Pure Comparative Negligence in Florida: A New Adventure in the Common Law

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PURE COMPARATIVE NEGLIGENCE IN FLORIDA: A NEW ADVENTURE IN THE COMMON LAW

ROBERT C. TIMMONS* AND DOUGLAS K. SILVIS**

I. ADOPTION OF THE COMPARATIVE NEGLIGENCE DOCTRINE ........................................... 738
   A. Introduction .............................................................................................................. 738
   1. HOFFMAN V. JONES ................................................................................................... 738
   2. ROLES TO BE PLAYED ............................................................................................... 739
   3. FORMAT OF THIS ARTICLE ..................................................................................... 740
   B. The Florida Supreme Court Decision in Hoffman ................................................... 741
      1. PROCEDURAL CONSIDERATIONS ......................................................................... 741
      2. RATIONALE FOR ADOPTING THE DOCTRINE .................................................. 742
      3. CHOICE OF THE PURE FORM ............................................................................ 743
      4. OPERATION OF THE PURE FORM RULE ............................................................ 745

II. FLORIDA AND FOREIGN PRECEDENT ........................................................................... 749
   A. Florida Law: Railroad and Hazardous Occupations Statutes ..................................... 749
      1. IN GENERAL ........................................................................................................... 749
      2. LAST CLEAR CHANCE ............................................................................................ 750
      3. SOLE PROXIMATE CAUSE ..................................................................................... 750
      4. NEGLIGENCE PER SE ............................................................................................. 751
      5. IMPUTED NEGLIGENCE ........................................................................................... 751
      6. PLEADING ............................................................................................................... 752
      7. REMITTITUR ............................................................................................................ 752
   B. Value of Foreign Precedent ......................................................................................... 753
      1. IN GENERAL ........................................................................................................... 753
      2. FEDERAL COMPARATIVE NEGLIGENCE STATUTES .............................................. 753
      3. JURISDICTIONS ADOPTING THE PURE FORM RULE ........................................ 754
      4. JURISDICTIONS ADOPTING THE NON-PURE RULES ........................................ 755
   C. Effect of Comparative Negligence on Existing Florida Law ......................................... 757
      1. IN GENERAL ........................................................................................................... 757
      2. LAST CLEAR CHANCE ............................................................................................ 757
      3. IMPUTED NEGLIGENCE ........................................................................................... 757
      4. NEGLIGENCE PER SE ............................................................................................. 758
      5. STATUS OF CONTRIBUTORY NEGLIGENCE AS A DEFENSE .................................. 760
         a. Gross Negligence and Willful, Wanton Conduct ................................................. 760
         b. Warranty Liability ............................................................................................... 761
         c. Strict Liability in Tort .......................................................................................... 763
            (1) Precedent with Respect to Strict Liability ....................................................... 763
            (2) Comparative Negligence and Strict Liability .................................................. 765
      6. ASSUMPTION OF RISK ............................................................................................ 766
         a. Current Status ...................................................................................................... 766
         b. Definitions ............................................................................................................ 767

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I. ADOPTION OF THE COMPARATIVE NEGLIGENCE DOCTRINE

A. Introduction

1. Hoffman v. Jones

On July 10, 1973, the Supreme Court of Florida decided Hoffman v. Jones and instituted the doctrine of comparative negligence in Florida.

1. 280 So. 2d 431 (Fla. 1973), aff'd 272 So. 2d 529 (Fla. 4th Dist. 1973) [hereinafter
In drastically altering its law with respect to negligence actions, Florida joined an ever-growing majority of jurisdictions recognizing the doctrine.

Although twenty-seven jurisdictions have adopted comparative negligence, Florida's judicial adoption differs markedly from that of a majority of other states in two respects: first, most states have adopted the doctrine by statute; second, and of equal importance, by adopting a "pure form" of comparative negligence, Florida has joined a very small minority of states which permit recovery of damages by a tortfeasor who himself may have been more than fifty percent responsible for his own injuries. In view of the incompleteness of this judicial creation, and in light of the relative uniqueness of the pure form of comparative negligence, the decision in Hoffman v. Jones provides and will continue to provide some critical repercussions for the judiciary, for the trial bar, and, hopefully, for the legislature.

2. ROLES TO BE PLAYED

Obviously, the primary concern of members of the Florida judiciary relating to comparative negligence will center on the administration of the doctrine. This will doubtless be no small task since for all its seeming simplicity in requiring that damages be distributed according to the relative fault of the parties, comparative negligence has proven extremely difficult to administer.

The advocate, of course, will assist the courts in the implementation of the doctrine, even as he researches and argues on behalf of his clients while attempting to fit this "new" concept of loss distribution into his daily practice. His contribution, like that of the judge, will be in the slow formulation of practical ways to implement comparative negligence in specific cases.


2. 280 So. 2d at 438. Although a literal reading of the holding of Hoffman would require that the case be limited to negligence actions, the probable intent of the supreme court was to subject all actions wherein contributory negligence is a defense to the apportionment rule. Id. See section II, C, 5 infra.

3. See note 19 infra.

4. Id. The widespread effects of the doctrine of comparative negligence on other laws make legislative action in that area desirable. The Florida legislature, as will be pointed out in section III, A infra, could make the transition to the doctrine much swifter and less painful.

5. 280 So. 2d at 439. See also note 19 infra and accompanying text.

