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Innocent Injury and Loss Distribution: The Florida Pure Comparative Negligence System

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INNOCENT INJURY AND LOSS DISTRIBUTION: THE FLORIDA PURE COMPARATIVE NEGLIGENCE SYSTEM

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INTRODUCTION

The debate regarding the judiciary's power to abandon the doctrine of contributory negligence[1] ended in Florida with the Supreme Court

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This article was written during the summer of 1976, and was in the publication process when the Florida Supreme Court reversed itself after rehearing in *Stuyvesant Insurance Co. v. Bournazian,* 342 So. 2d 471 (Fla. 1977). The article required some substantial last-minute changes, and the author thanks Mr. Stephen O'Hara for his assistance in making those changes.

1. Most judicial attempts to abandon contributory negligence and adopt comparative negligence have been unsuccessful in the past. For example, in Maki v. Frelk, 229 N.E.2d 284 (Ill. App. Ct. 1967), *rev'd* 239 N.E.2d 445 (Ill. 1968), an Illinois appellate court abandoned the rule of contributory negligence and adopted a form of comparative negligence. The case had been transferred to the appellate court by the Supreme Court of Illinois for consideration of whether the contributory negligence rule should be changed. When the appellate court actually made the change, the supreme court reversed, stating that such a change should be made by the legislature. Maki v. Frelk, 239 N.E.2d 445 (Ill. 1968), *rev'g* 229 N.E.2d 284 (Ill. App. Ct. 1967). *Accord,* Peterson v. Culp, 465 P.2d 876 (Ore. 1970); *see* Haeg v. Sprague, Warner & Co., 281 N.W. 261 (Minn. 1938); *cf.* Syroid v. Albuquerque Gravel Products Co., 522 P.2d 570 (N.M. 1974) (declining to abandon the doctrine of contributory negligence and noting the legislature's refusal to do so). The *Maki* decision generated much debate over the authority and feasibility of judicial abandonment of the contributory negligence rule. *See* Phillips, *Maki vs. Frelk: The Rise and Fall of Comparative Negligence in Illinois,* 57 ILL. B.J. 10 (1968); 17 BUFFALO L. REV. 573 (1968); 1967 U. ILL. L.F. 351; 21 VAND. L. REV. 889 (1968). *See also* Annot., 32 A.L.R.3d 463 (1970).

Some states have adopted pure comparative negligence legislatively, thereby abrogating the contributory negligence rule. *See* MISS. CODE ANN. § 11-7-15 (1972); N.Y. CIV. PRAC. LAW § 1411 (McKinney Supp. 1976-77); R.I. GEN LAWS § 9-20-4 (Supp. 1975); WASH. REV. CODE ANN. § 4.22.010 (Supp. 1975). Georgia's comparative negligence rule is both legislative and judicial in origin. In Flanders v. Meath, 27 Ga. 358 (1859), the Georgia Supreme Court recognized the need for a change in the contributory negligence rule. The *Flanders* court stated that there should be some form of apportionment of damages "where both parties are in fault, but the defendant most so." *Id.* at 362 (dictum). *See also* Macon & W.R.R. v. Winn, 26 Ga. 250, 254 (1858) (dictum). As a basis for implementing such a system, the Georgia courts turned to a statute providing for apportionment of damages in actions against railroads when the plaintiff was contributorily negligent. *See* GA. CODE ANN. § 94-703 (1972). The Georgia courts gradually expanded this statute's application to all forms of negligence cases. *See generally* Annot., 32 A.L.R.3d 463 (1970).

The Florida courts had a similar opportunity when the Florida legislature adopted a comparative negligence statute, the application of which was limited to injuries caused by railroads when the plaintiff was contributorily negligent. *See* 1887 Fla. Laws, ch. 3744, § 1 (current version at FLA. STAT. § 768.06 (1975)). But the opportunity was

of Florida's decision in *Hoffman v. Jones*.[2] The *Hoffman* decision broke a century-long stalemate by adopting the doctrine of pure comparative negligence. This drastic alteration of tort law in Florida breathed new life into the common law tradition of case by case resolution of the interstitial problems which inevitably arise from judicial change of substantive law.[3] Although the development of rules of procedure and of substantive law under the new system is

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lost when the Supreme Court of Florida declared the statute unconstitutional as violative of the due process and equal protection clauses of the federal and state constitutions. Georgia S. & F. Ry. v. Seven-Up Bottling Co., 175 So. 2d 39 (Fla. 1965). The statute was declared unconstitutional because it was limited to cases involving railroads. *Id.*

2. 280 So. 2d 431 (Fla. 1973). Since *Hoffman*, the courts of Alaska and California have likewise abandoned the rule of contributory negligence, replacing it with the doctrine of pure comparative negligence. Kaatz v. State, 540 P.2d 1037 (Alas. 1975); Nga Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975).

3. The Alaska, California, and Florida Supreme Courts all recognized that the adoption of pure comparative negligence left many unanswered questions. *See* Kaatz v. State, 540 P.2d 1037, 1049–50 (Alas. 1975); Nga Li v. Yellow Cab Co., 532 P.2d 1226, 1242 (Cal. 1975); Hoffman v. Jones, 280 So. 2d 431, 439 (Fla. 1973). The Supreme Court of Florida stated:

> Petitioners in this cause, and various amicus curiae who have filed briefs, have raised many points which they claim we must consider in adopting comparative negligence, such as the effects of such a change on the concept of "assumption of risk," and no "contribution" between joint tortfeasors. . . .
>
> . . . [I]t is not the proper function of this Court to decide unripe issues, without the benefit of adequate briefing, not involving an actual controversy, and unrelated to a specific factual situation.
>
> We are fully confident that the trial court judges of this State can adequately handle any problems created by our change to a comparative negligence rule as these problems arise.

280 So. 2d at 439. The *Hoffman* court continued:

> We feel the trial judges of this State are capable of applying this comparative negligence rule without our setting guidelines in anticipation of expected problems. The problems are more appropriately resolved at the trial level in a practical manner instead of a theoretical solution at the appellate level. The trial judges are granted broad discretion in adopting such procedure as may accomplish the objectives and purposes expressed in this opinion.

Id. at 439–40, *quoted with approval in* Nga Li v. Yellow Cab Co., 532 P.2d 1226, 1242 (Cal. 1975).

The Alaska, California, and Florida Supreme Courts did, however, abolish the "last clear chance" doctrine because it existed only to ameliorate the harshness of the contributory negligence rule. 540 P.2d at 1050; 532 P.2d at 1240; *see* 280 So. 2d at 438.

The Supreme Court of California, in *Nga Li*, also abrogated the defense of assumption of risk to the extent that it was a variant of contributory negligence. 532 P.2d at 1241, 1243. The Florida Supreme Court has recently reached the same result. "We find no discernible basis analytically or historically to maintain a distinction between the affirmative defense of contributory negligence and assumption of risk." Blackburn v. Dorta, No. 46,621, slip op. at 10 (Fla. May 5, 1977), *rev'g* Dorta v. Blackburn, 302 So. 2d 450 (Fla. 3d Dist. Ct. App. 1974). *See* Hall v. Holton, 330 So. 2d 81 (Fla. 2d Dist. Ct. App. 1976); Parker v. Maule Industries, Inc., 321 So. 2d 106 (Fla. 1st Dist. Ct. App. 1975); Rea v. Leadership Housing, Inc., 312 So. 2d 818 (Fla. 4th Dist. Ct. App. 1975).

not complete, there is now a sufficient mass of legislative and judicial law on which to predicate an analysis of the socio-economic impact of pure comparative negligence on loss distribution in tort.

This article will not attempt to judge the wisdom of adopting pure comparative negligence, whether by the judiciary or by the legislature; nor will it examine all the doctrine's ramifications with respect to the concept of negligence.[4] Rather, the scope of the article is confined to a consideration of loss distribution of tort injuries under Florida's pure comparative negligence system.

A basic understanding of pure comparative negligence is essential to the theses presented in this article. Perhaps the best way to effect an explanation is to juxtapose the doctrine of pure comparative negligence with the doctrines of contributory negligence and modified comparative negligence.

I. CONTRIBUTORY NEGLIGENCE, MODIFIED COMPARATIVE NEGLIGENCE, AND PURE COMPARATIVE NEGLIGENCE

A. Contributory Negligence

The doctrine of contributory negligence[5] totally bars recovery by a plaintiff whose own fault contributes to his injury in however slight a degree. Recovery is barred regardless of the obviousness of the defendant's negligence or its causal proximity to the plaintiff's injury. But if the plaintiff is free of causal negligence, he collects his full damages.[6]

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4. Comparative negligence has been amply discussed in the literature. For a short bibliography, see George & Walkowiak, *Blame and Reparation in Pure Comparative Negligence: The Multi-Party Action*, 8 SW. U.L. REV. 1 n.1, 3 n.7 (1976).

5. For the history and rationale of the doctrine, see James, *Contributory Negligence*, 62 YALE L.J. 691 (1953).

6. The doctrine of "last clear chance" may be ignored for purposes of this discussion. The basic tenet of the doctrine of contributory negligence is that financial responsibility for injuries must be totally borne by the defendant or by the plaintiff. Once it is determined that the defendant was causally negligent, the defendant avoids financial responsibility only if the plaintiff was also causally negligent. Since the doctrine of "last clear chance" presumes that the plaintiff's negligence was temporarily superseded by the negligence of the defendant, the plaintiff's negligence is no longer causal.

For a time, a few states experimented with a form of contributory negligence which permitted juries to consider degrees of negligence. *See* Galena & Chi. Union R.R. v. Jacobs, 20 Ill. 478 (1858); Sawyer v. Sauer, 10 Kan. 466, 471–72 (1872). The Illinois plan adopted in *Galena* provided that the plaintiff could collect all of his damages "wherever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross." 20 Ill. at 497. Though the jury was required to compare the degrees of negligence, the comparison did not effect any reduction in damages. If the plaintiff were slightly negligent and the defendant grossly negligent, the plaintiff recovered all of his damages. By contrast, the doctrine of comparative negligence

Suppose that *A*, *B*, and *C* are involved in a multiple car collision. They all suffer provable damages in the following amounts: *A* suffers $15,000 damages; *B* suffers $38,000 damages; and *C* suffers $6,000 damages. Under the doctrine of contributory negligence, the fact finder must determine that one party was entirely free of negligence contributing to his own injuries before it can award that party any damages. Now, suppose that percentages of negligence are assigned to *A*, *B*, and *C* as shown in Table 1.[7]

TABLE 1

	Provable Damages	Degree of Negligence
A	$15,000.00	25%
B	$38,000.00	65%
C	$ 6,000.00	10%

The doctrine of contributory negligence will not permit the jury to award damages to any of the parties. Each must bear the burden of his or her respective loss.

B. Comparative Negligence

Both in its pure and in its modified form, comparative negligence recognizes that the plaintiff's fault should affect the plaintiff's right to compensation. It abridges but does not eliminate contributory negligence as a defense.[8] Although under the doctrine of contributory

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requires not only computations of degrees of negligence, but also a reduction in collectable damages based upon the computations. In City of Lanark v. Dougherty, 38 N.E. 892 (Ill. 1894), Illinois summarily abandoned its experiment with "comparative" negligence. *Cf.* Atchison, T. & S.F.R.R. v. Morgan, 1 P. 298 (Kan. 1883).

7. Percentages of negligence are given in Table 1 for purposes of the hypothetical and for comparison. Normally the doctrine of contributory negligence does not permit the jury to compute degrees of negligence since *any* causal negligence on the plaintiff's part precludes any recovery by him.

8. Thus, the Supreme Court of Florida stated in *Hoffman*:

> [W]e now hold that a plaintiff in an action based on negligence will no longer be denied any recovery because of his contributory negligence.
>
> If it appears from the evidence that both plaintiff and defendant were guilty of negligence which was, in some degree, a legal cause of the injury to the plaintiff, this does not defeat the plaintiff's recovery entirely. The jury in assessing damages would in that event award to the plaintiff such damages as in the jury's judgment the negligence of the defendant caused to the plaintiff. In other words, the jury should apportion the negligence of the plaintiff and the negligence of the defendant; then in reaching the amount due the plaintiff, the jury should give the plaintiff only such an amount proportioned with his negligence and the negligence of the defendant.

280 So. 2d at 438. More recently, the Supreme Court of Florida stated: "We now have

negligence the plaintiff may not collect at all if he is the least bit at fault in causing his own injuries, the various comparative negligence models—in varying degrees—permit the plaintiff to receive some compensation for the injuries he suffered. Comparative negligence, therefore, represents yet another attempt to revitalize the fault system of allocation of tort losses.

1. Modified Comparative Negligence.—Modified comparative negligence lessens but does not obliterate the harshness of the contributory negligence rule. A claimant's[9] recoverable compensation is computed by subtracting the proportion of causal negligence attributed to him from the total damages he suffered. Whether the claimant may recover at all is controlled by the pattern of modified comparative negligence which the jurisdiction follows. There are three basic patterns.

In pattern 1, the claimant may collect damages if he established that his negligence is no more than 50% of the total computable negligence; his recovery consists of the total damages he suffered, reduced by the proportion of his negligence to that total.[10] For example, consider the hypothetical figures posed in Table 1. Table 2 shows

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comparative negligence, so the defense of contributory negligence is available in determining the apportionment of the negligence [in products liability actions.]" West v. Caterpillar Tractor Co., 336 So. 2d 80, 90 (Fla. 1976). *See also* Butuad v. Suburban Marine & Sporting Goods, 555 P.2d 42 (Alas. 1976).

9. In a contributory negligence jurisdiction, it is procedurally and conceptually easy to refer to the parties as plaintiff or defendant. But under certain comparative negligence models, the possibility of multiple recoveries by parties antiquates such procedural classifications. Therefore, to the extent that confusion does not result, hereinafter all persons seeking damages shall be referred to as "claimants" whether they are plaintiffs, counterclaimants, or crossclaimants.

10. Note that the claimant may recover if his negligence is found to be no greater than the combined negligence of the parties from whom he seeks recovery. Under this formula, a claimant may recover when his negligence is found to be less than or *equal to* the combined negligence of such other parties. *See* ARK. STAT. ANN. §§ 27–1764 to 1765 (Supp. 1975); CONN. GEN. STAT. ANN. § 52–572h (West Supp. 1976); KAN. STAT. § 60–258a (Supp. 1975); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1976–77); NEV. REV. STAT. § 41.141 (1975); ORE. REV. STAT. § 18.470 (1975); TEX. REV. CIV. STAT. ANN. art. 2212a(1) (Vernon Supp. 1975).

Two jurisdictions which do not precisely fit the pattern 1 model, but which do not at all fit the pattern 2 or pattern 3 models, are South Carolina and Tennessee. South Carolina has a statute of limited application which apparently permits the claimant to collect all of his damages if his negligence is equal to or less than the negligence needed to establish liability. *See* S.C. CODE § 46–802.1 (Supp. 1975).

Tennessee follows a form of apportionment if the claimant's negligence is causally "remote." *See* Bejach v. Colby, 214 S.W. 869 (Tenn. 1919). It has been suggested that, rather than being a system of comparative negligence, the Tennessee approach benefits the defendant by modifying the doctrine of last clear chance. *See* Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 496–97 (1953); *see generally* Annot., 32 A.L.R.3d 463, 479–80 (1970).

judgments which could be computed in a jurisdiction which follows the pattern 1 model.

TABLE 2[11]

A is entitled to judgment for $11,250[12] against *B* and *C*.[13]
B is entitled to no affirmative judgment.
C is entitled to judgment for $5,400[14] against *A* and *B*.

A's negligence is less than 50%; therefore, *A* is entitled to judgment against *B* and *C* jointly and severally. Likewise, *C* is entitled to judgment against *A* and *B* jointly and severally. But *B*'s negligence is greater than 50%; though he suffered the greatest amount of damages, he must not only bear the total burden of his loss, but he is also jointly and severally liable to *A* and *C* on their judgments.

In pattern 2, the claimant may collect damages if he establishes that his proportion of negligence is less than that of *the party* from whom he is seeking compensation; his recovery consists of the total damages he suffered, reduced by the proportion of his negligence to the total computable negligence.[15] For example, again consider the

11. The figures in Table 2 do not necessarily represent the amount which would eventually be received or paid; rules of contribution, set-off, or indemnity would affect the sums actually received or paid by the parties or their insurers. Since the decision to adopt a system of postverdict loss distribution between the plaintiff and defendant or among the defendants is conceptually independent of the decision to adopt contributory or comparative negligence, the effects of postverdict loss allocation are discussed in sections II and III of this article. Note, however, that different judgments would result under Nevada's comparative negligence scheme. *See* notes 13, 19, 20 *infra*.

12. *A*'s total damages are reduced by 25%, his percentage of negligence. Thus, $15,000 − (25% x $15,000) = $11,250.

13. For purposes of the hypothetical, assume that joint and several liability applies. But note that some jurisdictions have statutorily abrogated or limited the concept of joint and several liability in their comparative negligence schemes. For example, the Nevada statute abrogates joint and several liability where recovery is allowed against more than one defendant. NEV. REV. STAT. § 41.141(3) (1975). And in Texas, "[e]ach defendant is jointly and severally liable for the entire amount of the judgment awarded the claimant, except that a defendant whose negligence is less than that of the claimant is liable to the claimant only for that portion of the judgment which represents the percentage of negligence attributable to him." TEX. REV. CIV. STAT. ANN. art. 2212a(2)(c) (Vernon Supp. 1976–77).

14. *C*'s total damages are reduced by 10%, his percentage of negligence. Thus, $6,000 − (10% x $6,000) = $5,400.

15. *See* COLO. REV. STAT. § 13-21-111 (1973); HAW. REV. STAT. § 663-31 (Supp. 1975); IDAHO CODE § 6-801 (Supp. 1975); MINN. STAT. ANN. § 604.01(1) (West Supp. 1976); N.D. CENT. CODE § 9-10-07 (1975); OKLA. STAT. ANN. tit. 23, § 11 (West Supp. 1976–77); UTAH CODE ANN. § 78-27-37 (Supp. 1975); WYO. STAT. § 1-7.2 (Supp. 1975).

Montana, New Jersey, and Wisconsin follow a variation of pattern 2. In these jurisdictions, a claimant may recover if his negligence is less than *or equal to* the

hypothetical figures posed in Table 1. Table 3 shows judgments which could be computed in a jurisdiction which follows the basic pattern 2 model.

TABLE 3

A is entitled to judgment for $11,250[16] against *B*.[17]
B is entitled to no affirmative judgment.
C is entitled to judgment for $5,400[18] against *A* and *B*.

Since *C*'s negligence is less than either *A*'s or *B*'s, *C* is entitled to judg-

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negligence of the party against whom recovery is sought; the claimant's total damages are reduced by the proportion of his negligence. *See* MONT. REV. CODES ANN. § 58-607.1 (Supp. 1975); N.J. STAT. ANN. § 2A: 15-5.1 (West Supp. 1976-77); WIS. STAT. ANN. § 895.045 (West Supp. 1976-77). It is interesting to note that one justice on the Supreme Court of Wisconsin advocates adopting the pattern 1 model:

> The principal difficulty here, as with many accident cases involving multiple defendants, is the fundamental proposition that the comparison of negligence is always made as between the individual plaintiff and each individual defendant rather than the individual plaintiff with the several defendants that may, by their negligence, have collectively contributed to his injuries. The unfairness of this approach grows from the fact that one or more defendants may have contributed to his injuries, yet he can recover only in those situations where he can demonstrate that his negligence is either less than or as great but not greater than the negligence of one or more defendants considered separately. . . . The legislature should further amend the basic comparative negligence law in Wisconsin to correct this inequity so as to provide for recovery based on a comparison of the causal negligence, if any, of the person injured with the total negligence of all the persons whose negligence contributed to the injuries. If the plaintiff is considered less negligent, or his negligence is considered only as great as the combined negligence of all the defendants, then he should be able to recover from the contributing defendants in proportion to their causal negligence.

