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COMMENT

THE CASE FOR COMPARATIVE CONTRIBUTION IN FLORIDA

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This article examines the recently enacted Uniform Contribution Among Tortfeasors Act in Florida. After briefly discussing the common law doctrine of no contribution and efforts to alleviate such a harsh rule, the authors focus on the serious conflicts between the new statute and the underlying equitable principles of Hoffman v. Jones. *In particular, the pro rata sharing of liability, the settlement, and the release provisions of the statute are criticized as not allocating the ultimate liability of the tortfeasors based on their relative degrees of fault. The authors suggest that a legislative change regarding these provisions is warranted so as to maintain a consistent and equitable apportionment system for everyone.*

I. INTRODUCTION

The Florida Contribution Among Tortfeasors Act[1] creates a basic right of contribution[2] among tortfeasors, and signals the demise of the "common law" rule in Florida prohibiting contribution between joint wrongdoers.[3] The new legislation, modeled after the

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1. FLA. STAT. § 768.31 (1975).

2. Contribution is the right of one defendant, who has discharged a common liability, to recover from another joint defendant his share of the common liability. *See generally,* Comment, *South Dakota Uniform Contribution Among Tortfeasors Act: A Problem of Interpretation?* 16 S.D.L. REV. 447 (1971).

3. See notes 14-17 *infra* and accompanying text.

1955 draft of the Uniform Contribution Among Tortfeasors Act[4] promulgated by the Conference of Commissioners on Uniform State Laws, seeks to achieve equity and justice through a pro rata[5] sharing of common fiscal responsibility by those joint tortfeasors who have paid more than their pro rata share of the common liability.[6] Although designed to provide the uniformity in contribution that was lacking under an earlier Uniform Act drafted in 1939,[7] the new law raises serious problems of interpretation and application in Florida.

The primary issue, and the focus of this article, is the conflict between the principles of comparative negligence and equity adopted by the Supreme Court of Florida in *Hoffman v. Jones*,[8] and the pro rata principle of contribution contained in the Contribution Among Tortfeasors Act.[9] In *Hoffman*, the court declared that "[i]n the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault."[10] The Contribution Among Tortfeasors Act expressly states, however, that the degrees of fault will not be considered in determining the pro

4. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, (1955 Revision), 12 UNIFORM LAWS ANN. 63 (1975).

5. FLA. STAT. § 768.31(3) (1975). *See* note 9 *infra.*

6. FLA. STAT. § 768.31(2)(b) (1975).

7. The Uniform Contribution Among Tortfeasors Act of 1939 was adopted in the following jurisdictions: Arkansas, ARK. STAT. ANN. §§ 34-1001 to 34-1009 (1975); Delaware, 10 DEL. CODE ANN. §§ 6301 to 6308 (1975); Hawaii, HAWAII REV. STAT. §§ 663-11 to 663-17 (1975); Maryland, MD. ANN. CODE, art. 50, §§ 16-24 (1975); Mississippi, MISS. CODE ANN. § 85-5-5 (1975); New Jersey, N.J. STAT. ANN. 2A:53A-1 to 2A:53A-5 (1975); New Mexico, N.M. STAT. ANN. §§ 24-1-11 to 24-1-18 (1975); Pennsylvania, PA. STAT. §§ 2081 to 2089 (1975); Rhode Island, R. I. GEN. LAWS ANN. §§ 10-6-1 to 10-6-11 (1975); South Dakota, S.D. COMP. LAWS ANN. §§ 15-8-11 to 15-8-22 (1975).

Most of these states made substantial modifications in the 1939 Act which defeated the basic idea of uniformity. Because of unfavorable reports as to the progress and operation of the 1939 Act, the Commissioners withdrew it for further study and revision. The 1955 Act was promulgated in the hope that it would reconcile the serious variations which existed and eliminate the mounting confusion. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, Commissioners' Prefatory Note (1955 Revision), 12 UNIFORM LAWS ANN. 59-60 (1975).

8. 280 So. 2d 431 (Fla. 1973).

9. FLA. STAT. § 768.31(3) (1975):

> Pro Rata Shares. - In determining the pro rata shares of tortfeasors in the entire liability:
>
> (a) Their relative degrees of fault shall not be considered.
>
> (b) If equity requires, the collective liability of some as a group shall constitute a single share.
>
> (c) Principles of equity applicable to contribution generally shall apply.

10. 280 So. 2d at 438.

rata liability of joint tortfeasors.[11] Instead, a pro rata share will generally be determined by dividing the number of joint tortfeasors into the amount of the judgment.[12] For example, in the normal situation, if two joint tortfeasors are found liable for a judgment of $100,000, each of their pro rata shares would be $50,000, regardless of their respective degrees of negligence in creating the accident. In a situation where damages are $100,000 and Defendant A is only 20 percent negligent while Defendant B is 80 percent negligent, Defendant A will be held accountable for 30 percent of the damages for which he is not responsible. If one accepts the *Hoffman* premise that liability should be equated with fault, such a result is clearly inconsistent with that premise and therefore is unjust.

However, before examining in detail the possible conflict of the Contribution Among Tortfeasors Act with the principles espoused in *Hoffman*, an examination of how the Act changes the common law, and an examination of how other states have dealt with the possible conflict between comparative negligence principles and the pro rata provisions of the Contribution Among Tortfeasors Act is warranted.

II. CONTRIBUTION: THE COMMON LAW RULE ABOLISHED

The fundamental provision of the Contribution Among Tortfeasors Act is contained in Florida Statutes § 761.31(2)(a) which establishes a basic right to contribution when two or more persons become jointly and severally liable in tort for a single personal injury, wrongful death, or property damage.[13] Prior to the passage of Contri-

11. FLA. STAT. § 768.31(3)(a) (1975). Note that the right to contribution arises only after one of the joint tortfeasors has paid more than his pro rata share of the common liability. FLA. STAT. § 768.31(2)(b) (1975).

12. The general determination of pro rata shares is tempered somewhat by FLA. STAT. §§ 768.31(3)(b) and (c) (1975). *See* note 9 *supra*.

Examples of equity considerations modifying a pro rata division are: (1) vicarious relationships, such as master-servant, where the wrong of the servant should in fairness be treated as a single share; (2) situations involving co-owners of property; (3) instances where members of an unincorporated association are involved, etc.

Another example of how equity generally will apply involves the situation where there are at least three defendant-tortfeasors, one of whom is insolvent. In those instances it is suggested that a defendant-tortfeasor who has paid the plaintiff the full judgment should still only receive contribution of one-third from the other solvent tortfeasor, as opposed to one-half. *See* UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2, Commissioners' Comment (1955 Revision), 12 UNIFORM LAWS ANN. 87-88 (1975).

13. The new legislation does not affect the doctrine of joint and several liability as developed in Florida. Contribution shifts liability only after the injured party has received

bution Among Tortfeasors Act, there could be no contribution between tortfeasors in Florida.[14] Apparently misconstruing the English case of *Merryweather v. Nixan*,[15] the courts of Florida, as well as those of most American jurisdictions, enforced a general "common law" rule against contribution.[16] Claiming to adopt the *Merryweather* view, the judiciary in Florida seems to have failed to comprehend the limitations implicit in its facts, and continually treated the case as the general rule prohibiting contribution, rather than for the exception for which it stood.[17] Furthermore, Florida expanded the common law definition of joint tort,[18] *i.e.* wrongs perpetrated by two or more persons acting in concert, to encompass

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compensation for the loss occasioned by the defendants' negligent conduct. All joint tortfeasors will continue to be jointly and severally liable to the plaintiff for the injury as if they had acted alone in causing the damage.

