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Focus

Who's Most to Blame? 'Baird' Clears Way for an Answer

By Robert S. Gerber and Matthew W. Holder

Should two defendants found liable for intentionally causing a wrongful death be allowed to sue for indemnity to determine who is responsible for a smaller portion of the victim's damages?

Should two persons liable for defrauding an elderly victim of her life savings be allowed to use the resources of the state's judicial system to determine who was less deceitful?

According to the appellate panel in the case of *Baird v. Jones*, 21 Cal.App.4th 684 (1993), the answer to both questions may be yes. In *Baird*, two justices of the 4th District Court of Appeal held that concurrent intentional tortfeasors have, between each other, rights of comparative equitable indemnity.

As the majority reasoned, "If it is equitable and just to allocate loss between concurrent negligent tortfeasors, a negligent tortfeasor and an intentional tortfeasor, or a negligent tortfeasor and a strictly liable defendant" — all rules previously announced by California courts — "then there is little logic in prohibiting an intentional tortfeasor from forcing another intentional tortfeasor to bear his or her share of liability."

The majority opinion in *Baird* provoked a vigorous dissent. The dissent seized on language from prior California cases to argue that parties should not be permitted to base a cause of action on their own intentional wrongdoing. According to the dissent, to hold otherwise would violate public policy. Additionally, the dissent argued that the majority's approach would further overburden an already strained judicial system, whose resources should not be wasted aiding one intentional tortfeasor in a claim against another.

At the present time, *Baird* is still good law and has been the subject of relatively little comment by other courts and scholars. But did *Baird* reach the right result? Or is the dissent correct, and should *Baird* be overruled? Consider the facts:

Earl J. Baird was a homeowner who signed a listing agreement with Chuck I. Jones, a real estate agent. Baird owned his home with his wife, but only his name was on the listing agreement.

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After receiving an offer to purchase the home, Baird and Jones agreed to counteroffer. To make the counteroffer binding, Baird needed his wife's signature. Rather than obtain the wife's signature, however, Jones suggested that only Baird sign the counteroffer so that he could use the counteroffer as a means to "test the waters" with the buyer.

Baird knew that what the agent was proposing to do was wrong, because he would be misrepresenting to the buyer both his intent and ability to sell the home. Nonetheless, he went along with Jones' plan.

As it turned out, the buyer was not the only one being fooled. Unbeknownst to Baird, Jones actually intended to convince the buyer to accept the counteroffer, and succeeded in doing so. The buyer, of course, was unaware that Baird's wife owned a portion of the home, and believed the counteroffer was binding. Jones also forged the signatures of both Baird and his wife on a planning application that would allow the buyer to build additional units on the property.

The application was approved, and the buyer then spent a significant sum of money in anticipation of his future development plans.

All of this happened without Baird's knowledge. Believing he had merely made a counteroffer that was not even binding, Baird later told Jones that he changed his mind and did not want to sell the home after all. Jones tried in vain to save the deal, but finally had to tell the buyer the deal was off.

The buyer sued both Baird and Jones for intentional misrepresentations. The buyer won a joint and several judgment against both defendants. The trial court found that Baird intentionally misrepresented his ability to sell the home, and also that he was vicariously liable for Jones' conduct. Baird, however, argued that Jones should pay the entire judgment, because the fake counteroffer was Jones' idea. The trial court agreed with Baird, shifting the entire damages judgment to Jones under the doctrine of comparative equitable indemnity because the actions of Jones were "far more flagrant" than those of Baird (note that Baird was still responsible for a portion of the buyer's attorney's fees, and also received no indemnification for his own fees).

The Court of Appeal agreed that this was a permissible application of the doctrine. The majority presented its holding as the logical extension of two prior California Supreme Court decisions - *Li v. Yellow Cab Co.*, 13 Cal.3d 804 (1975), and *American*

Motorcycle Association v. Superior Court, 20 Cal.3d 578 (1978).