Gross v. Denow, 212 N.W.2d 2, 9-10 (Wis. 1973) (Wilkie, J., concurring). To date, the Wisconsin legislature has not heeded this advice.

Maine follows a variation of pattern 2 similar to the variation followed by Montana, New Jersey and Wisconsin—but with a vastly different approach. In Maine, a claimant may recover if his negligence is less than that of the party against whom recovery is sought, but the jury must reduce the damages recoverable to the extent they believe "just and equitable having regard to the claimant's share in the responsibility for the damage." ME. REV. STAT. tit. 14, § 156 (Supp. 1976-77).

Nebraska and South Dakota follow a variation only remotely related to pattern 2. This variation does involve a comparison of the claimant's proportion of negligence to that of the party against whom recovery is sought. But the claimant may collect damages only if his negligence is comparatively slight. Apportionment of damages is based upon the slight-gross comparison. *See* NEB. REV. STAT. § 25-1151 (1975); S.D. COMPILED LAWS ANN. § 20-9-2 (1967). Compare this variation of pattern 2 with Galena & Chi. Union R.R. v. Jacobs, 20 Ill. 478 (1858), discussed in note 6 *supra*.

16. *See* note 12 *supra*.

17. *A* is entitled to judgment only against *B* because only *B* is more negligent than *A*.

18. *See* note 14 *supra*.

ment against both. *B*, of course, remains liable to *A* and jointly and severally liable to *C*.

Pattern 3 is like pattern 2 in that the claimant may recover if he establishes that his proportion of negligence is less than that of the party from whom he is seeking compensation; his recovery consists of the total damages he suffered, reduced by the proportion of his negligence to the whole. But pattern 3 also has an apportionment feature. The claimant recovers individual judgments against each more negligent tortfeasor. Where recovery is allowed against more than one defendant, each such defendant is liable for the proportion of his own negligence to the causal negligence of the defendants against whom recovery is allowed.[19] Thus, pattern 3 discards the concept of joint and several liability. The claimant, rather than the defendant, must incur the loss for injuries caused by other tortfeasors from whom compensation is unavailable.

For illustration of the pattern 3 mathematics, consider the Table 1 hypothetical. Table 4 shows the judgments which would result in a pattern 3 jurisdiction.[20]

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19. New Hampshire and Vermont are pattern 3 jurisdictions; their statutes combine aspects of comparative negligence and apportionment of damages among tortfeasors:

> Contributory negligence shall not bar recovery in an action by any plaintiff, or his legal representative, to recover damages for negligence resulting in death, personal injury, or property damage, if such negligence was not greater than the causal negligence of the defendant, but the damages awarded shall be diminished, by general verdict, in proportion to the amount of negligence attributed to the plaintiff; provided that where recovery is allowed against more than one defendant, each such defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. The burden of proof as to the existence or amount of causal negligence alleged to be attributable to a party shall rest upon the party making such allegation.

N.H. REV. STAT. ANN. § 507: 7-a (Supp. 1975); *see* VT. STAT. ANN. tit. 12, § 1036 (1973).

Nevada is a pattern 1 jurisdiction for purposes of computing compensable damages; but, like pattern 3 jurisdictions, the Nevada statute provides for apportionment of damages severally among liable defendants. *See* NEV. REV. STAT. § 41.141 (1975).

20. Slightly different recoveries would result under the Nevada system; Nevada is a pattern 1 jurisdiction for purposes of computing allowable recoveries, but follows a form of the pattern 3 apportionment feature. In Nevada, *A* would be entitled to judgment for $11,250: $9,750 against *B* and $1,500 against *C*. *B* would be entitled to no affirmative judgment. *C* would be entitled to judgment for $5,400: $1,500 against *A* and $3,900 against *B*. The difference in the proportions recoverable is attributable to the language of the Nevada statute which permits a claimant to recover against a tortfeasor in proportion to that tortfeasor's negligence to the whole. Thus, *A* collects 10% of $15,000 from *C* and 65% of $15,000 from *B*. *C* collects 25% of $6,000 from *A* and 65% of $6,000 from *B*. *See* NEV. REV. STAT. § 41.141 (1975).

TABLE 4

A is entitled to judgment for $11,250 against *B*.[21]
B is entitled to no affirmative judgment.
C is entitled to judgment for $5,400:
$1,512 against *A* and $3,888 against *B*.[22]

Note that if *B* were impecunious, *A* and *C* would be forced to bear the loss for the damages attributable to *B*. In pattern 1 or pattern 2 jurisdictions, this loss would be borne either by *A* alone or by *A* and *C* as jointly and severally liable tortfeasors.[23]

In summary, the primary feature of all modified comparative negligence jurisdictions is the continuing reliance upon "contributory" negligence as a total bar to recovery. The claimant must prove that he is not *more* negligent than the tortfeasor(s) from whom he seeks compensation.

2. Pure Comparative Negligence.—By comparison to either modified comparative negligence or contributory negligence, the doctrine of pure comparative negligence permits all of the injured parties to recover their damages reduced only by their respective proportions of negligence (self-responsibility discounts).[24] Of course, a claimant may not recover from a non-negligent party; nor may a claimant recover from a party who is innocent of causal negligence.[25]

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21. *A* is entitled to judgment only against *B* since only *B*'s negligence is greater than *A*'s. The computation of *A*'s judgment is the same as in a pattern 1 or pattern 2 jurisdiction. *See* note 12 *supra*.

22. *C* is less negligent than either *A* or *B*; he is entitled to judgments against both. *C* may recover a total of $5,400. *See* note 14 *supra*. But the liability is apportioned among *A* and *B* by the ratio of their respective proportions of negligence to the total causal negligence of the defendants against whom recovery is allowed. *A* is 25% negligent, and *B* is 65% negligent. Total causal negligence of the defendants against whom recovery is allowed is 90%. *C*'s judgment against *A* = $5,400 x 25/90 = $1,512. *C*'s judgment against *B* = $5,400 x 65/90 = $3,888.

23. In a pattern 2 jurisdiction where *B* is impecunious, the rationale of forcing defendant *A* rather than claimant *C* to bear the loss is not to punish *A* for his greater fault. The rationale is more pragmatic: *A*'s liability loss is a readily insurable loss which can and should be transferred to the party more capable of bearing it through liability insurance. The same rationale applies in a pattern 1 jurisdiction when *C* is held jointly liable with *B* for *A*'s injuries and *A* is held jointly liable with *B* for *C*'s injuries.

24. Mississippi, Rhode Island, New York, and Washington have adopted pure comparative negligence legislatively. *See* note 1 *supra*. Alaska, California, and Florida have adopted pure comparative negligence judicially. *See* note 2 and accompanying text *supra*.

25. Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973). The court stated:

> This rule should not be construed so as to entitle a person to recover for damage in a case where the proof shows that the defendant could not by the exercise of due care have prevented the injury, or where the defendant's negligence was not a legal cause of the damage. Stated differently, there can be

To illustrate the principle of pure comparative negligence, consider the hypothetical postulated in Table 1. Table 5 shows judgments which would be computed in a comparative negligence jurisdiction.

TABLE 5

A is entitled to judgment for $11,250[26] against *B* and *C*.[27]
B is entitled to judgment for $13,300[28] against *A* and *C*.
C is entitled to judgment for $5,400[29] against *A* and *B*.

Even though *B* was more negligent than either *A* or *C* (indeed, more negligent than both combined), *B* is entitled, as are *A* and *C*, to collect his damages reduced only by his percentage of negligence. Assuming that the negligence of each party is a causal element of the injuries of the others, each is liable jointly and severally for the damages he caused.[30] The percentage of negligence which the jury attributed to *B* is not relevant to the degree of his liability *to* another party, but is employed for the express purpose of computing *B*'s self-responsibility discount. Thus, if *B* were the only party to have suffered compensable loss, the relative degrees of fault of *A* and *C* would not be relevant for the purpose of determining liability to *B*.

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no apportionment of negligence where the negligence of the defendant is not directly a legal cause of the result complained of by the plaintiff. A plaintiff is barred from recovering damages for loss or injury caused by the negligence of another only when the plaintiff's negligence is the sole legal cause of the damage, or the negligence of the plaintiff and some person or persons other than the defendant or defendants was the sole legal cause of the damage.

26. $15,000 − (25% x $15,000) = $11,250.

27. Assume that the concept of joint and several liability has not been abandoned.

28. $38,000 − (65% x $38,000) = $13,300.

29. $6,000 − (10% x $6,000) = $5,400.

30. Unlike the three-party hypothetical, *Hoffman* was a two-party action. The *Hoffman* court concluded that the negligence of the two parties was a reciprocal such that a reduction of the damages of one effected a transference of the total amount of damages caused by the other. Unfortunately, the concept does not readily transfer to the three-party action in which all of the parties have been causally negligent and in which all of the parties have suffered damage. A more reasonable conclusion, in light of the equitable foundation of the doctrine, is that pure comparative negligence consists of two elements: a fault component which is satisfied when the parties' damages are reduced by the self-responsibility discounts; and a no-fault aspect which acknowledges the fortuity with which the quantum of damages is suffered. The no-fault component was influential in the *Hoffman* court's decision to abandon contributory negligence. The court stated: "The rule of contributory negligence is a harsh one which either places the burden of a loss for which two are responsible upon only one party or relegates to Lady Luck the determination of the damages for which each of two negligent parties will be liable." 280 So. 2d at 437. For a general discussion of this aspect of pure comparative negligence, see George & Walkowiak, *Blame and Reparation in Pure Comparative Negligence: The Multi-Party Action*, 8 SW. U.L. REV. 1 (1976).

The rationale for this principle was illustrated in *Gutierrez v. Murdock*,[31] a two-party action. In *Gutierrez*, the defendant crossed the center line of a highway and collided with the plaintiff's automobile. The defendant explained that he was acting defensively in order to avoid a collision with an unknown, reckless third party. Contrary to the principle of pure comparative negligence, the trial court never instructed the jury to compute the plaintiff's proportion of negligence. Rather, the trial court instructed the jury to compute the plaintiff's recovery by multiplying his total damages by the percentage of the defendant's negligence.[32] On appeal, the Third District Court of Appeal reversed, declaring the jury instructions to be erroneous.[33] Following the *Hoffman* principle, the *Gutierrez* court held that "in order to properly determine the award of damages, the jury must first determine both the negligence of the plaintiff and the defendant *as related to each other*."[34] The trial court's instructions would have placed the burden of the unknown tortfeasor's negligence on the plaintiff since the jury could easily have apportioned the total negligence between the plaintiff, the defendant, and the mysterious stranger. A verdict reflecting only the defendant's percentage of negligence would reduce the plaintiff's damages, not only by his own self-responsibility discount (if any), but also by the proportion of the unknown tortfeasor's negligence. The effect of the district court's decision in *Gutierrez* was to shift the percentage of negligence attributed to the mysterious stranger from the plaintiff to the defendant. Thus, one of the basic tenets of tort law was satisfied.[35]

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31. 300 So. 2d 689 (Fla. 3d Dist. Ct. App. 1974).

32. *Id.* at 690.

33. *Id.* at 691.

34. *Id. See also* Model v. Rabinowitz, 313 So. 2d 59 (Fla. 3d Dist. Ct. App. 1975), *cert. denied*, 327 So. 2d 34 (Fla. 1976). In *Model*, the court stated: "[I]t is improper in comparative negligence situations for the jury to apportion negligence either to joint tortfeasors; or 'phantom' tortfeasors who are not before the court; or even to the Supreme Being." 313 So. 2d 59, 60 n.1.

35. This basic tenet of tort law is that, in the absence of a better rationale, losses should be transferred from a poor loss distributor to a good loss distributor. When the decision must be made whether to force the plaintiff to bear the loss or shift the loss to a defendant who has greater access to liability insurance, it is axiomatic that the loss should be shifted since liability insurance is the better loss distributor. Liability insurance purports to transfer losses equitably to all who partake in the "risk-creating activity." One proponent of this philosophy states:

> I think it highly desirable to provide for the shifting of tort damage—the victims of which are statistically ubiquitous but personally unidentifiable in advance—from the shoulders of those who are hurt to all of society, or to all who partake in the risk-creating activity producing the harm.

Gregory, *Contribution Among Tortfeasors: A Defense*, 54 HARV. L. REV. 1170, 1176 (1941).

Returning to the hypothetical, recall that each party has one favorable judgment, yet remains potentially liable on two unfavorable judgments. *A* has a favorable judgment of $11,250, and is potentially liable on two unfavorable judgments totaling $18,700;[36] *B* has a favorable judgment for $13,300, and is potentially liable on two unfavorable judgments totaling $16,650;[37] *C* has a favorable judgment for $5,400, and is potentially liable on two unfavorable judgments totaling $24,550.[38] Thus, each has a potential liability exceeding his potential recovery.[39] But the pattern of liability does not reflect the pattern of probable payments.

As has always been the rule, each party is entitled to only one satisfaction of his judgment. Satisfaction of a joint and several liability by one tortfeasor relieves the other joint tortfeasor of all liability.[40] The possible permutations in a multiple party action are numerous. One example will serve to illustrate some inherent problems of applying pure comparative negligence in the absence of a system of total loss distribution.[41] Suppose that *B* and *C* proceed against *A*, and that

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36. $13,300 + $5,400 = $18,700.

37. $11,250 + $5,400 = $16,650.

38. $11,250 + $13,300 = $24,550.

39. This result will not occur if a party's net total liabilities do not exceed his net total compensable damage. Such a situation arises (1) where a party suffers much greater injury than the other parties, and/or (2) where a party is fortunate enough not to severely injure someone else. Such possibilities do exist; it is unrealistic to accept a concept of loss allocation which places so much emphasis on chance.

It is equally unrealistic to assume that the relevance of these various loss possibilities will be lost upon *A*'s, *B*'s, or *C*'s loan officers, accountants, or insurance carriers. Each of the loss variations (including those shown in note 41 and accompanying text *infra*) represents a possible result of a multi-party accident under pure comparative negligence where there is no system of post-verdict loss distribution other than the traditional concept of joint and several liability.

40. This rule applies only in the absence of a right to contribution.

41. Other examples follow:

(1) Both *B* and *C* proceed against *A*, who satisfies both judgments by paying $18,700 ($13,300 + $5,400). *A* then proceeds against *B*; *B* pays $11,250 to *A*. The net results follow: *A* loses $7,450 ($18,700 − $11,250); *B* gains $2,050 ($13,300 − $11,250); *C* gains $5,400.

(2) *A* and *C* proceed against *B*, who satisfies their judgments by paying them $16,650 ($11,250 + $5,400). *B* proceeds against *A*, who pays *B* $13,300. The net results follow: *A* loses $2,050 ($13,300 − $11,250); *B* loses $3,350 ($16,650 − $13,300); *C* gains $5,400.

(3) *A* and *C* proceed against *B*, who satisfies their judgments by paying them $16,650. *B* then proceeds against *C*, who pays *B* $13,300. The net results follow: *A* gains $11,250; *B* loses $3,350; *C* loses $7,900 ($13,300 − $5,400).

(4) *A* and *B* proceed against *C*, who satisfies their judgments by paying them $24,550 ($13,300 + $11,250). *C* then proceeds against *A*, who pays *C* $5,400. The net results follow: *A* gains $5,850 ($11,250 − $5,400); *B* gains $13,300; *C* loses $19,150 ($24,550 − $5,400).

(5) *A* and *B* proceed against *C*, who satisfies their judgments by paying them

A satisfied their respective judgments by paying $13,300 to *B* and $5,400 to *C*. *A* then has the option of proceeding against either *B* or *C* to recover his own judgment of $11,250. Suppose *A* proceeds against *C*. *C*, who received $5,400 *from A*, now must pay $11,250 *to A*. Absent a rule permitting contribution among tortfeasors, and absent the possibility that *A* or *C* could secure indemnity, application of pure comparative negligence yields the following results: *A* loses $7,450;[42] *B* gains $13,300; and *C* loses $5,850.[43] Because all parties were negligent, no party is entitled to recover his full damages suffered. But note, too, that only one party receives his full compensable damages, while two parties never recover their full compensable damages.

When pure comparative negligence is applied in a multiple party action, such undesirable results are avoided only through a viable pattern of post-judgment loss distribution. This article undertakes an analysis of the Florida approach to post-verdict loss distribution. Two methods have been employed to accomplish loss distribution of tort injuries: set-off and contribution.

II. SET-OFF

Under pure comparative negligence, the degrees of causal negligence attributed to the claimant interact with the total amount of damages which he has proven to establish the amount of compensation to which he is entitled. The pure comparative negligence action may, therefore, be logically thought of as containing three distinguishable elements. The claimant must first prove the liability of the person from whom he is seeking compensation for his injuries. He must then prove his damages—the amount of money which will compensate him for all of the legally compensable injuries he has suffered as a result of the tortfeasor's liability. Finally, the percentage of the claimant's *culpability* is determined. The total dollar amount of the damages suffered by the claimant is reduced by the percentage of his own culpability. The claimant receives judgment for the dollar amount of damages thus reduced. Under pure comparative negligence the claimant should be entitled to these damages without subjecting them to further reduction. Application of a legal doctrine such as set-off can effect an unnecessary further reduction of personally innocent damages.

$24,550. *C* then proceeds against *B*, who pays *C* $5,400. The net results follow: *A* gains $11,250; *B* gains $7,900 ($13,300 − $5,400); *C* loses $19,150.

42. ($13,300 + $5,400) − $11,250 = $7,450.

43. $11,250 − $5,400 = $5,850.

The doctrine of set-off (the reduction of a claimant's recovery by subtracting from that recovery the amount of any outstanding liability the claimant owes to the judgment debtor) has a long history in the law of contract litigation.[44] The essential difference between the purpose of damages in contract litigation and the purpose of compensatory damages in tort litigation, however, necessitates a different approach to the question of whether damages should be set off in a tort action brought in a jurisdiction applying pure comparative negligence.[45] A detailed comparison of the difference between the nature of damages in these two types of civil actions requires a more detailed analysis than space permits. Nevertheless, the primary distinctions between the purposes of such damages can be stated in an abbreviated form.

Damages in a contract action represent an attempt to place the injured party in the same financial situation that he would have been had the contract been performed. Tort damages are awarded to compensate the claimant for the physical or emotional injury suffered as the result of a tortfeasor's conduct; that is, to restore him as nearly as possible to his condition before the tort. Therefore, in the contract action the agreement forms the basis for determining the amount of damages to be awarded to the claimant. A tort claimant, however, receives as damages a dollar award which represents not only out-of-pocket expense, but also an attempt to quantify the physical and emotional trauma suffered as a result of the physical injury caused. The unsuccessful contract claimant may have lost the benefit of a good bargain; the unsuccessful tort claimant may have lost an arm, a leg, or a loved one.

The Rhode Island legislature apparently considered the dichotomous nature of damages when, adopting the doctrine of pure comparative negligence, it expressly prohibited set-off.[46] The Alaska and California Supreme Courts made no reference to set-off in their landmark decisions adopting pure comparative negligence.[47] The Supreme Court of Florida in *Hoffman*, however, adopted a rule providing for set-off[48]—with unfortunate and probably unintended results, especially

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44. For a brief summary of the history of set-off, see F. JAMES, CIVIL PROCEDURE § 10.14 at 473–74 (1965).