For a discussion of whether the *Hoffman* principles of equating liability with fault indicate that joint and several liability should be abrogated see Timmons & Silvis, *Pure Comparative Negligence in Florida: A New Adventure in the Common Law*, 28 U. MIAMI L. REV. 737, 780-787 (1974). *See also* 30 U. MIAMI L. REV. 747 (1976).

14. H.E. Wolfe Constr. Co. v. Ellison, 127 Fla. 808, 174 So. 594 (1937); Seaboard Air Line Ry. v. American Dist. Elect. Protective Co., 106 Fla. 330, 143 So. 316 (1932); Feinstone v. Allison Hosp., Inc., 106 Fla. 302, 143 So. 251 (1932); Louisville & N.R.R. v. Allen, 67 Fla. 257, 65 So. 8 (1914); Rader v. Variety Children's Hosp., 293 So. 2d 778 (Fla. 3d Dist. 1974); Stembler v. Smith, 242 So. 2d 472 (Fla. 1st Dist. 1970); Kellenberger v. Widener, 159 So. 2d 267 (Fla. 2d Dist. 1963); Winn-Dixie Stores, Inc. v. Fellows, 153 So. 2d 45 (Fla. 1st Dist. 1963).

15. 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799).

16. *See* cases cited in note 14 *supra*. *See also* Union Stock Yards Co. v. Chicago, B. & Q.R.R., 196 U.S. 217 (1905); Denneler v. Aubel Ditching Service, Inc. 203 Kan. 117, 453 P.2d 88, (1969); Riexinger v. Ashton Co., 9 Ariz. App. 406, 453 P.2d 235 (1969); National Trailer Convoy, Inc. v. Oklahoma Turnpike Auth., 434 P.2d 238 (Okla. 1967); Fidelity & Cas. Co. of New York v. Chapman, 167 Or. 661, 120 P.2d 223 (1941); Adams v. White Bus Line, 184 Cal. 710, 195 P. 389 (1921).

17. In *Merryweather*:

> "Lord Kenyon, Ch. J. said, there could be no doubt but that the nonsuit was proper: that he had never before heard of such an action having been brought, where the former recovery was for a tort: that the distinction was clear between this case and that of a joint judgment against several defendants in an action of assumpsit . . . ."

Although *Merryweather* states that the action is unheard of where a tort is involved, the concept of tort was strictly limited at that point in the common law to conscious, wilful, malicious, or intentional wrongs. "At that time the word 'tort' had not come to be applied to the vast number of *quasi delicts* not known and classified as actions sounding in tort and arising out of mere negligence or unintentional injury." Reath, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan*, 12 HARV. L. REV. 176, 178 (1898). Therefore, *Merryweather* actually stands for the exception to the general rule that a court will imply an assumpsit for indemnity or contribution among persons jointly liable. *Id.* at 177.

18. For a discussion of the history and theories of joint and several liability see Jackson, *Joint Torts and Several Liability*, 17 TEX. L. REV. 399 (1939) and Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413 (1937).

independent, concurring torts by parties having no prior relationship to each other.[19]

The combined effect of the no contribution rule and the expansion of the term "joint tort" gave to the victim of the tortious conduct the absolute power to determine the subject of liability.[20] The

19. *See* De La Concha v. Pinero, 104 So. 2d 25 (Fla. 1958); Davidow v. Seyfarth, 58 So. 2d 865 (Fla. 1952); Hernandez v. Pensacola Coach Corp., 141 Fla. 441, 193 So. 555 (1940); Feinstone v. Allison Hosp., Inc., 106 Fla. 302, 143 So. 251 (1932); Starling v. City of Gainesville, 90 Fla. 613, 106 So. 425 (1925); Louisville & N.R.R. v. Allen, 67 Fla. 257, 65 So. 8 (1914).

The 1939 Uniform Act defined the term "joint tortfeasors" to mean two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not a judgment had been recovered against all or some of them.

The phrase "whether or not judgment has been recovered against all or some of them" was included to indicate that an express finding of joint and several liability was not a necessary prerequisite to the recovery of contribution among tortfeasors. If the injured person P was hurt by the concurrent negligence of A and B and recovered a judgment in a suit only against A, contribution could be recovered by A against B in a separate action. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1, Commissioners' Notes (1939), 9 UNIFORM LAWS ANN. 233 (1957).

The 1955 Uniform Act eliminated the definition of "joint tortfeasors" found in the 1939 version to avoid problems of interpretation in jurisdictions in which those who acted independently and not in concert could not be joined as defendants in the same action. Commissioners' Notes (1955 Revision), 12 UNIFORM LAWS ANN. 64 (1975). Florida's adherence to the principle, that where the negligence of two or more persons concurs in producing a single indivisible injury, joint and several liability exists even though there was no common duty, design, nor concerted action, gives FLA. STAT. § 768.31(2)(a) virtually the same meaning provided for under the 1939 Uniform Act.

20. Comment, *The Allocation of Loss Among Joing Tortfeasors*, 41 S. CAL. L. REV. 728, 732 (1968). *See generally* Comment, *South Dakota Uniform Contribution Among Tortfeasors Act: A Problem of Interpretation?*, 16 S.D. L. REV. 477 (1971); Comment, *Contribution Among Joint Tortfeasors*, 44 TEX. L. REV. 326 (1965).

Despite the injustice of allowing the plaintiff to select arbitrarily the subject of liability, several reasons were advanced by the courts for preventing contribution among joint tortfeasors. The principal philosophical reason against allowing contribution was that no man should be able to make his misconduct the ground for an action in his favor—*in pari delicto portior est conditio defendantis*. Merryweather v. Nixan, 80 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799); Adamson v. Jarvis, 4 Bing. 66 (1827). Denial of access to the courts was thought to punish past misconduct and to discourage similar prospective improper activity. Jones, *Contribution Among Tortfeasors*, 11 U. FLA. L. REV. 175, 180 (1958). Such a rule was perceived to prevent prospective tortfeasors from participation with others in acts for fear of being compelled to pay the entire damages instead of only a ratable share of them. Lelfar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV., 130, 133 (1932).

One legal scholar argued that contribution would make it more difficult for the claimant to settle cases involving multiple tortfeasors. James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156, 1160 (1941). Despite agreeing to settle with the plaintiff, a tortfeasor could still be called upon to pay his share of any verdict which was rendered against his fellow joint tortfeasors, and therefore, would not want to settle until they all did. *Id.* at 1161. (This, however, is not true under the new Florida Statute. *See* § 768.31(5) (1975), which provides for the discharge of liability for contribution for a settling party given a release.)

plaintiff was permitted to place the entire burden of responsibility for payment on one defendant, who was then helpless to shift any of the responsibility to the other joint defendants. The injured party could sue any joint tortfeasor individually and collect the entire amount of damages, or he could join defendants and then collect from any one or all of those held liable for the full amount of the damages. The parties not sued or not attached escaped without paying any of the damages.

To remedy the harsh effects of denying contribution, Florida courts circumvented the rule by applying principles of idemnification. In doing so the courts demonstrated an amazing dexterity in manipulating the doctrine of indemnity to allow some compensation between tortfeasors.[21] When a separate and distinct duty between tortfeasors existed and the violation of such duty resulted in injury to the plaintiff, indemnity was employed to permit compensation to the non-breaching tortfeasor.[22] In a case where two joint tortfeasors were at fault and both liable to the party injured, yet not in *pari delicto* as to each other, and the act of only one tortfeasor was the primary cause of the injury, the secondary

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In addition, allowing contribution could have favored the powerful and wealthy at the expense of the poor and weak during negotiation, thus bringing about a less satisfactory social distribution of accident losses than existed. James, *supra* at 1165. Finally, contribution may have been undesirable because of perceived administrative difficulty in apportioning fault between tortfeasors. However, in light of today's juries having little trouble allocating relative degrees of fault between a plaintiff and defendant in comparative negligence cases, such apprehension seems unwarranted. *See* text accompanying note 91 *infra*.

