelatos*, 753 P.2d at 596. Rehnquist explained:

"The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student. This court has often pointed out: '[T]he first rule of construction is that legislation must be considered as addressed to the future, not the past The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with ante-

of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent.'"⁵⁸ Applying the previously mentioned general principle to Proposition 51, the court decided that a fair reading of the whole statute revealed that the subject of retroactivity was simply not addressed.⁵⁹ Therefore, because the presumption of prospectivity was not overcome, the court concluded that prospective application was required.⁶⁰ Accordingly, the decision of the court of appeals was affirmed as to the constitutionality but reversed as to retroactivity.⁶¹ The question left unresolved by the California Supreme Court is: What types of actions are governed by the provisions of Proposition 51?

III. A PROPOSED TEST

At the time of this Comment's publication, no California court has yet enunciated a test to determine whether an action is governed by Proposition 51.⁶² Both the language of the statute and its intended purpose suggest that a three-prong test is appropriate. The first prong of the proposed test asks whether the action is one that would be encompassed under the common law doctrine of joint and several liability.⁶³ The second prong requires a determination as to whether the action is one for personal injury, property damage, or wrongful

cedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'"

Id. at 596 (quoting *United States v. Security Ind. Bank*, 459 U.S. 70, 79-80 (1982)) (citations omitted).

58. *Id.* at 597 (quoting *Aetna*, 182 P.2d at 166). The court also pointed out that the California Civil Code section 3 states that "[n]o part of [this code] is retroactive unless expressly so declared." *Id.* at 597 (quoting CAL. CIV. CODE § 3 (West 1991)).

59. *Id.* at 598.

60. *Id.* at 605.

61. *Id.* at 611.

62. That is to say that neither California appellate courts nor the Ninth Circuit Court of Appeals interpreting California law have decided this issue.

63. The basis of this first prong comes from what seems to be the purpose statement of the statute:

(a) The legal doctrine of joint and several liability, also known as the 'deep pocket rule,' has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers.

CAL. CIV. CODE § 1431.1(a) (West 1991). If the action is not under the doctrine of joint and several liability at common law, then the statute's purpose would not apply to that particular action. Therefore, neither should the language of the statute apply. For the full text of the operative portion of the statute, see *supra* note 1.

death based on *principles of comparative fault*.⁶⁴ The third prong examines whether the application of Proposition 51 would fulfill the policy concerns undergirding its adoption.⁶⁵ Each of the three prongs would have to be satisfied in order to entitle the defendant to apportionment under Proposition 51.⁶⁶

A. *Hypothetical Case*

In order to illustrate the application of this three-prong analysis, a borderline hypothetical fact situation will serve as a test case. Assume that a manufacturer produces a product which is later determined to be defective under California law.⁶⁷ The defective product is distributed through ordinary channels and sold by a retailer. Assume also that the retailer could not have discovered the defect even after making a diligent inspection and was not in any way negligent. A consumer purchases the product and subsequently is personally injured by the product and sues both the manufacturer and the retailer under strict products liability. Assume that the consumer used the product properly and did not assume any risks or act negligently in any way. At the time of trial the manufacturer is found to be insolvent, thus the retailer is the sole defendant. Further assume that the retailer will be able to satisfy the judgment entered against it, and that the plaintiff is not wealthy. The issue then becomes: Is the retailer entitled to an apportionment of fault under Proposition 51, or must the retailer bear the full financial burden of the plaintiff's damages? The following is an application of the proposed three-prong test to the hypothetical scenario outlined above.

64. The basis for the second prong derives from what seems to be the parameters of application set by the statute: "(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint." CAL. CIV. CODE § 1431.2(a) (West 1991). For the full text of the operative portion of the statute, see *supra* note 1.

65. The basis for the third prong is the perceived problems underlying the purpose statement:

(b) Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault. Under joint and several liability, if they are found to share even a fraction of the fault, they often are held financially liable for all the damage. The People—taxpayers and consumers alike—ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums.

(c) Local governments have been forced to curtail some essential police, fire and other protections because of the soaring costs of lawsuits and insurance premiums.

CAL. CIV. CODE § 1431.1(b)-(c) (West 1991). For the full text of the operative portion of the statute, see *supra* note 1.

66. Note that it is the defendant rather than the plaintiff who seeks an apportionment in order to reduce his share of the plaintiff's noneconomic damages.

67. For a discussion of what constitutes a defective product under California law, see B. WITKIN, SUMMARY OF CALIFORNIA LAW §§ 1247-49 (9th ed. 1988).

B. *Joint and Several Liability*

In order to satisfy the first prong of the proposed Proposition 51 test, a defendant must be found jointly and severally liable for plaintiff's damages using common law analysis. The doctrine of joint and several liability operates on the principle that each individual tortfeasor is personally liable for any indivisible injuries of which his wrongdoing is a proximate cause.⁶⁸ Courts also apply joint and several liability in situations under which a preexisting relationship between two entities calls for holding one entity liable for the acts of the other.⁶⁹

Under joint and several liability, a joint judgment is entered against all of the tortfeasors, regardless of their respective degrees of fault. The plaintiff may then collect his judgment from whichever defendant or combination of defendants he chooses. As a result, the defendants are left to determine among themselves whether liability will be reapportioned *pro rata* or according to fault.⁷⁰ The defendant with the deepest pocket may be the only one sued by the plaintiff and must cross-complain⁷¹ or subsequently file an action for indemnity or contribution against the other responsible tortfeasors.⁷² If the other tortfeasors are for some reason unable to pay, the deep pocket defendant may end up bearing more than his proportionate share of the financial burden of the entire judgment. Therefore, theoretically, a defendant who was only one percent responsible for plaintiff's injuries could wind up having to pay 100 percent of the damages.⁷³

1. Analysis

Applying the facts of our hypothetical test case, the issue becomes whether a retailer is jointly and severally liable with the manufacturer of a defective product using common law analysis.⁷⁴ In *Kamin-*

68. See *American Motorcycle Ass'n v. Superior Court*, 575 P.2d 899, 904 (Cal. 1978) [hereinafter *AMA*]; W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* §§ 47, 52 (5th ed. 1984).

69. *AMA*, 575 P.2d at 904.

70. See generally Pressler and Shieffler, *supra* note 7, at 652.

71. This is the California equivalent of Federal Rule Civil Procedure 14(b) Impleader.

72. See generally Evangelatos v. Superior Court, 753 P.2d 585, 633 (Cal. 1988).

73. Such a case actually occurred in Florida. See *Walt Disney World Co. v. Wood*, 515 So. 2d 198 (Fla. 1987); see also Andrew Blum, *The '1 Percent Case': Yes, It Exists*, NAT'L L.J., Dec. 14, 1987.

74. See *supra* note 63 and accompanying text setting forth the test.

ski v. Western MacArthur Co.,⁷⁵ a California appellate court conclusively stated that “[i]n products liability cases, a consumer injured by a defective product may sue any business entity in the chain of production and marketing, from the original manufacturer down through the distributor and wholesaler to the retailer; *liability of all such defendants is joint and several.*”⁷⁶ Four principal policy concerns are used to rationalize the imposition of joint and several liability on entities in the stream of commerce.⁷⁷ The following are the policy reasons stated by the California courts and a brief application of those policies to the hypothetical case.⁷⁸

In *Vandermark v. Ford Motor Company*,⁷⁹ the California Supreme Court set forth its policy reasons in order to rationalize joint and several liability in the chain of distribution.⁸⁰ The first rationale is a sort of moral fault or implied responsibility.⁸¹ Retailers, so the argument goes, are a key part of the overall producing and marketing enterprises and are, thus, somewhat responsible for the injuries resulting from defective products.⁸² Therefore, even though retailers may not be directly at fault, responsibility is imputed to them based on their role in the stream of commerce.

In the hypothetical case, the innocent consumer was not in any way morally blameworthy for his injuries. Yet, neither was the retailer because the defect in the product was undiscoverable. However, strict liability imputes fault or implies responsibility on the retailer because the retailer is an integral part of the overall enterprise and thus should bear the resulting costs. Therefore, in order to satisfy the underlying policy concerns of joint and several liability, the retailer is held responsible and forced to compensate the injured plaintiff.

The second policy justification for joint and several liability in the stream of commerce is the concern for compensating the injured, and often innocent, plaintiff.⁸³ Many times a plaintiff is injured by a de-

75. 220 Cal. Rptr. 895 (Cal. Ct. App. 1985).

76. *Id.* at 901 (emphasis in original). See also *Becker v. IRM*, 691 P.2d 166 (Cal. 1985); *Vandermark v. Ford Motor Co.* 391 P.2d 168 (Cal. 1964); *Barth v. B.F. Goodrich Tire Co.*, 71 Cal. Rptr. 306 (Cal. Ct. App. 1968) (strict liability applied to wholesale-retail distributor).

77. Pressler and Shieffler, *supra* note 7, at 669-70.

78. The application of the stated policies to the hypothetical fact situation should in no way imply that unless each and every policy concern is met, joint and several liability should not apply. Rather, this is done for illustrative purposes only.

79. 391 P.2d 168 (Cal. 1964).

80. *Id.* at 171-72.

81. Pressler and Shieffler, *supra* note 7, at 669.

82. *Vandermark*, 391 P.2d at 171. See also *Angelus Assoc. Corp. v. Neonex Leisure Prods., Inc.*, 213 Cal. Rptr. 403, 409 (Cal. Ct. App. 1985). “[P]ublic policy demands [retailers] respond in damages to the injured consumer although they may be ‘factually innocent’ of any wrongdoing.” *Id.*

83. Pressler and Shieffler, *supra* note 7, at 669.

fective product manufactured by a subsequently insolvent entity. Thus, the retailer may then be the only member of the chain of distribution available to compensate the plaintiff.⁸⁴ The *Kaminski* court explained that "[b]y extending liability to entities farther down the commercial stream than the manufacturer, the policy of compensating the injured plaintiff is preserved."⁸⁵ Therefore, the interest in making the plaintiff "whole" is deemed to justify placing the financial burden of the injury on the retailer.

In the hypothetical case, the plaintiff is an innocent purchaser of a product manufactured by a now insolvent entity. The retailer is the only entity down the commercial stream capable of responding in damages. Therefore, the policy of compensating injured plaintiffs is preserved only if the retailer is forced to compensate the injured plaintiff.

The third policy reason underlying the imposition of joint and several liability in the chain of commerce is the concept of loss distribution.⁸⁶ The retailer shares in the profit from the production, distribution, and sale of the products and should, therefore, share in the losses associated with participating in the enterprise.⁸⁷ Retailers are "an integral part of the overall producing and marketing enterprises that should bear the cost of injuries resulting from defective products."⁸⁸

Applying this rationale to the facts of the hypothetical case, the retailer should be forced to compensate the plaintiff. The retailer, through its dealings with the manufacturer, directly benefits financially from the sale of the product to the consumer, thereby sharing in the profits generated from production and distribution of the product. Losses normally associated with participating in the enterprise surely include civil suits arising out of injuries caused by defective

84. *Vandermark*, 391 P.2d at 171.

85. *Kaminski v. Western MacArthur Co.*, 220 Cal. Rptr. 895, 901 (Cal. Ct. App. 1985). See also *Price v. Shell Oil Co.*, 466 P.2d 722, 725 (Cal. 1970) (imposing strict liability on the lessor of chattels). The purpose of strict liability "is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Id.* (quoting *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963)).

86. *Pressler and Shieffler*, *supra* note 7, at 669.

87. *Vandermark*, 391 P.2d at 171.

88. *Id.* See also *Price*, 466 P.2d at 725-26. "[T]he paramount policy to be promoted by the rule is . . . the spreading throughout society of the cost of compensating them." *Id.*

products. Therefore, the policy of profit and loss sharing is fulfilled by making the retailer compensate the plaintiff for his injuries.

The fourth justification cited for applying joint and several liability is the defendant's ability to pay.⁸⁹ The retailer is thought to be in a better position to insure against losses caused by defective products than is the consumer plaintiff.⁹⁰ Joint and several liability places the burden on those "better capable of estimating and spreading the risk of the marketing of defective products."⁹¹

The retailer in the hypothetical case engages in many similar transactions and is thus capable of estimating the associated risks. The retailer is also able to slightly increase prices to all consumers, thus spreading the risk, in order to pay for the increased insurance against such risks. The consumer, though, is a one-time purchaser virtually unaware or unable to calculate the risk, let alone spread the risk. Therefore, it is much more efficient for one retailer to insure against injuries than to place this burden on many individual consumers.