45. Recall that it is possible for a party to be liable to and from another only when pure comparative negligence or pattern 1 of modified comparative negligence are applicable.

46. *See* R.I. GEN. LAWS § 9–20–4.1 (Supp. 1975).

47. *See* Kaatz v. State, 540 P.2d 1037 (Alas. 1975); Nga Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975).

48. The *Hoffman* court stated:

> In the usual situation where the negligence of the plaintiff is at issue, as well as that of the defendant, there will undoubtedly be a counterclaim filed. . . .

in the multi-party action.[49]

The *Hoffman* court recognized that pure comparative negligence could result in a seriously injured but more negligent party receiving the only affirmative judgment.[50] This result is inherent in the adoption of pure comparative negligence, for a party is entitled to the full amount of his damages reduced only by his self-responsibility discount. The Florida court, however, required that in the two-party negligence action where both parties receive an award of damages, the verdicts be set off against each other and one affirmative judgment entered.[51]

The bankruptcy of this approach in tort litigation has already been stated. When, however, the presence of liability insurance is acknowledged, the effect of set-off seems apparent. It does not result in the reduction of a personal liability on behalf of the claimant-tortfeasor; rather, it presents a further litigation issue on behalf of the liability insurance carrier seeking to reduce its judgment liability.[52]

Prior to *Hoffman*, the traditional reluctance of the courts to consider the effect of the presence of liability insurance had already been overcome in Florida.[53] This earlier pragmatism coupled with the

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This could result in two verdicts—one for plaintiff and one for cross-plaintiff. In such event the Court should enter one judgment in favor of the party receiving the larger verdict, the amount of which should be the difference between the two verdicts. This is in keeping with the long recognized principles of "set-off" in contract litigation.

280 So. 2d at 439.

49. Damages in contract litigation essentially derive directly from the enterprise or person suing or being sued. Thus, the purpose of set-off is one of efficiency. It prevents unnecessary and unwarranted exchanges of money. *See* Stuyvesant Insurance Co. v. Bournazian, 342 So. 2d 471, Appendix B at p. 124 *infra* (Fla. 1977). Tort liability, however, is frequently borne by an enterprise which is a preferable loss distributor—the insurance carrier. Therefore, the societal effect of setting off tort losses is that losses are borne by the claimant rather than allocated as enterprise costs to a better loss distributor. Given the no-fault aspect of damages (which have been reduced by an individual's self-responsibility discount), these losses should be shifted to the better loss distributor—the liability insurance carrier. *Cf. id.* at 473–74, Appendix B at p. 126 *infra* (discussion of impact of set-off on insurance carrier liability). *See also* note 35 *supra*.

50. The court stated:

[L]et us assume that a plaintiff is 80 per cent responsible for an automobile accident and suffers $20,000 in damages, and that the defendant—20 per cent responsible—fortunately suffers no damages. . . . If a jury found that this defendant had been negligent and that his negligence, in relation to that of the plaintiff, was 20 per cent responsible for causing the accident then he should pay 20 per cent of the total damages, regardless of the fact that he has been fortunate enough to not be damaged personally.

280 So. 2d at 439.

51. *Id. See* note 48 *supra*.

52. *See* note 54 and accompanying text *infra*.

53. In Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969), the Supreme Court of

Hoffman court's radical, almost legislative, adoption of pure comparative negligence, supplied the court with a sufficient framework to analyze the effects of set-off upon a party represented by a liability insurer. The failure of the court to make this analysis resulted in the decision to apply set-off. Thus, the *Hoffman* court disregarded the superiority of loss spreading of innocent damages through liability insurance and inadvertently created a scheme in which transactional costs are increased to the benefit, in most cases, of only the liability insurance carrier, the most efficient loss distributor.

When set-off is applied as under *Hoffman*, the liability insurance carrier of the party from whom damages are sought is placed in the position of affirmatively seeking compensation for damages caused to its insured in order to apply those damages as a credit against its own ultimate liability.[54] Thus, the judgment of a party whose damages have already been reduced by his self-responsibility discount is further reduced by the amount of compensable damages (total damages suffered reduced by the self-responsibility discount) of the party from whom he seeks compensation.[55] The party who has suffered the greatest amount

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Florida concluded that a direct cause of action inured to an injured party against a tortfeasor's liability insurer since the injured party was a third party beneficiary of the contract between the tortfeasor and the liability insurer.

54. *See Acts of 1955 Arkansas General Assembly, Act 191, Comparative Negligence*, 9 ARK. L. REV. 357 (1955). The analysis states:

> [I]f there is no set-off, the insurer, who usually has charge of the defense by terms of the policy, will not be so careful to prove high damages and low negligence on the part of his assured, since such proof will not ultimately benefit the insurance carrier. If set-off is allowed in all cases, however, the insurance company has a direct interest in giving the insured the benefit of all its energy to show his damages in order to net the plaintiff a smaller recovery if possible.

Id. at 383. Naturally, if the insurance company is providing first-person insurance, its opportunity of collecting under a subrogation clause is reduced. It has been suggested that this result is desirable since subrogation encourages insurance companies to flock to the courts, increasing litigation costs and resulting only in the transference of the same money. Pitkin, *The Dilemmas of Auto Insurance*, THE AMERICAN LEGION MAGAZINE 8, 48 (April 1969).

55. *See* note 48 *supra*. Assume that *A* and *B* are involved in an accident which each suffers damages due to the combined negligence of both. The following verdicts are returned:

Party	Self Responsibility Discount	Total Damages
A	20%	$16,000
B	80%	$20,000

The judge would reduce each party's total damages by the percentage of his self-responsibility discount: *A*'s innocent damages would be $12,800 [$16,000 — (20% x $16,000)]; *B*'s innocent damages would be $4,000 [$20,000 — (80% x $20,000)]. The judge would then enter an $8,800 judgment for *A* ($12,800 — $4,000).

of innocent damage after reduction by the self-responsibility discount is the only party entitled to an affirmative judgment. This could quite naturally result in a more culpable party (larger self-responsibility discount) with greater damages receiving the only affirmative judgment.[56]

The doctrine of set-off, therefore, does not give the insured party benefits proportional to the doctrine's disadvantages. The insured individual suffering innocent damages in an amount less than the party from whom he seeks compensation totally loses the right to collect any amount of those damages.[57] Only if the insured individual

56. 280 So. 2d at 439. For example, assume that *A* and *B* are involved in an accident in which each suffers damages due to the combined negligence of both. The following verdicts are returned:

Party	Self Responsibility Discount	Total Damages
A	20%	$ 5,000
B	80%	$50,000

The judge would reduce each party's total damages by the percentage of his self-responsibility discount: *A*'s innocent damages would be $4,000 [$5,000 — (20% x $5,000)]; *B*'s innocent damages would be $10,000 [$50,000 — (80% x $50,000)]. Application of set-off would result in a $6,000 (the difference between *A*'s and *B*'s innocent damages) judgment for *B*. Thus, *B* would receive the only affirmative judgment even though the jury found *B* more negligent than *A*.

In the *absence* of set-off, each party would be entitled to his damages reduced by his self-responsibility discount.

Any criticism of the right to collect from someone less negligent is a criticism of pure comparative negligence and is beyond the scope of this article. Since the purpose of this article is to analyze methods of loss allocation *under* pure comparative negligence, the validity of the doctrine itself is assumed.

57. In the *absence* of set-off, uninsured motorists coverage provides an insured claimant compensation for his innocent damages even though the party from whom he seeks these damages is uninsured. A typical uninsured motorists coverage clause provides:

> The company will pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured highway vehicle because of bodily injury sustained by the insured, caused by accident and arising out of the ownership, maintenance, or use of such uninsured highway vehicle; provided, for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration.
>
> No judgment against any person or organization alleged to be legally responsible for the bodily injury shall be conclusive, as between the insured and the company, of the issues of liability of such person or organization or of the amount of damages to which the insured is legally entitled unless such judgment is entered pursuant to an action prosecuted by the insured with the written consent of the company.

is found liable for an amount exceeding the amount of his liability insurance does he directly feel the effects of the doctrine of set-off. But even in that case, the direct effect has been to force him to bear the financial burden of his own personally innocent losses in exchange for a reduction in total liability. The benefits to the insured are evanescent.[58]

If the doctrine of set-off is not applied, each party will be entitled to his own personally innocent damages from the party liable for those damages. Each party will receive compensation for those damages reduced only by his own self-responsibility discount. In this instance, therefore, each party will receive more substantial benefits than the doctrine of set-off grants him since the right to seek compensation for injuries innocent of his own fault is not lost.

Although the *Hoffman* court may have supposed that the expected efficiency of set-off would provide benefits to uninsured parties, judicial acknowledgment of the existence and social desirability of insurance as a loss allocation system should force a reexamination of the initial acceptance of the doctrine of set-off.

Once primary cost[59] reduction has been effected through application of the self-responsibility discount factors, the strictures of the fault system have been satisfied[60] and the injured claimant will expect

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Coverage U—Uninsured Motorists, 1966 Standard Form, The Standard Uninsured Motorist Endorsements, *reprinted in* A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE 291 app. A (1969). *See* FLA. STAT. § 627.727 (1975).

This form of coverage illustrates the essential issue: whether the injured individual should be required to exchange his right to collect for innocent injuries (a right which he would have but for application of set-off) for a reduction of judgment liability which inures only to the benefit of his insurance carrier.

58. Suppose an insured suffers $10,000 damages for his innocent injuries. Suppose further that his liability for other parties' injuries exceeds his liability coverage by $10,000. Whether the insured receives $10,000 compensation for his injuries via an affirmative judgment (set-off not applied) or has his judgment liability reduced by $10,000 (application of set-off) and receives no compensation for his own injuries, the net dollar effect to him is the same. But the vast majority of cases will not involve suits in excess of insurance coverage. Even in such cases, the social utility of effecting a reduction in innocent damages is questionable. Sound policy requires transference of losses to the more efficient loss distributor.

59. "Primary costs" are damages caused by injuries which the fault system is intended to deter. It is a truism that primary costs occur only where fault-related injuries are suffered. The injuries, whether fault-related or non-fault-related, are just as real, and a means of compensation would be necessary. Innocent injuries, however, do not require proceedings for fault determination and the consequent administration of a system of secondary loss distribution. More efficient and, perhaps, more equitable methods of loss allocation would be fashioned if the determination of fault were not deemed essential for the determination of compensation.

60. One purpose of a fault system is to deter certain conduct by imposing civil liability for injuries caused by that conduct. Under pure comparative negligence, the deterrent features of the fault system are exhausted once fault is determined, the

compensation for his injuries. It will come as small consolation that the liability insurance for which he has been paying to protect himself against loss does not, in fact, protect him—except to the extent that his own innocent losses do not exceed those of the opposing party. While arguments will be marshalled that insurance premiums have been reduced through the application of set-off, the prior record of liability insurance, at least in the automobile insurance area, will not bear this out. This largest arena of liability coverage returns less than forty-five percent of premium dollars to injured victims while chewing up the rest in overhead and legal fees.[61] An attempt to reduce rather than increase litigable issues could be expected to lower liability insurance premium costs; for as these issues proliferate, the percentage of overhead and legal fees may be expected to take a larger and larger share of the premium dollar. To the extent, therefore, that set-off illustrates the deficiencies of the fault system as a basis for the allocation of tort losses and fosters the trend toward nonfault alternatives, it may indirectly achieve socially desirable goals.

The philosophical and practical problems which set-off presents to efficient loss allocation in the two-party action are magnified in the multi-party action. In *Stuyvesant Insurance Co. v. Bournazian*,[62] the Florida appellate courts had their first encounter with the problems necessarily inherent in requiring set-off in the multiple party negligence action under pure comparative negligence. The action was commenced by Royce Bournazian for an automobile accident which occurred between an automobile owned and driven by him and a vehicle owned by Paul Riley[63] and driven by his wife, Betty Riley.

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self-responsibility discount factor is applied, and the claimant is determined to be entitled to receive damages. Fault deterrence does not justify further reduction of the claimant's damages.

61. *See* R. KEETON, COMPENSATION SYSTEMS: THE SEARCH FOR A VIABLE ALTERNATIVE TO NEGLIGENCE LAW 32–33 (1969). Loss spreading through liability insurance is socially desirable since it permits interpersonal allocation of secondary tort costs, such as expenses of litigation, to all persons involved in an injury causing enterprise. Liability insurance is preferred over the alternative of non-distribution which requires that the injured party bear insurable costs. But even liability insurance is not the most socially desirable method of loss distribution. The optimum method would be a pure no-fault, first-party insurance system. *See generally*, George & Walkowiak, *Blame and Reparation in Pure Comparative Negligence: The Multi-Party Action*, 8 SW. U.L. REV. 1 (1976).

62. 303 So. 2d 71 (Fla. 2d Dist. Ct. App. 1974), *rev'd*, No. 46,573 (Fla. Mar. 10, 1976) [hereinafter cited as Bournazian original opinion] (reprinted in Appendix A of this article; see pp. 121–24 *infra*), *withdrawn and superseded* by 342 So. 2d 471 (Fla. 1977 [hereinafter cited as Bournazian opinion on rehearing] (reprinted in Appendix B of this article; see pp. 124–27 *infra*) (*aff'g* 2d Dist. Ct. App.).

63. Under Florida law, an automobile is classified as a dangerous instrumentality. The practical result of this rule is to impose vicarious liability upon the owner of a vehicle for personal injuries to another caused by the consensual operation of the

Royce sued both Rileys and joined their liability insurer,[64] Stuyvesant Insurance Company. Royce's wife, Linda Bournazian, filed a derivative claim against both Rileys and their insurance carrier as a result of the injuries suffered by her husband. Betty counterclaimed against Royce and his liability carrier, Allstate Insurance Company, for her injuries; and Paul filed a derivative claim against Royce and Allstate for the injuries suffered by Betty. The jury was given the case and instructed to apply the recently adopted pure comparative negligence rule. Separate verdicts were rendered for each party. After deductions for the parties' self-responsibility discounts, the verdicts were further reduced to the amounts listed in Table 6.

TABLE 6

Verdict for Royce for $8500 against Betty, Paul, and Stuyvesant.
Verdict for Linda for $1500 against Betty, Paul, and Stuyvesant.
Verdict for Paul for $1000 against Royce and Allstate.
Verdict for Betty for $19,000 against Royce and Allstate.

The trial court, in an attempt to apply the set-off language of *Hoffman*, mistakenly aggregated the Bournazian verdicts and subtracted them from the larger Riley verdicts. The trial court then awarded judgment of $10,000 to the Rileys.[65] On appeal, the trial court's application of set-off was reversed.

The Second District Court of Appeal correctly recognized that $30,000 of innocent damages had been suffered by the parties and that applying set-off as the trial court had done resulted in an insurance company windfall at the expense of the injured parties. As the court noted,

> [h]ad the Bournazians' claims been prosecuted in one suit and the Rileys' claims in another, both insurance carriers would have been liable for the total of the resulting verdicts. By reason of the claims

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vehicle. Southern Cotton Oil Co. v. Anderson, 86 So. 629 (Fla. 1920); Jordan v. Kelson, 299 So. 2d 109 (Fla. 4th Dist. Ct. App. 1974). *See also* note 82 *infra*.

64. Of the jurisdictions which have adopted pure comparative negligence by court rule, only Florida permits direct actions against liability insurance carriers. *See* Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969), discussed in note 53 *supra*.

65. The trial court added Royce's verdict for $8,500 and Linda's verdict of $1,500 and concluded that the Bournazians were entitled to a total of $10,000. The trial court then added Paul's $1,000 verdict to Betty's $19,000 verdict and concluded that the Rileys were entitled to a total of $20,000. The court subtracted the cumulative Bournazian award from the cumulative Riley award and entered judgment for the Rileys in the amount of $10,000. Bournazian opinion on rehearing, 342 So. 2d at 472, Appendix B at 125 *infra*.

> being tried together, Stuyvesant was relieved from liability largely because of the serious nature of its insured's injuries and Allstate's liability was reduced for the same reason. Such a result flies in the face of the social desirability of providing automobile accident victims in Florida with reasonable access to liability insurance benefits.[66]

Nevertheless, bound by the *Hoffman* opinion, the Second District Court of Appeal construed the rule of set-off to apply to reciprocal jury verdicts involving the same parties. It thus concluded that *Hoffman* required alternative judgments as set out in Table 7.[67]

TABLE 7

Royce's verdict of	$ 8,500
less Paul's verdict of	1,000
Paul owes Royce	$ 7,500
Royce's verdict of	$ 8,500
less Betty's verdict of	19,000
Royce owes Betty	$10,500
Royce's verdict of	$ 8,500
less Stuyvesant's verdict of	0
Stuyvesant owes Royce	$ 8,500
Paul's verdict of	$ 1,000
less Allstate's verdict of	0
Allstate owes Paul	$ 1,000
Betty's verdict of	$19,000
less Allstate's verdict of	0
Allstate owes Betty	$19,000

The Second District concluded that this application of the rule of set-off was the only way to effect the intent of pure comparative negligence and the supreme court's set-off rule.[68] Naturally, each party was entitled to execute judgment but once. Thus, if Royce collected his judgment from Stuyvesant, then Betty or Paul could collect their judgments from Royce. Royce's liability insurance company would, of course, then be forced to pay the full total of Royce's liability to Betty and Paul. Only if one party proceeded against another party who had an affirmative judgment against it would the net

66. 303 So. 2d at 73 (footnote omitted).
67. *See id.*
68. *Id.*

compensable damages not be paid. Insurance companies would, of course, be forced to pay the full amount of the net compensable losses. Surely, this was an intended goal of the Florida Supreme Court when it adopted pure comparative negligence. The premium paid to a liability insurance company represents full consideration for the risks of liability. The Second District Court's application of the set-off doctrine prevents a windfall to the liability insurer at the expense of injured parties.[69] Thus, explaining its application of set-off, the court stated:

> This result does not violate the concept that the liability of the insured is a condition precedent to the liability of his insurer. The liability of the insureds as reflected by the verdicts will be taken into account in the rendition of the judgments. For example, the liability of Paul to Royce established in this case was $8,500, which is exactly the amount that Paul's insurer will be obligated to pay. Royce's judgment against Paul will be reduced to $7,500 only because Royce had a corresponding liability of $1,000 to Paul. The fact that there were off-sets among the parties does not diminish the responsibility of the liability insurance carriers.[70]

Despite the desirable result reached by the Second District Court of Appeal, its decision was quashed by the Florida Supreme Court's first opinion in *Bournazian*.[71] In an opinion which offered more confusion than enlightenment, the supreme court applied set-off as shown in Table 8.[72]

TABLE 8

(1)	Betty's verdict of	$19,000
	less Royce's verdict of	8,500
	Royce owes Betty	$10,500
(2)	Paul's verdict of	$ 1,000
	less Royce's verdict of	0
	Royce owes Paul	$ 1,000[73]

69. The Supreme Court of Florida, on rehearing *Bournazian*, implicitly recognized that insurance premiums represent the costs of shared liability among policyholders exclusive of reduction by the policyholders' own damages. 342 So. 2d at 473–74, Appendix B at p. 127 *infra*. Any other interpretation would allow allocation of the risk to a poor loss distributor.

70. 303 So. 2d at 73.

71. Bournazian original opinion, Appendix A at 121 *infra*.

72. *See* Bournazian opinion on rehearing, 342 So. 2d at 472–73, Appendix B at 125 *infra*.

