

2002

## Fair to Whom? Misapplication of the Fair Responsibility Act

Carolyn Hacker

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/cwlr>

---

### Recommended Citation

Hacker, Carolyn (2002) "Fair to Whom? Misapplication of the Fair Responsibility Act," *California Western Law Review*. Vol. 39 : No. 1 , Article 4.

Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol39/iss1/4>

This Comment is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact [alm@cwsl.edu](mailto:alm@cwsl.edu).

## COMMENTS

### FAIR TO WHOM? MISAPPLICATION OF THE FAIR RESPONSIBILITY ACT

#### I. INTRODUCTION

Imagine you are waiting to cross the street at a marked crosswalk. The light turns green and you step into the street just as a driver runs the red light from the other direction and hits you. It seems clear that this driver was blatantly negligent and everyone agrees that you have the right to sue the driver for every penny spent on medical expenses and the damages associated with the pain and suffering of being permanently disabled. But what if that driver has no money?

In the course of investigating your claim, your attorney discovers that, at the time of the accident, the bulb in one of the red lights facing the driver was burned out (assume there was one signal overhead and another to the left of the intersection facing the driver). Your attorney names the city as a defendant in the lawsuit on the theory that it negligently maintained the intersection signal. Since the driver was unable to pay your damages, the city stands to bear the total cost based on the well-established common law principle of joint and several liability, which holds every defendant liable for the entire damage award.

This scenario raises several issues. On the one hand, joint and several liability is vital to ensuring that people injured through no fault of their own recover all of their damages from the parties at fault. On the other hand, it seems unfair that the city winds up paying more than its proportionate share of the damages merely because it has more money. In California, insurance companies that wanted to reduce claims and litigation costs began campaigning for reform of the joint and several liability system.<sup>1</sup> In 1986, their efforts to stir up dissension resulted in the question being put before California voters in the form of a proposition.<sup>2</sup>

---

1. Ellyn Moscovitz, *The Fair Responsibility Act of 1986: How Fair Is It?*, 13 WHITTIER L. REV. 909, 909 (1992).

2. Proposition 51, "The Fair Responsibility Act" (June 3, 1986) (codified as CAL. CIV. CODE § 1431.1-1431.5 (West 1986)).

Proposition 51 specifically stated that its intent was to protect these “deep pocket defendants.”<sup>3</sup> While joint and several liability would be retained for economic damages, principles of comparative fault would be applied to non-economic damages.<sup>4</sup> Namely, each defendant would only be liable for its percentage of the general damages, with a jury deciding these percentages.<sup>5</sup> Following a hard-fought campaign in which the insurance industry spent millions on television advertising, the voters approved this contentious initiative.<sup>6</sup>

An unanticipated result of this proposition, which will be the focus of this Comment, is that many California courts have interpreted this statute to mean that juries may calculate a percentage of fault for a named defendant even when there are no other named parties with fault to compare.<sup>7</sup> This means that, though neither names nor evidence of fault of any other party besides the defendant is offered at trial, an instruction that provides for attribution of fault to “all other persons” is allowed.<sup>8</sup> Because of this, the basis for the jury’s apportionment becomes highly questionable. Moreover, the result is that an injured plaintiff may be denied a full recovery without a showing that anyone besides the named defendant is at fault.

Part II of this Comment will explain the background and policies behind joint and several liability, Proposition 51, the related California jury instructions, and immunity statutes. Part III will argue that names and evidence of fault sufficient to prove the elements of the applicable tort must be presented at trial before a Proposition 51 apportionment may be made. The current system of attributing fault to an unknown, unnamed person seems to violate the very principles of law. Part IV will discuss the special problems that arise with application of the Part II rule to immune entities and will provide a suggestion as to how they should be resolved.

## II. BACKGROUND

### A. Joint and Several Liability

Joint and several liability is the long-employed common law principle that where there are multiple tortfeasors, each will be held indivisibly liable for the total damages.<sup>9</sup> The rationale behind this is that “if [the] defendants

---

3. CAL. CIV. CODE § 1431.1 (West 1986).

4. *See id.* § 1431.2

5. *See id.*

6. *See* Kenneth Reich, *Deep Pockets’ Controversy Prop. 51 Ads, Pro and Con-Is Voter Being Mised*, L.A. TIMES, May 26, 1986, at B1; *see also* CAL. CIV. CODE § 1431.2 (West 1986).

7. *See* discussion *infra* section III.

8. *See* California Jury Instructions, Civil § 16.00 (9th ed. 2002); *see also* California Jury Instructions, Civil § 16.73 (9th ed. 2002).

