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A CRITICISM OF JUDICIALLY ADOPTED COMPARATIVE PARTIAL INDEMNITY AS A MEANS OF CIRCUMVENTING PRO RATA CONTRIBUTION STATUTES

MICHAEL A. HUMMERT

THE ADVENT of comparative negligence¹ in most American jurisdictions has created new problems with traditional methods of allocating tort loss among multiple defendants, namely contribution and indemnity.² Many state

¹ Under a comparative negligence system, the contributory negligence of the person seeking recovery for injury to his person or property does not bar his recovery in an action for negligence; however, the damages awarded to such person are diminished in proportion to the percentage of negligence attributed to him. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 829, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975). Contributory negligence is defined as "conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm." RESTATEMENT (SECOND) OF TORTS § 463 (1965).

Under the traditional contributory negligence rule, "[e]xcept where the defendant has the last clear chance, the plaintiff's contributory negligence bars recovery against a defendant whose negligent conduct would otherwise make him liable to the plaintiff for the harm sustained by him." RESTATEMENT (SECOND) OF TORTS § 467 (1965).

² Traditionally, the distinction between contribution and indemnity was stated as follows: "Indemnity seeks to transfer the *entire* loss imposed upon one tortfeasor to another who in justice and equity should bear it. Contribution distributes the loss *equally* among all tortfeasors, each bearing his pro rata share." *Herrero v. Atkinson*, 227 Cal. App. 2d 69, 73, 38 Cal. Rptr. 490, 492 (1964) (emphasis added).

The advent of comparative negligence created new problems with traditional methods of allocating tort loss because the relevant percentages of fault of the multiple tortfeasors played no part in the allocation of the loss under those traditional methods. If the court ruled that indemnity applied, the loss was completely shifted from one tortfeasor to another. On the other hand, if the court ruled that contribution applied, each tortfeasor's share was determined by dividing the judgment by the number of responsible tortfeasors subject to the judgment. The traditional methods of allocating tort loss were mechanical and often had little relation to the negligence

legislatures have responded to this problem by enacting contribution statutes providing for pro rata contribution among multiple defendants in negligence cases.³ During the last decade, and particularly in the last four years, several state supreme courts have judicially adopted the doctrine of comparative partial indemnity⁴ because of the perceived inequities of applying pro rata contribution under a system of comparative negligence. A statutory system of pro rata contribution conflicts with the underlying purpose of a comparative negligence system in that a defendant's share of the loss is determined solely by the number of joint tortfeasors subject to the judgment and not by his percentage of fault as assessed by the jury.⁵ The courts of those states which have enacted pro rata

of the parties. See notes 6-60 *infra*. See generally Heft, *Spreading the Burden: The Better Way to Accomplish Contribution is by Comparative Negligence*, 22 FED'N INS. COUNSEL Q. 37 (1972); Comment, *Reconciling Comparative Negligence, Contribution and Joint and Several Liability*, 34 WASH. & LEE L. REV. 1159 (1977).

³ See, e.g., ALASKA STAT. §§ 09.16.010-.060 (1970) (quoted at note 172 *infra*); CAL. CIV. PROC. CODE §§ 875-77 (West Supp. 1980) (quoted at note 97 *infra*); MASS. ANN. LAWS ch. 231, §§ 1-4 (Michie/Law Co-op 1974); N.C. GEN. STAT. §§ 1B-1 to -6 (1969); N.D. CENT. CODE §§ 32-38-01 to -04 (1976); TENN. CODE ANN. §§ 23-3101 to -3106 (1976). All of these statutes, excluding the California statute, are patterned after the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1955 version) drafted by the American Law Institute. 12 UNIFORM LAWS ANN. 63 (1975).

Some jurisdictions have, however, adopted contribution statutes apportioning the loss based on the relative degree of fault of each defendant. See, e.g., ARK. STAT. ANN. § 34-1002(4) (1962); DEL. CODE ANN. tit. 10, § 6302(d) (1975); FLA. STAT. ANN. § 768.31(3)(a) (West Supp. 1977); HAWAII REV. STAT. § 663-12 (Supp. 1975); S.D. COMP. LAWS ANN. § 15-8-15 (1967); TEX. REV. CIV. STAT. ANN. art. 2212a, §§ 1, 2 (Vernon 1973); UTAH CODE ANN. § 78-27-40(2) (Supp. 1975). Most of these statutes are patterned after the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1939 version) which requires contribution in accordance with the relative degrees of fault of the tortfeasors. 9 UNIFORM LAWS ANN. 230 (1957).

⁴ American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978); Missouri Pac. R.R. Co. v. Whitehead & Kales Co., 566 S.W.2d 466 (Mo. 1978); Laubach v. Morgan, 588 P.2d 1071 (Okla. 1978). See notes 84-170 *infra* and accompanying text. The doctrine of comparative partial indemnity essentially provides for the apportionment of a loss among multiple tortfeasors based on their relative degrees of fault as assessed by the trier of fact. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 598, 578 P.2d 899, 912, 146 Cal. Rptr. 182, 195 (1978).

⁵ The purpose of a comparative negligence system is to develop "a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault." *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 813, 532 P.2d 1226, 1232, 119 Cal. Rptr. 858, 864 (1975). This purpose is obviously not achieved under a pro rata contribution system where a defendant's share of the loss is

contribution statutes, however, have no choice but to apply and interpret those statutes; they cannot simply ignore the statutes because they perceive that there is a better way to allocate tort loss among multiple defendants.

This comment will first examine the historical development of the parallel doctrines of contribution and indemnity, as well as basic principles of statutory construction. Second, it will examine the recent decisions adopting comparative partial indemnity. Finally, it will criticize those decisions as a means of judicially circumventing the contribution statutes in the respective states in which they were rendered.

DEVELOPMENT OF INDEMNITY AND CONTRIBUTION

At common law there existed no right to allocation or apportionment of damages among concurrent tortfeasors.⁶ The joinder of defendants⁷ was strictly limited to cases in which

determined solely by the number of responsible tortfeasors subject to the judgment. The comparative contribution system is the form of contribution most compatible with the system of comparative negligence, and it is not the purpose of this comment to criticize the theory behind the doctrine of comparative partial indemnity which attempts to allocate loss among multiple tortfeasors based on their relative degrees of fault.

⁶ *Merryweather v. Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799). Concurrent, or joint, tortfeasors are two or more persons who are liable to the same person for the same harm. Under the Restatement (Second) of Torts, it is not necessary that "joint tortfeasors" act in concert or in pursuance of a common design, nor is it necessary that they be joined as defendants. RESTATEMENT (SECOND) OF TORTS § 886A, Comment b (1979).

The common law rule prohibiting any allocation of tort loss among joint tortfeasors is generally attributed to the English case of *Merryweather v. Nixan*. See generally PROSSER, LAW OF TORTS § 50 (4th ed. 1971) [hereinafter referred to as PROSSER]; Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932) [hereinafter referred to as Leflar]. Some commentators have argued that the rule of *Merryweather v. Nixan* is actually the exception to the rule, and that the true common law rule was determined in *Battersey's Case*, Winch's Rep. 48 (C.P. 1623) that "among persons jointly liable the law implies an assumpsit either for indemnity or contribution and the exception is that no assumpsit, either express or implied, will be enforced among wilful tortfeasors or wrongdoers." Note, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan*, 12 HARV. L. REV. 176, 177 (1898). The case of *Merryweather v. Nixan* did in fact involve the deliberate and intentional acts of joint tortfeasors. 8 Term Rep. at 186, 101 Eng. Rep. at 1337.

⁷ Under the Restatement (Second) of Torts, an injured person may join in one action any number of tortfeasors where each of them is responsible for the entire amount of damages for which the action is brought. RESTATEMENT (SECOND) OF TORTS

each tortfeasor was said to be acting in concert with a common purpose to produce a single injury.⁸ The rule prohibiting contribution among such tortfeasors was based on the ground that since all of them were wrongdoers it would be inequitable to permit the parties who had intentionally caused an injury to use the courts to settle their differences.⁹ Thus, each tortfeasor was liable for the entire sum of the judgment, and the release of one joint tortfeasor from liability effected the release of all other joint tortfeasors as well.¹⁰

Over the years the term "joint tortfeasor" was expanded to include not only intentional wrongdoers, but also persons whose negligent conduct combined to cause damage.¹¹ Later courts seized upon the limitation that contribution was denied to intentional tortfeasors, however, and applied the rule only when the defendant/tortfeasor seeking contribution was a wilful and conscious wrongdoer.¹² The accepted English view came to be that contribution was not denied in cases of mere vicarious liability, negligence, accident, mistake, or other unintentional breaches of the law.¹³

The great majority of American courts, however, refused to permit contribution even when the acts of negligent tortfeasors, although acting concurrently and independently, resulted in a single injury to the plaintiff.¹⁴ The courts allowed

§ 882 (1979). The joinder of parties is today largely governed by statutes or rules of court as a procedural matter. The earliest common law rule, however, refused to permit joinder of any defendants except those who had acted in concert to produce an injury because in theory there was a mutual agency and the act of one defendant became the act of all. RESTATEMENT (SECOND) OF TORTS § 882, Comment a (1979).

⁸ See Sir John Heydon's Case, 11 Co. Rep. 5, 77 Eng. Rep. 1150 (1613); PROSSER, *supra* note 6, at 305. See note 7 *supra*.

⁹ See *Everet v. Williams*, 9 L.Q. Rev. 197 (Ex. 1725) (commonly known as the Highwayman's Case); PROSSER, *supra* note 6, at 305.

¹⁰ PROSSER, *supra* note 6, at 301.

¹¹ V. SCHWARTZ, COMPARATIVE NEGLIGENCE 252 (1974).

¹² See *Adamson v. Jarvis*, 4 Bing. 66, 130 Eng. Rep. 693 (1827); PROSSER, *supra* note 6, at 306.