The first prong of the proposed Proposition 51 test requires a showing that the action is one in which the defendants are jointly and severally liable at common law. California case law explicitly states that retailers and manufacturers are jointly and severally liable for defective products placed in the stream of commerce. Further, the policy concerns underlying joint and several liability are fulfilled by applying the doctrine to stream of commerce cases. Therefore, the first prong of the test is satisfied in the hypothetical case.

C. Historical Background of Comparative Fault

In order to satisfy the second prong of the proposed Proposition 51 test, the underlying action must be one for personal injury, property damage, or wrongful death based on principles of comparative fault. While deciding whether the claim is one for personal injury, property damage, or wrongful death is fairly straightforward, the determination of whether the action is based on principles of comparative fault is considerably more challenging.

Apportionment of fault between plaintiffs and defendants or among defendants alone was virtually nonexistent at common law.⁹² The legal principle of contributory negligence controlled negligence causes of action, and the doctrine of strict products liability was not

89. Pressler and Shieffler, *supra* note 7, at 669.

90. Kaminski v. Western MacArthur Co., 220 Cal. Rptr. 895, 901 (Cal. Ct. App. 1985).

91. *Id.*

92. Evangelatos v. Superior Court, 753 P.2d 585, 689 (Cal. 1988).

yet born.⁹³ Under the rigid rule of contributory negligence, a plaintiff who was found to be responsible in any way for her own injuries was barred from recovering any damages.⁹⁴ Reflecting the mounting dissatisfaction with contributory negligence,⁹⁵ the California Supreme Court retreated from that harsh rule in 1975 in *Li v. Yellow Cab*.⁹⁶ The following traces the evolution of the principles of comparative fault in California.

1. *Li v. Yellow Cab*

In *Li*, the plaintiff (driver) made an unsafe left turn and was struck by the defendant's car, which was traveling at an unsafe speed.⁹⁷ The trial court analyzed the case under the then-existing rule of contributory negligence, thereby barring the plaintiff's claim.⁹⁸ Reasoning that contributory negligence was inequitable because it failed to "distribute responsibility in proportion to fault,"⁹⁹ the California Supreme Court reversed the dismissal expressly adopting the "pure" form of comparative negligence.¹⁰⁰

The court proceeded through a lengthy analysis of the California Civil Code in order to determine if it had the power to adopt the new standard.¹⁰¹ The majority finally concluded that, by its own terms,¹⁰² the code was to be liberally construed to promote justice.¹⁰³ In keeping with its view of liberal construction, the court granted to trial judges "broad discretion in seeking to assure that the principle stated is applied in the interest of justice and in furtherance of the purposes and objectives set forth in this opinion."¹⁰⁴ The court expressed mild

93. Strict Products Liability was officially adopted in California in *Greenman v. Yuba Power Products*, 377 P.2d 897 (Cal. 1978).

94. KEETON, *supra* note 68, § 67 at 433.

95. *Id.*

96. 532 P.2d 1226 (Cal. 1975).

97. *Id.* at 1229.

98. *Id.* at 1230.

99. *Id.*

100. *Id.* at 1242. The "pure" form of comparative negligence "apportions liability in direct proportion to fault in all cases." *Id.*

101. *Id.* at 1232-38. The court repeatedly cites Professor Arvo Van Alstyne's article for support. See *Introductory Commentary to West's Annotated Civil Code*, CAL. CIV. CODE (West 1954).

102. See CAL. CIV. CODE § 4 (West 1988).

103. *Li*, 532 P.2d at 1239. The court declared: "[W]e conclude that the rule of liberal construction made applicable to the code by its own terms . . . together with the code's peculiar character as a continuation of the common law . . . permit if not require that section 1714 be interpreted so as to give dynamic expression to the fundamental precepts which it summarizes." *Id.*

104. *Id.* at 1243-44.

concern for the ability of the jury to adequately apportion negligence between the parties, then summarily dismissed its worries, relying on the success that other jurisdictions had enjoyed under the system.¹⁰⁵ The court expressly refused to decide whether the principle of comparative negligence should be applied to cases involving multiple defendants,¹⁰⁶ and confined its holding to negligence cases.¹⁰⁷

2. *American Motorcycle Association v. Superior Court*

Three years later in 1978, the court was faced with the decision of whether to apply the principles announced in *Li* to multiple defendant cases in *American Motorcycle Association v. Superior Court*.¹⁰⁸ In *American Motorcycle Association* (hereinafter AMA), a teenage boy was seriously injured in an AMA-sponsored race.¹⁰⁹ AMA and Viking Motorcycle Club were named as defendants and sued for negligence.¹¹⁰ AMA sought to cross-complain against the plaintiff's parents, seeking indemnity from them if AMA was found to be liable.¹¹¹ In the alternative, AMA argued that the doctrine of joint and several liability was abolished by *Li* and sought declaratory relief allocating a portion of the negligence to the plaintiff's parents.¹¹² However, the trial court refused to allow AMA to cross-complain against the plaintiff's parents, and thus, AMA appealed.¹¹³

Once before the California Supreme Court, AMA argued that the concept of joint and several liability was totally incompatible with a system of comparative negligence because it undermined the ration-

105. *Id.* at 1232.

106. *Id.* at 1241. This issue was later decided in *AMA*. See *infra* notes 108-126 and accompanying text.

107. *Li*, 532 P.2d at 1243. Comparative negligence principles were later expanded to strict liability in *Daly v. General Motors Corp.*, 575 P.2d 1162 (Cal. 1978). See *infra* notes 127-142 and accompanying text.

108. 578 P.2d 899 (Cal. 1978).

109. *Id.* at 902. Plaintiff's injuries allegedly included a crushing of his spine, which resulted in permanent loss of the use of his legs and permanent inability to perform sexual functions. *Id.* at 903.

110. *Id.* at 902. The plaintiff claimed that the defendants negligently designed, managed, supervised, and administered the race, as well as negligently solicited entrants. *Id.*

111. *Id.* at 903. This was done because the plaintiff did not name his parents as defendants in his complaint. AMA claimed that the plaintiff's parents negligently failed to supervise their child and that this failure constituted active negligence on their part. Furthermore, AMA claimed that its negligence, if any, was only passive and, therefore, AMA was entitled to be indemnified by the plaintiff's parents. *Id.*

112. *Id.*

113. *Id.* at 903. AMA sought a writ of mandate from the court of appeal to force the trial court to grant AMA leave to file its cross-complaint. The court of appeal recognized the need for a quick resolution and the recurrent nature of the issue and accordingly issued an alternative writ. The court ultimately granted a peremptory writ of mandate. The supreme court, because of the importance of the case, then ordered a hearing on its own motion. *Id.*

ale for joint and several liability.¹¹⁴ The court, however, disagreed, asserting that the ability to apportion fault on a comparative negligence basis does not render an otherwise indivisible jury divisible for purposes of joint and several liability.¹¹⁵ The court further explained that the policy concerns behind joint and several liability would be subserved by its abrogation, stating, "The fact that one of the tortfeasors is impecunious or otherwise immune from suit does not relieve another tortfeasor of his liability for damage which he himself has proximately caused."¹¹⁶ The court was concerned that a completely innocent plaintiff rather than a blameworthy defendant would end up bearing the financial shortfall left by an absent co-defendant.¹¹⁷ The court therefore concluded that *Li* had not abolished the common law doctrine of joint and several liability¹¹⁸ and that a concurrent tortfeasor's liability could be reduced only in proportion to the amount attributable to the plaintiff.¹¹⁹

As to AMA's indemnity plea, the court was more sympathetic. After careful reexamination of the common law doctrine of equitable indemnity in light of *Li*, the court concluded that partial indemnification among concurrent tortfeasors on a comparative fault basis should be allowed.¹²⁰ The court briefly traced the historical differences between contribution and indemnity, ultimately concluding that the difference between the two concepts is "more formalistic than substantive."¹²¹ At the time of the development of the equitable indemnity doctrine, no concept of comparative negligence existed, thus equitable indemnity became an all or nothing proposition, similar to contributory negligence.¹²² Because equitable indemnity suffered from the same infirmity as contributory negligence, the court

114. *Id.* at 905. In support of this proposition AMA cited *Finnegan v. Royal Realty Co.*, 218 P.2d at 17, 32 (Cal. 1950).

115. *AMA*, 578 P.2d at 905.

116. *Id.* at 904.

117. *Id.* at 905. This, however, is precisely what Proposition 51 was later enacted to accomplish. See CAL. CIV. CODE § 1431.2 (West Supp. 1991). See *supra* note 1.

118. *AMA*, 578 P.2d at 906-07. The court pointed out that joint and several liability was retained under comparative negligence in all states that had decided the issue. *Id.* (citing SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 16.4, at 253 (1974)).

119. *Id.* at 906-07. See also *Li v. Yellow Cab*, 532 P.2d 1226, 1243 (Cal. 1975).

120. *AMA*, 578 P.2d at 912. The court again justified its decision by pointing out that other jurisdictions had successfully adopted similar rules. *Id.* at 913.

121. *Id.* at 907. "As Judge Learned Hand observed more than a quarter century ago: '[I]ndemnity is only an extreme form of contribution.'" *Id.* at 907 n.3 (quoting *Slattery v. Marra Bros.*, 186 F.2d 134, 138 (2d Cir. 1951)).

122. *Id.* at 908-09.

determined that it too required modification.¹²³ The court concluded that the fairness principles established in *Li* mandated a "system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault."¹²⁴ Therefore, the court determined that a defendant may file a cross-complaint against a co-tortfeasor for indemnity even when such tortfeasor was not named by the plaintiff in the original action.¹²⁵ Accordingly, AMA was allowed to file its cross-complaint against the plaintiff's parents for equitable indemnity.¹²⁶

3. *Daly v. General Motors Corp.*

That same year, the California Supreme Court in *Daly v. General Motors Corp.* contemplated whether to extend the principles of comparative negligence set forth in *Li* to strict products liability cases.¹²⁷ Some fifteen years earlier in *Greenman v. Yuba Power Products, Inc.*,¹²⁸ the court had sanctioned the new doctrine of strict products liability.¹²⁹ This doctrine, however, did not include any basis for apportionment of fault among the parties, and contributory negligence was not a defense.¹³⁰

Numerous amicus briefs were submitted on both sides of the issue of whether to further extend principles of comparative fault.¹³¹ Those who opposed the expansion of comparative negligence into comparative fault vigorously argued that comparing a plaintiff's negligence with a defendant's strict liability was like comparing "apples and oranges" or mixing "oil and water."¹³² The majority of the court, while "fully recognizing the theoretical and semantic distinctions between the twin principles of strict products liability and traditional negligence," thought that the two concepts could be "blended or ac-

123. *Id.* at 912.

124. *Id.*

125. *Id.* at 917. "[W]e think it only fair that a defendant who may be jointly and severally liable for all of the plaintiff's damages be permitted to bring other tortfeasors into the suit." *Id.* The court further concluded that the interaction of partial indemnity with California's cross-complaint procedures would not unduly prejudice plaintiffs. *Id.*

126. *Id.* at 918.

127. *Daly v. General Motors Corp.*, 575 P.2d 1162 (Cal. 1978).

128. 377 P.2d 897 (Cal. 1978).

129. See *infra* notes 223-49 and accompanying text for further discussion of the development of strict products liability.

130. *Daly*, 575 P.2d at 1166. Assumption of the risk was, however, a complete defense. *Id.* See also *Luque v. McLean*, 501 P.2d 1163, 1169 (Cal. 1972); Restatement (Second) of Torts § 402A, cmt. b (1977).

131. *Daly*, 575 P.2d at 1164.

