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## An Analysis of Recent Supreme Court Developments in Tort and Insurance Law: The Common-Law Tradition

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# AN ANALYSIS OF RECENT SUPREME COURT DEVELOPMENTS IN TORT AND INSURANCE LAW: THE COMMON-LAW TRADITION

*Ellis Horvitz\**

## I. INTRODUCTION

Since the end of World War II, the California Supreme Court has widely been regarded as the most influential state court in the nation. Its civil decisions have frequently broken new ground, expanding concepts of tort liability, damages and insurance coverage.

Recently, some court watchers have commented that, since 1987, the court has moved in a more conservative direction. Is this observation warranted? To be sure, the present court has shown less inclination than its predecessors to expand concepts of civil liability and to enlarge damages and insurance coverage. At the very least, it has been more cautious and selective in doing so. However, to characterize the present majority as more conservative than its predecessors is superficial and does little to aid an analysis of the present court.

The California Supreme Court's decisions have consistently reflected the major social and economic developments of its time. The period following World War II was an age of optimism, in which all community goals seemed to be within our reach. During this time, legislatures enacted laws to assist society's victims and distributed the cost by taxation. Likewise, the courts crafted rules of tort and contract liability in furtherance of the same objective, with insurance acting as the primary cost-shifting mechanism.

But times and perceptions change. Old problems have not yielded to social and economic programs designed to cure them, and new problems have emerged. As a community, we have become increasingly concerned with the cost, effectiveness, and unforeseen consequences of remedial programs. Too many legitimate needs compete for too few resources.

Changes in our circumstances and perceptions have occurred slowly, but inexorably. Should the courts be unmindful of these changes, ignore the lessons of recent experience, and cling to formulas based on

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conditions that no longer exist? Prior to and since 1987, that has not been the approach of the California Supreme Court.

The present members of the court are contemporary, as their predecessors were. They are pragmatic, deeply concerned with the impact that their decisions will have on the litigants before them as well as others who are not. They are prepared to reexamine legal assumptions and conclusions. In addition, they are willing to modify or occasionally reject them—where prior doctrine no longer serves current community needs. The cases discussed in this Essay bear out this evaluation.

## II. DISCUSSION

### A. 1940-1986: *A Sampling of Significant Tort and Insurance Decisions*

For the past fifty years, the California Supreme Court has led the nation in defining the reach of civil law. In tort and insurance law in particular, the court generally broadened defendants' potential liability. The following decisions demonstrate that trend.

In the seminal case of *Ybarra v. Spangard*,<sup>1</sup> the court liberalized the doctrine of *res ipsa loquitur*, which allows a plaintiff to shift the burden of proving causation to the defendant where: (1) The accident giving rise to the plaintiff's injury is of a type which does not ordinarily occur unless someone is negligent; (2) the accident was caused by an instrumentality under the exclusive control of defendant; and (3) the plaintiff did not voluntarily contribute to the cause of the accident.<sup>2</sup> In *Ybarra*, the plaintiff underwent an appendectomy and awoke from surgery with an injured shoulder.<sup>3</sup> Although the plaintiff could not identify the individual who had "exclusive control" over the instrumentality that caused his injury, the court held that the plaintiff could nonetheless invoke the *res ipsa loquitur* doctrine by identifying and suing "all those defendants who had any control over [the plaintiff's] body or the instrumentalities which might have caused the injuries."<sup>4</sup>

In 1963 Justice Traynor authored the landmark product liability decision of *Greenman v. Yuba Power Products, Inc.*,<sup>5</sup> holding a manufac-

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1. 25 Cal. 2d 486, 154 P.2d 687 (1944).

2. *Id.* at 489, 154 P.2d at 689; see also *Zentz v. Coca Cola Bottling Co.*, 39 Cal. 2d 436, 449, 247 P.2d 344, 348 (1952) (allowing plaintiff injured by exploding soda bottle to invoke doctrine of *res ipsa loquitur*).

3. *Ybarra*, 25 Cal. 2d at 488, 154 P.2d at 688.

4. *Id.* at 494, 154 P.2d at 691; accord *Raber v. Tumin*, 36 Cal. 2d 654, 660, 226 P.2d 574, 577 (1951).

5. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

turer strictly liable in tort for placing an article on the market that the manufacturer knew would be used without inspection for defects, and which proved to have a defect that caused injury.<sup>6</sup> Subsequent California Supreme Court cases applied this holding in other contexts, imposing strict liability not only on manufacturers, but on retailers and distributors in an effort to spread the cost of injuries caused by defective products.<sup>7</sup>

With *Sindell v. Abbott Laboratories*,<sup>8</sup> the court established the new concept of "market share" product liability. The court relaxed the plaintiff's burden of proving causation when identifying which manufacturer produced a product that allegedly harmed the plaintiff, if the product that is marketed has "effects . . . which are delayed for many years [and play] a significant role in creating the unavailability of proof."<sup>9</sup> Under *Sindell*, each manufacturer sued by the plaintiff was strictly liable based on the manufacturer's share of the product's market, even though the plaintiff failed to prove which manufacturer's product was used.<sup>10</sup>

In *Barker v. Lull Engineering*,<sup>11</sup> the court adopted another procedural rule to ease the plaintiff's task of proving liability for injuries caused by a defective product. It held that in a design defect case, if the plaintiff proves the defendant's product's design caused the plaintiff's injury, the burden of proof shifts to the defendant.<sup>12</sup> In response, the defendant must show the product meets the reasonable expectations of a consumer and its benefits outweigh any dangers in its design.<sup>13</sup>

Before 1969 a landowner's duty of care to visitors was determined by a sliding scale based on the injured party's status as a trespasser, invi-

6. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

7. *See, e.g.,* *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 262-63, 391 P.2d 168, 171-72, 37 Cal. Rptr. 896, 899-900 (1964); *see also* *Elmore v. American Motors*, 70 Cal. 2d 578, 585, 451 P.2d 84, 88, 75 Cal. Rptr. 652, 656 (1969) (applying strict liability to claims of injured bystander notwithstanding victim's lack of privity with manufacturer); *Seely v. White Motor Co.*, 63 Cal. 2d 9, 18-19, 45 Cal. Rptr. 17, 23-24, 403 P.2d 145, 151-52 (1965) (recognizing risk spreading policy as basis for adopting strict products liability).

8. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980).

9. *Id.* at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144.

10. *Id.* at 612, 607 P.2d at 937, 63 Cal. Rptr. at 145.

11. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

12. *Id.* at 435, 573 P.2d at 457-58, 143 Cal. Rptr. at 239-40.

