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Fault and Equity: Implied Indemnity After *Houdaille*

GEORGE W. CHESROW,* ROGER B. HOWARD,** AND JEAN G. HOWARD***

This article examines the doctrine of implied indemnity in light of the recent decision of the Supreme Court of Florida in Houdaille Industries, Inc. v. Edwards. The authors discuss the meaning of "fault" and "no fault" in terms of the mechanisms of accident law, develop three models for allocating accident losses, and evaluate the change in accident law introduced in Houdaille, concluding that the court achieved conceptual consistency at the expense of equity.

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I. INTRODUCTION

Accident law¹ is a set of legal and equitable mechanisms for

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1. The specific legal domain of this article is the law governing accident cases, which we will call "accident law." See, e.g., Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965). Although most of accident law is tort law, there are exceptions. See Dickerson, *Products Liability and the Disorderly Conduct of Words*, 20 ATLA. L. REP. 422 (1977).

allocating loss.² If the defendants are found liable to the plaintiff, then the plaintiff's loss is allocated to the defendants jointly.³ If the plaintiff is comparatively negligent, part of the loss is allocated to the plaintiff and part to the defendants jointly. Contribution,⁴ indemnity,⁵ and subrogation⁶ allocate part or all of the loss among

2. See generally Greenstone, *Spreading the Loss—Indemnity, Contribution, Comparative Negligence and Subrogation*, 13 *FORUM* 266 (1977); LeFlar, *Contribution and Indemnity Between Tortfeasors*, 81 *U. PA. L. REV.* 130 (1932).

3. The concept of joint liability provides the underlying premise for allocation of loss in accident law. See W. PROSSER, *THE LAW OF TORTS* § 46, at 291 (4th ed. 1971). Thus, two or more parties, whose acts together cause a unitary loss, are each liable for the full amount of that loss; absent a claim for contribution or indemnity, the plaintiff may recover the whole amount from either. See Jackson, *Joint Torts and Several Liability*, 17 *TEX. L. REV.* 399 (1939) and Prosser, *Joint Torts and Several Liability*, 25 *CAL. L. REV.* 413 (1937). Florida has expanded the common law definition of joint tort to encompass independent concurring torts by parties having no prior relationship to each other. *De La Concha v. Pinero*, 104 So. 2d 25 (Fla. 1958); *Davidow v. Seyfarth*, 58 So. 2d 865 (Fla. 1952); *Hernandez v. Pensacola Coach Corp.*, 141 Fla. 441, 193 So. 555 (1940); *Feinstone v. Allison Hosp., Inc.*, 106 Fla. 302, 143 So. 251 (1932).

4. In 1975, the Florida Legislature adopted the Uniform Contribution Among Tortfeasors Act, *FLA. STAT.* § 768.31 (1979). Subsection (3)(a) of the Act originally provided for a pro rata distribution of loss among joint tortfeasors. *Id.* § 768.31(3)(a) (1975). See *Lincenberg v. Issen*, 318 So. 2d 386 (Fla. 1975); Comment, *The Case for Comparative Contribution in Florida*, 30 *U. MIAMI L. REV.* 713 (1976); 30 *U. MIAMI L. REV.* 747 (1976). One year after the adoption of the Act, the legislature amended subsection (3)(a) to provide that in determining the pro rata shares of tortfeasors in the entire liability "[t]heir relative degrees of fault shall be the basis for allocation of liability." *FLA. STAT.* § 768.31(3)(a) (1979) (emphasis added).

Basically, contribution is an equitable concept providing for the equalization of financial burdens and the fair division of losses between tortfeasors. Therefore, "[o]ne who is compelled to pay or satisfy the whole or to bear more than his just share of a common burden or obligation, upon which several persons are equally liable or which they are bound to discharge . . . [may] obtain from [the others] payment of their respective shares." 18 *AM. JUR.* 2d *Contribution* § 1 (1965).

5. Parties may provide for indemnity by contract; courts also recognize implied indemnity, based on an implied contract, to prevent unjust enrichment. As Prosser says, "the duty to indemnify will be recognized in cases where community opinion would consider that in justice the responsibility should rest upon one rather than the other." W. PROSSER, *supra* note 3, § 51, at 313.

The court in *Houdaille Indus., Inc. v. Edwards*, 374 So. 2d 490, 492 (Fla. 1979) defined indemnity as: "a right which inures to one who discharges a duty owed by him, but which, as between himself and another, should have been discharged by the other."

The historically accepted definition of indemnity was broader:

The idea of indemnity implies a primary or basic liability in one person, though a second person is also for some reason liable with the first, or even without the first, to a third person. Discharge of the obligation by the second person leaves him with a right to secure compensation from the one who, as between themselves, is primarily liable.

LeFlar, *supra* note 2, at 146 (footnote omitted). See also note 96 *infra*.

6. Subrogation is also an equitable remedy, whereby one who has paid for a claimed loss stands in the complainant's shoes vis-a-vis the wrongdoer, thereby obtaining a cause of action against the wrongdoer. Not based on fault, subrogation represents the last truly equi-

the defendants and other litigants who could be held jointly liable⁷ to the plaintiff.⁸ Through these multiple mechanisms, current acci-

table remedy available to the litigants. In *Rebozo v. Royal Indem. Co.*, 369 So. 2d 644 (Fla. 3d DCA 1979), the court stated:

The doctrine of subrogation is pure equity, having foundation in principles of natural justice. It rests, not on contract, but on the natural principles of right and justice, when applied to the facts of the particular case, and *includes every instance in which one who is not a volunteer pays the debt of another* *** It is applied only when necessary to bring about equitable adjustment of a claim founded on right and natural justice.

Id. at 646 (quoting *American Fid. & Cas. Co. v. United States Fid. & Cas. Co.*, 305 F.2d 633, 634-35 (5th Cir. 1962) (quoting *Vance v. Atherton*, 252 Ky. 591, 595, 67 S.W.2d 968, 970 (1934))).

The District Court of Appeal, Fourth District, has adopted subrogation as a solution to the inequities resulting from the unavailability of contribution or indemnity between successive tortfeasors. *City of Lauderdale Lakes v. Underwriters at Lloyds*, 373 So. 2d 944 (Fla. 4th DCA 1979). In *Underwriters at Lloyds v. City of Lauderdale Lakes*, 382 So. 2d 702 (Fla. 1980), the supreme court approved the decision by the district court, accepting subrogation as a means of achieving an equitable apportionment of liability when injuries originally caused in part by an initial tortfeasor have been negligently aggravated by a doctor. See text accompanying note 137 *infra*.

7. The 1939 Uniform Contribution Among Tortfeasors Act defined the term "joint tortfeasors" to mean "two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not a judgment had been recovered against all or some of them." 9 UNIFORM LAWS ANN. 233 (1957), § 1, Commissioner's Notes. The 1955 revision of the Act eliminated the definition of "joint tortfeasors" allegedly to avoid problems of interpretation in jurisdictions in which those who acted independently and not in concert could not be joined as defendants in the same action. 12 UNIFORM LAWS ANN. § 1, Commissioner's Comment a at 64 (1975) (1955 revision). Florida follows the concept that if the negligence of two or more persons concurs in producing a single indivisible injury, joint and several liability exists even though there is no common duty, design or concerted action. This gives FLA. STAT. § 768.31(3)(a) (1979) virtually the same meaning as the 1939 Uniform Act. The court in *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977), however, made clear that injury resulting from successive wrongs would not be considered to produce joint liability.

Finally, loss allocation through contribution and indemnity generally operates in two ways. First, a defendant can plead one or the other against a codefendant. Alternatively, he can plead either contribution or indemnity against a third party. In the latter case, the defendant has the burden of showing that the third party defendant is liable for the plaintiff's loss.

8. The Supreme Court of Florida adopted comparative negligence in *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973). The court described the process of computing loss allocation between the plaintiff and defendant:

If it appears from the evidence that both plaintiff and defendant were guilty of negligence which was, in some degree, a legal cause of the injury to the plaintiff, this does not defeat the plaintiff's recovery entirely. The jury in assessing damages would in that event award to the plaintiff such damages as in the jury's judgment the negligence of the defendant caused to the plaintiff. In other words, the jury should apportion the negligence of the plaintiff and the negligence of the defendant; then, in reaching the amount due the plaintiff, the jury should give the plaintiff only such an amount proportioned with his negligence and the negligence of the defendant.

Id. at 438.

dent law sometimes falls into inconsistency.

The concept of fault is critical to an understanding of loss allocation. In *Houdaille Industries, Inc. v. Edwards*,⁹ the Supreme Court of Florida severely restricted the availability of implied indemnity¹⁰ as a mechanism of accident law, by requiring a success-

9. 374 So. 2d 490 (Fla. 1979).

10. The court noted that the public policy disfavoring contracts of indemnification requires that such contracts show an intent to indemnify in clear and unequivocal terms. 374 So. 2d at 489. Thus, a clause providing that the "Lessee shall indemnify LESSOR and save it harmless from suits . . . occasioned wholly or in part by any act or omission of Lessee . . ." sufficiently expresses clear intent to indemnify lessor in cases where lessee and lessor are jointly at fault. *Id.* (quoting *Leonard L. Farber Co. v. Jaksch*, 335 So. 2d 847, 848, (1976) (emphasis added by the *Poe* court)). See also *Walter Taft Bradshaw & Assoc. v. Bedsole*, 374 So. 2d 644 (Fla. 4th DCA 1979) (no intent expressed in clear and unambiguous terms for subcontractor to indemnify landscape contractor or designer); *A-T-O, Inc. v. Garcia*, 374 So. 2d 533 (Fla. 3d DCA 1979) (no contractual indemnity where construction contract failed to provide monetary limitation or specific consideration to indemnitor pursuant to FLA. STAT. § 725.06 (1979)); *Air Agency, Inc. v. British Airways*, 370 So. 2d 419 (Fla. 3d DCA 1979) (no evidence of contract providing indemnity of active tortfeasor).

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In *W.R. Fairchild Constr. Co. v. Fairchild-Florida Constr. Co.*, 369 So. 2d 653 (Fla. 1st DCA 1979), decided before *Springlock* and *Houdaille*, the court affirmed that the language "Subcontractor agrees to indemnify and save Contractor harmless from all claims, demands, costs, expenses, interest and attorneys' fees whatsoever arising out of or pertaining to the subcontract and the performance or failure to perform same," constituted an agreement to indemnify the contractor for damages imposed on the basis of strict liability. *Id.* at 654-55 (emphasis added). The basis of the court's decision was the pre-*Houdaille* distinction between active and passive negligence and the view that strict liability means merely passive negligence. *Id.* at 655. Arguably, the court also assumed (as in *Houdaille*, later) that strict liability involves no fault. See note 81 and accompanying text *infra*.

During 1979, the courts decided several cases involving the right to attorney's fees in indemnity actions. In *Brown v. Financial Indem. Co.*, 366 So. 2d 1273 (Fla. 4th DCA 1979), the court held that on the basis of an indemnification contract an indemnitee could recover attorney's fees in both the trial and appellate court. But in light of the indemnity clause involved in *Misener Marine Constr. Co. v. Southport Marine, Inc.*, 377 So. 2d 757 (Fla. 2d DCA 1979), the court held that a contractor had no right to indemnification for attorney's fees incurred in defending against the claim of an injured employee. The services of the employee had arisen from the duties of the contractor and not in connection with the performance of the subcontractor, while the indemnity clause protected the contractor solely "against 'all claims . . . based upon or arising out of damages or injury to persons . . . sustained in connection with the performance of this subcontract'" *Id.* at 758.

Attorney's fees may be awarded on the basis of implied indemnity when there is no contractual or statutory basis. In *Occidental Fire & Cas. Co. v. Stevenson*, 370 So. 2d 1211 (Fla. 2d DCA 1979), the court held that an independent insurance agent could recover attorney's fees for having had to defend himself solely because of the fault of his principal, the

ful indemnitee to be "without fault."¹¹ Previously, the court had defined liability, comparative negligence, and contribution in terms of fault.¹² The *Houdaille* court, then, implicitly sought a consistent basis for the mechanisms of loss allocation. In each context, "fault" should denote the same idea; "fault" and "no fault" should mutually exclude each other, to achieve consistent justice. Thus, one mechanism for allocating loss should not categorize a particular set of facts as involving "fault" while another mechanism classifies a similar set of facts as involving "no fault."

