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Vincent S. Walkowiak

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IMPLIED INDEMNITY: A POLICY ANALYSIS OF THE TOTAL LOSS SHIFTING REMEDY IN A PARTIAL LOSS SHIFTING JURISDICTION

VINCENT S. WALKOWIAK*

INTRODUCTION

Every radical change in the body of substantive law is inevitably followed by a complementary residual modification of procedural rules and substantive law to accommodate that change and resolve the interstitial details between the existing law and the change. Some changes, however, are so fundamental that the accommodations are as substantial as the initial change itself. When the Florida supreme court adopted pure comparative negligence in *Hoffman v. Jones*[1] in 1973, it was the first court to do so in the twentieth century. New life was breathed into legal development through use of common law. The effects on the negligence law of Florida were immediate and probably long lasting. Contributory negligence was abandoned as an absolute defense;[2] "last clear chance" was totally abrogated;[3] and the continued existence of the doctrine of

*B.A., 1968; J.D., 1971, University of Illinois; Associate Professor of Law, Southern Methodist University.

1. Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). While Florida is not the only state to have adopted pure comparative negligence by court decision, having been followed by California, Nga Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 199 Cal. Rptr. 858 (1975) and Alaska, Kaatz v. State, 540 P.2d 1037 (Alas. 1975), it was the pioneer jurisdiction and did so even though the state lacked a comprehensive system of post-judgment loss distribution. It is appropriate, therefore, to concentrate on Florida, the modern pioneer in the common law development of interpersonal rights.

2. Comparative negligence in both its pure and modified form permits the defendant to assert the affirmative defense of contributory negligence, but it is no longer an absolute defense to the plaintiff's claim. Under pure comparative negligence, the plaintiff's damages are reduced by the proportion that his negligence bears to the total negligence involved. As the *Hoffman* court stated in describing the typical two party action: "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." 280 So. 2d at 438. *See also* Gutierrez v. Murdock, 300 So. 2d 689 (Fla. 3d D.C.A. 1974). The California Supreme Court in adopting the same doctrine expressed the rule as follows: "[I]n all actions for negligence resulting in injury to person or property, the contributory negligence of the person injured in person or property shall not bar recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the person recovering." Nga Li v. Yellow Cab Co., 13 Cal. 3d 804, 829, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975).

3. 280 So. 2d at 438.

assumption of the risk as an absolute defense was seriously questioned.[4] The *Hoffman* decision was rendered at a time when Florida had no comprehensive system of post-judgment loss distribution. Florida is, therefore, a state in which judicial and legislative action has proceeded through the subsequent stages of developing such a system. These are stages that may have been barely contemplated at the time of *Hoffman*. Consequently, other jurisdictions may be helped by understanding the spectrum of developmental alternatives considered by this state.

Pure comparative negligence involves a comparison of the degrees of fault of the claimant and defendant, permitting the claimant[5] to recover a judgment reduced by the percentage ratio of his negligence to the total causative negligence.[6] Thus it became apparent that the Florida loss allocation system, which prohibited contribution among joint tortfeasors, could not long survive.[7] Prior to *Hoffman*, the rule prohibiting contribution was consistently attacked,[8] but

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4. Three Florida district courts of appeal abrogated the defense of assumption of risk as an absolute defense. Hall v. Holton, 330 So. 2d 81 (Fla. 2d D.C.A. 1976); Parker v. Maule, 321 So. 2d 106 (Fla. 1st D.C.A. 1975); Rea v. Leadership Housing, Inc., 312 So. 2d 818 (Fla. 4th D.C.A. 1975). *See also* Nga Li v. Yellow Cab Co., 13 Cal. 3d 804, 829, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975). One Florida district court of appeal decided, however, that the doctrine was not totally subsumed into pure comparative negligence. Dorta v. Blackburn, 302 So. 2d 450 (Fla. 3d D.C.A. 1974). The issue, therefore, was not completely without doubt until it was resolved by the supreme court in Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977), the consolidated appeal of Dorta v. Blackburn, *supra*, Rea v. Leadership Housing Inc., *supra*, and Parker v. Maule, *supra*, in which the court held that the defense of assumption of risk is no longer an absolute defense but is merged into the doctrine of comparative negligence.

5. It is conceptually much easier to think of the injured party seeking damages in the pure comparative negligence action as a "claimant" rather than to utilize the more traditional plaintiff-defendant dichotomy. In the pure comparative negligence action every injured party may seek compensation for his damages from the causally negligent other parties. These damages are reduced, however, by the claimant's percentage of negligence.

6. Thus in a two party action if one of the parties is injured and both have been negligent, both parties share in the total loss caused. The claimant shares in the total loss caused by bearing the burden of his loss which is the reciprocal of his percentage of negligence to all negligence which caused his injury. The defendant shares in the total loss by remaining financially liable for the amount of the claimant's loss which the claimant has not been forced to bear. See Hoffman v. Jones, 280 So. 2d at 438.

7. Although the *Hoffman* court refused to abolish this rule, the refusal appeared less a recognition that the rule was inconsistent with the doctrine of pure comparative negligence than a reluctance to decide an unripe issue. 280 So. 2d at 439. The reluctance of the district courts to overrule the rule prohibiting contribution may be found in the *Hoffman* decision itself, wherein the supreme court chastened the Fourth District Court of Appeal for overruling long standing precedent in the following manner: "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. . . .

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"This is not to say that the District Courts of Appeal are powerless to seek change; they are free to certify questions of great public interest to this Court for Consideration, and even to state their reasons for advocating change. They are, however, bound to follow the case law set forth by this Court." 280 So. 2d at 434. See note 11 *infra*. After chastising the district court, the supreme court accepted its decision adopting pure comparative negligence.

8. Lincenberg v. Issen, 318 So. 2d 386, 389 (Fla. 1975) is demonstrative of this proposition: "Initially, we are compelled to elucidate on the questioned continued viability and com-

adoption of pure comparative negligence gave new impetus to the movement to abolish the doctrine. Judicial adoption of contribution among joint tortfeasors awaited action by the Florida supreme court. However, while a direct challenge to the rule prohibiting contribution among joint tortfeasors was pending before the court,[9] and perhaps in response to that pending challenge, the Florida Legislature adopted the Uniform Contribution Among Tortfeasors Act.[10] In light of this legislative action, the Florida supreme court, in *Lincenberg v. Issen*,[11] took no action regarding its own adoption of contribution among joint tortfeasors.[12]

In 1976, the Florida Legislature abandoned the pro rata contribution scheme and adopted contribution among tortfeasors based upon degrees of fault.[13] Both contribution statutes specifically recognized that the adoption of contribution among tortfeasors did not require the abrogation of the common law doctrine of implied indemnity.[14] Thus, while the adoption of the loss

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patibility of the principle of no contribution among joint tortfeasors, a doctrine to which the courts of Florida have been committed in negligence suits although significantly we must note that various exceptions have been created to alleviate the harshness of this rule." For a brief bibliography, see Walkowiak, *Innocent Injury and Loss Distribution: The Florida Pure Comparative Negligence System*, 5 FLA. ST. U.L. REV. 66, 99 n.105 (1977).

9. Lincenberg v. Issen, 318 So. 2d 386 (Fla. 1975), *rev'g*, Issen v. Lincenberg, 293 So. 2d 777 (Fla. 3d D.C.A. 1974). *Lincenberg* was briefed and argued in 1974, although the supreme court did not render a decision until July 30, 1975, after the legislative session had ended.

10. 1975 Fla. Laws 1975, ch. 75-108, amended by 1976 Fla. Laws, ch. 76-186, codified as FLA. STAT. §768.31 (1977). See note 13 *infra*.

11. 318 So. 2d 386 (Fla. 1975), *rev'g*, 293 So. 2d 777 (Fla. 3d D.C.A. 1974). The Third District Court of Appeal's opinion was one of a number of post-*Hoffman* decisions in which the Florida intermediate appellate courts refused to abandon the rule which prohibited contribution among tortfeasors. *See also* Rader v. Variety Children's Hospital, 293 So. 2d 778 (Fla. 3d D.C.A. 1974); Acevedo v. Acosta, 296 So. 2d 526 (Fla. 3d D.C.A. 1974); Maybarduk v. Bustamante, 294 So. 2d 374 (Fla. 4th D.C.A. 1974).

12. In *Issen*, the Florida supreme court frankly acknowledged that the rule prohibiting contribution among joint tortfeasors was inconsistent with the doctrine of pure comparative negligence. 318 So. 2d at 391. The trial court had permitted the jury to compute the percentage of negligence of the joint tortfeasors. Since the Florida Legislature had adopted the pro rata contribution scheme of the Uniform Contribution Among Tortfeasors Act in which contribution shares are computed regardless of the degrees of fault of the tortfeasors, the trial court's direction to have the jury compute degrees of fault required the jury to reach an unnecessary decision. The tortfeasor satisfying more than his pro rata share of liability was entitled to receive pro rata contribution from all joint tortfeasors regardless of their relative degrees of fault. Interestingly, the procedure followed by the trial court, while inconsistent with the contribution statute as adopted by the legislature in 1975, anticipated the amended contribution statute. Under the amended act the percentages of fault of the joint tortfeasor must be computed, since contribution shares are computed based upon the percentage degrees of fault of the liable parties. See notes 13 and 31 *infra*.

13. Fla. Laws 1976, ch. 76-186, §1. The amendment to §768.31 of the Florida Statutes redefined pro rata under the statute. FLA. STAT. §768.31(3)(a) (1975) had read: "In determining the pro rata shares of tortfeasors in the entire liability: (a) their relative degrees of fault shall not be considered." FLA. STAT. §768.31(3)(a) (1977) now reads: "In determining the pro rata shares of tortfeasors in the entire liability: (a) their relative degrees of fault shall be the basis for allocation of liability."

14. FLA. STAT. §768.31(2)(f) (1977): "This act does not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of

sharing approach of pure comparative negligence has been regarded as the logical antecedent to the abrogation of the common law rule prohibiting loss sharing among joint tortfeasors,[15] it is debatable whether this antecedent also logically precludes total loss shifting from one joint tortfeasor to another. In 1977, the Florida Legislature passed the Florida Insurance and Tort Reform Act of 1977.[16]

Although the concept of implied indemnification has enjoyed a degree of prominence in the legal literature, discussion of the doctrine has been limited primarily to a critique of the rules permiting its application.[17] It is not the express purpose of this article to criticize the method by which implied indemnity is applied in Florida or elsewhere. Instead, this article will analyze the effects the implied indemnification rules will have upon the loss allocation model presently in existence in Florida and upon the parties subject to application of that model. With that goal in mind, implied indemnity, as interpreted by the Florida courts, along with other rules of tort loss distribution, will be examined and contrasted before analysis of their effects is undertaken.

JOINT TORTFEASOR LIABILITY

When the tortious acts of two or more defendants cause an indivisible injury to the plaintiff, the defendants are joint tortfeasors and as such are jointly and severally liable for the total consequence of their actions even if they have not acted in concert.[18] The rule that permits a plaintiff to join joint tortfeasors as defendants in the same lawsuit protects the plaintiff by not allowing a joint tortfeasor to cast liability on an unnamed tortfeasor. The plaintiff, however, is entitled to collect his judgment in full from any one or any combination of the liable defendants. The plaintiff may sue joint tortfeasors jointly or severally, and the tortfeasors sued cannot join additional but unnamed tortfeasors as

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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."

15. "With emphasis, we restate that this Court in *Hoffman* announced that when the negligence of more than one person contributes to the occurrence of an accident, each should pay the proportion of total damages which he has caused the other party. The same rationale eliminates justification for the no contribution principle and dictates that this rule be abolished." Lincenberg v. Issen, 318 So. 2d 386, 391 (Fla. 1975).

16. 1977 Fla. Laws, ch. 77-468 (codified in scattered sections of FLA. STAT. (1977)).

17. *See, e.g.*, Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932); O'Donnell, *Implied Indemnity in Modern Tort Litigation: The Case for a Public Policy Analysis*, 6 SETON HALL L. REV. 268 (1975); Werner, *Contribution and Indemnity in California*, 57 CAL. L. REV. 490 (1969); Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 U.S.CAL. L. REV. 728 (1968).

18. The Florida supreme court succinctly stated this rule in Louisville & N.R.R. v. Allen, 65 So. 8, 12 (Fla. 1914): "The rule under which parties become jointly liable as tortfeasors 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." (Quoting Brown v. Coxe Bros. & Co., 75 F. 689, 690 (C.C.E.D. Wisc. 1896)).

defendants to the plaintiff's action.[19] Because each tortfeasor is severally liable for the full amount, it is unnecessary for the plaintiff to sue each and every joint tortfeasor. It may, in fact, be tactically unwise to do so, as the plaintiff in *Anderson v. Crawford*[20] discovered. Since joint and several liability is preserved under pure comparative negligence, *Anderson*, a 1933 decision by the Florida supreme court, is of more than historical interest.

In *Anderson*, the plaintiff sued for personal injury and property damages as a result of a collision between his automobile and a freight train, naming as defendants the engineer in charge of the train and the railroad as joint tortfeasors. The negligence attributed to the railroad was that the train was carelessly and negligently operated by the engineer. The plaintiff moved to have the trials of the two defendants severed, alleging that the standard for establishing the liability of the defendant railroad was different from the standard for establishing the liability of the defendant engineer.[21] The trial court denied the motion and this ruling was sustained on appeal by the Florida supreme court.[22] Having made the decision to seek a judgment from both tortfeasors, the plaintiff recognized that the trial presented potential obstacles to recovering a judgment from either. In this instance suing both potential tortfeasors in the same action may have affected the plaintiff's potential recovery because the standards for liability were different. The plaintiff (or rather his attorney) was faced with the difficult decision of whether to join as a party a potentially attractive defendant whose presence would adversely affect his right to recovery. He made the decision to join both in the same lawsuit and as a result may have lost the ability to recover from either. This tactical point of joint tortfeasor liability was not lost on the plaintiff in *Pendarvis v. Pfeifer*[23] when he elected to sue only one of two potentially liable tortfeasors.

In *Pendarvis*, the plaintiff, an eight-year-old child, was struck by an automobile when he alighted from his school bus. He sued the school bus driver for negligence and received judgment for damages. The defendant school bus

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19. *See, e.g.*, Colle v. Atlantic Coast Line R.R., 153 Fla. 258, 14 So. 2d 422 (1943); Pendarvis v. Pfeifer, 132 Fla. 724, 182 So. 307 (1938); Anderson v. Crawford, 111 Fla. 381, 149 So. 656 (1933).

20. 111 Fla. 381, 149 So. 656 (1933).

21. Many of the Florida tort cases involving railroads are sui generis during this era of Florida negligence law. At this time, Florida had a comparative negligence statute which applied only to railroad companies. 1887 Fla. Laws, ch. 3744, codified as FLA. STAT. §768.06 (1977). The Supreme Court of Florida declared this statute unconstitutional as violative of the equal protection and due process clauses of the state and federal constitutions in Georgia S. & F.R.R. v. Seven-Up Bottling Co., 175 So. 2d 39 (Fla. 1965). Interestingly, while the Florida supreme court declared the Florida statute unconstitutional, the Georgia supreme court through a series of interpretive decisions expanded the application of a similar Georgia statute to all types of negligence cases. The State of Florida had to wait until *Hoffman* before the change from contributory negligence to comparative negligence was effected and in a much more dramatic fashion. The *Hoffman* court did state, however, that the opinions rendered under the railroad comparative negligence statute, previously declared unconstitutional, would serve as valuable precedent to guide future decisions regarding pure comparative negligence. 280 So. 2d at 439.

22. 111 Fla. at 383, 149 So. at 657.

23. 132 Fla. 724, 182 So. 307 (1938).

driver then appealed, alleging that the driver of the other vehicle was at least partly responsible for the plaintiff's injuries and should also have been sued in the same action. The Florida supreme court rejected this argument, citing *Anderson v. Crawford*.[24] It sustained the lower court's finding that the driver had a duty to the plaintiff and that the driver had breached that duty.[25] It was the plaintiff's option whether to seek judgment against any one or all of the allegedly negligent tortfeasors, the court found. Since the defendants were jointly and severally liable, the plaintiff could collect judgment against a joint tortfeasor fully, without regard to the other joint tortfeasor — even if they had been joined as party defendants. A defendant named as a tortfeasor in an action cannot join as a party defendant other alleged joint tortfeasors. A joint tortfeasor is liable, as the court firmly established, for the total damages found by the jury to have been caused to the plaintiff by the combined action of all joint tortfeasors, whether they are named in the action or not.[26] Adoption of

24. 111 Fla. 381, 149 So. 656 (1933).

25. It is worthy of emphasis that both *Anderson* and *Pendarvis* represent cases in which the plaintiff stood a better chance, in the tactical judgment of his attorneys, of receiving compensation from the tortfeasors by suing them separately. In both cases, the standard by which the liability of the different defendants would be measured was different. In *Anderson*, the absolute defense of contributory negligence was not available to the railroad; in *Pendarvis*, the common carrier liability rule of the bus driver set a higher standard of care for him than the driver of the automobile. A plaintiff should always have an excellent tactical reason for failing to join all joint tortfeasors in the same action when that is procedurally possible in view of the high risk that the named defendant will be successful in shifting all blame to the absentee tortfeasor.