73. The court concluded that Royce "spent" his $8,500 verdict when it was discharged by his and Betty's offsetting judgments. *Id.*

(3) Paul and Betty owe Linda $ 1,500[74]

The court noted that "[t]he set-off principle announced [in *Hoffman*] for comparative negligence cases in Florida does not easily translate to cases which involve multiple parties and their insurers."[75] But then the court mechanically applied the derivative liability rule,[76] stating that payment of the net liabilities would represent accurate and full reflection of the jury verdicts.[77]

Justice Adkins, the author of the majority opinion in *Hoffman*, dissented; he criticized the *Bournazian* majority for misapplying *Hoffman's* expression of the set-off rule:

> The majority's decision in the case at bar distributing the loss from the shoulders of the parties' liability insurance carriers to the injured parties does not create a more socially desirable method of loss distribution.
>
> It was entirely proper that the respective verdicts for the parties be set off. However, set-offs among the parties should not diminish the responsibility of the liability insurance carriers.[78]

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74. There was no offsetting liability by Linda to Paul and Betty. *Id.*; Bournazian original opinion at 4, Appendix A at 122 *infra*.

75. Bournazian original opinion at 2, Appendix A at 121 *infra*.

76. The court stated: "Our consideration of this problem begins with a recognition of the legal principle that the liability of the insurers in this case is derivative only, representing a responsibility to pay an amount first determined to be owed by another." *Id.* at 3, Appendix A at 121 *infra*.

77. *Id.* at 4, Appendix A at 122 *infra*. But the cash payments will not fully and accurately reflect the jury verdicts. *See* note 78 and accompanying text *infra*. Perhaps the court's statement could be defended if the jury were informed of the effect in advance. But that is not the case. And there is substantial authority against informing the jury of the legal effects of its answers to special interrogatories. *See* Annot., 90 A.L.R.2d 1040 (1963). *But see* Smith, *Comparative Negligence Problems with the Special Verdict: Informing the Jury of the Legal Effects of Their Answers*, 10 LAND AND WATER L. REV. 199 (1975). *See also* Cadena, *Comparative Negligence and the Special Verdict*, 5 ST. MARY'S L.J. 688 (1974).

78. Bournazian original opinion at 7, Appendix A at 123 *infra* (Adkins, J., dissenting). Even the majority recognized that "the dollar effect of these transfers [see Table 8 *supra*] requires the insurance carriers to pay only $13,000 in claims." *Id.* at 4, Appendix A at 122 *infra* (footnote omitted). The majority further noted that "under the district court's view [the insurance carriers] would pay out $30,000." *Id.* at 4 n.5, Appendix A at 122 n.5 *infra*. Thus, the net effect of the appeal in *Bournazian* was to reap a $17,000 benefit for the insurance companies at the expense of the injured individuals involved. The supreme court's original *Bournazian* decision required that Stuyvesant (through its insureds, Paul and Betty Riley) pay $1,500 to Linda Bournazian, and that Allstate (through its insured, Royce Bournazian) pay $10,500 to Betty Riley and $1,000 to Paul Riley.

This "net effect" result of the Bournazian original opinion would cause considerable concern to an attorney who represents parties in the same position as the Bournazians

Betty Riley would likewise disagree that the majority's result accurately and fully reflected the jury verdicts; Betty arbitrarily bore the entire brunt of the $8,500 judgment awarded Royce Bournazian against Betty, Paul, and Stuyvesant. If Royce's judgment were set off against Paul's judgment, then Paul would owe Royce $7,500; Betty would be entitled to her full judgment of $19,000 from Royce, as awarded by the jury.[79] Thus, the *Bournazian* decision effected a dramatic change in the manner of handling judgments. The rule previously applied in Florida permitted a judgment creditor to execute his judgment against joint tortfeasors jointly and severally. The *Bournazian* decision took that option from the judgment creditor and placed it with the court.

The *Bournazian* court at least should have considered the alternative set out in Table 9.

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and their liability insurer or the Rileys and their liability insurer. *See generally* R. KEETON, BASIC TEXT ON INSURANCE LAW § 7.7(a) (1971); Comment, *The Insurer's Duty to Defend Under a Liability Insurance Policy*, 114 U. PA. L. REV. 734 (1966). Indeed, there is some question as to whether an attorney may ethically represent two such parties in that situation. THE FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-105(B), 32 FLA. STAT. ANN. (Supp. 1976-77) provides: "A lawyer shall not continue multiple employment if the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C)."

Any attorney attempting to represent both insureds and their insurance companies in a *Bournazian*-type situation would inevitably have such a prohibited conflict. At the minimum, an attorney would have to fully and accurately disclose such a conflict:

> In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

THE FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(C), 32 FLA. STAT. ANN. (Supp. 1976-77).

Consider one final comment regarding the "net effect" of the supreme court's original *Bournazian* decision. The insurance industry does not have an inherent economic interest in reducing the aggregate amount of losses transferred from victims to others. Loss transference is the *raison d'etre* of the industry. George & Walkowiak, *Blame and Reparation in Pure Comparative Negligence: The Multi-Party Action*, 8 SW. U.L. REV. 1, 28 n.77 (1976). Reduction of transferred losses in the initial *Bournazian* manner, therefore, represents a threat to business interests as well as to the humanitarian goals of the pure comparative negligence doctrine. Perhaps, after all, the doctrine of comparative negligence will become fostered exclusively by lawyers for lawyers. *See generally* Palmer, *Let Us Be Frank About Comparative Negligence*, 28 L.A.B.A. BULL. 37 (1952).

79. It should be emphasized that under no circumstances can Royce collect the $7,500 in cash and also use that liability to offset Betty's judgment. Also, as the Supreme Court of Florida noted, the amounts received by each spouse will be treated as the spouse's separate property. Bournazian original opinion at 4 n.4, Appendix A at 122 n.4 *infra*. *See* FLA. STAT. § 708.08(1) (1975).

TABLE 9

(1)	Royce's verdict of	$ 8,500
	less Paul's verdict of	1,000
	Betty and Paul owe Royce	$ 7,500
	Betty's verdict of	$19,000
	less Royce's remaining verdict of	7,500
	Royce owes Betty	$11,500
(2)	Betty and Paul owe Royce	$ 1,500

Those results effect the full compensation awarded Betty by the jury; Betty would be entitled to benefit by the amount paid to Royce in cash or via set-off. This is not to suggest that the Table 9 application of set-off should have been adopted instead of the method adopted by the *Bournazian* court. But the Table 9 application is of analytical interest in that it appears to be equally acceptable. In the absence of further guidance, the problem of mechanistic alternatives could have been expected to proliferate.

Fortunately, the confusion generated by *Bournazian* was short-lived in Florida. On rehearing, the Supreme Court of Florida affirmed the decision of the district court of appeal; the supreme court's original opinion was withdrawn.[80] The court thus reversed its previous position stating:

> We conclude . . . that the concept of "set-off" (more properly "recoupment") as announced in *Hoffman* applies only between uninsured parties to a negligence action, or to insured parties to the extent that insurance does not cover their mutual liabilities. The doctrine has no effect on the contractual obligations of liability insurance carriers.[81]

If application of the *Hoffman* set-off rules to the *Bournazian* facts was difficult for the courts, application of set-off to the multiple-party action would have proven even more difficult. *Bournazian* was essentially a two-party action since there were only two active tortfeasors: Royce (as evidenced by the fact that Linda was not even sued) and Betty (although Paul was sued for vicarious liability under Florida's interpretation of the dangerous instrumentality doctrine[82]).

80. Bournazian opinion on rehearing, 342 So. 2d at 474, Appendix B at 127 *infra*.

81. *Id.*

82. *See, e.g.*, Morse Auto Rentals, Inc. v. Lewis, 161 So. 2d 235 (Fla. 3d Dist. Ct. App. 1964) (recognizing general rule but applying an exception); Hutchins v. Frank E. Campbell, Inc., 123 So. 2d 273 (Fla. 2d Dist. Ct. App. 1960). *See* note 63 *supra*.

The solutions offered by the original *Bournazian* decision would become even more bizarre in the typical three-party action.

With respect to the hypothetical three-party action postulated in Tables 1[83] and 5,[84] liability might be assessed in any of the three ways shown in Table 10 if set-off is applied.

TABLE 10[85]

Variation 1 (*A* v. *B* set-off)

B's verdict of	$13,300
less *A*'s verdict of	11,250
B is entitled to	$ 2,050
C's verdict of	$ 5,400
less *B*'s unsatisfied	2,050
A or *B* pay *C*	$ 3,350
Net cash exchange	$ 3,350

83. *See* text accompanying note 7 *supra*.

84. *See* text accompanying notes 26–29 *supra*.

85. There is an alternative pattern to each of the three variations shown in Table 10:

Variation 1a (*A* v. *B* set-off)

B's verdict of	$13,300
less *A*'s verdict of	11,250
A pays *B*	$ 2,050
C is allowed to collect his full $5,400 from either *A* or *B*.	
Net cash exchange	$ 7,450

Variation 2a (*A* v. *C* set-off)

A's verdict of	$11,250
less *C*'s verdict of	5,400
C pays *A*	$ 5,850
B is allowed to collect his full $13,300 from either *A* or *C*.	
Net cash exchange	$19,150

Variation 3a (*B* v. *C* set-off)

B's verdict of	$13,300
less *C*'s verdict of	5,400
C pays *B*	$ 7,900
A is allowed to collect his full $11,250 from either *B* or *C*.	
Net cash exchange	$19,150

But there is no reason to believe that the *Bournazian* court, having initially decided to apply the doctrine of set-off, would stop at having set off a common liability once while permitting the co-tortfeasors to collect affirmatively. In other words, once a court

Variation 2 (*A* v. *C* set-off)

A's verdict of	$11,250
less *C*'s verdict of	5,400
A is entitled to	$ 5,850
B's verdict of	$13,300
less *A*'s unsatisfied	5,850
A or *C* pay *B*	$ 7,450
Net cash exchange	$ 7,450

Variation 3 (*B* v. *C* set-off)

B's verdict of	$13,300
less *C*'s verdict of	5,400
B is entitled to	$ 7,900
A's verdict of	$11,250
less *B*'s unsatisfied	7,900
B or *C* pay *A*	$ 3,350
Net cash exchange	$ 3,350

The initial *Bournazian* decision would make any of the Table 10 variations acceptable if set-off applied, though none of them effect the intent of a jury seeking to apply the *Hoffman* principle. And the benefit (if any) to the liability insurers of *A*, *B*, or *C* is likewise evanescent, for the insurance industry has no inherent economic interest in discouraging effective loss transference.

In theory, the fault system seeks to deter socially undesirable conduct (1) by requiring the party at fault to compensate those injured as a result of his conduct and (2) by preventing persons injured through their own fault from collecting for those injuries. Thus, the primary costs of accidents are reduced through the fault system by discouraging certain conduct and by inducing the introduction of safety devices to the extent that they cost less than the cost of damages which they prevent.[86] The doctrine of pure comparative negligence

decides to apply set-off, it will likely set off liabilities until there is nothing further to set off.

86. For a well-articulated analysis of the economics of *secondary* loss distribution, see Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965); Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalven*, 75 YALE L.J. 216 (1965); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961). This author is indebted to Professor

represents a pattern in which civil liability is related to the goal of accident prevention.

The doctrine attempts to reduce primary accident costs through application of the fault principle. Once the determination of which injuries are compensable has been made, however, the loss transference costs of the fault system become a factor. The effect of the original *Bournazian* set-off scheme would be to raise the costs of loss transference and, therefore, the cost of accidents. The amount of money available for loss compensation would be decreased as more capital was expended in loss avoidance. In this case, loss avoidance would take the form of litigation necessary to prove an insured's innocent injuries. These innocent injuries would not be proved in order to provide compensation to the insured. They would be proved to provide set-off for a liability carrier against other personally innocent injuries.

The reduction of accident costs should, however, include the socially desirable result of interpersonal loss spreading through insurance, a concept implicitly recognized by the *Bournazian* decision on rehearing. If the injured parties are required to bear the financial burden of their own innocent losses through application of the doctrine of set-off, a less socially desirable result is reached than spreading these losses interpersonally or intertemporally. Set-off requires the parties to personally bear the amount of their set-off liability. Thus, if *X*'s innocent damages are $50,000 and *Y*'s innocent damages are $70,000, *Y* would be entitled, after application of set-off, to a judgment of $20,000. *X* would receive no affirmative judgment. *X* and *Y* would each be required to personally bear $50,000 of innocent loss.[87] If set-off is not applied, the $100,000 of loss borne by *X* and *Y* is spread interpersonally through insurance among all those participating in the same or a similar activity. This pattern removes the socially dislocating economic effect which would occur if *X* and *Y* bear their own personally innocent damages; it transforms these damages, in effect, into enterprise liability. This is the preferred system of the two; each person participating in the enterprise bears a portion of the innocent losses.[88]

Calabresi for much of the terminology employed in this article; the author has attempted to apply Professor Calabresi's basic theses regarding secondary loss distribution to the pure comparative negligence model adopted in *Hoffman*.

87. For a description of how set-off is related to an unnecessary reduction in personally innocent damages, see text accompanying note 57 *supra*.

88. *See* Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 714 (1965).

III. CONTRIBUTION

A. The Rule Prohibiting Contribution

The substantive law of torts consists in large part of a body of rules upon which is based the decision to shift or apportion losses among persons involved in an injury causing incident. Fundamental doctrinal revision of these rules, as in *Hoffman*, requires attention not only to the element of a prima facie cause of action and, therefore, to the effects upon primary accident costs; such revision also requires attention to the efficiency of the resulting system in minimizing unnecessary financial loss. An effective system of tort law must include a set of rules by which the decision to shift tort losses may be made; the system should also incorporate the most economical and efficient method of loss allocation among the parties ultimately liable for those losses.

Historically, two parties actively involved in the legal cause of an injury were not required to share the consequences of liability for that injury.[89] In other words, there is no common law right to contribution among joint tortfeasors.[90] Florida followed the common law prohibition against contribution[91] but, at the same time, permitted

89. Remember that joint tortfeasors are jointly and severally liable to a successful claimant. The *claimant* has the right to execute his judgment against one or all of the joint tortfeasors in an amount fully equalling the claimant's judgment. At common law, a joint tortfeasor could not seek contribution from another joint tortfeasor for payment of a joint and several liability. However, it generally has been recognized that a surety could seek contribution from a co-surety for payment on an obligation, even though, unknown to each other, they became sureties on that obligation at different times. *See* Love v. Gibson, 2 Fla. 598, 618–19 (1849); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 135 (1932).

90. The rule prohibiting contribution among joint tortfeasors has been attributed to the English case, Merryweather v. Nixan, 101 Eng. Rep. 1337 (K.B. 1799). In *Merryweather*, two tortfeasors had earlier been sued in an action in which they were adjudged joint tortfeasors. The plaintiff in that action levied his entire judgment against one of the tortfeasors, who subsequently brought suit against his accomplice for "contribution of a moiety." The case was dismissed by the trial court. On appeal, the *Merryweather* court affirmed the dismissal. *See also* note 106 *infra*.

91. The rule prohibiting contribution among tortfeasors was accepted in Florida as an integral part of English common law. Florida became a territory of the United States in 1822; legislative power was vested in the Governor and in a Legislative Council. Act of Mar. 30, 1822, ch. 13, § 2, 3 Stat. 654. The Council passed an act adopting the English statutory and common law in effect prior to the fourth year of the reign of James I of England, Fla. Terr. Act of Sept. 2, 1822. James I took the throne on March 23, 1603. 12 ENCYCLOPAEDIA BRITANNICA, *James I*, 856, 857 (1967). Thus, the 1822 Florida Act adopted the English statutory and common law in effect prior to March 24, 1606, the beginning of James I's fourth year of reign. In 1823, however, the 1822 Florida Act was replaced by another which adopted the English statutory and common law in effect prior to July 4, 1776. Fla. Terr. Act of June 29, 1823 (repealed by Fla. Terr. Act of Nov. 23, 1828; reenacted by Fla. Terr. Act of Nov. 6, 1829). The law

"apportionment" of damages among tortfeasors in selected situations.

In an action against several defendants, once it is established that the acts of each defendant caused some damage, the further question of the extent of each defendant's liability must be answered. If the defendants acted in concert they are joint tortfeasors and will be held jointly and severally liable for the entire damage. If they did not act in concert, the Florida courts have traditionally examined the nature of the injury complained of to determine whether the defendants will be jointly and severally liable, or whether the damage caused the plaintiff will be severally apportioned among the tortfeasors.

In *Symmes v. Prairie Pebble Phosphate Co.*,[92] two defendants owned property upstream of the plaintiff's oyster bed. Acting separately, each defendant caused mud and refuse to be deposited in the river; this diverted the flow of water sufficiently to destroy the plaintiff's oyster bed. The plaintiff sued both defendants. The defendants demurred on the basis that there was no allegation of joint action and, therefore, that they could not be sued as joint tortfeasors. The lower court sustained the demurrer and, on appeal, the Supreme Court of Florida affirmed, stating:

> A joint tort is essential to the maintenance of a joint action for damages therefor against several parties. For separate and distinct wrongs in no wise connected by the ligament of a common purpose, actual or implied by law, the wrongdoers are liable only in separate actions and not jointly in the same action.[93]

Thus, in 1913 the Supreme Court of Florida recognized, for the first time, the doctrine of apportionment of damages among concurrent tortfeasors.[94] Although the recognition of this doctrine seemed to

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is now codified; it provides: "The common and statute laws of England which are of a general and not a local nature . . . down to the 4th day of July, 1776, are declared to be of force in this state . . . ." FLA. STAT. § 2.01 (1975).

If the rule against contribution among joint tortfeasors originated with Merryweather v. Nixan, 101 Eng. Rep. 1337 (K.B. 1799) (*see* note 90 *supra*), then the rule need not have become a part of the Florida common law; its acceptance may have been the result of judicial error. The *Merryweather* decision was rendered 23 years *after* July 4, 1776. It has been argued, however, that the rule prohibiting contribution actually originated with Battersey's Case, 124 Eng. Rep. 41 (C.P. 1623), and that *Merryweather* represents only the first clear enunciation of the rule. *See* Reath, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan*, 12 HARV. L. REV. 176, 176–77 (1898). Of course, this is of historical interest only; without question, Florida recognized the rule until the Florida Legislature adopted pro rata contribution in 1975. *See* note 131 and text accompanying note 133 *infra*.

92. 63 So. 1 (Fla. 1913).

93. *Id.* at 3.

94. *Accord*, Standard Phosphate Co. v. Lunn, 63 So. 429 (Fla. 1913).

leave open the possibility of complete abolition of the rule prohibiting contribution among joint tortfeasors, the court quickly ended such speculation the following year. In *Louisville & Nashville Railroad v. Allen*,[95] it explained that the doctrine of apportionment of damages among tortfeasors was limited to those situations where tortfeasors, not acting in concert, caused distinctly separate injuries to the plaintiff. The court alternatively limited the doctrine to those situations where a single injury is caused which is capable of division and whose cause is capable of attribution to a particular tortfeasor. In all other cases the tortfeasors would be jointly and severally liable.[96] The court accepted the following as a correct statement of the rule:

> [T]he rule under which parties become jointly liable as tort feasors extends beyond acts or omissions which are designedly co-operative, and beyond any relation between the wrongdoers. If their acts of negligence, however separate and distinct in themselves, are concurrent in producing the injury, their liability is joint as well as several. . . . Each becomes liable because of his neglect of duty, and they are jointly liable for the single injury inflicted because the acts or omissions of both have contributed to it.[97]

Where the negligence of two tortfeasors causes a single indivisible result, the tortfeasors are treated as joint tortfeasors and are jointly and severally liable. Apportionment lies only when multiple tortfeasors are found to be "concurrent" tortfeasors.