This article first explores the meanings of "fault" and "no fault" as used by the courts in accident law, to predict from those definitions the contexts in which courts will allow implied indemnity. The analysis shows that the court has used "fault" and "no fault" consistently only if "fault" denotes culpable conduct and "no fault" denotes nonculpable conduct that nevertheless gives rise

insurance company. *Id.* at 1213; see note 91 *infra*.

A landlord may have to indemnify a tenant for attorney's fees incurred in defending rights as tenant against a third party. In *Robinson v. Bailey*, 370 So. 2d 46 (Fla. 1st DCA 1979), the court upheld a finding that the tenants had a right to indemnification for attorney's fees from a landlord who failed to defend tenants against a third party seeking an injunction requiring tenants to surrender the property based on the landlord's actions. (Subsequent to the lease, the landlord had entered into an option with a third party to sell leased land; the third party then sought to remove the tenants from the land.)

The right of indemnification or contribution for cost of defense does not extend to attorney's fees in defense of a mutual insured. *Argonaut Ins. Co. v. Maryland Cas. Co.*, 372 So. 2d 960 (Fla. 3d DCA 1979). Whether the court would uphold a contract providing for indemnification or contribution between insurance companies seems unlikely, although the *Argonaut* court cited *Brayman v. Northwestern Mut. Ins. Co.*, 381 F. Supp. 362 (D. Colo. 1974) (no contribution or indemnification for attorney's fees between insurers, absent a specific contractual right). 372 So. 2d at 963. Florida public policy encouraging insurance companies to settle and protect the interest of their insured precludes a contractual agreement for indemnity or contribution for attorney's fees between insurers. *Id.* at 964.

11. 374 So. 2d at 493 (Fla. 1979). "A weighing of the relative fault of tortfeasors has no place in the concept of indemnity for the one seeking indemnity must be without fault." *Id.* See also *Seaboard Coast Line R.R. v. Smith*, 359 So. 2d 427, 429 (Fla. 1978); *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977). The concept of fault first entered into indemnity through translation of the phrase "not in pari delicto" [not in equal fault]. See note 110 *infra*.

12. Of liability, the court in *Hoffman v. Jones* said: "In the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault." 280 So. 2d 431, 438 (Fla. 1973).

The same court tied the doctrine of comparative negligence to the concept of fault: "If plaintiff and defendant are both at fault, the former may recover, but the amount of his recovery may be only such proportion of the entire damages plaintiff sustained as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant." *Id.*

As for contribution, the Florida Statute applies a "fault" standard. See FLA. STAT. § 768.31(3)(a) (1979); note 4 *supra*.

to liability.¹³ The article then develops three models of accident law, based on the three goals of accident law: allocating loss to the wrongdoer,¹⁴ compensating the injured party,¹⁵ and minimizing the misallocation of economic resources, through enterprise liability.¹⁶ Seen within this analytical framework, the *Houdaille* decision appears to have achieved conceptual consistency at the cost of equity. For in cases in which contribution is unavailable as a loss-allocation mechanism, a "no fault" basis for implied indemnity produces inequitable results.

II. LIABILITY AND FAULT

Three categories of behavior give rise to liability in accident law. In the first category, a party negligently¹⁷ or intentionally¹⁸ breaches a duty owed to another, thereby causing an injury. Breach of duty causing an injury is one variety of culpable wrongdoing, or *culpable fault*.¹⁹ The driver of an automobile who injures another has breached a duty to the injured party. The driver is culpably at fault and therefore is liable for those injuries which were a natural consequence of his acts.²⁰ Likewise, the manufac-

13. See note 36 and accompanying text *infra*.

14. See W. PROSSER, *supra* note 3, § 2, at 9; Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

15. Prosser explains that "[t]he civil action for a tort, on the other hand, is commenced and maintained by the injured person himself, and its purpose is to compensate him for the damage he has suffered, at the expense of the wrongdoer." W. PROSSER, *supra* note 3, § 2, at 7. See generally Calabresi, *supra* note 1.

16. See W. PROSSER, *supra* note 3, § 28, at 14-16; Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Walkowiak, *Implied Indemnity: A Policy Analysis of the Total Loss Shifting Remedy in a Partial Loss Shifting Jurisdiction*, 30 U. FLA. L. REV. 501, 514, 540-42 (1978).

17. See W. PROSSER, *supra* note 3, § 28, at 139-40.

18. See *id.* §§ 7-8, at 28-34.

19. There is no universally accepted term for fault based on breach of duty to the plaintiff. Some of the more common terms are "negligence," *Continental Ins. Co. v. Sabine Towing Co.*, 117 F.2d 694, 697 (5th Cir. 1941); *Hoffman v. Jones*, 280 So. 2d 431, 438 (Fla. 1973); Vargo, *The Defenses to Strict Liability in Tort: A New Vocabulary with an Old Meaning*, 29 MERCER L. REV. 447, 462-63 (1978); "wrongful conduct" or "personal fault," RESTATEMENT OF RESTITUTION § 96 (1937); "causal negligence," Annot., 53 A.L.R.3d 184, 192 (1973); "fault or culpable conduct," Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337, 353 (1977); "actual fault or active negligence," *Home Indem. Co. v. Edwards*, 360 So. 2d 1112, 1114 (Fla. 1st DCA 1978) (citing 28 FLA. JUR. *Sales* § 157 (1968)); "moral responsibility," W. PROSSER, *supra* note 3, § 75, at 492.

20. *E.g.*, *Lincenberg v. Issen*, 318 So. 2d 386 (Fla. 1975) (equation of liability with fault); *Baston v. Shelton*, 152 Fla. 879, 13 So. 2d 453 (1943) (actionable negligence is failure to use ordinary care and procedure to avoid injury to another when failure to do so will probably cause injury in the ordinary case).

turer or seller of a defective product may negligently breach a duty to the person injured by that product.²¹ If so, he is culpably at fault and liable for the plaintiff's injuries.²²

Second, a court may hold a party to an accident liable as a matter of *law*, not because of wrongdoing on his part, but because public policy imputes to him the negligence of another.²³ As a matter of law, the owner of an automobile must pay for the damages caused by his automobile, driven negligently by another, because the law imputes to the owner the negligence of the driver.²⁴ Similarly, the law imputes to an employer the negligence of an employee if during the course and scope of his employment he injures someone else.²⁵ The concept of legal fault underlies imputed liability and differs qualitatively from culpable fault.

Third, a court may hold a party liable on a theory of strict liability or breach of implied warranty.²⁶ Theoretically, his liability

21. *E.g.*, *General Motors Corp. v. County of Dade*, 272 So. 2d 192 (Fla. 3d DCA 1973) (manufacturer of bus had duty to use safe glass). *See also* W. PROSSER, *supra* note 3, § 96, at 641-50.

22. *See generally* W. PROSSER, *supra* note 3, § 96.

23. *See* Leflar, *supra* note 2, at 148. Again, there is no one universally accepted term for liability without moral or culpable fault. Some of the common terms are: "without personal fault," RESTATEMENT OF RESTITUTION § 96 (1937); "legally liable," Sherk, *Common Law Indemnity Among Joint Tortfeasors*, 7 ARIZ. L. REV. 59, 65 (1965); "legal fault," Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 376 (1978); "without negligence," *Continental Ins. Co. v. Sabine Towing Co.*, 117 F.2d 694, 697 n.4 (5th Cir. 1941); "relative fault," Annot., 53 A.L.R.3d 184, 187 (1973).

24. *E.g.*, *Fincher Motor Sales, Inc. v. Lakin*, 156 So. 2d 672 (Fla. 3d DCA 1963); *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629 (1920).

25. The basis for the employer's liability derives from the maxim "respondeat superior." W. PROSSER, *supra* note 3, §§ 68-70, at 458-61. *See also* *Weaver v. Hale*, 82 Fla. 88, 89 So. 363 (1921); *Williams v. Hines*, 80 Fla. 690, 86 So. 695 (1920); *Varnes v. Seaboard Air Line Ry.*, 80 Fla. 624, 86 So. 433 (1920).

Where the servant inflicts injury on another through a highly dangerous instrumentality, the employer's liability merges with the "dangerous instrumentality" doctrine. *E.g.*, *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629 (1920). *See* *Maldonado v. Jack M. Berry Grove Corp.*, 351 So. 2d 967 (Fla. 1977) (employer-landowner legally liable for negligence of employee). *See also* *American Home Assur. Co. v. City of Opa Locka*, 368 So. 2d 416 (Fla. 3d DCA 1979) (city vicariously liable for action of police officer); *Gold Coast Parking, Inc. v. Brownlow*, 362 So. 2d 288 (Fla. 3d DCA 1978) (parking lot owner and insurer vicariously liable for tort of helper).

26. *E.g.*, *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976). *See generally* Jensvold, *A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases*, 58 MINN. L. REV. 723, 734-35 (1974). Jensvold declares that

the object of strict liability is also to achieve an equitable distribution of losses. However, like all substantive rules of tort law, the doctrine of strict liability reflects an implicit value judgment as to who should ultimately bear a loss. It is in part premised upon the notion that economic losses caused by unsafe products should be borne by manufacturers and distributors of the products who are better able to insure against or otherwise spread losses among the industry than are

does not arise from any acts of negligence on his part, but rather from having engaged in conduct that created a risk ultimately causing the plaintiff's injuries.²⁷ The manufacturer or retailer of a defective product may be held liable because the product was defective and unreasonably dangerous (thus risk-creating) and caused the plaintiff's injuries.²⁸ Florida courts have held that strict liability and breach of implied warranty involve culpable fault, a view not universally shared.²⁹

The term "fault" as used by the courts in determining liability has two meanings. First, fault means liability based on culpable

individual consumers.

27. See generally Fletcher, *supra* note 14.

28. West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976).

29. *Id.* The concept of strict liability raised the specter of distributing loss in the absence of fault or, alternatively, defining strict liability to include fault. Florida chose the latter alternative, viewing the action of strict liability as negligence per se. *Id.* at 90.

In strict liability, as in the negligence branch of vicarious liability, fault means negligence which caused the injury. The causal requirement is one of the elements of strict liability. In order to hold a manufacturer liable on the theory of strict liability, a user must establish the manufacturer's relationship to the product, and the existence of the proximate causal connection. *Id.* at 87. If no causal connection is proved, the manufacturer is considered to be without fault and is not liable under a theory of products liability. *Watson v. Lucerne Mach. & Equip., Inc.*, 347 So. 2d 459 (Fla. 2d DCA 1977) (manufacturer not liable for defective machine when employee crawled under conveyor belt and had head crushed by rotating arm of machine); *Ellis v. Golconda Corp.*, 352 So. 2d 1221 (Fla. 1st DCA 1977) (strict liability in tort does not connote liability without fault).

The relation between cause and fault in strict liability is further illustrated by the concept of independent fault. In *Wendland v. Akers*, 356 So. 2d 368 (Fla. 4th DCA 1978), the court held that dog owners were not liable for injuries suffered by a veterinarian's assistant despite strict liability under the Florida dogbite statute. FLA. STAT. § 767.04 (1979). The court found that the veterinarian's actions in handling the dog amounted to "[a]n intervening efficient independent fault which solely cause[d] or result[ed] in injury [and] relieve[d] the owner of an animal from liability." 356 So. 2d at 371.

For a discussion of fault (or no-fault) theories of products liability, see J. ALPERT, PRODUCTS LIABILITY § 5 (1979) (strict liability does not impose liability in the absence of fault, but presumes fault in the marketing of an unreasonably dangerous defective product). According to Wade, *supra* note 23, at 376-77:

Conduct that is characterized as negligent is commonly recognized as fault. But a term sometimes used as a synonym for strict liability is liability without fault. Yet the two tend to fade into each other and are not utterly different in kind.

.....

. . . [S]trict liability (whether for products, animals, or abnormally dangerous activities) is not accurately characterized as liability without fault

This is legal fault, and it can be mixed with, and compared with, fault of the morally reprehensible type. One does not have to stigmatize conduct as negligent in order to characterize it as fault.

See also Parks, Watts-Fitzgerald & Watts-Fitzgerald, *Products Liability*, 33 U. MIAMI L. REV. 1185, 1203-11 (1979), distinguishing cause-in-fact from proximate cause in products liability cases.

fault: a party culpably at fault is liable to the injured party.³⁰ This meaning obviously does not include liability based on legal (imputed) fault.³¹ Second, fault sometimes means liability based on either culpable or legal fault.³² In this sense fault is synonymous with liability in accident law.