In *Li*, the court rejected the harsh "all-or-nothing" doctrine of contributory negligence, which had barred a plaintiff from recovering any money from a negligent defendant in cases where the plaintiff's own negligence contributed to his injuries. Contributory negligence was replaced by a system of pure comparative fault.

Similarly, in *American Motorcycle Association*, the court rejected the unfair "all-or-nothing" doctrine of equitable indemnity, which had allowed a responsible but less culpable defendant to shift his entire liability to the more culpable defendant. Again, this doctrine was replaced by a system of pure comparative fault. The reasoning of the *Baird* majority was relatively straightforward — comparative equitable indemnity is about fairness, and mandatory, "all-or-nothing" approaches are rarely fair. Even in cases involving two intentional tortfeasors, the majority reasoned, one party might be more culpable than the other.

Accordingly, the majority held, principles of comparative equitable indemnity should be applied to produce a fair result between these two parties. Otherwise, one wrongdoer — perhaps the more culpable wrongdoer — could escape financial responsibility altogether if she was lucky enough to avoid being sued, or after losing the lawsuit was able to hide her assets long enough for the plaintiff to satisfy the entire judgment via another defendant.

The majority explained that such a result would be "unconscionable." It qualified its holding, however, by explaining that comparative equitable indemnity could not be applied if doing so would be against "public policy."

The majority opinion in *Baird* provokes several important questions. First, under the majority's reasoning, how many unseemly disputes could our courts be forced to adjudicate? The two examples identified at the beginning of this article are arguably just the tip of the iceberg. With already lengthy case calendars and overworked court staff, should the resources of our judicial system be spent resolving these disputes?

It should be noted that although the *Baird* majority held that comparative equitable indemnity would not be applied if against public policy, it did not articulate exactly how courts should apply this exception. For example, which indemnity claims by intentional tortfeasors are permissible, and which are against public policy? Further, can courts invoke the public policy exception to dismiss indemnity claims on demurrer, or must they first allow for sufficient fact discovery?

Second, does opening the door to indemnity claims for intentional misconduct actually encourage such misconduct? Several California statutes already demonstrate that the policy of this state is to discourage intentional misconduct.

For example, Section 857 of the Code of Civil Procedure precludes contribution in favor of any tortfeasor who has intentionally injured another person (note, though, that this statute also provides that it was not intended to "impair any right of indemnity under existing law," a point emphasized by the *Baird* majority). In addition, Section 533 of the Insurance Code categorically exempts insurers from paying losses caused by the willful act of an insured. Finally, the equitable defense of unclean hands would seem applicable to a cross-claim by an intentional tortfeasor. Can the reasoning of the *Baird* majority be reconciled with the policy underlying the above statutes and defenses?

Lastly, is the majority decision in *Baird* even consistent with existing California Supreme Court precedent? Both *Li* and *American Motorcycle Association* contain language suggesting that the Supreme Court never intended the doctrine of comparative equitable indemnity to extend to cases involving intentional wrongdoing. Indeed, the *Li* court noted that because intentional conduct is different in kind than negligent conduct, it has been "persuasively argued" that comparative equitable indemnity should not be available to intentional tortfeasors. Ultimately, however, the *Li* court did not decide this issue.

Arguably, the debate boils down to a choice between a case-by-case approach, for which the *Baird* majority advocated, and a blanket prohibition, which the *Baird* dissent favored. Worth noting is that the trial court in *Baird* may have reached the result it did because of the unique facts of the case. Baird was not merely less culpable than his real estate agent. Instead, Baird himself was also a victim of the agent's misrepresentations, and the agent undoubtedly breached his fiduciary duties to Baird. Perhaps the *Baird* majority would not have reached the result it did had Baird not been conned by his own agent.

Under the present state of the law, an attorney representing a client sued for intentional wrongdoing should consider relying upon *Baird* to cross-claim against other parties who should share responsibility. An attorney defending against such an indemnity claim should read the *Baird* dissent closely, start formulating arguments based on its reasoning, and hope that the California Supreme Court will ultimately overrule *Baird*.

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