Concurrent tortfeasors are tortfeasors who do not act in concert and whose separate acts cause *severable* damage.[98] They are liable only for the damages which they have caused. Thus, when the successive negligence of two parties causes injury which is capable of division, each is held liable only for that portion of the damages caused by his own negligence.[99] The burden of proving that the plaintiff's injuries

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95. 65 So. 8 (Fla. 1914).

96. 65 So. at 12, *quoting* Brown v. Coxe Bros. & Co., 75 F. 689, 690 (C.C.E.D. Wis. 1896).

97. Brown v. Coxe Bros. & Co., 75 F. 689, 690 (C.C.E.D. Wis. 1896).

98. The rule has been stated as follows:

Damages for harm are to be apportioned among two or more causes where

(a) there are distinct harms, or

(b) there is a reasonable basis for determining the contribution of each cause to a single harm.

RESTATEMENT (SECOND) OF TORTS § 433A(1) (1965).

99. Alternatively, the tortfeasor may seek indemnity. In Stuart v. Hertz Corp., 302 So. 2d 187 (Fla. 4th Dist. Ct. App. 1974), the defendants were held liable for injuries to the plaintiff caused by an automobile accident and aggravation of injuries which the defendants claimed were caused by a treating physician's malpractice. The defendants

are capable of division and assignment by cause is upon the tortfeasors.[100] If the tortfeasors fail in their burden of proof, they are treated as joint tortfeasors and are jointly and severally liable. The issue of factual causation does not dictate which damages are apportionable. Rather, convenience, practicality, and administrative expedience dictate when the doctrine should be applied. If the injury caused to the plaintiff by multiple tortfeasors is capable of being split into constituent parts which may be easily attributed to individual tortfeasors, the doctrine is applied. Where this is not the case, the tortfeasors are treated as joint tortfeasors and each is held jointly and severally liable for the entire injury. Since the essential distinction between multiple tortfeasors and concurrent tortfeasors turns upon the practical possibilities of the division of damages and the attribution of discrete damages to a particular actor-tortfeasor, the jury in an action in which the tortfeasors seek apportionment is required to find that the damages caused by the tortfeasors are subject to attribution by cause among them.[101] Under apportionment, the plaintiff is awarded individual judgments against each tortfeasor for the amount of the plaintiff's injury which the jury finds was caused by that tortfeasor. When the claimant receives indivisible injuries through the acts of multiple parties, such distribution is impossible and the tortfeasors are jointly and severally liable. An Illinois court stated the rationale for this rule as follows: " 'When the contributory action of all accomplishes a

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filed a third party complaint against the physician, seeking indemnification from him of the amount of damages for which they were held liable as a result of the physician's aggravation of the plaintiff's injuries. In granting the defendants the right to indemnity, the appellate court stated that there was no right to contribution among tortfeasors. *Id.* at 190. The court continued:

> [A] tort feasor initially causing an injury has the right to seek indemnification against the physician for aggravating injury in the course of treatment. Recognition of this principle (whether denominated as an exception upon or limitation to the no contribution rule) is consistent with (having little difference in character and quality from) the so-called "active-passive" negligence exception and the so-called "duty" exception previously recognized by the courts of this state as a method of mitigating the "inflexible rule against contribution".

Id. at 194 (footnote omitted). *See* note 104 *infra.*

100. *See* C.F. Hamblen, Inc. v. Owens, 172 So. 694 (Fla. 1937); Wise v. Carter, 119 So. 2d 40 (Fla. 1st Dist. Ct. App. 1960).

101. Thus, even though the defendants do not have a common design, or do not have a common duty, or are not guilty of the same acts of negligence, they will be treated as joint tortfeasors if a single indivisible injury results. Hudson v. Weiland, 8 So. 2d 37 (Fla. 1942); Randle-Eastern Ambulance Service, Inc. v. Millens, 294 So. 2d 38 (Fla. 3d Dist. Ct. App. 1974); *see also* Putnam Lumber Co. v. Berry, 2 So. 2d 133, 140 (Fla. 1941). And if a defendant's negligence combines with a vis major, the defendant will be liable for the entire injury unless the defendant can establish that a rational basis for division exists. *See, e.g.*, Wm. G. Roe & Co. v. Armour & Co., 414 F.2d 862 (5th Cir. 1969) (applying Florida law).

particular result, it is unimportant to the party injured that one contributed much to the injury, and another little; the one least guilty is liable for all because he aided in accomplishing all.' "[102]

The foregoing statement contains the grain of rationality behind the traditional reluctance to endorse unlimited application of the doctrine of apportionment. Once the jury apportions the plaintiff's damages among multiple tortfeasors, the plaintiff receives individual judgments against each of the tortfeasors. Since the jury determines that each tortfeasor legally caused only that amount of damage, the tortfeasor cannot be legally held accountable for any of the plaintiff's damages in excess of that amount. Thus, the plaintiff must seek to execute his respective judgments individually against the various tortfeasors. And if the plaintiff cannot collect judgment against a particular tortfeasor, the innocently injured plaintiff must suffer the burden of this loss. No recourse is available against the other tortfeasors in any amount exceeding the apportioned share as found by the jury.

Although concurrent tortfeasors are only liable for the damages which the jury finds that they caused, in Florida joint tortfeasors (tortfeasors who act together or who cause a single indivisible result) are jointly and severally liable for the entire amount of the legally provable damages caused to the plaintiff through their combined fault. "The rule is . . . well settled that, if an injury be caused by the concurring negligence of two parties, either is liable to the injured party to the same extent as though it had been caused by his negligence alone."[103] Once the plaintiff receives a joint and several judgment against the tortfeasors, he may collect that full judgment once against any individual or any combination of the tortfeasors. The rule prohibiting contribution does not allow the tortfeasor who compensates the plaintiff to receive any court-enforced financial assistance from his co-tortfeasors. Once the plaintiff executes his judgment in full, any attempts at loss allocation among active co-tortfeasors are barred, whether the co-tortfeasors were parties to the action or not.[104]

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102. West Chicago St. R.R. v. Feldstein, 69 Ill. App. 36, 37 (1897), *quoting with approval* T. COOLEY, A TREATISE ON THE LAW OF TORTS 155 (2d ed. 1888).

103. H.E. Wolfe Const. Co. v. Ellison, 174 So. 594, 605 (Fla. 1936); *see* Nichols v. Rothkopf, 185 So. 725 (Fla. 1939).

104. Florida courts have long recognized the concept of implied indemnity; the doctrine permits a secondarily liable tortfeasor to receive full compensation from a primarily liable tortfeasor. *See, e.g.*, Seaboard Air Line Ry. v. American Dist. Elec. Protective Co., 143 So. 316 (Fla. 1932); Westinghouse Elec. Corp. v. J.C. Penney Co., 166 So. 2d 211 (Fla. 1st Dist. Ct. App. 1964). Indemnity may arise out of an express contract or out of liability imposed by law. One court expressed the rule as follows:

> [Implied indemnity is permitted] when the active negligence of one tort-feasor and the passive negligence of another tort-feasor combine and proximately

The rule prohibiting contribution among joint tortfeasors has been criticized extensively on the basis that it is unfair or unsound social policy.[105] The rule does not facilitate reduction of primary accident costs. And it has a definitely detrimental effect upon loss transference once the primary accident cost reduction feature has been exhausted.

B. Rules Allowing Contribution

Any rule of contribution begins to operate procedurally only upon the happening of two events: (1) a jury determination that the tortfeasors are liable for the injuries caused by their conduct, and (2) a tortfeasor's payment of more than the legal share of his liability to the plaintiff. Loss *avoidance*—primary accident cost reduction—is effected by application of the rules of tort liability. A system of contribution, however, purports to effect loss *transference*—the shifting of the secondary costs of the fault system.

The plaintiff controls the litigation; if he sues only one of multiple tortfeasors, the chosen defendant has no recourse against his co-

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> cause an injury to a third person. . . . In such case, the passively negligent tortfeasor, who is compelled to pay damages to the injured person on account of the injury, is entitled to indemnity from the actively negligent tort-feasor.

Hunsucker v. High Point Bending & Chair Co., 75 S.E.2d 768, 771 (N.C. 1953), *quoted with approval in* Winn-Dixie Stores, Inc. v. Fellows, 153 So. 2d 45, 49 (Fla. 1st Dist. Ct. App. 1963). However, implied indemnification shifts the entire burden of loss from one tortfeasor to another and does not allocate losses among multiple tortfeasors. The triggering mechanism for such loss shifting generally revolves around classification of tortfeasors as active-passive or as primary-secondary. No loss allocation is possible between active tortfeasors through the vehicle of implied indemnification. *But see* Stuart v. Hertz Corp., 302 So. 2d 187 (Fla. 4th Dist. Ct. App. 1974) discussed in note 99 *supra*.

105. *See generally*, C. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS (1936); Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 CORNELL L.Q. 552 (1936); Furnish, *Distributing Tort Liability: Contribution and Indemnity in Iowa*, 52 IOWA L. REV. 31 (1966); Gregory, *Contribution Among Tortfeasors: A Uniform Practice*, 1938 WIS. L. REV. 365; Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932); Turck, *Contribution Between Tortfeasors in American and German Law—A Comparative Study*, 41 TULANE L. REV. 1 (1966); Note, *Toward A Workable Rule of Contribution in the Federal Courts*, 65 COLUM. L. REV. 123 (1965); Comment, *Contribution Among Tortfeasors: The Need for Clarification*, 8 J. MAR. J. OF PRAC. & PROC. 75 (1974); Comment, *The Rule in Merryweather v. Nixan*, 17 LAW Q. REV. 293 (1901); Note, *Recent Developments in Tortfeasor Contribution in Illinois*, 5 LOY. CHI. L.J. 496 (1974); Comment, *Contribution Between Joint Tort-feasors in Wisconsin*, 43 MARQ. L. REV. 102 (1959); Comment, *Contribution Among Joint Tortfeasors*, 44 TEX. L. REV. 326 (1965). The rule's defense by Professor Fleming James sparked a sprightly debate between Professor James and Professor Charles Gregory. *See* James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941); Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 HARV. L. REV. 1170 (1941); James, *Replication*, 54 HARV. L. REV. 1178 (1941); Gregory, *Rejoinder*, 54 HARV. L. REV. 1184 (1941).

tortfeasors unless a rule of contribution applies. Similarly, even if the plaintiff does sue more than one of multiple tortfeasors, once those tortfeasors have been adjudged liable, the plaintiff may execute his entire judgment against only one of them. Of course, the plaintiff will normally be guided by expediency in the collection of a judgment rather than by an attempt to do rough justice among tortfeasors. Indeed, the liability of many tortfeasors is predicated upon rules of negligence which assume no moral culpability beyond that of negligence. In a jurisdiction which prohibits contribution among tortfeasors, the deterrent effect which the fault system purportedly has upon tortfeasors is vitiated by the probability that only one tortfeasor will be assessed full liability for injuries caused by all. Since a rule of contribution necessarily implies a sharing of common liability among solvent tortfeasors, all liable tortfeasors will be held financially responsible for the injuries caused by their tortious conduct. Such a rule enhances rather than detracts from primary cost reduction. Assuming that liability for fault-caused injuries acts as a deterrent, the *certainty* of *some* liability is a more effective deterrent than the *possibility* of *full* liability or *no* liability. Unlike apportionment, when contribution applies, any risk of loss falls upon the tortfeasor who pays more than his share of liability to the plaintiff; risk of loss does not fall on the injured party. A rule of contribution imposes the burden of loss for an indigent tortfeasor upon a co-tortfeasor who must affirmatively seek recoupment from his co-tortfeasors—not upon the injured party attempting to collect compensation for his personally innocent damages.

In addition to transference of such secondary costs among joint tortfeasors, a system of contribution has a second positive feature: shared financial responsibility for a common legal liability. Allocation of tort damages among all parties participating in the enterprise insures that the effects of substantial legal liability are interpersonally spread. Once the proscribed conduct is described and the party made to account for his conduct, the deterrent aspects of the fault system are satisfied. There is no further justification for insisting upon additional economic dislocation to a tortfeasor; commission of a tort does not entail moral culpability necessitating punishment.[106]

106. If the acts committed are sufficiently heinous to warrant a punishment, a legislative decision to criminalize this conduct should be made. But the presence and, in some cases, the legal necessity of liability insurance for certain areas of conduct indicates a policy decision that a deterrent system of interpersonal and intertemporal loss allocation is sufficient for most areas of conduct.

Interestingly, the rule prohibiting contribution among joint tortfeasors was originally applied against joint tortfeasors who committed *intentional* torts. *See* Merryweather v.

By 1975 over thirty state jurisdictions and the District of Columbia had abandoned the rule prohibiting contribution.[107] In Florida, how-

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Nixan, 101 Eng. Rep. 1337 (K.B. 1799), *summarized in* note 90 *supra*. But the rule prohibiting contribution cannot be an effective deterrent against intentional tortious action unless the tortfeasor is aware of the rule. He then knows that the plaintiff may collect his entire judgment from any of the joint tortfeasors. He also knows that the tortfeasor from whom the plaintiff seeks compensation will bear the full burden of the loss without recourse to his co-tortfeasors. That may act as a deterrent.

Of course, if an intentional joint tortfeasor knows of the rule prohibiting contribution, he also knows that the plaintiff may not attempt to collect a judgment from him at all. The joint tortfeasor knows that he will not be forced to make any payment if the plaintiff collects judgment from a co-tortfeasor. Thus, the intentional joint tortfeasor may gamble that he will not incur any liability.

But if contribution among tortfeasors is permitted, an intentional joint tortfeasor would know that he will be responsible for some portion of the plaintiff's damages. A rule permitting contribution may serve as more of a deterrent to an intentional tortfeasor than a rule prohibiting contribution. *See generally* Jones, *Contribution Among Tortfeasors*, 11 U. FLA. L. REV. 175, 180–81 (1958); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 133–34 (1932).

As with deterrence, the possibility that the intentional joint tortfeasor might avoid any liability renders the damages assessment of little effect as punishment for tortious conduct. This is especially true since the plaintiff's attorney is more interested in collecting a judgment than in assessing moral guilt among joint tortfeasors.

One commentator has suggested that there are two reasons for the existence of the rule denying contribution among tortfeasors: (1) to punish past conduct and therefore deter future misconduct on the part of wrongdoers; and (2) to prevent expenditure of valuable court time in the resolution of disputes among wrongdoers. Leflar, *supra* at 133–34. Thus, at base, the real reason for prohibiting contribution among intentional tortfeasors may be expressed *ex turpi causa non oritur actio*: "Out of a base . . . consideration, an action does . . . not arise." BLACK'S LAW DICTIONARY 663 (4th ed. 1951). *See generally* Leflar, *supra* at 130; *see also* H. BROOM, A SELECTION OF LEGAL MAXIMS 464–65.

107. The pro rata contribution pattern of the Uniform Contribution Among Tortfeasors Act has served as a model for a number of state contribution statutes. For examples, see ALASKA STAT. §§ 09.16.010–.060 (1962); CALIF. CIV. PROC. CODE §§ 875–880 (West Supp. 1976); MD. ANN. CODE art. 50, § 17 (1957); MASS. GEN. LAWS ANN. ch. 231B (West Supp. 1976–77); MICH. COMP. LAWS ANN. §§ 600.2925a–.2925d (West Supp. 1976–77); NEV. REV. STAT. §§ 17.215–.325 (1973); N.J. STAT. ANN. § 2A:53A–1 to –5 (West 1952); N.C. GEN. STAT. § 1B–1 to 1B–8 (1969); PA. STAT. ANN. tit. 12, §§ 2082–2089 (Purdon 1967); R.I. GEN. LAWS § 10–6–1 to –11 (1956); TENN. CODE ANN. §§ 23–3101 to –3106 (Cum. Supp. 1975). A few jurisdictions have implemented schemes of pro rata contribution judicially rather than legislatively. *See* Knell v. Feltman, 174 F.2d 662 (D.C. Cir. 1949); Best v. Yerkes, 77 N.W.2d 23 (Iowa 1956); Scammon v. City of Saco, 247 A.2d 108 (Me. 1968); Royal Indem. Co. v. Aetna Cas. & Sur. Co., 229 N.W.2d 183 (Neb. 1975).

But some states, including Florida, employ some form of proportional contribution based upon degrees of fault. The Arkansas and Idaho statutes provide:

> When there is such disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares solely for the purpose of determining their rights of contribution among themselves, each remaining severally liable to the injured person for the whole injury as at common law.

ARK. STAT. ANN. § 34–1002(4) (1962); IDAHO CODE § 6–803(3) (Cum. Supp. 1975); *see*

ever, challenges to the rule prohibiting contribution were met with frustration until the continued vitality of the rule was questioned by the petitioner and amicus curiae in *Hoffman v. Jones*.[108] Following *Hoffman*, one federal judge predicted: "[Adoption of pure comparative negligence] dictates the abolishment of the equally harsh rule of no contribution among active tortfeasors. This Court feels confident that the Supreme Court of Florida would agree."[109] The Florida district courts of appeal, however, exercised considerable restraint in deciding whether the doctrine of comparative negligence was inconsistent with the rule prohibiting contribution among tortfeasors.[110] Since the Supreme Court of Florida reserved decision until the issue was ripe,[111] the reluctance of the district courts of appeal was most likely due to the *Hoffman* court's strong admonitory language prohibiting the district courts from overruling controlling supreme court decisions.[112]

Finally, in *Lincenberg v. Issen*,[113] the Supreme Court of Florida squarely faced, as a necessary corollary to its adoption of pure comparative negligence, the question of adopting some form of contribution or of abandoning joint and several liability and permitting apportion-

DEL. CODE tit. 10, § 6302(d) (1974); HAW. REV. STAT. § 663–12 (Supp. 1975). Other states which have proportional contribution based on degrees of fault employ slightly different language. *See* MINN. STAT. ANN. § 604.01(1) (West Supp. 1977) (contribution shall be "in proportion to the percentage of negligence attributable to each"); N.Y. CIV. PRAC. LAW § 1402 (McKinney Cum. Supp. 1976–77) ("equitable shares shall be determined in accordance with the relative culpability of each person liable for contribution"); OR. REV. STAT. § 18.445(1) (1975) ("proportional shares of tortfeasors in the entire liability shall be based upon their relative degrees of fault or responsibility"). While Florida once followed the pro rata contribution pattern of the Uniform Contribution Among Tortfeasors Act, it now follows a proportional scheme of contribution based on fault. FLA. STAT. § 768.31(3)(a) (Supp. 1976) (amending FLA. STAT. § 768.31(3)(a) (1975)); *see* note 131 and text accompanying note 133 *infra*.

108. 280 So. 2d 431 (Fla. 1973). *See* note 3 *supra*.

109. Tampa Elec. Co. v. Stone & Webster Eng'r Corp., 367 F. Supp. 27, 37 (M.D. Fla. 1973). *See also* Ward v. Ochoa, 284 So. 2d 385, 388 (Fla. 1973) (Dekle, J., concurring specially), in which Justice Dekle advocated discontinuance of the rule prohibiting contribution among tortfeasors.

110. In every case, the district courts of appeal refused to abandon the rule prohibiting contribution among tortfeasors. *See* Acevedo v. Acosta, 296 So. 2d 526, 528–29 (Fla. 3d Dist. Ct. App. 1974) (recognizing rule prohibiting contribution); Maybarduk v. Bustamante, 294 So. 2d 374, 378 (Fla. 4th Dist. Ct. App. 1974) (suggesting that the *Hoffman* court did not intend to alter the rule prohibiting contribution); Rader v. Variety Children's Hosp., 293 So. 2d 778, 779–80 (Fla. 3d Dist. Ct. App. 1974) (refusing to abrogate rule prohibiting contribution); Issen v. Lincenberg, 293 So. 2d 777, 778 (Fla. 3d Dist. Ct. App. 1974), *rev'd*, 318 So. 2d 386 (Fla. 1975) (suggesting that the *Hoffman* court recognized the continued existence of the rule).