III. COMPARATIVE NEGLIGENCE AND FAULT

Under the doctrine of comparative negligence, a defendant may have the plaintiff's loss apportioned between the plaintiff and the defendant according to their relative fault.³³ Not specifically defined, "fault" in a given case is what the jury determines on the facts before it.³⁴ More broadly, fault in comparative negligence may mean either culpable fault alone or both culpable and legal fault, depending on whether the actions of the jury or the actions of the legal system as a whole define fault.³⁵ This becomes clear upon analysis of the three categories of behavior defining liability.³⁶

When the defendant is liable for negligence (culpable fault), the courts have uniformly permitted the defense of comparative negligence. The driver of an automobile³⁷ or the negligent manufacturer may plead comparative negligence against the plaintiff, and the court may ask the jury to determine the degree of each party's fault.³⁸ Comparative negligence is also a defense to strict liability

30. See note 19 *supra*.

31. See note 23 *supra*.

32. Thus, in *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973), the court stated: "In the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault." *Id.* at 438. See *Lincenberg v. Issen*, 318 So. 2d 386 (Fla. 1975). Because a party may be held liable for legal or implied negligence, this meaning of fault must include both culpable and legal fault.

33. 280 So. 2d at 438.

34. The Florida Standard Jury Instructions, prepared by the Supreme Court Committee on Standard Jury Instructions, do not use the word "fault." The court in *Hoffman*, however, couched its analysis of comparative negligence in terms of the "proportionate fault of each party." 280 So. 2d at 439. Thus, it is the jury which operationally defines fault: "In accomplishing these purposes, the trial court is authorized to require special verdicts to be returned by the jury and to enter such judgment or judgments as may truly reflect the intent of the jury as expressed in any verdict or verdicts which may be returned." *Id.*

35. The court shapes the case through its rulings on motions (*e.g.*, to dismiss, to clarify or strike, or to give judgment on the pleadings or for summary judgment). The court may thus eliminate those cases which as a matter of law do not reach the threshold of fault necessary to take the case to the jury.

36. See notes 17-29 and accompanying text *supra*.

37. *Moore v. St. Cloud Utilities*, 337 So. 2d 982 (Fla. 4th DCA 1976).

38. *Auburn Mach. Works Co. v. Jones*, 366 So. 2d 1167 (Fla. 1979).

and breach of implied warranty.³⁹ Since both involve culpable fault, the jury determines the relative culpability of the defendants and the plaintiff. Logically, culpable fault provides the basis for the verdict.

The courts recognize that comparative negligence is a valid defense to legal liability, but they do not permit the jury to consider the legal fault of the defendants. Instead, the courts invoke the rule of equity that requires class liability, including the common liability arising from legally imputed fault, to be treated as a single legal cause of the plaintiff's loss.⁴⁰ The verdict form asks the jury to determine and weigh the fault of the plaintiff and the defendants, but does not distinguish between the legal fault of the owner and the culpable fault of the driver.⁴¹ By pairing the driver and owner, a court finds the owner liable as a matter of law, contingent only on the liability of the driver, and will permit the comparative negligence of the plaintiff as a defense to the class liability of both defendants, irrespective of the nature of each one's fault.⁴² Thus, viewed as what the jury decides, fault means culpable fault. The legal system as a whole, however, provides a decisionmaking framework that operates on a concept of liability based on both culpable and legal fault.

39. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976).

40. *Moore v. St. Cloud Utilities*, 337 So. 2d 982 (Fla. 4th DCA 1976).

41. *Moore* illustrates this point. A pickup truck driven by Miller but owned by Cassel's Garage ran into a utility pole, knocking down the attached powerlines. Plaintiff was injured when the car in which he was riding stopped so that the driver could help Miller. Plaintiff brought an action against Miller (the driver of the truck), Cassel's Garage (the owner of the truck), the utility company (the owner of the pole and wires), and various other defendants. The defendants pled comparative negligence, and the trial court submitted a special interrogatory verdict to the jury, which found plaintiff liable for 20% of his loss and Miller and Cassel's Garage *jointly* liable for 20%, distributing the remaining liability among the other defendants. *Id.* at 983. The District Court of Appeal, Fourth District, reversed on the ground that comparative negligence did not permit the jury to apportion damages among the defendants, and ruled that Miller and the utility company were jointly and severally liable for the full amount of the loss attributed to their negligence. *Id.* at 984.

In not treating Cassel's Garage as an independently negligent party, the court recognized the *legal* nature of the owner's liability. *Id.* at 983. The trial court, however, had asked the jury to determine liability based solely on culpable fault. It was asked to weigh the culpable fault of the defendants and the plaintiff but was not permitted to consider the legal fault of Cassel's Garage separately from the culpable fault of Miller. The legal liability of Cassel's Garage was a question not of fact but of law, already determined by the court in equating the garage with Miller in the verdict form.

42. *Id.* at 984.

IV. CONTRIBUTION, IMPLIED INDEMNITY, AND FAULT

Accident law provides two mutually exclusive mechanisms for shifting loss among defendants and third parties who may be held liable to the plaintiff. The Uniform Contribution Among Tortfeasors Act⁴³ permits the finder of fact to allocate loss among liable defendants and third party defendants as a function of their fault. Implied indemnity permits the court or the jury to shift the entire loss attributable to one defendant to another liable defendant or third party defendant. Implied indemnity arises only if (a) the indemnitor has breached a duty to the indemnitee, and (b) the plaintiff can hold the indemnitee liable for the plaintiff's injuries arising from the indemnitor's conduct.⁴⁴ The Contribution Act states that if implied indemnity is available as a mechanism for loss distribution, contribution will not apply.⁴⁵ Thus, the joint burden of the defendants held liable to the plaintiff may be allocated by one of two mutually exclusive mechanisms.

A. Contribution and Fault

Fault in contribution is similar to fault in comparative negligence, with the added complexity that legal fault will always be within the domain of implied indemnity.⁴⁶ When defendants are both liable for negligence and therefore both culpably at fault, the courts have uniformly permitted the defendants to plead contribution and have instructed the juries to allocate loss according to the fault of the parties jointly liable.⁴⁷ The driver of an automobile has a right to contribution from another tortfeasor who jointly caused plaintiff's injuries, with the jury to determine the degree of fault of each negligent defendant.⁴⁸ Likewise, a manufacturer held strictly

43. FLA. STAT. § 768.31 (1979). The relevant text of the Act is set forth in note 4 *supra*.

44. *Id.* § 768.31(1)(f) states:

(f) This act does not impair any right of indemnity under existing law.

When one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

45. *Id.*

46. The Supreme Court views fault in comparative negligence and contribution as essentially equivalent. In *Lincenberg v. Issen*, 318 So. 2d 386, 391 (Fla. 1975), the court summarized its position on fault in both doctrines: "There is no equitable justification for recognizing the right of the plaintiff to seek recovery on the basis of apportionment of fault while denying the right of fault allocation as between negligent defendants."

47. See, e.g., *Lincenberg*, 318 So. 2d 386.

48. In *Lincenberg*, the court set forth the full special interrogatory verdict used by the trial court to apportion damages between the negligent parties involved in an automobile

liable or found to have breached an implied warranty may generally recover from a jointly liable party whose affirmative negligence helped cause the plaintiff's injuries.⁴⁹ Legal fault, however, has always been removed from the domain of contribution and treated through the mechanism of implied indemnity. While the jury determines the culpable fault of the parties, other aspects of the system define "fault" when it includes both culpable and legal fault.⁵⁰

B. *Implied Indemnity and Fault Before Houdaille*

Before *Houdaille*,⁵¹ courts took three main approaches in de-

accident. 318 So. 2d at 387-88.

49. *E.g.*, *Ellis v. Golconda Corp.*, 352 So. 2d 1221 (Fla. 1st DCA 1977); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976).

50. In *Lincenberg*, the plaintiff sued the driver of the automobile in which she was riding and the driver and owner of the second automobile. The trial court submitted a special interrogatory verdict containing the following clauses, which distinguished the negligence of the drivers but equated the negligence of the driver and owner of the second car: "1. Was there negligence on the part of the Defendant, HARRY LINCENBERG, which was the legal cause of this accident? . . . 2. Was there negligence on the part of Defendants, ELEANOR RHODES and RONALD ANGELO RHODES, which was the legal cause of the accident?" 318 So. 2d at 387-88. The basis for considering the owner and driver as a single unit appears in FLA. STAT. § 768.31(3)(b) (1979): "If equity requires, the collective liability of some as a group shall constitute a single share." In this connection, the Commissioners' Comments on § 2 of the Uniform Contribution Among Tortfeasors Act make it clear that vicarious relationships should be treated as class liabilities: "Second, [the Act] invokes the rule of equity which requires class liability, including the common liability arising from vicarious relationships, to be treated as a single share." 12 UNIFORM LAWS ANN. 57, 87 (1975) (1955 revision).

In 1976 the legislature amended the Florida version of the Act to permit apportionment of damages among defendants according to relative fault. The rule about class liabilities remains. FLA. STAT. § 768.31(3) (1979).

51. Indemnity actions originated in contract. *See generally* *Davis, Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517 (1952); *Leflar, supra* note 2; *O'Donnell, Implied Indemnity in Modern Tort Litigation: The Case for a Public Policy Analysis*, 6 SETON HALL L. REV. 268 (1975); *Walkowiak, supra* note 16.

Contractual indemnity allowing a party to indemnify itself against its own wrongful acts is permissible even though the court views such agreements with disfavor. *See* note 11 *supra*.

The action soon spread to implied contract under an equitable theory of preventing unjust enrichment. *See* *Seaboard Air Line Ry. v. American Dist. Elec. Protective Co.*, 106 Fla. 330, 143 So. 316 (1932) (railroad entitled to indemnity where electric company negligently performed its contractual duty of maintaining and operating signal system, on grounds of implied duty to keep wires from sagging). A good description of the contractual theory behind implied indemnity is found in *F.J. Walker, Ltd. v. Motor Vessel "Lemoncore"*, 561 F.2d 1138 (5th Cir. 1977):

A stevedore owes a warranty of workmanlike performance to the vessel. In fulfilling this warranty, the stevedore owes the vessel a duty to use such care and diligence as an ordinarily prudent and skillful person would use in the same circumstance However, proof of a breach of the warranty of workmanlike performance does not ipso facto establish a right to indemnity by the vessel.

termining whether the facts of a particular case gave rise to a right of implied indemnity.⁵² First, a court might impute an indemnitee's liability from the acts of another.⁵³ For example, the owner of a negligently driven vehicle could seek implied indemnity from the driver if the owner's liability to the plaintiff derived solely from ownership of the vehicle.⁵⁴ Likewise, an employer could obtain im-

Obviously, if such breach is not an operative factor in the damages that occur, or if conduct on the part of the shipowner causes the injury, indemnity should be denied.

Id. at 1148 (citations omitted). See also 41 AM. JUR. 2d *Indemnity* § 2 (describing the equitable basis of implied indemnity).

Policy determines which circumstances will support an action in implied indemnity, as Leflar shows:

The doctrine of *respondeat superior* and its fellow doctrines, both statutory and common law, imposing liability irrespective of fault, have operated as a sort of social insurance, lifting the burden of loss off the innocent individual upon whom it happened to fall, and shifting it onto another innocent person who normally has some opportunity to spread it over a portion of society as a whole by adding it to the total cost of production or risk of ownership in the area of social activity out of which the injury arose.

Leflar, *supra* note 2, at 148. See also Davis, *supra*, at 536.

52. There have been many schemes for categorizing the situations in which the courts have allowed indemnity. Leflar, for example, classified indemnity actions as contractual or quasi-contractual ("arising out of a 'contract implied by law'"). Leflar, *supra* note 2, at 146. He then subdivided implied indemnity on the basis of three possible situations: (1) The improper act of one person produces injury and the law permits the injured person to recover for his injury from someone other than the actor. In such cases the actor, or possibly someone standing in his stead, must indemnify the one who has been held liable without fault for the actor's misconduct. *Id.* at 147. In this category, Leflar included liability of a carrier (based on *respondeat superior*) for the negligence of a connecting carrier, liability of a municipal corporation for a defect created by another, liability of the occupier of premises for dangerous conditions created by another, liability of the lessor for acts of the lessee. *Id.* at 149-50. (2) One voluntarily but innocently and in good faith doing at the direction of another person an act which on its face appears lawful and proper, but which is in fact tortious. *Id.* at 150. (3) When the indemnitor had the last clear chance. Leflar rejected the distinction between active and passive negligence as artificial in the context of the third category. *Id.* at 154.