9. 14 CAL. JUR. 3D CONTRIBUTION AND INDEMNIFICATION § 77 (1999).

are independent tortfeasors and thus each liable for the damage caused by him alone, and, at least, where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress."<sup>10</sup> The idea, that the fault should be borne by a negligent tortfeasor rather than an innocent plaintiff, even if that defendant is only one of the causes of the harm, has been a firmly entrenched aspect of tort law for decades.<sup>11</sup>

This compensation scheme also serves the very important function of protecting plaintiffs when one or more of the tortfeasors is indigent. In this scenario, without joint and several liability, the plaintiff might be denied a full recovery, despite having included all negligent parties in the lawsuit.<sup>12</sup> As one court stated, "we think that . . . abandonment of the joint and several liability rule would work a serious and *unwarranted* deleterious effect on the practical ability of negligently injured persons to receive *adequate* compensation for their injuries."<sup>13</sup>

### B. Proposition 51

In 1986, California voters enacted Proposition 51 in an effort to ensure that civil judgments more accurately corresponded with the degree of fault of the defendant.<sup>14</sup> In recent years, concern arose that plaintiffs were targeting government agencies and corporations with good insurance coverage for large damages suits.<sup>15</sup> The rationale cited for this behavior was that the doctrine of joint and several liability ensured recovery from any defendant shown to share some portion of the fault of the injury.<sup>16</sup> In some cases, this meant that the defendant with a small percentage of fault, but a large bank

10. *Summers v. Tice*, 199 P.2d 1, 5 (Cal. 1948).

11. *See Finnegan v. Royal Realty Co.*, 218 P.2d 17, 32 (Cal. 1950) ("Even though persons are not acting in concert, if the result[s] produced by their acts are indivisible, each person is held liable for the whole. . . . The reason for imposing liability on each for the entire consequence is that there exists no basis for dividing damages and the law is loath to permit an innocent plaintiff to suffer as against a wrongdoing defendant. This liability is imposed where each cause is sufficient in itself as well as where each cause is required to produce the result.").

12. In rejecting the replacement of joint and several liability with a comparative negligence scheme, the California Supreme Court has noted:

[I]n many instances a plaintiff will be completely free of all responsibility for the accident, and yet, under the proposed abolition of joint and several liability, such a completely faultless plaintiff, rather than a wrongdoing defendant, would be forced to bear a portion of the loss if any one of the concurrent tortfeasors should prove financially unable to satisfy his proportioned share of the damages.

*American Motorcycle Ass'n. v. Superior Court*, 578 P.2d 899, 905 (Cal. 1978).

13. *Id.* at 906 (emphasis added).

14. CAL. CIV. CODE § 1431.1-1431.5 (West 1986).

15. *See John W. Wade, Should Joint and Several Liability of Multiple Tortfeasors be Abolished?* 10 AM. J. TRIAL ADVOC. 193, 193 (1986).

16. *Id.* at 194.

account, was held liable for the full amount of damages sought.<sup>17</sup> Though joint and several liability served the purpose of ensuring recovery by the plaintiff, it was viewed as an unfair burden on these defendants.<sup>18</sup>

One author has suggested that the primary impetus for the passage of Proposition 51 was a tremendous effort by the insurance industry to portray their rising expenses as a “crisis.”<sup>19</sup> This effort was apparently successful, as reflected in the preamble language of the Initiative (section 1431.1):

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.<sup>20</sup>

It is important to note that Proposition 51 applies only to non-economic damages.<sup>21</sup> By the terms of the statute, these are defined as “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.”<sup>22</sup> These are the same types of losses generally referred to in the law as “general damages.” Economic damages, generally called special damages, remain the joint and sev-

17. See Proposition 51, “The Fair Responsibility Act” (June 3, 1986), reprinted in Evangelatos v. Superior Court, 753 P.2d 585, app. at 614 (1988) (Argument in Favor of Proposition 51).

18. See *id.*

19. James A. Gash, *Rethinking Principles of Comparative Fault in Light of California's Proposition 51*, 19 PEPP. L. REV. 1495, 1543 n.6 (1992).

20. CAL. CIV. CODE § 1431.1 (West 1986).

21. *Id.* § 1431.2.

22. See *id.*

eral liability of all defendants to the litigation.<sup>23</sup> Examples of economic damages are identified in the statute as “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.”<sup>24</sup>

Proposition 51 thus apportions damages between defendants according to what kind of recovery is sought. The substantive language of the initiative is as follows:

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.<sup>25</sup>

Opponents of Proposition 51 argue that it removes the protections for injured plaintiffs who previously were protected by joint and several liability.<sup>26</sup> The essence of joint and several liability was that recovery by innocent, injured plaintiffs was of paramount concern and should be ensured.<sup>27</sup> This initiative opens the way for plaintiffs to be denied full recovery in several ways. One or more of the liable defendants may be insolvent, missing, unknown, or immune. In these cases, the plaintiff cannot include the party in the initial lawsuit at all or it would be futile to do so. Furthermore, even if some percentage of fault were apportioned to one of these parties, the plaintiff would never be able to actually collect on the judgment. Thus, plaintiff is left in exactly the same uncompensated, helpless position that the architects of joint and several liability sought to prevent.

### *C. California Jury Instructions*

Because Proposition 51 allows each defendant to be held liable only for his own percentage of fault, it logically follows that calculation of this percentage “necessarily requires independently acting tortfeasors who have some fault to compare.”<sup>28</sup> However, for many reasons, the plaintiff may not

---

23. *Evangelatos v. Superior Court*, 753 P.2d 585, 590 (Cal. 1988).

24. CAL. CIV. CODE § 1431.2 (West 1986).

25. *Id.*

26. See Proposition 51, “The Fair Responsibility Act” (June 3, 1986), reprinted in *Evangelatos*, 753 P.2d at app. 615 (Argument Against Proposition 51).