¹³ See, e.g., *Hillen v. I.C.I.*, 1 K.B. 455 (1934); *Burrows v. Rhodes*, 1 Q.B. 816 (1890). See PROSSER, *supra* note 6, at 306. See generally SALMOND, LAW OF TORTS 86 (8th ed. 1934).

¹⁴ See, e.g., *Union Stock Yards Co. v. Chicago, B. & Q. R.R. Co.*, 196 U.S. 217 (1905); *Rieinger v. Ashton Co.*, 9 Ariz. App. 406, 453 P.2d 235 (1969); *National Trailer Convoy, Inc. v. Oklahoma Turnpike Auth.* 434 P.2d 238 (Okla. 1967).

the plaintiff to choose the party against whom he desired to recover and did not allow that defendant to receive any reimbursement from the other wrongdoer, reasoning that it was not the duty of the courts to come to the aid of a wrongdoer.¹⁵ This rule caused many jurisdictions in the United States, either statutorily¹⁶ or judicially,¹⁷ to relax the rule against contribution and permit recovery by one tortfeasor from another for a portion of the common liability so long as the party seeking partial recoupment had not been guilty of conduct characterized as an intentional wrong.¹⁸

Statutes which allow a right of contribution can be classified into two groups. The majority of states which have allowed contribution have adopted the rule that equity is equality and thus determine each party's pro rata share by dividing the total judgment by the number of responsible tortfeasors subject to the judgment.¹⁹ A minority of states, though, have adopted the rule of comparative contribution which distributes each tortfeasor's proportionate share of the judgment debt according to his relative degree of fault.²⁰

Of the states that have adopted contribution by statute, however, most place procedural limitations on its use. First, the right to contribution does not arise unless a joint judgment has been rendered against all tortfeasors from whom contribution is sought.²¹ Second, the tortfeasor seeking contri-

¹⁵ See, e.g., *Avery v. Central Bank*, 221 Mo. 71, 119 S.W. 1106 (1909); *Thweatt's Adm'r v. Jones*, 1 Rand. 328 (Va. 1823). See *Leflar*, *supra* note 6, at 131-32.

¹⁶ See note 3 *supra*.

¹⁷ See, e.g., *Knell v. Feltman*, 85 App. D.C. 22, 174 F.2d 662 (1949); *Huggins v. Graves*, 210 F. Supp. 98 (E.D. Tenn. 1962); *Hawkeye-Security Ins. Co. v. Lowe Const. Co.*, 251 Iowa 27, 99 N.W.2d 421 (1959); *Bedell v. Reagan*, 159 Me. 292, 192 A.2d 24 (1963); *Skaja v. Andrews Hotel Co.*, 281 Minn. 417, 161 N.W.2d 657 (1968).

¹⁸ See, e.g., *Turner v. Kirkwood*, 49 F.2d 590 (10th Cir.), *cert. denied*, 284 U.S. 635 (1931); *Best v. Yerkes*, 247 Iowa 800, 77 N.W.2d 23 (1956); *Jacobs v. General Accident Fire & Life Assurance Corp.*, 14 Wis. 2d 1, 109 N.W.2d 462 (1961). See also *Allen, Joint-Tortfeasors—A Case for Unlimited Contribution*, 43 Miss. L.J. 50, 55 (1972).

¹⁹ See note 2 *supra*.

²⁰ See notes 3-4 *supra*.

²¹ See, e.g., CAL. CIV. PROC. CODE § 875 (West Supp. 1980) (quoted at note 97 *infra*). Where such a requirement is imposed, the practical result is to prevent an absent tortfeasor from being forced to contribute since there can be no joint judgment against him and the tortfeasor seeking contribution. This result is avoided only if the

bution must have already discharged the entire judgment debt, or at least more than his proportionate share, before he can assert his right to contribution.²²

Unlike the doctrine of contribution, indemnity was recognized even at early common law. Courts recognized the right of one defendant who was legally responsible to the plaintiff for the plaintiff's damages, but who was not guilty of any fault or wrongful conduct,²³ to recover his entire loss from the individual whose fault or wrongful conduct gave rise to the injuries sustained by the plaintiff.²⁴ This right of implied indemnity has been recognized by the various jurisdictions in the United States which have adopted the common law.²⁵

Over the years, the courts defined, developed and modified the rules governing the right of implied indemnity, and in so doing a number of different tests were established. These tests were to be applied to different fact situations for the purpose of determining whether the right of implied indemnity existed in a particular case.²⁶ Examples of the various tests established by the courts include the active-passive test,²⁷ the pri-

absent tortfeasor can be joined under third party practice. *See Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 148, 282 N.E.2d 288, 291, 331 N.Y.S.2d 382, 386 (1972).

²² *See, e.g.*, CAL. CIV. PROC. CODE § 875 (West Supp. 1980) (quoted at note 97 *infra*).

²³ The most common example of liability without fault is an employer's vicarious liability for the negligent conduct of his employees under the doctrine of respondeat superior. *See* RESTATEMENT (SECOND) OF AGENCY §§ 212-49 (1958).

²⁴ *See Merryweather v. Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799). *See generally* PROSSER, *supra* note 6, at 310-11.

²⁵ *See, e.g.*, Canadian Indem. Co. v. United States Fidelity & Guar. Co., 213 F.2d 658 (9th Cir. 1954); *Thomas v. Malco Refineries*, 214 F.2d 884 (10th Cir. 1954); *Waylander v. Peterson Co. v. Great N. Ry. Co.*, 201 F.2d 408 (8th Cir. 1953); *Skala v. Lehon*, 343 Ill. 602, 175 N.E. 832 (1931). *Lunderburg v. Bierman*, 241 Minn. 349, 63 N.W.2d 355 (1954); *McLaughlin v. Siegel*, 166 Va. 374, 185 S.E. 873 (1936). *See generally* Comment, *Another Look at Strict Liability: The Effect on Contribution Among Tortfeasors*, 79 DICK. L. REV. 125 (1974); RESTATEMENT (SECOND) OF TORTS § 886B, Comment a (1979).

²⁶ For a good discussion of the various tests employed by most courts, *see Walkowiak, Implied Indemnity: A Policy Analysis of the Total Loss Shifting Remedy in a Partial Loss Shifting Jurisdiction*, 30 U. FLA. L. REV. 501, 516-27 (1978) [hereinafter cited as Walkowiak].

²⁷ *See, e.g.*, *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967); *United Air Lines, Inc. v. Wiener*, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964).

mary-secondary test,²⁸ and the duty versus no-duty test.²⁹ The definitions of these tests have been vague and the application of individual tests has been illogical and inconsistent.³⁰

Under the active-passive test, a joint tortfeasor may be entitled to indemnity when his negligence is "passive" as compared to the joint tortfeasor-indemnitor, who is guilty of "active" negligence.³¹ In *United Air Lines, Inc. v. Wiener*,³² a United Air Lines DC-7 was involved in a mid-air collision with an F-100F United States Air Force jet fighter near Las Vegas, Nevada.³³ United's Flight 736 was a regularly scheduled flight from Los Angeles, California to Denver, Colorado, and was flying in a major transcontinental airway known as Victor 8. The jet fighter was on a training mission from Nellis Air Force Base and was carrying an instructor pilot and a student pilot practicing instrument flying.³⁴ The jet went off course and crashed with the DC-7 in the Victor 8 airway, leaving no survivors.³⁵

Multiple actions were brought against United Air Lines and the United States government, all of which were tried on a consolidated basis.³⁶ Judgments were entered in favor of the plaintiffs, and United and the government were granted contribution against each other.³⁷ The Ninth Circuit reversed in part and granted indemnity in favor of United against the government in the cases involving non-government employees.³⁸ The court said that the government's negligent acts oc-

²⁸ See, e.g., *Allegheny Airlines, Inc. v. United States*, 504 F.2d 104 (7th Cir. 1974), cert. denied, 421 U.S. 978 (1975); *Maybarduk v. Bustamente*, 294 So. 2d 374 (Fla. Dist. Ct. App. 1974).

²⁹ See, e.g., *South Austin Drive-In Theatre v. Thomison*, 421 S.W.2d 933 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.). The duty versus no-duty test is frequently an element of the active-passive test, see note 27 *supra*, for implied indemnification. See *Walkowiak*, *supra* note 26, at 526.

³⁰ See *Walkowiak*, *supra* note 26, at 516.

³¹ *Id.*

³² 335 F.2d 379 (9th Cir.), cert. denied, 379 U.S. 951 (1964).

³³ *Id.* at 384.

³⁴ *Id.* at 385-86.

³⁵ *Id.* at 387.

³⁶ *Id.* at 384.

³⁷ *Id.*

³⁸ *Id.* at 402.

curred literally from the start to the finish of the events leading up to the accident,³⁹ and that there was such a difference in the contrasted character of fault as to warrant indemnity in favor of United.⁴⁰

The primary-secondary test is a variation on the active-passive test, and is based partly on a duty owed by one of the defendants to the other. In *Maybarduk v. Bustamente*,⁴¹ the plaintiff brought suit against a surgeon and hospital for injuries sustained as a result of a hemostat being left in her abdomen following surgery.⁴² The surgeon filed a cross-complaint for indemnity against the hospital alleging that the hospital had failed to furnish him with a qualified and trained assistant.⁴³ The Florida Court of Appeals reversed the trial court's dismissal of the cross-complaint and held that if the surgeon could show that the hospital's omission to furnish a qualified assistant was the primary cause of the plaintiff's injuries, then the surgeon was entitled to indemnity.⁴⁴

The duty versus no duty test is a composite of the active-passive and primary-secondary tests. Simply stated, the right to indemnity turns upon the issue of whether one defendant breached a duty of care owed by that tortfeasor to another, in addition to or coexistent with the primary duty owed the injured party.⁴⁵ When both parties violate a duty of care owed the injured party, then each is guilty of the same quality of

³⁹ The court said that the cumulative effect of the government's acts was to dispatch the jet fighter on a training mission into the same area as a commercial plane, with no warning to either aircraft. Moreover, the government's pilots likely had the last clear chance to avoid the accident by taking evasive action. Thus, under all the circumstances, the court concluded that the government and United were not in *pari delicto*, and that United was entitled to indemnity. 335 F.2d at 402.