53. Under this theory of implied indemnity, one who because of a prior relationship with the wrongdoer was held liable for damages could shift his entire loss to the wrongdoer who, in fact, had caused the harm. Indemnity has been defined as "a right which inures to a person who has discharged a duty which is owed by him but which, as between himself and another, should have been discharged by the other." 41 AM. JUR. 2d *Indemnity* § 1. See also W. PROSSER, *supra* note 3, § 51, at 310: "There is an important distinction between contribution, which distributes the loss among the tortfeasors by requiring each to pay his proportionate share, and indemnity, which shifts the entire loss from one tortfeasor who has been compelled to pay it to the shoulders of another who should bear it instead."

54. *E.g.*, *Fincher Motor Sales, Inc. v. Lakin*, 156 So. 2d 672 (Fla. 3d DCA 1963). Indemnity has also been allowed where the owner of various forms of property was initially held liable for the negligent acts of another. *GACL, Inc. v. Riviera Tile and Terrazzo Co.*, 300 So. 2d 39 (Fla. 3d DCA 1974) (owner of apartment complex sought indemnity against tile company that installed soap dish that shattered, causing injuries to tenant); *St. Vincent's Hosp.*,

plied indemnity from his employee who negligently injured the plaintiff, if the liability of the employer derived entirely from his status as employer.⁵⁵ Such imputed liability, variously labelled as constructive or derivative,⁵⁶ secondary,⁵⁷ vicarious or technical,⁵⁸ or passive⁵⁹ liability or negligence, corresponds exactly with the second category in our discussion of liability⁶⁰ and the concept of legal fault.⁶¹

Inc. v. Crouch, 292 So. 2d 405 (Fla. 1st DCA 1974) (indemnity action by hospital against subcontractor for damages paid to wife of patient who had been injured on pile of building material left in hospital parking lot after visiting husband); *Olin's Rent-A-Car System, Inc. v. Royal Continental Hotels, Inc.*, 187 So. 2d 349 (Fla. 4th DCA 1966) (hotel entitled to indemnity from auto rental company that did business at hotel and provided services for hotel); *State Road Dep't v. Cuyahoga Wrecking Co.*, 171 So. 2d 50 (Fla. 3d DCA 1965) (contractor who demolished and removed building prior to condemnation entitled to indemnification from road department); *Westinghouse Elec. Corp. v. J.C. Penney Co.*, 166 So. 2d 211 (Fla. 1st DCA 1964) (indemnity action by store owner against elevator maintenance company for damages paid to injured shopper).

55. *E.g.*, *Florida Power Corp. v. Taylor*, 332 So. 2d 687 (Fla. 2d DCA 1976) (power company sought indemnity from canal authority for damages paid to employee injured while measuring distance between ground and high-voltage transmission line).

56. *See* cases cited note 54 *supra*.

57. *E.g.*, *Maybarduk v. Bustamante*, 294 So. 2d 374 (Fla. 4th DCA 1974) (surgeon, held liable to patient, sought indemnity from hospital and from assistant furnished by hospital); *see Walkowiak, supra* note 16, at 524-27 (discussion of primary and secondary liability in *Maybarduk* in terms of the duties owed among the various parties).

58. *E.g.*, *American Home Assur. Co. v. City of Opa Locka*, 368 So. 2d 416 (Fla. 3d DCA 1979).

59. Passive negligence was originally used to denote vicarious, technical or constructive liability where the party failed to act and was liable because of the actions of another. Subsequently the active/passive terminology became a catch-all for approximating contribution. *See* note 52 *supra*. At the core of such actions, however, lie situations called passive but more accurately described by one of the other concepts in indemnity. In *Florida Power & Light Co. v. General Safety Equip. Co.*, 213 So. 2d 486 (Fla. 3d DCA 1968), the court affirmed dismissal of a third party action by the power company for indemnity because the complaint alleged active negligence on the part of the defendant. In so ruling, the court stated that passive liability could exist which would entitle the defendant to indemnity if it were in fact vicariously or technically liable:

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.

Id. at 488.

60. *See* note 23 and accompanying text *supra*.

61. The concept of "fault" in indemnity in Florida arises from four different sources. First, it may arise from the traditional indemnity situations involving a vicarious relationship where fault includes both legally imputed fault (legal fault) and actual negligence (culpable fault). Cases arising under the dangerous instrumentality doctrine involving cars, although now a statutory form of strict liability, fall properly into the first category because

Second, a court might find that even a negligent party should receive indemnification from another whose acts were more culpable than the acts of the indemnitee. Thus, a court would require a supplier of goods to indemnify a retailer or user of the goods who negligently relied upon the supplier's representations of proper care of the goods.⁶² Similarly, the owner of a building who negligently relied upon a contractor who made improvements or repairs would have a right to indemnity.⁶³ In products cases, a manufacturer who negligently failed to discover a defective component could recover through implied indemnity from the manufacturer of the component.⁶⁴ In each case, the indemnitor could more easily have performed the necessary inspection and correction of defects than the indemnitee could. Focusing on the indemnitor's conduct as the breach of a duty owed by one defendant to the other, courts before *Houdaille* commonly distinguished between the *active neg-*

they do not involve the sharing of the costs as in the manufacture of a product. Further, unlike the strict (statutory) liability of the dogbite cases, a third individual is involved—presumably one is more responsible for control of one's dog than for the behavior of the negligent driver of one's car. See cases cited note 29 *supra*.

Second, indemnity actions occur in the specialized field of admiralty law. The principles of vicarious liability and strict liability are both present in maritime indemnity, which will not be discussed separately. See note 51 *supra*.

Third, some actions involve the fault embodied in strict liability although variously characterized either incorrectly as liability without fault or correctly as negligence per se. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976). See generally J. ALPERT, *supra* note 29; Jensvold, *supra* note 26; Kissel, *Contribution or Indemnification Among Strictly Liable Defendants*, 16 FOR THE DEFENSE 133 (1975); Twerski, *The Many Faces of Misuse: An Inquiry Into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403 (1978); Wade, *supra* note 23.

Fourth, and most recently, the concept arises from the use of the term "fault" in contribution and comparative actions. FLA. STAT. § 768.31(3)(a) (1979).

62. *E.g.*, *Pender v. Skillcraft Indus., Inc.*, 358 So. 2d 45 (Fla. 4th DCA 1978). Compare cases cited note 51 *supra*, with *Seaboard Coast Line R.R. v. Dan Graves Masonry, Inc.*, 37 Fla. Supp. 139 (Pinellas County Cir. Ct. 1971). See also *Tromza v. Tecumseh Prods. Co.*, 378 F.2d 601 (3d Cir. 1967); *Mallory S.S. Co. v. Druhan*, 17 Ala. App. 465, 84 So. 874 (1920); *Boston Woven-hose & Rubber Co. v. Kendall*, 178 Mass. 232, 59 N.E. 657 (1901); *Busch & Latta Paint Co. v. Woermann Constr. Co.*, 310 Mo. 419, 276 S.W. 614 (1925); *John Wanamaker, N.Y., Inc. v. Otis Elevator Co.*, 228 N.Y. 192, 126 N.E. 718 (1920).

63. See cases cited note 54 *supra*.

64. *E.g.*, *Tromza v. Tecumseh Prods. Co.*, 378 F.2d 601 (3d Cir. 1967); *McDonald v. Blue Jeans Corp.*, 183 F. Supp. 149 (S.D.N.Y. 1960). Jensvold argues that

[s]ince each defendant is liable only if the product was in a defective condition at the time it left his possession, the ultimate responsibility should rest upon the one who first placed the defective product into the stream of commerce. Thus, it follows that if a product is defective only because one of its component parts is defective, the ultimate responsibility for injuries caused by the product is imposed upon the manufacturer of the component part.

Jensvold, *supra* note 26, at 730.

ligence of the indemnitor and the *passive* negligence of the indemnitee.⁶⁵ Behavior of this sort would generally fall within the first and third categories of liability discussed above (the breach of a duty of care, and strict liability for the creation of a risk of harm to another, respectively), but is by no means coterminous with them or with the broader concept of culpable fault.⁶⁶

In the third approach, the courts developed implied indemnity as a substitute for contribution.⁶⁷ The early common law had re-

65. *E.g.*, *Winn-Dixie Stores, Inc. v. Fellows*, 153 So. 2d 45 (Fla. 1st DCA 1963), *modified*, 160 So. 2d 102 (Fla. 1964) (grocery store owner sought indemnity from bottling company which had negligently constructed bottle display causing injuries to customer). In *Florida Power & Light Co. v. Hercules Concrete Pile Co.*, 275 F. Supp. 427, 429 (S.D. Fla. 1967), the court stated: "Under this principle one who is considered a 'passive' tortfeasor may recover indemnity from a so-called 'active' tortfeasor, the measure of damages being the recovery which the injured party received from the passive tortfeasor." *See also* *People Gas Sys., Inc. v. B & P Rest. Corp.*, 271 So. 2d 804 (Fla. 3d DCA 1973); *Stempler v. Smith*, 242 So. 2d 472 (Fla. 1st DCA 1970); *Florida Power & Light Co. v. General Safety Equip. Co.*, 213 So. 2d 486 (Fla. 3d DCA 1968); *Westinghouse Elec. Corp. v. J.C. Penney Co.*, 166 So. 2d 211 (Fla. 1st DCA 1964).

66. The concepts of culpable and legal fault merged with the concepts of active and passive negligence in the leading case of *Winn-Dixie Stores, Inc. v. Fellows*, 153 So. 2d 45 (Fla. 1st DCA 1963). There, the court denied an indemnity action on the ground that the failure of the storeowner to correct a dangerous bottle display arranged by the bottling company was primary and active negligence of the same degree for which the bottling company was liable. *Id.* at 51. One unintended consequence of the *Winn-Dixie* opinion was to shift the focus from the relation and duty owed between the two defendants to the relation and duty owed by both the defendants to the injured party. *E.g.*, *Firestone Tire & Rubber Co. v. Thompson Aircraft Tire Co.*, 353 So. 2d 137, 140 (Fla. 3d DCA 1978) (whether a party is actively or passively negligent is for the trier of fact to decide); *Florida Power Corp. v. Taylor*, 332 So. 2d 687, 690 (Fla. 2d DCA 1976) (indemnity applies not only in the context of vicarious liability but also in any case involving two tortfeasors, one actively and the other passively negligent).

Davis offers this justification:

[N]egligent tortfeasors who breach different qualities of duties toward an injured person can be considered to be on different 'planes of fault'— which difference is important enough to warrant a complete *shifting* of the loss from one to the other. But tortfeasors who breach substantially equal duties are on the same "plane of fault" and should *share* the loss.

Davis, *supra* note 51, at 547 (emphasis in original).

67. Prior to adoption of the Uniform Contribution Among Tortfeasors Act in 1975, indemnity was viewed as a means of alleviating what was increasingly perceived as the unjust enrichment caused by prohibiting contribution. *See generally* Davis, *supra* note 51; Ferrini, *The Evolution from Indemnity to Contribution—A Question of the Future, if Any, of Indemnity*, 58 CHI. BAR REC. 254 (1978).

The "active/passive" distinction, in particular, lent itself to expanding the concept of indemnity by suggesting that the degrees of negligence of the defendant tortfeasors be weighed in determining which one was to bear the loss. *See* *Stuart v. Hertz Corp.*, 302 So. 2d 187 (Fla. 1st DCA 1975), *rev'd*, 351 So. 2d 703 (Fla. 1977), where the court stated: "Apart from the existence of an express contract to indemnify, indemnity has been permitted when it is predicated upon the existence and violation of a *duty* as between the tortfeasors . . . and likewise where it has been predicated upon the *degrees of wrongful conduct* as between

jected contribution, the apportionment of loss among the parties liable for the plaintiff's injuries.⁶⁸ Courts expanded the scope of implied indemnity by resorting to the distinction between active and passive negligence or finding the parties not in *pari delicto*.⁶⁹ Because a tortfeasor without a right of contribution must sustain the entire loss caused jointly by himself and others, courts often weighed the degrees of negligence of the tortfeasors to determine which party should bear the loss. As one court observed, indemnity could ameliorate the rule against contribution among tortfeasors "where the facts shown make it unequitable that the principal wrongdoer should escape liability."⁷⁰ Behavior susceptible to this approach also falls within the first and third categories of liability and involves culpable fault.⁷¹

the tortfeasors" *Id.* at 191 (citations omitted)(emphasis in original).

