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been construed by the United States Supreme Court to allow an unrestricted right to strike, although one federal district court has so held.<sup>38</sup> It should be noted that *Wilson v. Sandstrom* itself does not present the problem of the outer limits of the thirteenth amendment in this area since the kennel owners themselves were incarcerated for not working, rather than the more ordinary problem of union officials who are jailed for calling illegal strikes. However, *Wilson v. Sandstrom* may presage an increasing tension between an individual's thirteenth amendment rights and society's dependence on that individual's services.

HARLEY S. TROPIN

## Contribution Act Construed—Should Joint And Several Liability Have Been Considered First?

*This article examines the various issues and legal concepts regarding apportionment of damages between parties presented in a recent Supreme Court of Florida decision. The relationship between comparative negligence, joint and several liability, and contribution among joint tortfeasors is discussed. The author is critical of the court's focusing its analysis on the collateral issue of contribution among tortfeasors rather than on the central issue of the case—joint and several liability. In addition, the potential inconsistencies between the Uniform Contribution Among Tortfeasors Act and the underlying principles of Hoffman v. Jones are noted, and the author urges resolution of those conflicts.*

Two automobiles collided at an intersection resulting in injury to a passenger in one of the automobiles. Issen, the injured passenger, brought suit against Lincenberg, the driver-owner of the car in

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could, because of "ancient usage," constitutionally require able-bodied men to work on public roads); *Robertson v. Baldwin*, 165 U.S. 275 (1897) (proscription of involuntary servitude was not intended to apply to sailors' contracts, because of the "exceptional nature" of the sailors' duties). It is doubtful, however, that the occupation of racing greyhounds falls into any of the "historical exceptions."

38. *United States v. Petrillo*, 68 F. Supp. 845, 849 (N.D. Ill. 1946), *rev'd on other grounds*, 332 U.S. 1 (1947); see Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 HOUSTON L. REV. 593, 604: "A constitutional right to strike may well be derived from the proscription of involuntary servitude contained in the thirteenth amendment, as reinforced by the first amendment guarantees of free speech and peaceful assembly."

which Issen was a passenger,<sup>1</sup> and against Ronald and Eleanor Rhodes, the driver and owner of the other car, respectively. The jury found that the plaintiff was free of negligence, that both defendant drivers were negligent, and that each was a contributing legal cause of plaintiff's injuries. The jury further found, in response to special interrogatories, that Lincenberg's negligence represented 15 percent and Rhodes' negligence 85 percent of the liability. Plaintiff's damages were affixed at \$20,000. Defendant Lincenberg contended that, in light of the *Hoffman v. Jones*<sup>2</sup> decision implementing comparative negligence and apportionment principles in Florida, judgments should be entered against the defendants only to the extent that each was found to be at fault rather than adjudging them both jointly and severally liable for the entire amount.<sup>3</sup> The trial judge certified to the District Court of Appeal, Third District, the question<sup>4</sup> as to whether such an apportionment should be made by the jury and whether the special interrogatories were proper. The Third District answered in the negative, finding that the doctrine of comparative negligence generally is not applicable between defendant joint tortfeasors, and noting that Florida did not even allow contribution among joint tortfeasors.<sup>5</sup>

On conflict certiorari review, the Supreme Court of Florida quashed the Third District's opinion and *held*: The case is controlled by the recently passed Uniform Contribution Among Tortfeasors Act (Uniform Act).<sup>6</sup> In construing the Uniform Act, the court

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1. Florida's automobile guest statute had been repealed prior to the suit. Fla. Laws 1972, ch. 72-1, § 1, *repealing* FLA. STAT. § 320.59 (1971).

2. 280 So. 2d 431 (Fla. 1973), *noted in* 28 U.MIAMI L. REV. 473 (1974).

3. The status quo in Florida had been the imposition of joint and several liability for concurrent negligence in automobile accidents. *See, e.g., De La Concha v. Pinero*, 104 So.2d 25 (Fla. 1958); *Nichols v. Rothkopf*, 135 Fla. 749, 185 So. 725 (1939); *Booth v. Mary Carter Paint Co.*, 182 So. 2d 292 (Fla. 3d Dist. 1966).