26. If the plaintiff had executed on his judgment against the bus driver, it would have discharged the joint tortfeasor who might also have been liable for the plaintiff's damages. *See* Leo Jay Rosen Associates, Inc. v. Schultz, 148 So. 2d 293 (Fla. 3d D.C.A. 1963) and authorities cited therein. A more interesting question arises when the plaintiff, prior to executing his judgment against one tortfeasor, attempts to sue another joint tortfeasor and thereby receive a larger judgment. This problem came up by way of two unreconciled Florida decisions. In Weaver v. Stone, 212 So. 2d 80 (Fla. 4th D.C.A. 1968) the plaintiffs in an earlier action sued the employer of the operator of a vehicle and received a judgment for their damages. The employer tendered the full amount of the judgment to the plaintiffs and they refused to accept it. The employer then deposited the full amount of the judgment plus interest and costs in the registry of the court pursuant to FLA. STAT. §55.141 (1977). Plaintiffs never collected the money from the registry and instead proceeded to sue the operator of the vehicle. The trial court granted a summary judgment for the defendant in the action, since the clerk of the court in the action against the employer had noted the judgment as satisfied following tender by the employer. The plaintiffs appealed the trial court's decision. The Third District Court of Appeal affirmed the trial court, although it did not expressly consider the validity of the satisfaction of the judgment. Its holding was based upon a procedural ground; the proper manner for the plaintiff to impeach this proceeding was by way of a motion to amend or vacate pursuant to Rule 1.540 of the Florida Rules of Civil Procedure and not collateral attack on a subsequent action. 212 So. 2d at 82 (Cross, J., dissenting).

On similar facts, the court in Gerardi v. Carisle, 232 So. 2d 36 (Fla. 1st D.C.A. 1969) expressly declined to follow the dicta in *Weaver*. It held that the deposit in a court registry pursuant to statute does not operate as either res judicata or estoppel by judgment. Such deposits do not preclude the plaintiff from bringing a subsequent action against another party who would have been jointly and severally liable on the judgment had it been joined in the same action. *Id.* at 39. The *Gerardi* court cited with approval Power v. Baker, 27 F. 396 (C.C.D. Minn. 1886) which held that a plaintiff may sue joint tortfeasors in separate suits,

pure comparative negligence or contribution among tortfeasors did nothing to alter this rule.[27]

There was, however, some possibility that the losses caused to a plaintiff could be distributed among tortfeasors even prior to the adoption of contribution among joint tortfeasors. If the plaintiff has been caused injuries by the independent acts of two or more parties and those injuries are severable by cause, each defendant will be liable as a "concurrent" tortfeasor only for the injury caused by that defendant. The plaintiff bears the burden of proving breach of duty by the defendants, causation, and injury. The burden of proving that the defendants are "concurrent" tortfeasors is, however, on the defendants. In order to prove that they are "concurrent," and not joint, tortfeasors, the defendants must prove that each defendant's act caused a certain identifiable portion of the plaintiff's injuries, *and* that the plaintiff's damages are capable of division and assignment by cause among the defendants.[28] If a defendant succeeds in establishing that he is a concurrent tortfeasor, then the plaintiff may receive individual judgments against each of the defendants for the amount of damage that each defendant allegedly caused. The plaintiff may execute each judgment up to the amount of each concurrent tortfeasor's several liability.[29] If any concurrent tortfeasor is judgment-proof, the burden of loss

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"and if separate judgments are obtained, he may make his election to take the larger judgment or pursue the solvent party . . . ." *Id.* at 397.

Since each joint tortfeasor is jointly and severally liable, the plaintiff could collect a judgment entered against multiple tortfeasors in any combination or manner he wished up to the total amount of the judgment. In the absence of any form of post-judgment loss allocation, the parties defendant have little basis to argue prejudice (except for tactical trial considerations) when the plaintiff elects to proceed against them in individual suits. It also seems unrealistic in the absence of compelling circumstances to expect that the plaintiff's decision to execute a judgment against defendants jointly and severally liable will be dictated by any other motive than efficiency. The judgment will be executed against the solvent defendant with the most liquid assets. In terms of victim compensation, this represents the most effective means of assuring that the victim will be compensated in the full amount of his judgment as efficaciously as possible. Post execution loss allocation is left to the tortfeasors. That being the case, the potentially liable joint tortfeasors should, in the interest of judicial economy, have the power to insure that an adjustment of their ultimate liability be effected without the necessity of subsequent litigation. This is accomplished under the Florida contribution statute by permitting the joint tortfeasor to bring a third party action against the joint tortfeasor. FLA. STAT. §768.31(4)(b) (1977). A joint tortfeasor entitled to indemnity may also enforce his claim by bringing a third party action pursuant to Rule 1.180 of the Florida Rules of Civil Procedure. *See, e.g.*, General Dynamics Corp. v. Adams, 340 F.2d 271 (5th Cir. 1965) (applying Florida law); Mims Crane Service, Inc. v. Insley Mfg. Corp., 226 So. 2d 836 (Fla. 2d D.C.A. 1969).

By bringing a third party action asserting the right to contribution or indemnity, the defendant-third party plaintiff does not join the third party defendant as a party defendant to the plaintiff's action. Nevertheless, once the third party defendant is joined in suit in this manner it will have the effect of forcing the plaintiff to join the third party defendant as a party-defendant in the principal action. *See* Stuart v. Hertz Corp., 351 So. 2d 703 (Fla. 1977).

27. See note 30 *infra*.

28. Hamblen, Inc. v. Owens, 127 Fla. 91, 172 So. 694 (1937); Wise v. Carter, 119 So. 2d 40 (Fla. 1st D.C.A. 1960).

29. Thus, if a plaintiff is caused total compensable damages of $1,000 through the "concurrent" negligence of two tortfeasors, the plaintiff will receive separate judgments against

for the damage that that tortfeasor caused falls upon the plaintiff.[30] If the tortfeasors fail to sustain their burden of proof that they are concurrent tortfeasors the plaintiff receives judgment against them as joint tortfeasors.

Just as the adoption of pure comparative negligence did not directly affect a joint tortfeasor's liability, it did not directly affect a concurrent tortfeasor's liability to the plaintiff, nor did the contribution statute alter liability to the plaintiff of either joint or concurrent tortfeasors. Prior to the adoption of the contribution among joint tortfeasors statute, the plaintiff could collect his entire judgment against any tortfeasor, and unless that tortfeasor was entitled to seek indemnity he could not shift any portion of his loss to a joint tortfeasor. The burden of loss for a judgment-proof joint tortfeasor fell upon the other tortfeasors from whom the claimant had collected his judgment. Under a contribution statute such as that adopted by the Florida Legislature, the plaintiff still retains the right to collect his entire judgment from any liable joint tortfeasor, but that tortfeasor is then entitled to proceed against his co-tortfeasors and seek shares of contribution of the common liability from them.[31]

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the two tortfeasors. Each judgment represents the amount of the injury caused to the plaintiff by that particular tortfeasor. Plaintiff might receive a judgment of $600 from tortfeasor *A* and a judgment of $400 from tortfeasor *B*. Plaintiff must then endeavor to collect $600 from *A* and $400 from *B* in order to receive his total compensable recovery. Neither tortfeasor is liable for the amount of separable damages caused by the other. *See generally*, Note, *Consequences of Proceeding Separately Against Concurrent Tortfeasors*, 68 HARV. L. REV. 697 (1955).

30. If all defendants have been sued and are fiscally responsible for their tortious conduct, the distinction between several liability under apportionment and joint and several liability effects only a minor inconvenience upon the plaintiff as he proceeds to execute his judgment(s). If, however, under apportionment a particular defendant is judgment proof due to an immunity or is fiscally irresponsible, then the plaintiff must bear the burden of loss for that individual's fault-caused injuries. Whether the jurisdiction follows the rule formerly followed in Florida that contributiory negligence is an absolute defense, or follows some rule of comparative negligence, the claimant is entitled to collect only for personally innocent injuries. Under a contributory negligence scheme, the jury must find that the plaintiff was personally innocent of all causal negligence before he is entitled to recover. Under a rule of comparative negligence a claimant is entitled only to that portion of those injuries which is caused by another party — that is, his total injuries are reduced by their percentage of negligence (which the author calls the "self-responsibility discount"). Thus, under either the contributory negligence rule or a comparative negligence rule only "personally innocent" damages are compensable. Prior to the adoption of a contribution statute, joint and several liability could work a hardship upon a tortfeasor by subjecting him to total liability for injuries caused through the tortious conduct of multiple parties. The plaintiff, through his attorney, could be expected to execute his judgment in the most efficacious manner rather than attempt to accomplish "rough" justice. This desire for efficiency might not necessarily comply with percentage degrees of fault attributed to the liable tortfeasors. The claimant is not required to attempt to "apportion" the execution of his joint and several judgment. Thus even though all tortfeasors might be fiscally able to contribute to the payment of the judgment only one might be subject to execution of the plaintiff's judgment against all. In the absence of a rule permitting contribution among joint tortfeasors, all liable for their own conduct, the tortfeasor from whom the claimant collected his judgment could not normally transfer any portion of those losses to the co-tortfeasors.

31. At this point, the distinction between the contribution shares under 1975 Fla. Laws, ch. 75-108 ("Pro Rata" contribution) under which Florida operated for one year, and the contribution shares under FLA. STAT. §768.31 (1977) in its present form (proportional con-

The burden of loss for the amount that an insolvent tortfeasor must contribute to the common liability still falls upon the defendant who has satisfied the judgment, but contribution permits the solvent tortfeasors to share the common liability.[32]

CONTRIBUTION V. INDEMNITY

Contribution among joint tortfeasors does not alter the principle that the burden of loss for a judgment-proof joint tortfeasor falls initially upon the tortfeasor from whom the judgment was collected. The plaintiff may still execute his judgment against any one of the joint tortfeasors found jointly and severally liable.[33] If the claimant collects more than a particular tortfeasor's share of the common liability,[34] the tortfeasor has a right to seek contribution

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tribution) should be drawn. See note 13 *supra*. Under either form, the tortfeasors are jointly and severally liable for the total injuries caused.

Under "pro rata" contribution, the tortfeasor paying more than his pro rata share is entitled to seek contribution from the other joint tortfeasors. The pro rata shares are determined by requiring each party to contribute based upon the ratio of the number of tortfeasors found liable for the injury. Thus, if three tortfeasors were liable, the tortfeasor required to compensate the claimant in full would be entitled to contribution of one third of the judgment from each of his joint tortfeasors.

Under proportional contribution, the tortfeasor paying more than his proportional share is entitled to seek contribution from the other joint tortfeasors. The proportional shares are determined by requiring each party to contribute based upon his percentage of fault as computed by the jury. Thus, if three tortfeasors were found liable, the jury would be asked to compute their relative percentages of fault. Assuming the claimant were fault free, the jury might find tortfeasor *A* was 70 percent negligent, tortfeasor *B* was 20 percent negligent and tortfeasor *C* was 10 percent negligent. If tortfeasor *C* were the most liquid, the claimant might be expected to collect his entire judgment from him, in which case *C* could seek 70 percent of what he was required to pay the claimant from *A* and 20 percent of what he was required to pay the claimant from *B*.

Under neither statute can a tortfeasor expect to receive contribution from his co-tortfeasors until he has paid more than his share of liability to the claimant. *See* FLA. STAT. §768.31(2)(b) (1977). Thus, if the claimant executes judgment against only one tortfeasor and collects the percentage share or less of that tortfeasor's liability to the claimant, the tortfeasor has no contribution right against his co-tortfeasors.

32. Under either the pro rata or proportional contribution statutes the tortfeasor who initially bears the loss is permitted to collect aliquot shares from the other joint tortfeasors. FLA. STAT. §768.31(2)(b) (1977). Thus, if one of the three joint tortfeasors is insolvent, the tortfeasor initially bearing the entire loss ends up bearing the loss for the contribution share of the insolvent tortfeasor. For example, if under the proportional contribution example given in note 31 *supra*, tortfeasor *A* were insolvent, tortfeasor *C* would still be entitled to collect only 20 percent of the judgment from tortfeasor *B*. FLA. STAT. §768.31(2)(b) (1977). See note 34 *infra*. By comparison, a Texas contribution statute of application in non-negligence based actions contains the provision that all solvent tortfeasors bear a proportion of the loss caused by an insolvent tortfeasor. TEX. CIV. STAT. art. 2212 (1971) superceded in negligence actions by TEX. CIV. STAT. art. 2212(a) (1976).

33. Although the right to receive contribution does not accrue until one party has paid more than his "pro rata" share of the common liability, FLA. STAT. §768.31(2)(b) (1977), this does not impair that party's ability to have his right to contribution determined in the principal suit. See note 26 *supra*.

34. "No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability." FLA. STAT. §768.31(2)(b) (1977).

from his co-tortfeasors up to their share of the common liability. Contribution thus can be understood as a right of a tortfeasor who has been forced to pay[35] more than his share of a common liability to force his co-tortfeasors to pay a share of the common liability.[36] As noted earlier, the antecedent to establishing that multiple tortfeasors are concurrent and not joint tortfeasors is proof that each tortfeasor has caused separate damage to the plaintiff. There is, therefore, no common liability of concurrent tortfeasors.

Indemnity,[37] whether contractual or implied, is the right of a tortfeasor who has been forced to pay a common liability to force another tortfeasor to compensate him for the entire amount that he has been forced to pay. Unlike contribution, which is loss sharing among tortfeasors, indemnity is a mechanism for the shifting of loss from one tortfeasor to another. The right to indemnification may be based upon a contract between the tortfeasors[38] or may be a

35. Although a tortfeasor who has settled with a claimant may have the right to receive contribution from a co-tortfeasor with whom he shared a common liability, there does not appear to be any significant distinction between this settlement and execution of a judgment by a claimant against one of multiple tortfeasors since an element of "duress" is present in both instances. Collusive settlements are handled by permitting the settling tortfeasor to recover only the reasonable amount of a settlement. FLA. STAT. §768.31(2)(d) (1977).

36. As has been noted, the means by which these "shares" are determined is subject to multiple interpretation and the contribution statute itself anticipates some cumulation of the collective liability of a group to be treated as a single share. FLA. STAT. §768.31(3)(b) (1977). For example, the court in Lincenberg v. Issen, 318 So. 2d 386, 393 (Fla. 1975) quoted with approval the following language from the official comment to §2 of the Uniform Contribution Among Tortfeasors Act: "[C]lass liability, including the common liability arising from vicarious relationships is to be treated as a single share. For instance the liability of a master and servant for the wrong of the servant should in fairness be treated as a single share. Other examples are those situations involving co-owners of property, members of an unincorporated association, those engaged in a joint enterprise and the like; where the problem is the allocation of liability between such a group on the one hand and a tortfeasor having no connection with the group. It adopts the equitable principle involved in the case of *Wold v. Grozalsky*, 277 N.W. [N.Y.] 364, 14 N.E.2d 437 (1938), where the plaintiff was injured by the collapse of a party wall between two buildings. One building was owned by *A*, the other jointly by *B* and *C*. It was held that *B* and *C* were liable each for only one-fourth of the entire liability, rather than one-third. Another case is *Walsh v. Phillips*, New York Supreme Court, Niagara County, July 3, 1952, where one contributor was an unincorporated association, and its numerous members were held liable in the aggregate only for a single share." See also VTN Consol. v. Coastal Engineering Assoc., 341 So. 2d 226 (Fla. 2d D.C.A. 1976).

37. Although a major portion of this article involves formulating a functional working definition of indemnity, the RESTATEMENT OF RESTITUTION offers a viable although ambiguous general rule: "A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct." RESTATEMENT OF RESTITUTION §76 (1937).

38. The most common types of contractual indemnification are liability insurance policies, and "hold harmless clauses" in contracts. Although a complete discussion of contractual indemnification is not within the scope of this article, it is important to note that the Florida courts have consistently required that such contractual provisions be specific in their terms. These provisions have been enforced in order to give effect to the intent of the parties so long as that intent is not contrary to public policy. *See, e.g.*, University Plaza Shopping Center, Inc. v. Stuart, 272 So. 2d 507 (Fla. 1973); Ivey Plants, Inc. v. FMC Corp., 282 So. 2d 205 (Fla. 4th D.C.A. 1973).

right specifically provided for by statute,[39] but the main focus of this discussion will be upon the implied right to indemnity as interpreted by the Florida courts.[40]

The Florida statute that created the right to contribution specifies the method of its enforcement.[41] The description and enforcement of the right to implied indemnity, however, has been set forth, in common law tradition, in the judicial opinions that created it. Unlike contribution, which is a sharing of a common liability, the right of a person seeking indemnity is the right to receive full compensation for *all* damages he has suffered as a result of the actions which form the basis for his claim to indemnity. These damages include attorney's fees expended by the indemnitee in defending against liability to the plaintiff, and necessary attorney's fees expended to collect indemnity from the indemnitor, a form of recovery not granted to the tortfeasor seeking contribution.[42] The underlying theoretical basis for the right to implied indemnity is different from, and inconsistent with, the right to contribution, and therefore the enforcement and the measure of damages differ.[43]

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39. *See, e.g.*, FLA. STAT. §30.30(3) (1977) (party forcing sheriff to levy on property must hold sheriff harmless if levy is subsequently determined wrongful); FLA. STAT. §585.10 (1977) (Department of Agriculture must indemnify owners of animals destroyed by Department).