68. *E.g.*, *Jacksonville Coach Co. v. Royal*, 97 So. 2d 190 (Fla. 1957); *Jackson v. Florida Weathermakers, Inc.*, 55 So. 2d 575 (Fla. 1951); *Crenshaw Bros. Produce Co. v. Harper*, 142 Fla. 27, 195 So. 353 (1940); *H.G. Wolfe Constr. Co. v. Ellison*, 127 Fla. 808, 174 So. 594 (1936).

69. Generally, the terms were used in combination with each other. Not "in *pari delicto*" means not in equal fault. *See Davis, supra* note 51; *Kissel, supra* note 61.

70. *Stahlberg v. Hannifin Corp.*, 157 F. Supp. 290, 292 (N.D.N.Y. 1957).

Even after adoption of the Uniform Contribution Act and the subsequent comparative fault amendment, *see* note 5 *supra*, the lower courts viewed indemnity as a means of extending contribution to two areas not covered by the Act: situations involving statutory limits of the Workers' Compensation Act, FLA. STAT. § 440.01-.60 (1979), and situations involving successive tortfeasors. *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977).

In *Stuart*, the supreme court quashed the decision of the court of appeals and held that an initial tortfeasor could not seek indemnity from a successive tortfeasor who aggravated the injuries of the plaintiff. The court reasoned that to espouse a hybrid doctrine of partial equitable indemnification would lead to confusion and nonuniformity of application by the lower courts. *Id.* at 706. Although the court had found in *Trail Buildings Supply Co. v. Reagan*, 235 So. 2d 482 (Fla. 1970), that a manufacturer had a right of indemnity against an employer of an injured employee, the court limited that right in *Seaboard Coast Line R.R. v. Smith*, 359 So. 2d 427 (Fla. 1978) and virtually eliminated that right in *Houdaille Indus., Inc. v. Edwards*, 374 So. 2d 490 (Fla. 1979). In *Houdaille*, the court determined that indemnity, unlike contribution, does not permit a weighing of the relative degrees of fault. *Id.* at 493. The court returned to viewing the relationship between the defendants as the critical one in determining whether indemnity would be allowed. If, as between the defendants, the one seeking indemnity is without fault, indemnity is allowed. *Id.*

Subsection (3)(a) of FLA. STAT. § 768.31 (1979) reads in part: "Pro rata shares. In determining the pro rata shares of tortfeasors in the entire liability: (a) Their relative degrees of fault shall be the basis for allocation of liability." With the adoption of subsection (3)(a) in 1976, Florida became a pure comparative negligence state. Under the 1975 Act, Florida was a comparative negligence state permitting contribution on a pro rata basis determined by the number of defendants. If there were three defendants, for example, each would be liable for one-third of the damages. *Lincenberg v. Issen*, 318 So. 2d 386 (Fla. 1975). *See* note 5 *supra*.

71. The inclusion of both legal liability and negligence in the term "fault" is found in the early case of *Seaboard Air Line Ry. v. American Dist. Elec. Protective Co.*, 106 Fla. 330,

C. *Implied Indemnity, Contribution, and Fault After Houdaille*

In *Houdaille Industries, Inc. v. Edwards*,⁷² the court faced the question whether a manufacturer sued for breach of warranty may bring a third party suit for indemnity against the employer of the injured party. Edwards, an employee of Houdaille Industries, was killed when a steel cable used in the manufacture of concrete beams broke while being stretched through a beam mold. Houdaille paid workers' compensation benefits to Edwards' survivors. Edwards' personal representative then sued the manufacturer of the steel cable, Florida Wire, for wrongful death, alleging that Florida Wire had breached an implied warranty of fitness by providing a defective cable. Florida Wire, barred by the workers' compensation statute from bringing an action for contribution against the employer of the injured worker,⁷³ filed a third party indemnity action against Houdaille, alleging that if Florida Wire were negligent, its negligence was merely passive, while that of Houdaille was active.⁷⁴ Under the traditional tests for implied indemnity, passive negligence would have provided a valid basis for recovery.⁷⁵

Houdaille moved for summary judgment on the third party action, arguing that breach of implied warranty involved active negligence by definition.⁷⁶ In response, Florida Wire contended that breach of warranty is a form of liability which does not involve actual fault or active negligence on the part of the manufacturer.⁷⁷

143 So. 316 (1932) (en banc). The court stated:

Generally, one of two joint tortfeasors cannot have contribution from the other. But there are exceptions to this rule, one of which is in that class of cases where although both parties are at fault and both liable to the person injured, such as an employee of one of them, yet, they are not in *pari delicto* as to each other, as where the injury has resulted from a violation of the duty which one owes the other, so that as between themselves, the act or omission of the one from whom indemnity is sought is the primary cause of the injury.

Id. at 332 (emphasis in original). This definition of fault as including both legal and moral fault, was the commonly accepted definition of fault in indemnity. *Maybarduk v. Bustamante*, 294 So. 2d 374, 376 (Fla. 4th DCA 1974); *Winn-Dixie Stores, Inc. v. Fellows*, 153 So. 2d 45, 49 (Fla. 1st DCA 1963).

72. 374 So. 2d 490 (Fla. 1979).

73. FLA. STAT. § 440.11 (1979).

74. *Id.* Specifically, Florida Wire alleged that Houdaille failed to conduct the detensioning process properly, did not properly insert a strand back in the jack used in the detensioning process, improperly installed the jack to the strand of wire which resulted in misalignment of the jack and subsequent release of the strand, and did not properly instruct its employees about the detensioning process.

75. See note 59 *supra*.

76. *Home Indemnity Co. v. Edwards*, 360 So. 2d 1112, 1113 (Fla. 1st DCA 1978), *rev'd*, 374 So. 2d 490 (1979).

77. See *id.* at 1114.

The trial court agreed with Houdaille and dismissed the third party complaint.⁷⁸ On appeal, the District Court of Appeal, First District, reversed, holding that a manufacturer of a product is entitled to bring an action in implied indemnity against an employer who has, through active misuse of the product, caused injuries to its employee.⁷⁹ Houdaille sought conflict certiorari in the Supreme Court of Florida, which reversed.⁸⁰

The supreme court decided that the manufacturer had no right to indemnity from the employer, "absent a special relationship between the manufacturer and the employer which would make the manufacturer only vicariously, constructively, derivatively, or technically liable for the wrongful acts of the employer."⁸¹ The court suggested that the district court had improperly used the traditional indemnity concepts of active and passive negligence by weighing the fault of the manufacturer against the fault of the employer. In the context of implied indemnity, the court said, these terms mean nothing more than fault or no fault.⁸² In applying this test, the court held that it is improper to weigh the relative fault of the parties.⁸³ The court assumed that liability under an implied warranty involves some fault,⁸⁴ so that a third party indemnity action will not lie against an employer even though he may also be at fault.

V. THE MEANING OF FAULT

The supreme court's use of the term "no fault" in *Houdaille* is inconsistent with its use of "fault" to include both legal and culpable fault. It is logically inconsistent for the indemnitee to be liable to the plaintiff (hence at fault) but entitled to implied indemnity (hence not at fault). If, however, "no fault" includes legal fault, then the *Houdaille* decision is consistent with the term "fault" de-

78. 374 So. 2d at 492.

79. 360 So. 2d at 1114-15.

80. 374 So. 2d at 494. The district court decision conflicted with *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977), and with *Spring Lock Scaffolding Rental Co. v. Charles Poe Masonry, Inc.*, 358 So. 2d 84 (Fla. 3d DCA 1978). For a discussion of the supreme court's revised conflict jurisdiction, see Kramer, Halpern & Robbins, *Constitutional Law, 1979 Developments in Florida Law*, 34 U. MIAMI L. REV. 597, 615-19 (1980).

81. 374 So. 2d at 492. Until the *Houdaille* decision, a manufacturer could argue it was entitled to indemnity from an employer when the manufacturer's negligence was passive as compared to the active negligence of the employer. See *Trail Builders Supply Co. v. Reagan*, 235 So. 2d 482, 485 (Fla. 1970); note 76 *supra*.

82. 374 So. 2d at 493.

83. *Id.*

84. *Id.* The appellate court had rejected this assumption. 360 So. 2d at 1114.

fined as culpable fault. Florida courts maintain conceptual consistency by deeming strict liability and breach of implied warranty to encompass instances of both culpable and legal fault.

The *Houdaille* court stated that implied indemnity is available only to a party who is without fault and thus only vicariously or technically liable.⁸⁵ These implicate areas traditionally described as legal fault. Thus, actions described in those terms are preserved, and "no fault," as used in *Houdaille*, must equal or include "legal fault."⁸⁶

The court also ruled that a manufacturer allegedly having breached an implied warranty cannot bring an indemnity action against an employer, without pleading the existence of a special relationship between itself and the employer which would make the manufacturer only vicariously, constructively, or technically liable. Such a relationship is necessary because the plaintiff's action against the manufacturer under an implied warranty is based upon the fault of the manufacturer.⁸⁷ Hence, a recovery by the plaintiff upon the theory of breach of implied warranty on the facts before the court in *Houdaille* would preclude the finding of no fault in the conduct of the manufacturer and thus prevent implied indemnity.

At the same time, the court specifically recognized that the liability of a manufacturer who sells a product containing a defective component manufactured by another may be without fault.⁸⁸ The manufacturer of the product who fails to discover the defec-

85. 374 So. 2d at 492, 493.

86. "No fault" may include more than legal fault. The court specifically included failure to discover a defective component in "no fault." Failure to discover has traditionally included both negligence and strict liability. If logical analysis cannot separate these elements, this "no fault" would include more than "legal fault." See note 87 and accompanying text *infra*. Thus, the plaintiff has some control over the third party action for implied indemnity. If the plaintiff is injured in an automobile accident, he may sue the owner of the other car. If his complaint states a cause of action against the owner based solely on ownership, then the owner may bring an indemnity action against the driver of the car. If the plaintiff sues the owner for negligent entrustment, then the defendant will have a cause of action for indemnity which is contingent upon the finding of the trier of fact that he was, in fact, not negligent. Most plaintiffs will plead as many theories as possible; hence, plaintiff's control will be minimal.

87. Thus, the court states that it is concerned only with the fault or no fault of the party seeking indemnity. 374 So. 2d at 493. Florida Wire's claim that Edwards' death resulted solely from the negligence of Houdaille is viewed as a complete defense to the *original* action, but irrelevant in the indemnity action. *Id.* If Florida Wire is liable, it can only be so because it was found at fault—that is, a defect in its product had some causal relation to the death of Edwards. *Id.* at 494.

88. *Id.* at 493 n.3.

tive component may plead implied indemnity because failure to discover a defective component gives rise to liability without fault. By not permitting a cause of action in implied indemnity for breach of warranty in *Houdaille* but allowing it against a component manufacturer, the court in effect distinguishes actions for breach of implied warranty from those for strict liability based on the original concept of passive negligence; where the manufacturer is held liable for the affirmative actions of another, implied indemnity may lie.⁸⁹ But where the manufacturer's product contains a defect for which he is responsible, he may not plead implied indemnity.⁹⁰

Thus, culpable fault inheres in the manufacture of an allegedly defective product that causes injury to another. If the defect results from a component manufactured by another, however, and the manufacturer of the product merely failed to discover the defect, the manufacturer's actions are then "without fault." If the breach of a duty owed to the manufacturer by a component supplier created the liability of the manufacturer, the manufacturer's liability involves no fault, and indemnity will lie. This analysis, in

89. *Id.*

90. *Id.* at 493. It follows that a retailer who would be found at fault under a theory of negligence per se in strict liability and implied warranty would still have a right to indemnity (from a manufacturer) if he could allege he was only derivatively or technically liable—that is, that his fault was really no fault because all he did was sell the product as agent for the manufacturer. 374 So. 2d at 493. See also *Jensvold*, *supra* note 26; *Walkowiak*, *supra* note 16. As agent, the retailer carried out the duties owed under such implied agency in a manner without fault and unrelated to the cause of the injury.