13. *Id.* at 432, 573 P.2d at 456, 143 Cal. Rptr. at 238. In *Murphy v. E.R. Squibb & Sons*, 40 Cal. 3d 672, 710 P.2d 247, 221 Cal. Rptr. 447 (1985), the court declined, however, to expand liability for product defects as far as the plaintiffs would have liked. *Id.* at 680, 684, 710 P.2d at 252, 255, 221 Cal. Rptr. at 452, 455. There, the court refused to apply strict liability where the plaintiff was complaining of the pharmacist-defendant's failure to warn of possible dangers in prescription drugs. *Id.* at 677-81, 710 P.2d at 250-53, 221 Cal. Rptr. at 450-53.

tee or licensee.<sup>14</sup> The court in *Rowland v. Christian*<sup>15</sup> eliminated the sliding scale test so that a landowner's liability would instead be determined by a reasonable care standard and that the status of the injured party would no longer be determinative.<sup>16</sup>

In *Becker v. I.R.M. Corp.*,<sup>17</sup> the court expanded landowner liability. It held that a purchaser of residential rental property has an affirmative duty to inspect it for safety hazards<sup>18</sup> and can be strictly liable for injuries caused by defects existing at the time the property is purchased, even if the injury does not occur until after the purchase.<sup>19</sup> One year later, the court again expanded landowners' liability. In *Francis T. v. Village Green Owners Ass'n*,<sup>20</sup> the court held that a plaintiff who was attacked on the defendant's property need not prove the defendant had notice of prior similar attacks; foreseeability of harm could be established without such evidence.<sup>21</sup>

The court replaced the doctrine of contributory negligence with comparative fault in *Li v. Yellow Cab Co.*<sup>22</sup> The resulting elimination of contributory negligence as an absolute defense wrought fundamental change, which has spawned a virtual avalanche of new law.

For example, in 1978, the court announced a rule of equitable comparative indemnity among concurrent tortfeasors. This rule, set forth in *American Motorcycle Ass'n v. Superior Court*,<sup>23</sup> was "an extension of the [*Li v. Yellow Cab Co.*] comparative fault doctrine which allowed loss to be apportioned between plaintiff and defendants according to their respective responsibility for the loss."<sup>24</sup> In addition, the court held in *Daly*

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14. See *Oettinger v. Stewart*, 24 Cal. 2d 133, 148 P.2d 19 (1944).

15. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

16. *Id.* at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104. *But see* *Beauchamp v. Los Gatos Golf Course*, 273 Cal. App. 2d 20, 25, 77 Cal. Rptr. 914, 918 (1969) (stating that terms "invitee," "licensee," and "trespasser" are relevant to jury and have not been abandoned despite *Rowland*).

17. 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985).

18. *Id.* at 469, 698 P.2d at 125, 213 Cal. Rptr. at 222.

19. *Id.* at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219.

20. 42 Cal. 3d 490, 723 P.2d 573, 229 Cal. Rptr. 456 (1986).

21. *Id.* at 501-03, 723 P.2d at 578-80, 229 Cal. Rptr. at 461-63 (citing *Isaacs v. Huntington Memorial Hosp.*, 38 Cal. 3d 112, 126, 695 P.2d 653, 659, 211 Cal. Rptr. 356, 362 (1985) ("[F]oreseeability is determined in light of all the circumstances and not by a rigid application of a mechanical 'prior similars' rule."); *Kwaitkowski v. Superior Trading Co.*, 123 Cal. App. 3d 324, 330, 176 Cal. Rptr. 494, 497 (1981)).

22. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

23. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978), *superseded by statute as stated in* *Miller v. Stouffer*, 9 Cal. App. 4th 70, 11 Cal. Rptr. 2d 454 (1992).

24. *GEM Developers v. Hallcraft Homes, Inc.*, 213 Cal. App. 3d 419, 426-27, 261 Cal. Rptr. 626, 630 (1989) (citing *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1197, 753 P.2d 585, 590, 246 Cal. Rptr. 629, 633 (1988)).

v. *General Motors Corp.*<sup>25</sup> that comparative fault principles apply to strict liability actions.<sup>26</sup> These cases continued the *Li v. Yellow Cab Co.* trend of adopting flexible rules to allow an equitable apportionment of liability among all parties responsible for causing the harm.

The 1960s witnessed a change in the compensability of noneconomic damages. In *Amaya v. Home Ice, Fuel & Supply Co.*,<sup>27</sup> the court decided, four-to-three, that a plaintiff may not recover for emotional distress unless the plaintiff suffered physical injury or was in the "zone of danger"<sup>28</sup> created by the defendant's negligent conduct.<sup>29</sup> Five years later, however, in *Dillon v. Legg*,<sup>30</sup> the court held that a mother who witnessed a negligent act that caused the death of her child could recover for emotional distress even though she was not in the "zone of danger" and did not fear for her own safety.<sup>31</sup>

Similarly, in *Molien v. Kaiser Foundation Hospitals*,<sup>32</sup> a woman was negligently misdiagnosed as suffering from syphilis and was directed to tell her husband about the diagnosis so that he could receive treatment as well.<sup>33</sup> Although the husband could not meet the criteria for "bystander" recovery under *Dillon v. Legg*, the court held that he was nevertheless a "direct victim" of the physician's negligence, because the physician directed the wife to inform the husband of the diagnosis, and he was required to undergo tests himself.<sup>34</sup> In *Ochoa v. Superior Court*,<sup>35</sup> the court allowed a plaintiff to pursue emotional distress damages after she witnessed and was aware of the slow progressive decline in the health of her child as a result of a physician's neglect of the child's immediate medical needs.<sup>36</sup>

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25. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

26. *Id.* at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390.

27. 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963), *overruled by* *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

28. *Id.* at 302, 379 P.2d at 517, 29 Cal. Rptr. at 37.

29. *Id.* at 302-03, 379 P.2d at 516-17, 29 Cal. Rptr. at 36-37. In the case of negligent operation of a motor vehicle, the zone of danger is that in which the plaintiff was in such physical danger that it would cause fear of his or her own safety, even though he or she was not actually involved. *Id.* at 302, 379 P.2d at 516-17, 29 Cal. Rptr. at 36-37 (citing *Reed v. Moore*, 156 Cal. App. 2d 43, 319 P.2d 80 (1957)).

30. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

31. *Id.* at 732-33, 441 P.2d at 915, 69 Cal. Rptr. at 75.

32. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

33. *Id.* at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.

34. *Id.* at 923, 616 P.2d at 816-17, 167 Cal. Rptr. at 834-35.

35. 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985).

36. *Id.* at 169-70, 703 P.2d at 8, 216 Cal. Rptr. at 668. The court also held, however, that a cause of action could not be premised on a *Molien* "direct victim" theory because the defendant's negligent actions were directed solely at the plaintiff's son, and not at the plaintiff. *Id.* at 172-73, 703 P.2d at 10, 216 Cal. Rptr. at 670.