21. *See, e.g.*, Seaboard Air Line Ry. v. American Dist. Elec. Protective Co., 106 Fla. 330, 143 So. 316 (1932) (failure of a railroad signal which co-defendant signal company had a duty to maintain caused plaintiff's injury, and defendant railroad company was allowed indemnification where there was a violation of a duty owed by one defendant to another); Stuart v. Hertz Corp., 302 So. 2d 187 (Fla. 4th Dist. 1974) (negligent defendant allowed indemnification from doctor for aggravation of an injury); Westinghouse Elec. Corp. v. J.C. Penney Co., 166 So. 2d 211 (Fla. 1st Dist. 1964) (store owner allowed indemnification from installer of an escalator who had given assurances of "smooth and quiet operation," which breach was found to be the proximate cause of the injury). *See generally* Stuart v. Hertz Corp., *supra* for other examples.

Indemnity differs from contribution in that indemnity, in its purest sense, is founded upon contract, express or implied, whereas contribution is derived, not from any contractual obligation, but rather from principles of equity. Stuart v. Hertz Corp., *supra* at 190. In addition, indemnity transfers the *entire* loss from one tortfeasor, who has been compelled to pay it, onto the shoulders of another tortfeasor who should pay it, while contribution can be employed to shift a partial amount of liability, based on either a pro rata or percentage of fault determination. *Id.*

22. *See* Seaboard Air Line Ry. v. American Dist. Elec. Protective Co., 106 Fla. 330, 143 So. 316 (1932).

tortfeasor was allowed to seek indemnity.[23] If the active negligence of one tortfeasor and the passive negligence of another were combined to proximately cause one injury to a third person, the passively negligent tortfeasor, who would be compelled to pay damages to the injured party, could be entitled to indemnity from the actively negligent tortfeasor.[24]

Under the guise of "equitable indemnity," one Florida court actually allowed *partial* indemnification (in reality contribution) where injuries incurred in one automobile accident were aggravated by a physician's negligence.[25] Affirming the trial court's denial of a motion to dismiss the third party complaint, the court declared that the car rental agency was liable to the plaintiff for the full amount of damages, but it could recover from the doctor for any aggravation of the injury.[26]

The new Florida Act, by conclusively establishing a right of contribution, enables the courts to avoid the theoretical confusion in the field of negligence created by the cavalier expansion of the concept of "indemnity" to encomass true contribution situations. While not preventing further distortion of the doctrine of indemnity, the Contribution Among Tortfeasors Act does alleviate the necessity for further distortion by abrogating the no contribution rule. The present distortions may remain, however, since the Act does not impair any right of indemnity under existing law.[27] What is certain is that there should be no right of contribution in indemnity situations, unless it is recovered from a third tortfeasor against whom no right of indemnity exists.[28]

The right of contribution established by the Act exists only in

23. Stuart v. Hertz Corp., 302 So. 2d 187 (Fla. 4th Dist. 1974). For a detailed discussion of the active-passive negligence doctrine see Hunsucker v. High Point Bending & Chair Co., 75 S.E.2d 768 (N.C. 1953); Dole v. Dow Chemical, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S. 2d 382 (1972).

24. *See* Winn-Dixie Stores, Inc. v. Fellow, 153 So. 2d 45 (Fla. 1st Dist. 1963). It is interesting to note that the court in *Winn-Dixie* acknowledged the fact that no contract of indemnification existed between the active and passive tortfeasors. The duty imposed by law upon the actively negligent tortfeasor to reimburse the passively negligent tortfeasor would have rested upon an implied contract arising from the fact the latter had merely discharged an obligation for which the former was primarily liable. *Id.* at 50. *See also* note 21 *supra*.

25. Stuart v. Hertz Corp., 302 So. 2d 187 (Fla. 4th Dist. 1974). See discussion note 21 *supra*.

26. *Id.*

27. FLA. STAT. § 768.31(2)(f) (1975).

28. *See* UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, Commissioners' Comments (1955 Revision), 12 UNIFORM LAWS ANN. 66 (1975).

favor of a tortfeasor who has paid more than his pro rata share of the common liability.[29] The total recovery is thus limited to the amount paid by any tortfeasor in excess of his pro rata share, and under the new Act, no tortfeasor can be compelled to pay contribution beyond his own pro rata share of liability.[30]

III. THE UNIFORM ACTS AND CONTRIBUTION IN OTHER JURISDICTIONS

The 1939 Uniform Contribution Among Tortfeasors Act drafted by the Commissioners on Uniform Laws contained an optional provision which allowed consideration of the relative degrees of fault of the joint tortfeasors in determining their pro rata shares.[31] This optional section provided that when there was such disproportionate fault among joint tortfeasors as to make an equal distribution by contribution among the tortfeasors of common liability inequitable, the relative degrees of fault were to be examined to determine the proper shares.[32]

Although the Commissioners may have believed that the apportionment of the relative degrees of fault among joint tortfeasors was a sound and equitable position,[33] apprehension existed that some states would be unwilling to extend the right of contribution to that extreme.[34] Rather than jeopardize the passage of the entire act, the commissioners made the relative degree of fault provision optional.[35]

Also, the 1939 optional provision providing for apportionment based on the relative degrees of fault among joint tortfeasors was qualified by another subsection which provided that the apportionment provision applied only if the issue of proportionate fault was litigated between the joint tortfeasors by cross-complaint.[36] The purpose of this restriction was to compel litigation of the issue of

29. FLA. STAT. § 768.31(2)(b) (1975).

30. *Id.*

31. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2 (4) (1939), 9 UNIFORM LAWS ANN. 235 (1957).

32. *Id.*

33. Commissioners' Note (1939 Act), 9 UNIFORM LAWS ANN. 236-37 (1957).

34. Comment, *South Dakota Uniform Contribution Among Tortfeasors Act: A Problem of Interpretation?* 16 S.D. L. REV. 447, 449 (1971).

35. Only four states adopted the optional apportionment provision—Arkansas, Delaware, Hawaii, and South Dakota. *See* note 7 *supra.*

36. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 7(5) (1939), 9 UNIFORM LAWS ANN. 247 (1957).

apportionment during the trial of the issue of culpability, thus avoiding the multiplicity of rehearing the same testimony and evidence at a later time.[37] However, the Florida Act and the 1955 Uniform Act on which it was based contain no provision creating a relative degree of fault rule. Rather, they provide that contribution will be based on a pro rata division of the common liability irrespective of the degrees of fault among the joint tortfeasors.[38]

Seven states have enacted the 1955 Uniform Act in some form.[39] Of the seven, Florida, Massachusetts, Nevada, and North Dakota have also adopted the doctrine of comparative negligence.[40] Therefore, it would be helpful to examine some of these states' statutes and their judicial interpretations in order to discover the various applications of comparative negligence principles to the doctrine of contribution among tortfeasors.

A few courts have chosen to apply the pro rata provision literally and without modification.[41] The possible conflict with comparative negligence provisions has apparently been avoided by the courts of the states in question. The Supreme Court of North Dakota stated simply that when the actions of the defendants are the proximate cause of an injury the court will not determine their relative degrees of fault and they will share equally in the damages.[42]

In Massachusetts if two or more tortfeasors injure a plaintiff in the same accident, each tortfeasor, if his negligence is greater than the plaintiff's, is liable for all of the plaintiff's damages, diminished in proportion to the amount of negligence attributable to the plaintiff.[43] The only consideration of fault in such a system is the initial

37. *See* Commissioners' Notes (1939 Act), 9 UNIFORM LAWS ANN. 249 (1957). Failure to raise the issue of apportionment during trial required the joint tortfeasors to abide by the ratio of equal pro rata shares.