4. The trial judge certified the following question to the District Court of Appeal, Third District:

"Where the plaintiff, in an automobile injury accident case sues two defendants, alleging both to be negligent resulting in injuries to the plaintiff, is it proper for the trial judge to allow the jury to apportion fault as it sees fit between the negligent defendants, therefore, was it proper in a case wherein the plaintiff sued two defendants, alleging each negligently operated to instruct the jury to apportion fault and submit the foregoing special interrogatories to the jury?"

5. *Issen v. Lincenberg*, 293 So. 2d 777, 778 (Fla. 3d Dist. 1974).

6. *Id.*

6. FLA. STAT. § 768.31 (1975). Subsection 7 provides:

This act shall apply to all causes of action pending on June 12, 1975, wherein the

held that in determining the amount plaintiff should recover, the comparative negligence jury instructions should provide that the percentage of *all* defendants' negligence should be taken as a whole in comparing it to the plaintiff's negligence.<sup>7</sup> Therefore, special verdicts as to each defendant's percentage of fault are improper except in limited instances;<sup>8</sup> and, with respect to any contribution, apportionment of damages will be on a pro rata basis.<sup>9</sup> *Lincenberg v. Issen*, 318 So. 2d 386 (Fla. 1975).<sup>10</sup>

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rights of contribution among joint tortfeasors is involved and to cases thereafter filed.

Petitioner argued in its Petition for Rehearing, which was subsequently withdrawn, that because the parties were not afforded an opportunity to brief or to have oral argument concerning the new statute, the court should have first ascertained the statute's constitutionality. Furthermore, petitioner contended the retrospective effect of the statute conflicts with FLA. CONST. art. 3, § 6 because the title of the enactment fails to give notice of the retrospectivity. Petitioner cited *Chiapetta v. Jordan*, 16 So. 2d 641 (Fla. 1944) as authority. Petitioner's Petition for Rehearing at 7, *Lincenberg v. Issen*, 318 So. 2d 386 (Fla. 1975).

The court might have found, however, that the statute is essentially remedial in nature, and does not have the effect of destroying any vested rights or property existing at the time. See Respondent's Reply in Opposition to Petition for Rehearing at 2, *Lincenberg v. Issen*, 318 So. 2d 386 (Fla. 1975).

7. For example, in *Lincenberg*, the plaintiff's negligence (0 percent) would be compared to the total of the defendants' (*Lincenberg's* and *Rhode's*) negligence (100 percent).

8. "[S]uch special verdicts may be desired and of assistance to the trial judge in performing his equity responsibility under Section 3(c). To that end and for that purpose only, the trial judge may in his discretion request special verdicts on the degrees of fault." 318 So. 2d at 393.

9. FLA. STAT. § 768.31(3) (1975) provides:

In determining the pro rata shares of tortfeasors in the entire liability:

- (a) Their relative degrees of fault shall not be considered.
- (b) If equity requires, the collective liability of some as a group shall constitute a single share.
- (c) Principles of equity applicable to contribution generally shall apply.

The Commissioners' Comments to the 1955 Uniform Act, 12 UNIFORM LAWS ANN. 87 (1975) indicate that "pro rata" means equal shares except in situations where there is vicarious or other common liability such that class liability need be treated as a single share. The comments specifically describe the equity considerations mentioned in section 3(c) as where there are at least three tortfeasors, one of which is insolvent. It is suggested that even in those rare instances contribution should remain one-third rather than one-half.

Justice Boyd in his concurring opinion argued that the equity requirements of section 3(c) conflicted with the requirements of section 3(a). Therefore, in attempting to achieve legislative intent and in order to hold the statute constitutional, the two sections should be read together as requiring that relative degrees of fault be considered by the jury and the court in fixing liability. 318 So. 2d at 394.

10. In dicta, the court indicated that in light of the principles underlying the *Hoffman* decision, the court would have judicially adopted the right to contribution, had the Uniform Act not been enacted.

Examination of a problem concerning apportionment of damages should begin with an analysis of the interrelated, yet distinct concepts of comparative negligence, joint and several liability, and contribution among tortfeasors.