27. “Joint and several liability ensure that even if at least one joint tort-feasor is insolvent or judgment-proof, the injured party may still recover the full amount of the judgment from each of the remaining tort-feasors.” 86 C.J.S. TORTS § 40 (1997).

28. *Rashtian v. BRAC-BH, Inc.*, 12 Cal. Rptr. 2d 411, 414 (Cal. Ct. App. 1992).

have made all possible tortfeasors a party to the suit.<sup>29</sup> As such, a modified version of California jury instruction 16.00 from the Book of Approved Jury Instructions (“BAJI”) is frequently used in litigation. This instruction allows the jury to ascribe percentages of fault to the defendants, the plaintiff, and a general category of all “other persons.”<sup>30</sup> The question this raises, which will be a focus of the discussion of this Comment, is: must these “other persons” be named, and sufficient evidence of their fault presented at trial, before a percentage of fault may be apportioned to them at trial to offset the liability of the named defendants? It would seem intuitively unfair to deny a plaintiff a full recovery because fault was apportioned to unknown parties. To further allow it to be done without any showing of proof requires the jury to decide based on a whim and the superior court “is not a place of mysticism or conjuring.”<sup>31</sup> However, there is some precedent for courts using this instruction in the absence of evidence of the fault of these non-party tortfeasors.<sup>32</sup>

#### *D. Immune Entities*

One subset of individuals who have served as a basis for raising the issues of how and when fault may be apportioned is immune entities. Immunity statutes protect certain types of persons and entities from liability in tort.<sup>33</sup> This generally serves the purpose of either encouraging socially desirable behaviors (such as helping in an emergency without fear of a lawsuit) or protecting the financial integrity of vital institutions (such as schools). These

---

29. For example, if the tortfeasor is unknown, such as a hit-and-run driver, then he or she may also be outside of the jurisdiction and not subject to service, immune, or insolvent (and therefore, perhaps not worth suing).

30. California Jury Instructions, Civil § 16.00 (9th ed. 2002) (Question six asks, “Assuming that 100% represents the total negligence [and fault] [and wrongful conduct] that was the cause of the plaintiff’s [injury] [damage]. What percentage of this 100% is due to the contributory negligence of the plaintiff and what percentage of this 100% is due to the [negligence] [and] [fault] [and] [wrongful conduct] of the defendant[s] [and all other persons]?”).

31. Pl.’s Reply in Support of Proposed J. at 6, *Castillo v. San Diego Transit Corp.* (San Diego Super. Ct. 2001) (No. 728790).

32. *See, e.g., Bly-Magee v. Budget Rent-A-Car Corp.*, 29 Cal. Rptr. 2d 330, 333 (Cal. Ct. App.) (1994). (Special verdict form allowing allocation of fault to “other persons” was used and the jury returned a verdict attributing 5% of fault to plaintiff, 90% to defendant, and 0% to “other persons.” Defendant objected to use of the “other persons” designation, but the court affirmed the holding on appeal. The court stated that sufficient evidence of other possible third party tortfeasors was present in the record and “Budget had every opportunity to focus the jury on this issue but chose not to do so.”) *Id.* at 335.

33. *See, e.g.* CAL. CIV. CODE § 1714.45 (West 1998) (providing immunity from products liability suits for manufacturers of consumer products known by consumers to be inherently unsafe); CAL. EDUC. CODE § 44808 (West 1993) (providing immunity for schools for injuries to students incurred off-campus); CAL. BUS. & PROF. CODE § 2395 (West 1990) (grants immunity to licensed medical professionals for civil damages incurred while providing medical care at the scene of an emergency).

statutes typically provide that the institution is presumed immune unless any of a set of listed exceptions applies.<sup>34</sup>

While the courts have made it clear that immunity statutes protect certain parties from being apportioned any percentage of fault when they are named as primary parties to a lawsuit, the courts have wavered on the proper course where the immune entity is not a party to the suit.<sup>35</sup> However, in the most recent California Supreme Court decision on this issue, involving a tobacco manufacturer, the court concluded that a third party could not be assigned a portion of fault by way of Proposition 51 if it would have been immune from any liability if named as a party.<sup>36</sup> Despite this seemingly clear statement of logic, the holding of this case has not been uniformly followed.<sup>37</sup>

### III. ANALYSIS

California voters likely never anticipated the broad range of situations in which Proposition 51 is now being applied. If they had, these citizens never would have approved the measure.

As one commentator noted:

Now the question must be asked: Is the "Fair Responsibility Act" really fair? For the most part, the answer to that question depends on who one asks. For the insurance industry, which created and promoted the initiative, the initiative has been more than fair. Recent court decisions have gone beyond what the initiative originally contemplated. For injured persons, the initiative has been anything but "fair," resulting in substantially reduced recoveries.<sup>38</sup>

The voters, in an effort to do what was fair, probably never considered that injured people would be left unable to recover all of their damages. The logical assumption is that the damages will be divvied up among the defendants who are parties to the trial. Thus, once everyone pays his or her fair share, the plaintiff receives full compensation and no one is subject to an unfair burden. The voters likely did not consider defendants with no money or assets, were not aware of immunity statutes, and did not conceive that un-

---

34. See, e.g. CAL. CIV. CODE § 1714.45 (West 1998); CAL. EDUC. CODE § 44808 (West 1993); CAL. BUS. & PROF. CODE § 2395 (West 1990).