38. FLA. STAT. § 768.31(3)(a) (1975). *See* note 9 *supra*.

39. In addition to Florida they are: Alaska, ALASKA STAT. §§ 09.16.010 to .060 (1973); Massachusetts, MASS. GEN. LAWS ANN. ch 231B, §§ 1-4 (Supp. 1975); Nevada, NEV. REV. STAT. §§ 17.215 - .325 (1973); North Carolina, N.C. GEN. STAT. § 1B-1 to -6 (1969), *as amended*, (Cum. Supp. 1975); North Dakota, N.D. CENT. Code §§ 32-38-01 to -04 (1960); and Tennessee, TENN. CODE ANN. §§ 23-3101 to -3106 (Cum. Supp. 1975).

40. Massachusetts, MASS. GEN. LAWS ANN. ch 231, § 85 (Supp. 1975); Nevada, NEV. REV. STAT. § 41.141 (1973); North Dakota, N.D. CENT CODE § 9-10-07 (Supp. 1973). Florida judicially adopted comparative negligence in Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

41. *See, e.g.*, Steuber v. Hastings Heating & Sheet Metal Co., 153 N.W.2d 804 (N.D. 1967).

42. *Id.*

43. Massachusetts, unlike Florida, does not employ pure comparative negligence. In Massachusetts contributory negligence is not a bar to recovery provided the plaintiff's negli-

jury determination as to whether the particular tortfeasor was in any way responsible. Once that is determined, all consideration of fault abruptly ceases and apportionment in contribution actions is strictly pro rata.[44] A plaintiff may arbitrarily elect to sue and/or collect from either party in order to receive a full recovery.[45] If the defendant is assessed more than his pro rata share of the liability, he may seek contribution from the other tortfeasor.[46] For example, assume a three party accident with damages to A of $100,000 and negligence in the following percentages: A—10 percent; B—20 percent; and C—70 percent. If A sues only C or seeks satisfaction of the judgment from only C, even if B was joined, he will recover $90,000, which represents the entire $100,000 judgment reduced by the 10 percent liability of A.[47] If C then sought contribution from B, C could recover $45,000, representing one half[48] of the $90,000 paid to A. In other words despite the fact that C's negligence was far greater than B's, each is ultimately held equally liable. Conversely, if A collected the $90,000 from B only, B could only recover $45,000 from C in contribution. Therefore B again ultimately pays $25,000 for which he is not responsible. The inequities of such a contribution rule are evident.

Wisconsin, long a forerunner in negligence law, has judicially recognized contribution among joint tortfeasors[49] and has legislatively embraced the doctrine of comparative negligence.[50] Because the Supreme Court of Wisconsin had to consider to what extent the

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gence is "not as great as" that of the defendant(s). MASS. GEN. LAWS ANN. ch. 231, § 85 (Supp. 1975).

44. Regarding contribution, the responsibility of the jury is simply to determine how many persons were at fault, no matter how minute their negligence may have been in causing the accident. Once the total amount of damages has been calculated, the liability of each tortfeasor will usually be determined by dividing the number of tortfeasors into the amount of the judgment. The size of the pro rata share depends entirely on how many tortfeasors caused the injury, regardless of their respective degrees of fault. *See* note 12 *supra* and accompanying text.

45. *See* Bouchard, *Apportionment of Damages Under Comparative Negligence*, 55 MASS. L.Q. 125, 133 (1970).

46. *Id.* at 134.

47. This is the same position taken by the Supreme Court of Florida in Hoffman v. Jones, 280 So. 2d 431 (1973). Florida employs "pure" comparative negligence. Therefore, a plaintiff may recover damages even if he is more negligent than defendant. This is not true in Massachusetts. *See* note 43 *supra*.

48. If there had been three joint tortfeasors each accordingly would be held accountable for one third of the total amount of damages paid.

49. *See* Bielski v. Schulze, 16 Wisc. 2d 1, 114 N.W. 2d 105 (1962).

50. WISC. STAT. ANN. § 895.045 (1966), *as amended* (Supp. 1975).

principles of comparative negligence apply in defining the right of contribution among tortfeasors, the Wisconsin court's analysis will be helpful in determining how the two doctrines can be most accurately reconciled.

Wisconsin judicially recognized the doctrine of contribution in *Ellis v. Chicago & Northwestern Railway*[51] in 1918. From 1918 until 1962 the Wisconsin courts apportioned liability on a strict pro rata basis with no consideration of relative degrees of fault. However, in 1962, in the landmark case of *Bielski v. Schulze*,[52] Wisconsin's highest court propounded what has become known as the doctrine of "comparative contribution."[53] Rather than basing the recovery in an action for contribution upon pro rata shares as in Massachusetts and North Dakota, the Wisconsin court in *Bielski* awarded recovery on the percentage of each tortfeasor's fault.[54] Applying the prior example, in Wisconsin, both B and C would be individually liable for all the damages,[55] however, if A had recovered the full $90,000 from B, B, who was responsible for only 20 percent of A's damages could recoup $70,000 from C. Similarly, if A had elected to sue C only, or to collect the entire judgment from him, C would only be entitled to $20,000 from B.

In choosing to apply comparative negligence principles to contribution among joint tortfeasors rather than continuing the practice of apportioning damages on a pro rata basis, the Supreme Court of Wisconsin in *Bielski* stated that:

> If the doctrine [contribution] is to do equity, there is no reason in logic or in natural justice why the shares of common liability of joint tortfeasors should not be translated into the percentage of the causal negligence which contributed to the injury . . . . It is difficult to justify, either on a layman's sense of justice or on natural justice, why a joint tortfeasor who is 5% causally negligent should only recover 50% of the amount he paid to the plaintiff from a co-tortfeasor who is 95% causally negligent, and conversely why the defendant who is found 5% causally negligent

51. 167 Wisc. 392, 167 N.W. 1048 (1918).

52. 16 Wisc. 2d 1, 114 N.W.2d 105 (1962).

53. *See* Bouchard, *supra* note 45 at 133.

54. 16 Wisc. 2d at 6, 114 N.W.2d at 107. *See also* Johnson v. Heintz, 61 Wisc. 2d 585, 213 N.W.2d 85 (1973); City of Franklin v. Badger Ford Truck Sales, Inc., 58 Wisc. 2d 641, 207 N.W.2d 866 (1973).

55. *Bielski* specifically recognizes the continued viability of joint and several liability. 16 Wisc. 2d at 6, 114 N.W.2d at 107.

should be required to pay 50% of the loss by way of the reimbursement to the co-tortfeasor who is 95% negligent.[56]

Thus, the Supreme Court of Wisconsin established "comparative contribution" as the law of that state, thereby endorsing the belief that the same equitable considerations which mandate contribution as a desirable and just doctrine also mandate that the monetary amount of contribution assessed to a particular tortfeasor be dependent on the percentage of injury caused by his negligence.[57] Since *Bielski*, Wisconsin courts have consistently demanded that contribution among joint tortfeasors be based upon principles of comparative negligence.[58]

New York, even before adopting comparative negligence by statute,[59] recognized the principle allowing a defendant to apportion liability for negligence with a third party who was responsible for part of the negligence. In *Dole v. Dow Chemical Co.*,[60] an administratrix of the estate brought a wrongful death action against a chemical company which had sprayed the deceased's employer's grain bin with a volatile and possibly poisonous substance. The defendant chemical company was held to have the right to prove the deceased's employer's responsibility and seek an apportionment of the

56. 16 Wisc. 2d at 9, 114 N.W.2d at 109.