40. This categorization rejects, as have the Florida courts, the California division into "implied contractual indemnity" and "implied non-contractual indemnity," a superfluous dichotomy which ignores the basic policy underlying implied indemnification. See Cahill Bros. v. Clementina Co., 208 Cal. App. 2d 367, 25 Cal. Rptr. 301 (1962); Comment, *Contribution and Indemnity in California*, 57 CAL. L. REV. 490 (1969). The basis for the right to indemnity under Florida law has been attributed to contract, Stuart v. Hertz Corp., 302 So. 2d 187 (Fla. 4th D.C.A. 1974) and equity, Magnum Marine v. Kenosha Auto Transport Corp., 481 F.2d 933 (5th Cir. 1973); and although the California categorization has been rejected, implied indemnity has been awarded to owners of defective equipment (provided that the owner was not "actively" negligent) from parties with whom they contracted to maintain equipment when the owners were held liable for defects in the equipment attributed to the negligence of the party who had contracted to maintain it. *See, e.g.*, Seaboard Airline Ry. v. American Dist. Elect. Protective Co., 106 Fla. 330, 143 So. 316 (1932); Armor Elevator Co., Inc. v. Elevator Sales and Service, Inc., 309 So. 2d 44 (Fla. 3d D.C.A. 1975); Mims Crane Service, Inc. v. Insley Mfg. Corp., 226 So. 2d 836 (Fla. 2d D.C.A. 1969).

41. FLA. STAT. §768.31(4) (1977).

42. *See, e.g.*, Insurance Co. of North America v. King, 340 So. 2d 1175 (Fla. 4th D.C.A. 1976); Mims Crane Service, Inc. v. Insley, 226 So. 2d 836 (Fla. 2d D.C.A. 1969); Morse Auto Rental, Inc. v. Dunes Enterprises, Inc., 198 So. 2d 652 (Fla. 3d D.C.A. 1967); Fountainebleau Hotel Corp. v. Postol, 142 So. 2d 299 (Fla. 3d D.C.A. 1962). *But see*, Allstate Ins. Co. v. Alterman Transport Lines, Inc., 465 F.2d 710, 716 (5th Cir. 1972), in which the court, applying Florida common law, held that implied indemnity did not permit the indemnitor to collect for attorney's fees expended in prosecuting the suit for indemnity.

43. These alternative theories of recovery among joint tortfeasors may, of course, be alternatively pleaded. Florida Power Corp. v. Taylor, 332 So. 2d 687 (Fla. 2d D.C.A. 1976). The party entitled to indemnity cannot be liable to the indemnitor for contribution, although the party seeking indemnity if unsuccessful may seek and be liable for contribution. FLA. STAT. §768.31(2)(f) (1977). *See* First Church v. City of St. Petersburg, 344 So. 2d 1302 (Fla. 2d D.C.A. 1977). This does not preclude another tortfeasor from seeking contribution from the indemnitee. Thus an employer, vicariously liable for the negligence of his employee, might be entitled to seek indemnity from his employee, although the employee would not be entitled to contribution from the employer. However, a joint tortfeasor whose negligence combined with the negligence of the employee would be entitled to seek contribution from the em-

The statutory right of a joint tortfeasor to seek contribution arises when one tortfeasor has paid more than his share of a common liability to the plaintiff. The basis of their common liability is predicated upon mutual breaches of duty to the plaintiff by each tortfeasor. In theory the existence, or nonexistence, of a joint tortfeasor would have no effect upon the liability of either tortfeasor to the plaintiff. The right to implied indemnity, however, arises from a breach of a duty owed by the joint tortfeasor-indemnitor to the joint tortfeasor-indemnitee. This breach of duty is derived from independent substantive rules of law and creates a basis of liability in favor of the joint tortfeasor-indemnitee. Whereas the contribution action represents an action among parties each of whom is liable to the plaintiff through their separate conduct, the indemnity action represents an action between parties in which the indemnitee's liability is established only through proof of breach of duty of the indemnitor to the plaintiff. The right of the plaintiff to seek compensation in full from a particular joint tortfeasor is unaffected, that is, joint and several liability is not abrogated.[44] The rights and obligations of the party-tortfeasors to each other are, however, different under these two post-judgment loss allocation devices.[45]

A joint tortfeasor seeking contribution or a joint tortfeasor seeking indemnity can establish that right by cross-claim against a named defendant or third party action.[46] And, although notions of judicial efficiency might seem

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ployer, for which contribution share the employer would be entitled to indemnity from his employee.

44. *See* Gerardi v. Carlisle, 232 So. 2d 36 (Fla. 1st D.C.A. 1969); FLA. STAT. §768.31(2)(a) (1977). In this respect joint tortfeasor liability is distinguished from "concurrent" tortfeasor liability.

45. Thus, a joint tortfeasor seeking both contribution and indemnity from an employer providing workmen's compensation benefits to the injured claimant-employee had the contribution action dismissed, while the indemnity action was allowed in Firestone Tire & Rubber v. Thompson Aircraft, 353 So. 2d 137 (Fla. 3d D.C.A. 1977). There the court stated: "Instead of resting on principles of common liability, the equitable doctrine of indemnity is predicated on the distinction between primary (active) and secondary (passive) liability between parties where negligence is not coequal. In other words, the basis for indemnity lies in the relationship between the tortfeasors themselves, not on their common liability to the injured party." *Id.* at 140.

46. *See, e.g.*, General Dynamics Corp. v. Adams, 340 F.2d 271 (5th Cir. 1965) (applying Florida law) (third party action); Peoples Gas System, Inc. v. B. & P. Restaurant Corp., 271 So. 2d 804 (Fla. 3d D.C.A. 1973) (third party action); Mims Crane Service Inc. v. Insley Mfg. Corp., 226 So. 2d 836 (Fla. 2d D.C.A. 1969) (third party action); Chappell v. Scarborough, 224 So. 2d 791 (Fla. 1st D.C.A. 1969) (cross-claim). It should be emphasized that the third party action is intended to permit the tortfeasor entitled to indemnity to enforce his claim in the same action and is not a procedural device through which the defendant can avoid all liability to the plaintiff by asserting another party's sole responsibility. Thus, in Armor Elevator Co. v. Elevator Sales & Service, Inc., 309 So. 2d 44 (Fla. 3d D.C.A. 1975), the defendant's third party complaint for "indemnity" was dismissed. The defendant-third party plaintiff did not assert that it was a passive tortfeasor and that its liability if any was due to the active negligence of the third party defendant, but rather that another party (the third party defendant) was the active cause of the injury and guilty of active negligence. The Third District Court of Appeal sustained the dismissal. The failure of the third party plaintiff to assert that it was a passive tortfeasor and that its liability was derivative from the active negligence of the third party defendant constituted a failure to plead a claim for indemnity.

to dictate otherwise, a joint tortfeasor seeking contribution or indemnity may withhold his claim against another named or unnamed party tortfeasor and bring a separate action to enforce his right to contribution[47] or indemnity.[48] Neither the statutorily granted right to contribution nor the common law right to indemnity change the *Pendarvis* rule that one tortfeasor cannot join another tortfeasor as a party defendant to the plaintiff's action.[49] A tortfeasor seeking contribution must establish that a nonjoined party from whom he seeks contribution is jointly liable to the plaintiff before he can enforce his statutory right to contribution.[50] By establishing the liability of one joint tortfeasor, the plaintiff has not deprived another joint tortfeasor who is not named in the original action or joined as a third party defendant of his due process rights to litigate his liability to the plaintiff in a subsequent contribution action before being obliged to provide contribution to the joint tortfeasor seeking that contribution. Similarly, the constitutional right of the joint tortfeasor-indemnitor to be heard must be preserved. The right to indemnity, however, is based on the concept that the liability of the indemnitee is derived from the conduct of the indemnitor. The indemnitee may, therefore, by properly notifying the indemnitor, "vouch in" the indemnitor to the action

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The subsequent assertion that the third party defendant's active negligence was the sole cause of the injury was a pleading of "avoidance without confession" and likewise subject to dismissal as a third party complaint. 309 So. 2d at 46.

The third party complaint is an effective device through which a defendant may assert his claim to indemnity. It is not, however, a procedural device through which a defendant can force joinder of a party-defendant to the plaintiff's action. Since the right to receive indemnity does not alter the concept of joint and several liability, the indemnitee remains jointly and severally liable to the plaintiff. If the plaintiff has not joined the indemnitor in the principal action, the indemnitee cannot force that joinder. Fincher Motor Sales, Inc. v. Lakin, 156 So. 2d 672 (Fla. 3d D.C.A. 1963). Similarly, the third party plaintiff is not bound by the plaintiff's complaint and the third party plaintiff may assert a claim for indemnity alleging that he is a passive tortfeasor in his third party complaint although the plaintiff has alleged otherwise. Crawford Door Sales, Inc. v. Donahue, 321 So. 2d 624 (Fla. 2d D.C.A. 1975). Whether the practical implication of permitting a third party action in fact does require the plaintiff to litigate the liability of both the defendant-third party plaintiff and the third party defendant is another, and as yet unanswered question. That the Florida supreme court thinks that it does seem clear from its opinion in Stuart v. Hertz Corp., 351 So. 2d 703 (Fla. 1977). See note 92 *infra*.

47. FLA. STAT. §768.314(a) (1977). For an interesting contrast of philosophies see TEX. CIV. STAT. ANN. 2212(a)(2)(g) (Vernon Supp. 1978), which, unlike the Florida statute, provides that: "All claims for contribution between named defendants in the primary suit shall be determined in the primary suit, except that a named defendant may proceed against a person not a party to the primary suit who has not effected a settlement with the claimant."

48. *E.g.*, Aircraft Taxi Co. v. Perkins, 227 So. 2d 722 (Fla. 3d D.C.A. 1969); Bordettsky v. Hertz Corp., 171 So. 2d 174 (Fla. 2d D.C.A. 1965).

49. See note 46 *supra*.

50. This aspect of joint tortfeasor liability expresses rather clearly one important reason why the plaintiff is well advised to join all joint tortfeasors in the same action. The plaintiff will also find it necessary in many instances to establish the liability of joint tortfeasors in a single action since the injuries caused to a plaintiff may exceed the assets (or insurance coverage) of any single tortfeasor. Unless the plaintiff establishes the liability of the joint tortfeasors he cannot aggregate their assets to receive full compensation.

in which the indemnitee has been named as a tortfeasor.[51] Once the indemnitor has been notified, he is obligated to defend the action. If the indemnitor does not, and if the indemnitee in a subsequent action establishes his right to indemnity, the liability judgment of the plaintiff against the indemnitee is conclusive of the liability of the indemnitor to the plaintiff and there is no necessity of further legal proceedings to establish the liability of the indemnitor to the plaintiff.[52] The common law right to "vouch in" an indemnitor is a direct product of the conceptual basis of the right to implied indemnity and it has not been supplanted by the procedural right to bring a third party action.[53]

Before further analysis of the substantive and procedural differences between the concepts of contribution and indemnity is conducted, the Florida pure comparative fault system and its goals need to be discussed.[54]

The pure comparative fault system of loss transference adopted by the Florida supreme court in *Hoffman* can be treated as having two goals: a primary goal of loss avoidance through deterrence of proscribed conduct that causes injuries; and a secondary goal of loss transference of the costs of compensation for injuries caused by proscribed conduct.[55] The first step in the

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51. *See* Olin's Rent-A-Car System v. Royal Continental Hotels, Inc., 187 So. 2d 349 (Fla. 4th D.C.A. 1966) in which the Royal Continental Hotel (Hotel) had been sued by an invitee of the hotel who was injured through the negligence of Olin's Rent-A-Car System's (Olin's) employee. Hotel notified Olin's of the suit and requested that Olin's appear and defend the claim since it was based upon the negligence of its employee. Hotel notified Olin's that failure to successfully defend the suit would result in Hotel proceeding to seek indemnity. Olin's did not appear, Hotel was found liable for the negligence of Olin's employee, and Hotel sought indemnity in a subsequent action. The Fourth District Court of Appeal recognized the right of an indemnitee to "vouch-in" an indemnitor as an effective device to enforce the right to indemnity. In reaching this conclusion, the court quoted with approval from Littleton v. Richardson, 34 N.H. 179 (1856): "When a person is responsible over to another, either by operation of law or by express contract . . . and he is duly notified of the pendency of the suit, and requested to take upon him the defense of it, he is no longer regarded as a stranger because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he was the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion . . . will be conclusive against him whether he has appeared or not . . . ." 187 So. 2d 351; *accord,* Morris v. Federated Mut. Ins. Co., 497 F.2d 538, 543 (5th Cir. 1974). *See generally,* 3 MOORE'S FEDERAL PRACTICE, §14.021 at 14-51 through 14-52 (2d ed. 1974).

52. *See* Olin's Rent-A-Car System v. Royal Continental Hotels, Inc., 187 So. 2d 349, 351-52 (Fla. 4th D.C.A. 1966). The ease with which this method can be employed to establish the liability of the indemnitor to the plaintiff recommends itself to all potential indemnitees, as the court stated in Morris v. Federated Mut. Ins. Co., 497 F.2d 538, 543 (5th Cir. 1975) (applying Florida law): "Vouching in . . . requires nothing more than a letter with perhaps the precaution of registered or certified mail."

53. Morris v. Federated Mut. Ins. Co., 497 F.2d 538, 543 (5th Cir. 1975); Olin's Rent-A-Car System v. Royal Continental Hotel, Inc., 187 So. 2d 349, 351 (Fla. 4th D.C.A. 1966).

54. For a more detailed analysis of the pure comparative fault system as it affects the multiple party actions, see Walkowiak, *supra* note 8.

55. This thought as the means by which to analyze fault-based liability is not original with me and in different form has provided the basis of a series of articles by Professor Guido Calabresi. *See, e.g.,* Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts,* 70 YALE L.J. 499 (1961); Calabresi, *The Decision for Accidents: An Approach to Non-*

process of deciding whether to shift any portion of a loss suffered by an injured party claimant to a defendant is evaluation of the conduct of the party defendant. If that conduct falls below the legal standard established for that form of conduct and the conduct is determined to have caused compensable injury, the portion of the loss that represents the non-claimant-caused injury is shifted from the claimant suffering the injury to the party defendant.[56] In that manner, an actor is presumably deterred from following certain courses of conduct, normally described as negligence, that may result in injury to himself or to another. Presumptively, when the proscribed conduct is deterred, the number of injuries that would be caused by that conduct is reduced or eliminated. Reduction of primary accident costs is theoretically accomplished when people are deterred from conduct that causes loss by the fear of financial liability for those losses. The acceptance of this primary loss reduction aspect of the fault system has prompted one commentator to suggest that jurisdictions that prohibit all contribution among joint tortfeasors justify their decision with the conclusion that the prohibition of contribution among tortfeasors promotes further reduction of primary accident costs by deterring future wrongful conduct through the threat of full financial responsibility for jointly caused injuries.[57] It was during the period that Florida was among the states prohibiting contribution among joint tortfeasors that its courts adopted and developed doctrines of implied indemnification permiting total loss transference from one tortfeasor to another.[58] This doctrine of total loss *transference* among joint tortfeasors was created by the courts and its existence rationalized with a rule that prohibited any loss *sharing* among joint tortfeasors.[59] The difference was justified by articulating a set of standards through which the right to indemnity could be established. Thus, it was not sufficient for one joint tortfeasor to establish that his liability was based upon a relative degree of fault: it was necessary that his liability be based upon an entirely different form of conduct or theory of liability.[60] The courts adopted two basic tests, either of which

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fault Allocation of Costs, 78 HARV. L. REV. 713 (1965); Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J. LAW & ECON. 67 (1968).

56. In basic form this is fault-based liability. *See* O. W. HOLMES, THE COMMON LAW 85-87 (Howe ed. 1963).

57. "[The Courts] had the rule of no contribution between tortfeasors, and other related rules, and inasmuch as these rules would be 'well supported in principle' if they served to deter people from participation in legally objectionable activity, the courts proceeded to assume that they did have this deterrent effect, without any proof whatever of the fact." Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 134 (1932). Criticism of the rationale underlying the rule which prohibited contribution among joint tortfeasors has occupied untold hours and resulted in reams of legal scholarship, a sampling of which is collected in a brief bibliography in Walkowiak, *supra* note 8, at 99 n.105.

58. *See*, however, Stuart v. Hertz Corp., and other cases discussed at note 86 *infra*.

59. In Slattery v. Marra Bros., 186 F.2d 134, 138 (2d Cir. 1951), Judge Learned Hand, recognizing the anomaly, stated that decisions granting indemnity "may perhaps be accounted for as lenient exceptions to the doctrine that there can be no contribution between joint tortfeasors, for indemnity is only an extreme form of contribution."

60. Thus it was not sufficient for a party seeking indemnity to prove that he was held to a higher standard of care than the party from whom the indemnity was sought. Indemnity would be granted only if the party seeking indemnity was a passive or secondary tortfeasor

might be employed to establish that the right to indemnity existed.[61] These are discussed below.

ACTIVE-PASSIVE

A joint tortfeasor may be entitled to indemnity when the joint tortfesor-indemnitee's negligence is "passive" and the joint tortfeasor-indemnitor, through whom the indemnitee has been found passively negligent, is guilty of "active" negligence. The distinction between active and passive negligence has created problems of interpretation, since the grammatical impact of these words must be distinguished from their legal definition. Thus, in *Florida Power and Light Co. v. General Safety Equipment Co.*,[62] the Third District Court of Appeal undertook to define "active" and "passive" negligence. In that case, the plaintiff had been injured when motorized equipment operated by Dade County came in contact with high voltage lines owned by Florida Power. The plaintiff sued both Dade County and Florida Power as joint tortfeasors and both brought third party actions[63] seeking indemnity from the manufacturers of the motorized equipment that had come into contact with the power lines. The trial court dismissed both third party complaints.[64]

The Third District Court of Appeal affirmed the dismissal of the third party complaints seeking indemnity because the plaintiff had alleged that the defendants, Florida Power and Dade County, were liable for "active" negligence.