Comparative negligence, in some form, has been adopted either by statute or judicial decision in a majority of jurisdictions.<sup>11</sup> It was developed through attempts to eliminate the harsh rule of contributory negligence which prohibited an injured plaintiff who was partially at fault from recovering any damages. The idea was to replace contributory negligence with a more equitable and just doctrine which could apportion damages "according to the proportionate fault of each party."<sup>12</sup>

In Florida comparative negligence was adopted by the supreme

Therefore, although this Court has in the past recognized as viable the principle of no contribution, in view of a re-examination of the principles of law and equity and in light of *Hoffman* and public policy, as a matter of judicial policy, it would be undesirable for this Court to retain a rule that under a system based on fault, casts the entire burden of a loss for which several may be responsible upon only one of those at fault, and for these reasons this Court recedes from its earlier decisions to the contrary.

318 So. 2d at 391.

11. Comparative Negligence has been adopted by statute in the following jurisdictions: ARK. STAT. ANN. §§ 27-1763 to 27-1765 (Supp. 1975); COLO. REV. STAT. ANN. § 13-21-201 (1973), as amended, § 13-21-111 (Cum. Supp. 1975); CONN. GEN. STAT. REV. § 52-572h (1975); GA. CODE ANN. § 66-402 (1966), § 94-703 (1972), § 105-603 (1968); HAWAII REV. STAT. § 663-31 (Supp. 1975); IDAHO CODE § 6-801 (Supp. 1975); KAN. STAT. ANN. § 60-258 (Supp. 1975); ME. REV. STAT. ANN. tit. 14, § 156 (Supp. 1975); MASS. ANN. LAWS ch. 231, § 85 (1975); MINN. STAT. ANN. § 604.01 (Supp. 1976); MISS. CODE ANN. § 11-7-15 (1972); NEB. REV. STAT. § 25-1151 (1964); NEV. REV. STAT. § 41.141 (1973); N.H. REV. STAT. ANN. § 507:7-a (Supp. 1973); N.J. STAT. ANN. § 2A:15-5.1 (Supp. 1975); N.Y. CIV. PRAC. § 1411 (McKinney Supp. 1975-76); N.D. CENT. CODE 9-10-07 (1975); OKLA. STAT. ANN. tit. 23, § 11 (Supp. 1975); ORE. REV. STAT. § 18.470 (1975); R.I. GEN. LAWS ANN. § 9-20-4 (Supp. 1975); S.C. CODE ANN. § 46-802.1 (Supp. 1975); S.D. COMPILED LAWS ANN. § 20-9-2 (1967); TEX. REV. CIV. STAT. art. 2212a § 1 (Supp. 1975). UTAH CODE ANN. § 78-27-37 (Supp. 1975); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1975); V.I. CODE ANN. tit. 5, § 1451 (Supp. 1975); WASH. REV. CODE § 4.22.010 (Supp. 1975); WIS. STAT. ANN. § 895.045 (Supp. 1975); WYO. STAT. ANN. § 1-7.2 (Cum. Supp. 1975).

Comparative negligence has been judicially adopted in Florida in *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973) and in California in *Nga Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). Both Florida and California adopted the pure form of comparative negligence.

12. *Hoffman v. Jones*, 280 So. 2d 431, 439 (Fla. 1973). See also C. HEFT & C. HEFT, *COMPARATIVE NEGLIGENCE MANUAL* (1971); W. PROSSER, *LAW OF TORTS* (4th ed. 1971); Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135 (1958); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); Schwartz, *Pure Comparative Negligence in Action*, 34 AM. TR. LAWYERS J. 117 (1972); Timmons & Silvis, *Pure Comparative Negligence in Florida: A New Adventure in the Common Law*, 28 U. MIAMI L. REV. 737 (1974); 9 ARK. L. REV. 357 (1955).

court in *Hoffman v. Jones*.<sup>13</sup> The *Hoffman* court found that the common law rule of contributory negligence<sup>14</sup> violated public policy in that it was clearly inequitable, and that there was no justification for making one party (there, the plaintiff) bear the entire burden of loss when two or more parties were at fault.<sup>15</sup> The court stated:

If fault is to remain the test of liability, then the doctrine of comparative negligence which involves apportionment of the loss among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise . . . .

When the negligence of more than one person contributes to the occurrence of an accident, *each* [person] should pay the proportion of the total damages he has caused the other party.<sup>16</sup>

Defendant Lincenberg attempted to analogize his situation to these general equitable apportionment principles based on the equation of liability with fault declared in *Hoffman*. He contended that, as a negligent party, he should be held liable *only* for his proportionate share of the damages.<sup>17</sup> This contention would seem to have merit despite the fact that "comparative negligence" generally, and *Hoffman* in particular, involve apportioning damages between a plaintiff and defendant. The specific holding<sup>18</sup> of *Hoffman* may be limited to the situation between a plaintiff and a defendant. However, applying the principles of equity and the desire to equate liability with fault espoused in that decision, it would seem logical and just to apply those apportionment principles to *all* parties.<sup>19</sup>

Holding a defendant tortfeasor who is only 15 percent at fault liable for the entire amount of damages is obviously inconsistent with the equitable principles involved in apportioning damages on

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13. 280 So. 2d 431 (Fla. 1973).

14. Contributory negligence was held to be the law of Florida in *Louisville & Nashville R.R. v. Yniestra*, 21 Fla. 700 (1886), and was not overruled until *Hoffman*.

15. For a more detailed discussion of the court's reasoning see 28 U. MIAMI L. REV. 473 (1974).

16. 280 So. 2d at 436-37 (emphasis added).

17. The jury found Lincenberg's negligence to be 15 percent. Therefore, Lincenberg contended his total liability should be limited to \$3000 (15 percent of \$20,000).

18. "Therefore, we now hold that a plaintiff in an action based on negligence will no longer be denied any recovery because of his contributory negligence." 280 So. 2d at 438.

19. "A primary function of a court is to see that legal conflicts are equitably resolved. 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 at 438. See also *Timmons & Silvis*, *supra* note 12, at 776-88.

the basis of each person's relative degree of fault. However, if each defendant was held responsible only for his proportionate share of the damages, the common law doctrine of joint and several liability would necessarily be abrogated or limited in its scope.<sup>20</sup>

The origin of joint and several liability is a confusing one, principally because it arose from separate theories. "Joint torts" originally meant liability for concerted action, but later came to include situations where two or more persons owed a common duty, where there was vicarious liability, and where there was concurrent negligence resulting in a single injury.<sup>21</sup> It is the latter situation with which *Lincenberg* is concerned. Entire liability has traditionally been imposed in such cases on the theory that damages cannot be apportioned.<sup>22</sup> Florida imposes entire or joint and several liability where the result is traditionally labeled indivisible, such as when two automobiles collide to injure a third person.<sup>23</sup> However, the question now becomes whether such an apportionment of damages actually is possible, and if so, whether there remains any justification for retaining joint and several liability.

There has been considerable controversy as to whether a jury is capable of apportioning damages in multi-party automobile accidents. At one time, Dean Prosser suggested that although such apportionment would be the most equitable and theoretically sound procedure, American juries were not sophisticated enough to handle the complicated processes.<sup>24</sup> On the other hand, judges in Canada have apportioned damages in multi-party actions for years.<sup>25</sup> It has been suggested that the Canadian and English statutory require-

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20. It has been suggested that by the *Hoffman* court's decision "to allow a jury to apportion fault as it sees fit between negligent parties . . ." the court has ruled sub silentio that joint and several liability can only exist where the jury could not make an apportionment. Timmons & Silvis, *supra* note 12, at 781, quoting *Hoffman v. Jones*, 280 So. 2d 431, 439 (Fla. 1973). See note 54 *infra*.

Retaining joint and several liability in concerted actions by several parties, however, could be justified on the traditional policy grounds of discouraging such actions. Furthermore, a plaintiff-victim would rarely, if ever, be partly responsible for his own injuries in such situations.

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

22. Prosser, *supra* note 21, at 432.

23. Of course each defendant's negligence must be a proximate cause of the injury. See cases cited in note 3 *supra*.

24. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 503-08 (1953).