132. *Id.* at 1167. Opponents argued that since contributory negligence is only a defense to negligence, and comparative negligence only affects contributory negligence, then comparative negligence cannot be a defense to strict liability. *Id.*

commodated."¹³³ The court criticized the rigidity of the "apples and oranges" distinction,¹³⁴ pointing out that in order to achieve substantial justice, some interweaving of the two concepts was necessary.¹³⁵ The court also noted that the whole concept of strict products liability resulted from dissatisfaction with the "wooden formalisms of traditional tort and contract principles."¹³⁶ The court further asserted that neither the existing comparative negligence, nor the former contributory negligence standards rendered exact measures.¹³⁷ The court finally concluded that "[f]ixed semantic consistency . . . is less important than the attainment of a just and equitable result."¹³⁸

Further, the court summarily dismissed the objection that juries would be incapable of measuring and comparing the negligence of the plaintiff with the strict liability of the defendant.¹³⁹ The court noted that while the term "equitable apportionment of loss" is a more accurate and descriptive term, "comparative fault" was in such wide use that it should be adopted by the court.¹⁴⁰ Finally, reaffirming the wisdom of *Li*, the court granted broad discretion to trial courts when applying its holding¹⁴¹ and extended such discretion to the implementation of comparative fault principles in strict products liability cases.¹⁴²

4. *Safeway Stores, Inc. v. Nest-Kart*

The California Supreme Court again expanded tort reform in 1978 by taking principles of comparative fault one step further in *Safeway*

133. *Id. Contra* Lippard v. Houdaille Indus., Inc., 715 S.W.2d 491 (Mo. 1986 (en banc)) (holding that principles of comparative fault do not apply to strict products liability cases).

134. *Daly*, 575 P.2d at 1167-68.

135. *Id.* at 1167.

136. *Id.*

137. *Id.* at 1168.

138. *Id.* The court further concluded:

[i]n this evolving area of tort law in which new remedies are judicially created, and old defenses judicially merged, impelled by strong considerations of equity and fairness we seek a larger synthesis. If a more just result follows from the expansion of comparative principles, we have no hesitancy in seeking it, mindful always that the fundamental and underlying purpose of *Li* was to promote the equitable allocation of loss among all parties legally responsible in proportion to their fault.

Id. at 1169.

139. *Id.* at 1170. "We are . . . convinced that jurors are able to undertake a fair apportionment of liability." *Id.* See also *supra* note 105 and accompanying text.

140. *Daly*, 575 P.2d at 1172.

141. See *supra* notes 101-104 and accompanying text.

142. *Daly*, 575 P.2d at 1172.

Stores, Inc. v. Nest-Kart.¹⁴³ In *Safeway*, the plaintiff was injured when a supermarket shopping cart collapsed.¹⁴⁴ The plaintiff brought suit against the owner of the cart, Safeway, and the manufacturer, Nest-Kart, alleging that the defendants were liable for her injuries under both negligence and strict liability theories.¹⁴⁵ Following *Li*, which allowed for broad discretion when applying its principles,¹⁴⁶ the trial court instructed the jury to determine whether and under which theories each defendant was liable, and to apportion the relative fault attributable to each defendant.¹⁴⁷ The jury ultimately concluded that Safeway was liable under both negligence and strict products liability theories, and that Nest-Kart was liable only under strict products liability.¹⁴⁸ The jury further found that Safeway's comparative fault was eighty percent, and that Nest-Kart's comparative fault was twenty percent.¹⁴⁹ Upon a motion by Safeway,¹⁵⁰ the trial court indicated that common sense suggested apportionment on a comparative fault basis was proper, but held that statutory law called for a pro rata apportionment.¹⁵¹ However, on appeal, the California Supreme Court sanctioned apportionment of fault between a strictly liable defendant and a negligent defendant.¹⁵²

The California Supreme Court reaffirmed the wisdom of its decision in *AMA*, stating that existing contribution statutes "do not in themselves necessarily prohibit apportionment of liability among multiple tortfeasors on a comparative fault basis."¹⁵³ Thus, the narrow issue before the court was whether apportionment on a comparative fault basis was proper when one or more of the defendants' liability derives from principles of *strict liability*.¹⁵⁴ The court answered in the affirmative for three reasons. First, the court believed that the basic equitable considerations undergirding the adoption of comparative fault applied equally to the present case. The court declared, "Nothing in the rationale of strict products liability conflicts with a rule which apportions liability between a strictly liable de-

143. 579 P.2d 441 (Cal. 1978).

144. *Id.* at 442.

145. *Id.*

146. *See supra* notes 101-104 and accompanying text.

147. *Safeway*, 579 P.2d at 442.

148. *Id.*

149. *Id.*

150. *Id.* at 443. Safeway sought a judgment of contribution requiring Nest-Kart to pay an additional 30% of the judgment to achieve an equal apportionment between the parties.

151. *See* CAL. CIV. CODE §§ 875, 876 (West 1988). Section 875 provided for contribution among joint defendants, while section 876 provided for an equal pro rata division of the judgment.

152. *Safeway*, 579 P.2d at 444.

153. *Id.*

154. *Id.*

defendant and other responsible tortfeasors.”¹⁵⁵ Further, the court quickly dismissed any concerns regarding conflicting social policies behind strict products liability that might be undermined by its holding, pointing out that the appellate courts uniformly recognized contribution in such cases.¹⁵⁶ Indeed, allocation of damages based on a comparative fault basis, rather than pro rata, achieved a more precise and equitable apportionment.¹⁵⁷

The court next addressed the logical fallacy of apportioning fault between a strictly liable defendant and a negligent defendant—the fallacy being that the doctrine of strict liability is based on a “no fault” concept, whereas negligence is premised on “fault.”¹⁵⁸ Although the court once again acknowledged that commentators have argued that such an apportionment is like comparing “apples and oranges,”¹⁵⁹ the court maintained that “the suggested difficulties are more theoretical than practical, and . . . juries are fully competent to apply comparative fault principles between negligent and strictly liable defendants.”¹⁶⁰ As proof of this proposition, the court pointed out that the jury in the instant case was able to apportion fault between the two parties without difficulty.¹⁶¹

Finally, the court reasoned that a contrary conclusion would lead to bizarre and irrational results.¹⁶² If a negligent defendant (one who was found to be at fault) were allowed to apportion damages based on comparative fault, he would be placed in a better position than a defendant who was only strictly liable (one with whom fault was not found) who was not allowed to apportion damages based on comparative fault.¹⁶³ Such a result could not be justified.¹⁶⁴ Since the case

155. *Id.*

156. *Id.* See also *Pearson Ford Co. v. Ford Motor Co.*, 78 Cal. Rptr. 279, 285 (Cal. Ct. App. 1979); *Barth v. B.F. Goodrich Tire Co.*, 92 Cal. Rptr. 809, 817 (Cal. Ct. App. 1971); *Kerr Chemicals, Inc. v. Crown Cork & Seal Co.*, 99 Cal. Rptr. 162, 165-66 (Cal. Ct. App. 1971).

157. *Safeway*, 579 P.2d at 445-46.

158. *Id.*

159. *Id.* See, e.g., Boone, *Comparative Negligence: Solution or Problem?*, CAL. TRIAL LAW J. 17, 33 (Fall 1975); Harvey R. Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No Fault*, 14 SAN DIEGO L. REV. 337, 351-56 (1977).

160. *Safeway*, 579 P.2d at 446. See *supra* note 105 and accompanying text.

161. *Safeway*, 579 P.2d at 446. See *supra* note 149 and accompanying text.

162. *Safeway*, 579 P.2d at 446.

163. *Id.* Similar reasoning recently led an appellate court to conclude that apportionment of fault under Proposition 51 applied to situations where one defendant was negligent and another acted intentionally. *Weidenfeller v. Star and Garter*, 2 Cal. Rptr. 2d 14 (Cal. Ct. App. 1991). “It is inconceivable the voters intended that a negligent tortfeasor’s obligation to pay only its proportionate share of the non-economic loss

did not involve derivative or vicarious liability, the court expressly refused to decide whether the principles of comparative fault applied to cases in which one party's liability was solely derivative or vicarious in nature.¹⁶⁵

5. *Far West Financial Corporation v. D & S Company, Inc.*

In 1988, the California Supreme Court revisited the concept of comparative fault in *Far West Financial Corporation v. D & S Company, Inc.*¹⁶⁶ Far West, a real estate developer, contracted with D & S, a general contractor, to build a condominium project.¹⁶⁷ Shortly after the completion and sale of the condominiums, several defects appeared.¹⁶⁸ Several years after a settlement and release agreement had been reached between the homeowner's association and Far West regarding the initial defects, many additional and much more serious defects surfaced.¹⁶⁹ The homeowner's association subsequently filed suit against Far West and D & S.¹⁷⁰ Far West then filed a cross-complaint for indemnity against D & S, alleging that D & S had complete control over the construction site and any deficiencies were directly attributable to D & S.¹⁷¹ Far West subsequently entered into a good faith settlement agreement with the association pursuant to California Civil Code section 877.6.¹⁷² When D & S sought to do the same, Far West unsuccessfully opposed the accompanying request for dismissal of Far West's cross-complaint for indemnity.¹⁷³ The court of

. . . would become disproportionate . . . solely because the only other responsible tortfeasor acted intentionally." *Id.* at 16.

164. *Safeway*, 579 P.2d at 446.

165. *Id.* at 555 n.5.

In the instant case the jury found that Safeway was itself negligent in failing to safely maintain its carts, and thus Safeway's liability is in no sense solely derivative or vicarious. Accordingly, we have no occasion to determine in this case whether the comparative indemnity doctrine should be applied in a situation in which a party's liability is entirely derivative or vicarious in nature.

Id. Compare City of Franklin v. Badger Ford Truck Sales, Inc., 207 N.W.2d 866, 871-73 (Wis. 1973) with Kelly v. Long Island Lighting Co., 286 N.E.2d 241, 243 (N.Y. 1972).

166. 760 P.2d 399 (Cal. 1988). For an in-depth analysis of the case, see Scott J. Hyman, *Far West Financial Corp. v. D & S Co. and the Abolition of Total Equitable Indemnity: What a Long, Strange Trip It's Been*, 21 PAC. L.J. 147 (1989).

167. *Far West*, 760 P.2d at 401.

168. *Id.*

169. *Id.* These previously latent defects affected the roof, ground drainage, underground plumbing, area lighting, building settlement, painting and exterior of the project. *Id.*

170. *Id.* The association also sued numerous subcontractors, engineering firms, and architects who had also worked on the development. *Id.*

171. *Id.* at 402. D & S and several other contractors subsequently filed their own indemnity cross-complaints against Far West and each other. *Id.*

172. *Id.* See CAL. CIV. CODE § 877.6 (West 1992).

173. *Id.* at 402-03. The right to indemnity has existed in California since 1872. See CAL. CIV. CODE § 2772 (West 1974) (defining indemnity). Contribution, however, has

appeal affirmed the trial court's dismissal.¹⁷⁴

The California Supreme Court granted certiorari to resolve the conflict in court of appeal decisions regarding this question.¹⁷⁵ Far West claimed that since section 877.6 spoke only in terms of partial or comparative indemnity, a party who is only vicariously or derivatively liable should not be barred from total indemnity even after a trial court adjudicates that, pursuant to section 877.6, the settlement of the directly liable tortfeasor was in good faith.¹⁷⁶ D & S argued that partial or comparative indemnity encompassed the entire spectrum of possible apportionments and therefore, no distinction between total and partial equitable indemnity should be drawn.¹⁷⁷ The court conceded that "the language of section 877.6 is, on its face, reasonably susceptible to either of the suggested interpretations," and thus, it needed to look to legislative history to resolve the question.¹⁷⁸ However, the court explicitly stated that there was "no legitimate ba-

only been in existence since 1957. See CAL. CIV. PROC. CODE § 875-77 (West 1980 and Supp. 1989).

174. *Far West*, 760 P.2d at 403. The court of appeal, recognizing that prior appellate decisions conflicted, agreed with the majority concluding that Far West's claim for total equitable indemnity was properly barred by the trial court's determination that the settlement was in good faith and thus complied with Section 877.6. The judgment was therefore affirmed. *Id.*

175. *Id.* at 403. Compare *IRM Corp. v. Carlson*, 224 Cal. Rptr. 438 (Cal. Ct. App. 1st Dist. 1986) (claim barred); and *Stratton v. Peat, Marwick, Mitchell & Co.*, 235 Cal. Rptr. 374 (Cal. Ct. App. 1st Dist. 1987) (claim barred); with *County of Los Angeles v. Superior Court*, 202 Cal. Rptr. 444 (Cal. Ct. App. 3d Dist. 1984) (claim not barred); and *Bear Creek Planning Comm. v. Title Ins. & Trust Co.*, 211 Cal. Rptr. 172 (Cal. Ct. App. 3d Dist. 1985) (claim not barred).