> If recovery were had against the defendants [Florida Power Company and Dade County] upon proof of their negligence as alleged it could not be said that their liability for their negligence in the form of acts or omissions was such as to place them in the position of one who, being without fault, had been subjected to vicarious or technical tort liability for the wrongful conduct of another.[65]

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and the party from whom he sought indemnity was an active or primary tortfeasor as these terms were defined. Aircraft Taxi Co. v. Perkins, 227 So. 2d 722 (Fla. 3d D.C.A. 1969). *See also* Duncan v. Judge, 43 Wash. 2d 836, 264 P.2d 865 (1953). *But see* Panasuk v. Seaton, 277 F. Supp. 979 (D. Mont. 1968); Wheeler v. Glazer, 137 Tex. 341, 153 S.W.2d 449 (1941). It has been suggested that the standards for awarding indemnity adopted by some jurisdictions do measure degrees of fault and arrive at the decision to award indemnity on that basis. Comment, *supra* note 40, at 496-99.

61. Some courts have suggested that there is a third category of implied indemnity action in Florida. This third category would include all actions for implied indemnity by the owner of an automobile against the negligent operator of that motor vehicle. *E.g.*, General Dynamics Corp. v. Adams, 340 F.2d 271 (5th Cir. 1965). The author has subsumed these actions for indemnity within the two major tests as the same rules for determining indemnity have been applied to the automobile ownership cases as have been applied in all other cases.

62. 213 So. 2d 486 (Fla. 3d D.C.A. 1968).

63. It has been consistently recognized in Florida that a third party action is an effective procedural device by which to prosecute an indemnity claim. See note 46 *supra*.

64. 213 So. 2d at 488.

65. *Id.* Thus, if Florida Power had a duty to act and failed to act its negligence would be active negligence. Under the present loss allocation system this would permit it to pursue an action for contribution from their joint tortfeasors. See Florida Power Corp. v. Taylor, 332 So. 2d 687 (Fla. 2d D.C.A. 1976).

Florida Power asserted however, that its negligence, if any, was "passive" because the plaintiff had alleged that it was negligent for failing to de-energize the power lines with which the motorized crane made contact. The Third District Court of Appeal responded to this contention by stating that Florida Power was entitled to indemnity only if it was a "passive" tortfeasor and then juxtaposed the definition of "passive" negligence with negligent failure to act.

> Although in defining negligence, omission to act is frequently referred to as passive negligence, it does not follow that it is entitled to be so classified in contemplation of the rule regarding indemnification . . . . The difference here is that the liability of the power company, if established on the allegations of negligence in the complaint, would not be a vicarious or technical liability arising from tort of another, but its liability would result from its active negligence through its failure or omission to act as required under certain circumstances.[66]

The right to implied indemnification is available to a tortfeasor who has been held liable to a plaintiff due to his technical or vicarious liability. Florida Power's *failure* to correct a dangerous condition when it had a duty to do so was "active" negligence. The proscribed conduct that would reduce primary costs was failing to act when there was an affirmative duty to do so. Thus, the First District Court of Appeal in *Winn Dixie Stores, Inc. v. Fellows*,[67] found that the failure of store employees to correct a dangerous store display was active negligence even though the display had been constructed by a third party. The store was not entitled to bring an action for indemnification against the third party because it had an affirmative duty to its customers to discover and correct the defect. The basis of liability to the plaintiff was the failure to act when there was an affirmative duty to do so. The store employees were the "actors" through whose breach of duty the plaintiff had suffered injury. In its normative aspect, liability for negligence seeks to *deter* persons from *not acting*, that is, to require that they act when there is a clearly defined duty to do so.[68]

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66. 213 So. 2d at 488.

67. 153 So. 2d 45 (Fla. 1st D.C.A. 1963).

68. *Compare* Winn-Dixie Stores, Inc. v. Fellows, 153 So. 2d 45 (Fla. 1st D.C.A. 1963), *with* Kroger Co. v. Bowman, 411 S.W.2d 339 (Ky. Ct. App. 1967) (indemnity awarded to store for injuries suffered when defective carton of soda split, causing injuries to store's customer). In *Kroger*, as in *Winn-Dixie*, the beverage seller provided the cartons and set up the display. In *Kroger*, however, the court found that the store employees were not negligent in failing to discover the defective carton. 411 S.W.2d at 343. In *Winn-Dixie*, the store employees had not only discovered the defective display, but also had been registering complaints to the beverage seller for some months before the accident. 153 So. 2d at 51. Thus the decisions are perfectly compatible for if the store employees in *Winn-Dixie* had not known of the dangerous conditions of the display *and* had no duty to discover its danger, it too would have been entitled to indemnity. *See generally* Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 So. CAL. L. REV. 728, 745-46 (1968). It is important to note at this time how the potential allocation of loss will differ when the decision is made to place an affirmative duty to act upon a party. If there had been no affirmative duty to act on the part of the *Winn-Dixie* employees, *Winn-Dixie* would be entitled to full indemnification. The entire loss would be borne by the beverage seller. There would be no negative incentive to avoid liability by the *Winn-Dixie* employees. When there is an affirmative duty to act, *Winn-Dixie* shares the

In order to establish the right to implied indemnity, the indemnitee must be found liable to the plaintiff for the culpable conduct of another person. The clearest explication of this principle is found in *Mims Crane Service, Inc. v. Insley Mfg. Corp.*[69] The plaintiff was seeking compensation for property damage caused when the boom on a crane collapsed. Mims Crane Service had sold the crane to the plaintiff, and as the vendor of the defective crane, Mims was liable to the plaintiff for the damage. In deciding whether Mims was entitled to seek implied indemnification from other party defendants whose negligence combined with the defective crane to cause the plaintiff's damage, the Second District Court of Appeal examined the basis of Mims' liability to the plaintiff. If Mims' liability was due to its own negligence, Mims would not be entitled to indemnity.

> Conversely, if recovery should be had against Mims solely on the theory of negligence in furnishing the defective equipment, or, stated another way, if Mims' liability to plaintiff was not based on Mims' negligence but upon ownership of the defective truck-crane, then Mims should not be precluded from asserting its right of action for indemnification . . . .
>
> [Plaintiff's] complaint did not allege that Mims knew or should have known of the defective condition of the equipment, which knowledge could have the effect of making Mims' negligence not secondary or passive, but primary or active.
>
> We conclude that the third party complaint stated a cause of action for indemnity. . . .[70]

The critical issue to be determined before Mims would be entitled to indemnification, therefore, was not whether the vendor, Mims, was the *least* negligent party, but rather, whether the injured party sought recovery from Mims for a breach of duty owed by Mims to the plaintiff exclusive of mere ownership of the defective crane. That is, it must be determined whether Mims was merely an "innocent" conduit through whom compensation for injuries caused to the plaintiff by the actively negligent tortfeasors would be passed or whether it was also an "active" tortfeasor. As between the plaintiff and the owner, Mims, the non-self-caused injuries of the plaintiff should be compensated by the technically liable joint tortfeasor Mims. This is no less true under pure comparative negligence because there claimants are entitled to collect compensation only for their non-self-caused injuries.[71] When, however, a technically liable tortfeasor is innocent of active negligence, as between him and an actively negligent joint tortfeasor, the courts have consistently held that the loss should be transferred to the active tortfeasor in order to effect primary loss reduction. In the interest of maximizing victim compensation, the tech-

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loss occasioned upon the claimant with the party constructing the display. In this manner, theoretically, *Winn-Dixie* will encourage its employees to seek out and correct dangerous conditions existing on their premises and therefore reduce primary losses by correcting conditions that cause injuries. Similarly the loss occasioned upon the customer is shared by the store and the beverage seller, thereby spreading the loss.

69. 226 So. 2d 836 (Fla. 2d D.C.A. 1969).

70. *Id.* at 840.

71. See note 30 *supra.*

nically liable tortfeasor is liable to the claimant but then that party is entitled to seek indemnity from the manufacturer of the injury producing instrumentality.

When the owner of a defective instrumentality violates a duty he owes to the plaintiff, the owner's liability is no longer technical and the remedy of implied indemnity is not available to transfer liability to a joint tortfeasor. Thus, if Mims had negligently failed to inspect the truck-crane in the presence of a duty to do so, it would not have been entitled to implied indemnity. If a manufacturer can establish that the owner of a product has been "actively" negligent in the use of the product, the owner will not be entitled to indemnity from the manufacturer for injuries caused to innocent third parties by the negligent use, even though the manufacturer was also negligent in designing the product. In *General Motors Corp. v. County of Dade*,[72] General Motors sold buses equipped with tempered glass to Dade County. A woman bus passenger was injured when an unknown person threw a brick at one of these buses, shattering the glass. The passenger sued the county and received judgment for her injuries.[73] Dade County sued the manufacturer for indemnity. After a trial on the issues a jury awarded Dade County indemnity.

The Third District Court of Appeal reversed the award of indemnity to Dade County.[74] If Dade County had been found liable to the woman passenger solely due to its ownership of a defectively designed bus, the court would have sustained the award of indemnity. The court found, however, that the record in this action supported the finding that Dade County knew the bus did not have safety glass and yet routed the bus through an area in which Dade County officials should have anticipated that missiles of this sort might be thrown. As between the county and the manufacturer, the manufacturer was the passive tortfeasor, or as the court stated:

> A vendee-user of a product is not entitled to indemnity from a manufacturer for damages the former is required to pay a third party when, as here, the vendee-user's fault goes beyond the mere negligent failure to discover a product defect.[75]

Criticism of this decision as representing a phony kind of judicial distinction masking a more basic judicial interest in sending the bills to the party whom the court deems should pay, ignores the effect it may have upon reducing primary accident costs. When primary losses may thus be theoretically reduced through the assessment, in this case to Dade County, of liability for the negligently inflicted injuries, the right to indemnity will not be granted. Dade County *could have prevented this incident* (and thereby reduced primary costs) by not routing this bus through this "high missile" area or by purchasing buses

72. 272 So. 2d 192 (Fla. 3d D.C.A. 1973).

73. The plaintiff's action against Dade County is reported in Itoman v. County of Dade, 248 So. 2d 235 (Fla. 3d D.C.A. 1971).

74. General Motors Corp. v. County of Dade, 272 So. 2d 192 (Fla. 3d D.C.A. 1973). *See also* General Dynamics Corp. v. Adams, 340 F.2d 271 (5th Cir. 1965).

75. General Motors Corp. v. County of Dade, 272 So. 2d 192, 194 (Fla. 3d D.C.A. 1973). *See also* Winn-Dixie v. Fellows, 153 So. 2d 45, 51 (Fla. 1st D.C.A. 1963).

with safety glass. Its negligence in routing this bus caused this injury to the plaintiff. The economic savings it realized by the purchase of a bus without safety glass ultimately resulted in liability for the plaintiff's injuries which could not be totally shifted to the manufacturer. If Dade County had brought this action under current law it would be required at least to share the loss.[76]

It is only when the "conduct" of the defendant-indemnitee can no longer be said to be an active cause of the injuries to the plaintiff that indemnity is awarded, for otherwise the injury-causing "conduct" will not be deterred through imposition of financial responsibility for the costs of the loss suffered. Thus, the right to indemnity is denied to a tortfeasor who although a passive participant in the initially negligent act, ratifies the conduct of an active tortfeasor and the act of ratification contributes to the plaintiff's injury.[77] But even within the ambit of active-passive negligence, concepts of enterprise liability manifest themselves. Consequently, a tortfeasor who is vicariously liable for the active negligence of his servant will be permitted to seek indemnity from his servant, but he will be denied the right to indemnity from a third party tortfeasor whose negligence combined with that of the employer's servant to cause the plaintiff's injuries.[78] It was a recognition of this fact that gave rise to the concept that implied indemnity could effect partial loss shifting to enterprises or parties responsible for injuries. If this result was accomplished in an efficient manner, a better secondary loss distribution system might result. An effort to interpret the remedy of implied indemnity in order to accomplish that result was attempted by the Fourth District Court of Appeal in a short-lived decision, *Stuart v. Hertz Corp.*[79]

In *Stuart*, the plaintiff, Ruth McCutcheon, and her husband were seeking to collect for injuries which were suffered in an accident in which Stafford

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76. See discussion of Winn-Dixie v. Fellows at note 68 *supra.*

77. Great A. & P. Tea Co. v. Federal Detective Agency, Inc., 157 So. 2d 148 (Fla. 3d D.C.A. 1963).

78. Dura Corp. v. Wallace, 297 So. 2d 619 (Fla. 3d D.C.A. 1974). Plaintiff was injured by a rock thrown by a lawn mower operated by Diaz' son. Plaintiff joined both, Dura, the manufacturer of the lawn mower alleging defective design, and Diaz under the theory of respondeat superior for the actions of his son. Diaz cross-claimed for indemnity against Dura. The jury found for the plaintiff against Diaz and Dura, and found for Diaz on the cross-claim seeking indemnity. The Third District Court of Appeal reversed the finding that Diaz was entitled to indemnity. Since he was found vicariously liable for the active negligence of his son, he could not seek indemnity from a party other than the party whose active negligence subjected him to liability. *Id* at 621.

The new Florida contribution statute would permit Diaz and his son to *share* the costs of compensating the plaintiff with the manufacturer based upon their relative degrees of fault. For purposes of deciding these proportional shares, Diaz and his son would be treated as one party. See FLA. STAT. §768.31(3)(b) (1976). *See also Lincenberg*, 318 So. 2d at 393.

79. 302 So. 2d 187 (Fla. 4th D.C.A. 1974), *rev'd*, 351 So. 2d 703 (Fla. 1977). A similar factual situation was treated differently in Lindsey v. Austin, 336 So. 2d 487 (Fla. 3d D.C.A. 1976). In *Lindsey*, a physician had operated to remove a corn from a woman's foot and was sued for malpractice. He brought a third party action for indemnity from another physician who had treated the woman after the surgery, alleging that the second physician had aggravated the injuries caused the woman. The Third District Court of Appeal regarded the third party claim for indemnity as a suit for contribution and advised the trial court to treat it as such.

Holbrook negligently injured Mrs. McCutcheon while driving an automobile owned by the Hertz Corporation.[80] The defendants, Hertz Corp. and Holbrook, brought a third party claim against Dr. Frank Stuart, alleging that, while treating Mrs. McCutcheon for the injuries she suffered in the accident, the doctor negligently severed Mrs. McCutcheon's carotid artery, causing an orthopedic disability and neurological injuries for which they were passively liable.[81] The trial court refused to dismiss the third party complaint for indemnity.

Although this case was decided after the supreme court's decision to adopt pure comparative negligence, the Fourth District refused to judicially adopt contribution among joint tortfeasors,[82] commenting that there were no reported cases within the state recognizing the right of a tortfeasor initially liable to collect indemnity from a physician who negligently aggravated the injury in the course of treatment.[83] As the court noted, the right to implied indemnity was a judicial creation that has a separate and distinct existence fundamentally different from the right to contribution among joint tortfeasors.[84] The court went on to state that it could not find a contractual basis for the right to implied indemnity in this action, and that it had not been established that the physician owed a specific duty to the tortfeasor.[85] Nevertheless, the *Stuart* court held that tortfeasors Hertz Corp. and Holbrook had a cause of action for implied indemnity against the physician who aggravated the injuries. The tortfeasors were entitled to be indemnified for the cost of the

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80. Stafford Holbrook's father, George Holbrook, was sued individually and as the father and next friend and guardian ad litem of Stafford Holbrook. As this is not essential to our discussion of the case, all references to George Holbrook have been eliminated or consolidated with those of his son.

81. A tortfeasor is liable for all of the injuries which naturally flow from the original tortious act. "Where one who has suffered personal injuries by reason of the negligence of another exercises reasonable care in securing the services of a competent physician or surgeon, and in following his advice and instructions, and his injuries are thereafter aggravated or increased by negligence, mistake, or lack of skill of such physician or surgeon, the law regards the negligence of the wrongdoer in causing the original injury as the proximate cause of the damages flowing from the subsequent negligent or unskillful treatment thereof and holds him liable therefor . . . ." J. Ray Arnold Corp. v. Richardson, 105 Fla. 204, 141 So. 133, 135 (1932), *quoted with approval in* Stuart v. Hertz Corp., 302 So. 2d 187, 189 (Fla. 4th D.C.A.) and 351 So. 2d 703, 707 (Fla. 1977).

82. 302 So. 2d at 190-91, citing an earlier decision from the same district in which the court expressly refused to abandon the long-standing rule prohibiting contribution among joint tortfeasors, Maybarduck v. Bustamante, 294 So. 2d 374 (Fla. 4th D.C.A. 1974). However, as suggested previously, this position may not represent the individual philosophy of the court so much as it does the excoriation which would follow if a District Court did attempt to abandon earlier precedent of the Florida supreme court. See note 7 *supra*. *See generally*, Walkowiak, *supra* note 8 at 102.

83. 302 So. 2d at 189.

84. *Id.* at 191.