Similarly, the court suggested that a manufacturer who incorporates a defective component into his own product could, under certain circumstances, be without fault in its relationship to the supplier of the component part. 374 So. 2d at 493 n.3. Even though a manufacturer would be negligent per se and at fault under strict liability, in this case a manufacturer would act as the agent of the party who produced the defective part. If the manufacturer pled that it had carried out its duties to the supplier by installing the part without fault and was therefore only technically liable, it could seek indemnity against the supplier. In returning to the traditional definition of indemnity based on duties between tortfeasors, the court is really returning to the implied contract basis for indemnity and the notion of an implied warranty of performance. The court in *Houdaille* states that "[t]he user of an item supplied by another, in the absence of a contract, does not owe the latter any duty of care in connection with the use of the item so as to create a duty upon the user to indemnify the supplier." *Id.* at 494. Thus, *Florida Wire*, or any manufacturer of a defective part, could not seek indemnity from a user of the product. But if the court finds an implied contract, *Florida Wire* or a supplier might have to indemnify the manufacturer who used the component part. This "agency no-fault" claim to indemnity could not be asserted by one who actually manufactured the defective part.

It appears that Florida has adopted a standard of comparative causation in the area of products liability. See *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976).

keeping with the original concept of "passive negligence," leads to the conclusion that in effect the court has defined "fault" to include culpable fault only, and "no fault" to include only legal fault.

VI. PLEADING IMPLIED INDEMNITY

The reasoning in *Houdaille* suggests that the court has limited the use of implied indemnity by preventing a trial court from using the active-passive dichotomy to allow a culpably liable party to shift the loss allocated to him to another more culpable party. Partial reallocation of loss among culpable parties may be accomplished only through comparative negligence and contribution.

After *Houdaille*, then, a third party action for implied indemnity will survive a motion to dismiss only by satisfying the following criteria:

- A. The plaintiff's complaint alleges a cause of action against the indemnitee based at least in part on imputed liability; and
- B. The third party complaint alleges:
 - 1. there existed a special duty running from the indemnitor to the indemnitee;
 - 2. the indemnitor breached his special duty to the indemnitee;
 - 3. the plaintiff's injuries resulted from the same actions which breached the indemnitor's duty to the indemnitee; and
 - 4. the indemnitee can be held liable to the plaintiff for the injuries to the plaintiff resulting from the indemnitor's acts.

If the courts consistently interpret prior case law and the *Houdaille* decision, implied indemnity will still be allowed in the following major areas:⁹¹

- A. *Respondeat superior* (e.g., implied indemnity from the employee to the employer);

91. In each of these cases, a court may establish a defendant's liability, then impute that liability to the real party at fault whose breach of a special duty to the defendant actually caused the plaintiff's injuries. A particularly interesting example is the rule of restitution that allows an agent to obtain indemnity from his principal when the agent, acting in reliance upon and at the direction of his principal, has done an authorized act that creates liability for both the agent and the principal. If the agent's reliance upon the directions of his principal was justifiable and in good faith, the court will allow indemnity against the principal. See note 90 *supra*. See also RESTATEMENT OF RESTITUTION § 90 (1937); RESTATEMENT (SECOND) OF AGENCY § 439 (1958).

The Supreme Court of Florida recognized such a right of indemnity in *Croom v. Swann*, 1 Fla. 211 (1847). More recently, the District Court of Appeal, Second District, allowed a similar right of indemnity in *Occidental Fire & Cas. Co. v. Stevenson*, 370 So. 2d 1211 (Fla. 2d DCA 1979). See note 10 *supra*.

- B. Agency relationship (*e.g.*, implied indemnity from principal to agent who, in good faith, acted in an authorized manner);
- C. Ownership of dangerous instrumentalities (*e.g.*, implied indemnity from a driver or bailee for hire to the owner of the automobile);
- D. Strict liability or breach of implied warranty (*e.g.*, implied indemnity from the manufacturer of a defective product to a retailer who fails to discover a hidden defect; from the manufacturer of a component with a hidden defect to the manufacturer of a product using that component who fails to discover the defect);
- E. Ownership of land (*e.g.*, implied indemnity to an owner from a lessee who created a dangerous condition); and
- F. Statutorily created duties (*e.g.*, implied indemnity from a negligent connecting carrier to a common carrier).

If the plaintiff's recovery is based in any way on the culpable conduct of the indemnitee, so that the indemnitee cannot be held liable solely on the grounds of his legal fault, then no cause of action for implied indemnity will lie against a party culpably at fault. The defendant must then depend on comparative negligence or contribution for his remedy against the other culpable parties involved in the accident.

VII. LOSS DISTRIBUTION AND EQUITY

The *Houdaille* decision narrows the scope of implied indemnity in precluding parties culpably at fault from escaping liability by shifting the loss to more culpable parties. Although the decision preserves a certain conceptual consistency (in restricting indemnity to indemnitees free from fault), the consistency comes at the expense of justice. Narrowing indemnity will lead to inequity in some cases by allowing the unjust enrichment of negligent employers. Equity begins with the idea of doing justice, irrespective of technicalities. Since equity provides the basis for loss distribution in tort law, larger concerns than the narrow concept of fault should guide the courts in formulating rules for the allocation of losses.

A. Models of Accident Law

Three models based on three goals and three decision rules offer a framework for evaluating changes in accident law.⁹² The

92. The suggestive outlines of the three models may be found in Fletcher, *supra* note 14, at 538. Professor Fletcher correctly recognizes that the law has changed from a concept

fault model pairs the goal of allocating loss to the wrongdoer⁹³ with a decision rule based on fault. The compensation model pairs the goal of compensating the injured party⁹⁴ with a decision rule based on immediate and complete compensation. The third model, the economic allocation of resources, pairs the goal of minimizing the cost of accidents to the economy⁹⁵ with a decision rule based on

of fault based on individual autonomy and responsibility for one's own actions, to one which combines that concept with policy concerns for compensating the victim of an accident fully and rapidly, and making enterprises bear their own costs. Professor Fletcher defines a "paradigm of reciprocity" based on the concept of fault defined as the creation of nonreciprocal risks and contrasts that paradigm with a "paradigm of reasonableness" which assigns liability instrumentally on the basis of a utilitarian calculus of social concerns. Professor Fletcher views the mid-19th century transition from a simple definition of liability based on fault as nonreciprocal risk creation to a complex social policy definition, to be a "revolutionary" change from one paradigm to another. See KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970). Professor Fletcher fails to recognize, however, that his paradigm of reciprocity assumes a social policy—allocation of loss according to risk creation—and is therefore a model under the general paradigm of reasonableness. The 19th century change referred to by Professor Fletcher did not introduce a new paradigm with the sudden discontinuity which characterizes the total reorganization of scientific thought after a paradigm shift. Rather, the change expanded the concept of the law to include social policies other than allocation of loss according to risk creation and compensation. The result was that other concerns, such as complete compensation of the victim and minimization of economic costs, may now be considered in determining loss allocation. Nevertheless, Professor Fletcher has contributed to our concept of fault and to the fault model of accident law. His concept of fault as risk creation represents a recurring theme in this article. See also Calabresi, *supra* note 1.

93. See W. PROSSER, *supra* note 3, § 3, at 16; Blum & Kalven, *Public Law Perspectives on a Private Law Problem—Auto Compensation Plans*, 31 U. CHI. L. REV. 641 (1964); Fletcher, *supra* note 14, at 538. For a vitriolic and destructive analysis of Blum and Kalven's version of the fault model, see Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalven*, 75 YALE L.J. 216, 221-22 (1965).

94. Prosser declares that the miscellaneous wrongs included under the head of torts: have little in common and appear at first glance to be entirely unrelated to one another, except perhaps by the accident of historical development; and it is not easy to discover any general principle upon which they may all be based, unless it is the obvious one that injuries are to be compensated, and anti-social behavior is to be discouraged.

W. PROSSER, *supra* note 3, § 1, at 3.

See generally G. REJDA, *SOCIAL INSURANCE AND ECONOMIC SECURITY* (1976). For a rejection of this goal and its model, see Blum and Kalven, *supra* note 93, at 37-38, 41-43. Calabresi has referred to this goal as "risk spreading" because the ultimate form of the goal is social insurance for all accidents. See Calabresi, *supra* note 93, at 218-19.

95. See Calabresi, *supra* note 1, at 713; Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961). The same general ideas may also be found in G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970). See also A. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951), reprinted in 54 CAL. L. REV. 1422 (1966); J. FLEMING, *THE LAW OF TORTS* 9-14 (3d ed. 1965); Calabresi, *Does the Fault System Optimally Control Primary Accident Costs?* 33 LAW CONTEMP. PROB. 429 (1968); Calabresi, *Torts—The Law of the Mixed Society*, 56 TEX. L. REV. 519 (1978); Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959); Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J.

the efficient, economic allocation of resources.

A thorough, reliable evaluation of changes in the law must take into account the potential conflicts among evaluations based on each of the three different models.⁹⁶ It is possible to resolve conflicts among the models by eliminating one or more of the models from consideration, or by weighting the evaluations made by the models so that one goal is favored over the others. These are political rather than legal decisions, which must weaken the validity of the observer's conclusions. Fortunately, a legal resolution of the problem is possible in two situations. First, if one or more of the models favors change in the law and none disfavors it, then the analytical framework supports making the change in the law. Conversely, if one or more of the models disfavors change in the law and none favors it, the change in the law should not be made.⁹⁷ This is the approach adopted here.

The Fault Model. The fault model seeks to place the loss on the risk creator or party at fault.⁹⁸ Each finder of fact defines fault, limited only by the jury instructions or the finder's own knowledge of the law.⁹⁹ Logically, when more than one party is at fault, the cost to each (his penalty) should be proportional to his fault.¹⁰⁰ Thus, the decision rule of the fault model may be stated: does the change in the law lead to a more precise allocation of the cost ac-

1172 (1952); Walkowiak, *supra* note 16.

96. The fundamental tenet of economic models is that a misallocation of risk and loss results in an overall decrease in economic efficiency. Since the goal of accident law is the minimization of total accident costs, not minimization of accidents, a correct allocation of resources is essential to minimization of accident costs. Calabresi, *supra* note 93.

See the extensive debate over the deterrent effect of fault-based liability in automobile no-fault insurance, as reflected in R. KEETON & J. O'CONNELL, *AFTER CARS CRASH . . .* (1967); PROTECTION FOR THE TRAFFIC VICTIM: THE KEETON-O'CONNELL PLAN AND ITS CRITICS (E. Shapiro, R. Needham & J. Feldman, eds. 1967); Knepper, *Alimony for Accident Victims?* 15 DEFENSE L.J. 513 (1966); O'Connell, *Is It Really Immoral to Pay Regardless of Fault?* TRIAL, November/December 1967, at 18.

97. Suppose that the fault model, applied to the law before and after the *Houdaille* decision, showed that the law has moved away from the goal of allocating loss to the wrongdoers. The decision rule for the fault model would disfavor the change. Suppose, further, that the decision rules for the compensation and allocation of cost models showed no change. That would suggest that the *Houdaille* decision was correct because it moved the law toward one goal while leaving the other two goals unaffected. Conversely, if one decision rule showed a positive change and another showed a negative change, then there would be no way to decide whether the *Houdaille* decision was correct unless the observer picked one model over the others.

98. Fletcher, *supra* note 14, at 550.

99. See notes 40 & 50 and accompanying text *supra*.

100. This is the basis for comparative negligence, contribution, and implied indemnity. See notes 33 & 47 and accompanying text *supra*.

ording to the relative fault of the parties?

The Compensation Model. The goal of the compensation model is full compensation for the injured party.¹⁰¹ Not directly concerned with the risk creator, this model views the identifying and penalizing of the parties at fault as a barrier to full compensation.¹⁰² The compensation model rests on the assumption that compensation from the most reliable source should be immediate and automatic, not dependent on establishing a threshold of fault.¹⁰³ Thus, the decision rule for the compensation model may be stated: Does the change provide immediate and complete compensation for all injuries?

The Economic Allocation of Resources Model. This model is seeks to prevent accidents from distorting the allocation of resources in a quasi-free market economy.¹⁰⁴ The proper allocation of resources will occur if the cost of injuries is borne by the enterprises¹⁰⁵ "involved"¹⁰⁶ in the accident.¹⁰⁷ Among the parties thus

101. W. PROSSER, *supra* note 3, § 4, at 17; Calabresi, *supra* note 1, at 713; Fletcher, *supra* note 14, at 537.

102. Walkowiak, *supra* note 16, at 540-42.

103. Calabresi has referred to the compensation goal as "risk spreading," which has as its ultimate goal "social insurance." Calabresi, *supra* note 93, at 218. This means that compensation of all victims may best take place where there are no barriers to compensation. This will occur only when the compensation is immediate and automatic, necessarily requiring that no parties have an interest in avoiding payment. The only possible mechanism for achieving this goal would be insurance across all parts of society, administered by the government or some quasi-governmental agency. Hence, the concern for the reduction of all barriers and the movement away from the tort system.