⁴⁰ *Id.*

⁴¹ 294 So. 2d 374 (Fla. Dist. Ct. App. 1974).

⁴² *Id.* at 375.

⁴³ *Id.* at 378.

⁴⁴ *Id.* The court said that "where . . . both parties are at fault and both liable to the person injured . . . , yet they are not in *pari delicto* as to each other, as where the injury [to the plaintiff] has resulted from a violation of the duty which one [defendant] owes the other, so that as between themselves, the act or omission of the one from whom indemnity is sought is the primary cause of the injury . . ." then the person seeking indemnity is entitled to recover. *Id.* at 376 (quoting *Seaboard Airline Ry. Co. v. American Dist. Elec. Protective Co.*, 106 Fla. 330, 143 So. 316 (1932)).

⁴⁵ *Humble Oil & Ref. Co. v. Martin*, 148 Tex. 175, 222 S.W.2d 995 (1949).

negligence toward the injured person and neither is entitled to indemnity.⁴⁶

Indemnity, whether contractual or implied, is the right of a tortfeasor who has been forced to pay a common liability to force another tortfeasor to compensate him for the entire amount that he has been forced to pay.⁴⁷ Unlike contribution which involves a sharing of a loss among tortfeasors, indemnity shifts the total loss from one tortfeasor to another.⁴⁸ The right to indemnification may arise from an express contract⁴⁹ or from a contract implied in fact,⁵⁰ or it may be quasi-contractual,⁵¹ but "the right of a person seeking indemnity is the

⁴⁶ *South Austin Drive-In Theatre v. Thomison*, 421 S.W.2d 933, 947 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.). In *South Austin*, the parents of a six year old boy brought an action against the manufacturer, owner and operator of a power mower for injuries sustained by the boy when the mower operator backed over him. *Id.* at 944. The court said that all three defendants owed a duty to the plaintiff, and thus none was entitled to indemnity. *Id.* at 947.

⁴⁷ RESTATEMENT OF RESTITUTION § 96 (1937).

⁴⁸ See generally PROSSER, *supra* note 6, at 310. See also DOOLEY, MODERN TORT LAW: LIABILITY AND LITIGATION § 26.01 (1977) [hereinafter cited as DOOLEY].

⁴⁹ A party may expressly agree to indemnify another for future damages. Such an arrangement is generally covered by the law of contracts. The right to indemnity, however, must be explicitly provided for in the contract if it is to be allowed. Questions of fault or active and passive negligence play no part in the analysis of the right to indemnity under an express contract theory. See *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964); *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958).

⁵⁰ In the absence of an express contract to indemnify, see note 49 *supra*, a contract is sometimes implied from an existing contractual relationship. The right of implied contractual indemnity arises when one party to a contract breaches a duty thereunder, and the non-breaching party is held liable to a third person. The duty to indemnify is implied from the general contractual duty to exercise due care under the original contract. See *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956); *General Elec. Co. v. Moretz*, 270 F.2d 780 (4th Cir. 1959).

⁵¹ Where there is no contractual basis for allowing indemnity, it is sometimes permitted on equitable principles based on tort. The right of non-contractual implied indemnity arises where the fault of one party substantially overshadows that of another. In such a case the former will be required to indemnify the one who incurred the liability for damages because to require him to pay the damages would be inequitable. See *United Air Lines, Inc. v. Wiener*, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964); *Miller v. Pennsylvania R. Co.*, 236 F.2d 295 (2d Cir. 1956).

Various tests have been employed to compare the relative fault of multiple tortfeasors where the right of non-contractual implied indemnity is involved. See notes 27-30 *supra* and accompanying text. Where the parties are *in pari delicto*, or both equally or "actively" negligent, no right to indemnity exists. Where one party's negligence, however, is termed active (or primary) and another's is termed passive (or secondary), the former will be required to indemnify the latter if he is forced to pay

right to receive full compensation for *all* damages he has suffered as a result of the actions which form the basis for his claim to indemnity."⁵²

The doctrines of contribution and indemnity are often confused by attorneys and by the courts,⁵³ but it is important to note some key distinctions between them. Contribution apportions the loss among multiple tortfeasors by requiring each to pay his pro rata or proportionate share.⁵⁴ Indemnity, on the other hand, shifts the entire loss from one tortfeasor who has been forced to pay it to another tortfeasor who, for one reason or another, should bear the burden instead.⁵⁵ Consequently, the right of indemnity and contribution among the same parties are mutually exclusive; if a person is entitled to indemnity, the right of contribution does not exist.⁵⁶ Contribution normally exists by statute,⁵⁷ whereas indemnity is a judicially created common law doctrine.⁵⁸ Furthermore, the right to pro rata contribution pre-supposes that joint tortfeasors are equally at fault, while non-contractual implied indemnity shifts the liability to the party found to have the greater fault in terms of being actively, or primarily, negligent.⁵⁹

This "fault assessment" is probably the most dramatic difference between the concepts of pro rata contribution and indemnity.⁶⁰ Courts ignore the relative fault of the judgment

the loss. See *Allegheny Airlines, Inc. v. United States*, 504 F.2d 104 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975); *Ingham v. Eastern Airlines, Inc.*, 373 F.2d 227 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967).

⁵² Walkowiak, *supra* note 26, at 511.

⁵³ PROSSER, *supra* note 6, at 310.

⁵⁴ See notes 14-22 *supra* and accompanying text.

⁵⁵ PROSSER, *supra* note 6, at 310. See notes 23-52 *supra* and accompanying text.

⁵⁶ See *Herrero v. Atkinson*, 227 Cal. App. 2d 69, 74, 38 Cal. Rptr. 490, 492 (1964). See also CAL. CIV. PROC. CODE § 875(f) (West Supp. 1980) (quoted at note 97 *infra*).

⁵⁷ See notes 18-22 *supra* and accompanying text.

⁵⁸ See notes 24-52 *supra* and accompanying text.

⁵⁹ *Herrero v. Atkinson*, 227 Cal. App. 2d 69, 74, 38 Cal. Rptr. 490, 493 (1964). Parties *in pari delicto* are not able to recover under a theory of non-contractual implied indemnity. See note 51 *supra*.

⁶⁰ See note 1 *supra* and accompanying text. Restatement (Second) of Torts suggests that one of the problems with contribution is that it is statutory in most states, and the statutes are usually ineptly drawn and contain serious and inequitable restrictions on the remedy. "Some influential state courts, frustrated by this [inequity] and being unable to modify the statute, have declared that indemnity is an equitable

debtors as among themselves in determining whether there is a right to pro rata contribution and simply allocate the burden of loss in equal shares to each tortfeasor. On the other hand, in determining whether a right to non-contractual implied indemnity exists, courts must scrutinize the relative fault of the parties in assessing whether one is actively, or primarily, negligent when compared to the other tortfeasor who is simply passively, or secondarily, negligent.

BASIC PRINCIPLES OF STATUTORY CONSTRUCTION

Statutes which impose duties or establish rights which were not recognized by the common law frequently have been strictly interpreted.⁶¹ When any doubt exists as to the meaning of legislation, courts employing a rule of strict construction have adopted the interpretation which makes the least, rather than the most, change in the common law.⁶² Indeed, the United States Supreme Court has ruled that "[n]o statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."⁶³

Strict construction as a rule of statutory interpretation has been adopted in many jurisdictions.⁶⁴ It has been employed when reasonable doubt exists whether a change claimed to have been made by a statute in the common law should apply

doctrine judicially adopted and subject to further judicial development for the purpose of attaining justice. They have produced a judicial doctrine of 'partial indemnity,' with the proportion of responsibility of the parties depending upon the relative percentages of fault. The potential merger of contribution and indemnity may therefore take place . . . with indemnity absorbing contribution." *RESTATEMENT (SECOND) OF TORTS* § 886B, Comment m (1979).

⁶¹ See, e.g., *Socony-Vacuum Oil Co. v. Texas Co.*, 113 F. Supp. 514 (E.D. Mich. 1953); *Acme Fireworks Corp. v. Bibb*, 6 Ill. 2d 112, 126 N.E.2d 688 (1955); *Martin v. Martin*, 58 Misc. 2d 459, 296 N.Y.S. 2d 453 (Fam. Ct. 1968).

⁶² See generally *SANDS*, 3 *STATUTES AND STATUTORY CONSTRUCTION*, §§ 61.01-.05 (4th ed. 1974) [hereinafter referred to as *SANDS*]; *CRAWFORD, STATUTORY CONSTRUCTION*, §§ 248-250 (1940).

⁶³ *Shaw v. Northern Pa. R.R. Co.*, 101 U.S. 557, 565 (1879).