85. In this respect the court seems to be rejecting the reasoning of many of the courts which have permitted the tortfeasor to sue for aggravation of injuries in similar circumstances. These courts imply a right of subrogation from the injured party to the tortfeasor, compensating the injured party permitting that tortfeasor to sue for aggravation of injuries caused by physician's malpractice. *E.g.*, Clark v. Halstead, 276 A.D. 17, 93 N.Y.S.2d 49 (1949); Fisher v. Milwaukee Electric Ry. & Light Co., 173 Wisc. 57, 180 N.W. 269 (1920).

damages which they would now be compelled to pay to the plaintiff as a result of the physician's negligence.[86]

Unlike the cited New York decision of *Dole v. Dow Chemical Co.*,[87] this was not an attempt by the *Stuart* court to adopt contribution among tortfeasors. It was, rather clearly, an attempt to shift full financial liability for an injury to the injury-producing party (Stuart) from a party liable due to the application of a technical rule of tort law. In *Stuart*, the tortfeasor initially causing Mrs. McCutcheon's personal injuries was liable for the aggravation of those injuries caused later in time by the physician treating Mrs. McCutcheon. The physician's negligence was attributed to the operator of the motor vehicle through the rather artificial device of proximate cause, that is, the doctrine that aggravation of personal injuries through medical malpractice is always a foreseeable result for which the tortfeasor initially causing the injury will be liable.[88] The incremental increase in the financial liability of the vehicle operator for the malpractice of a physician is as independent of the fault of the initial tortfeasor as is the vicarious liability of an employer for the torts of his servant. In the interests of victim compensation, the innocently injured party should be entitled to collect fully from the tortfeasor responsible for causing the initial injuries,[89] but once the victim has been fully compensated, the enterprise primarily responsible for the injuries should bear the cost of compensating for those injuries. Whether expressed in terms of primary loss deterrence or loss spreading throughout an injury-producing enterprise, the judgment in *Stuart* made fine judicial sense. It was its limitation rather than its breadth which made the *Stuart* decision imperfect. It did, however, manifest a willingness on the part of the court to attempt to fashion a common law remedy in a manner that would be consistent with the total system of post-judgment loss allocation.

When two enterprises share in the active tortious causation of a claimant's injuries, the right to contribution applies.[90] It is only when one tortfeasor is

86. In reaching this conclusion the court relied upon Herrero v. Atkinson, 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (1964); Gertz v. Campbell, 155 Ill. 2d 84, 302 N.E. 2d 40 (1973); Dole v. Dow Chemical Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972); to support its conclusion that indemnity has a strong equitable basis in addition to its fundamentally contractual basis. 302 So. 2d at 190-91. *Gertz* and *Stuart* recognize the right of a tortfeasor initially causing an injury who has been held liable for that injury and its subsequent aggravation to seek indemnity from a physician who has aggravated that injury. As the *Stuart* court acknowledged, this principle is consistent with the "active-passive" and "duty" requirement recognized by the Florida courts as providing a basis for the right to indemnity. 302 So. 2d at 194. *Dole* however went much further than either *Gertz* or *Stuart* and amounts to a judicial rejection of the traditional rule prohibiting contribution among joint tortfeasors under the rubric of abandoning the traditional passive-active test for awarding indemnity. The *Dole* decision was codified by the New York legislature and is the basis for its proportional contribution among joint tortfeasors act. See N.Y. Civ. Prac. §1402 (1974).

87. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

88. 302 So. 2d at 189.

89. That is, that the indemnitee will remain jointly and severally liable for all injuries caused to the claimant.

90. In this action, we can identify the two enterprises as: (1) operation of motor vehicles, and (2) practice of medicine. They are not, however, joint tortfeasors regarding all of the injuries suffered by Mrs. McCutcheon; therefore, the question of whether and in what amount

only technically liable for discrete damages that the right to indemnity as defined by the Fourth District Court of Appeal in *Stuart* applied. In *Stuart* the indemnitor and indemnitee were both liable for breach of the same standard of conduct to the plaintiff. However, the *Stuart* court required the actor responsible for causing discrete injuries for which another joint tortfeasor was technically liable to assume full financial responsibility for those discrete losses. Although the indemnitor was required to reimburse the indemnitee for only a portion of the plaintiff's total damages, the indemnitor was reimbursing the indemnitee for all of the damages caused by the indemnitor for which the indemnitee was held technically liable. Unlike apportionment, the plaintiff was entitled to seek total compensation from the indemnitee for the injuries jointly caused by the indemnitor and the indemnitee. Unlike contribution among joint tortfeasors, indemnity as defined by the Fourth District Court of Appeal in *Stuart* was total loss shifting of the designated costs of compensating for injuries from a party technically liable to a party responsible for causing injuries, rather than a distribution of the costs of compensating for injuries among parties jointly causing those injuries.[91] The loss was shared based upon a criterion of *comparative cause* rather than of *comparative degrees of negligence.* Although the required apportionment apprehended an accuracy that is sometimes wanting in the measurement of tort damages, the decision did represent an important first step toward eliminating proportions of fault as the exclusive basis for the decision to spread the post-judgment costs of compensating for injuries. That the Fourth District Court of Appeal's decision in *Stuart* would result in little, if any, predictable difference in loss distribution from that which results from proportional contribution may, however, constitute the unstated justification for the supreme court's rejection of *Stuart.*[92]

The supreme court opinion, however, seems to reflect a misconception of the differences between the implied indemnity cause of action as set forth by the Fourth District, contribution, and apportionment among concurrent tortfeasors.

> [T]he court here finds itself faced with the question of whether to apportion the loss between the initial and subsequent rather than joint or concurrent tortfeasors. This cannot be done.
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> An active tortfeasor should not be permitted to confuse and obfuscate

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Hertz would be entitled to contribution from Dr. Stewart has been left unanswered. That the initial injuries suffered by Mrs. McCutcheon are, relative to Hertz and Dr. McCutcheon, the sole financial responsibility of the "negligent" Hertz Corp., seems obvious. They are, at best, joint tortfeasors regarding the aggravation of the injuries caused Mrs. McCutcheon by Dr. Stewart's alleged "negligence" *after* she was brought to him for treatment of her initial injuries. The "proportion" of fault attributable to the two parties for these injuries (the aggravation of Mrs. McCutcheon's initial injuries) may be shared by Dr. Stewart and Hertz based upon their relative proportions of fault of a common liability. FLA. STAT. §768.31(2)(b) (1977).

91. *See* Dole v. Dow Chemical Co., 20 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S. 2d 382 (1972). *See also* Pachowitz v. Milwaukee and Suburban Transport Corp., 56 Wis. 2d 383, 202 N.W.3d 268 (1972).

92. 351 So. 2d 703 (Fla. 1977) (Boyd, J., dissenting in part and concuring in part; Overton, C.J., dissenting).

> the issue of his liability by forcing the plaintiff to *concurrently* litigate a complex malpractice suit in order to proceed with a simple personal injury suit.[93]

As noted, however, Hertz sought to shift a portion of the losses it suffered to the negligent physician *after* the plaintiff sought full compensation from Hertz. The *Stuart* indemnification doctrine announced by the Fourth District was not an attempted substitution of joint tortfeasor liability and consequent substitution of apportionment among joint tortfeasors. Nevertheless, it seems implicit in the supreme court's majority opinion, and in Justice Boyd's separate opinion, that the supreme court perceived it as such.[94]

Thus, the attempted experiment in modifying the active-passive implied indemnity doctrine undertaken by the Fourth District Court of Appeal failed to serve as a stepping stone in the further development of a more equitable post-judgment loss distribution system, and the all-or-nothing approach was endorsed by the Florida supreme court as one of the distinguishing characteristics of implied indemnity.[95]

Regardless of whether implied indemnity required a total shifting of all losses or permitted a partial allocation of loss, the active-passive test for determining the entitlement to the right to indemnification has not accommodated all of the circumstances in which indemnity has been granted. It has led to some criticism and an attempt by some Florida courts to substitute an additional and, as some have suggested, a more technically appropriate standard.

PRIMARY-SECONDARY

A party whose liability to a third person is derived from a legal relationship with another party may be entitled to indemnification from the party through whose acts his liability is established. The party committing the act or omission is called the "primary" tortfeasor, and the party who is liable as a result of this relationship is called the "secondary" tortfeasor. The primary-secondary tortfeasor test has been adopted in Florida to supplement the active-passive test to determine whether a joint tortfeasor is entitled to receive indemnity. The joint tortfeasor's right to indemnity is established under this test by: (1) examining

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93. 351 So. 2d at 706 (emphasis supplied). A third party action does not require the plaintiff to establish the liability of the third party defendant to the plaintiff. The plaintiff establishes the liability of the defendant-third party plaintiff who in turn establishes the liability of the third party defendant to him. *See* Mount Sinai Hosp. of Greater Miami v. Mora, 342 So. 2d 1063 (Fla. 3d D.C.A. 1977).

94. Justice Boyd, concurring in part and dissenting in part, advocated a proportionate reduction in the total liability of Hertz *to* the plaintiff for the amount of loss suffered by the plaintiff attributable to the aggravation of her injuries due to the malpractice of the physician. 351 So. 2d at 707.

95. The court cited with particular approval, the rule stated in Transcon Lines v. Barnes, 498 P.2d 502, 509 (Ariz. 1972): "It must be remembered that indemnity is an all or nothing proposition damage-wise, and hence should be an all or nothing proposition fault-wise. Apportionment of damages is not contemplated by it . . . . Stated in the positive the cases mean simply that indemnity between tortfeasors is allowable only where the whole of the fault was in the one against whom indemnity is sought." 351 So. 2d at 706.

the character of his conduct affecting the plaintiff in order to establish whether his liability is derivative, and (2) examining the legal relationship between that tortfeasor and the tortfeasor through whose conduct he is being held liable. The primary-secondary test was endorsed by the Fourth District Court of Appeal in *Maybarduk v. Bustamante*.[96]

In *Maybarduk*, the plaintiffs brought a medical malpractice action against Maybarduk, a surgeon; Mercy Hospital, the hopsital in which Maybarduk had performed the surgery; and Bustamante, the surgeon's assistant who had been provided by the hospital to assist during the surgery.[97] The plaintiff alleged that the defendants had failed to remove one of their surgical instruments during surgery. Maybarduk cross-claimed for indemnity against Bustamante and Mercy Hospital. He alleged that his liability was vicarious and his negligence, if any, was passive. The trial court granted a motion to dismiss the cross-claim for failure to state a cause of action. The Fourth District reversed, stating that whether Maybarduk was an active or a passive tortfeasor was a question of fact.[98] The Court discussed the primary and secondary liability of Maybarduk, Bustamante, and Mercy Hospital in the following terms:

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96. 294 So. 2d 374 (Fla. 4th D.C.A. 1974).

97. The plaintiffs also sued the malpractice insurers of the hospital and the surgeon. This was possible since the Florida supreme court already had held that an injured party is a third party beneficiary of a liability insurance contract and has the right to bring a direct action against the liability insurer issuing the policy. Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969). The Florda Insurance and Tort Reform Act of 1977, 1977 Fla. Laws, 1977, ch. 77-468, §39, statutorily abolished direct action against liability insurers by creating FLA. STAT. §768.063 (1977) [hereinafter all references will be to the codification]. The effect of liability insurance upon loss allocation is discussed *infra*, at note 128 and accompanying text. The new provision does not alter the rules of discovery regarding insurance coverage, however. And while the new provision prohibits naming any liability insurer as a party defendant initially, it does require that the liability insurer file a statement in its own name indicating the insured, the policy limits and any policy or coverage defenses which the insurer intends to assert. FLA. STAT. §768.063(3) (1977). The intent of the statute seems rather clearly to return to the pre-*Shingleton* rule followed in Florida so that jury verdicts will not be "tainted" by the knowledge that the defendants are insured. Thus, claimant's attorneys will be forced to resort to voir dire, for instance, and other such devices to introduce the fact that the defendants are insured. It has long been a proper challenge to a juror's qualifications that he has a financial interest in the outcome of a lawsuit. If a juror owns stock in defendants' liability insurance company, that juror may be struck for cause, even if, as is the case in most jurisdictions, the liability insurer is not named in the law suit. "It is well settled that stockholders of an insurance company which carries liability insurance indemnifying a party to an action from a judgment against it in that case are 'interested in the result of the case' and not qualified to serve as jurors, and that to conceal such disqualification would 'abridge the right of a plaintiff to pursue the lawful procedure in the selection of a jury;' and that this is true whether actual injury resulted or not." Shipman v. Johnson, 89 Ga. App. 620, 622, 80 S.E.2d 717,720 (1954). *See also*, Mitchell v. Vann, 278 Ala. 1, 174 S.E.2d 501 (1965). Under FLA. STAT. §768.063(4) (1977), the insurer may be named after the liability of its insured has been established for the purpose of entry of judgment against the insurer. Thus, the supreme court's interpretation of the doctrine of set-off in Stuyvesant Ins. Co. v. Bournazian, 342 So. 2d 471 (Fla. 1976) discussed *infra* at note 141, is unaffected by this section.

98. 294 So. 2d at 378 (citing with favor Peoples Gas Systems, Inc. v. B. & P. Restaurant Corp., 271 So. 2d 804 (Fla. 3d D.C.A. 1973)).

> Whether Bustamante was Maybarduk's "borrowed servant" or the hospital's employee (which fact is yet to be determined) would not necessarily be determinative of the respective primary and secondary liability *as between Maybarduk and the hospital.* If it is shown that the hospital owed Maybarduk a duty then notwithstanding the fact that Bustamante was Maybarduk's borrowed servant over whom Maybarduk had supervision and control, indemnification might still lie against the hospital if it could be shown that the hospital's omission of the duty (to furnish a qualified assistant) was the *primary* cause of the injury.[99]

This concept of duty to the indemnitee, discussed by the *Maybarduk* court as primary-secondary liability, is frequently an element of the active-passive test for implied indemnification and is consistent with that basis for awarding indemnity to a tortfeasor.[100] If Maybarduk had been found actively negligent in personally failing to discover the surgical instrument when he had a duty to do so, he would be denied indemnity from his joint tortfeasors, that is, Bustamante and Mercy Hospital. His right to implied indemnity was contingent upon proof that his liability to the patient was based solely upon the fact that he was the chief surgeon during an operation in which a surgical instrument was not removed, and that the person from whom he sought indemnity owed him a duty to discover the instrument and breached that duty or, in the case of the hospital, that it had a duty to provide him with a qualified assistant and breached that duty.[101] Thus interpreted, implied indemnity can be approached quite readily as a two-pronged application of traditional breach of duty analysis, the first prong consisting of a finding that breach of duty caused injury to a plaintiff and by operation of law makes the indemnitee a joint tortfeasor. The second prong consists of a finding that there is a duty running from the indemnitor *to* the indemnitee to act or to forbear injury.[102] This duty of the

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99. 294 So. 2d at 378 (emphasis by the court).

100. *See, e.g.*, General Dynamics Corp. v. Adams, 340 F.2d 271 (5th Cir. 1965) (applying Florida law); Winn Dixie, Inc. v. Fellows, 153 So. 2d 45 (Fla. 1st D.C.A. 1963); Mims Crane Service, Inc. v. Insley Mfg. Corp., 226 So. 2d 836 (Fla. 2d D.C.A. 1969).

101. *See* Aircraft Taxi Co. v. Perkins, 227 So. 2d 722, 723 (Fla. 3d D.C.A. 1969) in which the court denied the right to indemnity to a common carrier against another vehicle involved in the collision, stating: "Therefore, Aircraft's (the common carrier's) driver could not have indemnity from the driver or owner of the other car, and Aircraft, in claiming indemnity from the latter stands in no better or higher position than its driver in that regard. *There was no duty running to Aircraft from the driver of the other car,* as there was to its own driver." (emphasis supplied). *See also,* Stembler v. Smith, 242 So. 2d 472 (Fla. 1st D.C.A. 1970); State v. McLaughlin, 315 S.W.2d 499 (Mo. App. 1958).

102. This can be distinguished from contribution among joint tortfeasors. Contribution is loss-sharing among tortfeasors liable for the same injury in allocated shares. The liability of the tortfeasors is established when they each breach a duty to the plaintiff and one of the tortfeasors jointly and severally liable for the injuries pays more than his share for the injuries caused. Its basis therefore lies in effective secondary cost reduction through loss-sharing. See Walkowiak, *supra* note 8 at 99 for a more extensive discussion of contribution in a pure comparative negligence system. Indemnity is total loss-shifting from one tortfeasor to another and its justification must be found in either effective primary cost reduction through loss-shifting to a party who will be deterred from injury producing conduct or secondary loss reduction through loss shifting to a more effective cost distributor than the tortfeasor initially assessed for the damages.

indemnitor to the indemnitee may be created by (1) contract between the indemnitor and indemnitee,[103] (2) the negligent performance of a duty assigned by a master to a servant,[104] or (3) application of law.[105]

Since the comparative fault system has the twin goals of primary cost reduction by deterrence of injury-producing conduct, and effective compensation and distribution of the secondary costs of accidents, the primary-secondary test for implied indemnification is consistent in principle with the pure comparative negligence system adopted in Florida. The party whose conduct is responsible for the injury will be deterred through financial loss representing the cost of compensating for injuries that resulted from his conduct. The indemnitee has had duty owed him breached. The claimant has had a duty owed him breached. Indemnitors will be deterred from breaching those duties if civil liability for the claimant's injuries will ultimately be borne exclusively by indemnitors. Thus examined, the doctrine of implied indemnity under either the active-passive test or the primary-secondary test satisfies the desire to effect primary cost reduction. The secondary costs of accidents are theoretically borne entirely by the indemnitor.

If however, implied indemnity does not represent a sound secondary loss distribution scheme, or if fault-based liability is sufficiently discredited as the basis for compensation, implied indemnity as a method of tort loss distribution is called into question. Implied indemnification can logically exist in a comparative fault system only when the twin goals of liability based upon fault are satisfied. If both goals cannot be satisfied by the doctrine then some election must be made and the doctrine modified or abandoned in order to accomplish the most socially desirable goal. That the doctrine has the potential to do so is clearly illustrated through analysis of a series of opinions that define the rights of an automobile owner to sue the operator of his vehicle for indemnification for injuries caused through negligent operation of the vehicle.