104. The goal of this model is to reduce accident costs. Calabresi, *supra* note 1, at 713.

105. Despite the crucial position of "enterprise" in the resource allocation model, the word is never defined precisely. Calabresi, for example, loosely defines "enterprise liability" as the notion that losses should be borne by the doer, the enterprise, rather than distributed on the basis of fault. . . ." Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 500 (1961). Thus, "enterprise" refers to a doer—one who engages in economic activity for profit. Put this way, any corporation or individual is an enterprise, since the worker no less than the employer is engaged in the sale of a commodity (labor) for profit.

106. "Involvement" is another important concept which is generally left to our imagination and inductive reasoning. Calabresi clearly means to leave the concept vague and puts quotation marks around the term to show its special, but undefined, qualities. See Calabresi, *supra* note 1, at 739-42. Calabresi suggests: "In other words, 'involvement' is a term of art designed to include all those factors that are part of an accident and may be replaced by substitutes with a substantially different accident potential." *Id.* at 742. Calabresi attempts to keep the concept general enough so that it will not always require case-by-case analysis:

I do not mean that such decisions should be made on a case-by-case basis.

That question is entirely a matter of the costs involved. There might be some contexts in which a case-by-case determination of what activities are involved and what are not may be worth the extreme cost of such determinations. In other areas guidelines of general applicability as to involvement might do nearly

identified, the initial burden should fall on the party most likely to include the accident cost in the price of whatever the enterprise sells.¹⁰⁸ The enterprise should be the smallest economic production unit involved in the loss and identifiable without excessive secondary cost.¹⁰⁹ Alternatively, the initial burden should fall on the party best informed of the costs of the accident (i.e., with the highest risk awareness),¹¹⁰ best able to insure against the loss or distribute it most cheaply to other enterprises or other parties in the same enterprise (the factor of loss distribution),¹¹¹ and least likely to place part or all of the cost on a party outside the enterprises

as good a job of excluding irrelevant activities and the fact that they do it much more cheaply than the case-by-case approach would be conclusive.

Id. n.43. This approach seems wise, given the general lack of detailed parameters available for model construction. Nevertheless, it is clear that the term is strikingly similar to "causation" in fault developing under the Uniform Contribution Among Tortfeasors Act. See Twerski, *supra* note 61. This raises an interesting question: If fault means causation and an enterprise is involved if it helps cause the accident, are the fault and allocation of resources models really very different from each other?

107. If an enterprise involved in the accident bears no part of the accident's cost, then the cost of the product sold by the enterprise need not increase to bear that burden. As a result, more of the product will be bought and more will be produced than would have been the case if the accident cost had been correctly apportioned. This leads to more resources being allocated to this enterprise and fewer resources being allocated to the enterprise forced to bear the cost of the accident. Since the fundamental assumption of the market model of economics is that, all things being equal, the market mechanisms of supply and demand most efficiently allocate resources, it logically follows that an enterprise should bear the costs of the injuries it causes. Obviously, as noted above, the model of economic allocation of resources assumes that accidents should be viewed as costs and that the goal of the system should be allocation of resources to minimize economic costs, rather than the elimination of all accidents. See generally Calabresi, *supra* note 1, at 717-18.

108. This follows logically from the supply and demand theory stated above. If an enterprise's prices cannot reflect the cost of an accident, then that cost will not affect demand or supply. *Id.*

109. *Id.* at 733-34. If an enterprise is not differentiated from another, and only one is involved in the accident, then the uninvolved one will bear costs not incidental to its enterprise; hence, resources will be misallocated.

110. *Id.* at 729. The idea here is that the loss should be placed on the enterprise which has better access to information regarding the ultimate costs of the accident and therefore can better make the decision to avoid the accident. Thus, if workers are so disorganized that they never have sufficient information to determine whether or how it is in their best interest to take steps to avoid injuries, then the loss should be placed on the employer who presumably keeps statistics and ledgers concerning employee injuries and can place protective devices on the machines to avoid accidents.

111. *Id.* at 727-29. If the employer can fix the machine to avoid accidents or pay the workers more for the privilege of injuring them and include that cost in his enterprise's production costs, whereas the employees must strike to force higher wages or better working conditions, then the loss should be placed initially on the employer. He would then distribute it to his workers and the other enterprises involved in the accident. It has generally been assumed that the employer has better knowledge and ability to distribute the risk and loss than his employees. This argument is questionable, if the employees are unionized.

involved in the accident (non-externalization).¹¹² When two or more enterprises are involved in the accident and cannot be treated as one enterprise or distinguished according to the criteria set forth above, the best rule is to distribute the loss on a pro rata basis.¹¹³

In many cases, there is no general answer to the questions posed, aside from the number of enterprises "involved." Often, logic alone cannot determine which enterprise should bear the initial burden of the accident.¹¹⁴ That determination requires an empirical study of the extent to which each party or enterprise meets the criteria of risk awareness, loss distribution, and non-externalization. Thus, the decision rule for the allocation of resources model may be stated as a series of questions:

- 1) How many enterprises can be identified?
- 2) How many of those enterprises are "involved"?
- 3) Which enterprises or parties best exemplify the goals of (a) risk awareness, (b) loss distribution, and (c) non-externalization?
- 4) If the answers to 3) are unknown, is the initial cost allocated on a pro rata basis among the enterprises "involved" in the

112. *Id.* Insurance is a mechanism for externalizing the costs. The employer has worker's compensation and tort liability insurance; the employee has workers' compensation and accident insurance of his own. The insurance company gambles that this employee will not be injured unless and until he has paid enough premiums to cover his potential injuries. If the worker pays less than his injuries, then the insurance company loses on this particular individual. The insurance company, however, insures many workers, some of whom will never be injured on the job. In the economic sense, these other workers help pay the cost of the employee's injuries. The economic activities of the employees who are not injured must bear some of the cost (the premiums they pay) of an injured employee's accident. The various enterprises of injured employees do not bear their correct share of the economic loss, thus misallocating resources. The same analysis may be applied to other enterprises vis-a-vis the employer's enterprise. Insurance therefore tends to cause the system to run less efficiently. Once again, however, this variable has no real significance. Labor, employers, and manufacturers all tend to have insurance and externalize the loss. There is nothing wrong with insurance on a macro scale as long as the loss is kept within the same industry. Major disruptions arise when the loss is allocated by insurance or the law to enterprises which, as a class, should not bear the loss. *Id.*

113. *Id.* at 740. In short, if an enterprise is involved in an accident, then some economic pressure should help the parties engaged in that enterprise focus their attention on the problem, leading to a more rapid and efficient distribution of loss and to a decision for or against having accidents.

114. *Id.* at 732. Because these concepts are generally empirical, no absolute rule of liability can be established for each situation. For instance, an employer may be in no better position than an employee to reduce cost and spread risk, as where the employee is a member of a large union and the employer is only a small operation. *Id.* at 728 n.22. Each factual situation must be analyzed on its own terms before the economic burden of liability can be properly placed.

accident?¹¹⁵

B. *Application of the Models to the Workers' Compensation Problem Before Houdaille*¹¹⁶

The three models of loss allocation provide a means of evaluating the law before and after *Houdaille* in terms of the relationships among an injured employee, his employer, and the manufacturer of a product the employee was using when he was injured. Consider the following hypothetical. An employee suffers an injury as a result of the negligence of his employer and a defect in the equipment on which he works. The employee receives \$10,000 in workers' compensation from his employer, then sues the manufacturer of the equipment. The jury finds the manufacturer liable for the employee's damages of \$100,000. The manufacturer brings a third party action against the employer in indemnity, alleging that the employer actively caused the employee's injuries, while the manufacturer was only a passive cause.

At this point, the manufacturer has a judgment against him for \$100,000. He will pay \$10,000 of that to the employer or his insurance carrier to cover the workers' compensation payment made to the employee, and \$90,000 to the employee. Thus, the employee will receive the full amount of his loss, \$100,000. The manufacturer will have paid \$100,000; the employer will have paid nothing.

Let us now assume two alternative outcomes in the manufacturer's action for implied indemnity from the employer. First, if the manufacturer succeeds on his indemnity theory, the employer must pay the \$100,000. Alternatively, if the manufacturer does not succeed, he must pay the \$100,000 judgment himself. Thus, the third party action reallocates all or nothing; either the employer or the manufacturer will bear the entire loss. In either case, the employee will receive full compensation.

The Fault Model. The goal of the fault model is to distribute loss according to fault. This model assumes that the jury can determine fault if instructed to do so. According to the fault model, then, the jury's verdict on implied indemnity should bear some relationship to the fault of the parties.

115. See generally Calabresi, *supra* note 1. For a slightly different statement of the general model, not distinguishing between primary and secondary accident costs, see Walkowiak, *supra* note 16, at 540-42.

116. This section does not discuss the situation in which contribution is available, since *Houdaille* does not affect that kind of case.

In *Houdaille*, the supreme court expressly restricted the scope of implied indemnity, in part because the court believed that trial courts and juries were using implied indemnity to distribute cost according to the manufacturer's and employer's relative degrees of fault.¹¹⁷ Under that view, if a jury believed that a manufacturer was 50% or more at fault, then the jury would not allow implied indemnity; thus, the manufacturer would bear 100% of the loss. If, on the other hand, the jury believed that the employer was 51% or more at fault, it would find the manufacturer entitled to implied indemnity, and the employer would bear 100% of the loss.¹¹⁸ The jury allowed the manufacturer indemnity if his fault was 49% or less. If indemnity actions were evenly distributed over all possible percentages of fault, then in as many as 49% of the cases the jury would allow 100% recovery from the employer, and the loss would almost always fall upon the party most at fault.¹¹⁹ Although the fault model would allocate the loss to both parties if both are at fault, implied indemnity provides a rough approximation to allocation of loss according to fault, where workers' compensation law makes an employer immune to contribution.

The Compensation Model. The goal of the compensation model is to provide immediate and complete compensation of all injuries. In the examples given above, the employee is compensated for 100% of his injuries, but must resort to the courts to recover most of his compensation. Thus, in these examples, the law only approximates the goal of the model.¹²⁰ This is true, irrespec-

117. The court made this assumption in holding that it would no longer recognize the "active/passive" rationale for indemnification. 374 So. 2d at 493. If the court was correct, then the jury was assigning 100% of the loss to whichever party the jury believed was most at fault.

118. It is of course unnecessary to assume that the jury is making such a fine distinction between the fault of the indemnitor and the indemnitee. If the jury follows its instructions at all, it will set a higher threshold. To simplify, however, we will assume that the jury makes any possible distinction, down to and including the 51%/49% split of fault.

119. There is no empirical evidence that manufacturers are more likely than employers to be culpably at fault in industrial accidents. In the absence of such data, all we can assume is that both parties are involved. Further, we do not know whether the manufacturer and the employer in any particular case share the fault equally. But it seems reasonable again to assume that over the class of all accidents the employer is more at fault as often as is the manufacturer.

120. Note the analogy to primary and secondary costs in the model of allocation of resources. Here, the primary compensation is the \$10,000 recovery under workers' compensation. The employee must sue for the remaining \$90,000, thereby incurring secondary costs. Although attorney's fees and certain unrecoverable costs usually reduce the amount of the employee's recovery, trial attorneys generally assume that the jury awards the plaintiff more than his true damages, to cover attorney's fees. Thus, this paper treats secondary costs as constant and safe to ignore.

tive of the actions of the jury vis-a-vis the employer in the indemnity action. The compensation model views the legal battle between the manufacturer and the employer as essentially irrelevant to the primary goal, compensation.¹²¹

The Economic Allocation of Resources Model. As indicated above, the critical issue for the model of economic allocation of resources often reduces to the question whether to distribute pro rata the cost of the accident to the enterprises "involved" in the accident.¹²² To reach this point in the application of the rule, a court must first determine how many enterprises there are, whether these enterprises are "involved" in the accident, and whether they can be distinguished on the basis of risk awareness, loss distribution, and non-externalization.

At least two enterprises appear in the hypothetical relationship between the employer, employee, and manufacturer stated above. The manufacturer makes and sells equipment used in the fabrication of another product by the employer and employee. The equipment could be used in the manufacture of other products; alternatively, the employer could select other kinds of brands of equipment to continue manufacturing his present product.¹²³ Thus, the manufacturer and the employer represent different enterprises.¹²⁴ The accident, however, "involves" both enterprises.¹²⁵ The employee is using the manufacturer's product (the equipment) to make his employer's product when his injury occurs.