35. See, e.g., discussion *infra* section IV.

36. *Richards v. Owens-Illinois, Inc.*, 928 P.2d 1181, 1191 (Cal. 1997).

37. See, e.g., *Arena v. Owens-Corning Fiberglas Corp.*, 74 Cal. Rptr. 2d 580 (Cal. Ct. App. 1998) (relying upon *DaFonte v. Up-Right, Inc.*, 828 P.2d 140, 141 (1992) (holding "the plain language of section 1431.2 eliminates a third party defendant's joint and several liability to an injured employee for unpaid noneconomic damages attributable to the fault of the employer, who is statutorily immune from suit."). *Id.*

38. Ellyn Moscowitz, *The Fair Responsibility Act of 1986: How Fair Is It?*, 13 WHITTIER L. REV. 909, 909-10 (1992).



named parties might be apportioned part of the fault. These additions have come as the special finishing touches of the courts.

The clearest and most shocking example of Proposition 51 being stretched to applications far beyond its intended use arose out of an automobile accident-related lawsuit. In apportioning fault amongst the various parties, the jury attributed ten percent of the fault to a squirrel!<sup>39</sup> Apparently the squirrel chose an inopportune moment to run out into the road.<sup>40</sup> As a result, the court effectively denied the plaintiff ten percent of the expected recovery.<sup>41</sup> Clearly, the plaintiff had no chance of enforcing judgment against the squirrel, and the voters of California would likely be horrified to hear that this Act had been expanded to cover such an allocation.

*A. Must Third Parties be Named Before a Percentage of Culpability May be Ascribed to Them?*

The application of modified special verdict BAJI instructions 16.00 and 16.73 to Proposition 51 apportionments would suggest that the jury need not name the third parties to whom it may attribute some percentage of the fault. This is because the last question of the instruction asks the jury what percentage of fault is attributable to "all other persons" besides the defendant(s) and plaintiff(s).<sup>42</sup> The instructions do not specify that the jury receive a list of candidates who constitute a class of "other persons," nor do they specifically define who may not be considered a candidate.<sup>43</sup> Thus, facially, the instructions pave the way for the jury to consider just about anyone it wants to blame.

In one fairly recent case, *Bly-Magee v. Budget Rent-A-Car Corporation*, the court upheld the use of this instruction.<sup>44</sup> Here, plaintiff rented a car from Budget and was subsequently stopped by a California Highway Patrol officer because the car's license plates had expired.<sup>45</sup> When the driver also could not produce the car's registration or her proof of insurance, the officer cited her for driving with an expired registration and failure to produce the same upon request.<sup>46</sup> The driver subsequently refused to sign the citation and was

---

39. James A. Gash, *Rethinking Principles of Comparative Fault in Light of California's Proposition 51*, 19 PEPP. L. REV. 1495, 1543 n.338 (1992) (citing Sandra Calin, *Multiple Tortfeasors: Proposition 51, the "Fair Responsibility Act of 1986,"* 21 BEVERLY HILLS BAR. J. 26, 29 (Winter 1987)).

40. *Id.*

41. *Id.*

42. See California Jury Instructions, Civil § 16.00 (9th ed. 2002); see also California Jury Instructions, Civil § 16.73 (9th ed. 2002).

43. See California Jury Instructions, Civil § 16.00 (9th ed. 2002); see also California Jury Instructions, Civil § 16.73 (9th ed. 2002).

44. *Bly-Magee v. Budget Rent-A-Car Corp.*, 29 Cal. Rptr. 2d 330, 335 (Cal. Ct. App. 1994).

45. *Id.* at 331.

46. *Id.*

taken to the courthouse.<sup>47</sup> A magistrate was unavailable, so the police incarcerated the driver and allegedly subjected her to verbal and physical abuse.<sup>48</sup> Upon her release seven hours later, the plaintiff sued Budget and the local branch from which she had rented the vehicle.<sup>49</sup>

At the conclusion of the trial, Budget requested a special verdict form that named three non-party deputy sheriffs as possible parties to whom fault could be assigned.<sup>50</sup> The court rejected this request and instead used a form with the “other persons” designation.<sup>51</sup> When the jury did not allocate any of the fault to “other persons,” Budget appealed on the grounds that this language confused the jurors and amounted to reversible error.<sup>52</sup> In holding that the instruction did not mislead the jury, the appellate court noted that “[g]iven that the evidence included *expansive references* to the conduct of the CHP and the Sheriff’s Department, including the complaints in the other cases filed by Bly-Magee against these law enforcement agencies arising out of this same incident, Budget had every opportunity to focus the jury on this issue but chose not to do so.”<sup>53</sup>

It is important to note in this case that while the names of the nonparties were not specifically used on the form, they were referenced by name frequently throughout the course of the trial. Thus, as the court noted, the jury should have had a clear idea to whom the “other persons” designation referred.<sup>54</sup> Further, the parties to the trial had the opportunity to focus the jury’s attention on these individuals and their culpability.