Another avenue of recovery previously unavailable to injured plaintiffs was created by the court in *Vesely v. Sager*.<sup>37</sup> In *Vesely*, the court held that liability may be imposed on a vendor of alcoholic beverages for providing alcoholic drinks to a customer who, as a result of intoxication, injures a third person.<sup>38</sup>

In *Tameny v. Atlantic Richfield Co.*,<sup>39</sup> the court held that a plaintiff could recover tort damages if the plaintiff could prove that his or her discharge from employment violated public policy.<sup>40</sup> Four years later, the court carried the *Tameny* ruling one long step further in *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*,<sup>41</sup> holding that a plaintiff was entitled to bring a tort action—and obtain punitive damages—against a defendant who in bad faith denied the existence of a contract in response to the plaintiff's efforts to enforce the contract.<sup>42</sup>

By 1958 insurance bad faith emerged as an important basis for tort liability. In *Comunale v. Traders & General Insurance Co.*,<sup>43</sup> the court held that an insurer could be compelled to indemnify its insured in excess of policy limits if the insurer could have settled an underlying action against the insured within policy limits but failed to do so.<sup>44</sup> And in *Crisci v. Security Insurance Co.*,<sup>45</sup> the court held that an insured could recover tort damages, including emotional distress damages, if the insurer unreasonably failed to settle a claim against the insured,<sup>46</sup> thereby unleashing a torrent of new litigation.

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37. 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

38. *Id.* at 165, 486 P.2d at 159-60, 95 Cal. Rptr. at 631-32. *Vesely* was abrogated by the California Legislature in 1978. See CAL. BUS. & PROF. CODE § 25602(c) (West 1985) (amending CAL. BUS. & PROF. CODE § 25602 (1953)); see also *Cory v. Shierloh*, 29 Cal. 3d 430, 439, 629 P.2d 8, 13, 174 Cal. Rptr. 500, 505 (1981) (upholding constitutionality of statute providing immunity from civil liability to providers of intoxicating beverages).

39. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

40. *Id.* at 178, 610 P.2d at 1337, 164 Cal. Rptr. at 846; see also *Commodore Home Sys., Inc. v. Superior Court*, 32 Cal. 3d 211, 221, 649 P.2d 912, 918, 185 Cal. Rptr. 270, 276 (1982) (allowing punitive damages for violations of California's Fair Employment and Housing Act when there has been oppression, fraud or malice).

41. 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984).

42. *Id.* at 769, 686 P.2d at 1167, 206 Cal. Rptr. at 363.

43. 50 Cal. 2d 654, 328 P.2d 198 (1958).

44. *Id.* at 660, 328 P.2d at 202.

45. 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

46. *Id.* at 431-33, 426 P.2d at 177-78, 58 Cal. Rptr. at 17-18; see also *Johansen v. California State Auto. Ass'n Inter-Ins. Bureau*, 15 Cal. 3d 9, 12-13, 538 P.2d 744, 746, 123 Cal. Rptr. 288, 290 (1975) (holding that failure to settle claim against insured, thereby exposing insured to substantial risk of liability in excess of policy limits, gives rise to bad faith action even if insurer reasonably but mistakenly believed policy did not provide coverage).

In other cases the court imposed a quasi-fiduciary duty on insurers,<sup>47</sup> by expanding the rights of plaintiffs to sue insurers for improper handling of a claim under an insurance contract.<sup>48</sup> In addition, the court adopted procedural rules that decreased the burden of proving liability or damages in such actions.<sup>49</sup> The court also developed principles of insurance contract construction which broadened an insurer's obligations. For example, in *Gray v. Zurich Insurance Co.*,<sup>50</sup> the court observed that most insurance policies are adhesion contracts and, as such, must be construed strictly against the insurer.<sup>51</sup> The court also held that the duty to

47. See, e.g., *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal. 3d 809, 818-19, 620 P.2d 141, 145, 169 Cal. Rptr. 691, 695 (1979) ("For the insurer to fulfill its obligation not to impair the right of the insured to receive the benefits of the [insurance] agreement, it . . . must give at least as much consideration to the latter's interests as it does to its own."), *cert. denied*, 445 U.S. 912 (1980); *Davis v. Blue Cross*, 25 Cal. 3d 418, 427-28, 600 P.2d 1060, 1065-66, 158 Cal. Rptr. 828, 833-34 (1979); *Silberg v. California Life Ins. Co.*, 11 Cal. 3d 452, 460-61, 521 P.2d 1103, 1108-09, 113 Cal. Rptr. 711, 716-17 (1974).

48. See, e.g., *Sarchett v. Blue Shield*, 43 Cal. 3d 1, 13-15, 729 P.2d 267, 275-77, 233 Cal. Rptr. 76, 184-86 (1987) (holding that insurer acting with knowledge that insured is ignorant of express policy terms regarding right to arbitration after claim is denied, or insurer which fails to advise insured of these rights acts, in bad faith); *Brandt v. Superior Court*, 37 Cal. 3d 813, 815, 693 P.2d 796, 797, 210 Cal. Rptr. 211, 212 (1985) (holding "[w]hen an insurer tortiously withholds benefits, . . . attorney's fees, reasonably incurred to compel payment of the policy benefits, [are] recoverable as an element of the damages resulting from such tortious conduct"); *Davis*, 25 Cal. 3d at 428, 600 P.2d at 1065, 158 Cal. Rptr. at 833 (holding failure to "reasonably . . . inform an insured of the insured's rights and obligations under the insurance policy" may give rise to bad faith liability); *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 575, 510 P.2d 1032, 1038, 108 Cal. Rptr. 480, 486 (1973) (stating insurers cannot "unreasonably and in bad faith withhold[] payment of the claim of its insured"); *Barrera v. State Farm Mut. Auto. Ins. Co.*, 71 Cal. 2d 659, 663, 456 P.2d 674, 677, 79 Cal. Rptr. 106, 109 (1969) (ruling that insurers "must undertake a reasonable investigation of the insured's insurability within a reasonable period of time from the acceptance of the application and the issuance of a policy"); cf. *Egan*, 24 Cal. 3d at 824, 620 P.2d at 149, 169 Cal. Rptr. at 699 (holding that insurance company could be liable for bad faith and punitive damages arising out of conduct by managerial employees, but employees themselves could not be liable for bad faith because "they [were] not parties to the insurance contract and not subject to the implied covenant").

49. See, e.g., *White v. Western Title Ins. Co.*, 40 Cal. 3d 870, 888-90, 710 P.2d 309, 319-20, 221 Cal. Rptr. 509, 519-20 (1985) (creating exception to ban of CAL. EVID. CODE § 1152, admissibility of settlement offers; and holding, over vigorous dissent by Justice Malcolm Lucas, that insurer's offer to settle may not be used as evidence that insured's claim is covered, but unreasonably low settlement offer is admissible as evidence that insurer failed to process claim in good faith), *superseded by statute as stated in* *Maler v. Superior Court*, 220 Cal. App. 3d 1592, 270 Cal. Rptr. 222 (1990); *Colonial Life & Accident Ins. Co. v. Superior Court*, 31 Cal. 3d 785, 792, 647 P.2d 86, 90, 183 Cal. Rptr. 810, 814 (1982) (holding evidence of insurer's conduct toward other insureds is discoverable as potentially leading to circumstantial evidence of malice toward insured).