111. *See* note 3 *supra*.

112. The *Hoffman* court stated: "To allow a District Court of Appeal to overrule controlling precedent of this court would be to create chaos and uncertainty in the judicial forum, particularly at the trial level." 280 So. 2d at 434.

113. 318 So. 2d 386 (Fla. 1975), *rev'g* 293 So. 2d 777 (Fla. 3d Dist. Ct. App. 1974).

ment of damages among joint tortfeasors.[114] In *Issen*, the plaintiff, Minnie Issen, was a fault-free passenger injured in a two-car accident. The trial court submitted special interrogatories to the jury,[115] requesting that the jury determine the percentages of negligence attributable to Harry Lincenberg and Ronald Rhodes, the two drivers.[116] The jury fixed the plaintiff's damages at $20,000; it determined that Lincenberg was 15% negligent and that Rhodes was 85% negligent.[117] The trial court was uncertain whether it should enter judgment in full against both tortfeasors jointly and severally or whether it should enter judgment against the defendants in the percentages of negligence returned by the jury.[118]

The plaintiff urged the court to adopt a rule of apportionment.[119] Thus, the plaintiff wanted the court to enter two judgments: one against Lincenberg for $3,000[120] and one against Ronald and Eleanor Rhodes[121] for $17,000.[122] When the case reached the Third District Court of Appeal on a question certified by the trial court,[123] the district

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114. In *Issen*, the petitioner urged the court to *apportion* the plaintiff's damages according to the percentage of negligence attributed to each of two tortfeasors. 318 So. 2d at 389. For a discussion of the procedural differences between apportionment and contribution, see text accompanying notes 91–104 *supra*.

115. In *Hoffman*, the Supreme Court of Florida authorized the use of special verdicts to accomplish the purposes of pure comparative negligence. 280 So. 2d at 439. For an interesting discussion of the use of special verdicts in a modified comparative negligence jurisdiction, see Cadena, *Comparative Negligence and the Special Verdict*, 5 ST. MARY'S L.J. 688 (1974).

116. There were three defendants: Harry Lincenberg, the driver of the car in which the plaintiff was a passenger; Ronald Rhodes, the driver of the second car; and Eleanor Rhodes, the owner of the second car. 318 So. 2d at 387. While the jury attributed negligence to all three defendants, Eleanor Rhodes was only vicariously liable as the owner of the car driven by Ronald. *See* note 63 *supra*.

117. 318 So. 2d at 387–88.

118. 318 So. 2d at 388. Entry of separate judgments against each defendant according to the percentages of negligence returned by the jury is not to be confused with proportional contribution. If proportional contribution were applied, the court would enter one $20,000 judgment against Lincenberg and Rhodes jointly and severally. *After* one of the defendants paid the plaintiff more than his proportional share of the damages, the court would permit the defendants to allocate such payments between themselves. That is, if Lincenberg paid the plaintiff more than $3,000 (15% of $20,000), Lincenberg would be entitled to collect any amount exceeding $3,000 from Rhodes. If the plaintiff executed against Rhodes and Rhodes paid the $20,000 judgment in full, Rhodes would then be entitled to collect $3,000 from Lincenberg.

119. *See* note 114 *supra*.

120. 15% x $20,000 = $3,000.

121. *See* note 116 *supra*.

122. 85% x $20,000 = $17,000.

123. The trial court wanted the district court of appeal to determine the propriety of instructing the jury to apportion fault. 293 So. 2d at 778. *See* note 118 and accompanying text *supra*.

court declined to discontinue the rule prohibiting contribution.[124] The district court of appeal further stated that the doctrine of comparative negligence did not apply where the plaintiff was not contributorily negligent.[125] Thus, the joint tortfeasors remained jointly and severally liable.

The Supreme Court of Florida assumed jurisdiction of *Issen* on the ground that the district court decision conflicted with the supreme court's decision in *Hoffman*.[126] Assuming that the supreme court was prepared to expand the rules of loss allocation among joint tortfeasors, it had two primary options: it could have expanded the common law rules of apportionment, permitting damages in negligence actions to be apportioned among joint tortfeasors and judgments to be entered accordingly;[127] or it could have acquiesced in the legislature's model for contribution[128] and preserved the doctrine of joint and several liability among joint tortfeasors. Certainly, the court was fully prepared to abandon the archaic prohibition against contribution among joint tortfeasors. As Justice Roberts, writing for the majority, stated:

> 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. Courts in other states which have receded from the doctrine of no contribution have emphasized the unfairness and injustice of placing the entire burden upon the one who happens to be called upon to pay the entire damages where such payment should in justice be shared by another who shared the responsibility for the injury.[129]

The court acknowledged that it had considered several different models of loss allocation—including apportionment and proportional

124. 293 So. 2d at 778. *See* note 110 and accompanying text *supra*.

125. 293 So. 2d at 778. Because the plaintiff was not contributorily negligent, the district court disapproved the trial court's instruction to the jury to apportion liability according to the degrees of fault of the two joint tortfeasors. The doctrine of pure comparative negligence requires computation only of the plaintiff's degree of fault to determine his self-responsibility discount.

Recall the hypothetical posed in the text accompanying Tables 1 and 5 *supra*. Computation of three hypothetical parties' degrees of negligence can be justified in that each party is asserting an affirmative claim to which the doctrine of comparative negligence applies. The doctrine forces a percentage reduction in each party's amount of claimed damages.

126. Lincenberg v. Issen, 318 So. 2d 386, 387 (Fla. 1975).

127. The Vermont, New Hampshire, and Nevada statutes represent the clearest examples of this form of loss distribution. *See* notes 19–20 *supra*. The Vermont and New Hampshire statutes were considered by the *Issen* court. 318 So. 2d 392 n.2.

128. See note 131 and text accompanying note 133 *infra*.

129. 318 So. 2d at 391.

contribution.[130] But, while the case was pending in the supreme court, the Florida Legislature had adopted the pro rata contribution scheme of the Uniform Contribution Among Tortfeasors Act.[131] The court

130. 318 So. 2d at 392 & n.2. One justice suggested that the court could have ruled that the doctrine of pure comparative negligence required that the relative degrees of fault of joint tortfeasors be considered in assessing liability. *See* 318 So. 2d at 394 (Boyd, J., concurring specially). Although the rules of apportionment and proportional contribution may have different practical effects upon the plaintiff, both result in the same ultimate allocation of loss when the tortfeasors are solvent. Since a pro rata contribution model purports to achieve equality of loss sharing based upon enterprise participation, application of a multiple judgment scheme would circumvent, by permitting proportional loss allocation, the legislative intent in adopting pro rata contribution.

131. 1975 Fla. Laws ch. 75-108 (current version at FLA. STAT. § 768.31 (Supp. 1976)). *See* 318 So. 2d at 392. The law provided:

(1) SHORT TITLE.—This act shall be cited as the Uniform Contribution among Tortfeasors Act.

(2) RIGHT TO CONTRIBUTION.—

(a) Except as otherwise provided in this act, when two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.

(c) There is no right of contribution in favor of any tortfeasor who has intentionally (willfully or wantonly) caused or contributed to the injury or wrongful death.

(d) A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

(e) A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, is subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's pro rata share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.

(f) This act does not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

(g) This act shall not apply to breaches of trust or of other fiduciary obligation.

(3) 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; and

(c) Principles of equity applicable to contribution generally shall apply.

accepted the legislative scheme and quashed the decision of the Third District Court of Appeal. The concept of joint and several liability of joint tortfeasors was preserved.[132]

In 1976, the Florida Legislature abandoned the pro rata system of contribution which it had adopted in 1975, replacing it with a contribution system in which fault is the basis of allocation.[133]

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(4) ENFORCEMENT.—

(a) Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced by separate action.

(b) Where a judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action.

(c) If there is a judgment for the injury or wrongful death against the tortfeasor seeking contribution, any separate action by him to enforce contribution must be commenced within 1 year after the judgment has become final by lapse of time for appeal or after appellate review.

(d) If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, his right of contribution is barred unless he has either:

1. Discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment, or

2. Agreed while action is pending against him to discharge the common liability and has within 1 year after the agreement paid the liability and commenced his action for contribution.

(e) The recovery of a judgment for an injury or wrongful death against one tortfeasor does not of itself discharge the other tortfeasors from liability for the injury or wrongful death unless the judgment is satisfied. The satisfaction of the judgment does not impair any right of contribution.

(f) The judgment of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution.

(5) RELEASE OR COVENANT NOT TO SUE.—When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,

(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

(6) UNIFORMITY OF INTERPRETATION.—This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it.

132. 318 So. 2d at 392.

133. 1975 Fla. Laws ch. 75-108, § 1 (codified at FLA. STAT. § 768.31(3)(a) (1975)) was amended in the 1976 legislative session to provide: "Their relative degrees of fault shall be the basis for allocation of liability." 1976 Fla. Laws ch. 76-186, § 1

C. *Allocation Models*

The plaintiff in *Issen* postulated a system of apportionment, which was rejected. For a one-year period, Florida followed the pro rata contribution scheme of the Uniform Act. Florida now follows a fault-based proportional contribution system. The remainder of this article examines the effects of each of these models upon allocation of tort losses in Florida.

1. Apportionment and Fault-based Proportional Contribution— Recall the hypothetical posed in Table 1 and Table 5. Application of an apportionment model would result in the judgments computed in Table 11.

TABLE 11

A v. *B*

A's damages	$15,000
times *B*'s percentage of negligence	x 65%
A's judgment against *B*	$ 9,750
B's damages	$38,000
times *A*'s percentage of negligence	x 25%
B's judgment against *A*	$ 9,500

A v. *C*

A's damages	$15,000
times *C*'s percentage of negligence	x 10%
A's judgment against *C*	$ 1,500
C's damages	$ 6,000
times *A*'s percentage of negligence	x 25%
C's judgment against *A*	$ 1,500

B v. *C*

B's damages	$38,000
times *C*'s percentage of negligence	x 10%
B's judgment against *C*	$ 3,800

(codified at FLA. STAT. § 768.31(3)(a) (Supp. 1976)). The amendment took effect June 20, 1976, and applies to all actions filed or settled after the amendment became effective. 1976 Fla. Laws ch. 76-186, §§ 2-3. Thus, for one year Florida had the opportunity to operate under a pro rata system of contribution in which degrees of fault were not considered.

C's damages	$ 6,000
times *B*'s percentage of negligence	x 65%
C's judgment against *B*	$ 3,900

The results shown in Table 11 are dictated by the conclusion that the self-responsibility discount is the same as the fault-transferring factor.

The Table 11 results could be reached in two ways: (1) as advocated by the petitioner in *Issen*, the court could enter separate judgments against the parties in the amounts of the verdicts; or (2) the court could preserve joint and several liability and permit the tortfeasors to seek contribution in the proportions indicated.[134] The procedural aspects of these alternatives are different, but the results will be the same if all parties to the action are solvent.[135]

Note, though, that application of a proportional contribution or apportionment scheme dramatically alters the rights and liabilities of *A*, *B*, and *C* from the initial verdicts computed under pure comparative negligence. Table 12 shows the ultimate rights and liabilities of each party *absent* application of apportionment or contribution.

TABLE 12[136]

Judgments for *A*	$11,250
Judgments against *A*	$18,700

134. The latter method is that of Florida's fault contribution scheme. New York is the only other state to have adopted pure comparative negligence and a contribution statute which incorporates the presumption that the self-responsibility discount is the same as the fault-transferring factor. *See* N.Y. CIV. PRAC. LAW §§ 1402, 1411 (McKinney 1976).

135. The manner of loss allocation under the apportionment scheme requires entry of claimants' judgments against each of the tortfeasors. Ignoring the doctrine of set-off for the moment, six judgments would be entered as shown in Table 11.

Under a proportional contribution statute, since the doctrine of joint and several liability applies, only three judgments would be entered: judgment for *A* against *B* and *C* for $11,250; judgment for *B* against *A* and *C* for $13,300; judgment for *C* against *A* and *B* for $5,400. *See* notes 26–29 and Table 5 in accompanying text *supra*. But under the proportional scheme, the party paying more than his proportional share of the mutual liability would have an action over against his co-tortfeasor. Thus, if *C* paid *A* the entire liability of $11,250 owed to *A* by *B* and *C*, *C* would have the right to contribution of $9,750 from *B*.

In an apportionment scheme, since the plaintiff theoretically does not receive a judgment from a tortfeasor greater than the damages caused by that tortfeasor, the burden of a tortfeasor's possible insolvency falls upon the plaintiff. But, because the judgments are joint and several in a proportional contribution scheme, those burdens of loss fall upon the tortfeasors and not upon the claimants.

136. *See* notes 36–38 and accompanying text *supra*.

Judgments for *B*	$13,300
Judgments against *B*	$16,650
Judgments for *C*	$ 5,400
Judgments against *C*	$24,550

Table 13 shows the potential rights and liabilities of each party *after* application of an apportionment rule, assuming that each of the parties is financially solvent.[137]

TABLE 13

Judgments for *A*	$11,250[138]
Judgments against *A*	$11,000[139]
Judgments for *B*	$13,300[140]
Judgments against *B*	$13,650[141]
Judgments for *C*	$ 5,400[142]
Judgments against *C*	$ 5,300[143]

Application of this allocation model transfers "innocent" damages[144] of $29,950[145] from the persons suffering the damages to the persons responsible for causing the damages.

But if the doctrine of set-off, as initially interpreted by the Supreme Court of Florida in *Bournazian*[146] were applied, a radical alteration

137. Since an apportionment scheme imposes the risk of loss for an insolvent tortfeasor upon the claimant, the amounts collectible would be adversely affected by the presence of a liable but insolvent party. A contribution scheme imposes the risk of loss for an insolvent tortfeasor upon the tortfeasor seeking contribution; a tortfeasor's right to judicially enforce contribution is thus contingent upon the solvency of the other tortfeasors.

138. $9,750 (*A*'s judgment against *B*) + $1,500 (*A*'s judgment against *C*) = $11,250. See Table 11.

139. $9,500 (*B*'s judgment against *A*) + $1,500 (*C*'s judgment against *A*) = $11,000. See Table 11.

140. $9,500 (*B*'s judgment against *A*) + $3,800 (*B*'s judgment against *C*) = $13,300. See Table 11.

141. $9,750 (*A*'s judgment against *B*) + $3,900 (*C*'s judgment against *B*) = $13,650. See Table 11.

142. $1,500 (*C*'s judgment against *A*) + $3,900 (*C*'s judgment against *B*) = $5,400. See Table 11.

143. $1,500 (*A*'s judgment against *C*) + $3,800 (*B*'s judgment against *C*) = $5,300. See Table 11.

144. Recall that innocent damages are determined by reducing a claimant's total damages by his self-responsibility discount.

145. $11,250 (*A*'s innocent damages) + $13,300 (*B*'s innocent damages) + $5,400 (*C*'s innocent damages) = $29,950.

146. Bournazian opinion on rehearing, 342 So. 2d at 472–73, Appendix B at 125 *infra*.

of the above loss distribution would occur. The procedural dissimilarities between an apportionment scheme and fault-related, proportional contribution would create strangely divergent results. Injection of the set-off doctrine into an apportionment scheme, such as that advocated by the *Issen* plaintiff, *might* result in the loss pattern shown in Table 14.

TABLE 14

A v. *B*

A's damages	$15,000
times *B*'s percentage of negligence	x 65%
A's verdict against *B*	$ 9,750
B's damages	$38,000
times *A*'s percentage of negligence	x 25%
B's verdict against *A*	$9,500

Application of set-off requires that *B*'s smaller verdict of $9,500 be subtracted from *A*'s larger verdict of $9,750. *A* receives judgment for $250 against *B*.

A v.*C*

A's damages	$15,000
times *C*'s percentage of negligence	x 10%
A's verdict against *C*	$ 1,500
C's damages	$ 6,000
times *A*'s percentage of negligence	x 25%
C's verdict against *A*	$ 1,500

Application of set-off results in no affirmative judgment.

B v. *C*

B's damages	$38,000
times *C*'s percentage of negligence	x 10%
B's verdict against *C*	$ 3,800

For a discussion of the supreme court's application of set-off in the initial *Bournazian* opinion, *see* notes 72–79 and accompanying text *supra*.

C's damages	$ 6,000
times *B*'s percentage of negligence	x 65%
C's verdict against *B*	$ 3,900

Application of set-off requires that *B*'s smaller verdict of $3,800 be subtracted from *C*'s larger verdict of $3,900. *C* receives judgment for $100 against *B*.

Thus, although *A* suffers $11,250 innocent damages, *B* suffers $13,300 innocent damages, and *C* suffers $5,400 innocent damages, the court would award a $250 judgment for *A* against *B* and a $100 judgment for *C* against *B*. Total innocent damages of $29,950 were suffered, but only $350 is exchanged.

The apportionment model assumes that each tortfeasor will be liable only for the percentage of his fault to the total cause of the injuries. Because of this feature, the introduction of additional "tortfeasors" would be good litigation strategy. It may be assumed that, as the number of potential "tortfeasors" increases, the percentages of liability assessed against named tortfeasors would correspondingly decrease—perhaps in sufficient percentages to make the additional litigation costs worthwhile.

Injection of the set-off doctrine into a fault-based, proportional contribution scheme would yield even more perverse results. Setting off the common liabilities, a trial court could enter verdicts according to any of the three variations shown in Table 13. Thus, three judgment patterns emerge: $3,350 judgment for *A* against *B* and *C*; $7,450 judgment for *B* against *A* and *C*; or $3,350 judgment for *C* against *A* and *B*. Suppose the court awards judgment for *A* in the amount of $3,350. *A* may proceed to execute that judgment in full against *B* or *C*. If *A* collects from *C*, *C* has the right to seek contribution from *B*. And since *A*'s damages are already reduced by his self-responsibility discount, *B* and *C* will most likely be held, under the proportional contribution statute, to ratios of contribution identical to their ratios of negligence as found by the jury. Since *B* was found to be 65% negligent and *C* was found to be 10% negligent, *C* will be entitled to contribution in the ratio of 1 to 6.5. Thus, *C* will be entitled to receive $2,903.33 from *B* as contribution for the common liability of $3,350 satisfied by *C*. Similarly bizarre results would occur from the other judgment options available.[147] These formulations

147. If a $7,450 judgment is entered for *B* against *A* and *C*, and *B* collects from *A*, *A* has the right to seek contribution from *C*. Since *A* was found to be 25% negligent

represent a mathematical precision which masks the basic imprecision of tort law, and the formulations do nothing to change that inherent imprecision. Indeed, to the extent that they appear to be a scientific application of risk allocation based upon fault, the formulations prevent meaningful change.

The changing face of tort law, which may be seen in the movement from fault-based allocation of liability to allocation of liability based upon enterprise involvement, will create additional problems in a proportional contribution scheme. Since Florida's new contribution statute requires that fault be the basis of contribution, development of the most reasonable loss allocation system is stymied by the difficulties inherent in comparing the obligations of tortfeasors liable for non-negligent torts to the obligations of negligent tortfeasors whose negligent conduct contributes to the same injuries.

