Limiting the Application of Proposition 51 in Cases of Liability Based on Public Policy and Employer's Negligence

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Proposition 51 was adopted June 3, 1986, and is codified as Civil Code section 1431.2. It revised the old rule of joint and several liability as to general damages and imposed a new rule of partial responsibility depending on percentages of fault. The statute, like any poorly drafted initiative foisted on the public by a false and misleading insurance industry advertising campaign, has created several unanswered questions, not the least of which is "who is a defendant for apportionment purposes?"

Most defendants erroneously take the view and would argue, that under Proposition 51 they are entitled to treat every "defendant" as a separate entity to diminish the percentage of each separate defendant's liability by the amount of any negligence proven against other defendants, even if such other defendants are the plaintiff's employer or are vicariously liable for the negligence of others under established public policy.

While the jury will be asked to determine the percentage of the total negligence to be attributed to all defendants, Proposition 51 does not diminish the non-economic damages that may be collected against all defendants because they are vicariously liable or subject to imputed liability as a matter of law.

The new Civil Code section 1431.2 provides:

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

The only case construing this new statute is *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188 [246 Cal.Rptr. 629], which held the statute was constitutional and would be applied prospectively only.

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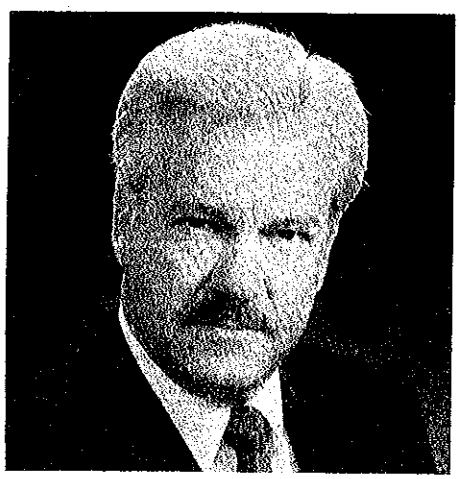
The intent of the statute was to allocate general or non-economic damages between defendants as can be seen from the adoption of Civil Code section 1431.1 which contains the finding and declaration of the People of the State of California:

> 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. [Emphasis added.]



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The campaign for Proposition 51 by the League of Cities, the County Supervisors Association and financed by the insurance industry never mentioned the long-standing public policy of California to penalize an employer's workers' compensation lien or credit rights. Nor was it ever suggested that Proposition 51 was intended to modify in any way the long-standing principle that when negligent agents, employees, and partners cause injuries, their innocent principals are also liable. The statute makes absolutely no reference to cases in which defendants are found liable as a matter of public

policy as a result of vicarious or imputed liability.

It is safe to say that Proposition 51 never contemplated anything other than allocating general damages between separate defendants whose liability arose in a setting in which multiple separate wrongful acts combined to cause injury.

Most helpfully, the appendix to *Evangelatos v. Superior Court, supra*, 44 Cal.3d at pp. 1243-1246, sets forth the complete California Voters' Handbook prepared by the Secretary of State concerning Proposition 51. Proposition 51 was initiated and promoted by the League of Cities and other public entities. The hypothetical situation that Proposition 51 was designed to remedy was described in the Argument in Favor of Proposition:

> Nothing is more unfair than forcing someone — be it a city, a county or the state, a school, a business firm or a person — to pay for damages that are someone else's fault.
>
> That's what California's "deep pocket" law is doing — at a cost of tens of millions of dollars annually. And that's why we need Proposition 51 — the Fair Responsibility Act.
>
> Regardless of whether it is a city, county or private enterprise that is hit with huge "deep pocket" court awards or out-of-court settlements, the TAXPAYER AND CONSUMER ULTIMATELY PAY THE COSTS through high taxes, increased costs of goods and services, and reduced governmental services.
>
> How does the "deep pocket" law work? Here's an illustration:
>
> A drunk driver speeds through a red light, hits another car, injures a passenger. The drunk driver has no assets or insurance.
>
> The injured passenger's trial lawyer sues the driver AND THE CITY because the city has a very "deep pocket" — the city treasury or insurance. He claims the stop light was faulty.
>
> The jury finds the drunk driver 95% at fault, the city only 5%. It awards the injured passenger $500,000 in economic damage (medical costs, lost earnings, property damage) and $1,000,000 in non-economic damages (emotional distress, pain and suffering, etc.)
>
> Because the driver can't pay anything, THE CITY PAYS IT ALL — $1,500,000.
>
> THAT'S THE "DEEP POCKET" LAW AND IT'S UNFAIR!
>
> Under Proposition 51, the city could still pay all the victim's economic damages, but only its 5% portion of the non-economic. Total: $550,000 — that's $950,000 less!
>
> Everyone agrees the injured passenger should be reimbursed. But there are TWO VICTIMS — the ACCIDENT VICTIMS and the TAXPAYER who foots the bill.
>
> Proposition 51 is a GOOD COMPROMISE — it takes care of both victims!
>
> With the passage of Proposition 51:
> * Liability insurance, now virtually impossible to obtain, would again be available to cities and counties.
> * Private sector liability insurance premiums could drop 10% to 15%.
> * The glut of lawsuits with dubious merit would be significantly reduced.
>
> Every California county — and virtually all its cities — are IN FAVOR OF PROPOSITION 51.
>
> One of the largest coalitions of school, governmental, law enforcement, small and large business, professional, labor and non-profit organizations in history urges you to VOTE YES ON PROPOSITION 51.
>
> This initiative proposition was put on the ballot by hundreds of thousands of voters because repeated attempts in the Legislature to reform the unfair "deep pocket" law were thwarted by the intense lobbying of the California Trial Lawyers Association.

The Voters' Handbook and the arguments concerning Proposition 51 fail to identify any suggestion that cases of imputed or derivative liability, in which the State of California holds as a matter of public policy that a defendant will be held vicariously liable for the wrongful act of another, will result in an exoneration of the vicariously liable defendant.

One helpful way to understand California law on this issue is to visualize derivative or imputed liability as running "vertically" from the wrongful acts of the tortfeasor upward to the vicariously liable defendant based on public policy considerations. The same simile applies in any case where one defendant is responsible for the acts of another as a matter of public policy.

This type of "vertical" or derivative liability is easily distinguishable from a case of "horizontal" liability in which multiple separate tortfeasors are simultaneously negligent and proximately cause an injury. An example of this type of "horizontal" liability occurs in the hypothetical presented by the Voters' Handbook, when an intoxicated person is confused by a defectively designed intersection and causes an injury. Under this latter hypothetical the negligence of two defendants combines at the same time to bring about an injury. In such a case, a jury would be asked to allocate, pursuant to Proposition 51, the combined negligence of both parties causing the injury: drunk driver and public entity responsible for the defectively designed intersection.

On the other hand, defendants in a case of "vertical" liability are not entitled to allocate fault under Proposition 51, because their liability is derivative and is imposed on all defendants vicariously, as a result of the wrongful act of a tortfeasor.

Proposition 51, as a clear reading of the Voters' Handbook shows, was intended to separate fault when multiple tortfeasors have caused simultaneous "horizontal" forces to proximately cause an injury. It is only in this case that Proposition 51's requirement of allocation of *actual* fault occurs.

Proposition 51 was not intended to alter vicarious legal liability for injuries that arise as a result of public policy and never intended to repeal the imputed liability of:

1. providers of automobiles to permissive users;
2. employers of negligent employees;
3. principal of negligent agents;
4. joint venturers;
5. partners;
6. owners and general contractors under Restatement 416 in peculiar risk cases;
7. parents for their children's torts;
8. public franchisees for the torts of their contractors, e.g., public utilities, trucking firms, etc.

In addition to the legislative history, the statute itself provides language that is clearly consistent with statutory intent. Civil Code section 1431.2 sets forth the cases in which Proposition 51 rules apply and states that it is to be applied "[i]n any action for personal injury ... based upon principles of comparative fault...." It is for this reason that the mandate of Civil Code section 1431.2 that, "[e]ach 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..." does not apply in cases where liability is imposed as a matter of public policy and imputed to others as a matter of law, since the comparative fault of a public policy defendant should never be in issue and therefore the action is not based upon "principles of comparative fault."

To hold otherwise would be to re-write by judicial fiat years of liability imposed by public policy under rules that are universally accepted and respected throughout the United States to the detriment of every citizen. As preposterous as that seems, that is the course defendants have argued by their bald claim that Proposition 51 exonerates them from liability, except as may be proven against them individually with regard to non-economic or general damages.