50. 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966).

51. *Id.* at 269-71, 419 P.2d at 171-72, 54 Cal. Rptr. at 107-08; see also *Silberg v. California Life Ins. Co.*, 11 Cal. 3d 452, 464, 521 P.2d 1103, 1111, 113 Cal. Rptr. 711, 719 (1974) (holding that ambiguities in insurance policy must be construed against insurer).



defend an insured under a liability policy is broader than the duty to indemnify, and that an insurer must defend its insured as long as the policy potentially provides coverage.<sup>52</sup>

This trend of expanded liability was not without exception. For example, while *Molien v. Kaiser Foundation Hospitals*<sup>53</sup> and *Ochoa v. Superior Court*<sup>54</sup> promoted recovery for emotional distress damages, the court did not look favorably upon all attempts to extend liability in favor of plaintiffs who did not directly suffer an injury as a result of the defendant's conduct. In *Turpin v. Sortini*,<sup>55</sup> the court held that a child cannot recover general damages in a "wrongful life" action based on the defendant's allegedly negligent conduct, without which the child would not have been conceived and born. The child could recover only special damages resulting from the child's severe birth defect.<sup>56</sup> Moreover, in *Borer v. American Airlines*,<sup>57</sup> the court refused to allow children plaintiffs to assert a loss of consortium claim based on injury to a parent. The court explained that "social policy must at some point intervene to delimit liability."<sup>58</sup> Similarly, in the companion case of *Baxter v. Superior Court*,<sup>59</sup> the court refused to recognize a parent's cause of action for loss of consortium based on injury to one's child.<sup>60</sup>

The court's decision in *Silberg v. California Life Insurance Co.*<sup>61</sup> also reflected restraint in expanding tort liability. In *Silberg*, the court held that an insured could not recover punitive damages against an insurer for denying coverage, if the insurer had no prior notice that its construction of the plaintiff's policy was incorrect.<sup>62</sup> In addition, the court placed firm limits on an insured's right to recover emotional distress damages in an insurance bad faith action.<sup>63</sup>

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52. *Gray*, 65 Cal. 2d at 273-75, 419 P.2d at 174-76, 54 Cal. Rptr. at 110-12.

53. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

54. 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985).

55. 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

56. *Id.* at 237-39, 643 P.2d at 965-66, 182 Cal. Rptr. at 348-49.

57. 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977).

58. *Id.* at 446, 563 P.2d at 861, 138 Cal. Rptr. at 305.

59. 19 Cal. 3d 461, 563 P.2d 871, 138 Cal. Rptr. 315 (1977).

60. *Id.* at 465, 563 P.2d at 874, 138 Cal. Rptr. at 318.

61. 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974).

62. *Id.* at 463, 521 P.2d at 1110, 113 Cal. Rptr. at 718.

63. *Id.* at 460, 521 P.2d at 1108, 113 Cal. Rptr. at 716 (stating not only must plaintiff produce actual evidence of emotional distress in case such as this, but plaintiff must also establish that defendant's conduct was legal cause of distress); *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 580, 510 P.2d 1032, 1041-42, 108 Cal. Rptr. 480, 489-90 (1973); see also *Mitchell v. Superior Court*, 37 Cal. 3d 591, 608, 691 P.2d 642, 652, 208 Cal. Rptr. 886, 896 (1984) (holding that plaintiff's claim of emotional distress must be reasonable and genuine, and plaintiff

These tort and insurance decisions demonstrate that, by the end of 1986, the California Supreme Court followed a general trend of expanding liability, but had also drawn the line at creating new rights and obligations where, as in the area of emotional distress damages, societal interests required some judicially determined limits.

*B. A Survey of Selected Tort and Insurance Decisions After 1986*

The court's opinions since 1986 build upon established precedents in California, but demonstrate considerable attention to contemporary sources, including recent judicial decisions in other states, current law review articles and other scholarly sources. Nostalgia finds no expression in the court's decisions. In several areas, the court has slowed or halted the expansion of tort liability and insurance coverage. But again, not all decisions fit this description. The court's decisions before and after 1987 cannot be separated by a bright line into two discrete sets of conflicting case law. Changes have been gradual and reflect shifting community perceptions of social and economic problems. Generally, the current court's shaping of the law has been selective, cautious and moderate. The following cases are illustrative.

In *Brown v. Superior Court*,<sup>64</sup> a products liability action against manufacturers of the drug diethylstilbestrol (DES),<sup>65</sup> the court held that, because of the public interest in the development, availability and affordability of prescription drugs, a manufacturer of a drug cannot be held strictly liable for injuries caused by the drug, as long as the drug was properly prepared and accompanied by warnings of any dangers that were known or scientifically knowable at the time the drug was distributed.<sup>66</sup> The court also held that defendant manufacturers in a products liability action based upon "market share" liability under *Sindell v. Abbott Laboratories*<sup>67</sup> are not *jointly* liable for the plaintiffs' injuries, but are instead liable only for a portion of the damages that corresponds to the manufacturer's share of the relevant market for the product.<sup>68</sup> The court reasoned that "the imposition of joint liability among defendant manufacturers in a market share action would frustrate *Sindell's* goal of

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has no right to compensation for emotional distress which is unreasonable or exaggerated response to facts).

64. 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988).

65. DES is a synthetic estrogen used to prevent miscarriages. *Sindell v. Abbott Lab.*, 26 Cal. 3d 588, 593, 607 P.2d 924, 925, 163 Cal. Rptr. 132, 133, *cert. denied*, 449 U.S. 912 (1980).

66. *Brown*, 44 Cal. 3d at 1065-69, 751 P.2d at 480-83, 245 Cal. Rptr. at 421-24.

67. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980).