57. Florida considered adopting the Wisconsin Plan in 1975. The original legislation introduced was divided into two sections—one addressing comparative negligence and the other contribution among tortfeasors. The latter part of the bill was patterned specifically after the plan adopted by Wisconsin for apportioning loss among tortfeasors. Under the Wisconsin Plan, as modified, there would have been contribution between joint tortfeasors proportionate to the negligence attributable to each. Damages allowed would have been diminished in proportion to the negligence of the person seeking contribution. No recovery would have been allowed if the negligence of the person against whom recovery was sought was less than that of the person seeking contribution. This legislation, the original Senate Bill 98, was rejected in committee.

A second bill, Senate Bill 206, was introduced on the issue of comparative negligence. Although this bill merely embodied the basic principles of Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973), it died in a subsequent committee.

Following the defeat of the original Senate Bill 98, the Judiciary Committee requested representatives of transportation interests, insurance interests, and the Academy of Florida Trial Lawyers to meet and arrive at a compromise measure. The present Contribution Among Tortfeasors Act was the result of their efforts.

58. *See, e.g.*, Johnson v. Heintz, 61 Wisc. 2d 585, 213 N.W.2d 85 (1973); City of Franklin v. Badger Ford Truck Sales, Inc., 58 Wisc. 2d 641, 207 N.W.2d 866 (1973); Valiga v. National Food Co., 58 Wisc. 2d 232, 206 N.W.2d 377 (1973).

59. N.Y. CIV. PRAC. § 1411 (McKinney Supp. 1975-76) became effective September 1, 1975.

60. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

damages. The court rejected the active-passive basis of apportioning liability in favor of the concept of partial indemnification. The court stated:

> [The] [r]ight to apportionment of liability or to full indemnity, then, as among parties involved together in causing damage by negligence, should rest on relative responsibility and [is] to be determined on the facts.[61]

It is interesting to note that New York and Wisconsin, in judicially adopting contribution principles, found that in apportioning damages equitably, the relative degrees of fault of the parties must be considered. This is in direct contrast with those states adopting the 1955 draft of the Uniform Contribution Among Tortfeasors Act,[62] but consistent with the states adopting the optional provisions of the 1939 draft of the Uniform Act.[63]

IV. The Case for Comparative Contribution in Florida

In 1973, in the landmark case of *Hoffman v. Jones*,[64] the Supreme Court of Florida adopted comparative negligence as the law of the state in negligence actions. Stating that common law precepts of contributory negligence could, and should, be overturned in light of current "social and economic customs"[65] and modern "conceptions of right and justice"[66] the court went on to say that "[i]n the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault."[67] Moreover, the supreme court espoused its belief that "[i]f fault is to remain the test of liability, then the doctrine of comparative negligence which involves apportionment of the loss among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise."[68] The court also stated its conviction that "[w]hen the negligence of more than one person contributes to the occurrence of an accident, *each* should pay the proportion of the total damages he has caused to the other party."[69]

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61. 30 N.Y.2d at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 391-92.
62. *See* note 39 *supra*.
63. *See* notes 7 and 35 *supra*.
64. 280 So. 2d 431 (Fla. 1973).
65. *Id.* at 436.
66. *Id.*
67. *Id.* at 438.
68. *Id.* at 436.
69. *Id.* at 437 (emphasis added).

Therefore, if the supreme court applied the equitable principles of *Hoffman* to the common law rule prohibiting contribution among tortfeasors,[70] one would expect that, at the very least, the court would follow the *Bielski v. Schultz*[71] analysis. In *Bielski*, as discussed previously, the Supreme Court of Wisconsin created a right of contribution among joint tortfeasors based on the relative degrees of fault of each defendant.

The Supreme Court of Florida addressed this issue in *Lincenberg v. Issen*.[72] Although the defendant Lincenberg was actually contending that the *Hoffman* principles equating liability with fault implied that each party could *only* be held liable for his proportionate share of the damages (*i.e.*, that the doctrine of joint and several liability should be limited or abrogated), the court instead focused on the collateral issue of contribution.[73]

In the early part of its opinion, the *Lincenberg* court indicated that the *Hoffman* "rationale eliminates justification for the no contribution principle and dictates that [the] rule be abolished."[74] The court further stated that "there is no equitable justification for recognizing the right of the plaintiff to seek recovery on the basis of apportionment of fault while denying the right of fault allocation as between negligent defendants."[75]

The court itself never actually reached a decision as to whether contribution should be based on relative degrees of fault,[76] since the legislature had just passed the Uniform Contribution Among Tortfeasors Act.[77] The new statute provides for a pro rata right to contribution only,[78] and was made applicable to all cases pending on the date of its becoming law.[79]

Therefore, the court was faced with the choice of applying the pro rata provision literally (resulting in substantial injustice to some

70. *See* note 14 *supra* and accompanying text.

71. 16 Wisc. 2d 1, 114 N.W.2d 105 (1962). *See* note 52 *supra* and accompanying text.

72. 318 So. 2d 386 (Fla. 1975).

73. For a more detailed discussion of *Lincenberg* and the issue of joint and several liability, see 30 U. MIAMI L. REV. 747 (1976). *See also* Timmons & Silvis, *supra* note 13, at 781.

74. 318 So. 2d at 391.

75. *Id.*

76. The court, in a footnote, mentioned several alternative apportionment methods, but failed to implement them since the new statute provides a procedure for implementing contribution. 318 So. 2d at 392.

77. FLA. STAT. § 768.31 (1975).

78. FLA. STAT. § 768.31(2)(b) (1975).

79. FLA. STAT. § 768.31(7) (1975).

defendants)[80] or finding some way to avoid the harsh effects of the pro rata provision. Several courses of action were available. First, the court could side-step the pro rata contribution problem by abrogating or limiting the doctrine of joint and several liability.[81] Second, the court could examine the constitutionality of the pro rata provision of the statute.[82] Third, the court might contend that section (3)(a) of the Act (prohibiting consideration of relative degrees of fault in determining pro rata shares) is inconsistent with section (3)(c) of the Act (providing that considerations of equity generally shall apply), and therefore should be disregarded.[83]

Justice Boyd's concurring opinion in *Lincenberg* proffered the third alternative. He stated that because the two provisions conflicted, and because it is the court's duty to achieve legislative intent and uphold the constitutionality of statutes, the sections should be read together as allowing consideration of relative degrees of fault.[84]

There are several problems with such a view despite the fact that it seeks to reconcile the equity considerations of *Hoffman* with the establishment of a right to contribution. First, the statutory language is patently clear that relative degrees of fault are not to be considered.[85] Second, both the legislative history[86] and the Commissioners' Comments to the 1955 draft of the Uniform Contribution Among Tortfeasors Act[87] support the proposition that relative degrees of fault are not to be considered in determining the pro rata shares.

The lack of consistency in Florida's apportionment system is readily apparent. *Lincenberg* states that the percentage of negligence of the plaintiff must be compared to that of *all* the defendants taken as a whole in determining the amount the plaintiff may re-

80. *See* examples in Part III *supra*.

81. This was actually defendant Lincenberg's contention, but a detailed examination of this issue is beyond the scope of this article. For a discussion of the subject see 30 U. MIAMI L. REV. 747 (1976).

82. The *Lincenberg* court specifically declined to rule on the constitutionality of the statute. 318 So. 2d at 391 n.*. *See* Part VI *infra* for a discussion of the constitutionality of § 768.31 (1975).

83. *See* note 9 *supra* for the full text of section 3.

84. 318 So. 2d at 394.

85. FLA. STAT. § 768.31(3)(a) (1975).

86. *See* note 57 *supra*.

87. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2, Commissioners' Comments (1955 Revision), 12 UNIFORM LAWS ANN. 87 (1975).

cover.[88] Furthermore, the court stated that because of the "pro rata" provision of the new Act, juries should not allocate a percentage of fault attributable to each defendant, and that special interrogatories should be limited to those situations where section (3)(c) general equity considerations are applicable.[89] According to the Commissioners' Comments those equity considerations will rarely occur;[90] therefore, in essence, special interrogatories would rarely be permissible. An apportionment system which attempts to equate liability with fault necessarily must allocate to each party his share of the negligence. Unless joint and several liability is abrogated, allowing special interrogatories would be an advisable method of allocating the burden of each party.[91] Objections to special interrogatories on the grounds that they are too complicated for widespread use are not justified since the jury in *Lincenberg* seemed to have no difficulty in allocating a percentage of fault to *each* party.

V. ADDITIONAL PROBLEMS: SETTLEMENT AND RELEASE PROVISIONS OF THE CONTRIBUTION AMONG TORTFEASORS ACT

Although not discussed in *Lincenberg*, the settlement[92] and release[93] provisions of the Contribution Among Tortfeasors Act raise other unfavorable aspects regarding the operation of contribution in Florida.[94] Contrary to the spirit of *Hoffman v. Jones*[95] and perhaps

88. *See* 318 So. 2d at 393-94.

89. *Id.*

90. *See* UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2, Commissioners' Comment (1955 Revision), 12 UNIFORM LAWS ANNS. 87 (1975). *See also* note 12 *supra*.

91. *See* 30 U. MIAMI L. REV. 747, 753 (1976).

92. FLA. STAT. § 768.31(2)(d) (1975).

93. FLA. STAT. § 768.31(5) (1975).

94. The release provisions of the Contribution Among Tortfeasors Act are similar to those found in FLA. STAT. § 768.041 (1975). Prior to the passage of FLA. STAT. § 768.041 (1975), early Florida decisions held that a release or discharge of one or more joint tortfeasors, executed in satisfaction of the tort, was a discharge of all joint tortfeasors since the party injured could have but one satisfaction for damages sustained. Atlantic Coast Line R.R. v. Boone, 85 So. 2d 834 (Fla. 1956); Davidow v. Seyfarth, 58 So. 2d 865 (Fla. 1952); Feinstone v. Allison Hosp., Inc., 106 Fla. 302, 143 So. 251 (1932); Louisville & N.R.R. v. Allen, 67 Fla. 257, 65 So. 8 (1914). Each tortfeasor was considered to sanction all the acts of the others and each was liable for the whole damage caused, as if it had been occasioned solely by himself. *Id.* Thus, any person who paid the victim for the injury paid for all. *Id.* No further action against any other tortfeasor was possible as nothing remained for which the other tortfeasor could be liable. *Id.*

The fact that a release contained a provision stipulating that the instrument released no one except the covenantee from liability did not relieve the instrument from the general rule discharging joint liability. Roper v. Florida Pub. Util. Co., 131 Fla. 709, 179 So. 904 (1938); Louisville & N.R.R. v. Allen, *supra*. The Florida courts, however, soon recognized a

the Act itself in establishing the right to contribution, these provisions allow a defendant to pay only a small portion of the total damages and relieve himself from further liability, while the nonsettling defendant remains responsible for the entire balance of the judgment with no right of contribution against the settling tortfeasor.[96]

The problem may be illustrated as follows: A and B are liable to P for $100,000. If P were to settle with A for $10,000 and release him, B would then be liable for the remaining $90,000, and would not have a right of contribution from A. Because B has no right of contribution from A,[97] the result is clearly contrary to apportionment principles based on equating liability with fault. Had A re-

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distinction between a release and a covenant not to sue and began to attach different procedural consequences to each. *See, e.g.*, Albert's Shoes, Inc. v. Crabtree Constr. Co., 89 So. 2d 491 (Fla. 1956); Atlantic Coast Line R.R. v. Boone, *supra*; Davidow v. Seyfarth, *supra*; Martin v. Burney, 34 So. 2d 36 (Fla. 1948); City of Miami v. Miner, 124 Fla. 684, 169 So. 609 (1936).

The legal difference between the two was highly technical and focused on the intent of the parties in drawing the instrument. A release was defined as an outright cancellation or discharge of the entire obligation as to one or all of the alleged joint wrongdoers. Albert's Shoes, Inc. v. Crabtree Constr. Co., *supra* at 492. Atlantic Coast Line R.R. v. Boone, *supra* at 843. A covenant not to sue recognizes that the obligation or liability continues, but the injured party agrees not to assert any rights grounded thereon against a particular covenantor. *Id.* Thus, if it was apparent on the face of the instrument that the intention was to discharge the liability of one joint tortfeasor, the court would hold that the indivisible joint liability as to the other tortfeasor was also extinguished. If, on the other hand, it was clear that the consideration paid was not intended as full compensation for the injuries, and that the agreement intended to preserve the liability of those who were not parties to it, the provision was construed as a covenant not to sue instead of a technical release.

The passage of FLA. STAT. § 58.28 (1957), *as amended*, FLA. STAT. § 768.041 (1975), provided a statutory exception to previous case law and gave rise to the terms "pro tanto release" and "release in bar." *See* Walker v. U-Haul Co., 300 So. 2d 289 (Fla. 4th Dist. 1974), *cert. denied*, 314 So. 2d 588 (Fla. 1975); Talcott v. Central Bank & Trust Co., 247 So. 2d 727 (Fla. 3d Dist. 1971), *cert. denied*, 262 So. 2d (Fla. 1972); Ellingson v. Willis, 170 So. 2d 311 (Fla. 1st Dist. 1964); Mathis v. Virgin, 167 So. 2d 897 (Fla. 3d Dist. 1964); *cert. denied*, 174 So. 2d 30 (Fla. 1965). The statute declared that where there existed multiple tortfeasors in connection with injuries or damages accruing to a party, recovery from one joint tortfeasor was to be set off against any recovery against another joint tortfeasor. FLA. STAT. § 768.041(2) (1975). Where the parties did not intend a full satisfaction of a judgment against more than one tortfeasor, a partial satisfaction or release as to one tortfeasor was effective only as a pro tanto release of the judgment and did not constitute a release of the judgment and did not constitute a release in bar. Mathis v. Virgin, *supra*.

Because they almost duplicate FLA. STAT. § 768.041, the release provisions of the Contribution Among Tortfeasors Act will not significantly change prior Florida law, as FLA. STAT. § 768.31(5)(a) specifies that a release or covenant to sue will not discharge any other tortfeasors from liability unless its terms so provide.

95. 280 So. 2d 431 (1973).

96. *See* FLA. STAT. § 768.31(5)(b) (1975).

97. *Id.*

mained in the lawsuit, B's pro rata share would only be $50,000, *i.e.*, 50 percent of the damages. B's reluctance to settle has cost him an additional $40,000. The injustice of the situation is further mangnified if we assume that B was only 5 percent at fault as compared to A's 95 percent. The person most responsible for the damages, A, pays only 10 percent of the total damages, while B, who is only 5 percent at fault pays 90 percent of the total damages, an excess of 40 percent over his pro rata share and 85 percent over his proportioned share. This result is obtained, however, only if Florida Statutes section 768.31(5)(a), which provides that any release or covenant not to sue granted one tortfeasor reduces the claim of the plaintiff against the other defendants to the extent of any amount stipulated by release, is interpreted to mean that the reduction in the amount given for the release refers only to the *dollar amount received* by the plaintiff and does not mean a reduction in the amount of damages equivalent to A's pro rata share.[98]

Furthermore, while the Act contains a provision requiring that the release or covenant be given in good faith,[99] a danger exists that the settlement or release granted by the plaintiff could be collusive, yet still enforceable as against the non-settling joint tortfeasor. A legally sophisticated, but unscrupulous tortfeasor, aware of the extent of his possible liability, could approach the plaintiff with what seems to be a favorable settlement, leaving the ignorant but stubborn tortfeasor exposed to liability beyond his pro rata share and perhaps even further beyond his true proportionate share. Moreover, the plaintiff is free to select the tortfeasor with which he settles on the basis of criteria not related to equitably distributing the loss. If one of the purposes of establishing contribution is to alleviate the inequities caused by affording the plaintiff-victim the absolute power to determine whom to sue and from whom to collect,[100] the present legislation falls far short of achieving such a goal.