25. *Id.* at 504.

ments of joinder of all parties and apportionment of the damages among all parties in proportion to their respective faults are superior in those respects.<sup>26</sup>

Since the widespread implementation of comparative negligence, however, such an apportionment has become more feasible, even if not always easily computed in multi-party actions. Conceptually, if a jury is considered capable of apportioning fault between two parties (a plaintiff and a defendant in the traditional comparative negligence setting), it should not be any more difficult for a jury to allocate fault among several parties (including more than one defendant). The fact that the jury in *Lincenberg* seemed to have little difficulty in assigning a percentage of fault to each of the parties is evidence of the feasibility of such apportionment. Furthermore, the use of special verdicts<sup>27</sup> might better enable a court to see whether the jury properly performed its duty. Using a general verdict with special interrogatories,<sup>28</sup> however, would be less confusing to the jury and would still serve the function of determining relative degrees of fault consistent with *Hoffman* principles. Of course, if the doctrine of joint and several liability were abrogated, simple general verdicts as between each plaintiff and defendant could be made. Therefore, in the absence of a strong reason to the contrary, it would be logically inconsistent with the equity and fault apportionment principles of *Hoffman* to discriminate against such apportionment among *all* parties.<sup>29</sup>

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26. See generally C. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS (1936).

27. *Hoffman* provided for the use of special verdicts in negligence actions, but did not make them mandatory. 280 So. 2d at 439. However, the *Hoffman* court probably did not anticipate using common law special verdicts where the jury must make a special finding of fact for each material legal issue. Florida does not have a statutory special verdict such as FED. R. CIV. P. 49(a). The *Hoffman* court may have envisioned the use of a general verdict with special interrogatories. See 28 U. MIAMI L. REV. 473, 478-82 (1974).

Many commentators have been urging the use of special verdicts or special interrogatories. See, e.g., C. GREGORY, *supra* note 26, at 121-24; Gregory, *Loss Distribution by Comparative Negligence*, 21 MINN. L. REV. 1, 14-15 (1936); Maloney, *supra* note 12, at 170-72; Timmons & Silvis, *supra* note 12, at 800-02. *Contra.*, Schwartz, *Pure Comparative Negligence in Action*, 34 AM. TR. LAWYERS J. 117, 131-35 (1972).

In *Lincenberg*, however, the court restricted the use of special verdicts to the extent that they comply with the special equity requirements of FLA. STAT. § 768.31(3)(c) (1975). See notes 8 & 9 *supra* and accompanying text.

28. Special interrogatories would not require a finding of fact on every material issue. See C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2512, at 524 (1971). The special findings in *Lincenberg* were actually special interrogatories with a general verdict.

29. At least one state, New Hampshire provides for pure apportionment of damages among *all* parties. N.H. REV. STAT. ANN. § 507: 7-a (Supp. 1973) provides:

One such strong reason may be the social policy favoring protection of the injured plaintiff in case of an execution-proof defendant or a defendant that cannot be brought before the court.<sup>30</sup> While the goal of preventing an injured plaintiff from bearing the entire burden in such cases is certainly valid, there are alternative means of allocating the burden. One alternative is that a partially negligent plaintiff and the solvent defendant(s) would share the burden based on the ratio of their comparative fault.<sup>31</sup>

In the event that either the court or the legislature deems it necessary to retain joint and several liability as presently applied, a second solution to the inconsistency and conflict with the *Hoffman* decision is to allow contribution among tortfeasors based on their relative degrees of fault. In fact, contribution would only exist in situations where there was joint and several liability. Otherwise, a defendant would never have to pay more than his fair share in the first place.

The common law did not allow contribution,<sup>32</sup> but in recent years the harshness of such a rule has become increasingly apparent.<sup>33</sup> Contribution would recognize the commonly accepted doctrine of joint and several liability, but would allow defendants to recover from one another to the extent they have paid the plaintiff more than their share of the common liability. The problem again

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[E]ach such defendant shall be liable for that portion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants . . . .

30. See Timmons & Silvis, *supra* note 12, at 784.

31. *Id.* at 785-86. Note, however, that in *Lincenberg* comparing plaintiff's negligence to that of a solvent defendant would not make any difference since the plaintiff was *not* negligent.

32. See, e.g., *Seaboard Air Line Ry. Co. v. American Dist. Elec. Protective Co.*, 106 Fla. 330, 143 So. 316 (Fla. 1932); *Stembler v. Smith*, 242 So. 2d 472 (Fla. 1st Dist. 1970); *Kellenberger v. Widener*, 159 So. 2d 267 (Fla. 2d Dist. 1963).

The no contribution rule had its origin in *Merryweather v. Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (1799). Some often stated reasons for the rule were: (1) the court's desire not to aid anyone with "unclean hands"; (2) the possible deterrent effect because it serves as a warning to potential wrongdoers; and (3) possible administrative problems involving any contribution. See Prosser, *supra* note 21, at 425-26.