2. Pro Rata Contribution.—Under both the Uniform Contribution Among Tortfeasors Act and the new Florida contribution statute, an intentional tortfeasor may not seek contribution.[148] The Uniform Act, however, does permit loss distribution when the joint tortfeasors are liable under other theories. For example, in *Chamberlain v. Carborundum Co.*,[149] a federal court applying the Pennsylvania version of the Uniform Act[150] permitted a party held strictly liable to seek contribution from a negligent tortfeasor. Proportional contribution does not automatically preclude the same result, but pro rata contribution among all parties liable for the same injury is a more efficient means of reaching that result. The pro rata scheme spreads liability in the most efficient manner among all tortfeasors involved in an injury-producing event. The scheme avoids inter-tort jurisdictional litigation over degrees of fault in subsequent contribution actions involving both fault and nonfault based liabilities.

There is more than operational efficiency to recommend pro rata contribution among jointly and severally liable parties. Further examination of the philosophical foundations of the various allocation models will show the relevance of the maxim "equality is equity."

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and *C* was found to be 10% negligent, their ratios of contribution would be 2.5 to 1. *C* would be liable to *A* for $2,128.57 in contribution.

If the court enters a $3,350 judgment for *C* against *A* and *B*, and *C* collects from *A*, *A* has the right to seek contribution from *B*. Since *A* was found to be 25% negligent and *B* was found to be 65% negligent, the ratios of contribution would be 2.5 to 6.5. *B* would be liable to *A* for $2,419.44 in contribution.

148. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(c); FLA. STAT. § 768.31(2)(c) (Supp. 1976). For a discussion of the application of contribution and no-contribution rules to intentional tortfeasors, see note 106 *supra*.

149. 485 F.2d 31 (3d Cir. 1973).

150. PA. STAT. ANN. tit. 12, §§ 2082–2089 (Purdon 1967).

Under both Florida's proportional contribution statute and the apportionment method proposed by the plaintiff in *Issen*, the parties of the Table 1/Table 5 hypothetical—absent application of set-off—are liable in the following amounts: *A*'s total liability is $11,000, *B*'s is $13,650, and *C*'s is $5,300.[151] The percentages of undifferentiated negligence of the parties can be stated in ratios as follows: *A* to *B* to *C* = 25% to 65% to 10% = 2.5 to 6.5 to 1. Note, however, that the proportional negligence procedure requires that the individual parties contribute to the total *compensable* damages in ratios different from the ratios of negligence. Table 15 shows the ratios of contribution to the total liability fund absent application of set-off.

TABLE 15

A to *B*	$11,000 to $13,650
A to *C*	$11,000 to $ 5,300
B to *C*	$13,650 to $ 5,300

Thus, *A* and *B* profit at *C*'s expense (in large part because of the fortuitous circumstance of *C*'s relatively low damages even though *C* was by far the least negligent). That the respective contributions of *A*, *B*, and *C* are not in the ratios of 2.5 to 6.5 to 1[152] indicates a

151. See Table 13.

It should be noted that the *Bournazian* court, on rehearing, did not totally abandon the doctrine of set-off. Set-off still applies to the extent that two parties receive verdicts for losses which each caused the other for uninsured liabilities. 342 So. 2d at 473–74, Appendix B at 126–27 *infra*. Thus, set-off would apply in order to reduce the burden and cost of an unnecessary exchange of money between parties, none of whom had attempted to spread losses through the expedience of insurance. *Id.*, at 474, Appendix B at 127 *infra*.

Interestingly, if only one party to an automobile accident had liability insurance, that party would be entitled to receive compensation under his uninsured motorists coverage for his innocent damages caused by an uninsured motorist. The uninsured party who claimed damages from the insured party would be entitled to collect from the insured party's insurance carrier under the liability provision. Thus, one party's liability insurance carrier would pay for all innocent injuries arising from the accident, regardless of the insured's fault. Of course, the insurance carrier would be subrogated to its insured's claim against the uninsured party (for whatever value that may have).

152. If each party's self-caused damages are also injected into the equation, the ratios *are* 2.5 to 6.5 to 1. The subject in the text, however, is contributions to the liability fund from which payments will be made to the other parties. For this purpose, the fault aspect of the pure comparative negligence rule, which came into play for the purpose of effecting the self-responsibility discount and computing the net innocent damages, offers some incongruous results. It should not be considered for purposes of computing contribution payment which is concerned with purely economic loss. Since provable damages consist in large part of non-economic loss which is nonetheless compensable *from* a tortfeasor, these figures may be abstracted from the "payments *to*"

basic error in the procedure followed. The ratios of contribution are based on the faulty premise that the initial percentages of liability permit the conclusion that *B* was 6.5 times as negligent as *C* with respect to *A*. But their ratios of liability are not in the same proportions because of the fortuity of the amount of damage caused to each of the parties.[153] It is doubtful that a jury would have intended this result. The ratios shown in Table 15 are the ratios of each party's liability under a proportional scheme. It is evident that these ratios do not represent *total* provable damages. They do, however, represent the total amount of the parties' liabilities to each other. If this method of loss allocation is justified at all, it is justified by its claim to be an expression of the jury's intent in computing the parties' degrees of negligence. The unstated assumption behind the rationale for this system of loss allocation is that the jury's determination was also intended to compute the degrees of liability. Innocent damages of $29,950, however, remain to be paid in proportions entirely inconsistent with the percentages of negligence computed by the jury. This occurs due to the truly accidental nature of damages. It is certainly no fault of *C* that *A*, who was more at fault, suffered damages greatly in excess of those suffered by *C*; and this "no-fault" aspect of the rule cannot be ignored.

For these reasons, the apportionment and proportional contribution schemes do not effect the *Hoffman* court's intent in adopting pure comparative negligence or a jury's intent in computing the percentages of negligence. Pure comparative negligence requires that the percentages of negligence be computed in order to assess the self-responsibility discount for each party claimant. These percentages are applied against the claimant's provable damages in order to compute the claimant's total "innocent" damages. Transference of the residual amount of the innocent damages derives from a second aspect of the rule of pure comparative negligence grounded in absolute liability.[154]

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table (Table 15). A tortfeasor liable to a claimant on a judgment will find little consolation in knowing he is compensating the claimant for non-economic loss.

153. Ratios of *total* damages (not reduced by self-responsibility discounts), however, would equal the ratios computed by the jury. The reduction in the parties' damages matched by their liability to a claimant would permit such ratios to be developed. The invalidity of this method of loss allocation is not expressly related to its essential inability to give expression to the jury's intent, but to its inefficiency as a method of loss allocation among parties liable *for* damages because of the inclusion in this calculus of non-compensated damages.

154. The principle underlying pure comparative negligence was stated by the *Hoffman* court in a conjunctive form which is misleading and ultimately indefensible as inconsistent with the basic equitable nature of the rule. The court stated that "the

Although this analysis may appear to represent a patent misreading of the pure comparative negligence rule,[155] the *Hoffman* court frankly acknowledged that the quantum of damages suffered by a claimant in an injury-producing event may be truly accidental and totally unrelated to the claimant's degree of fault.[156] This rather obvious fact lies at the equitable foundation of the pure comparative negligence doctrine's reluctant acceptance that a party who is only 10% at fault may have to pay a judgment to someone who is 90% at fault.[157] It is no fault of the relatively blameless and uninjured defendant that, under the rule, any portion of the more severely negligent plaintiff's damages are transferable to him.[158] The pure comparative negligence rule, nevertheless, is sound in terms of public policy because the no-fault component of the risk is readily insurable

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jury should give the plaintiff only such an amount proportioned with his negligence and the negligence of the defendant." 280 So. 2d at 438. The *Hoffman* court also stated: "When 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 the other party." *Id.* at 437. The *Hoffman* court, however, was analyzing a two-party action in which both parties suffered damages. The quoted language, therefore, can be understood only in conjunction with the court's acceptance of the reciprocal relationship of causal fault in the two-party action. As the computations from Table 15 indicate, such reciprocity is not present in a multi-party action.

The inability of the *Hoffman* court to realize the absence of reciprocity in the multi-party action resulted in its incorrect adoption of the doctrine of set-off. *See* note 157 *infra*.

155. This author acknowledges that the issue of the pure comparative negligence doctrine has been briefed, argued, and decided as if it were totally grounded on the fault principle. The doctrine requires the determination of fault, however, only (1) for the computation of the claimant's self-responsibility discount to establish his "innocent" damages and (2) as a necessary precedent to the transfer of the claimant's "innocent" damages to a more blameworthy tortfeasor. Unless the transference is *effected* without regard to the degree of fault, it would be necessary to abandon the doctrine of joint and several liability and to properly instruct the jury as to the effect of its verdict.

156. 280 So. 2d 431, 439 (Fla. 1973).

157. This article does not analyze the wisdom of the pure comparative negligence rule. The *Hoffman* court acknowledged the possibility that someone minimally at fault will be forced to compensate someone principally at fault:

> The liability of the defendant in such a case should not depend upon what damages he *suffered*, but upon what damages he *caused*. If a jury found that this defendant had been negligent and that his negligence, in relation to that of the plaintiff, was 20 per cent responsible for causing the accident then he should pay 20 per cent of the total damages, regardless of the fact that he has been fortunate enough to not be damaged personally.

280 So. 2d at 439. The assumption is that all damages are self-caused or caused by others. In a two-party situation, then, the determination of the percentage of the self-caused factor is a perfect measure of the percentage of the other-caused element of damages and constitutes a sound moral basis for loss shifting.

158. Of course, some causal negligence is necessary for the initial assessment of liability; the question will most likely be reduced to a "but for" causation analysis. *See* 280 So. 2d at 438.

and *should* be insured. Acceptance of the Hohfeldian relationship[159] of degrees of fault as perfect reciprocals forces the conclusion that all injury-causing factors are present—or the conclusion that one of the parties present must assume responsibility for a non-present cause.[160] Instructing the jury to compute the plaintiff's percentage of negligence imposes the financial responsibility for "phantom-caused" negligent damages on a defendant who is present but who may not be fully responsible.

Applying this bifold analysis to the multi-party, multi-damage action, the total percentage reduction in all damages suffered by the parties must likewise total 100% under the *Hoffman* rule. This effects a division as between the parties and effects a reduction in the parties' damages consistent with the jury's determination of their reciprocal percentages of fault. But since quantum of loss is unrelated to the percentage of damages, there is not necessarily a proportional reduction in the parties' liabilities to each other relative to the net innocent damages suffered.[161]

Absent a rational fault-based principle governing the division of the obligations of joint judgment debtors, the Florida Legislature initially adopted the straightforward pro rata contribution approach.[162] This approach does not fully implement the intent of pure comparative negligence; but it is efficient and is the most rational means of allocating joint tortfeasor liability.[163] Furthermore, while the doctrine of set-off would create problems in any scheme of loss distribution, a pro rata contribution scheme would offer some solutions if set-off applied. The loss distribution scheme of the initial Florida act and of the Uniform Contribution Among Tortfeasors Act, applied to the Table 1/Table 5 hypothetical, effects a transfer of liability more closely consistent with the no-fault aspect of pure comparative negligence. The pro rata scheme of the Uniform Act retains joint and

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159. *See generally* Hohfeld, *Some Fundamental Legal Conceptions As Applied In Judicial Reasoning*, 23 YALE L.J. 16 (1913).

160. The total percentage of negligence computed by the jury must equal 100. Because the jury is instructed to compute the *plaintiff*'s negligence, the defendant at bar is responsible for injuries caused by any unnamed "phantom" tortfeasors. *See* Gutierrez v. Murdock, 300 So. 2d 689 (Fla. 3d Dist. Ct. App. 1974), discussed in text accompanying notes 31–35 *supra*.

161. Total negligence is 100%, and total damages suffered is 100%. The percentage of negligence proportionately equals the reduction effected only where one party suffers damages or where all parties suffer damages in the same dollar amount.

162. As noted earlier, Florida followed the pro rata scheme for one year. *See* note 131 and text accompanying note 133 *supra*.

163. *See generally* George & Walkowiak, *Blame and Reparation in Pure Comparative Negligence: The Multi-Party Action*, 8 SW. U.L. REV. 1 (1976).

several liability, but permits the tortfeasors to share losses among themselves once liability has been established and once one tortfeasor has paid more than his pro rata share.[164] It is important to note that since the liability of the joint tortfeasors is initially joint and several, a claimant may collect judgment in full against any judgment debtor. Risk of loss for an insolvent joint tortfeasor in a normal action then falls upon the judgment debtors.[165]

Applying the pro rata scheme to the Table 1/Table 5 hypothetical, if *C* collected his entire judgment of $5,400 from *B*, *B* is entitled to recover $2,700 (the excess of *B*'s pro rata share) in contribution from *A*.[166] This is straightforward. But problems immediately arise, even in a pro rata system, upon application of set-off and the *Hoffman* court's requirement that there be a single judgment as between the parties. Thus, in a multiple action with three potential tortfeasors and three potential claimants, each entitled to a judgment and each subject to liability, application of the set-off doctrine might result in any of the variations shown in Table 16.[167]

TABLE 16

Variation 1

A's verdict of	$11,250
less *B*'s verdict of	13,300
B is entitled to	$ 2,050
C's verdict of	$ 5,400
less *B*'s unsatisfied	2,050
A or *B* pay *C*	$ 3,350

Assuming that the contribution statute is literally applied, if *C* collects his full judgment from either *A* or *B*, the paying party is entitled to pro rata contribution (1/2 of $3,350) from the non-paying party.

164. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(b).

165. Contrast this result with that reached under an apportionment scheme. *See* note 135 *supra*.

166. Likewise, if *A* collected his $11,250 judgment from *B*, *B* is entitled to recover one-half of that amount in contribution from *C*. And if *B* collects his $13,300 judgment from *C*, *C* is entitled to recover one-half of that amount in contribution from *A*.

167. Table 16 is derived from the Table 1/Table 5 hypothetical. A Table 16-type loss distribution pattern was initially imposed upon the *Bournazian* parties by the Supreme Court of Florida. *See text* accompanying notes 72–79 *supra*.

Variation 2

A's verdict of	$11,250
less *C*'s verdict of	5,400
A is entitled to	$ 5,850
B's verdict of	13,300
less *A*'s unsatisfied	5,850
A or *C* pay *B*	$ 7,450

Assuming that the contribution statute is literally applied, if *B* collects his full judgment from either *A* or *C*, the paying party is entitled to pro rata contribution (1/2 of $7,450) from the non-paying party.

Variation 3

B's verdict of	$13,300
less *C*'s verdict of	5,400
B is entitled to	$ 7,900
A's verdict of	$11,250
less *B*'s unsatisfied	7,900
B or *C* pay *A*	$ 3,350

Assuming that the contribution statute is literally applied, if *A* collects his full judgment from either *B* or *C*, the paying party is entitled to pro rata contribution (1/2 of $3,350) from the non-paying party.

"The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share . . . ."[168] Until a court interprets the quoted clause more consistently with the purposes of pure comparative negligence, it may be assumed that the right to receive contribution is contingent upon a distribution of cash.

Suppose, however, that the doctrine of set-off applies when the parties are insured—as it was applied by the Supreme Court of Florida in the original *Bournazian* decision. If set-off were interpreted as a court-imposed satisfaction of a legal liability, an insured might then look to his liability insurer for indemnification. The verdict rendered

168. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(b).

against a tortfeasor could be treated as a liability which must be satisfied by set-off. Unsatisfied damages would be collectible from the opposing party's liability insurer, and the amount of the verdict's set-off against liability would be reimbursed by the claimant's own liability insurer.[169] Thus, using Variation 1 of Table 16 as an example, the following scheme of loss distribution might evolve:[170] *A*'s liability insurer reimburses him for his innocent damages of $11,250 which were judicially set off against *B*'s judgment; *B*'s liability insurer reimburses him for his innocent damages of $13,300 which were judicially set off against *A*'s and *C*'s judgments; *C*'s liability insurer reimburses him for his innocent damages of $2,050 which were judicially set off against *B*'s judgment; *C* may then execute judgment against *A* or *B* for his remaining innocent damages of $3,350.[171] This approach would have the advantage of encouraging first-person coverage from the insured's own insurance company for the amount of damages set off by liability. In dramatic fashion, such an approach would illustrate yet another basic, but unfulfilled, nonfault aspect of the pure comparative negligence rule as a loss transference mechanism. Given the inherent problems of this indirect solution, however, it undoubtedly would have been unpalatable to the court which initially rejected the opportunity to frontally attack the loss distribution problem in *Bournazian*. Such a solution was rendered procedurally unnecessary when the court, on rehearing *Bournazian*, finally did confront one aspect of the loss distribution problem presented when the liability insurer for a tortfeasor is a named defendant.

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169. Most general liability policies provide that a liability insurance company has an obligation to pay for all the insureds' bodily injury or property damages *and* for all sums for which the insured becomes liable. The doctrine of set-off could be interpreted as requiring a liable insured to "pay" damages by excusing an opposing party's liability to him. It is a basic concept of liability insurance that the liability insurer will reimburse its insureds for the insureds' "covered expenditures."

170. Using Variation 2 from Table 16 as an example, the following scheme would emerge: *A*'s liability insurer would reimburse him for his innocent damages of $11,250 which were set off against *B*'s and *C*'s judgments; *C*'s liability insurer would reimburse him for his innocent damages which were set off against *A*'s judgment; *B*'s liability insurer would reimburse him for the $5,850 set-off against *A*'s judgment; *B* may then execute judgment against *A* or *C* for his unsatisfied innocent damages of $7,450. Using Variation 3 of Table 16 as an example, the following scheme would emerge: *B*'s liability insurer would reimburse him for the $13,300 set-off against *A*'s and *C*'s judgments; *C*'s liability insurer would reimburse him for the $5,400 set-off against *B*'s judgment; *A*'s liability insurer would reimburse him for the $7,900 set-off against *B*'s judgment; *A* may then execute against *B* or *C* for his remaining innocent damages of $3,350. *See* note 171 *infra*.

171. There is no conflict with the insureds' duty to cooperate, as set-off is imposed by the court.

CONCLUSION

The *Hoffman* court willingly accepted the burden of fashioning a more equitable basis for distributing losses suffered in accidents. Implicit in the *Hoffman* decision is the conclusion that loss shifting through loss sharing is a more efficient and just economic system than retention of the all-or-nothing approach of the contributory negligence rule. While the Florida Legislature also attempted to breathe life into an antiquated system of secondary loss allocation, the adoption of fault-based contribution principles serves only to frustrate the *Hoffman* court's noble experiment in common law adjustment of parties' rights. And as *Bournazian* illustrates, the doctrine of set-off is incompatible with the equitable foundation of the pure comparative negligence rule. Fortunately, the Supreme Court of Florida partially recognized the inadequacies of the system of loss allocation created by its initial *Bournazian* decision. On rehearing, the court abandoned the concept of set-off to the extent that insurance covers parties' mutual liabilities. The economic effect, however, is the same—as between two parties insured against liability. The innocent losses are interpersonally spread through the preferred loss distributor without being subject to a second unnecessary reduction. The disadvantage is that such a system, while in the guise of a radical new approach to loss allocation, does little to alleviate the problems of the costs of secondary loss distribution. The decision on rehearing continued the inexorable trend toward total insurability of injuries. Nevertheless, there will be a realization of the further inadequacies of the present fault-based system of loss allocation as fault-related litigation becomes more and more complex, and as increasingly large percentages of the insurance premium dollar are expended in secondary loss distribution under the pure comparative negligence/proportional contribution scheme. Realization of the inadequacies of the present system will accelerate the advent of pure, first-person, no-fault loss distribution of tort injuries based upon participation in an injury-causing enterprise.

APPENDICES

Both the *Bournazian* original opinion and the opinion on rehearing are included in the following appendices for the convenience of the reader.