Distinguishable from the *Bly-Magee* scenario are cases where the nonparties are never mentioned during the course of the trial, but the instruction is still allowed. In an unpublished case, currently on appeal in a California appellate court, the trial court explicitly excluded all evidence as to the contributory negligence of the plaintiff’s mother in a personal injury suit.<sup>55</sup> However, at the conclusion of the trial, the judge independently asked the jury what percentage of fault could be attributed to “all others” besides the plaintiff and the sole defendant (who was not the mother).<sup>56</sup> The jury returned a verdict finding that 50.1 percent of the fault was attributable to these “other persons.”<sup>57</sup>

---

47. *Id.*

48. *Id.* at 332.

49. *Id.*

50. *Id.* at 334.

51. *Id.*

52. *Id.*

53. *Id.* at 335 (emphasis added).

54. *Id.* at 334-35.

55. J. On Special Verdict, *Castillo v. San Diego Transit Corp.* (San Diego Super. Ct. 2001) (No. 728790).

56. *Id.* at 2.

57. *Id.*

The mother was not a named defendant at trial and her name was not mentioned at the verdict stage, but the jury apparently attributed some degree of fault to her.<sup>58</sup> And, while the jury, in conjecturing as to whom this instruction referred, likely primarily considered the mother, it may have considered any number of other people or entities.<sup>59</sup> In addition to the disagreeable imprecision of this method, it seems inappropriate for the jury to have been allowed to consider her participation in making its determination, given that the court explicitly excluded all evidence related to the mother. In permitting the use of this instruction, the court essentially allowed the mother to be reintroduced as a defendant through the backdoor. It will be interesting to see if the seeming impropriety of this method results in a reversal at the appellate level.

*B. Is Evidence Sufficient to Prove a Prima Facie Case of Negligence by These Third Parties Required?*

Assuming that the non-parties who might share liability are named, the next question is how much evidence of their culpability, if any, must be admitted before they can be apportioned a percentage of the damages. It would seem intuitive that a prima facie showing of negligence must be offered before liability can be assessed. After all, if these third parties were actual, named defendants, they would likely succeed in obtaining a demurrer if the plaintiff did not plead sufficient evidence of negligence.<sup>60</sup> Furthermore, the jury should have some reasonable basis for allocating fault to these parties. The charge of jurors is to weigh the evidence in light of the applicable law.<sup>61</sup> Without evidence, it would seem that their function would change fundamentally, resulting in verdicts based on intuition, conjecture and whim.<sup>62</sup>

Seemingly all of the published cases involving a dispute over a Proposition 51 apportionment included at least some admissible evidence as to the responsibility of non-parties. However, this evidence may not, in all cases, have actually been tantamount to a prima facie showing. The first question then is whether evidence of fault is required at all.

Logic suggests that there must be evidence of fault. Damages are paid based upon a finding that the defendant is liable for a tort. Liability for a tort

---

58. Compl. For Damages at 1, *Castillo v. San Diego Transit Corp.* (San Diego Super. Ct. 1999) (No. 728790).

59. There was also an immune entity involved in the incident, but this raises issues to be discussed later in the Comment. Evidence was explicitly excluded as to this entity as well.

60. CAL. CIV. PROC. § 430.10 (West 1973) (permitting a demurrer where facts are insufficient to state a cause of action).

61. See 50A C.J.S. JURIES § 2 (1997) ("A jury is a body of persons sworn to declare the facts of a case as they are proven from the evidence placed before them."); see also *id.* § 3 ("The term 'jury' . . . refers to a jury which is called to try the questions in an issue and to pass finally on the proof of such facts.").

62. See Pl.'s Reply in Support of Proposed J. at 6, *Castillo v. San Diego Transit Corp.*, (San Diego Super. Ct. 2001) (No. 728790).

is premised upon a showing of some form of wrongdoing. The only acceptable method under American standards of law to show that a wrong was actually committed, and that the defendant was the actual and proximate cause of the harm, is to offer material, admissible evidence. Thus, a party may not be assessed damages unless sufficient evidentiary proof is offered to overcome the relevant standard (preponderance of the evidence, clear and convincing, etc). Therefore, it follows that (a) any party figured into the equation for purposes of determining percentages of liability under Proposition 51 must have committed a tort, and (b) in order to prove this, evidence of that party's fault must be admitted.

This is why the courts have not allowed a percentage of fault to be apportioned to vicariously liable employers.<sup>63</sup> These employers have committed no tort in and of themselves. Their involvement is strictly by way of responsibility for the employee tortfeasor. Therefore, any evidence offered could only be to prove that the employee was a cause of the harm. Since a percentage of fault based on this evidence has already been allocated to the employee (for which the employer is vicariously liable), applying an additional equal share to the employer would be duplicative. It would have no independent evidentiary foundation.

Given that, on at least some level, the courts have verified the logic that liability cannot be allotted without evidence of fault, the next question is how much evidence is required. Not all entities to whom liability has been attributed have been parties to the suit. In dealing with this, the courts have seemingly undergone a somewhat indirect, haphazard evaluation of whether the elements of the tort have been met by these third parties.<sup>64</sup> So the question arises whether the plaintiff or defendant must establish a prima facie case against each person or entity to whom he or she wishes liability to be apportioned under Proposition 51.