33. The harshness of the rule can be demonstrated by the facts of this case. *Lincenberg* who is only 15 percent at fault could be held responsible for 100 percent of the damages if the plaintiff sought execution against him. Even if a state recognizes contribution, inequities still result unless contribution is done by apportioning damages on the basis of relative degrees of fault. See note 35 *infra* for an example of the inequities.

The majority of jurisdictions now allow contribution either by statute or judicial fiat. See cases and statutes cited in *Lincenberg v. Issen*, 318 So. 2d 386, 390 n.1 (Fla. 1975).

lies in how to apportion such recovery. If the principles of *Hoffman*<sup>34</sup> are followed, recovery would necessarily be based on relative degrees of fault. However, the Uniform Act provides that the determination must be made on a pro rata basis without consideration of the relative degrees of fault.<sup>35</sup>

Given these principles of comparative negligence, joint and several liability, and contribution among tortfeasors, an analysis of the legal issues presented in *Lincenberg* should have answered the following questions:

1. Do the equitable principles based on the equation of liability with fault espoused in *Hoffman* have broader applications than a mere comparison of a plaintiff's negligence with that of the defendants?

2. If so, is Lincenberg's contention that each party must be held liable only for that percentage of fault for which he is adjudged guilty correct, thereby in essence abrogating or limiting the application of joint and several liability?

3. If the court chooses not to so abrogate or limit the doctrine of joint and several liability, would allowing contribution among joint tortfeasors provide nearly the same net result in most cases?<sup>36</sup>

4. If contribution is allowed, what method of apportionment should be employed?

In *Lincenberg* the Supreme Court of Florida recognized that the equitable apportionment principles espoused in *Hoffman* should have broader application than permitting a plaintiff recovery for damages if he was partially at fault. Because of those equitable principles and public policy, the court renounced the common law rule that prohibited contribution.<sup>37</sup>

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34. *Hoffman* did not rule on the question of contribution because the issue was not "ripe," and also apparently because it was under the belief there was sufficient applicable case authority in existence based on a comparative negligence railroad statute, FLA. STAT. § 768.06 (1911), held unconstitutional in *Georgia S. & F. Ry. v. Seven-Up Bott. Co.*, 175 So. 2d 39 (Fla. 1965). There does not, however, seem to be sufficient precedent under that statute. See *Timmons & Silvis*, *supra* note 12, at 777.

35. FLA. STAT. § 768.31(3)(a) (1975). Therefore, on the facts of this case, the plaintiff could still recover 100 percent from Lincenberg, but Lincenberg would be entitled to contribution from Rhodes. However, since relative degrees of fault are not to be considered, Lincenberg could only get 50 percent contribution from Rhodes. The effect of course would be that Lincenberg must pay for 35 percent of the liability for which he was not negligent.

36. The only difference, in effect, would be when one defendant is insolvent or nonjoinable. *Timmons & Silvis*, *supra* note 12, at 789-91.

37. See note 10 *supra*.

Unfortunately, the court essentially failed to explore the second question in its analysis. The real issue in *Lincenberg* was whether or not the jury could apportion fault as between *all* parties to the action, thus eliminating the traditional joint and several liability situation. Lincenberg was *not* seeking contribution from Rhodes, but was contending he should only be required to pay the plaintiff 15 percent of the damages. Instead of focusing on the social policies for and against limiting the scope of joint and several liability (i.e., the desire to equate liability with fault versus the desire to provide an injured plaintiff with full compensation for his injuries), the court centered its analysis on the collateral issue of contribution. In fact the court's only reference<sup>38</sup> to joint and several liability followed its full discussion of the merits of establishing the right to contribution in Florida.

Perhaps the court was persuaded that the legislature intended<sup>39</sup> to codify joint and several liability in passing the Uniform Act. Yet a literal reading of the statute would tend to indicate that only "when" joint and several liability is found should the defendant-joint tortfeasors be allowed relief in the form of receiving contribution if one has paid more than his share of the common liability.<sup>40</sup> While this distinction is subtle, it is of paramount importance.