⁶⁴ See, e.g., *Ivey v. Wiggins*, 276 Ala. 106, 159 So. 2d 618 (1964); *Ramey v. Gunn*, 221 Ark. 10, 253 S.W.2d 559 (1953); *Universal Discount Corp. v. Brooks*, 115 Ind. App. 591, 58 N.E.2d 369 (1944); *Doughty v. Maine Cent. Transp. Co.*, 141 Me. 124, 39 A.2d 758 (1944); *Nielson v. Chicago, B. & Q. R. Co.*, 141 Neb. 584, 4 N.W.2d 569 (1942).

to a particular situation.⁶⁶ Therefore, if a change is to be made in the common law, the courts have required that the legislative intent to make such a change be clearly and plainly expressed.⁶⁶

The rule of strict construction has been the object of a great deal of criticism, primarily on the ground that it has no genuine probative value for the purpose of establishing what the legislature intended.⁶⁷ The rule, however, has been generally justified on the basis that it "serves to perpetuate traditional principles of justice upon which the common law is founded."⁶⁸ The rule that statutes in derogation of the common law are strictly construed has been thought to serve the same policy of continuity and stability as the doctrine of stare decisis has effectuated in the case law.⁶⁹

In a minority of jurisdictions, the legislatures have enacted general interpretive legislation abrogating the rule of strict construction of statutes in derogation of the common law.⁷⁰ Typically, such legislation provides that the statutes of the states should be "liberally construed with a view to promote its objects and assist the parties in obtaining justice."⁷¹ Such provisions have generally been effective in bringing about less

⁶⁶ See, e.g., *Northern Illinois Coal Corp. v. Langmeyer*, 342 Ill. App. 406, 96 N.E.2d 820 (1951); *People v. Daghita*, 299 N.Y. 194, 86 N.E.2d 172 (1949).

⁶⁶ *Mason v. Hillside Highway Dist.*, 65 Idaho 833, 154 P.2d 490 (1944); *Hummer v. School City of Hartford City*, 123 Ind. App. 624, 112 N.E.2d 891 (1953); *Pineo v. White*, 320 Mass. 487, 70 N.E.2d 294 (1946); *State v. Donovan*, 129 N.J.L. 478, 30 A.2d 421 (1943); *Woolcott v. Shubert*, 217 N.Y. 212, 111 N.E. 829 (1916); *Fenton v. Young Chevrolet Co.*, 191 Okla. 161, 127 P.2d 813 (1942).

⁶⁷ See Bruncken, *The Common Law and Statutes*, 29 YALE L.J. 516 (1920).

⁶⁸ SANDS, *supra* note 62, at § 61.01 and cases cited therein.

⁶⁹ Stated simply, the doctrine of stare decisis provides that when the court has once laid down a principle of law as applicable to a given set of facts, it will adhere to that principle and apply it in future cases where the facts are substantially the same. MOORE, *MODERN CONSTITUTIONS* 54 (1957). The traditional rationale for the doctrine has been that it promotes stability in the legal system. The doctrine rests upon the principle that the law by which men are governed should be fixed, definite and known, and should not lightly be modified or overruled. MOORE, *STARE DECISIS* 5 (1958).

⁷⁰ See, e.g., ARIZ. REV. STAT. ANN. § 1-211 (1956); ARK. STAT. ANN. § 27-131 (1947); CAL. CIV. PROC. CODE § 4 (West 1954); KAN. STAT. ANN. § 77-109 (1977); OKLA. STAT. tit. 12, § 2 (1960). See also Fordham and Leach, *Interpretations of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438, 449 (1950).

⁷¹ IOWA CODE ANN. § 4.2 (West 1967).

restrictive court decisions concerning the effect to be given new legislation.⁷² The requirement that statutes be construed liberally does not establish a presumption that the common law principles upon the subject have been altered or modified, but merely requires that in any case where that question is to be decided it must be determined without a presumption or bias in favor of either interpretation.⁷³

Another principle of statutory construction is the rule that words and phrases having well-defined common law meanings are to be interpreted as having the same meanings when used in statutes dealing with the same or similar subject matter.⁷⁴ A legislative definition of a term prevails over the common law meaning where it is clear and explicitly applicable.⁷⁵ Even though a statute may define the way in which a particular word is used, however, the common law meaning may, in cases of reasonable doubt, be useful to a proper understanding of the statute.⁷⁶

A constitutional principle of statutory construction and of judicial review in general is the notion that courts cannot sit as legislatures. The separation of powers doctrine recognizes that in the absence of some overriding constitutional, statutory, or charter proscription, the judiciary has no authority to invalidate duly enacted legislation⁷⁷ or to nullify statutory language.⁷⁸ Further, when a jurisprudential rule has been incorporated into statutory law it can no longer be changed by

⁷² See, e.g., *Orloff v. Los Angeles Turf Club, Inc.*, 30 Cal. 2d 110, 180 P.2d 321 (1947); *Chiesa & Co. v. City of Des Moines*, 158 Iowa 343, 138 N.W. 922 (1912); *O'Grady v. Potts*, 193 Kan. 644, 396 P.2d 285 (1964).

⁷³ See *People v. Kings County Dev. Co.*, 48 Cal. App. 72, 191 P. 1004 (1920). See also *In re Crutcher*, 61 Cal. App. 481, 215 P. 101 (1923); *People ex rel. Krause v. Harrison*, 191 Ill. 257, 61 N.E. 99 (1901).

⁷⁴ See *Gilbert v. United States*, 370 U.S. 650 (1962); *Hite v. United States*, 168 F.2d 973 (10th Cir. 1948); *Aberdeen Bindery, Inc., v. Eastern States Printing & Publishing Co.*, 166 Misc. 904, 3 N.Y.S.2d 419 (1938).

⁷⁵ See *People v. Burns*, 198 Cal. App. 2d 839, 18 Cal. Rptr. 921 (1962); *Knudson v. Jackson*, 191 Iowa 947, 183 N.W. 391 (1921).

⁷⁶ See *Gellman v. United States*, 235 F.2d 87 (8th Cir. 1956); *Walter v. Northern Ins. Co.*, 370 Ill. 283, 18 N.E.2d 906 (1938).

⁷⁷ *City of San Francisco v. Cooper*, 13 Cal. 3d 898, 534 P.2d 403, 120 Cal. Rptr. 707 (1975).

⁷⁸ *REA Enterprises v. California Coastal Zone Comm.*, 52 Cal. App. 3d 596, 125 Cal. Rptr. 201 (Ct. App. 1975).

court decision.⁷⁹ The United States Supreme Court has ruled that it does not have the power to overturn legislation of a state under the guise of constitutional interpretation simply because the Justices believe they can provide better rules.⁸⁰

The commentators seem in general agreement with the principle that courts cannot sit as legislatures. Dean Robert Keeton has argued that when the legislature has spoken to a particular issue the courts must apply the mandate of the statute absent a ruling that the statute is unconstitutional.⁸¹ Thus, when the issue at hand is not directly answered by the statute the court must interpret the statute to fill in the "gaps" left by the legislature. When doing this, the court should give the proper deference to the statute's manifestations of principle and policy to the extent that they can be ascertained.⁸² Along these lines, Justice Frankfurter wrote that a "judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policymaking might suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation."⁸³

DEVELOPMENT OF THE DOCTRINE OF COMPARATIVE PARTIAL INDEMNITY

In 1972, the New York Court of Appeals, in *Dole v. Dow Chemical Co.*,⁸⁴ propounded a variation to the doctrine of non-contractual implied indemnity. Dow was charged with negligently labeling a poisonous fumigant and with failing to warn potential users of the danger of exposure to concentrated vapors following its use. Such negligence was alleged to have resulted in the death of plaintiff's decedent.⁸⁵ Dow filed a third party complaint for indemnity against the decedent's

⁷⁹ T.L. James & Co. v. Montgomery, 332 So. 2d 834 (La. 1975).

⁸⁰ Labine v. Vincent, 401 U.S. 532 (1971).

⁸¹ Keeton, *Statutes, Gaps, and Values in Tort Law*, 44 J. AIR L. & COM. 1, 9 (1978).

⁸² *Id.*

⁸³ F. FRANKFURTER, *SOME REFLECTIONS ON THE READING OF STATUTES* 13 (1947).

⁸⁴ 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

⁸⁵ *Id.* at 146, 282 N.E.2d at 290, 331 N.Y.S.2d at 385.

employer alleging active and primary negligence in failing to follow instructions on the label, for allowing untrained personnel to work with the fumigant, and for failing to ventilate and test the enclosure after fumigation.⁸⁶ The court reversed the dismissal of the third party complaint and rejected the traditional "active-passive" test⁸⁷ in determining a defendant's right to implied indemnity.⁸⁸

In rejecting the traditional test, the court concluded that while indemnity was traditionally an all-or-nothing rule, "[t]here are circumstances which would justify apportionment of responsibility between third-party plaintiff and third-party defendant, in effect a *partial indemnification*."⁸⁹ The court reasoned that since the all-or-nothing rule of indemnity often achieved as equally unfair a result as the strict common law rule against contribution, indemnity itself should be tempered to achieve a more equitable result.⁹⁰ The *Dole* court proceeded to modify the common law doctrine of indemnity⁹¹ holding that the "[r]ight to apportionment of liability or to full indemnity, . . . as among parties involved together in causing damage by negligence, should rest on relative responsibility"⁹²

The *Dole* court undertook this modification of the prior common law indemnity doctrine even though New York had enacted a contribution statute⁹³ providing joint tortfeasors

⁸⁶ *Id.*

⁸⁷ See notes 31-40 *supra* and accompanying text.

⁸⁸ 30 N.Y.2d at 147, 153, 282 N.E.2d at 291, 295, 331 N.Y.S.2d at 386, 392.

⁸⁹ *Id.* at 147, 282 N.E.2d at 291, 331 N.Y.S.2d at 386 (emphasis added).

⁹⁰ *Id.* at 149-50, 282 N.E.2d at 292-93, 331 N.Y.S.2d at 387-88.

⁹¹ See notes 23-30 *supra* and accompanying text.

⁹² 30 N.Y.2d at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 391-92.