98. Such an interpretation, however, appears to be the correct one in light of modifications made in the 1955 Uniform Act because of objections to the release provisions of the 1939 version. The 1939 Act provided in section 5 that a release of any tortfeasor should not release him from liability for contribution unless it expressly provided for a reduction to the extent of the pro rata share of the released tortfeasor of the injured person's recoverable damages. 12 UNIFORM LAWS ANN. 58 (1975). The absence of any such language in the 1955 Act, upon which Florida's contribution law is based, would indicate that the amount stipulated by the release no longer has to be equivalent to the pro rata share of the settling tortfeasor.

99. FLA. STAT. § 768.31(5) (1975).

100. *See generally* notes 20-21 *supra* and accompanying text.

Instead of eliminating the prior arbitrariness possessed by the victim in determining the party from whom he sues or collects, the new Contribution Among Tortfeasors Act merely provides his capriciousness with new legislative clothing. The ultimate effect of the Act may be to encourage settlement at the expense of full and equitable litigation of the issue of culpability. But in light of the principles of *Hoffman v. Jones*,[101] it is difficult to concur with the Commissioners' Comments that it is more important to settle than to attempt to prevent discrimination by the plaintiff among potential defendants.[102]

VI. CONSTITUTIONAL VALIDITY

Despite the inequities inherent in Section 768.31 and its inconsistency with the *Hoffman v. Jones*[103] philosophy of equating liability with fault, the statute appears capable of withstanding constitutional attack. This analysis will be confined to substantive due process and equal protection issues as related to the pro rata sharing,[104] settlement,[105] and release[106] provisions which appear to be the strongest bases for attacking the statute's validity.

With regard to the Florida Constitution,[107] the test to be used in determining whether a statute is violative of the due process clause is whether it bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary, or oppressive.[108] Thus, under this test, it is necessary to first examine the legislative objectives in enacting the statute in order to determine whether the pro rata, settlement, and release provisions are reasonably related to them. For this purpose it is unnecessary to evaluate the wisdom of the means selected by the legislature or even whether

101. 280 So. 2d 431 (Fla. 1973).

102. *See* 12 UNIFORM LAWS ANN. 99-100 (1975).

103. 280 So. 2d 431 (Fla. 1973).

104. FLA. STAT. § 768.31(3)(a) (1975).

105. FLA. STAT. § 768.31(2)(d) (1975).

106. FLA. STAT. § 768.31(5) (1975).

107. FLA. CONST. Art. I, § 9.

108. Lasky, v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974). In light of the apparent demise of fourteenth amendment substantive due process in Ferguson v. Skrupa, 372 U.S. 726 (1963), only the state constitutional due process issues will be discussed. Moreover, it is easier to invalidate a statute under Florida due process concepts than under federal due process. For a discussion of the relation between Florida and federal due process see Comment, *Substantive Due Process in Florida*, 21 U. MIAMI L. REV. 99, 100 (1966).

the selected means will in fact accomplish the intended goals; only the constitutionality of the selected means is of relevance.[109]

Section 768.31 is of little aid in this regard since it merely states the effect of the contribution law without explicating its underlying purposes. From an examination of the statute itself and the Commissioners' Comments to the 1955 Revision of the Uniform Contribution Among Tortfeasors Act, together with the opinions of other courts in jurisdictions where the same or similar statutes have been adopted, it appears that the legislative objectives included the creation of a right of contribution among joint tortfeasors and the establishment of a procedure to make such a right of contribution effective in practice.[110] It was intended by the act that equity should prevail over the harsh injustice of the common law rule under which there was no such right.[111] With regard to pro rata shares, the Commissioners' Comment to the 1955 draft of the Uniform Contribution Among Tortfeasors Act provides in pertinent part:

> This section in positive terms resolves several difficult questions of policy.
>
> First, it recognizes and registers the lack of need for a comparative negligence or degree of fault rule in contribution cases. As stated in the comments on subsection 1(c)[112] the exclusion of intentional, wilful and wanton actors from the right to contribution eliminates the better arguments for a relative degree of fault rule.[113]

With respect to the release or covenant not to sue provision, the Commissioners' Comment explains:

> Subsection (b). Effect on Contribution. The 1939 Act[114] provided, in Section 5, that a release of any tortfeasor should not release him from liability for contribution unless it expressly provided for a reduction "to the extent of the pro rata share of the released tortfeasor" of the injured person's recoverable damages. . . .
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> . . . .

109. Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974).

110. *See generally* 12 UNIFORM LAWS ANN. 59-69 (1975).

111. *See* UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, Commissioners' Prefatory Note (1955 Revision), 12 UNIFORM LAWS ANN. 59-60 (1975).

112. FLA. STAT. § 768.31(2)(c) (1975).

113. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2, Commissioners' Comments (1955 Revision), 12 UNIFORM LAWS ANN. 87 (1975) (footnotes added for clarification).

114. For a reprint of the 1939 Act see 12 UNIFORM LAWS ANN. 57-59 (1975).

> The effect of Section 5 of the 1939 Act has been to discourage settlements in joint tort cases, by making it impossible for one tortfeasor alone to take a release and close the file. . . .
>
> It seems more important not to discourage settlements than to make an attempt of doubtful effectiveness to prevent discrimination by plaintiffs, or collusion in the suit. Accordingly, the subsection provides that the release in good faith discharges the tortfeasor outright from all liability for contribution. This is consistent with Section 1(d)[115] above, which provides that the settling tortfeasor has himself no right of contribution against another unless he has assumed the full responsibility to the claimant.[116]

The objectives of Section 768.31 could represent a valid exercise of the state police power in that they are somewhat related to the protection of the public safety, health, general welfare or morals.[117] In order to determine whether the statute is reasonably related to such permissible legislative objectives, it is necessary to examine the changes that the statute makes in prior tort law.

Before the enactment of Section 768.31 there was no common law right of contribution in Florida.[118] Thus, the statute appears reasonably related to the legislative objectives since it in fact creates this right. Admittedly, situations may exist where the statute's pro rata and settlement provisions work inequities since a tortfeasor's final liability may be greater than his relative degree of fault. Even so, as the Supreme Court of Florida , after noting in *Lasky v. State Farm Insurance Co.*[119] that under the threshold limitations for the recovery of damages in the no-fault law situations could be perceived in which severe pain might be uncompensated while in other situations suit could still be brought for extremely minor intangible damages, stated:

> [P]erfection is not required in classification; "problems of government are practical ones and may justify, if they do not require, rough accommodations,—illogical, it may be, and unscientific." Metropolis Theatre Co. v. Chicago, 228 U.S. 61, 33 S. Ct. 441, 57

115. FLA. STAT. § 768.31(2)(d) (1975).

116. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4, Commissioners' Comments (1955 Revision), 12 UNIFORM LAWS ANN. 99-100 (1975) (footnotes added for clarification).

117. *See* Pacheo v. Pacheo, 246 So. 2d 778 (Fla. 1971). *See also* Comment, *supra* note 108.

118. *See* note 14 *supra*.

119. 296 So. 2d 9 (Fla. 1974).