Classic Illustration: The Automobile Owner v. Its Operator

In Florida, an automobile is classified as a "dangerous instrumentality" and its owner is vicariously liable for injuries caused by the negligent operation of his vehicle by a third person using the vehicle with the owner's consent.[106] The owner is, therefore, generally entitled to indemnity from the operator of the vehicle through whose active (primary) negligence the passively (secondarily) negligent owner was found to be a joint tortfeasor.[107] As between the owner

103. *See, e.g.*, Suwannee Valley Elec. Co-op. v. Live Oak, P. & G. R.R., 73 So. 2d 820 (Fla. 1954); Seaboard Airline Ry. v. American Dist. Elec. Protective Co., 106 Fla. 330, 143 So. 316 (1932); Westinghouse Elec. Corp. v. J.C. Penney Co., 166 So. 2d 211 (Fla. 1st D.C.A. 1964).

104. *See, e.g.*, Grand Union Co. v. Prudential Bldg. Maintenance Corp., 226 So. 2d 117 (Fla. 3d D.C.A. 1969).

105. *See* Hutchins v. Campbell, Inc., 123 So. 2d 273, 276 (Fla. 2d D.C.A. 1960).

106. Southern Cotton Oil v. Anderson, 80 Fla. 441, 86 So. 629 (Fla. 1920).

107. *See, e.g.*, Cheek v. Agricultural Ins. Co. of Watertown, N.Y., 432 F.2d 1267 (5th Cir. 1970) (applying Florida law); Stuart v. Hertz Corp., 302 So. 2d 187 (Fla. 4th D.C.A. 1974); Gerardi v. Carlisle, 232 So. 2d 36 (Fla. 1st D.C.A. 1969); Bordettsky v. Hertz Corp., 171 So. 2d 174 (Fla. 2d D.C.A. 1965); Fincher Motor Sales, Inc. v. Lakin, 156 So. 2d 672 (Fla. 3d D.C.A. 1963).

whose liability is only technical or vicarious due to the application of a rule of law,[108] and an operator whose liability is based upon active or primary negligence, the goals of the fault system of loss avoidance through fault deterrence of accidents militate toward granting the owner the right to indemnity. The owner who has not been negligent in his choice of operators is "fault" free. The operator, however, in order to be liable to the owner and to the person injured must have committed some negligent act and therefore also violated a duty to the owner to drive in a non-negligent manner. The operator of the vehicle thus must either avoid causing all injury through "faultless" driving or, as is more pragmatic given the vagaries of fault-imposed liability, attempt to spread those losses through liability insurance.[109]

Purchase of liability insurance imposes upon the insurance carrier the contractual duty to satisfy the liability of the person insured for those acts which are covered by the policy. In theory, it is pure loss sharing.[110] All those parties participating in an activity pay a portion of the total costs of the injuries

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108. Naturally, if the owner were negligent in his choice of operators, his liability would not be based upon "passive" or "secondary" negligence and would no longer entitle him to receive contribution. Mims Crane Service v. Insley Mfg. Corp., 226 So. 2d 836, 840 (Fla. 2d D.C.A. 1969).

109. If the vehicle is operated with the owner's permission, the operator will most often be insured under the owner's policy. *See, e.g.*, "Persons Insured. The following are insured under Part I [liability coverage].

. . . .

"(2) any other person using such automobile with the permission of the named insured, provided his actual operation of (if he is not operating) his other actual use thereof is within the scope of such permission . . . ." State Farm Mutual Automobile Policy, Part I. See also cases cited in note 38 *supra*.

The Florida Insurance and Tort Reform Act of 1977, 1977 Fla. Laws, ch. 77-468, §12, repealed subsection 7 of §325.19, which required proof of insurance at the time of vehicle inspection. The reform act, however, created a Good Driver's Incentive Fund. The Good Driver's Incentive Fund was to be distributed to drivers who voluntarily maintained $10,000 of liability insurance for bodily injury and who received no traffic convictions for one year. The fund would have been composed of net monies collected from an additional fine imposed upon people convicted of moving traffic violations. 1977 Fla. Laws, ch. 77-468, §42 (codified as FLA. STAT. §318.22 (1977)).

The section creating the Good Drivers Incentive Fund was declared unconstitutional per curiam by the Florida Supreme Court on September 7, 1977. The court retained jurisdiction to fully articulate its reasons for doing so and published those reasons on February 23, 1978 in State v. Lee, 356 So. 2d 276 (Fla. 1978). The Good Drivers Incentive Fund was declared an unconstitutional act of the legislature on the grounds that it (1) improperly used the police power of the state to take private property from one group of individuals solely for the benefit of another group; and (2) violates the United States and Florida constitutions in that it constitutes an irrational classification. The court also held that the section creating the Good Drivers Incentive Fund was severable from the remainder of the act, Justices England and Sundberg dissenting from this aspect of the majority's decision.

As between an owner's liability insurance policy which provided for a pro rata distribution among insurers for losses covered by more than one insurance policy and the operator's liability insurance policy, which provided it was excess insurance, the owner's liability insurance has been interpreted to provide primary coverage. AAAcon Auto Transp., Inc. v. Denishar, 312 So. 2d 479 (Fla. 4th D.C.A. 1975) *aff'd*, 337 So. 2d 963 (Fla. 1976). Insofar as the owner is a lessor of the automobile, this has been codified by the Florida Insurance and Tort Reform Act, FLA. STAT. §627.7263 (1977), discussed *infra* in note 122.

caused by the activity. If the defined risk is that one out of 1,000 drivers will injure someone and that compensation for those injuries will be $1,000, the payment of one dollar from each of 1,000 persons involved in the enterprise of driving may protect all of those 1,000 persons from bearing the risk of having any one of them pay the full $1,000. Extensive debate over the deterrent effect of fault-based liability, given the reality of liability insurance, has been carried on in the literature.[111] It is sufficient to say here that a system of fault-based liability is regarded as a necessary antecedent to the right to implied indemnity. The role of liability insurance within this scheme is relatively straightforward. Normally the liability insurer of the joint tortfeasor-indemnitor is contractually responsible for indemnification to the joint tortfeasor-indemnitee. Thus, any criticism that the first goal of fault-based liability is frustrated by the pervasive existence of liability insurance is a criticism that fault-based liability does not deter the conduct it is expected to deter because the deterrent effect of full

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110. If it were not for the fact that automobile liability insurance is such a terrible failure at spreading losses effectively this statement would be axiomatic. This can no more be clearly demonstrated than by reference to the automobile liability insurance system, where 56 percent of the premium dollar is absorbed into administration costs, R. KEETON, COMPENSATION SYSTEMS: THE SEARCH FOR A VIABLE ALTERNATIVE TO NEGLIGENCE LAW 33 (1969), and of the total compensable losses suffered in automobile accidents, only 15 percent were compensated by liability insurers. 1 U.S. DEPT. TRANS., ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES, Table 15 FS, 146-47 (1970).

111. A brief and, of necessity incomplete bibliography would include: AMERICAN INSURANCE ASSOCIATION, REPORT OF SPECIAL COMMITTEE TO STUDY AND EVALUATE THE KEETON-O'CONNELL BASIC PROTECTION PLAN AND AUTOMOBILE ACCIDENT REPARATIONS (1968); AMERICAN TRIAL LAWYERS ASSOCIATION, JUSTICE AND THE ADVERSARY SYSTEM (1967); W. BLUM & H. CALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM: AUTO COMPENSATION PLANS (1965); P. GILLESPIE & M. KLIPPER, NO-FAULT: WHAT YOU SAVE, GAIN AND LOSE WITH THE NEW AUTO INSURANCE (1971); R. KEETON & J. O'CONNELL, AFTER CARS CRASH: THE NEED FOR LEGAL AND INSURANCE REFORM (1967); R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965); R. KEETON, J. O'CONNELL & J. MCCORD, CRISIS IN CAR INSURANCE (1968); J. O'CONNELL, THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE (1971); J. O'CONNELL, ENDING INSULT TO INJURY: NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES (1975); W. PROBUES, NO-FAULT INSURANCE (1971); E. SHAPIRO, R. NEEDHAM, & J. FELDMAN, PROTECTION FOR THE TRAFFIC VICTIM: THE KEETON-O'CONNELL PLAN AND ITS CRITICS (1967); STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, NO-FAULT PRESS REFERENCE MANUAL (1977); *The Keeton-O'Connell Plan — Some Questions and Answers*, 9 FOR THE DEFENSE 25 (1968); Knepper, *Alimony for Accident Victims?* 15 DEFENSE LAW JOURNAL 513 (1966); Knepper, *Review of 1975 Tort Trends*, 25 DEFENSE LAW JOURNAL 1 (1976); Knepper, *Review of 1976 Tort Trends*, 26 DEFENSE LAW JOURNAL 1 (1977); Marryott, *The Tort System and Automobile Claims: Evaluating the Keeton-O'Connell Proposal*, 52 A.B.A.J. 639 (1966); O'Connell, *Is it Really Immoral to Pay Regardless of Fault?* TRIAL, October/November, 1967, at 18. The belief that the fault system deters primary costs while a system of nonfault liability mushrooms those costs has taken on a religious fervor. "Bad seed, evil fruit. From the outset, the concept of no-fault was fatally flawed. . . . Bias and quirks, in effect, have been enshrined in the law. By making guilt irrelevant, no-fault and the free-and-easy riders which it has encouraged can scarcely fail to undercut highway safety, law enforcement and the sense of personal responsibility on which a free society depends. 'Pain and suffering,' as we have said before, may be overdone but that doesn't warrant placing a premium on license." Bleiber, *Who's to Blame? No-Fault Insurance Has Run Smack Into the Real World*, BARRON'S BUS. AND FINANCIAL WEEKLY, Jan. 26, 1976, at 7. *See also* Knepper, *Review of 1976 Tort Trends*, 26 DEFENSE LAW JOURNAL 1, 24 (1976).

financial responsibility will be spread throughout the "enterprise" in which the tortfeasor is engaged through the vehicle of liability insurance. The second goal of fault-based liability, effective loss allocation or loss transference of the costs of compensating injuries caused by the proscribed conduct, is, however, advanced through the vehicle of liability insurance. The fund from which the injured plaintiff may expect compensation is readily available and the costs of providing that fund are spread broadly.

Payment of a claim covered by a policy issued by a liability insurer is a contractual obligation the latter incurred. Therefore, the insurer is not entitled to indemnity from a person covered by the policy when it satisfies this contractual obligation.[112] This is true even if the contract is not directly issued to the covered person.[113] If the consideration given under a car lease is in part compensation for liability insurance coverage for the operator, the liability insurance company[114] cannot seek indemnity from the operator.[115] This is true

112. See cases cited in note 38 *supra*. The question of whether an insurer is entitled to indemnity from a non-insured was answered in the affirmative in Allstate Ins. Co. v. Allerman Transport Lines, Inc., 465 F.2d 710 (5th Cir. 1972) discussed in note 115 *infra*. The right of an insurer to contribution from a non-insured tortfeasor has also been answered affirmatively. *See* Hawkeye-Security Ins. Co. v. Lowe Constr. Co., 99 N.W.2d 421 (Iowa 1959), Farmers Mut. Auto Ins. Co. v. Milwaukee Auto Ins. Co., 8 Wis.2d 512, 99 N.W.2d 746 (1959).

113. See note 109 *supra*.

114. Under the terms of the standard liability policy, the insurance company issuing the policy to the owner would *normally* be subrogated to the owner's rights to collect indemnity. "In the event of any payment under this policy the company shall be subrogated to all the insured's rights of recovery therefore against any person or organization and the insured's shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights." Speciman Family Automobile Policy, §13 *Subrogation*. Reproduced from C. BRAINARD, AUTOMOBILE INSURANCE, APP. A at 539 (1st ed. 1961).

115. *See, e.g.*, Rouse v. Greyhound Rent-A-Car, Inc., 369 F. Supp. 1072 (M.D. Fla. 1973), *rev'd*, 506 F.2d 410 (5th Cir. 1975); Ins. Co. of North America v. Avis Rent-A-Car, 348 So. 2d 1149 (Fla. 1977); Roth v. Old Republic Ins. Co., 269 So. 2d 3 (Fla. 1972). In a truly bizarre situation the Fifth Circuit Court of Appeal in Allstate Ins. Co. v. Alterman Transport Lines, Inc., 465 F.2d 710 (5th Cir. 1972), was asked to apply Florida law to resolve a conflict between claims of implied indemnity by a liability insurance company and a contractual indemnity clause included in a lease. The problem owed its genesis to one defendant's failure to acquire Interstate Commerce Commission authorization to transport goods within the state of Florida. Therefore, Alterman Transport Lines, the party without I.C.C. authorization, contracted with Consolidated Transport to lease a tractor-trailer rig from Consolidated, who did have I.C.C. approval to ship freight within the state of Florida. The rig was to be operated by Alterman's employee, Steward. The lease provided, *inter alia*, that Consolidated would: "indemnify and save harmless Alterman against any claim for . . . loss that may be done to or suffered by driver or other persons in connection with the operation to be carried out." *Id.* at 712. While operating the rig, Steward rear-ended a car driven by Maquire. Maquire filed a negligence action in state court which was settled on a pro rata basis by Allstate Insurance Company as the liability carrier for Consolidated and Alterman Transport Lines. Allstate then brought an implied indemnity claim against Alterman Transport Lines as the subrogee of the rights of Consolidated under the liability insurance policy, seeking indemnity from Alterman for all damages which Allstate was forced to pay to Maquire on behalf of Consolidated. The District Court found that Allstate was entitled to indemnity, since Consolidated was found liable only through the active negligence of Alterman. As a passive tortfeasor whose liability was based solely upon ownership of the instrumentality, Consolidated, and therefore its subrogee, was

even though, as was the case in *Roth v. Old Republic Ins. Co.*,[116] the lease agreement between the lessor and lessee specifically prohibits operation of the leased vehicle by third parties. In *Roth*, the lessee (Plax) leased a car for one week from Yellow Rent-A-Car. His contract of lease with Yellow included a sum representing a portion of the lessor's premium for auto liability insurance coverage. It also contained the provision: "that the rented automobile will not be operated by anyone other than the undersigned renter without the express written consent of Yellow Rent-A-Car."[117] Plax left before the end of the rental term and turned the car over to Roth, a minor, without obtaining the written or oral consent of Yellow Rent-A-Car. While operating the vehicle Roth struck two elderly women. Roth, his mother, Yellow Rent-A-Car, and their insurance

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entitled to implied indemnity. Alterman, however, had a contract of indemnity with Consolidated which it sought to enforce. The District Court agreed and enforced the indemnity clause and awarded Alterman contractual indemnity from Consolidated for all damages which it had been forced to pay, including the amount of indemnity Alterman had paid Consolidated's insurer through the subrogation clause. The result was that Consolidated paid everything. The Fifth Circuit affirmed. *Id.* at 710.

Under the prevailing Florida precedent, if Alterman had established that some portion of the lease payment was allocated toward the liability insurance premium paid by Consolidated, Allstate would not have been entitled to receive indemnity as Consolidated's subrogee. Roth v. Old Republic Ins. Co. 269 So. 2d 3 (Fla. 1972). Although the contract of indemnity would still have been enforced between Alterman and Consolidated, Consolidated would not, in this manner, have contracted away its liability insurance coverage. The lessor, Consolidated, under the indemnity agreement contained in the lease, assumed the responsibility of providing insurance coverage for losses incurred. The District Court found that this type of agreement breached the subrogation clause of Allstate's insurance policy, a finding that was not sustained by the Fifth Circuit. 465 F.2d at 715-16. The shifting of loss from Allstate, the professional loss distributor, to Consolidated, the "passive" tortfeasor, through the vehicle of a "hold harmless" clause represents a clear example of inefficient loss distribution. It seems apparent that Alterman "paid" for the insurance coverage provided by Consolidated's insurer Allstate whether that was expressly stated or implied in the contract. The cost to Alterman of the lease arrangement without the indemnification provision was less valuable than it was with this provision included. This differential in value represented the contribution which Alterman made toward the cost of providing liability insurance coverage, whether it was expressed in the contract or implied by the circumstances. This finding, however, would rather clearly defeat any claim to indemnity that Allstate might have under the subrogation clause of the insurance contract with Consolidated, since Consolidated would not have a claim to indemnity in its own name. *See* Rouse v. Greyhound Rent-A-Car, Inc., 369 F. Supp. 1072 (M.D. Fla. 1973), *rev'd*, 506 F.2d 410 (5th Cir. 1975); Morse Auto Rentals, Inc. v. Lewis, 161 So. 2d 235 (Fla. 3d D.C.A. 1961); Roth v. Old Republic Ins. Co., 269 So. 2d 3 (Fla. 1972). *Consolidated* moreover represents the least efficient method of loss distribution and violates both aspects of liability based upon fault. The active tortfeasor, Alterman (through the action of its employee) has not been deterred from its injury-producing conduct, since it has avoided all liability. The "hold harmless" clause has permitted it to shift this loss to Consolidated, the passive/secondary tortfeasor. The second aspect of fault-based liability, efficient and equitable loss distribution, is likewise not satisfied. The professional loss distributor, Allstate, who is capable of transferring these losses inter-personally and inter-temporally, has also avoided liability. *See* Florida Insurance and Tort Reform Act of 1977, FLA. STAT. §627.7263 (1977), discussed in note 122 *infra*.