68. *Brown*, 44 Cal. 3d at 1072-75, 751 P.2d at 485-87, 245 Cal. Rptr. at 426-28.

achieving a balance between the interests of DES plaintiffs and manufacturers of the drug."<sup>69</sup>

In *Mexicali Rose v. Superior Court*,<sup>70</sup> the court revisited the 1936 products liability decision in *Mix v. Ingersoll Candy Co.*,<sup>71</sup> in the context of an injury caused by the plaintiff's ingestion of a food product prepared by the defendant. In a four-to-three decision, the court modified, but declined to abandon, the often criticized natural/foreign substance distinction used to determine liability arising out of harmful food products.<sup>72</sup> Following "the trend developing in courts recently considering the issue,"<sup>73</sup> the court held that a plaintiff injured in this manner may sue on a strict products liability theory only by proving a foreign substance (one not reasonably expected by the average consumer) was present in the food. Thus, the presence of a harmful, naturally occurring substance in food will not support a strict liability action.<sup>74</sup>

The court had occasion to answer a procedural question left open in the earlier decisions of *American Motorcycle Ass'n v. Superior Court*<sup>75</sup> and *Li v. Yellow Cab Co.*:<sup>76</sup> whether comparative fault principles eliminated "assumption of risk" as a complete defense to a personal injury

69. *Id.* at 1075, 751 P.2d at 487, 245 Cal. Rptr. at 428 (citing numerous legal commentators supporting this result). See, e.g., Victor E. Schwartz & Liberty Mahshigian, *Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution*, 73 CAL. L. REV. 941, 957 (1985); Rebecca A. Boys, Comment, *The Market Share Theory: Sindell's Contribution to Industry-Wide Liability*, 19 HOUS. L. REV. 107, 131-32 (1981); Steven D. Elmert, Note, *DES: Judicial Interest Balancing and Innovation*, 22 B.C. L. REV. 747, 770, 774 (1981); Kathryn T. Frame, Note, *Products Liability*, 34 OKLA. L. REV. 843, 853 (1981); Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668, 673 (1981); Richard P. Murray, Note, *Sindell v. Abbot Laboratories: A Market Share Approach to DES Causation*, 69 CAL. L. REV. 1179, 1194 (1981).

70. 1 Cal. 4th 617, 822 P.2d 1292, 4 Cal. Rptr. 2d 145 (1992).

71. 6 Cal. 2d 674, 59 P.2d 144 (1936), *overruled by Mexicali Rose v. Superior Court*, 1 Cal. 4th 617, 822 P.2d 1292, 4 Cal. Rptr. 2d 145 (1992).

72. *Mexicali Rose*, 1 Cal. 4th at 630, 822 P.2d at 1301-02, 4 Cal. Rptr. 2d at 154-55.

73. *Id.*, 822 P.2d at 1301, 4 Cal. Rptr. 2d at 154.

74. *Id.* However, in a departure from the earlier rule in *Mix*, the court in *Mexicali Rose* held that a plaintiff injured by a *naturally* occurring substance *may* state a cause of action for negligence.

Such a new rule, expanding a restaurateur's potential liability and allowing an action in negligence for injuries caused by both natural and foreign substances in food, corresponds to modern developments in tort law. This court has recognized that traditional tort law principles support imposition of a duty of care when one is in a position to exercise custody or control over another.

*Id.* at 632, 822 P.2d at 1303, 4 Cal. Rptr. 2d at 156.

75. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978), *superseded by statute as stated in Miller v. Stouffer*, 9 Cal. App. 4th 70, 11 Cal. Rptr. 2d 454 (1992).

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

action. In both *Knight v. Jewett*<sup>77</sup> and *Ford v. Gouin*,<sup>78</sup> a divided court rendered four separate opinions. No single view won a clear majority, but the approach approved by the plurality calls for a “primary assumption of the risk” analysis under which a participant in an inherently risky sport or other similar activity owes only a duty not to engage in conduct “so reckless as to be totally outside the range of the ordinary activity involved in the sport.”<sup>79</sup> Less reckless conduct cannot subject the participant to liability regardless of the plaintiff’s subjective knowledge—or lack of knowledge—of the dangers inherent in the activity.<sup>80</sup> This approach reflects a desire to exact personal responsibility from those who choose to engage in risky behavior, and retreats from the notion that the law will provide a remedy for every injury.

In *Elden v. Sheldon*,<sup>81</sup> the court looked to the societal benefit of providing certainty in the law as a basis for limiting “bystander emotional distress” actions cognizable under a *Dillon v. Legg*<sup>82</sup> theory. The court held that an unmarried cohabitant of a person injured by the defendant does not have a sufficiently close relationship to the victim to warrant recovery for bystander emotional distress: “[T]he consequences of a negligent act must be limited in order to avoid an intolerable burden on society,”<sup>83</sup> and a “bright line in this area of the law is essential.”<sup>84</sup>

The court again discussed recovery for emotional distress in *Thing v. La Chusa*.<sup>85</sup> After tracing the history of *Dillon v. Legg*,<sup>86</sup> the court noted that the case-by-case approach in cases following *Dillon* “not only produced inconsistent rulings in the lower courts, but has provoked considerable critical comment by scholars who attempt to reconcile the cases.”<sup>87</sup> To clarify the confusion over the right to recover for negligent infliction of emotional distress, the court chose not to create different standards for recovery, but instead chose to solidify the *Dillon* “guidelines” into *prerequisites* for recovery.<sup>88</sup> Thus a plaintiff who is not physically injured by the defendant may not recover damages for negligent infliction of emotional distress unless the plaintiff is closely related to the

77. 3 Cal. 4th 296, 834 P.2d 696, 11 Cal. Rptr. 2d 2 (1992).

78. 3 Cal. 4th 339, 834 P.2d 724, 11 Cal. Rptr. 2d 30 (1992).

79. *Knight*, 3 Cal. 4th at 320, 834 P.2d at 711, 11 Cal. Rptr. 2d at 17 (plurality opinion).

80. *Id.* at 313, 834 P.2d at 706, 11 Cal. Rptr. 2d at 12 (plurality opinion).

81. 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988).

82. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

83. *Elden*, 46 Cal. 3d at 274, 758 P.2d at 586, 250 Cal. Rptr. at 258.

84. *Id.* at 277, 758 P.2d at 588, 250 Cal. Rptr. at 260.

85. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

86. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

87. *Thing*, 48 Cal. 3d at 661, 771 P.2d at 825, 257 Cal. Rptr. at 876.

88. *Id.* at 667-68, 771 P.2d at 829-30, 257 Cal. Rptr. at 880-81.

victim, contemporaneously observes the conduct causing the victim's injury, and suffers severe or serious emotional distress.<sup>89</sup> The court recognized that persons in other situations may suffer deep distress from witnessing violent events, but reiterated the need emphasized in earlier decisions "to avoid limitless liability out of all proportion to the degree of a defendant's negligence, and against which it is impossible to insure without imposing unacceptable costs on those among whom the risk is spread."<sup>90</sup>

Similarly, in *Christensen v. Superior Court*,<sup>91</sup> the court held that only "close family members" may recover damages for emotional distress based on the defendant's negligent handling of a deceased relative's remains.<sup>92</sup> Moreover, the court limited recovery to those relatives who were aware that funeral services were being performed and on whose behalf the services were undertaken.<sup>93</sup>

The results in *Elden v. Sheldon*,<sup>94</sup> *Thing v. La Chusa*<sup>95</sup> and *Christensen v. Superior Court*,<sup>96</sup> reflect the sentiments expressed in earlier supreme court decisions grappling with the societal problems of potentially limitless liability. The court's resolution of that problem in the area of "bystander" emotional distress cases is fully consistent with the court's reasoning twelve years earlier in *Borer v. American Airlines*.<sup>97</sup> The court in *Borer* held that recovery for loss of consortium must be narrowly circumscribed because claims for such an intangible loss "may substantially increase the number of claims asserted in ordinary accident cases, the expense of settling or resolving such claims, and the ultimate liability of defendants."<sup>98</sup>

Notwithstanding language in the court's decisions indicating caution in expanding liability, the court has not foreclosed all attempts to broaden recovery for emotional distress. In *Burgess v. Superior Court*,<sup>99</sup> the court held that a mother may recover damages against a physician for negligently inflicted emotional distress where the mother's child was

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89. *Id.*

90. *Id.* at 664, 771 P.2d at 826-27, 257 Cal. Rptr. at 877-78.