The primary argument in favor of requiring that the plaintiff or defendant present evidence satisfying all of the elements of the offense is that it seems the most just system. American jurisprudence is based on the premise that one is innocent until proven guilty. While this axiom is typically invoked in reference to the criminal system, the same general principle applies to the civil system. Proof of this lies in the existence of the demurrer. If the plaintiff does not plead sufficient facts to satisfy the elements of the claim, the case is terminated before it begins. Likewise, if during the course of a trial, one party does not present evidence sufficient to at least raise a "genu-

---

63. See, e.g., *Rashtian v. BRAC-BH, Inc.*, 12 Cal. Rptr. 2d 411 (Cal. Ct. App. 1992); *Miller v. Stouffer*, 11 Cal. Rptr. 2d 454 (Cal. Ct. App. 1992); *Srithong v. Total Investment Co.*, 28 Cal. Rptr. 2d 672 (Cal. Ct. App. 1994); and *Wimberly v. Derby Cycle Corp.*, 65 Cal. Rptr. 2d 532 (Cal. Ct. App. 1997).

64. Note that the application of Proposition 51 has not been limited to tort suits in negligence—a percentage of liability may also be assigned to an intentional tortfeasor or a strictly liable defendant. See CAL. CIV. CODE § 1431.1 (West 1986). However, for purposes of this argument, the basis for liability is irrelevant because what is being argued is that the *elements* of the offense must be proven.

ine issue as to any material fact"<sup>65</sup> on every element, the other party will be granted a summary judgment. A person is not to be held directly liable for damages unless there has been a prima facie showing of proof of his or her liability; so why make an exception where the person is not a party to the trial and only indirectly apportioned a percentage of fault?

An argument against extending this degree of evidentiary formality to Proposition 51 allocations is that it will increase the duration of each suit and the burden on the parties and the court. However, only a subset of cases have cause to employ the Proposition 51 statutes. And, only a fraction of those will include non-parties in the determination of percentages of liability. While it may increase the length of the trial in those rare cases, it is arguably only returning them to their proper duration. The law encourages the settling of all claims relating to a single dispute in a single trial.<sup>66</sup> Thus, cases where all potential defendants were not joined may already be aberrations not favored by public policy. Therefore, it would be in accordance with law and public policy to at least fully litigate all of the issues and liabilities (even those related to non-parties) in one suit.<sup>67</sup>

Should the standard be changed to require a prima facie showing of negligence by all third parties to whom a percentage of liability will be apportioned, it would be necessary to figure out the mechanics of doing so. Whereas in most trials each party is present to promote or defend its own interests, this scenario would require parties to advocate on behalf of absent non-parties. In most cases, the defendant(s) would be in the position of wanting to raise the issue of the fault of non-parties in an effort to offset its own liability. In doing so, it would likely not be an overwhelming burden to require that the defendant plead facts sufficient to make out a prima facie case of negligence against each third party.

The next step is where things get a bit complicated. If the defendant pleaded facts sufficient to raise the issue of the negligence of third parties, the plaintiff is placed in the position of defending those non-parties. This is because it is in the plaintiff's interest to prevent liability attaching to non-parties, thereby preventing a decrease in the percentage of liability attributed to the named defendant. Plaintiffs in this position may be at a disadvantage because they do not have direct and immediate access to a non-party's records, employees, premises, and so forth. On the other hand, this may not be entirely unfair since the plaintiff was perhaps in a position to have included this non-party in the trial in the first place. And, since the third party is not

---

65. FED. R. CIV. P. 56(c).

66. The courts do not typically allow re-litigation over the *same claim* under the doctrine of res judicata/claim preclusion or the *same issue* under the doctrine of collateral estoppel/issue preclusion, even if those issues come up within the context of a different claim. See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 14.1 (3d ed. 1999).

67. This raises issues of defendants being present to defend their interests and raise all defenses. H Prop. 51 essentially ignores this also.

actually being held liable to pay any amount attributed to it by the jury, there is no appreciable injustice suffered by the third party.

It also bears evaluation whether increasing the burden of evidentiary proof would frustrate the plain language or intent of Proposition 51. The Act clearly states that it was intended to rectify inequities and injustices.<sup>68</sup> So on its face, it would seem that the legislature was concerned above all with ensuring justice, which as argued above, a prima facie evidentiary burden would accomplish. Further reading of the Act reveals the intent that each defendant shall be severally liable only for the damages proportionate to his or her degree of fault.<sup>69</sup> The percentage of fault cannot be ascertained without comparison to all other tortfeasors. And, under the increased evidentiary burden prescribed above, a party or non-party cannot be at fault, or a tortfeasor, until the burden of proof has been met. Thus, the Act can still be applied as intended if the courts require a prima facie showing of fault for each person allocated a portion of the liability. Furthermore, it retains its intended function of protecting deep pocket defendants from paying more than their share. What it would no longer allow is for deep pocket defendants to escape from payment of their full share by sloughing off liability onto unnamed third parties and/or named non-parties whose liability has not been conclusively established.