116. 269 So. 2d 3 (Fla. 1972), *quashing* Roth v. Cannel, 242 So. 2d 491 (Fla. 3d D.C.A. 1970), overruling by implication Hertz Corp. v. Richards, 224 So. 2d 784 (Fla. 3d D.C.A. 1969), followed in Liberty Mut. Ins. Co. v. Scammaca, 303 So. 2d 46 (Fla. 3d D.C.A. 1974).

117. 269 So. 2d at 4.

companies were all sued by the women.[118] The resulting suit was settled. Roth's liability insurer advanced the sums for settlement pending judicial determination of the rights of the parties to indemnity or restitution. The trial court held that Roth's insurer should indemnify Yellow Rent-A-Car's and Plax's insurers. The Third District Court of Appeal affirmed.[119] The Florida supreme court accepted jurisdiction of the case on the ground that it conflicted with its earlier opinion in *Susco Car Rental System of Florida v. Leonard.*[120]

Roth and *Susco,* however, seem readily distinguishable. In *Susco,* the court had held that the owner of an automobile who leases it to another is not relieved of responsibility to an injured third party for injuries caused by an operator of the vehicle other than the lessee even though the operation was contrary to the express terms of the contract.[121] *Susco* thus resolved the right of a plaintiff to collect from the lessor's insurer even though the operation was in violation of the contract between the lessor and the lessee.[122] The question presented by *Roth,* however, involved the rights to post-judgment loss allocation between the lessor, the lessee, and the operator for the injuries caused by the nonconsensual and negligent operation of the vehicle. In *Roth,* the plaintiff had been compensated already.

The *Roth* court held the insurance company would not be entitled to indemnity from the lessee's permittee, Roth, for injuries caused by his operation of the leased vehicle.[123] The court noted that the lessee had paid a portion of the insurance premium issued by Yellow's insurance company under the lease. Because the lessee had made this payment the court held that the lessee's permittee was also covered by Yellow's insurance for injuries caused to a third person under the earlier *Susco* decision. The court went on to hold that the prohibition against lending the automobile to any other person did not give the lessor's insurance company any greater rights against the lessee's permittee than it had against the lessee.[124] The court concluded that for reasons of public

118. See note 96 *supra.* While the liability insurer can no longer be named in the lawsuit as a party defendant, it is disingenuous to suggest that the courts' reasoning in regard to insurer liability will be changed.

119. Roth v. Cannel, 242 So. 2d 491 (Fla. 3d D.C.A. 1970).

120. 112 So. 2d 832 (Fla. 1959).

121. *Id.* at 835-36.

122. The Florida Insurance and Tort Reform Act of 1977, 1977 Fla. Laws, ch. 77-468, §29 amends §627.7263 (1975) to provide: "The valid and collectible liability insurance or personal injury protection insurance providing coverage for the lessor of motor vehicles for rent or lease shall be primary unless otherwise stated in bold type on the face of the rental or lease agreement . . . ." Thus, *Susco* is codified to the extent that the lessor's insurance remains primary insurance but the intent of the statute seems plainly to anticipate a disclaimer of even such primary coverage and the substitution of the lessor's insurance as primary insurance. New FLA. STAT. §627.7263(2) (1977) provides that each lease form shall contain a bold face declaration if the lessor's insurance is not primary insurance and an appropriate space for the insertion of the lessee's insurer if the lessor's insurance is not primary.

123. 269 So. 2d at 5-6. This presumes, of course, that the cost of compensating the injured party does not exceed the amount of the insurance coverage of the owner. In no event, however, does denying the owner's insurance company the right to indemnity affect the right of the injured party to compensation from either the owner or the actor.

124. *Id.* at 6.

policy any terms of the agreement between the lessor and the lessee which varied, circumvented, or intercepted the flow of protection from the lessor's insurance company to the public *and* the lessee's permittee was invalid.[125]

The right to implied indemnification of the liability carrier of the owner of an automobile for damages paid as a result of the negligent operation of the automobile is in all respects the same type of "passive" negligence for which the owner should be entitled to indemnity. Liability for negligent operation of an automobile is in all respects, based upon a technical rule of law — ownership of a "dangerous instrumentality."[126] In the absence of liability insurance that

125. The court elaborated on its earlier *Susco* opinion in reaching this result. Yellow Rent-A-Car's policy with Old Republic Insurance Company had been certified to the state and accepted as conforming with the state's Financial Responsibility Law. FLA. STAT. §324.151(1) (1977). The earlier *Susco* opinion struck down any contractual provision between a lessor and the lessee which attempted to limit the responsibility of the lessor for injury caused to third persons by the lessee. On this precedent, the *Roth* court concluded that the contractual provision under which the lessor's insurance company sought indemnity "is contrary to the provision of the Financial Responsibility law and inoperative as a basis for indemnity." 269 So. 2d at 6-7. *But see* note 122 *supra*.

The *Roth* decision was further amplified by the supreme court in Ins. Co. of North America v. Avis Rent-A-Car, 348 So. 2d 1149 (Fla. 1977) on a certified question of law pursuant to Fla.App.R. 4.61, FLA. STAT. §25.031 (1977) from the United States Court of Appeals for the Fifth Circuit. In *Avis*, an operator of a vehicle leased by Avis to the operator's employer negligently injured a third party. Avis' contract of lease and insurance contract with its insurer provided that operators of rented vehicles were insured for $100,000 per person, while Avis was insured for its own negligence for $500,000 per person. The operator's employer had insured itself against liability for $200,000 per person. A settlement was entered into in which Avis' insurer paid $150,000, and the lessee-employer's insurer paid its policy limits of $200,000. The Florida supreme court held that since Avis' insurer provided liability insurance coverage to operators for $100,000 of personal liability, Avis' insurer was not entitled to indemnity for that amount. *Id.* at 1154. However, the employer's insurer argued that Avis indirectly charged the lessee for the amount of insurance coverage Avis had and therefore, it was in violation of public policy for Avis (and Avis' insurer) not to provide that coverage to the lessee. The court held, however, that Avis had a responsibility to provide liability coverage adequate to meet the financial responsibility law for its liability to persons injured who may seek compensation from Avis under the dangerous instrumentality doctrine. *Id.* at 1153. Once the victim of the negligent operation of the vehicle was compensated for the loss that occurred through the negligent use of the vehicle, the parties' — tortfeasors' rights were governed by traditional concepts of indemnity. The loss paid for by Avis' insurer for injuries caused to the claimant by the active negligence of the lessee (or the lessee's permittee) can be divided into two categories. The first category, which in this case amounted to $100,000, was for loss for which the lessee's permittee was a covered insured under Avis' liability policy. As to this loss, it is clear Avis' insurer has no right to indemnity even though Avis' insurer provided coverage in excess of financial responsibility limits. *Id.* at 1154. The second category of loss for which Avis' insurer compensated the claimant was for injuries caused by the active negligence of the lessee's permittee in which Avis was the only insured. Avis liability for this amount was for possession of a dangerous instrumentality, a form of passive negligence for which Avis' insurer was entitled to indemnity from the active tortfeasor, and as here, through the doctrine of respondeat superior, the active tortfeasor's employer. *See also* A. United Rental, Inc. v. Bradley, 352 So. 2d 579 (Fla. 3d D.C.A. 1977). Thus the principle thrust of *Roth*, that the lessor's insurer is not entitled to pass on all of the loss occasioned by it due to its insured's liability through the application of the dangerous instrumentality doctrine is unaffected by *Avis*.

126. *See* Mims Crane Service, Inc. v. Insley Mfg. Corp., 226 So. 2d 836, 840 (Fla. 2d D.C.A. 1969).

covered the operator the owner would even be entitled to indemnity from an employer who himself is vicariously liable when his employee is the negligent operator of the car.[127] The insurer of the owner providing coverage when the vehicle is negligently operated by a non-contributing user should be entitled to indemnity from the user, even though the user is defined by the policy as an insured, if the mandate of implied indemnity loss distribution to the active-primary tortfeasor is to be followed.

Protection from ultimate liability provided by the contract of insurance for which Plax (the lessee) paid when he rented the car from Yellow (the lessor) inured to Roth (the permittee of Plax) for all purposes, including limitation of the right of the insurer of the lessor to seek indemnity from the lessee under the doctrine of implied indemnity.

Clearly, if the claim for damages caused by the operator of the vehicle, whether the lessee or his permittee, exceeded the amount of insurance coverage provided under the lease, the owner would remain entitled to indemnity from his lessee or the lessee's permittee.[128] It is only when the lessee, and therefore, his permittee, is covered for liability by the owner-lessor's liability insurance policy that the lessee and his permittee are insulated from a claim for indemnity.

The rationale for the *Roth* result, therefore, lies in the court's unstated conclusion that it is more socially desirable to choose a liability insurer as a means of secondary loss distribution than it is to attempt to effect primary loss reduction through imposition of liability for injuries. To the extent that the secondary interests of tort law involve effective methods of victim compensation this approach is sound. While it may be argued that the lessee has paid for insurance coverage for his permittee since he paid an additional amount which compensated the lessor for the cost of insurance coverage for the lessee, the protection provided by this policy need only inure to the parties injured by the permittee of the lessee.[129]

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127. Hutchins v. Frank E. Campbell, Inc., 123 So. 2d 273 (Fla. 2d D.C.A. 1969). In *Hutchins*, Kay Hutchins sought indemnity from her husband's employer, Campbell, for injuries caused to Hughes by Ms. Hutchin's car while it was operated by a Campbell employee to whom it had been loaned by her husband. The court acknowledged this was an odd case. *Id.* at 273. It then went on to hold that Ms. Hutchins' husband was entitled to a company car, he could, with her consent, bail her car to his employer for use on company business. The company business consisted of picking up and delivering his company car. The court found that an employer vicariously liable for the acts of his employees, and that the owner of the car which caused the damage are not in pari delicto. The owner of the car whose liability for the damages is solely under the dangerous instrumentality doctrine is entitled to indemnity from the employer of the negligent employees. *Id.* at 273. *See* Finches Motor Sales, Inc. v. Lakin, 156 So. 2d 672, 674 (Fla. 3d D.C.A. 1963). *Cf.* Florida Rock & Sand Co. v. Cox, 344 So. 2d 1296 (Fla. 3d D.C.A. 1977); Dura Corp. v. Wallace, 297 So. 2d 619, 621 (Fla. 3d D.C.A. 1974).

128. Insurance Co. of North America v. Avis Rent-A-Car, 348 So. 2d 1149 (Fla. 1977). *See also* Hertz Corp. v. Ralph M. Parson Co., 419 F.2d 783 (5th Cir. 1969) (applying Florida substantive law), *affirming* 292 F. Supp. 108 (M.D. Fla. 1968) as to indemnity, but *reversing on other grounds.*

129. *See* Ins. Co. of North America v. Avis Rent-A-Car, 348 So. 2d 1149, 1153 (Fla. 1977), discussed *supra* at note 125.

The decision of the court in *Protective National Ins. Co. of Omaha v. Roberts*,[130] provides another view of this aspect of Florida's tort victim compensation system. In *Roberts*, the defendant had issued a policy of automobile insurance to the plaintiff providing for coverage of uninsured motorists[131] and no-fault insurance benefits.[132] The plaintiff was injured as a result of a collision with an uninsured motorist. He collected the full amount of his no-fault benefits *and* also sought to receive the full amount of his uninsured motorist's coverage. The defendant insurance company sought to setoff the amount of no-fault payments it had made to the plaintiff against the full amount of the uninsured motorists' coverage.[133] The court refused to set off these amounts, stating that even though the uninsured motorist coverage is in lieu of an amount which might be collectible from the negligent, but uninsured, motorist, the plaintiff was charged for and paid separate premiums for each category of coverage. The court held that there can be no indemnity or setoff to an insurance company from an insured when the carrier has charged that insured for the coverage provided.[134]

To carry forward the *Roberts* analysis to the *Roth* situation, however, one must be prepared to say that the parties contracted that the liability insurance company of the lessor agreed to pay for any injury negligently caused by a permittee of the lessee even though the lease specifically prohibited use of the

130. 287 So. 2d 362 (Fla. 3d D.C.A. 1973).

131. Uninsured motorists coverage must be offered by any insurer offering liability coverage. FLA. STAT. §627.727 (1977). It provides that if the insured party suffers injuries due to the negligence of an individual who was not covered by liability insurance, the injured party may collect for those injuries from his own insurer. It is important to note that while this type of coverage is first person insurance, unlike the various no-fault plans proposed, it still requires that the injured party prove that his injuries were caused by the fault of another party before he is entitled to be compensated for those injuries. The Florida Insurance and Tort Reform Act of 1977, 1977 Fla. Laws, ch. 77-468, §30, added subsection (7) to FLA STAT. §626.727 (1977) providing that pain and suffering cannot be collected in an uninsured motorist's claim unless the injury is one described in FLA. STAT. §627.737(2)(a)-(f) (1977).

132. Under the no-fault coverage then in effect, the claimant was entitled to receive compensation for his injuries from his own insurance company after a deductible and up to a certain limit regardless of his own negligence or the negligence of another party. Florida Automobile Reparation Reform Act, FLA. STAT. §627.730 (1975) repealed by 1976 Fla. Laws, ch. 76-168, §3, effective July 1, 1982. It is important to note that the Florida Insurance and Tort Reform Act of 1977, 1977 Fla. Laws, ch. 77-468, §33, amended §627.736 so that the insurer paying the insured for no-fault benefits shall not be subrogated to the insured's action against a tortfeasor causing those injuries, nor shall the injured party receive compensation for those injuries from the tortfeasor. That is, the jury shall be instructed to deduct from any damages they return for the injured party the amount of the no-fault benefits received. FLA. STAT. §627.736(3) (1977). Thus under the new statute the procedure advocated by the plaintiff's insurer would have been followed, but the amount of these benefits would have been deducted from an amount which the *defendant's* insurer would have had to pay if the defendant had been under-insured. Thus the new statute eliminates duplicate recovery by a claimant for P.I.P. benefits and also eliminates a claimant's insurer's claim to collect for those benefits through subrogation.

133. As provided by FLA. STAT. §627.736(3) (1977). It can be predicted that the insurer would be entitled to such a deduction under the new Florida Insurance and Tort Reform Act. See note 132 *supra*.

134. 287 So. 2d at 363-64. But see note 131 *supra*.

vehicle by the permittee and even though the permittee[135] was a minor who could not have leased the car in his own name. The court should recognize, however, the right of the parties to control their respective rights and obligations contractually unless and until such contractual agreements conflict with some underlying social policy.[136] In *Roth*, the court stated as one reason for

135. The difficulty which the *Roth* decision presents for the casual observer lies in the fact that Yellow's insurer had been paid for risks of liability for injuries which could be caused by negligent operation of the vehicle, but Roth's insurer had also been paid for the risks of liability for his negligence. They are both equally capable of allocating the loss among their insureds and both have contracted for the economic responsibility. A different problem would exist if, as the court anticipates, a permittee were uninsured. The loss analysis and benefits of loss spreading obviously dictate that the better loss distributor should bear the contracted-for losses. The implication is that the insurance company for the owner has charged premiums based upon its predicted liability for injuries caused by lessees. Therefore, liability could be increased and thus premiums increased as knowledge is gained that permittees are covered by these policies. The basis upon which premiums are assessed is the predictability of losses and if insurance companies can control these losses through restrictions placed upon the lessors' rights to lease vehicles, theoretically, insurance premiums and the costs which they represent will be reduced. That is, if insurance companies can establish that unknown permittees are materially poorer drivers than lessees, the actuarial bases for their predictions regarding risk have become invalid. This would not be true of the insurer providing coverage to the permittee. In both instances, it should be noted, this loss allocation takes place after the injured party has been fully compensated.

Justification for refusing to allow two insurance companies both of whom have been paid by the "same" party to collect from each other under implied indemnity may lie in a more general criticism of the whole concept of subrogation, for it has been suggested that subrogation results in insurance companies jamming up the courts and increasing litigation costs merely to accomplish the transference of the same money. Pitkin, *The Dilemma of Auto Insurance*, THE AMERICAN LEGION MAGAZINE 8, 48 (April 1969). This same criticism, however, applies when one insurer seeks indemnity from another. Subrogation, however, may be distinguished, although not entirely satisfactorily, from the situation in which an insurer, forced to compensate on behalf of its insured for injuries caused by the negligence of a third party, subsequently seeks recovery from the negligent third person or his insurer. Economic justification for this difference lies in the different costs assessed to the parties for their insurance. To the extent that lessors are required to pay higher premiums for injuries caused by unknown or unwarranted permittees of their lessees, they will pass those costs on to the lessees. Although not denominated as such, the same or similar economic result would take place if there were no indemnification to the owner of a dangerous instrumentality held primarily liable for the negligence of an active tortfeasor. The costs also would be passed on to the consumer. This fault lies not in the rule of implied indemnity, but rather in the system of liability transference based upon allocation of fault to a single factor as the loss transference mechanism. *Cf.* George & Walkowiak, *Blame and Reparation in Pure Comparative Negligence: The Multi-Party Action*, 8 SOUTHWESTERN U.L. REV. 1, 52-55 (1976).