91. 54 Cal. 3d 868, 820 P.2d 181, 2 Cal. Rptr. 2d 79 (1991).

92. *Id.* at 875, 820 P.2d at 183, 2 Cal. Rptr. 2d at 81.

93. *Id.*

94. 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988).

95. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

96. 54 Cal. 3d 868, 820 P.2d 181, 2 Cal. Rptr. 2d 79 (1991).

97. 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977).

98. *Id.* at 444, 563 P.2d at 860, 138 Cal. Rptr. at 304; accord *Turpin v. Sortini*, 31 Cal. 3d 220, 237, 643 P.2d 954, 964, 182 Cal. Rptr. 337, 347 (1982); *Baxter v. Superior Court*, 19 Cal. 3d 461, 464, 563 P.2d 871, 873, 138 Cal. Rptr. 315, 317 (1977).

99. 2 Cal. 4th 1064, 831 P.2d 1197, 9 Cal. Rptr. 2d 615 (1992).

injured during birth.<sup>100</sup> Although the mother did not meet the *Dillon* guidelines because she was not contemporaneously aware of the negligent action causing her child's injury, she could recover as the "direct victim" of the physician's negligence in delivering her child because the physician-patient relationship included a duty to exercise due care in ensuring the health of the child as well as the mother.<sup>101</sup> This decision is consistent with the court's earlier opinion in *Molien v. Kaiser Foundation Hospitals*.<sup>102</sup>

In *Foley v. Interactive Data Corp.*,<sup>103</sup> the court reexamined the availability of tort damages in actions between contracting parties. While the court's decision in *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*<sup>104</sup> indicated a willingness to expand recovery in this area, the court in *Foley* rejected the plaintiff's attempt to expand the law to obtain tort damages for bad faith termination of an employment contract.<sup>105</sup> The court stated: "In our view, the underlying problem in the line of cases relied on by plaintiff lies in the decisions' uncritical incorporation of the insurance model into the employment context, without careful consideration of the fundamental policies underlying the development of tort and contract law in general . . . ."<sup>106</sup>

As in other cases, the court in *Foley* surveyed a wide selection of legal commentary in reaching its conclusion that, in the employment context at least, contract remedies, as opposed to tort actions, offer "the most appropriate method" for obtaining relief from a breach of contract.<sup>107</sup> The court explained that the important societal goals served by this rule include commercial stability enhanced by the predictability of the consequence of conduct related to employment contracts; preservation of an employer's discretion to dismiss an employee without hindrance from the fear that doing so will give rise to potential tort recovery in every case; the difficulty of confining tort awards to "deserving" plaintiffs due to the inherently indefinite nature of the term "good faith" and the consequent inability to dispose of unmeritorious actions at the demurrer or summary judgment stage.<sup>108</sup>

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100. *Id.* at 1085, 831 P.2d at 1209, 9 Cal. Rptr. 2d at 627.

101. *Id.* at 1076-78, 831 P.2d at 1202-04, 9 Cal. Rptr. 2d at 620-22.

102. 27 Cal. 3d 916, 923, 616 P.2d 813, 816-17, 167 Cal. Rptr. 831, 834-35 (1980).

103. 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

104. 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984).

105. *Foley*, 47 Cal. 3d at 699-700, 765 P.2d at 401, 254 Cal. Rptr. at 239.

106. *Id.* at 689, 765 P.2d at 393, 254 Cal. Rptr. at 231-32.

107. *Id.* at 695-96, 699, 765 P.2d at 398-99, 401, 254 Cal. Rptr. at 236-37, 239.

108. *Id.* at 696-97, 765 P.2d at 398-99, 254 Cal. Rptr. at 236-37; *see also id.* at 699, 765 P.2d at 401, 254 Cal. Rptr. at 239 ("The expansion of tort remedies in the employment context has potentially enormous consequences for the stability of the business community.").

Despite its reluctance in *Foley* to open the doors to additional tort actions arising out of a contractual relationship, the court, in *Gantt v. Sentry Insurance*,<sup>109</sup> allowed tort damages for wrongful discharge of a "whistle-blowing" employee.<sup>110</sup> The court held that the discharge violated public policy, and thus reaffirmed the rule in *Tameny v. Atlantic Richfield Co.*<sup>111</sup> The court in *Gantt* also held that worker's compensation is not the employee's exclusive remedy against the employer in a wrongful discharge action: Discharge in violation of public policy "cannot be deemed 'a risk reasonably encompassed within the compensation bargain.'" <sup>112</sup> However, the court cautioned that this is not an open-ended invitation to employees to sue their employers in tort. According to the court, the right to bring such an action must be "carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions."<sup>113</sup>

In *Moradi-Shalal v. Fireman's Fund Insurance Cos.*,<sup>114</sup> the court overruled its earlier expansive decision in *Royal Globe Insurance Co. v. Superior Court*.<sup>115</sup> In *Moradi-Shalal*, the court held that insureds may seek damages for fraud or breach of the common-law duty of good faith, but may not assert a *Royal Globe* private right of action for an insurer's violation of Insurance Code section 790.03, which codified common-law bad faith rules.<sup>116</sup> In reaching this conclusion, the court reiterated the concerns expressed by the three dissenting justices in *Royal Globe* who believed the decision created a cause of action which was "'wholly inconsistent both with our own firmly established California precedent, and with a fair and reasoned analysis of the applicable legislation.'" <sup>117</sup> The court then considered decisions from other jurisdictions,<sup>118</sup> scholarly

109. 1 Cal. 4th 1083, 824 P.2d 680, 4 Cal. Rptr. 2d 874 (1992).

110. *Id.* at 1100-01, 824 P.2d at 691-92, 4 Cal. Rptr. 2d at 885-86.

111. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

112. 1 Cal. 4th at 1101, 824 P.2d at 692, 4 Cal. Rptr. 2d at 886.

113. *Id.* at 1095, 824 P.2d at 687-88, 4 Cal. Rptr. 2d at 881-82.

114. 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988).

115. 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979), *overruled by* *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988).

116. *Moradi-Shalal*, 46 Cal. 3d at 304-05, 758 P.2d at 68-69, 250 Cal. Rptr. at 126-127; *see* CAL. INS. CODE § 790.03 (West 1972 & Supp. 1993).