APPENDIX A
Stuyvesant Insurance Co. v. Bournazian
Supreme Court of Florida
March 10, 1976
(WITHDRAWN AND SUPERSEDED)

ENGLAND, J.

This case was certified to us by the Second District Court of Appeal as posing a question of great public interest. We have jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution.

This action arose from an accident between an automobile owned and driven by Royce Bournazian and an automobile owned by Paul Riley and driven by his wife Betty. Royce Bournazian filed a personal injury suit against the Rileys and petitioner, the Rileys' automobile liability insurer. Mrs. Bournazian filed a derivative claim as a result of the injuries to her husband. Betty Riley counterclaimed against Royce Bournazian and his liability insurer (Allstate Insurance Company) for the injuries sustained by her, and Paul Riley filed a derivative claim against them for the injuries to his wife.

Separate jury verdicts were returned for each litigant on his or her claim. Royce Bournazian was awarded $8,500, and his wife $1,500, against both Rileys and their insurer. Betty Riley was awarded $19,000, and her husband $1,000, against Royce Bournazian and his insurer. The trial court aggregated the personal injury verdicts for both Bournazians and netted them against the aggregate awards for both Rileys, producing a net judgment of $10,000 for the Rileys. On appeal the district court reversed and awarded each verdict recipient the full amount of his or her individual award.[1] The effect of that opinion is to hold both insurance companies liable for the full amount assessed against their insureds.

Both the trial court and the district court attempted to apply the "set-off" theory which this Court announced in *Hoffman v. Jones*, 280 So.2d 431, 439 (Fla. 1973). Their difficulty in applying *Hoffman* stems from the fact that the decision there involved a significantly different fact situation. In *Hoffman*, both the plaintiff and defendant were individual, uninsured litigants. The set-off principle announced there for comparative negligence cases in Florida does not easily translate to cases which involve multiple parties and their insurers.

Our consideration of this problem begins with a recognition of the legal principle that the liability of the insurers in this case is derivative only, representing a responsibility to pay an amount first determined to be owed by another.[2] Applying that principle to this case requires that we first determine how much each individual owes,[3] and it is in that context that the *Hoffman* rationale of set-off can be usefully applied. Direct offsets can (and should) be applied whenever the identity of the parties permits. By that means, the net liability among individual parties can be calculated as follows:

(1) Royce Bournazian was found to be liable to Betty Riley for $19,000, and she was found to be liable to him for $8,500. As between them, he owes her $10,500.

(2) Royce was also found to be liable to Paul Riley for $1,000, but Paul was found

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1. Bournazian v. Stuyvesant Ins. Co., 303 So.2d 71 (2d Dist. Ct. App. Fla. 1974).

2. Section 624.605(b), FLA. STAT.

3. The fact that an injured person may proceed directly against the insurer as a third party beneficiary of the insurance contract, Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969), in no way elevates the carrier's responsibility to pay amounts for which the injured himself would not have been liable.

to be liable (along with Betty) to Royce for the $8,500 award. As between Paul and Royce, it would appear that Paul would owe Royce $7,500. Paul's liability is joint with Betty, however, and as such it would be subject to discharge by her payment or satisfaction. Since payment of the entire $8,500 was discharged by Betty's and Royce's offsetting judgments, it follows that Paul is entitled to receive $1,000 from Royce because there is nothing left of the $8,500 to offset that award.

(3) Linda Bournazian is owed $1,500 by Paul and Betty Riley jointly, without any offsetting liability by her to them.

By identifying the liability of the individuals in this manner, a determination of the derivative liability of the insurers becomes mechanical. It follows from the primary determination of liability that the Rileys' insurer should pay $1,500 to Linda Bournazian and that Royce Bournazian's insurer should pay $10,500 to Betty Riley and $1,000 to Paul Riley.[4] After these cash payments have been made, the jury verdicts will have been accurately and fully reflected in the combined dollar and "offset" transfers. Royce Bournazian will have "received" the $8,500 he was awarded, in the form of a partial discharge of his dollar obligation to Betty Riley. Linda Bournazian will have received in cash her exact jury award. Betty Riley will have "received" $19,000, $10,500 in cash and another $8,500 in the form of a complete discharge of her dollar obligation to Royce Bournazian. Paul Riley will have received his jury award of $1,000 in cash.

Viewed another way, the dollar effect of these transfers requires the insurance carriers to pay only $13,000 in claims.[5] That sum is precisely the net amount of the mutual liabilities of the parties who are obliged to each other, either jointly or individually, by the jury awards.

The decision of the Second District Court of Appeal is quashed and the case is remanded for further proceedings consistent with this opinion.

HATCHETT, J.; and MORPHONIOS, Circuit Court Judge, Concur
ALDERMAN, Circuit Court Judge, Concurs with an opinion
ADKINS, J., Dissents with an opinion, with which ROBERTS, Acting Chief Justice, Concurs

James E. Alderman, Circuit Judge, concurring:

I concur with the majority opinion by Justice England, however I wish to make these additional observations.

The view of the dissenting opinion is that liability insurance carriers should not be allowed to use the set-off principle to reduce their liability because this is not a "socially desirable method of loss distribution." Perhaps this is true and maybe there are better methods, but I question whether the court is in the best position to make that determination.

It is suggested that on the basis of public policy, we should nullify the provisions of liability insurance policies that make insurers responsible only for what their insureds are legally obligated to pay. Such judicial surgery, would, no doubt, have the effect of increasing the amount of liability payments by insurance companies. The persons receiving the extra payments certainly would benefit because they would receive more money than if they had sued uninsured persons, who in turn would have been able to set-off the amount of any counter-judgment. If insurance companies had inexhaustible sources of money, there would be no problem. Unfortunately, this is not the case. If they must pay out more than their individual insureds owe, then in the long run the costs of insurance will be higher. Ultimately, someone is going to have to pay this additional cost.

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4. Direct cash payments to these judgments creditors assures that each spouse will receive an amount which Florida law treats as his or her separate property. Section 708.08(1), FLA. STAT.

5. Under the trial court's view of set-off, the carriers would pay out $10,000, while under the district court's view they would pay out $30,000.

I believe Justice England has correctly stated the existing law of Florida. If that law should be changed because another method of loss distribution is more "socially desirable", then in my opinion, the change should be made by the people of Florida through their legislative representatives.

ADKINS, J., dissenting.

I must respectfully dissent from the majority opinion in this cause.

I concur with the District Court that liability insurance carriers should not be allowed to use the set-off principle announced in *Hoffman v. Jones* to reduce their liability. It was our hope that the result reached therein would create a more equitable system of determining liability and a more socially desirable method of loss distribution. The majority's decision in the case at bar distributing the loss from the shoulders of the parties' liability insurance carriers to the injured parties does not create a more socially desirable method of loss distribution.

It was entirely proper that the respective verdicts for the parties be set off. However, set-offs among the parties should not diminish the responsibility of the liability insurance carriers. For example, if a jury awards a plaintiff counter-defendant $8000 on the main claim and awards the defendant counter-plaintiff $8000 on the counterclaim, the respective verdicts should be set off. However, the liability insurance carrier for each party should still be responsible to the other party for $8000.00. In this way each party would be compensated for its injury from the liability carrier of the other party, with the liability carriers paying out $16000, the exact amount found by the jury to be owing. Under the holding of the majority, liability insurance carriers will escape liability, thereby profiting from the offsetting verdicts.

A person purchases automobile liability insurance coverage so that the insurer, and not the individual, will be financially responsible up to the policy limits for the damages caused by the individual. The fact that damages are owed to the individual by virtue of the negligence of a third party should not benefit the individual's liability insurance carrier, or reduce the amount of damages owed by the liability insurance carrier. If an insured has caused damages, those damages should be paid by the liability insurance carrier; whereas, if the insured is entitled to collect damages from a third party, such monies are owed to the insured and not to the liability insurance carrier.

As applied to the facts in the case at bar, under the majority's holding the insurers must pay out $13000.00. Under the holding of the District Court, with which I agree, the insurers must pay out $30000, the exact amount found by the jury to be owing. Thus under the facts in the instant case, the liability insurance carriers are provided with a windfall totalling $17000, and the injured parties are aggrieved to the tune of $17000.00.

In the words of Judge Grimes in the decision *sub judice*:

> "The only parties who profited from the offsetting verdicts were the two insurance companies. Had the Bournazians' claims been prosecuted in one suit and the Rileys' claims in another, both insurance carriers would have been liable for the total of the resulting verdicts. By reason of the claims being tied together, Stuyvesant was relieved from liability largely because of the serious nature of its insured's injuries and Allstate's liability was reduced for the same reason. Such a result flies in the face of the social desirability of providing automobile accident victims in Florida with reasonable access to liability insurance benefits. See Shingleton v. Bussey, Fla. 1969, 223 So.2d 713."

The majority attempts to justify its holding on "the legal principle that the liability of the insurers in this case is derivative only, representing a responsibility to pay an amount first determined to be owed by another." I agree with Judge Grimes' response *sub judice* to that principle:

> "This result does not violate the concept that the liability of the insured is a condition precedent to the liability of his insurer. The liability of the insureds

as reflected by the verdicts will be taken into account in the rendition of the judgments. For example, the liability of Paul to Royce established in this case was $8,500, which is exactly the amount that Paul's insurer will be obligated to pay. Royce's judgment against Paul will be reduced to $7,500 only because Royce had a corresponding liability of $1,000 to Paul. The fact that there were offsets among the parties does not diminish the responsibility of the liability insurance carriers. It must be remembered that in Florida, persons injured by reason of the negligence of an insured are third party beneficiaries of the insured's liability insurance contract. Shingleton v. Bussey, supra."

Addressing the question of contractual provisions in insurance policies which collide with considerations of public policy, Justice Ervin in *Shingleton v. Bussey, supra,* stated:

"It can hardly be disputed that motor vehicle liability insurance is a subject necessarily lending itself to regulation imposed by the State in the exercise of its police power. It is a subject affected with a public interest and its regulation in a multiple of ways for the protection of the general public has become of more and more importance in the passage of years and changing times. This being the case, it is not unreasonable to restrict or limit the effect of express contractual provisions where the same collide with those considerations which affect the interests of the public generally." p. 717

Accordingly, I would hold that where a set-off results in a judgment against the insurer for more than a judgment against its insured, an exception based on public policy should be carved out of the provisions in a liability insurance policy that an insurer is only responsible for sums for which a judgment has been entered against its insured, or for sums which the insured shall become legally obligated to pay. The rationale for such an exception being that the judgments would have been identical but for the set-off allowed to the insured and not to the insurer.

Although research has revealed no case dealing with the issue *sub judice,* commentators generally favor excluding insurers from the set-off process. Schwartz, *Pure Comparative Negligence in Action,* 34 ATL. L.J. 117 (1972); Flynn, *Comparative Negligence: The Debate,* 8 Trial 49 (May/June 1972); *Pure Comparative Negligence In Florida: A New Adventure In The Common Law,* 28 U. Miami L.REV. 737 (1974).

Based on the reasoning expressed herein, I would adopt the majority opinion of Judge Grimes of the District Court of Appeal as the opinion of this Court.

ROBERTS, Acting Chief Justice, Concurs

APPENDIX B

Stuyvesant Insurance Co. v. Bournazian
Supreme Court of Florida
December 16, 1976
ON REHEARING GRANTED

ENGLAND, J.

This case was certified to us by the Second District Court of Appeal as posing a question of great public interest. We accepted jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution, considered arguments and briefs, and rendered an opinion on March 10, 1976 from which two of six members of the Court dissented. On consideration of respondents' request for reconsideration we again heard oral argument. We now revisit our original opinion in its entirety.

This action arose from an accident between an automobile owned and driven by Royce Bournazian and an automobile owned by Paul Riley and driven by his wife Betty. Royce Bournazian filed a personal injury suit against the Rileys and Stuyvesant Insurance Company, the Rileys' automobile liability insurer. Mrs. Bournazian filed a derivative claim as a result of the injuries to her husband. Betty Riley counterclaimed against Royce Bournazian and his liability insurer (Allstate Insurance Company) for

the injuries sustained by her, and Paul Riley filed a derivative claim against them for the injuries to his wife.

Separate jury verdicts were returned for each litigant on his or her claim in a trial conducted under the doctrine of comparative negligence. Royce Bournazian was awarded $8,500, and his wife $1,500, against both Rileys and their insurer. Betty Riley was awarded $19,000, and her husband $1,000, against Royce Bournazian and his insurer. The trial court aggregated the personal injury verdicts for both Bournazians and netted them against the aggregate awards for both Rileys, producing a net judgment of $10,000 for the Rileys. On appeal the district court reversed and awarded each verdict recipient the full amount of his or her individual award.[1] The effect of that decision was to hold both insurance companies liable for the full amount assessed by the jury against their insureds, with no dollar off-sets between identical party-insureds. We now conclude that the result reached by the district court was correct.[2]

In our initial opinion we began with a recognition of the legal principle that the liability of the insurers in this case is derivative only, representing a responsibility to pay an amount first determined to be owed by another.[3] We then endeavored to determine how much each individual owed, and in doing so we held that the *Hoffman* principle of set-off should be applied when the identity of the parties would permit. As a result, we "netted" the individual liability of each party to the other before determining what the insurance company for each would pay, with the following results:

(1) Since Royce Bournazian was found to be liable to Betty Riley for $19,000, and she was found to be liable to him for $8,500, we found that the net amount he owed her was $10,500.

(2) Since Royce was found to be liable to Paul Riley for $1,000, and Paul was found to be liable (along with Betty) to Royce for the $8,500 award, we found that the net amount Paul would owe to Royce was $7,500. Because Paul's liability is joint with Betty, however, and therefore subject to discharge by her payment or satisfaction, we found that payment of the entire $8,500 was discharged by Betty's and Royce's offsetting judgments, so that on balance Paul was entitled to receive $1,000 from Royce.[4]

(3) Linda Bournazian was found to be entitled to $1,500 from Paul and Betty Riley jointly, without any offsetting liability by her to them.

By determining each insurer's liability after applying offsets between identical parties, the insurance carriers became obligated by our original decision to pay $13,000 in claims.

We are now persuaded that our original view as to the amount to be paid among the parties themselves was correct for the reasons announced in *Hoffman*, but that the

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1. Bournazian v. Stuyvesant Ins. Co., 303 So.2d 71 (Fla. 2d DCA 1974).

2. Both the trial court and the district court attempted to apply the "set-off" theory which this Court announced in Hoffman v. Jones, 280 So.2d 431, 439 (Fla. 1973). Their difficulty in applying *Hoffman* stems from the fact that the decision there involved a significantly different fact situation. Plaintiff and defendant there, both of whom were negligent, were the only parties to the litigation. The question of insurers' liability was not involved in the case.

3. Section 624.605(1)(b), Fla. Stat. (1975). The fact that an injured person may proceed directly against the insurer as a third party beneficiary of the insurance contract, Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969), in no way elevates the carrier's responsibility to pay amounts for which the insured himself would not have been liable.

4. In offsetting Royce Bournazian's $8,500 judgment against Betty Riley's $19,000 judgment, the positions of the Rileys in this lawsuit would in no way be undermined since we are not here concerned with a dispute between persons jointly liable as to the impact of the joint judgment on separate judgments in favor of each.

notion of set-off should have no effect on the contractual obligation of liability insurance carriers to pay the amounts for which their insureds are legally responsible. Stuyvesant argues that the amount legally owed by each party to the other is the net amount receivable after set-off has been applied, rather than the total amount awarded to each by a jury after comparing relative fault and damages. This restrictive view of "liability" is defective in a case tried under comparative negligence, however. The effect of set-off as an antecedent to payment by each insurer is to abrogate the parties' respective insurance contracts by providing an unwarranted second level of comparative recovery reductions—the jury's award being the first.

The term "set-off" as used in *Hoffman* was obviously applied in a non-technical sense. Under the common law, a defensive plea of set-off would not exist in the compulsory counterclaim situation which arises in every comparative negligence case.[5] In *Hoffman* we used the term "set-off" merely to explain to trial judges that they should enter a net judgment for the party predominantly prevailing in the particular lawsuit, just as is typically done in contract litigation where one party sues for failure to make payment and the other counterclaims for a failure to perform.[6] A net judgment would be entered in such cases even though separate jury verdicts for each party were generated from separate causes of action, the promises of the parties not being regarded as mutually dependent at common law.[7]

Hoffman established the principle of set-off as between injured parties liable to each other in order to avoid an unnecessary exchange of checks and the possibility of inequitable judgment executions. Set-off in comparative negligence cases, then, is no more than a mechanical device by which the court forces partial payment of an amount the jury has determined to be legally owing.

When the jury in this case fixed the dollar amounts owed by each party to the other, it had already reduced the full amount of each party's actual damages by his or her respective degree of responsibility for the accident. The verdicts resulting from trial determined the "legal liability" of each party for purposes of Section 624.605(1)(b), Fla. Stat. (1975).[8] It was at that point that the terms of each insurance contract brought into effect the duty of each liability insurer to pay what its insured owed.

Were we to hold that each insurance carrier could "recoup" its insured's financial liability to other parties, we would materially vary the terms of each liability insurance contract. For example, the jury here determined that Royce Bournazian was entitled to receive $8,500 from Betty Riley. If recoupment is allowed for the insurer to the extent of the $19,000 which Royce owed Betty, then (i) he would receive nothing from her carrier despite its contract liability to pay the amounts for which Betty became legally liable, and (ii) Betty would receive $10,500 from Royce's carrier despite

5. See, for example, Metropolitan Cas. Ins. Co. v. Walker, 151 Fla. 134, 9 So.2d 361 (1942). If "set-off" were used in the technical sense, unrelated liabilities could be used to reduce the insurer's contractual obligation. For example, if at the time of the accident, Linda Bournazian had been indebted to Betty Riley for $2,000 under a past due promissory note, Betty and Paul could "set-off" that debt against their new $1,500 liability to Linda. Not only would Linda go uncompensated for her loss in this accident, but the Riley's insurer would be fortuitously relieved of its contract responsibility to pay an amount for which the Rileys had been found liable in negligence and Betty would have lost the right to recover $1,500 of her $2,000 promissory note. *Hoffman* never contemplated such a result. The set-off notion there announced is obviously applicable only to the mutual legal obligations of two or more persons arising from a single tortious event.

6. See, for example, Ocean Ridge Dev. Corp. v. Quality Plastering, Inc., 247 So.2d 72 (Fla. 4th DCA 1971).

7. 3A A. CORBIN, CONTRACTS § 709 (1960).

8. In this section, "liability insurance" is defined as "insurance against legal liability . . . ."

its contract liability to pay *all* amounts for which he became legally liable. The effect of so holding would be tantamount to our requiring Royce to pay to Betty $8,500 of the $19,000 which Allstate had contracted to pay as a result of the accident. Nothing in *Hoffman*, the insurance laws, or the public policy of this state justifies our reading into a standard automobile liability insurance contract a requirement that a partially-negligent but fully-insured person should absorb a portion of the cost of his negligence. The purpose of the contract is precisely to the contrary, being designed and paid for to relieve the insured of all such obligations (within policy limits and over agreed deductibles, of course).

We conclude, therefore, that the concept of "set-off" (more properly "recoupment") as announced in *Hoffman* applies only between uninsured parties to a negligence action, or to insured parties to the extent that insurance does not cover their mutual liabilities. The doctrine has no effect on the contractual obligations of liability insurance carriers. The district court reached the correct result, and our previous opinion is withdrawn and superseded by this decision.

The judgment below is affirmed.

OVERTON, C. J., ADKINS, BOYD, SUNDBERG, HATCHETT and ROBERTS (Retired), JJ., Concur