176. *Far West*, 760 P.2d at 403-04. "Joint tortfeasors" include those defendants whose liability is vicarious or derivative. See e.g., *Far West Fin. Corp. v. D & S Co.*, 234 Cal. Rptr. 771, 774 (Cal. Ct. App. 1987) *aff'd* 760 P.2d 399 (Cal. 1988); *Turcon Constr. v. Norton-Villiers, Ltd.*, 188 Cal. Rptr. 580 (Cal. Ct. App. 1983) ("joint tortfeasor" includes joint, concurrent and successive tortfeasors). *But see Far West Fin. Corp. v. D & S Co.*, 760 P.2d 399, 414 (Cal. 1988) (Kaufman, J., concurring and dissenting) ("[A] vicariously liable defendant is not a 'tortfeasor' but an involuntary surety or guarantor An indemnity claim based on vicarious liability is not premised on the relative fault or responsibility of the parties for the plaintiff's injury but rather on the simple fact that the claimant has been compelled by force of law to pay for the tort of the one against whom the claim is asserted.").

177. *Far West*, 760 P.2d at 404.

178. *Id.*

Although the statute does not expressly refer to 'total indemnity' claims, the section does expressly apply to 'partial or comparative' indemnity claims; if the Legislature clearly intended the section to apply only to claims seeking partial indemnity, the reference to 'comparative' indemnity could be viewed as superfluous. In context, the issue before us cannot properly be decided by reference to the 'plain language' of the statute itself.

Id. (footnote omitted).

sis for concluding that an indemnity action between a vicariously or derivatively liable tortfeasor and a directly liable tortfeasor is not encompassed within section 877.6, subdivision (c), on the theory that such an action is not "based on principles of comparative fault."¹⁷⁹ The court then outlined the evolution of indemnity,¹⁸⁰ explaining that *AMA* combined total and partial indemnity into one equitable comparative indemnity doctrine.¹⁸¹ Therefore, the court concluded that a tort defendant who enters into a good faith settlement under Section 877.6 is thereafter insulated from any subsequent indemnity claims.¹⁸²

6. *Weidenfeller v. Star & Garter*

In late 1991 in *Weidenfeller v. Star & Garter*,¹⁸³ a California court of appeal quite possibly expanded principles of comparative fault even further. The plaintiff was a victim of an intentional assault in the parking lot of a bar.¹⁸⁴ The plaintiff sued the owners of the bar, alleging negligence based upon inadequate lighting in the parking lot.¹⁸⁵ The jury found that the owners' negligence proximately caused the plaintiff's injuries.¹⁸⁶ The jury attributed seventy-five percent of the fault to the assailant, twenty percent of the fault to the owners, and five percent of the fault to the plaintiff.¹⁸⁷ Pursuant to Proposition 51, the trial court entered a judgment against the owners for ninety-five percent of the economic damages and twenty percent of the noneconomic damages.¹⁸⁸ The plaintiff appealed on the grounds that Proposition 51 was inapplicable, claiming that the action was not based upon principles of comparative fault because the assailant acted intentionally.¹⁸⁹

The appellate court, rather than explicitly addressing the plaintiff's contention, skirted the comparative fault issue, choosing instead to focus on fulfilling the policy concerns of the statute. The court stated, "We think Weidenfeller's myopic view of the statute, focusing on its words rather than its purpose, distorts the meaning of [Propo-

179. *Id.* at 404 n.7.

180. *Id.* at 404-07.

181. *Id.* at 407. *Accord* *People ex rel. Department of Transportation v. Superior Court*, 608 P.2d 673, 681 (Cal. 1980).

182. *Far West*, 760 P.2d at 413.

183. 2 Cal. Rptr. 2d 14 (1991).

184. *Id.* at 15.

185. *Id.*

186. *Id.*

187. *Id.* The jury determined that Weidenfeller suffered economic damages of \$122,500 and non-economic damages of \$250,000.

188. *Id.* The damage awards were thus reduced to \$116,375 in economic loss (95% of \$122,500), and \$50,000 in non-economic loss (20% of \$250,000).

189. *Id.* at 15.

sition 51].”¹⁹⁰ The court then pointed out the potential irrational consequences of adopting the plaintiff’s reading of the statute, concluding, “It is inconceivable the voters intended that a negligent tortfeasor’s obligation would become disproportionate . . . solely because the only other tortfeasor acted intentionally.”¹⁹¹ The court did, however, implicitly ratify the lower court’s application of comparative fault principles by analogizing the case with *Safeway*.¹⁹² If the jury in *Safeway* was “fully competent to apply comparative fault principles between negligent and strictly liable defendants,” then the jury in this case could likewise competently compare the fault between negligent and intentional tortfeasors.¹⁹³ Furthermore, the court rejected as unpersuasive a contrary conclusion from a sister state.¹⁹⁴ Instead of focusing on the “legislative intent” of the statute,¹⁹⁵ the court could have followed the supreme court’s advice in *Li* to liberally apply principles of comparative fault¹⁹⁶ and could have, and probably should have, decided the case on those grounds.

7. Summary

At common law, contributory negligence prevailed. A plaintiff’s cause of action was barred if her own negligence was found to be a contributing cause to her damages.¹⁹⁷ In *Li*, the California Supreme Court adopted a new system of pure comparative negligence under which the plaintiff’s recovery was reduced in proportion to her degree of fault, as determined by the jury.¹⁹⁸ The court’s next decision, *AMA*, determined that fault could be apportioned on a comparative

190. *Id.* at 15-16. The court further stated, “Statutes must be construed in a reasonable and common sense manner consistent with their apparent purpose and the legislative intent underlying them—one practical, rather than technical, and one promoting a wise policy rather than mischief or absurdity.” *Id.* at 15 (quoting *Herbert Hawkins Realtors, Inc. v. Milheiser*, 189 Cal. Rptr. 450 (1983)).

191. *Id.* at 16. The court reasoned that “to penalize the negligent tortfeasor in such circumstances not only frustrates the purpose of the statute but violates the common sense notion that a more culpable party should bear the financial burden caused by its intentional act.” *Id.*

192. *Id.* at 17.

193. *Id.*

194. *Id.* at 16 n.10. “To the extent Kansas courts have held the doctrine of comparative fault is inapplicable to intentional torts in a situation such as here, we find those decisions unpersuasive.” *Id.*

195. *See supra* note 191.

196. *See supra* note 103 and accompanying text.

197. *See supra* note 94 and accompanying text.

198. *See supra* notes 97-107 and accompanying text.

fault basis between co-tortfeasors.¹⁹⁹ Under *Daly*, comparative negligence was subsumed by the doctrine of comparative fault, thereby allowing apportionment of fault between a negligent plaintiff and a strictly liable defendant.²⁰⁰ Then in *Safeway*, the court further expanded comparative fault to include apportionment of fault between a defendant liable in both negligence and strict products liability and a defendant liable only in strict products liability.²⁰¹ In *Far West*, where both defendants were strictly liable, the court established that the only type of indemnity remaining was comparative equitable indemnity and that it included the entire range of possible apportionments.²⁰² Further, the court suggested that fault could be equitably apportioned between directly liable tortfeasors and those who were only derivatively or vicariously liable.²⁰³ Finally, in *Weidenfeller*, an appellate court impliedly sanctioned application of principles of comparative fault between negligent and intentional tortfeasors.²⁰⁴

8. Analysis of the Hypothetical Case

The second prong of the proposed Proposition 51 test requires a determination that the cause of action is one for personal injury, property damage, or wrongful death based upon principles of comparative fault. In the hypothetical case, the presupposition was that a consumer suffered *personal injury* and was suing to recover damages.²⁰⁵ Therefore, the inquiry should focus solely on whether a retailer's liability for plaintiff's injury, which is primarily derivative based only upon its place in the chain of distribution, is one based on principles of comparative fault.²⁰⁶ First, the retailer's liability will be analyzed as though it were only derivative. Then the retailer's liability will be analyzed as if it were direct.

Although the issue has not been expressly decided yet, previous decisions of the California Supreme Court strongly suggest that comparative fault principles should apply to the hypothetical situation. The court first hinted at this result in a footnote in *Safeway* by expressly refusing to decide the question. In the words of the court, "We have no occasion to determine in this case whether the comparative indemnity doctrine should be applied in a situation in which a party's liability is entirely derivative or vicarious in nature."²⁰⁷ If the court had felt strongly otherwise, it could have easily stated that

199. See *supra* notes 108-26 and accompanying text.

200. See *supra* notes 127-42 and accompanying text.

201. See *supra* notes 143-65 and accompanying text.

202. See *supra* notes 166-82 and accompanying text.

203. See *infra* note 219 and accompanying text.

204. See *supra* notes 183-96 and accompanying text.

205. See *supra* note 67 and accompanying text.

206. See *supra* note 64 and accompanying text.

207. *Safeway Stores Inc. v. Nest-Kart*, 579 P.2d 441, 446 n.5 (Cal. 1978).

comparative fault principles do not apply to those situations, and the issue would have been easily resolved.²⁰⁸

The court next addressed this question, again in dicta, in *Daly*.²⁰⁹ The plaintiff in *Daly* had objected to the merger of comparative fault and strict liability, complaining that it would abolish or adversely affect the liability of retailers in the chain of distribution.²¹⁰ The court, however, did not anticipate any problems with the merger, declaring that if "jurors are capable of assessing fully and fairly the legal responsibility of a manufacturer on a strict liability basis, no reason appears why they cannot do likewise with respect to subsequent distributors and vendors of the product."²¹¹ This seems to state in no uncertain terms that the court sanctions the apportionment of fault between a derivatively liable retailer and a directly liable manufacturer. Justice Mosk, in his dissent, seemingly agrees with this author's interpretation of the majority's assessment of the law,²¹² stating in defiance of the majority that it would be "consummate supererogation for a trier of fact to attempt to measure some consumer negligence against either the faulty design of the product or the responsibility of the congeries of nonnegligent persons who place the defective product in the stream of commerce, or their responsibility vis-à-vis each other."²¹³

Conflict subsequently arose in the courts of appeal as to whether such apportionment was permissible. In *Angelus Associates Corp. v. Neonex Leisure Products, Inc.*,²¹⁴ the Court of Appeal for the Fourth District, Division Three argued that "[a]s to the person or entity ultimately responsible for the defective product, the retailer is neither a wrongdoer nor a tortfeasor. And where there is no wrongdoing to

208. Granted, courts cannot properly address via an advisory opinion issues not confronting the court, but in reality they often do. See *infra* notes 209-13 where the court hypothetically addresses an issue that is not before it. At the very least, the footnote suggests that the court considered the possibility.

209. *Daly v. General Motors Corp.*, 575 P.2d 1162 (Cal. 1978).

210. *Id.* at 1170. "We find equally unpersuasive a final objection that the merger of the two principles somehow will abolish or adversely affect the liability of such intermediate entities in the chain of distribution as retailers We foresee no such consequence." *Id.* (citing *Vandermark v. Ford Motor Co.*, 391 P.2d 168 (Cal. 1964)).

211. *Id.* The court had no occasion to decide this particular issue but still gave its opinion on how it may rule if the issue arose in the future. See *supra* note 208 and accompanying text.

212. *Daly*, 575 P.2d at 1183 (Mosk, J., dissenting). "The majority see no problem in assessing the liability of intermediate entities in the commercial chain. I do." *Id.* (Mosk, J., dissenting).

213. *Id.* (Mosk, J., dissenting) (emphasis added).

214. 213 Cal. Rptr. 403 (Cal. Ct. App. 1985).

apportion, the principles of comparative fault cannot apply.”²¹⁵ The Court of Appeal for the Fourth District, Division One in *Standard Pacific of San Diego v. A. A. Baxter Corporation*,²¹⁶ specifically responded to *Angelus*, retorting, “We fault this reasoning. Wrongdoing can be apportioned 100 percent to the manufacturer and zero percent to the innocent retailer.”²¹⁷ The California Supreme Court adopted the *Standard Pacific* view in *Far West*.²¹⁸

In *Far West*, the court rejected the position in *Angelus*, stating “there is no legitimate basis for concluding than an indemnity action between a vicariously or derivatively liable tortfeasor and a directly liable tortfeasor is not encompassed within section 877.6, subdivision (c) on the theory that such an action is not ‘based on comparative negligence or comparative fault.’”²¹⁹ Perhaps even more significantly, the court went on to say that “we have *never* viewed the ‘comparative fault’ terminology as so restrictive as to exclude the equitable allocation of loss between vicariously and directly liable tortfeasors.”²²⁰ In fact, the court stated that the term “equitable allocation of apportionment of loss” was probably a more appropriate term than “comparative fault.”²²¹ The court rationalized this view on policy grounds, declaring that “‘even in cases in which one or more tortfeasors’ liability rests on the principles of strict liability, fairness and other tort policies, such as deterrence of dangerous conduct or encouragement of accident-reducing behavior, frequently call for an apportionment of liability among multiple tortfeasors.’”²²²

Therefore, it appears that the only rational interpretation of the California Supreme Court’s views is that principles of comparative fault, based on an equitable allocation of fault, apply to vicariously or derivatively liable tortfeasors. Thus, under a derivative liability analysis, the retailer in the hypothetical test case would pass the second prong of the proposed test.