⁹³ N.Y. CIV. PRAC. LAW § 1401 (McKinney 1964) (repealed 1974) (current version at N.Y. CIV. PRAC. LAW § 1401 (McKinney 1976)) provided:

Where a money judgment has been recovered jointly against defendants in an action for a personal injury or for property damage, each defendant who has paid more than his pro rata share shall be entitled to contribution from the other defendants with respect to the excess paid over and above his pro rata share; provided, *however that no defendant shall be compelled to pay any other such defendant an amount greater than his pro rata share of the entire judgment.*

Id. (emphasis added). The current New York contribution statute provides that "two or more persons who are subject to liability for damages for the same personal injury,

with a right of pro rata contribution in limited circumstances. Under the statute, New York law preserved the all-or-nothing contributory negligence rule. The court emphasized the fact that the contribution statute applied only to joint judgment debtors⁹⁴ so that the effective application of the statute depended in large part on the willingness or ability of the injured party to sue more than one of those responsible for his damages.⁹⁵ Moreover, the court thought that there was a basic unfairness in requiring a co-defendant to pay a greater share of the judgment than the part for which he was judged responsible.⁹⁶

California has been the leading jurisdiction in the development of the judicially adopted doctrine of comparative partial indemnity.⁹⁷ In *Herrero v. Atkinson*,⁹⁸ a woman was negli-

injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought." N.Y. CIV. PRAC. LAW § 1401 (McKinney 1976).

The *Dole* decision was codified in N.Y. CIV. PRAC. LAW § 1402 (McKinney 1976) which provides:

The amount of contribution to which a person is entitled shall be the excess paid by him over and above his equitable share of the judgment recovered by the injured party; but no person shall be required to contribute an amount greater than his equitable share. The equitable shares shall be determined in accordance with the relative culpability of each person liable for contribution.

Id.

⁹⁴ See note 93 *supra*.

⁹⁵ 30 N.Y.2d at 148, 282 N.E.2d at 291, 331 N.Y.S.2d at 386.

⁹⁶ *Id.* at 148, 282 N.E.2d at 292, 331 N.Y.S.2d at 387. The New York Court of Appeals emphatically reaffirmed the *Dole* decision two and one-half months after its rendition in *Kelly v. Long Island Lighting Co.*, 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972). The court there stated that the "rule as stated in *Dole* now permits apportionment of damages among joint or concurrent tort-feasors regardless of the degree or nature of the concurring fault. We believe the new rule of apportionment to be pragmatically sound, as well as realistically fair." *Id.* at 29, 286 N.E.2d at 243, 334 N.Y.S.2d at 854.

⁹⁷ Since 1957 the California contribution statute has provided as follows:

Section 875:

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

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

(c) Such right of contribution may be enforced only after one tortfeasor has, by payment, discharged the joint judgment or has paid more than his pro rata share thereof. It shall be limited to the excess

gently injured in an automobile accident. She died a year and one-half later as a result of a blood transfusion which was administered negligently in the course of an operation necessitated by the auto accident.⁹⁹ There was no legal relationship between the defendant driver and the medical defendants other than the fact that both defendants contributed to the death.¹⁰⁰ The California Court of Appeals held that both parties were actively negligent in their separate acts. Nevertheless, the court allowed indemnity in favor of the negligent driver and against the doctors and hospital for "that portion of the damages caused by their own negligent conduct."¹⁰¹ The court concluded that "[t]here is no reason why the ultimate burden of damages should not be distributed among the various defendants, and each should be made to bear that portion of the judgment which in equity and good conscience should be borne by him."¹⁰²

Thus, under an indemnity theory,¹⁰³ the *Herrero* court approved the apportionment of damages between tortfeasors performing separate acts of negligence that combine to produce a single injury.¹⁰⁴ Contrary to the traditional distinction

so paid over the pro rata share of the person so paying and in no event shall any tortfeasor be compelled to make contribution beyond his own pro rata share of the entire judgment.

* * *

(f) This title shall not impair any right of indemnity under existing law, and where one tortfeasor judgment debtor is entitled to indemnity from another there shall be no right of contribution between them.
Section 876:

(a) The pro rata share of each tortfeasor judgment debtor shall be determined by dividing the entire judgment equally among all of them.

* * *

CAL. CIV. PROC. CODE §§ 875-76 (West Supp. 1980) (emphasis added).

⁹⁸ 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (1964).

⁹⁹ *Id.* at 70, 38 Cal. Rptr. at 497.

¹⁰⁰ *Id.* at 73, 38 Cal. Rptr. at 492.

¹⁰¹ *Id.* at 75, 38 Cal. Rptr. at 493-94.

¹⁰² *Id.* at 75, 38 Cal. Rptr. at 493.

¹⁰³ The court affirmed the general rule that "an implied right of indemnity does not exist among tortfeasors where the parties are in *pari delicto*, that is, when the fault of each is of equal grade and similar in character." *Id.* See notes 47-52 *supra* and accompanying text.

¹⁰⁴ The court made special note of the fact that the driver's cross-complaint against the doctors and the hospital sought indemnity and not contribution. The court went

drawn in non-contractual implied indemnity cases between "active" and "passive" tortfeasors, the court did not find one party more "actively" negligent than the other but held that each should be liable for damages caused by his own negligence.¹⁰⁶ The court reasoned that the right of non-contractual implied indemnity "depends upon the principle that everyone is responsible for the consequences of his own wrong, and if others have been compelled to pay damages which ought to have been paid by the wrongdoer, they may recover from him."¹⁰⁶

The *Herrero* and *Dole* decisions laid the foundation upon which the doctrine of comparative partial indemnity would be created. Neither the *Herrero* court nor the *Dole* court, however, gave any argument or rationale for ignoring the respective contribution statutes existing in each state.¹⁰⁷ Both of those courts attempted to focus on the distinction between contribution and indemnity, but ended up using the terms almost interchangeably. Furthermore, since neither court provided any real guidelines for allowing partial indemnity except general equitable considerations, most courts did not follow their lead and continued to refrain from any attempt to apportion loss under an indemnity theory.¹⁰⁸

In *American Motorcycle Association v. Superior Court*,¹⁰⁹ the Supreme Court of California adopted the doctrine of comparative partial indemnity.¹¹⁰ The opinion was the court's first major statement on the principles of comparative negligence since its adoption of that system in *Li v. Yellow Cab Co.*¹¹¹ In

on to say that "[i]ndemnity seeks to transfer the *entire* loss imposed upon one tortfeasor to another who in justice and equity should bear it. Contribution distributes the loss *equally* among all tortfeasors, each bearing his *pro rata* share." *Id.* at 73, 38 Cal. Rptr. at 492 (emphasis added). See note 97 *supra*.

¹⁰⁶ 227 Cal. App. 2d at 75, 38 Cal. Rptr. at 493.

¹⁰⁷ *Id.* See *Niles v. City of San Rafael*, 42 Cal. App. 3d 230, 116 Cal. Rptr. 733 (1974) where another California court of civil appeal reached a similar result.

¹⁰⁸ Compare note 92, *supra*, with note 97, *supra*.

¹⁰⁹ See, e.g., *General Elec. Co. v. Department of Pub. Works*, 32 Cal. App. 3d 918, 108 Cal. Rptr. 543 (1973); *Ford Motor Co. v. Robert J. Poeschl, Inc.*, 21 Cal. App. 3d 694, 98 Cal. Rptr. 702 (1971).

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

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

¹¹² 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). In *Li*, the California

American Motorcycle, a minor who suffered spinal injuries while competing in an amateur cross-country motorcycle race filed an action through a guardian ad litem against the American Motorcycle Association (AMA) and the Viking Motorcycle Club (Viking), the organizations which had sponsored and collected the entry fee for the race, and against numerous individuals. The complaint alleged that the defendants had negligently designed, managed, supervised and administered the race, and that as a result of such negligence the plaintiff had suffered serious injuries.¹¹²

AMA filed an answer to the complaint denying the allegations and subsequently sought leave of court to file a cross-complaint against the plaintiff's parents, one of whom was guardian ad litem.¹¹³ The first count of the proposed cross-complaint alleged that the parents had negligently failed to supervise their son in consenting to his participation in the race and that such negligence was "active," while AMA's negligence, if any, was merely "passive."¹¹⁴ Thus, the first cause of action sought indemnity from the parents in the event that AMA was found liable to the son.¹¹⁵ In the second cause of action of its proposed cross-complaint, AMA sought a declaration that the negligence of all parties contributing to the injury be considered in apportioning the liability.¹¹⁶ This second cause of action was based on an assumption that the decision in *Li* established a new rule of proportionate liability under which each concurrent tortfeasor who proximately caused an indivisible harm would be held liable only for a portion of the plaintiff's recovery determined on a comparative fault basis.¹¹⁷

Supreme Court disposed of the all-or-nothing rule of contributory negligence and judicially adopted a system of "pure" comparative negligence in which the plaintiff's damages are reduced by the proportion that his negligence bears to the total negligence involved in his injury. *Id.* at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875. The plaintiff's contributory negligence, if any, does not bar his recovery, but merely reduces the amount that he can recover. *Id.*

¹¹² 20 Cal. 3d at 584-86, 578 P.2d at 902-03, 146 Cal. Rptr. at 185-86.

¹¹³ *Id.* at 585, 578 P.2d at 903, 146 Cal. Rptr. at 186.

¹¹⁴ *Id.*

¹¹⁵ See notes 31-40 *supra* and accompanying text.

¹¹⁶ 20 Cal. 3d at 585, 578 P.2d at 903, 146 Cal. Rptr. at 186.

¹¹⁷ *Id.* AMA also argued that *Li* implicitly abrogated the rule of joint and several

The trial court denied AMA's motion to file its cross-complaint because the motion was unsupported by the existing legal doctrines. AMA then sought a writ of mandate in the court of appeal to effectuate its cross-complaint, but that court affirmed the trial court's decision denying AMA's motion. Ultimately, the California Supreme Court granted a peremptory writ of mandate to review the case.¹¹⁸

The California Supreme Court's decision in *American Motorcycle* extended the rule of partial indemnity employed in *Herrero* and *Dole*¹¹⁹ to all multiple tortfeasor cases involving negligence. Furthermore, it gave defendants the right to join all potential defendants in the lawsuit, but it retained the rule of joint and several liability. In examining the common law equitable indemnity doctrine, the court noted that while it eliminated inequity and injustice in some extreme cases it still suffered from the same "all-or-nothing" deficiency as the discarded contributory negligence doctrine and "falls considerably short of fulfilling *Li*'s goal of 'a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault.'"¹²⁰ The court concluded that the California common law equitable indemnity doctrine should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis to bring the doctrine in line with *Li*'s objectives.¹²¹

The *American Motorcycle* court seemed to focus, at one point, on the traditional distinction between contribution and indemnity,¹²² but nevertheless concluded that the "dichotomy

liability of concurrent tortfeasors inasmuch as the percentage of fault of each party was assessed by the jury, thus allowing "proportionate liability." *Id.* at 585-86, 578 P.2d at 903, 146 Cal. Rptr. at 186.