117. *Moradi-Shalal*, 46 Cal. 3d at 296, 758 P.2d at 62, 250 Cal. Rptr. at 120 (quoting *Royal Globe Ins. Co. v. Superior Court*, 23 Cal. 3d 880, 898, 592 P.2d 329, 341, 153 Cal. Rptr. 842, 854 (1979) (Richardson, J., dissenting)).

118. *Id.* at 297-98, 758 P.2d at 63-64, 250 Cal. Rptr. at 121-22.

[T]he courts in eight states have expressly acknowledged, but declined to follow, *Royal Globe*, and the courts in nine states have implicitly rejected its holding. Indeed, only two states other than California recognize a statutory cause of action for private litigants, and the courts in those states have rejected *Royal Globe's* conclusion that a single violation of the statute is a sufficient basis for a suit for damages.

criticism of *Royal Globe*,<sup>119</sup> and a report by the National Association of Insurance Commissioners recommending against including a private right of action in the model act from which California's Unfair Trade Practices Act<sup>120</sup> was derived.<sup>121</sup> The court explained that additional legislative history suggested remedies for violation of the Act were to be administrative rather than civil.<sup>122</sup> The majority decision thus reflects a recurring theme: consideration of the practical implications of its decisions and respect for principles espoused by commentators and courts in other jurisdictions.

These themes appear again in the insurance coverage cases, in which the court has struck a careful balance of interests in construing insurance contract rights and obligations. In *Garvey v. State Farm Fire & Casualty Co.*,<sup>123</sup> the court held that when concurrent causes result in property damage to a home, but only one cause is a covered peril under the homeowner's insurance policy, coverage exists only if the covered peril is the predominant cause of the loss.<sup>124</sup> The primary rationale for this decision was a pragmatic one:

[T]he reasonable expectations of the insurer and the insured in the first party property loss portion of a homeowner's policy—as manifested in the distribution of risks, the proportionate pre-

*Id.* (footnotes omitted).

119. *Id.* at 298-99, 758 P.2d at 64, 250 Cal. Rptr. at 122-23. The court noted that:

These articles emphasize both the erroneous nature of our holding (i.e., the strained interpretation of the statutory provisions, and the misreading or disregard of available legislative history) and the undesirable social and economic effects of the decision (i.e., multiple litigation, unwarranted bad faith claims, coercive settlements, excessive jury awards, and escalating insurance, legal and other "transaction" costs).

*Id.* at 299, 758 P.2d at 64, 250 Cal. Rptr. at 123; *see also id.* at 301-03, 758 P.2d at 66-67, 250 Cal. Rptr. at 124-25 (noting practical difficulties commentators observed arising from *Royal Globe* actions).

120. California Unfair Trade Practices Act, CAL. INS. CODE §§ 790-790.10 (West 1972 & Supp. 1993).

121. *Moradi-Shalal*, 46 Cal. 3d at 299, 758 P.2d at 65, 250 Cal. Rptr. at 123.

122. *Id.* at 300-01, 758 P.2d at 65-66, 250 Cal. Rptr. at 123-24. While it eliminated third-party bad faith actions, the court recognized that, "in the interest of fairness to the substantial number of plaintiffs who have already initiated their suits in reliance on *Royal Globe*," the decision overruling that case would apply prospectively only to plaintiffs who had not yet filed a bad faith action. *Id.* at 305, 758 P.2d at 69, 250 Cal. Rptr. at 127. The court had earlier applied the same reasoning in *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 829-30, 532 P.2d 1226, 1244, 119 Cal. Rptr. 858, 876 (1975) (holding adoption of comparative negligence principles would apply only to instant case and cases not yet tried), and in *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 743-44, 575 P.2d 1162, 1173, 144 Cal. Rptr. 380, 391 (1978) (holding use of comparative fault doctrine in strict liability actions applied only to cases not yet tried). *But see Newman v. Emerson Radio Corp.*, 48 Cal. 3d 973, 993, 772 P.2d 1059, 1072, 258 Cal. Rptr. 592, 605 (1989) (giving full retroactive application to *Foley*).

123. 48 Cal. 3d 395, 770 P.2d 704, 257 Cal. Rptr. 292 (1989).

124. *Id.* at 403-04, 770 P.2d at 707-08, 257 Cal. Rptr. at 295-96.



miums charged and the coverage for all risks except those specifically excluded—cannot reasonably include an expectation of coverage in property loss cases in which the efficient proximate cause of the loss is an activity expressly *excluded* under the policy. Indeed if we were to [rule otherwise], we would be requiring ordinary insureds to bear the expense of increased premiums necessitated by the erroneous expansion of their insurers' potential liabilities.<sup>125</sup>

Dissenting from the *Garvey* decision, Justice Mosk stated: "The majority, I must acknowledge, have succeeded in reaching a clear result: in this court, the insurer wins and the insureds lose."<sup>126</sup> This prophecy was incorrect. When the court again considered the concurrent cause issue in *State Farm Fire & Casualty Co. v. Von Der Lieth*,<sup>127</sup> it rejected the insurer's contention that negligence ordinarily cannot give rise to a covered loss under an "all risk" homeowner's insurance policy even if the policy does not expressly exclude negligence as a covered peril.<sup>128</sup>

Instead, the court held that negligence is implicitly excluded as a peril only if the negligence is attributable to an act undertaken solely for the purpose of preventing losses caused by an expressly excluded peril.<sup>129</sup>

Similarly, in *AIU Insurance Co. v. Superior Court*,<sup>130</sup> the court held that environmental pollution cleanup costs which are imposed by statute fall within a typical insuring clause in a comprehensive general liability policy which covers costs incurred "because of property damage."<sup>131</sup> Distinguishing *AIU*, the court in *Bank of the West v. Superior Court*,<sup>132</sup> held that insurable "damages" do not include the cost of restitution in an action filed by consumers against a bank that engaged in misleading conduct to profit at the consumers' expense.<sup>133</sup> The court reasoned that, if insurance coverage were available to an insured who was required to disgorge the ill-gotten proceeds of illegal activity, the insured "would simply shift the loss to his insurer and, in effect, retain the proceeds of his unlawful conduct."<sup>134</sup> This result was consistent with a previous California

125. *Id.* at 408, 770 P.2d at 711, 257 Cal. Rptr. at 299.

126. *Id.* at 416, 770 P.2d at 717, 257 Cal. Rptr. at 305 (Mosk, J., dissenting).

127. 54 Cal. 3d 1123, 820 P.2d 285, 2 Cal. Rptr. 2d 183 (1991).

128. *Id.* at 1134-35, 820 P.2d at 292-93, 2 Cal. Rptr. 2d at 190-91.

129. *Id.*

130. 51 Cal. 3d 807, 799 P.2d 1253, 274 Cal. Rptr. 820 (1990).