Theoretical problems arise with this line of reasoning, however. While the retailer’s liability is in some sense primarily derivative, based upon its place in the chain of distribution, its liability in other

215. *Id.* at 409.

216. 222 Cal. Rptr. 106 (Cal. Ct. App. 1986).

217. *Id.* at 112.

218. See *supra* note 179 and accompanying text.

219. *Far West Fin. Corp. v. D & S Co.*, 760 P.2d 399, 404 n.7 (Cal. 1988).

220. *Id.* (emphasis added). See also *Standard Pacific*, 222 Cal. Rptr. at 114-15. “Given the predicate that comparative fault principles are to be applied to strict liability cases, reason and logic compel the conclusion that equitably interpreted the statute’s [section 877.6] broad language includes such parties whose legal responsibilities are derivative or vicarious in nature.” *Id.*

221. *Far West*, 760 P.2d at 404 n.7 (quoting *Daly v. General Motors Corp.*, 575 P.2d 1162, 1168 (Cal. 1978)).

222. *Id.* at 410 (quoting *Ford Motor Co. v. Robert J. Poeschl, Inc.*, 98 Cal. Rptr. 702 (Cal. Ct. App. 1972)).

senses is direct. Strict liability in tort arises when an entity is instrumental in placing a product in the stream of commerce knowing that the product is to be used without inspection for defects, and the product is defective, causing injury when used in the intended way.²²³ Strict liability also applies to sellers who are engaged in the business of selling such products, even though the seller has exercised all possible care toward the purchaser.²²⁴ This is the case because strict liability does not derive from any fault of the defendant, but is based solely on public policy concerns that attach liability without regard to fault once an entity assists in placing a product into the stream of commerce.²²⁵ Furthermore, as one court has noted, "[t]he retailer's liability is coextensive with that of the manufacturer of the product."²²⁶ The purpose of such a harsh rule is to protect the consumers who are "powerless to protect themselves."²²⁷

The manufacturer, as the maker/designer of the product, is directly responsible for the damages that result from the defect. But, in a very real sense, so is the retailer who, by providing the mechanism through which the consumer can obtain the product, is also *instrumental in placing the product in the stream of commerce*. Without the manufacturer making the product, no one can be injured by it. Yet, without the retailer distributing the product, no one can be injured by it either.

The theoretical problem with applying principles of comparative fault to this type of situation arises when determining an appropriate standard by which to allocate the fault among the parties. In order to properly equip a jury, the judge must give the jury a standard or mechanism by which they can apportion fault. Intuitively, it seems that the entity who makes the product should be more responsible or blameworthy than one who merely sells it. After all, the manufacturer created, assembled, or designed the defective product—that is, brought into existence that which was previously nonexistent. The retailer, on the other hand, merely passed along the product from

223. RESTATEMENT (SECOND) OF TORTS § 402A (1965). See also *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 900-01 (Cal. 1962); 50 CAL. JUR. 3D *Products Liability* § 16 (1979).

224. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. f; 50 CAL. JUR. 3D *Products Liability* § 16 (1979).

225. See *id.*

226. *Midgley v. S. S. Kresge Co.*, 127 Cal. Rptr. 217, 219 (Cal. Ct. App. 1976) (citing *Price v. Shell Oil Co.*, 466 P.2d 722, 725 (Cal. 1970)). However, *Price* only held that a retailer is *similarly liable* to the manufacturer. *Price*, 466 P.2d at 725.

227. *Greenman v. Yuba Power Prods.*, 377 P.2d 897, 901 (Cal. 1978); see also 50 CAL. JUR. 3D *Products Liability* § 17 (1979).

one party to the next, and intuitively should, therefore, bear less of the responsibility than the manufacturer.²²⁸ Unfortunately, to date all there seems to be by way of a standard is this intuition.

Academic integrity demands the development of a standard that at least in theory would justify the use of a system of comparative fault in the chain of distribution. The ultimate question is, what should that standard be? A rigid pro rata apportionment would not really be a true comparison of fault, but rather the performance of a simple math problem—adding the number of defendants and dividing by 100—to determine the percentage of fault allocated to each defendant. This system would not achieve the goals set forth in *Li* and its progeny of apportioning liability in closer proportion to fault,²²⁹ and therefore would not be defensible.

Adherence to the traditional common law total indemnity standard, since abandoned in California, results in a total shifting of fault from the retailer to the manufacturer. This approach is altogether unsatisfying because shifting fault and comparing fault are really entirely different concepts.²³⁰ Commentators complained that allowing a comparison of fault between a negligent tortfeasor and a strictly liable tortfeasor is like comparing an apple and an orange. This author submits that comparing the fault of a strictly liable tortfeasor with another strictly liable tortfeasor in the chain of distribution is like comparing an apple with itself.²³¹

It may, however, be possible to use the factors or policy concerns that underlie strict products liability to develop a standard that could

228. For purposes of illustration, the retailer can be analogized with a common carrier. In the hypothetical fact situation, the retailer received a sealed product from the manufacturer and subsequently sold it to a consumer in exactly the same condition it was received. By doing this, the retailer was instrumental in placing a product in the stream of commerce, and thus strictly liable. Similarly, if Federal Express delivered the sealed package containing the defective product from the manufacturer to the consumer, Federal Express would also be instrumental in placing the product in the stream of commerce. Of course the common carrier is not a *seller* and is thus not strictly liable in tort, see RESTATEMENT (SECOND) OF TORTS § 402A, but this illustrates that the standard by which to compare the relative fault of the manufacturer and retailer should be based solely on the entity's role in the distribution process.

229. See *supra* note 104 and accompanying text.

230. This also would not achieve the goals of *Li*. See *id.*

231. The reasoning is as follows: If comparing the negligence of one party with the negligence of another party is like comparing an orange with another orange, and if comparing the negligence of one party with the strict liability of another party is like comparing an orange with an apple, then comparing the strict liability of a manufacturer with the strict liability of a retailer for an injury caused by a defective product is like comparing an apple with itself. It is not comparing an apple with another apple because there is no standard against which to compare relative conduct of the parties. At least in negligence cases (orange with orange), the trier of fact can measure the parties' relative deviations from the well-recognized standard of the average reasonable person. In contrast, in strict liability cases (apple with itself), both parties did what, by definition, makes them liable—they were instrumental in placing the product into the chain of commerce. No more or less culpable conduct was possible.

be at least theoretically defensible. Strict products liability was first suggested by Justice Traynor in his concurring opinion in *Escola v. Coca-Cola Bottling Co.*²³² This history provides a possible springboard to developing a future standard to apportion fault among strictly liable entities in the chain of distribution.

9. *Escola v. Coca-Cola Bottling Co.*

Justice Traynor's concurring opinion in *Escola*²³³ gave a glimpse of what was to come in strict products liability. The plaintiff in *Escola* was injured when a Coca-Cola bottle broke in her hand.²³⁴ Unable to prove any specific acts of negligence, the plaintiff relied completely on the doctrine of *res ipsa loquitur* to establish Coca-Cola's liability.²³⁵ After applying the facts of the case to the elements of *res ipsa*,²³⁶ a majority of the California Supreme Court concluded that the plaintiff had met her burden of proof and affirmed the lower court judgment in favor of the plaintiff.²³⁷ Justice Traynor filed a separate opinion concurring in the judgment.²³⁸

Traynor argued that "it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings."²³⁹ Three primary grounds were cited to justify imposing liability.²⁴⁰ First, the policy of accident prevention demanded that responsibility be placed where it would most effectively reduce the potential injuries caused by defective products.²⁴¹ The manufacturer of the prod-

232. 150 P.2d 436 (Cal. 1944).

233. *Id.*

234. *Id.* at 437.

235. *Id.* at 438.

236. *Id.* at 438-40.

237. *Id.* at 440.

238. *Id.* (Traynor, J., concurring).

239. *Id.* (Traynor, J., concurring). Traynor pointed out that California has recognized the principle established in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), that "irrespective of privity of contract, the manufacturer is responsible for an injury caused by such an article to any person who comes in lawful contact with it." *Escola*, 150 P.2d at 400 (Traynor, J., concurring) (citing *Sheward v. Virtue*, 126 P.2d 345 (Cal. 1942); *Kalash v. Los Angeles Ladder Co.*, 34 P.2d 481 (Cal. 1934)).

240. *Escola*, 150 P.2d at 440-41 (Traynor, J., concurring). See also KEETON et al., *supra* note 68, § 98.

241. *Escola*, 150 P.2d at 440-41 (Traynor, J., concurring). See also KEETON et al., *supra* note 68, at § 98. "The cause of accident prevention can be promoted by the adoption of strict liability and the elimination of the necessity for proving negligence." *Escola*, 150 P.2d at 440-41 (Traynor, J., concurring) (citations omitted). Critics argue, however, that the effects of strict liability may include elimination of negligence, but

uct would obviously be better able to anticipate such dangers than would an unsuspecting customer.²⁴² Second, the risk of injury is a cost of doing business that could more easily be insured against and distributed among a greater number of people by the manufacturer than by a consumer.²⁴³ Public policy, therefore, demanded that the risk should fall on those entities responsible for the defective product reaching the market.²⁴⁴ Third, the injured party is often unable to prove the cause of the defect or any negligence on the part of the manufacturer.²⁴⁵ Therefore, Traynor concluded, "The manufacturer's obligation to the consumer must keep pace with the changing relationship between them."²⁴⁶

Traynor also addressed the accompanying liability of the retailer. He pointed out that public policy demanded that the consumer be insured against injury at the retailer's expense.²⁴⁷ Traynor further argued that the courts recognize that the retailer cannot bear such a burden, and thus do allow the retailer to recoup the attendant losses from the manufacturer.²⁴⁸ Traynor's final thoughts suggest that he

will also tend to inhibit the development of new products. *Id.* (Traynor, J., concurring).

242. *Id.* (Traynor, J., concurring).

243. *Id.* at 441 (Traynor, J., concurring). "The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, . . . for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." *Id.* (Traynor, J., concurring). See also KEETON et al., *supra* note 68, § 98. "Those who are merchants and especially those engaged in the manufacturing enterprise have the capacity to distribute the losses of the few among the many who purchase the products. It is not a 'deep pocket' theory but rather a 'risk-bearing economic' theory." *Escola*, 150 P.2d at 441 (Traynor, J., concurring) (emphasis added).

244. *Id.* at 440 (Traynor, J., concurring). See also *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1962). "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Id.* at 901.

245. *Escola*, 150 P.2d at 441 (Traynor, J., concurring). See also KEETON et al., *supra* note 68, § 98. "[F]or institutional reasons . . . proof of the existence of fault or negligence in the sale of a defective product should no longer be required . . ." *Id.*

246. *Escola*, 150 P.2d at 443 (Traynor, J., concurring). To justify this increased responsibility on the manufacturer, Traynor pointed out that the consumer no longer has the skill or desire to adequately investigate the product prior to purchase because he has been "lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices. . . ." *Id.* (Traynor, J., concurring) (citations omitted). He further noted that consumers are purchasing on faith based upon increasing standards of inspection and a willingness of the manufacturer to give replacements or refunds for defective products. *Id.* (Traynor, J., concurring).

247. *Id.* at 441-42 (Traynor, J., concurring). See also *Goetten v. Owl Drug Co.*, 59 P.2d 142 (Cal. 1936); *Gindraux v. Maurice Mercantile Co.*, 47 P.2d 708 (Cal. 1935).