¹¹⁸ *Id.* at 586, 578 P.2d at 903, 146 Cal. Rptr. at 186.

¹¹⁹ See notes 84-108 *supra* and accompanying text.

¹²⁰ 20 Cal. 3d at 591, 578 P.2d at 907, 146 Cal. Rptr. at 190.

¹²¹ *Id.*

¹²² *Id.* The court stated that "[i]n traditional terms, the apportionment of loss between multiple tortfeasors has been thought to present a question of contribution; indemnity, by contrast, has traditionally been viewed as concerned solely with whether a loss should be entirely shifted from one tortfeasor to another, rather than whether the loss should be shared between the two." *Id.*

between the two concepts is more formalistic than substantive."¹²³ The common goal of both doctrines, said the court, is the equitable distribution of loss among multiple tortfeasors.¹²⁴ The court further reasoned that the inequity of the early common law rule against contribution led courts to create the equitable indemnity exception.¹²⁵ The exception originated in the common sense proposition that when two individuals are responsible for a loss, but one of them is more culpable than the other, it is only fair that the more culpable party should bear a greater share of the loss.¹²⁶ Citing *Herrero*¹²⁷ and *Dole*¹²⁸ as precedent for its conclusion, the court held that California should judicially adopt a system of comparative partial indemnity which would permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis.¹²⁹

The primary argument raised against the court's adoption of a common law comparative indemnity rule was that California's existing contribution statute¹³⁰ precluded any such judicial development.¹³¹ The *American Motorcycle* court had considerable difficulty in getting around this argument, and its primary ground for rejecting that contention was that the *Dole* court had "adopted a similar partial indemnity rule . . . despite the existence of a closely comparable statutory scheme."¹³² The court further reasoned that the *Dole* court viewed the New York contribution statute as simply a partial legislative modification of the harsh common law rule against contribution.¹³³ The court concluded that the *Dole* court

¹²³ *Id.* The court cited Judge Learned Hand's observation in *Slattery v. Marra Bros.*, 186 F.2d 134, 138 (2d Cir. 1951), that "indemnity is only an extreme form of contribution."

¹²⁴ 20 Cal. 3d at 591, 578 P.2d at 907, 146 Cal. Rptr. at 190.

¹²⁵ *Id.* at 592, 578 P.2d at 908, 146 Cal. Rptr. at 191.

¹²⁶ 20 Cal. 3d at 591-93, 578 P.2d at 907-08, 146 Cal. Rptr. at 190-91. See generally Comment, *Contribution and Indemnity in California*, 57 CAL. L. REV. 490 (1969).

¹²⁷ See notes 97-108 *supra* and accompanying text.

¹²⁸ See notes 84-96 *supra* and accompanying text.

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

¹³⁰ See note 97 *supra*.

¹³¹ 20 Cal. 3d at 599, 578 P.2d at 912, 146 Cal. Rptr. at 195.

¹³² *Id.* at 600, 578 P.2d at 913, 146 Cal. Rptr. at 196.

¹³³ *Id.*

found nothing in the New York statutory scheme to indicate that the legislature had intended to preclude judicial extension of the statutory apportionment concept through the adoption of a common law partial indemnification doctrine.¹³⁴ The *American Motorcycle* court similarly concluded that nothing in the legislative history of the California contribution statute suggested that the legislature intended to preempt the field or to foreclose future judicial developments which further the act's principal purpose of ameliorating the harshness and inequity of the old no contribution rule.¹³⁵ The court pointed to two specific sections of the California statute, which were not present in the New York statute, to confirm its conclusion. The court relied most heavily on the provision preserving the right of indemnity and subordinating the right of contribution to such right of indemnity.¹³⁶ The court concluded that since the equitable indemnity doctrine existed at the time the statute was enacted,¹³⁷ the legislature must have been aware of the doctrine.¹³⁸ The court further concluded that the legislature desired, by enacting this provision, to negate any possible inference that the contribution statutes were intended to eliminate such common law indemnity rights or to preclude judicial development of the allocation of loss issue.¹³⁹

¹³⁴ *Id.* at 601, 578 P.2d at 913, 146 Cal. Rptr. at 196. In fact, the *Dole* court never expressly considered the legislative history of the New York contribution statute, or the legislative intent in enacting the statute. See note 107 *supra* and accompanying text.

¹³⁵ 20 Cal. 3d at 602, 578 P.2d at 914, 146 Cal. Rptr. at 197.

¹³⁶ CAL. CIV. PROC. CODE § 875(f) (West Supp. 1980) (quoted at note 97 *supra*).

¹³⁷ It is important to note here that the equitable indemnity doctrine which existed in 1957 shifted the *total* loss from one tortfeasor who was required to pay the judgment to another tortfeasor who in equity should have to bear the burden instead because his conduct was deemed more culpable. See notes 24-52 *supra* and accompanying text.

¹³⁸ 20 Cal.3d at 602, 578 P.2d at 914, 146 Cal. Rptr. at 197.

¹³⁹ *Id.* at 602-03, 578 P.2d at 914-15, 146 Cal. Rptr. at 197-98. The court is apparently correct in its conclusion that the enactment of § 875(f) was intended by the legislature to negate any possible inference that the contribution statutes were intended to eliminate the common law right of equitable indemnity, but only as it existed in 1957 when the statute was enacted. The court's admission in the text accompanying note 140, *infra*, and the enactment of § 875(c) (see note 97 *supra*) which provides that "in no event shall any tortfeasor be compelled to make contribution beyond his own pro rata share of the entire judgment," negate the court's conclusion that the act did not preclude judicial expansion of equitable indemnity. The legisla-

The court admitted, however, that the 1957 legislature could not have foreseen the advent of comparative negligence and the adoption of comparative partial indemnity.¹⁴⁰

The second provision relied on by the court to confirm its conclusion that the contribution statute did not preclude judicial adoption of comparative indemnity states that the "right of contribution shall be administered in accordance with the principles of equity."¹⁴¹ The court reasoned that the explicit mandate of this provision "demonstrates that the Legislature did not conceive of its contribution legislation as a complete and inflexible system for the allocation of loss between multiple tortfeasors."¹⁴² The court further concluded that the legislature obviously intended for the judiciary to elaborate on the term "principles of equity," and thus the act itself refuted the argument that the legislature intended to curtail judicial discretion in apportioning damages among multiple tortfeasors.¹⁴³

While the court's interpretation of the provision appears logical if the provision is read by itself, the court's conclusion that it is not precluded from adopting comparative partial indemnity by the existence of the contribution statute does not follow when the provision is read in the context of the entire statute.¹⁴⁴ The premise behind the adoption of pro rata contribution is that equity is equality and thus each joint tortfeasor should bear that portion of the loss determined by dividing the total loss by the number of responsible tortfeasors subject to the judgment.¹⁴⁵ Nevertheless, the court concluded that the California contribution statute did not preclude it from developing a parallel, albeit more expansive, common law doctrine of comparative partial indemnity.¹⁴⁶

tion recognizes the critical distinction between the separate concepts of indemnity and contribution, but the court chooses to ignore it.

¹⁴⁰ 20 Cal. 3d at 602, 578 P.2d at 914, 146 Cal. Rptr. at 197.

¹⁴¹ CAL. CIV. PROC. CODE § 875(b) (West Supp. 1980) (quoted at note 97 *supra*).

¹⁴² 20 Cal. 3d at 603, 578 P.2d at 915, 146 Cal. Rptr. at 198.

¹⁴³ *Id.*

¹⁴⁴ See note 139 *supra*.

¹⁴⁵ DOOLEY, *supra* note 48, at § 26.20.

¹⁴⁶ Some commentators hailed the California Supreme Court's decision in *American Motorcycle* as a definite step towards clearing up the problems of allocation of

Only a few months later, the California Supreme Court, reaffirming its opinion in *American Motorcycle*, took an additional step in *Safeway Stores, Inc. v. Nest-Kart*.¹⁴⁷ In that case, the plaintiff was injured in a Safeway supermarket when the shopping cart she was using broke and fell on her foot, causing serious injuries requiring surgery.¹⁴⁸ The plaintiff brought suit against Safeway, the owner of the cart, Nest-Kart, the manufacturer of the cart, and Technibilt Corporation, a company which had on occasion repaired some of the carts, alleging that the defendants were liable for her injuries under both strict liability and negligence principles. At trial, which took place before the decision in *American Motorcycle*, the jury absolved both the plaintiff and Technibilt of any responsibility for the accident. The trial court, however, awarded the plaintiff damages of \$25,000 against both Safeway and Nest-Kart.¹⁴⁹

The jury's verdict indicated that Safeway's liability rested on both negligence and strict liability grounds and that Nest-Kart's liability was based solely on strict liability principles.¹⁵⁰ The issue raised before the California Supreme Court was whether the comparative indemnity doctrine of *American Motorcycle* should be used as the basis for apportioning liability

loss among multiple tortfeasors which had been created by the judicial adoption of comparative negligence in *Li*, see note 2 *supra*. However, these commentators simply accept the court's decision that the California contribution statute does not preclude them from adopting comparative indemnity, without questioning the court's reasoning for so concluding. See Comment, *Contribution and Indemnity Collide With Comparative Negligence—The New Doctrine of Equitable Indemnity*, 18 SANTA CLARA L. REV. 779 (1978); see also McKay, *American Motorcycle Association vs. Superior Court: From Comparative Negligence to Comparative Indemnity*, 5 ORANGE COUNTY BAR J. 180 (1978).