136. While the Florida Insurance and Tort Reform Act of 1977 offers a partial answer to this problem insofar as it declares the owner-lessor's insurance as primary insurance unless clearly disclaimed, see note 122 *supra*, it does not address the major problem presented by *Roth*: the lessor, *and* the lessor's insurer's rights to attempt to control their liability by contract once the victim has been compensated by the lessor or its insurer. It is to this problem that this analysis is directed. The answer provided by Insurance Co. of North America v. Avis Rent-A-Car, 348 So. 2d 1149 (Fla. 1977), discussed *supra* note 125, offers the incongruous prediction that providing no coverage beyond minimum financial responsibility coverage is economically preferable (to the lessor by limiting its liability) to providing higher limits of coverage to legitimate lessees and lessee-permittees.

The same result which can be expected under the new statutory section was effected by

refusing to grant the lessor's insurer the right to indemnity from the negligent operation that:

> Often . . . permittees of rental car lessees temporarily driving rental cars would not be as fortunate as Roth and have the protection of their own personal auto liability insurance coverage, rendering it even more difficult for injured members of the public to recover their losses arising from the negligence of drivers of rental cars.[137]

However, as *Susco* clearly held, these injured members of the public need not rely upon the liability coverage of the permittee to recover for their injuries since the owner-lessor and lessee-permittee and their liability insurers are joint tortfeasors who are jointly and severally liable *to* the injured party. If the liability insurer has determined that it is economically beneficial to provide insurance to one lessor because that lessor leases only to customers with an actuarially predictable lower accident rate, then that lessor should be able to benefit from that preference and be able to deter the lessee from turning the vehicle over to persons who have an actuarially greater tendency to be involved in accidents. Indeed, to the extent that it is true that juveniles have an actuarially greater tendency to become involved in accidents, primary accident costs are reduced. Joint and several liability of the parties to the plaintiff will not be affected. The injured party will still retain the right to bring to judgment any or all of the joint tortfeasors. But the lessee, permittee, and owner need not be treated as having resolved their relative rights to allocate the losses afforded each other *after* judgment once the injured party has been compensated. One premise underlying the right to indemnity is a breach of duty. As noted, this right may be based upon the breach of a contractually stated duty. *Roth* involved just such a breach. The lessee breached a duty to the lessor when he specifically violated a term of the lease agreement that while ineffective to deprive injured third parties of the right to sue the lessor, should be given effect for purposes of establishing the relative rights of the parties jointly liable to the plaintiff who have so contracted, if primary loss deterrence is the goal of the doctrine of implied indemnity. By endorsing implied indemnity the court accepted the concept of total loss shifting by one joint tortfeasor, through the expedient of implied indemnity, to another joint tortfeasor. That is, the court has acknowledged that the basis upon which liability is im-

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the Third District Court in National Indem. Co. v. Home Ins. Co., 345 So. 2d 1077 (Fla. 3d D.C.A. 1977). The court in *National Indem.* distinguished *Roth* by interpreting *Roth* as having been based in part on the fact that the lessee had contributed toward the purchase of the liability insurance. *Id.* at 1079. Equally material was the fact that the lessee in *National Indem.* had contractually agreed to indemnify the lessor. *Id.* at 1078. To that extent, *National Indem.* can be catalogued along with Allstate Ins. Co. v. Alterman Transport Lines, Inc., 465 F.2d 710 (5th Cir. 1972), discussed *supra* note 115 as representing a situation whose resolution turned upon the contractual assumption of the obligation to indemnify. Whether this form of contractual indemnity agreement would have been respected by the courts when entered into in the average lessee-lessor relationship in light of *Roth* is, of course, questionable. *Cf.* Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960); Coccia, *Getting Others to Assume the Loss*, 77 NAT'L UND. 39 (1973).

137. 269 So. 2d at 7.

posed upon a tortfeasor shall be considered. The basis for liability of a lessor (or a lessor's insurance company) is of a category that would normally permit the transference of the costs of compensation for innocent injury through the mechanism of implied indemnity. *Roth* may, however, have represented the first stage in a departure from secondary loss transference based upon fault, and may provide the vehicle for a new analysis of fault-based liability with a more fundamental impact than the adoption of pure comparative negligence. The *Roth* decision represents one of the clearest examples of the resolution of choices against the industry that specializes in compensating for injuries. It is a choice that must be made, in the first instance, as *Susco* clearly indicates, until the physically injured party has been compensated. The choice that has been made in *Roth*, although the court has not fully articulated that bias, is that the loss, once shifted to a preferred loss distributor, should be shifted no more.[138]

Although the doctrine of pure comparative negligence has been briefed, argued, and decided as if it were grounded entirely in the fault principle, the judicial intent has not been to make each tortfeasor's liability commensurate with his fault, since if this were the case the court would also have abandoned joint and several liability. Rather, the doctrine has two components: a fault element, which is satisfied when the claimant's damages are reduced by the self-responsibility discount and a no-fault element, which acknowledges the fortuity and randomness with which some damages are suffered. Thus the doctrine of pure comparative negligence does not require that a negligent party suffer any greater loss than a fault-computed proportionate reduction in his total damages.[139]

The supreme court, in *Hoffman v. Jones*,[140] stated that the damages awarded to each party in a comparative negligence action shall be set off against each other. In an attempt to implement this setoff requirement, the Third District Court of Appeal in *Stuyvesant Insurance Co. v. Bournazian*,[141] held that while the *Hoffman* setoff rule permitted a party with an affirmative judgment to reduce his liability by the amount of that affirmative judgment, the liability insurance carrier of that party was not entitled to be credited for the amount of

138. See note 131 *supra*. It is also important to note that the collateral sources rule which permits an injured party to collect for the full amount of the cost of compensation for injuries received from a tortfeasor has been radically modified. The Florida Insurance and Tort Reform Act of 1977, 1977 Fla. Laws, ch. 77-468, §34 created FLA. STAT. §627.7372 (1977), which provides that benefits paid by any collateral sources shall be admitted into evidence as well as the claimant's contribution for these sources. Thus, while the claimant theoretically will still have a claim for those injuries which have been compensated by a collateral source, it is highly problematical whether a jury will be inclined to award the claimant a second recovery for already compensated-for loss.

139. Pure comparative negligence does not alter the basic rationale which underlies the fault system of loss compensation. It affects a modification of the harshness of the common law contributory negligence rule. See note 6 *supra* and accompanying text.

140. 280 So. 2d 431 (Fla. 1973).

141. 303 So. 2d 71 (Fla. 2d D.C.A. 1974), reversed on March 10, 1976, by the Florida supreme court in an unpublished opinion found in Walkowiak, *supra* note 8, app. at 121. The March 10, 1976 supreme court opinion was later withdrawn and superceded by the court. Stuyvesant Ins. Co. v. Bournazian, 342 So. 2d 471 (Fla. 1976).

its insured's judgment. The insurance carrier's liability, therefore, was for the full amount of the damages caused by their insureds. Following rehearing by the supreme court, it affirmed the decision of the Third District Court of Appeal.[142] Thus *Bournazian* interpreted the setoff principles of *Hoffman* as a right possessed solely by the individual tortfeasor and as providing no benefit to the insurers of those individuals.[143] Comparative negligence principles were once again interpreted to shift a loss to the most efficient loss distributor.

The essential pro-compensation nature of pure comparative negligence is apparent. It permits any party who has been causally negligent to receive compensation for his injuries, reduced only by his percentage of causal negligence — the self-responsibility discount. *Hoffman* established that the party with a larger damage verdict is entitled to set off the amount of that verdict against any liability it may have to another party regardless of degrees of fault.

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142. 342 So. 2d 471 (Fla. 1976). The tactics of trying personal injury suits are now much more complex owing to the adoption of pure comparative negligence, proportional contribution, and set-off (recoupment), with consequent increases in the cost of litigation expected. One illustration of this can be found in Florida Rock & Sand Co. v. Cox, 344 So. 2d 1296 (Fla. 3d D.C.A. 1977). In *Cox*, the driver and passenger of an automobile brought an action against the contractor in charge of repairing a highway when the car they were in struck a median strip. The contractor filed a third party complaint against the sub-contractor responsible for repairing that section of the highway. The sub-contractor sought indemnity and contribution from the driver and passenger. The trial court dismissed the sub-contractor's complaint. The Third District Court of Appeal affirmed the dismissal of the indemnity action and affirmed dismissal of the contribution action against the passenger. Allegations had been made that the driver and passenger were joint venturers. As such, the negligence of one would be imputed to the other and the recovery of both would be reduced by the percentage of negligence attributable to the negligent joint venturers under the comparative negligence doctrine. The existence of a joint venture is a question of fact. If, therefore, the finder of fact determines that there was no joint venture, the negligence, if any, of the driver would *not* be imputed to the passenger. The driver, therefore, would have his recovery reduced by his self-responsibility discount and the passenger would be entitled to full compensation from a partially negligent tortfeasor, the sub-contractor. Unless the sub-contractor could seek contribution from the driver, he would bear the total loss suffered by the passenger for which he was only partially responsible. That is, if there is no joint venture and the sub-contractor is found 60 percent negligent and the driver is found 40 percent negligent, then the driver's damages will be reduced by 40 percent, his self-responsibility discount, and the passenger will be entitled to full recovery. The court concluded, therefore, that as to the non-joint venturer passenger's damages, the driver was a joint tortfeasor against whom a cause of action for proportional contribution lay. If, as may be the case here, the sub-contractor is not insured or its insurer not named in the suit, then the damages to be awarded the driver after deducting his self-responsibility discount will be set off against the driver's contribution share owed *to* the sub-contractor. (If the driver's liability insurer is subsequently named in the suit, it would not be entitled to utilize the damage judgment of its insured against the sub-contractor claim for contribution under the rule laid down in *Bournazian*.) The concept that the driver's insurance company should not be allowed to profit from the compensable loss due to the driver's loss is lost in the name of procedural integrity to fault-based liability. It seems apparent that in the name of good economics the costs of these types of suits will escalate insurance premiums and raise the minimum level at which nuisance suits should be settled.

143. While the Florida Insurance and Tort Reform Act of 1977, discussed at note 131, *supra*, eliminated the liability insurer or a party defendant during the determination of liability stage, the insurer may be named for purpose of entry of judgment.

Bournazian established that the right of this setoff inured solely to the party and not to the party's insurer. The doctrine of pure comparative negligence as interpreted in *Bournazian* implicitly acknowledges that the beneficial effects of financial liability upon primary cost reduction are fully satisfied when the insured's total damages have been reduced by his self-responsibility discount. His damages need not be reduced further when he has attempted to protect himself against further reduction through the loss distribution vehicle of liability insurance. That is, the losses that he has caused another should be compensated through the expedient of the professional loss distributor — the liability insurer. The Florida Insurance and Tort Reform Act of 1977 has taken the next step in this progression by modifying the collateral sources rule and totally eliminating recovery of personal injury protection benefits from a tortfeasor. Thus loss distributors providing first person benefits bear losses that concepts of fault-based compensation dictate should be shifted.

THE CONCEPTUAL MODEL

An initial analysis of rules of compensation based upon fault forces the conclusion that many people who suffer injuries receive no compensation at all because they have failed to prove that their injuries were caused by a breach of duty, failed to prove causation, or failed to overcome a defense asserted by the defendant; and that some injuries are compensated by parties whose liability is based not upon fault, but upon operation of a rule of law when there has been no "active" fault. The operation of the body of rules called tort law permits the participants in certain activities that may cause injury or death to avoid tort liability for those injuries unless society has imposed a duty to maintain a certain "standard of care" and the "standard of care" which has been set for that activity has been breached. It is not enough for a claimant to prove that he was injured by an activity which could have been conducted more safely. He must prove that it was undertaken in violation of the standard of care for that activity. Certain activities can be conducted in a manner that cause injury but do not require imposition of liability for injuries because the benefits to society in convenience outweigh our societal desire to prevent the injuries.[144] Thus, although the use of a private automobile at speeds of up to fifty-five m.p.h. greatly increases the risk and seriousness of injury when accidents occur at that speed, and the risk and seriousness of injuries could be eliminated if the speed at which private vehicles operated was reduced to twenty m.p.h., no liability is imposed upon persons driving at a speed of fifty-five m.p.h. in the absence of some further violation of a standard of care.

The civilly-proscribed conduct is not defined as traveling at the speed of fifty-five m.p.h. in the absence of additional circumstances, and therefore no loss shifting will occur. The injured party is made to bear the total burden of his losses without recourse to the injury producer's enterprise. The underlying basis for fault as a liability shifting mechanism is that certain conduct undertaken by a person involved in an enterprise should be proscribed because this

144. *See* Calabresi, *The Decision for Accidents: An Approach to Non-Fault Allocation of Costs*, 78 HARV. L. REV. 713, 716-21 (1965).

conduct is responsible for causing injuries in excess of acceptable limits. The conduct is deterred by imposing liability for injuries that result from that conduct. This theory requires that the proscribed conduct be capable of definition separately from involvement in the enterprise.[145] To the extent that injuries are caused by individuals who participate in an enterprise, these injuries are a cost of that enterprise. The resulting injuries that remain uncompensated by the parties participating in the enterprise because of a societal decision that they need not be compensated then serve to subsidize that enterprise.

All injury-producing enterprises are subsidized to a degree under the fault system in that some injuries which result from their operations are uncompensated. Under traditional negligence doctrine the costs of compensating for injuries caused by conducting an enterprise are not conclusive of the question of whether the participants of that enterprise will be required to compensate for those injuries.[146]

If an active (or primary) tortfeasor or his insurer is released from all liability through payments made by a secondary (or passive) tortfeasor or his insurer then the proscribed conduct will not have been deterred through administration of civil liability for tortious acts.[147] The secondary-passive tortfeasor is entitled to indemnity because his liability is based upon technical application of law favoring victim compensation. It becomes apparent that no specific, proscribable conduct committed by the secondary-passive tortfeasor has been identified, except that the enterprise in which he is involved has caused injury. The liability of the secondary-passive tortfeasor is based solely upon the decision that the need to insure compensation to injured parties is paramount and is, in fact, enterprise liability. Ownership of a defective crane,[148] liability to an invitee for the torts of another,[149] liability of the owner of a motor vehicle for the negligence of the operator,[150] or liability of an employer for the negligence of his employee[151] do not involve identifiable culpable conduct on the

145. The analysis of this form of loss transference under which the doctrine of implied indemnity operates is not intended to, by implication, convey approval.

146. Although certain types of enterprises are held to a higher standard of care than negligence, this has not always been the result of the actual increased number of injuries, but rather, the increased likelihood of *some* injuries.

147. As discussed earlier, in the text accompanying note 43 *supra*, the theoretical basis for the right to contribution is inconsistent with the right to indemnity. Although a pro rata distribution of the costs of compensating for losses might compensate for this inconsistency, the present proportional contribution system would seem to preclude any realistic contribution between a "passive" and "active" tortfeasor. The "fault" of the "active" tortfeasor through whom the "passive" tortfeasor was being held liable must in most instances be so far in excess of the "fault" of the passive tortfeasor as to constitute "total fault." This same difficulty would seem to exist in an action based upon strict liability; however, the Florida supreme court, in West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976) engrafted *Hoffman's* comparison of fault principles onto the strict liability action. *See also* Butaud v. Suburban Marine & Sporting Goods, 555 P.2d 42 (Alas. 1976).

148. Mim's Crane Service, Inc. v. Insley Mfg. Corp., 226 So. 2d 836 (Fla. 2d D.C.A. 1969).

149. Grand Union Co. v. Prudential Bldg. Maint. Corp., 226 So. 2d 117 (Fla. 3d D.C.A. 1969); Olin's Rent-A-Car System, Inc. v. Royal Continental Hotels, Inc., 187 So. 2d 349 (Fla. 4th D.C.A. 1966).

150. Hutchins v. Frank E. Campbell, Inc., 123 So. 2d 273 (Fla. 2d D.C.A. 1960).

151. *See* Maybarduk v. Bustamante, 294 So. 2d 374 (Fla. 4th D.C.A. 1974); Grand Union

part of the secondary or passive tortfeasor. Any denial of the right to indemnity from the active-primary tortfeasor or his insurer results in a second level of subsidy to the active-primary tortfeasor's enterprise in addition to the subsidy limiting its liability to "fault" caused injuries. This second subsidy is made more incongruous by the statutory right of the insurer of an "active" tortfeasor to seek contribution and is justified only when the economics of first person loss distribution vehicles are acknowledged.

Conclusion

While the adoption of pure comparative negligence augurs well for continued rethinking of the bases of loss distribution for tort injuries, it is essentially an attempt to breathe new life into fault based loss transference. So long as loss transference is contingent upon establishing fault, the unnecessary subsidization of injury producing enterprises will occur. Uncompensated victims will finance an enterprise while ever more complex vehicles for transferring the little compensation that is awarded are fashioned. This loss transference will be effected while attempting to pay homage to the twin goals of fault-based loss allocation. The doctrine of implied indemnity, while a product of the fault-based liability system, affords a vehicle for establishing loss transference based upon enterprise participation regardless of "fault," but at present it functions primarily as a vehicle for loss transference from enterprise liability to fault-based liability.

The doctrine and the cases interpreting its application, however, have continually forced the courts to re-analyze the system of tort loss distribution which follows the initial decision to compensate the injured party. That this may force a realistic appraisal of the role and effect of pure loss distribution regardless of fault reflects well upon the common law system of adjustment of interpersonal rights and offers prediction of a loss distribution system that is both efficient and just.

Corp. v. Prudential, 226 So. 2d 117 (Fla. 3d D.C.A. 1969). The right to indemnity would flow from the actively negligent tortfeasor-employee to the employer and not between an employer vicariously liable for the negligence of his employee and a non-employee tortfeasor. *See* Dura Corp. v. Wallace, 297 So. 2d 619 (Fla. 3d D.C.A. 1974), discussed at note 78 *supra*.