#### IV. SPECIAL PROBLEM OF IMMUNITY

Statutory immunity throws a monkey wrench into the neat little package prescribed above. Under normal circumstances, any party hoping to decrease his or her percentage of liability can present evidence of the fault of third parties at trial. Given that he or she provides a prima facie showing of negligence, we call this "fair." However, if the third party is immune, evidence of his or her fault is specifically *excluded* from trial. This presents a dilemma for the court and a significant roadblock for the party defendant(s).

The party defendant obviously would want to admit evidence of the immune entity's fault in order to offset its own. However, if no fault can be admitted, then the immune entity may not be considered a tortfeasor, and thus, not be apportioned a percentage of fault.<sup>70</sup> The result of this is that the party defendant pays the share of the entity that is protected, for some policy reason, by an immunity statute. Various courts have found this to be an unfair result, and have, therefore, allowed an allocation of fault to the immune entity in order to offset the defendant's percentage of damages. But again, this brings us right back to the scenario where the plaintiff is completely barred from fully recovering.

---

68. CAL. CIV. CODE § 1431.1(a) (West 1986).

69. *Id.* § 1431.2(a).

70. *Richards v. Owens-Illinois, Inc.*, 928 P.2d 1181, 1192 (Cal. 1997).

The two most recent and prominent California Supreme Court cases to have addressed this issue are *DaFonte v. Up-Right, Inc.*<sup>71</sup> and *Richards v. Owens-Illinois, Inc.*<sup>72</sup> In *DaFonte*, a ranch worker's arm was mangled when it was sucked into the grape harvester he was cleaning.<sup>73</sup> Though the worker's employer paid him workers compensation benefits, the employee also filed suit against the manufacturer, Up-Right, on theories of negligence and product defect.<sup>74</sup> This suit was joined with the insurer's subrogation action against the manufacturer.<sup>75</sup>

The trial court allocated forty percent of the fault to Up-Right, forty-five percent to the employer, and fifteen percent to the plaintiff.<sup>76</sup> However, pursuant to Proposition 51, it reduced the judgment against Up-Right by an amount equal to the forty-five percent of non-economic damages attributable to the employer.<sup>77</sup> The appellate court disagreed with this Proposition 51 allocation, which precluded recovery of full joint and several non-economic damages against Up-Right, and reversed.<sup>78</sup>

On appeal to the California Supreme Court, the manufacturer challenged the appellate court's allocation of damages.<sup>79</sup> The primary issue was whether Up-Right's percentage of damages should be offset by that of the employer, even though the employer was statutorily immune under worker's compensation laws.<sup>80</sup> The court held that because the plain language of the statute did not include an explicit exception for employers immune under worker's compensation programs, the court should not read one into the statute.<sup>81</sup> It read Proposition 51 to require that each defendant's fault must be weighed against the fault of all others, whether party to the suit or not.<sup>82</sup> As such, the court said that the employer could still be considered at fault.<sup>83</sup> The primary rationale for the worker's compensation scheme was to provide an alternative compensation system, not to establish as a matter of law and ethics that employers should not be considered tortfeasors.<sup>84</sup> It focused on the

---

71. 828 P.2d 140 (1992).

72. 928 P.2d 1181 (1997).

73. *DaFonte v. Up-Right, Inc.*, 828 P.2d 140, 141 (Cal. 1992).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 142. (This amount was not recoverable from the employer because it was statutorily immune under the worker's compensation statute.) *See id.* at 143.

78. *See id.* at 142.

79. *See id.*

80. *See id.*

81. *See id.* at 145.

82. *See id.* at 146.

83. *See id.* at 147.

84. *Richards v. Owens-Illinois, Inc.*, 928 P.2d 1181, 1189 (Cal. 1997) (discussing *Up-Right, Inc.*, 828 P.2d at 143).

intent of the Proposition, to protect “deep pocket defendants” from paying one cent more than their share, as the overriding principle to be protected.<sup>85</sup>

*Richards* declined to follow *DaFonte*, finding that there was a fundamental difference in the type of immunity afforded by the worker’s compensation system and that provided to tobacco manufacturers.<sup>86</sup> Here, a shipyard worker sued various asbestos manufacturers in negligence and strict liability for causing damage to his lungs.<sup>87</sup> The trial court granted him a large award of non-economic damages, which Owens-Illinois alone challenged on appeal.<sup>88</sup> The asbestos manufacturers contended that because *Richards* was a long-time smoker, and smoking has been shown to damage lung function, a significant portion of the liability should be attributed to tobacco companies by way of Proposition 51.<sup>89</sup>

The court rejected this claim on the basis that liability under Proposition 51 could only be assigned to “tortfeasors.”<sup>90</sup> In 1988, the legislature declared that tobacco manufacturers could not be held strictly liable for injuries caused by normal use of their product because tobacco “is known to be unsafe by the ordinary consumer.” Therefore, the court interpreted the statute to imply that manufacturers breached no duty in supplying tobacco products to voluntary consumers.<sup>91</sup> If the manufacturers had not breached a duty, they could not be held to be at fault, and were not tortfeasors.<sup>92</sup> This was the rationale for providing immunity to makers of “inherently unsafe” products.<sup>93</sup> Thus, the *Richards* court viewed it as “anomalous if, though immunized on such grounds from direct liability for providing an ‘inherently unsafe’ product to a knowing and voluntary consumer, the supplier could nonetheless be assigned ‘fault’ for doing so in an action between that same consumer and a third party defendant.”<sup>94</sup>

Extrapolation of the *Richards* holding would seem to provide that the implication of statutory immunity is usually the negation of duty.<sup>95</sup> Since the immune entity has no duty, it, by definition, cannot be held liable for a tort or, at least, the tort of negligence. A prima facie case of negligence cannot be made out without proving a duty and breach thereof. Thus, an immune party cannot be found to be a “tortfeasor” and, consummately held liable either directly or indirectly.