If, however, the legislature truly intended to codify the common law doctrine of joint and several liability, the court should not abrogate the doctrine. This would be true even though the concept of joint and several liability is somewhat inconsistent with the principles espoused in *Hoffman* since the legislature could be recognizing the strong social policy toward protecting an injured plaintiff's right to recover his damages.<sup>41</sup> Furthermore, the alternative solution, contribution, could have nearly the same net effect except in cases where a defendant is execution-proof or unavailable.<sup>42</sup> Of course, the court, in the absence of legislative action to the contrary, should be

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38. The court makes one brief reference to the issue in stating: "The Act retains the full, joint, and several liability of joint tortfeasors to the plaintiff . . ." 318 So. 2d at 392. However, the court does not explain how it reached such an important conclusion.

39. The legislative history is too scant to help determine to what extent joint and several liability was to be retained. It should be assumed that the legislature was aware of *Hoffman* and its apportionment principles based on equating liability with fault. If the legislature wanted to codify joint and several liability in such cases it surely would have stated such intention clearly. It cannot be presumed that because the legislature provided for contribution it necessarily considered the bounds of what constitutes joint and several liability.

40. See FLA. STAT. §§ 768.31 (2)(a), (b) (1975).

41. See generally *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

42. See note 36 *supra*.

free to determine the continued viability of joint and several liability since it is a common law doctrine.<sup>43</sup>

In fact, however, neither the legislature nor the court squarely confronted this, the central issue of the case. Consequently, the court could not discuss in a logical fashion the collateral issue of contribution because it had not yet thoroughly examined to what extent joint and several liability is still valid.<sup>44</sup> If the purpose of the Uniform Act was to retain the status quo regarding joint and several liability, the legislature should have stated it clearly or it should be apparent from the legislative history.<sup>45</sup> Perhaps the court believed that the issue was too controversial, and that if contribution was allowed, both the plaintiffs' and the defendants' bar would be relatively content.<sup>46</sup> What the court did not consider, though, was that because the Uniform Act prohibits consideration of the relative degrees of fault in determining the pro rata shares of contribution,<sup>47</sup> the statute is clearly inconsistent with *Hoffman* and the equation of liability with fault.<sup>48</sup> Furthermore, there are no strong public policy reasons that justify this inconsistency because the policy of insuring a plaintiff compensation for his injuries in case of an insolvent or unavailable defendant is not relevant in a contribution setting since joint and several liability is retained.

The net result of *Lincenberg* and the Uniform Act is, of course, a serious conflict with the principles equating liability with fault. Despite the weak opinion and poor statutory provision, there are three possible solutions which would bring some kind of order to the apportionment system. The first alternative is a statutory change—replacing the “pro rata” provision with one based on relative degrees of fault.<sup>49</sup> The effect of such a change would result in a *Bielski v. Schulze*<sup>50</sup> situation, where joint and several liability is

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43. See, e.g., *Hoffman v. Jones*, 280 So. 2d 431, 436 (Fla. 1973).

44. At least not with respect to the *Lincenberg* case since it did not involve contribution.

45. See note 40 *supra*.

46. Clearly defendants are now in a better position in that the institution of some right to contribution, even if recovery is determined on a pro rata basis, is more equitable than the former no contribution rule. While the plaintiffs' bar might not seriously object to contribution, if the court were to abrogate or limit the doctrine of joint and several liability, the plaintiffs' bar undoubtedly would object.

47. FLA. STAT. § 768.31(3)(a) (1975).

48. For a more detailed discussion see Comment, *The Case for Comparative Contribution in Florida*, 30 U. MIAMI L. REV. 713 (1976).

49. See *id.* at 736-37.

50. 16 Wis. 2d 1, 114 N.W.2d 105 (1962) where the Supreme Court of Wisconsin recog-

retained, but contribution among joint tortfeasors is allowed on a proportionate basis.

The second option would be to find the "pro rata" provision unconstitutional. Such a finding would have the same net effect as a legislative change, but the route is more tenuous.<sup>51</sup> Perhaps the court thought that by specifically not ruling on the constitutionality of the statute,<sup>52</sup> it could remedy the situation later, should it become necessary. The problem is that if the statute is held to be constitutional, even though grossly unfair,<sup>53</sup> in order to maintain consistency in the state's apportionment system, the court would have to either hope the legislature will repeal the "pro rata" provision, or be forced to answer the question it failed to consider in *Lincenberg* by ruling decisively that fault must be apportioned by today's jury among all parties.