Defendants also routinely and erroneously claim that in third party cases they are entitled to treat plaintiff's employer as a "defendant" (which is not the case) and diminish the percentage of each defendant's liability by the amount of any negligence proven against other defendants. Proposition 51 never contemplated that non-economic damages could not be collected against all defendants, even where the plaintiff's employer was significantly negligent.

In the case where there is a defense of employer's negligence raised for the purpose of reducing the amount of the overall judgment for which the defendants would be held responsible under the doctrine of *Witt v. Jackson* (1961) 57 Cal.2d 57 [17 Cal.Rptr. 369], the jury is asked to determine the percentage of negligence attributed to the employer. The essential thrust of the *Witt v. Jackson* defense of employer's negligence is to reduce the overall damages being paid by the defendants and for that reason it is a defense raised only by a defendant in response to a complaint in intervention filed by the compensation carrier or employer.

The Supreme Court in *Associated Construction & Engineering of California v. Workers' Compensation Appeals Board* (1978) 22 Cal.3d 829 [150 Cal.Rptr. 88] decided that the principles of comparative negligence should apply to the subrogation rights of a concurrently negligent employer under the workers' compensation system. The decision further holds that the concurrently negligent employer may recover compensation benefits paid or have credit for unpaid future benefits only to the extent that such compensation benefits (and future benefits) exceed the employer's proportionate share of responsibility for the employee's total damages. (See *Arbaugh v. Proctor & Gamble Manufacturing Company* (1978) 80 Cal.App.3d 500 [145 Cal.Rptr. 608].)

For example, where an employer or compensation carrier intervenes or has a lien for $25,000 and the jury finds the plaintiff free of comparative negligence, the employer 60% and two defendants 30% and 10% at fault, under California law with a verdict for plaintiff of $225,000 in economic damages and $200,000 in non-economic damages, the judgment would be for $200,000 in economic damages jointly and severally against the 40% defendants ($225,000, less compensation benefits of $25,000). The employer/compensation carrier would receive nothing because it caused 50% of the damage to plaintiff, which is in excess of its $25,000 lien. In addition, the compensation carrier would be obligated to provide benefits to plaintiff until a total of $255,000 in benefits was paid. Another way of stating this result is that the compensation carrier would have no credit rights until it first expended $255,000.

Defendants argue under this hypothetical, that if a jury found two defendants 30% and 10% responsible for the total fault, each would only be obligated to pay only their respective percentage of the general damages of $200,000, for a total of $80,000 (40% of $200,000).

There are no cases decided since the passage of Proposition 51 to support such claims. In large part, this is the case because the statute on its face denies the strained construction they seek.

Plaintiff as a matter of law cannot sue his/her employer and for that reason the *employer can never be a defendant.* The statute clearly states that the liability of each defendant on non-economic damages shall be "in direct proportion to that *defendant's percentage of fault.*" The intent of the statute was to allocate *general damages between defendants* as can be seen from the adoption of Civil Code section 1431.1 which contains the findings and declaration of the People of the State of California that,

> 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.

Since an employer can never be named as a defendant, or even as a party except to assert lien rights, as a matter of law an employer is never a defendant as intended by the statute.

Under the hypothetical verdict described above, with each of two defendants found 30% and 10% responsible, their proportional fault, relative to each other is 75% and 25%. Therefore, these defendants would be responsible for payment of the general damages in the same proportion. Plaintiff could collect $200,000 in general damages as follows: $150,000 from the 30% defendant and $50,000 from the 10% defendant.

The key to understanding this allocation is that as a matter of law the defendants are fully liable for all the general damages. The plaintiff's employer can never be sued for general damages and the compensation lien because it is free of any payment for pain and suffering is properly deducted from the economic or special damages portion of the verdict. The only reason for finding a percentage of negligence against the employer, under long-standing public policy, is for the purpose of determining lien and credit rights and not for allocating general damages. For these reasons, the payment of non-economic/general damages is the responsibility of the liable defendants and the only fair method for allocating their proportional obligation is to compare their percentages of fault.

In a case recently tried in Santa Clara County, the trial court agreed with the public policy analysis presented here and held that a finding of 60% employer's negligence did not diminish the plaintiff's right to collect all general damages of $200,000 from two defendants found collectively to be 30% and 10% liable. A copy of the Judgment On Special Verdict in *Mills v. Community Development, James F. Boccardo, and MMM Carpets*, Santa Clara County No. 643493, dated May 24, 1990, tried by Richard Alexander, is available upon request by writing the author at P.O. Box 13130, San Jose, CA 95109-1330. ■