---

85. *Up-Right, Inc.* 828 P.2d at 146.

86. *Richards*, 928 P.2d at 1189.

87. *Id.* at 1183.

88. *Id.* at 1184.

89. *Id.*

90. *Id.* at 1183.

91. *Richards*, 928 P.2d at 1191.

92. *Id.* at 1189 n.6.

93. CAL. CIV. CODE § 1714.45 (West 1988).

94. *Richard.*, 928 P.2d at 1191.

95. The court said that the tobacco manufacturers did not *breach* a duty. *Id.* If they caused harm, but did not breach a duty, it would seem to follow that they *had no duty in the first place.*



Stemming from this analysis, it also appears that the *Richards* holding requires that a prima facie case be made out against any entity to whom liability is to be apportioned. While immunity statutes may legislatively remove one of the elements of the tort from consideration, it would seem reasonable that lack of proof could likewise do so. Direct liability may not be ascribed to a party without a sufficient evidentiary basis; so why should an indirect apportionment be allowed to circumvent this rule?

It will be interesting to see how the courts approach similar cases based upon other grants of statutory immunity. For instance, California Business and Professions Code § 2395 provides immunity to licensed medical professionals for civil damages incurred while providing medical care at the scene of an emergency.<sup>96</sup> The policy basis for this statute is to encourage doctors to provide emergency medical treatment to those obviously in need of it where they otherwise would have *no duty to do so*.<sup>97</sup> Because the emphasis of this statute is the lack of duty, it would seem that the *Richard's* logic would apply.

The logic here requires an additional step. Normally, physicians would have no duty to aid. However, should they voluntarily begin treatment and cause some sort of further injury in the process, they could normally be held liable for the injury. In an effort to prevent this fear of liability from deterring doctors from providing medical services, the statute explicitly absolves them of this liability. Thus, in essence, the statute holds that medical providers cannot breach the duty that may arise from a gratuitous undertaking.<sup>98</sup> Therefore, all of the elements of a prima facie case of negligence could not be proven in order to make a Proposition 51 apportionment.

## V. CONCLUSION

As drafted, Proposition 51 added a measure of fairness to the tort compensation system. However, the courts have seemingly extended the doctrine far beyond what the voters intended and policy standards have long required. The firmly entrenched notion of joint and several liability reflects the belief that it is of paramount concern to protect an innocent, injured party's right to fully recover. Consistent with this principle, it is reasonable to hold that, where there are multiple tortfeasors present in the action, each should only have to pay its share of the damages. However, it is not consistent with joint

---

96. CAL. BUS. & PROF. CODE § 2395 (West 1990).

97. 36 CAL. JUR. 3D HEALING ARTS AND INSTITUTIONS § 285 (West 1997).

98. RESTATEMENT (SECOND) OF TORTS § 324 (1965).

One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him.

and several liability principles to decrease the plaintiff's recovery by apportioning part of the liability to non-present, insolvent, missing or immune parties from whom the plaintiff has no chance of recovering.

In order to prevent this latter eventuality, it would seem logical to limit the scope of Proposition 51 to what were likely its intended boundaries. Namely, liability may only be attributed to parties or non-parties who are named and where a prima facie showing of their degree of fault has been made. This would protect the plaintiff's right to recover and give the plaintiff the incentive to include all parties to the suit so that he or she would not risk being barred by preclusion doctrines from collecting from third parties to whom fault had been apportioned. It would also protect "deep pocket defendants" from paying more than their fair share. Moreover, because a prima facie case could almost never be made out against immune entities, defendants would be barred from attempting to offload some of the liability onto these entities.

The courts are presently in a position where it would not be impossible to retrace their steps and limit the application of Proposition 51 as suggested in this Comment. The California Supreme Court has not directly addressed the issue of the required evidentiary standard for third-party defendants against whom liability is to be assessed under Proposition 51. Likewise, the *Richards* holding represents movement in the right direction in that it does not include immune entities in the allocation of liability.

*Carolyn Hacker\**

---

\* J.D. Candidate, April 2003, California Western School of Law; B.A. Neuroscience, University of Illinois, at Urbana, 1999. I would like to thank Nicholas A. Boylan, Esq. of the Law Firm of Nicholas A. Boylan, A.P.C. and David L. Speckman, Esq. of the law firm of Speckman & Associates for inspiring the topic and many of the ideas of this Comment. Their insight, support and encouragement in bringing these important issues to light have been invaluable.