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

¹⁴⁸ *Id.* at 325, 579 P.2d at 442, 146 Cal. Rptr. at 551.

¹⁴⁹ *Id.* The jury found Safeway 80% responsible and found Nest-Kart 20% responsible. As might be expected in such a situation, Safeway moved for a judgment of contribution against Nest-Kart to require Nest-Kart to pay 50% of the judgment. The trial court indicated that common sense called for an apportionment of the judgment based on the relative fault of the parties, but ultimately concluded that such comparative apportionment was not permissible in light of the existing statutory contribution provisions and granted Safeway's motion for contribution. *Id.* at 326-27, 579 P.2d at 443, 146 Cal. Rptr. at 552.

¹⁵⁰ *Id.* at 326, 579 P.2d at 442, 146 Cal. Rptr. at 551.

between two tortfeasors, one of whose liability was derived solely from principles of strict liability while the other's liability was derived, at least in part, from negligence theory.¹⁵¹ The court concluded that even though the trial had taken place before the decision in *American Motorcycle*, the common law doctrine of comparative partial indemnity adopted in that case¹⁵² could be used to apportion the loss between Safeway and Nest-Kart.¹⁵³ The court reasoned that "[n]othing in the rationale of strict product liability conflicts with a rule which apportions liability between a strictly liable defendant and other responsible tortfeasors."¹⁵⁴

In 1978, the same year that *American Motorcycle* was decided, the supreme courts of Missouri, Illinois and Oklahoma also adopted the doctrine of comparative partial indemnity. In *Missouri Pacific Railroad Co. v. Whitehead & Kales Co.*,¹⁵⁵ the Missouri Supreme Court rejected the "active-passive" test generally used in Missouri because it produced illogical results,¹⁵⁶ and concluded that a "principled right to indemnity should rest on relative responsibility."¹⁵⁷ The court acknowledged the existence of the Missouri contribution statute,¹⁵⁸

¹⁵¹ *Id.* at 325, 579 P.2d at 442, 146 Cal. Rptr. at 551.

¹⁵² See notes 109-146 *supra* and accompanying text.

¹⁵³ 21 Cal. 3d at 332, 579 P.2d at 446, 146 Cal. Rptr. at 555.

¹⁵⁴ *Id.* at 330, 579 P.2d at 445, 146 Cal. Rptr. at 554. In discussing the trial court's conclusion that the California contribution statute prevented the apportionment of loss among multiple defendants based on their relative degree of fault (see note 149 *supra*) the California Supreme Court said that "*American Motorcycle* has now explicitly held that . . . the existing contribution statutes do not in themselves necessarily prohibit apportionment of liability among multiple tortfeasors on a comparative fault basis." 21 Cal. 3d at 328, 579 P.2d at 444, 146 Cal. Rptr. at 553.

¹⁵⁵ 566 S.W.2d 466 (Mo. 1978). In *Sampson v. Missouri Pac. R.R. Co.*, 560 S.W.2d 573 (Mo. 1978), the Missouri Supreme Court affirmed a \$300,000 judgment against Missouri Pacific for damages for injuries received by plaintiff, an employee of its consignee, when he fell from the top of a three decker auto rack rail car. The instant case arose from Missouri Pacific's attempt to bring Whitehead & Kales, the manufacturer and installer of the auto rack, into the *Sampson* case as a third party defendant liable to Missouri Pacific for all or part of the plaintiff's claim. 566 S.W.2d at 467.

¹⁵⁶ *Id.* at 470-72. See note 30 *supra* and accompanying text.

¹⁵⁷ 566 S.W.2d at 472.

¹⁵⁸ Mo. REV. STAT. § 537.060 (1969) provides that "[d]efendants in a judgment founded on an action for the redress of a private wrong shall be subject to contribution . . ." While the Missouri statute does not itself define contribution, the court had always observed that contribution was founded on the principle that equity is

but avoided the issue by stating simply that it applied only to judgment defendants.¹⁵⁹ The Missouri Supreme Court also relied on Missouri's third party joinder rule¹⁶⁰ as a basis for adopting comparative indemnity. The court concluded that "the legislature, as a matter of policy, decided that a third party could be brought into the case where liable to the original defendant either *in whole or in part* for the plaintiff's claim against him."¹⁶¹

In *Laubach v. Morgan*,¹⁶² the Oklahoma Supreme Court adopted a rule similar to comparative partial indemnity even though Oklahoma still prohibits contribution altogether among joint tortfeasors.¹⁶³ The court professed to do away with the "entire liability rule" by providing that multiple tortfeasors are severally liable only for the percentage of the damages which can be attributed to them individually.¹⁶⁴ The court concluded that the rationale behind comparative partial indemnity was most consistent with the underlying principle of comparative negligence that assesses liability in direct proportion to the respective fault of each person whose negligence caused the damage.¹⁶⁵

equality and that there could only be pro rata reimbursement under the statute. See *Commercial Union Ins. Co. v. Farmers Mutual Fire Ins. Co.*, 457 S.W.2d 224 (Mo. Civ. App.-St. Louis 1970); *Missouri Dist. Tel. Co. v. Southwestern Bell Tel. Co.*, 338 Mo. 692, 93 S.W.2d 19 (1935).

¹⁵⁹ 566 S.W.2d at 473.

¹⁶⁰ Mo. Rev. Stat. § 507.080 (1949).

¹⁶¹ 566 S.W.2d at 468.

¹⁶² 588 P.2d 1071 (Okla. 1978). In *Laubach*, plaintiff Laubach sued defendants Morgan and Martin for damages resulting from a three car collision. Defendant Martin cross-petitioned against defendant Morgan. The jury returned a verdict in favor of plaintiff for \$4,000, which was reduced by the plaintiff's percentage of negligence (30%) to \$2,800. *Id.* at 1072.

¹⁶³ Oklahoma's contribution statute, OKLA. STAT. tit. 12, § 831 (1971), deals only with contracts and has never been applied to joint tortfeasors. See *National Trailer Convoy, Inc. v. Oklahoma Turnpike Auth.*, 434 P.2d 238 (Okla. 1967).

¹⁶⁴ 588 P.2d at 1074. The Oklahoma court is the only court adopting comparative partial indemnity that has chosen also to reject the archaic joint and several rule of liability, which is itself arguably incompatible with the system of comparative negligence. That subject, however, is outside the scope of this comment.

¹⁶⁵ *Id.* at 1075. The court said that "[i]f liability attaches to each tortfeasor in proportion to his comparative fault, there will be no need for added litigation by defendants seeking contribution. The adoption of the theory of comparative fault satisfies the need to apportion liability without invading the Legislature's power to grant con-

The Illinois Supreme Court, in *Skinner v. Reed-Prentice Division Package Machinery Co.*¹⁶⁶ and two companion cases,¹⁶⁷ also adopted a system of comparative partial indemnity in 1978. At that time in Illinois, there existed no right of contribution among tortfeasors.¹⁶⁸ The court rejected the argument that the abolition of the no-contribution rule was best left to action by the legislature, and stated that where the court had created a rule or doctrine that was now unjust they have the power to modify or abolish it.¹⁶⁹ The court concluded that "governing equitable principles require that ultimate liability for plaintiff's injuries be apportioned on the basis of the relative degree to which [each tortfeasor's] conduct proximately caused them."¹⁷⁰

There is one recent opinion, however, which refuses to follow the trend of judicially adopted comparative partial indemnity. The Supreme Court of Alaska in *Arctic Structures, Inc. v. Wedmore*¹⁷¹ felt constrained by the existence of the Alaska contribution statute¹⁷² from adopting such a doctrine. The

tribution." *Id.*

¹⁶⁶ 70 Ill. 2d 1, 374 N.E.2d 437, cert. denied, 436 U.S. 946 (1978).

¹⁶⁷ *Stevens v. Silver Mfg. Co.*, 70 Ill. 2d 41, 374 N.E.2d 455 (1978); *Robinson v. International Harvester Co.*, 70 Ill. 2d 47, 374 N.E.2d 458 (1978). See also *Zaremski and Burns, Skinner v. Reed-Prentice: Genesis of Comparative Fault in Illinois?*, 67 ILL. BAR J. 334 (1979).

¹⁶⁸ Illinois did recognize the exception to the general rule prohibiting contribution that a "passive" tortfeasor could obtain indemnity from an "active" tortfeasor. 70 Ill. 2d at 3, 374 N.E.2d at 439.

¹⁶⁹ *Id.* at 6, 374 N.E.2d at 442.

¹⁷⁰ *Id.*

¹⁷¹ 605 P.2d 426 (1979).

¹⁷² ALASKA STAT. § 09.16.010-.060 (1973) provides as follows:

Section 09.16.010:

(a) [W]here two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. *No tort-feasor is compelled to make contribution beyond his own pro rata share of the entire liability.*

* * *

(f) This chapter does not impair any right of indemnity under existing law. If one tortfeasor is entitled to indemnity from another, the

court noted that the "statutory right of contribution is expressly limited to the pro rata share of the common liability and '[n]o tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.'"¹⁷³

Petitioners in *Arctic Structures* contended that despite the express language of the Alaska contribution act requiring pro rata distribution of liability for damages among concurrent tortfeasors, the underlying purpose of the act was the fair and equitable treatment of multiple defendants.¹⁷⁴ The petitioner's argument, like that made by AMA in *American Motorcycle*,¹⁷⁵ was based primarily on the Alaska Supreme Court's adoption of comparative negligence in *Kaatz v. State*,¹⁷⁶ that each party should be liable for the portion of the damages representing his percentage of fault. The Alaska Supreme Court rejected this argument based on what they perceived to be the explicit mandate of the Alaska contribution statute that pro rata contribution be applied in apportioning loss among multiple tortfeasors.¹⁷⁷

CONCLUSION

There is a definite trend towards judicial adoption of a system of comparative partial indemnity, or some form of "comparative contribution." The courts are struggling over new problems with traditional methods of allocating tort loss created by the advent of comparative negligence in most Ameri-

right of the indemnitee obligee is for indemnity and not contribution

Section 09.16.020

* * *

(3) principles of equity applicable to contribution generally shall apply.