Finally, the third alternative is for the court to re-examine the joint and several liability issue and its earlier unexplained statement concerning the Uniform Act's supposed retention of that doctrine. If the court, after weighing carefully the equitable principles underlying *Hoffman* against the policy of protecting a plaintiff's recovery at all costs, did abrogate or limit the scope of the traditional doctrine of joint and several liability, Florida could have a truly pure apportionment system. Joint and several liability might thus be drastically limited in scope, perhaps reducing the effectiveness of the "pro rata" provision to the few instances where apportionment was actually impossible.<sup>54</sup>

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nized the traditional joint and several liability, but *judicially* declared that the right of contribution exists and is measured according to the relative degrees of fault.

51. A discussion of the constitutionality of FLA. STAT. § 768.31 is beyond the scope of this case note. It is unlikely, however, that the statute violates either the equal protection or due process clause of the fourteenth amendment despite the fact that the statute is unfair. Furthermore, arguments that the statute violates Florida equal protection or due process requirements are unlikely to be successful. For a more detailed discussion of the constitutionality of the statute see Comment, *supra* note 48, at 731-36.

52. 318 So. 2d at 391 n. \*

53. See note 51 *supra*.

54. Joint and several liability could be retained only in those instances where a jury could not logically apportion damages or assess fault among all parties. *E.g.*, *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948) (where a victim was caught in a cross fire between two hunters and it was impossible to determine which hunter fired the fatal bullet); *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944) (where all assisting hospital personnel were held jointly liable when none of those upon whom the burden had rested could cast the guilt). See also *Lawrence v. Hethcox*, 283 So. 2d 41 (Fla. 1973) (where plaintiff was involved in two separate accidents and it may have been impossible to apportion to each tortfeasor the amount of damages caused by him).

Merely redefining what constitutes joint and several liability would have two principal advantages over completely abrogating the doctrine. The first is that joint and several liability could be retained for concerted actions by the tortfeasors,<sup>55</sup> and perhaps also for vicarious liability situations.<sup>56</sup> The second advantage is that the new contribution statute would not be affected; contribution would still be allowed "when" joint and several liability existed. In those cases, a "pro rata" distribution would not be objectionable since the jury could not actually allocate a percentage of fault to the various tortfeasors.

Whether the doctrine of joint and several liability should be abrogated or limited in its scope is a question which engenders great debate and controversy. However, if the supreme court had analyzed in a logical fashion the issues involved in *Lincenberg*, it would have explored and resolved that very question *before* addressing the issue of contribution. In any case it is hoped that the present conflict between the *Hoffman* principles of equating liability with fault and the legislature's "pro rata" contribution will be rectified in the near future.\*\*

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Another solution would be to allow plaintiff to recover only a pro rata share of the liability from each defendant, rather than allowing plaintiff to choose which defendant from whom he will seek execution. Such a solution would be unjustified if there was any concerted action by the tortfeasors, however. See note 20 *supra*.

55. See note 20 *supra*.

56. The corresponding right to indemnity may be sufficient protection for the vicarious tortfeasor.

\*\* Subsequent to the writing of this article, but prior to the final printing of this issue, the Florida Legislature amended Florida statutes section 768.31(3)(a) to provide that, in determining the pro rata shares of tortfeasors, "their relative degrees of fault shall be the basis for allocation of liability." Fla. Laws 1976, ch. 76-183, *amending* FLA. STAT. § 768.31(3)(a) (1975). This amendment takes effect on June 21, 1976.

This legislative change brings needed order and consistency to Florida's apportionment system. However, because contribution will now be based on relative degrees of fault, the supreme court may be even more unwilling to re-examine what constitutes the proper scope of joint and several liability. Although allowing contribution based on relative degrees of fault would generally have the same net effect as eliminating joint and several liability, there are situations where the distinction would be notable. In cases where a defendant is either non-joinable or execution-proof or where one defendant settles with or receives a release from the plaintiff, eliminating joint and several liability would have a significant impact on the rights of the parties. Thus, the Supreme Court of Florida may still be forced to face and resolve the difficult competing policies centered around the doctrine of joint and several liability and the desire to equate liability with fault.