Only the trier of fact can finally determine which enterprise could best bear the risk. Whether the employer or the manufac-

121. Of course, the manufacturer's claim for indemnity from the employer is external to the compensation system. If the indemnity action begins simultaneously with the action by the employee against the manufacturer, then there is some chance that the employee's costs will increase during the prolonged trial required for the manufacturer to prove his case against the employer. On the other hand, the battle between the manufacturer and employer will reduce the burden on the employee in proving his case. Thus, although the presence of the employer in the same action increases the costs to the employee who must pay for a longer trial, his burden is accordingly reduced by the defense of the employer who must show that the manufacturer is at fault. This analysis treats the cost of extended litigation as balanced by the lowered cost of proving the plaintiff's case in chief.

122. See note 34 and accompanying text *supra*.

123. Calabresi, *supra* note 105, at 508.

124. Analytically, even the employer and the employee may engage in different enterprises. Where the employee is represented by a union or collective bargaining agent, his power increases and his product (labor) can properly be distinguished from the product of the employer's enterprise. See Calabresi, *supra* note 1, at 728 n.22. For the purpose of this paper, however, it is unnecessary to separate the enterprises of the employer and the employee.

125. See note 106 and accompanying text *supra*.

turer best exemplifies risk awareness, loss distribution, and non-externalization must depend on many unknowns. These include the magnitude of each one's involvement in the creation of the risk, his bargaining relationship with the other and with other enterprises, and his ability to insure against loss. Only detailed analysis of the particular relationship existing in a unique employer-manufacturer pair can provide a basis for decision.¹²⁶

In the hypothetical example, the loss will never be allocated on a pro rata basis, because 100% of the loss will always fall on either the employer or the employee. If the cases are distributed equally over all combinations of manufacturer and employer fault, then in approximately 51% of the cases the manufacturer will bear the loss and in 49% of the cases the employer will bear the loss. Each set of enterprises will bear a pro rata share across all cases, statistically satisfying the allocation of resources model.¹²⁷

C. *Application of the Models to the Workers' Compensation Problem after Houdaille.*

The Fault Model. The *Houdaille* decision virtually eliminates an action for indemnity between the manufacturer and the employer. The manufacturer will now bear 100% of the loss 100% of the time. If the fault of the employer and that of the manufacturer are evenly distributed across all fault-probability pairings, the loss will now be allocated to the less culpable party in 49% of the cases.¹²⁸ Before *Houdaille*, the loss was allocated to the more culpable party 100% of the time.¹²⁹ Thus, the fault model views the net result of *Houdaille* as reducing the quality of accident law.

The Compensation Model. The elimination of implied indemnity has no substantial effect on the compensation model. The employee continues to be partially compensated through worker's compensation. He still must sue the manufacturer to get complete compensation. As the goal of the compensation model is complete compensation of the injured party, the decision rule indicates that this goal is accomplished equally well after the *Houdaille* decision. Thus, the compensation model would neither support nor undercut validity of the change in the law created by *Houdaille*.

126. See text accompanying notes 109-12 *supra*.

127. See note 113 and accompanying text *supra*.

128. See text accompanying note 119 *supra*.

129. See text accompanying note 118 *supra*.

The Economic Allocation of Resources Model. As shown above, there is no method of determining which of the enterprises has the best accident awareness, risk allocation, or non-externalization characteristics.¹³⁰ The test reduces to distribution of the loss on a pro rata basis among the enterprises "involved" in the accident. Before *Houdaille*, the loss from economic accidents jointly caused by manufacturers and employers would be divided equally between them across all such accidents, and both sets of enterprises would bear some of the loss. After *Houdaille*, only the manufacturers will bear the loss. The enterprise of the employer will never bear the cost of its own negligence. Hence, under the economic allocation of resources model, the *Houdaille* decision was incorrect.

D. *Equitable Conclusions*

On the basis of reasonable statistical hypotheses, the model of the economic allocation of resources and the fault model suggest that the supreme court incorrectly eliminated implied indemnity between a manufacturer and an employer, both of whom are negligent. The compensation model remains neutral in this case. If two of the models disfavor a change in the law and none favors it, the decisionmaker should not make the change.¹³¹ In achieving legal consistency by subsuming implied indemnity under the fault concept, the supreme court has moved the law away from two of the three goals of accident law. Absent another mechanism to achieve justice between an employer and manufacturer, such as contribution, one must conclude that the court decided *Houdaille* incorrectly.

VIII. REMEDIES

Since the passage of the 1976 amendments to the Uniform Contribution Among Tortfeasors Act,¹³² the Supreme Court of Florida has issued two inequitable opinions on implied indemnity. In *Stuart v. Hertz Corp.*,¹³³ the court refused to allow expansion of implied indemnity to provide equitable relief to a negligent motorist held liable for all of the plaintiff's injuries, including those caused by the successive negligence of a malpracticing doctor. The

130. See text accompanying note 126 *supra*.

131. See note 97 and accompanying text *supra*.

132. FLA. STAT. § 768.31 (1979).

133. 351 So. 2d 703 (Fla. 1977).

court ruled that since the motorist and the doctor were successive rather than joint tortfeasors, the motorist was not entitled to contribution.¹³⁴ In *Houdaille*, the court refused to permit implied indemnity as a mechanism for equitable loss distribution to an employer who was not a joint tortfeasor and hence not subject to contribution.¹³⁵ The common elements in both cases were the absence of contribution as an alternative mechanism for loss allocation and the refusal of the court to use implied indemnity to allocate loss based on fault.

In response to the decision in *Stuart v. Hertz Corp.*,¹³⁶ the District Court of Appeal, Fourth District, held that the initial tortfeasor may bring a separate law suit for subrogation against a successive tortfeasor, such as a doctor, whose negligence aggravates the original injuries.¹³⁷ The Fourth District certified its decision to the Supreme Court of Florida as passing upon a question of great public interest. Approving the district court's decision, the supreme court declared in *Underwriters at Lloyds v. City of Lauderdale Lakes*,¹³⁸ that an initial tortfeasor has a cause of action under a theory of subrogation against a successor tortfeasor. Relying on principles of fairness, restitution, equity, and good conscience, the court aligned Florida with other jurisdictions which recognize sub-

134. *Id.* at 705. There can be no question that doctoring is a different enterprise from driving an automobile for whatever purpose. Before the *Stuart* decision, a negligent driver could shift the loss attributable to the malpracticing doctor (the successive tortfeasor), thereby placing the cost of the doctoring enterprise on the medical profession and the doctor who was at fault. After *Stuart*, the driver, who is much less culpable than the doctor with respect to the malpractice injuries and whose enterprise bears little relationship to the doctor's, must bear the entire loss.

135. See 374 So. 2d at 492; text accompanying notes 89-90 *supra*.

136. 351 So. 2d 703 (Fla. 1977); see text accompanying note 133 *supra*.

137. In *City of Lauderdale Lakes v. Underwriters at Lloyds*, 373 So. 2d 944 (Fla. 4th DCA 1979), the district court asserted:

We do not believe that our decision here is at odds with *Hertz*, for this is no third party action which will make the plaintiff's claim longer and more complex. Nor is it the plaintiff who is suing the treating physician. Rather it is an active tortfeasor who, by way of subrogation, understandably seeks retribution for that portion of the plaintiff's injuries directly attributable to the negligence of another. Other jurisdictions have permitted such a remedy.

Id. at 945.

The district court was clearly concerned about the inequitable results of not accepting subrogation as a mechanism for loss allocation:

Our conclusion is reached not only on our version of common sense, but also on our concept of fundamental fairness. To us it makes no sense to allow a negligent physician to receive total immunity for his folly because of a prior, and possibly minor, injury inflicted by the negligence of another.

373 So. 2d at 946.

138. 382 So. 2d 702 (Fla. 1980).

rogation as a remedy enabling an initial tortfeasor to seek an equitable apportionment of liability with a subsequent tortfeasor.

In contrast to the strict requirement of *Houdaille* that an indemnitee be without "fault," subrogation allocates loss without referring exclusively to fault. If the legal obligation that the initial tortfeasor must pay ought to have been paid either in whole or *in part* by another, subrogation allows justice to be done without regard to the technical requirements of indemnity.¹³⁹

Subrogation, however, will offer no relief to a manufacturer in the *Houdaille* situation, found liable to the injured worker but barred from bringing an indemnity action against the employer. It makes no sense to say that the manufacturer is subrogated to the rights of the injured worker, since under the workers' compensation statute, the manufacturer can be liable only for all of the plaintiff's injuries; there is no basis for saying that some of the injuries result from the manufacturer's actions and some from the employer's actions.¹⁴⁰

Changes in the Uniform Contribution Among Tortfeasors Act,¹⁴¹ providing for contribution and reallocation of portions of the plaintiff's loss, might solve both the problem of successive tortfeasors and that of workers' compensation immunity. First, the Act should be amended to include successive tortfeasors by eliminating the "joint" requirement from section 2(a):

Except as otherwise provided in this act, when two or more persons become [jointly or severally] liable in tort for the same injury to person or property, or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.¹⁴²

This amendment would permit the courts to bring into one action

139. The supreme court asked the rhetorical question whether the result of the decision in *Hertz* was fair and equitable, in allowing the negligent doctor to avoid responsibility for his actions and requiring the initial tortfeasor to shoulder the total financial burden of the victim's injuries. The court answered the question by insisting that equity and good conscience should afford the initial tortfeasor a remedy: "The initial tortfeasor is simply trying to recoup his losses that in fairness should be shared with a negligent doctor. Under this doctrine the financial burden is equitably apportioned among the responsible parties, and negligent doctors can no longer escape liability for their actions." *Id.* at 704.

140. FLA. STAT. § 440.11(1) (1979) provides that the employer's obligation to provide an injured worker with statutory compensation is "exclusive" and in place of "all other liability of such employer," presumably including the newly fashioned remedy of apportionment of liability based upon subrogation.

141. FLA. STAT. § 768.31 (1979).

142. *Id.* § 768.31(2)(a) (brackets added). Proper amendment requires excision of the bracketed language.

all parties who have contributed to the plaintiff's losses, other than those with a statutory or common law immunity, and distribute the loss according to the fault of the respective parties.

Second, the problem of the workers' compensation immunity of the employer may be solved by an additional clause that has been suggested by Dean Wade,¹⁴³ advisor for the *Restatement of Torts (Second)*¹⁴⁴ and Chairman of the Committee drafting the Uniform Comparative Fault Act.¹⁴⁵ Dean Wade has expressed doubts about the Act's ability to handle the workers' compensation immunity.¹⁴⁶ Accordingly, he has suggested an amendment to the Uniform Comparative Fault Act that would fit equally well into the Contribution Act:

[Section 6a. *Action by Employee Against Third-Party Defendant.*]

(a) If an employee who has claimed or is entitled to claim against the employer benefits under [the workers' compensation act] brings a tort action against another person to recover additional damages for the injury, the employer may be joined by the defendant as a party for the purpose of determining the percentage of fault allocable in accordance with Section 2 to the employer in comparison with the combined fault of all of the parties, including the claimant.

(b) On the basis of those findings the court shall determine the award to the claimant by subtracting from the amount of the damages half of the amount that, except for the [workers' compensation act], would have been allocated as the primary responsibility of the employer; and it shall render judgment in accordance with the provisions of Section 2. After paying the judgment, the defendant may recover from the employer the other half of the amount that would have been allocated to the employer.¹⁴⁷

Dean Wade suggests that the loss attributable to the negligence of the employer should fall on either the employee or the employer, or be divided between them.¹⁴⁸ The proposed amendment set forth above allows the manufacturer to recover from the employer half the amount of the plaintiff's judgment. We suggest that this fair and equitable solution to the problem created by the *Houdaille*

143. Wade, *supra* note 23.

144. RESTATEMENT (SECOND) OF TORTS (1965).

145. Uniform Comparative Fault Act, 12 UNIFORM LAWS ANN. 32 (Supp. 1979).

146. Wade, *supra* note 23, at 388.

147. *Id.* at 390.

148. *Id.* at 388.

decision should be adopted as an amendment to the Uniform Contribution Among Tortfeasors Act. Under that amendment, fault would remain the basis for loss distribution, with justice and equity preserved in accident law.