248. *Escola*, 150 P.2d at 442 (Traynor, J., concurring). See also *Davis v. Air Tech. Indus., Inc.*, 582 P.2d 1010, 1014 (Cal. 1978) (when manufacturers and retailers are strictly liable for injuries caused by a defective product, the manufacturer is required to pay the plaintiff's damages); *Angelus Associates Corp. v. Neonex Leisure Products, Inc.*, 213 Cal. Rptr. 403, 404 (Cal. Ct. App. 1985) (even in the absence of an indemnity contract, persons not at fault are entitled to indemnity from those that are at fault, based upon equitable principles).

believed, at least intuitively, that a comparison between the retailer's fault and the manufacturer's fault was indeed possible: "Certainly there is *greater reason* to impose liability on the manufacturer than on the retailer who is but a conduit of a product that he is himself not able to test."²⁴⁹ Developing a standard to enable quantification of that "greater reason" is the task at hand.

10. Proposed Standard

A standard by which to compare the fault of the retailer and the manufacturer in the chain of distribution²⁵⁰ can be derived from an application of the three factors set forth in *Escola*, and echoed by Prosser and Keeton, to each party.²⁵¹ In negligence cases, the standard of reasonable care is a measuring point against which each party's conduct is compared to determine the relative fault.²⁵² Since strict products liability is premised on "no fault" in which "reasonable care" plays no part,²⁵³ a similar standard cannot be applied. However, at least in theory, each strictly liable defendant's conduct could be adjudged according to the applicability of the three policy factors undergirding liability: accident prevention, risk distribution, and problems of proof.²⁵⁴

a. Accident prevention

Applying the articulated factors to the hypothetical situation,²⁵⁵ as Justice Traynor suggested, greater liability will likely be attributed to the manufacturer than the retailer.²⁵⁶ The first factor to be considered is the policy of accident prevention accomplished through the reduction of defective products that reach consumers.²⁵⁷ The inquiry

249. *Escola*, 150 P.2d at 443-44 (Traynor, J., concurring) (emphasis added).

250. The statute may likewise be applied to *any* two defendants who are strictly liable for the plaintiff's damages.

251. It should be noted at the outset that this author does not claim to have the ultimate wisdom as to the standard that may or should be developed to justify the application of principles of comparative fault to chain of distribution situations. Rather, I merely propose one possible solution, admittedly simplistic, to a complex theoretical problem.

252. In actuality, the jury probably decides who should bear what portion of the loss based upon the respective conduct of the parties.

253. See *Safeway Stores Inc. v. Nest-Kart*, 579 P.2d 441, 445 (Cal. 1978).

254. See *supra* notes 239-46 and accompanying text.

255. To refresh the reader's memory as to the presumptions made in the hypothetical case, see *supra* note 67 and accompanying text.

256. See *supra* note 249 and accompanying text.

257. See *supra* note 241 and accompanying text.

should be limited to which of the parties, as a result of the imposition of strict liability, would be both willing and able to respond most effectively in an effort to curtail future defects in the product. In other words, what allocation of responsibility between the retailer and the manufacturer will best serve to fulfill the societal goal of accident prevention? This admittedly seeks an intuitive response based upon one's personal judgment, but it is now at least based upon an articulated and arguably justifiable standard.²⁵⁸ Common sense and experience in a market-driven economy suggest that a manufacturer would be more willing to remedy future defects in its product than would a retailer. The reason for this is that market forces would theoretically react by a decrease in demand for the defective product, in turn causing an increase in demand for substitute products. A retailer, not having much, if any, capital invested in the product, could more easily accommodate the distribution of the substituted goods than could the manufacturer.²⁵⁹ The manufacturer would also be more able to curtail future accidents caused by the distribution of defective products simply because it would have greater access to determining the cause of the defect and greater skill in developing a remedy. Therefore, the manufacturer should and presumably would be attributed most, if not all, of the fault/responsibility under the first factor.

b. Risk allocation

The second factor that could serve as a standard for the allocation of fault in a strict products liability situation is risk allocation. Those engaged in the enterprise of product distribution are to a certain extent capable of spreading the losses incurred from defective products of the few among the many who purchase the products.²⁶⁰ This inquiry should focus primarily on which party should, based upon its role in the chain of distribution, bear the greater share of the burden of risk allocation. Again, this calls upon the intuition of the observer, but it is at least based upon an articulated standard. The danger in the application of this factor is that the trier of fact may erroneously look primarily to the deep pocket defendant to bear the greater share of the burden of risk spreading because it is better able to reallocate such losses.²⁶¹ The manufacturer deals in much larger quantities of

258. That is, justifiable in the opinion of this author based upon the policy goals of strict products liability.

259. Granted, the retailer could and probably would lose a certain amount of business and consequently profits due to bad publicity, etc., as a result of selling the defective product. But the retailer, because of its diversification, could more easily adjust to the change than could a manufacturer.

260. See *supra* notes 243-44 and accompanying text.

261. This may be what juries end up doing anyway. This does not mean, however,

the particular product and would thus be in a better position to distribute the loss caused by the product among the many purchasers.²⁶² It would be pure speculation to predict what the outcome of such apportionment would be, but if the trier of fact agreed with Justice Traynor and this author, the manufacturer would again be apportioned most if not all of the fault/responsibility under the risk spreading factor.

c. Difficulty of proof

The difficulty of proof is the third factor that could be considered an applicable standard in apportioning relative fault/responsibility in strict products liability actions. This factor does not as easily lend itself to quantifiable analysis, but nevertheless should be contemplated. In light of the policy concerns underlying this factor,²⁶³ the inquiry should probably focus on which of the parties is most benefited by and responsible for the problems in proof. At first blush, one would think that both the retailer and the manufacturer would be equally benefitted by the problems in proof, because if the plaintiff cannot prove her case then neither is liable. However, this may not necessarily be true. For example, if the product is found to have a design defect, then the whole product line would likely be deemed unmerchantable.²⁶⁴ As a result, the retailer would lose the opportunity to sell the products in its inventory, but the manufacturer would lose the opportunity to sell not only what is in its inventory, but also the expectancy income from future production and sales.²⁶⁵ The manufacturer should undoubtedly bear more responsibility for the problems of proof because it is presumably in possession of the relevant documents,²⁶⁶ has access to key employees who may have information regarding the defect and any other relevant information essential to proving or disproving the plaintiff's case. The retailer, on the other hand, would be unlikely to have much information tend-

that the system is flawed merely because the mode of implementation chooses to ignore its mandates.

262. This is generally true, unless the retailer is the exclusive dealer of the manufacturer's product.

263. See *supra* notes 245-46 and accompanying text.

264. See U.C.C. § 2-314.

265. Presumably the retailer's inventory would be much smaller than the manufacturer's; however, exceptions will inevitably exist. The retailer would also lose expectancy income, but could probably more easily replace it with substitute goods than could a manufacturer.

266. For example, blueprints, records of calls placed or received regarding the defect, employee timesheets, and whatever other documents that may be relevant.

ing to prove or disprove the existence of a defect in the product that would not be readily discoverable by the plaintiff. Therefore, applying the third policy factor behind strict products liability, the great majority of the fault/responsibility would again rest on the manufacturer. Application of the above three factors would most likely result in the manufacturer being apportioned virtually all of the fault/responsibility for placing the defective product into the chain of distribution—an intuitively just result.

The above proposed analysis is at best shaky,²⁶⁷ and when presented to a jury would likely be unworkable. Instructing a jury composed of laypeople with little or no experience in law would present serious communication problems. Complex and confusing instructions would often be misunderstood, misapplied, or simply ignored. A jury would probably fall back on what the proposed three-factor test sought to eliminate: the jury's intuition and basic sense of fairness. Fortunately, a form jury instruction has already been drafted and incorporated into the Book of Approved Jury Instructions (BAJI) that could easily be applied to this situation.

d. BAJI 16.12

The BAJI Committee, as a result of the enactment of Proposition 51, was forced to make numerous alterations and one addition to the approved instructions in order to reflect the statute's changes.²⁶⁸ Number 16.12 is particularly relevant to the hypothetical case.²⁶⁹ Entitled "PRODUCTS LIABILITY—COMPARATIVE FAULT AND COMPARATIVE IMPLIED INDEMNITY BETWEEN DEFENDANTS—SPECIAL VERDICT FORM," the instruction appears to sanction apportionment of fault among all defendants in a strict products liability actions. Questions one through seven establish whether the product was defective and, if so, whose actions were the cause.²⁷⁰ Question eight then asks the jury to decide what percentage of the comparative fault is attributable to the defendant[s] and all other persons.²⁷¹ This is consistent with the court of appeal decision in *Mills v. MMM Carpets, Inc.*²⁷² apportioning fault among all respon-

267. Many other problems arise in the implementation of such a standard. For example, establishing the relevance to the plaintiff's case of the collateral issues that would have to be resolved between the manufacturer and retailer. The trial would be substantially lengthened to accommodate the additional testimony and proof.

268. B. WITKIN, SUMMARY OF CALIFORNIA LAW TORTS § 53 (9th ed. 1988). Thirty existing instructions were revised and one was added: No. 14.76, defining economic and noneconomic damages.

269. BAJI, No. 16.12 (7th ed. 1986 and Supp. 1992).

270. *Id.*

271. *Id.*

272. 1 Cal. Rptr. 2d 813 (Cal. Ct. App. 1991). See *infra* at notes 277-90 and accompanying text.

sible parties, not just those at trial. It also seems consistent with the apportionment of fault between the retailer and the manufacturer of a defective product. However, question eight sets forth no standard by which to compare the relative fault of the plaintiffs and defendants; it merely asks the jury to do so. The standard applied by the jury will, therefore, inevitably be intuitive.

The uncertainty regarding applicability of the instruction is further apparent in the language of the USE NOTE following the instruction, which states, "This form of Special Verdict is designed only for use in cases involving defective products strict liability with comparative fault and claims of comparative implied indemnity."²⁷³ The language of the instruction presupposes that principles of comparative fault apply to the underlying case.²⁷⁴ However, since *Far West* abolished total implied indemnity,²⁷⁵ all indemnity claims are presumably now determined on an equitable comparative basis.

In summary, theoretical standards may be developed to justify applying principles of comparative fault to entities in the chain of distribution. These standards could be derived from the factors used to justify the doctrine of strict products liability set forth by Judge Traynor in *Escola*. However, practical concerns suggest that the only workable solution would be to apply principles of comparative fault to the chain of distribution cases based solely on the jury's intuition and sense of fairness. BAJI 16.12 provides the means by which this could be accomplished. Therefore, in keeping with *Li's* liberal construction principles²⁷⁶ and in light of supreme court dicta indicating its apparent approval, lower courts could and probably should apply principles of comparative fault to strict products liability chain of distribution cases.

11. Who Are Defendants?

The related issue of who are "defendants" for purposes of Proposition 51 analysis also needs to be addressed. Should the jury be instructed to apportion fault between only those parties present at trial, or should the jury take into account all culpable parties both present and absent? Very recently a California appellate court con-

273. BAJI, No. 16.12. Conspicuously absent from the USE NOTE are customary citations to cases in which the instruction has been given or referred to.

274. BAJI, No. 16.12, question eight.

275. See *supra* note 181 and accompanying text.

276. See *supra* note 104 and accompanying text.

fronted this very question.²⁷⁷

In *Mills v. MMM Carpets*, the plaintiff was injured when the heel of her shoe punctured a section of carpet that had been placed over an uncovered utility hole.²⁷⁸ The plaintiff subsequently sued the building manager, the carpet installer (MMM), and the building owners.²⁷⁹ The plaintiff also recovered from her employer in a workers' compensation claim.²⁸⁰ The defendants sought an apportionment of fault under Proposition 51 in an attempt to reduce their liability in proportion with the employer's relative fault.²⁸¹ The trial court ruled *in limine* that the jury would be allowed to apportion relative fault between all parties, but only for purposes of the employer's action against the named defendants for indemnity.²⁸² Therefore, the percentage of fault attributable to the employer could not be considered in determining the amount of noneconomic loss that the named defendants would have to pay.²⁸³ Following the trial, the jury returned a special verdict apportioning fault as follows: Sixty percent to the employer, thirty percent to MMM, and ten percent to the building manager.²⁸⁴ The trial court, in accordance with its pre-trial ruling, excluded the employer's fault and assigned seventy-five percent of the liability for noneconomic loss to MMM and twenty-five percent to the building manager.²⁸⁵ MMM appealed the judgment.