131. *Id.* at 842-43, 799 P.2d at 1279, 274 Cal. Rptr. at 846. *But see id.* at 843, 799 P.2d at 1279-80, 274 Cal. Rptr. at 846-47 (stating that costs incurred as preventive measure to avoid effects of hazardous waste are not "damages" within coverage provision).

132. 2 Cal. 4th 1254, 833 P.2d 545, 10 Cal. Rptr. 2d 538 (1992).

133. *Id.* at 1266-73, 833 P.2d at 553-58, 10 Cal. Rptr. 2d at 545-51.

134. *Id.* at 1267, 833 P.2d at 553, 10 Cal. Rptr. 2d at 546.

decision<sup>135</sup> and cases from other jurisdictions. Also consistent with opinions from other jurisdictions, the court held that a clause providing coverage for "advertising injury" due to "unfair competition" in the bank's business insurance policy covered only common-law unfair competition claims and not the consumers' statutory claims for violation of the California Unfair Business Practices Act.<sup>136</sup>

In another insurance coverage opinion, the court considered whether to reverse its earlier decision in *Clemmer v. Hartford Insurance Co.*<sup>137</sup> In *Clemmer*, the court held that Insurance Code section 533,<sup>138</sup> which provides that an insurer is not liable for the insured's willful acts, does not apply if the insured intended to commit a wrongful act but did not intend to inflict the ensuing harm.<sup>139</sup> In *J.C. Penney Casualty Insurance Co. v. M.K.*,<sup>140</sup> the court declined to overturn *Clemmer*, but created an exception to that decision, holding that Insurance Code section 533 bars insurance coverage for inherently harmful intentional acts such as child molestation, regardless of a showing that the insured subjectively had no intent to harm the victim.<sup>141</sup>

In *Prudential-LMI Commercial Insurance v. Superior Court*,<sup>142</sup> the court delivered a mixed result for insureds and insurers when it addressed coverage for progressive property damage.<sup>143</sup> The court held that only the insurer of the risk at the time the damage manifests is responsible for indemnifying the insured for any covered loss, thereby relieving subsequent insurers from that obligation.<sup>144</sup> Moreover, the court held that the contractual one-year period for commencing suit against the insurer begins to run when the damage manifests, and subsequently filed suits will be time barred.<sup>145</sup> At the same time, however, the court held the one-year period for commencing suit is tolled from the time the

135. *Jaffe v. Cranford Ins. Co.*, 168 Cal. App. 3d 930, 214 Cal. Rptr. 567 (1985).

136. *Bank of the West*, 2 Cal. 4th at 1262-63, 833 P.2d at 550-51, 10 Cal. Rptr. 2d at 543-44; see Unfair Practices Act, 1977 Cal. Stat. 299 (codified as amended at CAL. BUS. & PROF. CODE § 17200-17209 (West 1987)).

137. 22 Cal. 3d 865, 587 P.2d 1098, 151 Cal. Rptr. 285 (1978).

138. CAL. INS. CODE § 533 (West 1972).

139. *Clemmer*, 22 Cal. 3d at 887, 587 P.2d at 1110, 151 Cal. Rptr. at 297.

140. 52 Cal. 3d 1009, 804 P.2d 689, 278 Cal. Rptr. 64, cert. denied, 112 S. Ct. 280 (1991).

141. *Id.* at 1014, 1021-22, 804 P.2d at 690, 695, 278 Cal. Rptr. at 65, 70.

142. 51 Cal. 3d 674, 798 P.2d 1230, 274 Cal. Rptr. 387 (1990).

143. See *id.* at 699, 798 P.2d at 1246-47, 274 Cal. Rptr. at 403-04 (applying "manifestation" rule when loss is discovered after policy commences, but "loss-in-progress" rule when loss is discovered before policy commences).

144. *Id.*

145. *Id.* at 686-87, 798 P.2d at 1238, 274 Cal. Rptr. at 395; see also *id.* at 682-84, 798 P.2d at 1235-36, 274 Cal. Rptr. at 392-93 (discussing legislative history of statute authorizing contractual one-year suit provision as support for "manifestation" rule).

insured files a timely notice, pursuant to the policy notice provisions, until the time the insurer formally denies the claim.<sup>146</sup>

### III. CONCLUSION

What conclusions can we draw from the California Supreme Court's civil decisions during the past six years?

The present court has slowed the steady growth of expanding liability, damages and insurance coverage. In part, this appears to be based upon recognition that greater tort and insurance remedies entail corresponding costs to the community, often in the form of higher prices or decreased availability of beneficial products and services.<sup>147</sup> Where the court has departed from precedent, it has been motivated by pragmatic considerations, and it has explained its holdings in terms of contemporary trends and values. Accordingly, a litigant will not do well to advance theoretical or abstract arguments divorced from the tangible implications of those arguments. Nor should a litigant ask the court to turn back the clock. Neither abstractions nor nostalgia are persuasive.

In addition, the court has frequently given careful consideration to decisions from other jurisdictions when deciding which direction California law should follow.<sup>148</sup> As the Uniform Law Commission recognized decades ago, where parties, transactions and issues are national in scope, uniform laws facilitate legitimate business interests. While the court has not expressly articulated this view, its decisions and reasoning are consistent with it.

Finally, the frequency of dissenting opinions reflects a diversity of opinion among the members of the court.<sup>149</sup> Moreover, there has been considerable turnover in the membership of the court in the past few years. New justices usually require a reasonable period of time to settle into their new roles, establish their individual identities and develop their

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146. *Id.* at 693, 798 P.2d at 1242, 274 Cal. Rptr. at 399; *see also id.* at 687-91, 798 P.2d at 1238-41, 274 Cal. Rptr. at 395-98 (discussing out-of-state authority and legal commentators' views on equitable tolling issue).

147. *See, e.g.*, *Brown v. Superior Court*, 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988) (identifying some costs of imposing strict liability on drug manufacturers, including increased cost of medication and reluctance of drug manufacturers to undertake new research due to increased cost and decreased availability of insurance).

148. *See, e.g.*, *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1269, 833 P.2d 545, 554-55, 10 Cal. Rptr. 2d 538, 547-48 (1992); *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 46 Cal. 3d 287, 297-98, 758 P.2d 58, 63-64, 250 Cal. Rptr. 116, 121-22 (1988).

149. *See, e.g.*, *Ford v. Gouin*, 3 Cal. 4th 339, 834 P.2d 724, 11 Cal. Rptr. 2d 30 (1992) (containing four separate opinions); *Knight v. Jewett*, 3 Cal. 4th 296, 834 P.2d 696, 11 Cal. Rptr. 2d 2 (1992) (containing four separate opinions).

judicial voices. This should stimulate further diversity and ensure that competing views are fully aired.

Few generalizations, if any, may accurately be stated about the *results* in the California Supreme Court's decisions since 1987. The *method* by which those decisions are reached, however, is well within what we recognize as the evolutionary common-law process.