ALASKA STAT. § 09.16.010-.020 (1973) (emphasis added).

Compare these provisions with those of the California contribution statute quoted at note 97 *supra*. See note 139 *supra*.

¹⁷³ 605 P.2d at 430. See note 139 *supra* where it was pointed out that the *American Motorcycle* court completely ignored almost identical provisions which existed in the California contribution statute. See note 97 *supra*.

¹⁷⁴ 605 P.2d at 431.

¹⁷⁵ See notes 116-17 *supra* and accompanying text.

¹⁷⁶ 540 P.2d 1037 (Alaska 1975).

¹⁷⁷ 605 P.2d at 430-31.

can jurisdictions.¹⁷⁸ The traditional methods of contribution and indemnity are at odds with the relative apportionment of fault which takes place under a system of comparative negligence. The system of comparative partial indemnity, like comparative contribution, apportions the loss among responsible tortfeasors according to their relative degrees of fault, and such a system is most compatible with the adoption of comparative negligence.¹⁷⁹

In many states, however, the legislatures are trying to come to grips with this problem and in most states in which contribution statutes have been enacted the legislatures have opted for pro rata, rather than comparative, contribution.¹⁸⁰ Where a legislature has enacted a contribution statute, it represents the legislature's answer to a particular legal issue, namely the question of allocation of tort loss among multiple defendants. When a statute directly addresses and answers such an issue the courts have no choice but to apply the statute unless they are willing to rule the statute unconstitutional.¹⁸¹ Only when the statute does not answer a particular question can the court interpret the statute to fill in the "gap" left by the legislature,¹⁸² but even then the court must adhere to the policy and intent manifested by the legislature through the statute.¹⁸³

Most of the courts adopting comparative partial indemnity have chosen to ignore completely the contribution statutes existing in their respective states.¹⁸⁴ The California Supreme Court in *American Motorcycle*¹⁸⁵ made the best attempt of any of the courts at arguing that they were not precluded by the California contribution statute from adopting such a doctrine.¹⁸⁶ In fact, it was the only court to actually deal directly

¹⁷⁸ See notes 1-2 *supra* and accompanying text.

¹⁷⁹ See note 4 *supra*.

¹⁸⁰ See notes 19-22 *supra* and accompanying text.

¹⁸¹ See note 81 *supra* and accompanying text.

¹⁸² See notes 81-82 *supra* and accompanying text.

¹⁸³ See notes 82-83 *supra* and accompanying text.

¹⁸⁴ See note 107 *supra* and accompanying text. See notes 158-59 *supra* and accompanying text.

¹⁸⁵ See notes 109-46 *supra* and accompanying text.

¹⁸⁶ See notes 130-46 *supra* and accompanying text.

with the issue of preclusion.

The court's reasoning in *American Motorcycle*, however, does not hold up under close scrutiny when examined in light of the entire California contribution statute.¹⁸⁷ While the court's selective reading of the statute appears at first glance to support its argument, it completely ignores the section of the statute which provides that "in no event shall any tortfeasor be compelled to make contribution beyond his own pro rata share of the entire judgment."¹⁸⁸ A clearer mandate by the legislature could hardly be imagined, but the court chooses not to make reference to it.¹⁸⁹

The *American Motorcycle* court instead relies on two other provisions of the California contribution statute to support its adoption of comparative partial indemnity.¹⁹⁰ The court's reliance on these provisions is misplaced, however, in light of the apparent intent of the statute and traditional definitions of contribution and indemnity. The court quotes that part of the statute providing that the right of contribution "shall be administered in accordance with the principles of equity," yet it is established that the premise upon which pro rata contribution is based is that *equality is equity*.¹⁹¹

The other provision relied on by the court says that "[t]his title shall not impair any right of indemnity *under existing law*"¹⁹² and goes on to subordinate the right of contribution to such right of indemnity.¹⁹³ In 1957, when the California contribution statute was enacted,¹⁹⁴ the right of non-contractual implied indemnity shifted the *entire* loss from one tortfeasor to another who in equity should bear the burden instead.¹⁹⁵ There was no right of partial indemnity which shifted only a part of the loss between the joint tortfeasors.¹⁹⁶

¹⁸⁷ See note 97 *supra*.

¹⁸⁸ CAL. CIV. PROC. CODE § 875(c) (West Supp. 1980) (quoted at note 97 *supra*).

¹⁸⁹ See note 139 *supra*.

¹⁹⁰ See notes 136-46 *supra* and accompanying text.

¹⁹¹ See notes 141-46 *supra* and accompanying text.

¹⁹² CAL. CIV. PROC. CODE § 875(f) (West Supp. 1980) (emphasis added).

¹⁹³ See notes 136-40 *supra* and accompanying text.

¹⁹⁴ See note 97 *supra*.

¹⁹⁵ See note 137 *supra*.

¹⁹⁶ See notes 137-39 *supra*.

The use by the courts of the label "partial indemnity" to identify this new judicial doctrine is itself a contradiction in terms, and illustrates the problem with the adoption of this doctrine. Saying that there is a right of "partial indemnity" is essentially the same thing as saying that the courts will allow a "partial total" shift of the tort loss from one defendant to another. Obviously, such a statement makes little sense considering the ordinary use of the words. Indemnity is a total, not partial, loss shifting remedy, and where one party is entitled to indemnity he is entitled to be reimbursed for the *entire* amount which he has been forced to pay.¹⁹⁷ Contribution, on the other hand, is a partial loss shifting remedy which allocates the loss between joint tortfeasors either pro rata, or proportionately according to their relative degrees of fault.¹⁹⁸

Where the legislature has adopted pro rata contribution by statute, the courts of that state have no choice but to apply pro rata contribution even if there is, in their opinion, a better method of loss allocation among multiple tortfeasors.¹⁹⁹ The courts which have adopted comparative partial indemnity in spite of the existence of a pro rata contribution statute²⁰⁰ have done so because they cannot change the statute to provide for comparative, rather than pro rata, contribution. The courts cannot substitute their judgment for the legislature's, and the fact that the courts cannot change the statute raises one of the best arguments why they should not adopt comparative partial indemnity to circumvent judicially the operation of the contribution statutes.

Comparative partial indemnity is nothing more than the adoption of a system of comparative contribution by the courts in complete disregard of the existing contribution statutes. The judiciary is constitutionally prohibited from acting as a legislature by the separation of powers doctrine.²⁰¹ The courts cannot judicially adopt a doctrine which effectively

¹⁹⁷ See notes 47-52 *supra* and accompanying text.

¹⁹⁸ See notes 55-59, 74-75 *supra* and accompanying text.

¹⁹⁹ See notes 77-80 *supra* and accompanying text.

²⁰⁰ See notes 84-170 *supra* and accompanying text.

²⁰¹ See notes 77-80 *supra* and accompanying text.

nullifies a statute simply because they think that the judicial doctrine is a better way to handle the particular problem addressed by the legislation. The court must either apply the statute, or strike it down as unconstitutional.²⁰²

The issue of contribution and indemnity is as important in aviation law as it is in any other area of the law where negligence principles are applicable.²⁰³ The effect of the problem discussed in this comment can easily be demonstrated by using the facts of *United Air Lines, Inc. v. Wiener*²⁰⁴ as a hypothetical. Assuming for the moment that the crash occurred in California before the California Supreme Court's decision in *American Motorcycle*, rather than in Nevada,²⁰⁵ the application of the California contribution statute²⁰⁶ would have resulted in both United Air Lines and the United States government paying one-half of the damages awarded to the multiple plaintiffs.²⁰⁷ An application of comparative partial indemnity, on the other hand, would require each defendant to pay that portion of the damages representing his relative degree of fault.²⁰⁸ Under the facts of *Wiener*, where one defendant is found to be greatly more negligent than the other, his proportion of the damages will greatly exceed the one-half that he would pay if the contribution statute were applied. In major aircraft litigation where accidents tend to be catastrophic, such a change could result in millions of dollars difference in the amount of judgment each defendant will have to pay.

Any change in an existing pro rata contribution statute, however, must be made by the legislature amending the statute to provide for comparative contribution. The courts can-

²⁰² See notes 81-82 *supra*.

²⁰³ See generally Oldham and Maynard, *Indemnity and Contribution Between Strictly Liable and Negligent Defendants in Major Aircraft Litigation*, 43 J. AIR. L. & COM. 245 (1977).

²⁰⁴ See notes 32-40 *supra* and accompanying text.

²⁰⁵ See note 33 *supra* and accompanying text.

²⁰⁶ See note 97 *supra*.

²⁰⁷ This, of course, also assumes that the California court would not rule as the Ninth Circuit did that the government was guilty of "active" negligence while United's negligence was merely passive, 335 F.2d at 402, and thus United would not be entitled to implied indemnity.

²⁰⁸ See notes 119-21 *supra* and accompanying text.

not ignore the statute and rely on the parallel doctrine of indemnity to circumvent completely the legislature's mandate that contribution in that state be by a pro rata system. To allow the courts to do so is in effect to allow the courts to legislate away the statutes which they believe should be changed, not because the statutes are unconstitutional, but because they believe that there is a better way to handle the particular problem. The courts cannot effectively circumvent pro rata contribution statutes by expanding the doctrine of non-contractual implied indemnity to create a separate judicial system of comparative partial indemnity which is nothing more than comparative contribution.