On appeal, the court quoted nearly three pages of *Evangelatos* setting forth the background and development of Proposition 51 and ul-

277. *Mills v. MMM Carpets, Inc.*, 1 Cal. Rptr. 2d 813 (Cal. Ct. App. 1991). For a discussion that preceded *Mills* of how "defendant" should be construed for purposes of Proposition 51, see Barbara A. Allen, Stacy Allen and Susan R. Swift, *California's Proposition 51: Ambiguities in Apportionment and the Impact of Federal Interpleader and Intra-State Settlement*, 12 WHITTIER L. REV. 273, (1991). Allen argues that CAL. CIV. CODE § 1431.2 should be amended to ensure that the responsibility of all tortfeasors, not just those present at trial, should be considered when apportioning fault. *Id.* In the alternative she suggests that the courts should interpret the statute to accomplish such a result. *Id.* The court in *Mills* adopted the latter alternative. After this paper was written, the Supreme Court of California in *DaFonte v. Upright*, 828 P.2d 140 (1992), substantially affirmed the holding in *Mills*. The court held that "section 1431.2 plainly limits a defendant's share of noneconomic damages to his or her own proportionate share of comparative fault." *Id.* at 147. For an in-depth discussion of *DaFonte*, see David C. Wright, California Supreme Court Survey, *DaFonte v. Upright*, 20 PEPP. L. REV. (forthcoming 1992).

278. *Mills*, 1 Cal. Rptr. 2d at 814.

279. *Id.*

280. *Id.*

281. *Id.* at 814-15.

282. *Id.* at 815.

283. *Id.*

284. *Id.*

285. *Id.* These figures were arrived at by adding MMM's 30% of the fault and the building manager's 10% of the fault to get 40% of the total fault that was present at the trial. *Id.* Then, by dividing MMM's 30% by the total 40%, the 75% figure was reached. *Id.* Similarly, the building manager's 10% was divided by 40% to get its 25% allotment. *Id.*

timately concluded that apportionment of liability for purposes of Proposition 51 "must take into account the fault of *all* tortfeasors, whether or not they are named as defendants, subject to liability for damages, or capable of responding in damages."²⁸⁶ The court reasoned that it would be bound to give effect to the ordinary language used in the statute.²⁸⁷ The court then concluded that the statute's phrase "defendant's percentage of fault," when examined in context does not vary in relation to the absence or presence of other responsible parties.²⁸⁸ Rather, the statutory language suggests comparison with the fault of the entire field of tortfeasors.²⁸⁹ Therefore, the appellate court reversed the trial court's decision and directed the trial court to enter judgment in accordance with the jury's original finding of thirty percent liability against MMM.²⁹⁰

Applying the above holding to the hypothetical test case, the retailer would be entitled to an apportionment of fault based upon the jury's consideration of all culpable tortfeasors whether present or absent. Therefore, the insolvent manufacturer's relative culpability would be considered and apportioned along with the retailer's, thereby reducing the amount that the retailer would have to pay. This is really the only rational conclusion based on a faithful interpretation of the Proposition given an analysis of the third prong of the Proposition 51 test—the policy reasons for the adoption of the initiative.

D. Policy

Proposition 51 was a voter-enacted initiative adopted in attempt to remedy perceived injustices.²⁹¹ The statute itself details the dual underlying policy concerns that were sought to be redressed in its enactment. The first policy concern addresses the desire to protect both public and private defendants from the "inequity and injustice" that results from a strict application of joint and several liability through oppressive judgments that are based on the defendant's ability to pay.²⁹² The statute claims that often governmental and private de-

286. *Id.* at 814.

287. *Id.* at 816 (citing *California Teachers Ass'n v. San Diego Community College Dist.*, 621 P.2d 856 (Cal. 1981)) ("Courts are bound to give effect to statutes according to the usual ordinary import of the language used.").

288. *Id.* at 816-17.

289. *Id.* at 818.

290. *Id.*

291. See *supra* note 1 and accompanying text.

292. CAL. CIV. CODE § 1431.1(a) (West 1992).

defendants who are perceived to have deep pockets or substantial insurance coverage are included in lawsuits when there is little or no basis for finding them at fault.²⁹³ These inequitable judgments have threatened local governments, public agencies, and private individuals and businesses with bankruptcy.²⁹⁴ In order to remedy these inequities, the statute mandates that “defendants in tort actions shall be held financially liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable.”²⁹⁵ These changes were found to be necessary in order to “avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses.”²⁹⁶ Therefore, the first policy concern of preventing inequity and injustice to defendants would be fulfilled in cases in which the defendant is liable in direct proportion to his fault.

The second policy concern addressed by the statute was to remedy the increased burden placed on the consumer/taxpayer as a result of joint and several liability. The judgments against the governments, agencies, private individuals and entities were being borne by the consumer/taxpayer in the form of higher prices for goods and services and higher taxes.²⁹⁷ The consumer/taxpayer was further burdened by the curtailment of police, fire, and other protections “because of the soaring costs of lawsuits and insurance premiums.”²⁹⁸ Therefore, the second policy concern would be fulfilled in cases in which the financial burden of large, otherwise unsatisfied judgments does not fall on the consumer/taxpayer.

California voters were forced to balance these dual policy concerns against the policy concerns that were the basis for joint and several liability.²⁹⁹ As their votes demonstrate, the voters ultimately concluded that the injustice to minimally blameworthy entities and the increased economic burden on the consumer/taxpayer outweighed the interests in fully compensating the injured plaintiff.

1. Analysis

In order for the hypothetical case to pass the third prong of the Proposition 51 test, its application must fulfill the policy concerns underlying its enactment. The first policy concern is for equity and justice to defendants. Retailers do not actively produce a defective product, but merely act as a conduit connecting the manufacturer

293. *Id.* at § 1431.1(b).

294. *Id.* at § 1431.1(a).

295. *Id.* at § 1431.1(c).

296. *Id.*

297. *Id.* at § 1431.1(a) (West 1992).

298. *Id.* at § 1431.1(c).

299. *See supra* at notes 79-91 and accompanying text.

with the consumer. Thus, there is arguably "little or no basis for finding them at fault."³⁰⁰ The only basis for including retailers in the action is under a "no fault" strict liability theory, based upon policy reasons which the voters explicitly rejected by enacting Proposition 51.³⁰¹ Both small and large retailers with large product liability awards against them could easily be faced with increased financial hardships or even bankruptcy if forced to pay the entire judgment due to the insolvency of the manufacturer.³⁰² Equity, therefore, demands that juries be instructed to apportion fault on a comparative fault basis at trial, in accordance with BAJI 16.12.³⁰³ Therefore, the first policy concern would be fulfilled by applying Proposition 51 to the hypothetical case.

The second policy concern underlying Proposition 51 is the increased financial burden that consumers are no longer willing to bear. The effect of imposing joint and several liability on retailers is simply illustrated in the attached graph.³⁰⁴ Large judgments against retailers shift the supply curve up and to the left from S to S1. A new equilibrium point is established at E1. At E1, fewer goods are sold at a higher price, yielding fewer profits to the corporation. As a direct result, fewer consumers will be able to purchase the product and will have to buy it at a higher price. Moreover, as a direct result of fewer goods being purchased, fewer goods will be manufactured, thereby creating an adverse effect on the job market and reducing the demand upon suppliers for raw materials. Further, stock prices will decline as will dividend yield to stockholders. Therefore, the consumer/taxpayer and the economy as a whole is forced to bear the burden of compensating individual plaintiffs. These negative effects are precisely those which the proponents of Proposition 51 sought to avoid.

Reasonable people may disagree as to the most efficient and fair way to allocate damages among plaintiffs and defendants. Scholars and laypersons alike may debate the motives and integrity of those who sponsored and advocated adoption of the statute. This, however, is not the duty of the courts. The voters unequivocally chose the defendants (and ultimately themselves), over the plaintiffs. Simply

300. CAL. CIV. CODE § 1431.1(b) (West 1992).

301. *Id.*

302. That is, if they do not have adequate insurance coverage or are self-insured. But even if they do have adequate coverage, premiums will rise or the retailer may become no longer insurable.

303. *See supra* notes 268-76 and accompanying text.

304. *See* appendix A.

stated, apportionment of fault between a strictly liable retailer and an absent manufacturer fulfills the dual policy concerns enunciated in the statute. Therefore, the third prong of the proposed test is satisfied.

IV. OTHER STATES

While the precise language of Proposition 51 is exclusive to California, other states have enacted similar statutes to curtail the application of joint and several liability. During 1986 and 1987, approximately half of the states enacted legislation reforming joint and several liability to combat the insurance crisis and the perceived unfairness of joint and several liability.³⁰⁵ Some jurisdictions went as far as to totally abolish joint and several liability, while others only slightly changed its effects.³⁰⁶ One commentator classified the states' reforms into six categories:³⁰⁷

1. Modification of joint and several liability by providing for the reallocation of loss among remaining parties to the litigation, including the plaintiff in some cases;³⁰⁸

2. elimination of joint and several liability but preserving it for certain types of actions, such as products liability or environmental tort actions;³⁰⁹

3. elimination of joint and several liability, but only for certain types of losses;³¹⁰

4. elimination of joint and several liability only for losses under a specified amount;³¹¹

5. elimination of joint and several liability for defendants who are under a certain percentage of fault;³¹² and

6. elimination of joint and several liability only where the plaintiff is at fault or is more at fault than the defendant.³¹³

The above categories are not mutually exclusive.

Of the states that limit application of their statutes to certain types

305. See Mike Steenson, *Recent Legislative Responses to the Rule of Joint and Several Liability*, XXIII TEX. INT'L L.J. 482 (1988); James J. Scheske, *The Reform of Joint and Several Liability Theory: A Survey of State Approaches*, 54 J. AIR L. & COM. 627 (Winter 1988).

306. Steenson, *supra* note 305, at 485.

307. *Id.*

308. Compare MINN. STAT. ANN. § 604.02 (1992) (includes plaintiff in reallocation) with 1987 Conn. Pub. Acts 87-227, § 3(d) (excludes plaintiff in reallocation).

309. See, e.g., HAW. S.B. No. S-86 § 17(2)(B)-(E).

310. See, e.g., CAL. CIV. CODE § 1431.2 (West Supp. 1991); N.Y. CIV. PRAC. L. & R. 1601 (McKinney Supp. 1987).

311. See, e.g., FLA. STAT. ANN. § 768.81 (West Supp. 1992) (preserves joint and several liability for damages that do not exceed \$25,000).

312. See, e.g., IOWA CODE ANN. § 668.4 (West 1992) (parties who are under 50% at fault are only severally liable).

313. See, e.g., MINN. STAT. ANN. § 604.02 (1992).

of actions, there is disagreement in the area of strict products liability.³¹⁴ Some state statutes expressly preserve joint and several liability for strict products liability actions,³¹⁵ while others explicitly limit the application of joint and several liability in such claims.³¹⁶ Because Proposition 51 is silent regarding its application to strict products liability stream of commerce claims against a retailer, it is, therefore, prudent to consider the relevant views of sister states.

In cases arising from the manufacture, sale, or use of a product, Minnesota's statute expressly reallocates any uncollectible amount from any entity in the chain of distribution to all other persons in the chain of distribution.³¹⁷ Those parties to the suit not in the chain of distribution are not included in the reallocation.³¹⁸ Thus, joint and several liability is preserved only for parties in the chain of distribution, and the retailer in the hypothetical case would not be entitled to an apportionment of fault.

New York's limitations of joint and several liability are similar to those of Minnesota. Although New York limits the application of joint and several liability to economic loss,³¹⁹ its statute explicitly excludes from the apportionment any tortfeasor who is beyond the jurisdiction of the state.³²⁰ The relative fault of a manufacturer who was beyond the reach of the court's jurisdiction would not be consid-

314. Compare HAW. S.B. No. S-86 § 17(2)(B)-(E) with FLA. STAT. ANN. § 768.81 (West Supp. 1992).

315. See, e.g., HAW. S.B. No. S-86 § 17(2)(B)-(E).

316. See, e.g., FLA. STAT. ANN. § 768.81 (West Supp. 1992).

317. MINN. STAT. ANN. § 604.02 (1992). The statute states in relevant part:

Subd. 2. Upon motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

Subd. 3. In the case of a claim arising from the manufacture, sale, use or consumption of a product, and amount uncollectible from any person in the chain of manufacture and distribution shall be reallocated among all other persons in the chain of manufacture and distribution but not among the claimant or others at fault who are not in the chain of manufacture or distribution of the product. Provided, however, that a person whose fault is less than that of a claimant is liable to the claimant only for that portion of the judgment which represents the percentage of fault attributable to the person whose fault is less.

Id.