> L.Ed. 730 (1913). Some inequality in result is not enough to vitiate on due process grounds a legislative classification grounded in reason. Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 369 (1911).[120]

Finally, with respect to due process issues and contribution, it is very questionable whether there could be any deprivation of life, liberty, or property in the constitutional sense. There is no constitutional right to contribution. Contribution is a right based on equitable principles.[121] To argue that the statute which creates a particular right simultaneously takes it away would seem to be circuitous and specious reasoning.[122] Moreover, the Supreme Court of New Jersey stated in *Pennsylvania Greyhound Lines v. Rosenthal*[123] that where common liability was previously enforceable against one or more tortfeasors at the election of the injured person, without the benefit of contribution, the contribution statute did not increase the liability of any of the tortfeasors, but rather lessened it by providing for a distribution of the common burden in lieu of the arbitrary choice given to the injured person. The New Jersey court held that, under these circumstances, there is no vested right to protection against contribution.

With regard to possible equal protection issues, the Florida Constitution[124] requires that statutory classifications be reasonable and non-arbitrary, and that all persons in the same class be treated alike. When the difference in treatment between those included and those excluded from a class bears a real and substantial relationship to legislative purpose, the classification does not deny equal protection.[125]

The traditional equal protection test under the United States Constitution, being somewhat of a more relaxed test than that of Florida,[127] will not invalidate a statute unless it is found to be with-

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120. *Id.* at 17.

121. Lincenberg v. Issen, 318 So. 2d 386, 390 (Fla. 1975).

122. Moreover, the fact that there was no right of contribution prior to the statute would appear to preclude any arguments that it denies the right of access to courts in violation of FLA. CONST. Art. I, § 21, and is therefore distinguishable from Kluger v. White, 281 So. 2d 1 (Fla. 1973).

123. 14 N.J. 372, 102 A.2d 587 (1954).

124. FLA. CONST. Art. I, § 2.

125. Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974); Daniels v. O'Connor, 243 So. 2d 144 (Fla. 1971).

126. U.S. CONST. amend. XIV.

127. Unlike the federal courts, the Supreme Court of Florida does not always adhere to

out any reasonable basis, and therefore patently arbitrary.[128] Since the state test is stricter than its federal counterpart, it will be used here exclusively to analyze the contribution statute.[129]

Initially, it is important to note that with respect to the statute's pro rata provision, all joint tortfeasors are treated alike, thus meeting the first element of the test.[130] Moreover, the differentiation with respect to those joint tortfeasors who enter settlement agreements with the injured parties does not appear to be arbitrary. Rather, such a differentiation appears to bear a real and substantial relation to the legislative purpose of encouraging out of court settlements.

The only way that a joint tortfeasor might contend that the statute deprived him of equal protection would be to argue that under the principles of *Hoffman v. Jones*[131] the word *equal* means the equation of liability with fault. Under this rationale a joint tortfeasor who had to pay a greater percentage of the damages than his degree or percentage of fault would be denied equal protection. But in *Lasky* the Supreme Court of Florida rejected such reasoning while addressing itself to the permanent injury threshold for seeking damages for pain and suffering under the Florida no-fault law. The court noted that legislative classification under the no-fault law might result in allowing recovery for pain and suffering in some cases where the suffering is relatively minimal while possibly prohibiting recovery for such items in a few cases where a significant amount of suffering is in fact present. "But perfection in classifica-

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the presumption of legislative validity. *See* Alloway, *Florida Constitutional Law*, 14 U. MIAMI L. REV. 501, 512 (1960).

128. Lindley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). The traditional test is generally applied to economic and social legislation. Dandridge v. Williams, 397 U.S. 471, 485 (1970). Under federal equal protection, state legislatures are presumed to have acted within their constitutional power despite the fact that the laws may actually result in some inequality. A statutory discrimination will not be set aside if any reasonably conceived state of facts justify it. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

Since the contribution statute involves no fundamental right or suspect criteria, the stricter federal equal protection test would not be applicable to the present analysis. *See generally*, Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

129. Logically, if the statute is found to be valid under the stricter Florida test, it should also be valid under the federal test. However, the converse would not necessarily be true.

130. The fact that all joint tortfeasors are subject to the statute distinguishes it from Florida's old railraod comparative negligence statute, which Georgia S. & Fla. Ry. v. Seven-up Bottling Co., 175 So. 2d 39 (Fla. 1965), held to be in violation of equal protection. It applied to railraod accident cases but not automobile accident cases.

131. 280 So. 2d 431 (Fla. 1973).

tion is not required and rough and unscientific accommodations are permissible so long as they are not unreasonable or arbitrary."[132] Under this test, the court found the permanent injury threshold to not be violative of equal protection.

An analogous argument would seem to hold true with respect to the contribution statute. Even though there may be situations where a tortfeasor must pay a greater percentage of damages than his percentage of fault, the statute is not clearly arbitrary or unreasonable in a constitutional sense since rough accommodations are permissible. Therefore, despite the statute's inequitable features and apparent inconsistency with the principles espoused in *Hoffman*, section 768.31 should withstand constitutional attack.

VII. CONCLUSION

In the final analysis, then, legislative changes in the Contribution Among Tortfeasor Act are necessary.[133] The pro rata section[134] should be replaced with a provision requiring that relative degrees of fault be considered in determining the amount of contribution one tortfeasor can seek from another. The settlement[135] and release[136] provisions may warrant legislative changes as well. When one defendant tortfeasor settles with or is given a release by the plaintiff, that plaintiff should be prohibited from collecting from the second defendant tortfeasor any excess over that tortfeasor's proportionate share of the damages. For example, if P's (not negligent) damages are $100,000 and he settles for $20,000 with A, who is later adjudged 60 percent negligent, P should only recover $40,000 from B (40 percent of $100,000). Even though such a statute might serve as a disincentive to settle out of court, it is submitted that achieving consistency in apportionment of liability based on each party's relative degree of fault is of primary importance. This is especially true since the chances of discrimination by the plaintiff or collusion between another defendant and the plaintiff are very real dangers.

The Commissions' Comments to the 1955 draft of the Uniform

132. 296 So. 2d at 20.

133. A constitutional challenge to the statute will likely fail. *See* Part VI *supra*. Furthermore, the court seems unwilling to discuss limiting joint and several liability as an alternative. *See* 30 U. MIAMI L. REV. 747 (1976).

134. FLA. STAT. § 768.31(3) (1975).

135. FLA. STAT. § 768.31(2)(d) (1975).

136. FLA. STAT. § 768.31(5) (1975).

Contribution Among Tortfeasors Act, however, indicate their belief that such a provision would not stop collusion or discrimination, but only serve as to prevent parties from settling out of court.[137]

While it is true some plaintiffs may be discouraged from settling, it is not true that defendants would be. If contribution were not allowed against the settling party, and the non-settling party were held responsible only for his proportionate share, neither would be handicapped. In a situation where the settling defendant settled for an amount which later turned out to be in excess of his proportionate share, he should be prohibited from seeking contribution—he merely made a bad bargain. Prompt legislative attention to these problems is needed.†

137. 12 UNIFORM LAWS ANN. 99-100 (1975).

† During the Final stages of the publishing process of this issue, the Florida Legislature amended Florida statutes § 768.31(3)(a) to provide:

> (3) PRO RATA SHARES — In determining the pro rata shares of tortfeasors in the entire liability:
>
> (a) Their relative degrees of fault shall be the basis for allocation of liability.

Fla. Laws 1976, ch. 76-186 *amending* FLA. STAT. § 768.31(3)(a) (1975). This amendment is effective June 21, 1976.

The legislative change is commendable in that it is consistent with the *Hoffman* court's desire to equate liability with fault. However, there may still be situations where apportionment will not be based on fault. Cases where one defendant settles with or is released by the plaintiff would present such a situation. Therefore, the legislature may want to reexamine the statutory treatment of contribution in such instances if liability is to be fully equated with fault.