318. They would, however, be included in the reallocation if all of the parties in the chain of distribution proved to be insolvent. *Id.*

319. See *supra* note 12 and accompanying text.

320. N.Y. CIV. PRAC. L. & R. 1601 (McKinney Supp. 1987).

ered in determining the percentage of fault attributable to the retailer.³²¹ Therefore, the retailer would be jointly and severally liable for the plaintiff's damages unless he could show that the court had jurisdiction over the insolvent manufacturer.

The general rule in these states is that joint and several liability was abrogated. Numerous exceptions to the general rule were then articulated. The inclusion of these exceptions leads to the logical conclusion that without such exceptions, abrogation of joint and several liability would have applied. In other words, since the statutes were not applied to stream of commerce cases in which the manufacturer is not present pursuant to legislative exclusions, absent those exclusions, the statutes would presumably have applied. Proposition 51, on the other hand, is silent regarding the treatment of entities in the chain of distribution.³²² Therefore, since stream of commerce cases in which the manufacturer is not present are not expressly excluded from its application, they should be presumed to be included. In fact, Proposition 51 was recently interpreted to include all tortfeasors who contributed to the injury when apportioning fault, not just those who are within the jurisdiction of the court.³²³

Other states have statutes that operate similar to California's. The comparable statute in Texas is quite complex.³²⁴ A claimant suing a retailer for products liability grounded in negligence can only recover if her percentage of responsibility is less than fifty percent.³²⁵ However, if the claimant is suing a retailer based on strict products liability, then she can recover if her percentage of responsibility is less than sixty percent.³²⁶ If the claimant's suit is not barred by the previously mentioned section, the court then reduces her recovery by

321. N.Y. CIV. PRAC. L. & R. 1602 (10) (McKinney Supp. 1987). The Practice Commentary for Rule 1602 (10) concludes that the ambiguity in this section makes it a "mine field of potential problems." *Id.*

322. *See supra* note 1.

323. *Mills v. MMM Carpets, Inc.*, 1 Cal. Rptr. 2d 813 (Cal. Ct. App. 1991). *See supra* notes 277-90 and accompanying text.

324. TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (West Supp. 1992). The statute reads in relevant part:

(a) In an action to recover damages for negligence resulting in personal injury, property damage, or death or an action for products liability grounded in negligence, a claimant may recover damages only if his percentage of responsibility is less than or equal to 50 percent.

(b) In an action to recover damages for personal injury, property damage, or death in which at least one defendant is found liable on the basis of strict tort liability, strict products liability, or breach of warranty . . . , a claimant may recover damages only if his percentage of responsibility is less than 60 percent.

Id.

325. *Id.* at § 33.001(a).

326. *Id.* at § 33.001(b). No reason is provided for the distinction in the relevant percentages.

the percentage equal to her responsibility.³²⁷ A defendant is then liable to the claimant only for his percentage of responsibility determined by the trier of fact.³²⁸ However, if the defendant's responsibility is greater than twenty percent,³²⁹ or if no responsibility may be attributed to the claimant and the defendant's responsibility is greater than ten percent, then the defendant is jointly and severally liable for the damages recoverable by the claimant.³³⁰ Therefore, under the Texas statute, the trier of fact would determine whether joint and several liability was abrogated in the hypothetical scenario through its apportionment of fault. Thus, if the retailer were found less than twenty percent responsible, *or* if the claimant were found zero percent responsible *and* the retailer was found to be less than ten percent responsible, then the retailer would be only severally liable to the claimant.

Florida's statute abrogating joint and several liability³³¹ applies

327. *Id.* at § 33.012(a).

328. *Id.* at § 33.013. The statute provides in pertinent part:

(a) Except as provided in Subsections (b) and (c), a liable defendant is liable to a claimant only for the percentage of the damages found by a trier of fact equal to that defendant's percentage of responsibility with respect to the personal injury, property damage, death, or other harm for which the damages are allowed.

(b) Notwithstanding Subsection (a), each liable defendant is, in addition to his liability under Subsection (a), jointly and severally liable for the damages recoverable by the claimant under Section 33.012 with respect to a cause of action if:

(1) the percentage of responsibility attributed to the defendant is greater than 20 percent

Id.

329. *Id.* at 33.013(b)(1).

330. *Id.* at § 33.013(c)(1). For the damages that are recoverable, *see Id.* at § 33.012.

331. FLA. STAT. ANN. § 768.81 (West Supp. 1992). The statute provides in relevant part:

(3) Apportionment of damages.—In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.

(4) Applicability.—

(a) This section applies to negligence cases. For purposes of this section, 'negligence cases' includes, but is not limited to, civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories. In determining whether a case falls within the term 'negligence cases,' the court shall look to the substance of the action and not the conclusory terms used by the parties. . . .

(5) Applicability of joint and several liability.—Notwithstanding the provi-

only to negligence cases.³³² However, for purposes of that section, "negligence cases" include actions based on strict liability and products liability.³³³ The statute abrogates joint and several liability except with regard to a particular defendant whose percentage of fault exceeds the plaintiff's percentage of fault.³³⁴ In such a case, the defendant is jointly and severally liable for only the plaintiff's economic damages.³³⁵ Joint and several liability also still applies to all actions in which the damages are less than \$25,000.³³⁶ Therefore, under the Florida statute, the trier of fact would also decide whether the retailer was jointly and severally liable through its apportionment of fault. Thus, if the retailer's percentage of fault were found to be less than the plaintiff's *and* if the total damages were less than \$25,000, then the retailer would not be jointly and severally liable. Even if the retailer were found to be more at fault than the plaintiff, then joint and several liability would attach only to the plaintiff's economic damages. Reliance on the statutes of other states is, therefore, inconclusive at best.

Proposition 51 has been in effect for more than six years. Thus, ordinarily one could argue that the legislature has had ample opportunity to modify or clarify its breadth if they so intended. However, since the initiative was enacted by the people, the state legislature may be hesitant to constrict or expand the application of Proposition 51. Further, since the statute was interpreted to be nonretroactive, many of the difficult borderline cases may not have reached the courts of appeal yet, thereby leaving important issues unresolved. Therefore, potential litigants and counsel have little guidance for interpreting the statute, aside from its original language and underlying policy concerns.

V. IMPACT

If Proposition 51 is found to apply to strict products liability cases involving a retailer and an insolvent manufacturer, more questions might be created than are answered. For example, a manufacturer would then logically be entitled to apportion those damages caused by a defective product between itself and the retailer *even when it*

sions of this section, the doctrine of joint and several liability applies to all actions in which the total amount of the damages does not exceed \$25,000.

Id.

332. *Id.* at § 768.81(4)(a).

333. *Id.*

334. *Id.* at § 768.81(3).

335. *Id.* For a definition of economic damages under Florida law, see *id.* at § 768.81(5).

336. *Id.* at § 768.81(5).

was solvent.³³⁷ The effect of the initiative would then be exactly opposite of what was intended, financially burdening those who were least responsible—the retailers. This, of course, presupposes that a jury attributes some portion of fault to the retailer even when the manufacturer is solvent—an unlikely result. On the other hand, jury trials are at best unpredictable, and stranger things have happened.³³⁸

A possible solution to the above problem would be for the retailer to enter into an express indemnity contract with the manufacturers. This, of course, assumes that the retailer has the requisite bargaining power to demand such a contract from the manufacturer, which is often not the case.³³⁹ Undoubtedly, such a process would also be prohibitively expensive and time-consuming. Therefore, express contractual indemnity would probably be unworkable.

Another potential concern would be the effect on other derivative or vicarious liability situations. Particularly troublesome is the potential impact on employer vicarious liability for tortious acts committed by an employee within the course and scope of employment. The active tortfeasor in such a situation is the employee, while the vicariously liable party is the employer. Allowing an apportionment of fault under Proposition 51 in this situation could, and likely would, substantially diminish the plaintiff's recovery. True, the plaintiff would be able to recover all of her economic damages from the deep-pocketed employer, but the amount of noneconomic damages would be determined solely by the jury's apportionment of fault. At first glance, this result may appear to be a harsh and unacceptable interpretation of the statute, but is it? The purpose of the statute was to substantially reduce the perceived inequities resulting from the application of joint and several liability to defendants who are minimally at fault.³⁴⁰ If Proposition 51 applies to the hypothetical retailer, then the only rational conclusion based upon a faithful interpretation of the statute would be that it should also apply to a vicariously liable

337. However, this would not fulfill the third prong of the proposed test because it would not fulfill the policies underlying the statute.

338. In one case, the jury apportioned 10% of the fault for an auto accident to a squirrel who crossed the road at an inopportune moment. Accordingly, the plaintiff's recovery was reduced by 10%! See Sandra Calin, *Multiple Tortfeasors: Proposition 51, the "Fair Responsibility Act of 1986,"* 21 BEVERLY HILLS BAR J. 26, 29 (Winter 1987).

339. "Absent an express indemnity agreement, a manufacturer is not obligated to defend parties in its chain of distribution whenever the manufacturer is potentially liable for a defective product." *Davis v. Air Tech. Indus., Inc.*, 582 P.2d 1010, 1013 n.6 (Cal. 1978).

340. See *supra* note 1 and accompanying text.

employer. The liability of both is based only on their relationship with the party actively at fault. The above analysis of the application of joint and several liability,³⁴¹ comparative fault principles,³⁴² and the policy concerns underlying the adoption of Proposition 51³⁴³ would likely apply, thereby allowing a vicariously liable employer to pass the three-prong test and invoke the statute.³⁴⁴ The ultimate result would be more plaintiffs recovering less in damages from deep pocket defendants who were minimally responsible for the damages, thus reducing the ultimate financial burden on the consumer—precisely the articulated purpose of the statute.³⁴⁵

VI. CONCLUSION

It would be an understatement to say that California courts face a difficult quandary when determining the extent of the application of Proposition 51. The express language of the initiative enacted by the citizens of California stands in direct contrast with years of common law precedent. The Supreme Court of California has decided that the statute passes constitutional muster. Therefore, it should be faithfully applied to fulfill its goals.

The simple three-prong test proposed by this Comment can be easily applied to a given fact situation in order to ascertain the applicability of Proposition 51. First, the court should determine whether the action is one in which common law joint and several liability would apply. Second, the court should determine whether the action is one for personal injury, property damage, or wrongful death based upon principles of comparative fault. Third, the court should determine if the application would fulfill the policy concerns underlying the statute's enactment. If all three prongs are satisfied, then the court should vigorously apply the statute.

An application of this three-prong test to the hypothetical fact scenario reveals that a retailer who is strictly liable in tort probably should be allowed to have its fault apportioned under the statute when the manufacturer of the product is insolvent. First, California courts have explicitly stated that retailers are jointly and severally liable for the distribution of defective products. An application of the policy concerns underlying joint and several liability further validates such a finding.

Second, whether the retailer's liability is derivative or direct, the California Supreme Court strongly implies that principles of compar-

341. See *supra* notes 68-91 and accompanying text.

342. See *supra* notes 92-290 and accompanying text.

343. See *supra* notes 291-304 and accompanying text.

344. See *supra* notes 62-66 and accompanying text.

345. See *supra* note 1 and accompanying text.

ative fault apply to chain of distribution cases. A possible standard by which to apportion fault can be developed by applying the factors that serve as the basis for strict liability in tort. The first factor to consider is the policy of accident prevention accomplished through the reduction of defective products that reach the consumers. The second factor that could be used is the policy of risk allocation. The third and most challenging factor to apply is the difficulty of proof. Practically speaking, however, BAJI 16.12 is better suited for purposes of a jury trial, and should probably be applied instead of, or in conjunction with, the strict liability factors.

Third, the dual policy concerns sought to be achieved through Proposition 51 would be accomplished in applying the statute to chain of distribution cases. A defendant (the retailer in this case) would be held liable in closer proportion to his fault, thereby achieving a more equitable result. Furthermore, the consumer/taxpayer would not bear the additional financial burden caused by joint and several liability in the form of higher taxes and higher prices for consumer goods.

Proposition 51, born only in 1986, is still in its infant stages. As the passage of time brings more opportunities for challenges by litigants and closer scrutiny by the courts, its broad and indefinite language must inevitably be bounded by judicial decisions. If adopted, the aforementioned test could serve to ease the growing pains of the statute, but by no means does it answer all questions or address all issues created by Proposition 51 that are sure to arise in the near future.

JAMES A. GASH

APPENDIX A