6. The question of the supreme court's authority to adopt comparative negligence by case decision is obviously moot. Assuming, however, that the court has the authority, and that the writers of this article think they do, it is submitted that many problems and a great deal of uncertainty could have been avoided had the legislature acted first. Nevertheless, it is not too late for the legislature to act. The complete adoption of comparative negligence in Florida must be a joint effort, and even though traditionally the legislature enacts statutes which the courts merely construe, there is no reason why the procedure cannot be reversed—insofar as it already has been by the Hoffman court—just this once.

Notwithstanding the efforts of the judge and the advocate, there is a need for some additional teleological guidance to the evolutionary process begun by Hoffman. While the judge and the advocate have been cast in their roles by the mere announcement of the doctrine, there is one performer yet to be committed—one who could truly make the difference in whether this will be a superb production or just another play—the legislator. If left to the judiciary and the bar, the resolution of such unanswered questions as the effect of the doctrine on contribution among joint tortfeasors, on assumption of risk, and on the role of the insurance company, will be found only by the tedious, often confusing evolution of the common law. It is submitted in this article that the play needs a director, and that the directorial function can best be performed by a legislature willing to enact comprehensive legislation on the subject.

3. FORMAT OF THIS ARTICLE

Neither this article nor any other can provide an exhaustive coverage of the subject of comparative negligence. Already, there exists a plethora of books and articles on the subject, treating everything from its history to practical problems in other jurisdictions. However, the pure form of comparative negligence, by virtue of its rarity, has undergone far less examination than have others. Therefore, the three-fold purpose of the

8. The authors of this article were somewhat skeptical of the pure form rule at first. However, a rigorous comparison of all of the forms suggests that the pure form rule should be retained. It is with respect to the refinements to this form that the legislature is herein petitioned to take action. See Vincent v. Fost Brewing Co., 47 Wis. 2d 120, 177 N.W.2d 513 (1970).

9. See section III, A, 4 infra.

10. It is the opinion of the writers that in the case of assumption of risk, the need for piecemeal, empirical study can better be satisfied by the “tedious, often confusing evolution of the common law.” See section II, C, 6 infra.

11. See section III, B infra.

12. This is not to say that the promulgation of rules of procedure by the Supreme Court of Florida could not also perform some of the same functions, but it appears from the language in Hoffman that court has declined to act at this time.


14. In the fall of 1955, shortly after Arkansas enacted its first comparative negligence
writers will be to provide first some basic background information and resource material for the reader, second an analysis of areas of practice that will be affected by the doctrine, and then a suggestion to the courts, the bar, and the legislature of possible approaches to solving the problems that are expected to arise in the implementation of the new apportionment rule. In short, the object is to make a contribution to the work of both the practitioner, who must practice under the doctrine as announced in *Hoffman*, and to the judiciary and the legislature, who share the power to shape the course of comparative negligence in this state and thereby to help Florida avoid some of the pitfalls pointed out by the past experiences of others.

B. The Florida Supreme Court Decision in Hoffman

1. PROCEDURAL CONSIDERATIONS

*Hoffman v. Jones* was a wrongful death action in which the trial court refused to give proposed jury instructions on comparative negligence. The District Court of Appeal, Fourth District, reversed, adopted the comparative negligence rule and certified the question to the Florida Supreme Court as one of great public interest.

The supreme court's decision consisted of three phases. First, the court chastised the district court for exceeding its authority by attempting to overrule a long line of precedents (including supreme court decisions) which established the contributory negligence rule in Florida. 280 So. 2d at 434, 440. See also Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974), rev'd on other grounds, Stewart v. Gilliam, 271 So. 2d 466 (Fla. 4th Dist. 1972). It should be noted that ever since the leading case of *Louisville & N.R.R. v. Yniestra*, 21 Fla. 700 (1886), an unbroken line of cases had recognized and implemented the contributory negligence rule in Florida. However, even in *Yniestra*, Chief Justice McWhorter castigated the contributory negligence rule for being "unjust and inequitable." 280 So. 2d at 437; Maloney, supra note 13, at 157-58.

Secondly, the court examined its own authority to judicially adopt the comparative negligence doctrine. After weighing the competing arguments, the majority decided that since the doctrine of contributory negligence was "judicially created," it could also be judicially modified or abolished; and, furthermore, in response to the inactivity of the legislature in this area, it determined that where "great social upheaval dictates," it could change the rule regardless of the nature of its inception. 280 So. 2d at 437. See Symposium, Comments on Maki v. Frekl—Comparative v. Contributory Negligence: Should the Court or the Legislature Decide?, 21 Vand. L. Rev. 889 (1968). Compare Maki v. Frekl, 40 Ill. 2d 193, 239 N.E.2d 445 (1968), with Maki v. Frekl, 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967), and Bejach v. Colby, 141 Tenn. 686, 214 S.W.2d 869 (1919).
2. RATIONALE FOR ADOPTING THE DOCTRINE

On the merits, the court carefully considered the several reasons for adopting comparative negligence. First, the court pointed out that other jurisdictions were already using the doctrine, including most foreign countries, \textsuperscript{17} the federal governments in certain areas, \textsuperscript{18} and several states. \textsuperscript{19}

\textbf{17.} 280 So. 2d at 436. England and most of the British Commonwealth, Austria, Canada, China, France, Germany, Israel, Italy, Japan, Poland, Portugal, Russia, Switzerland, Thailand, and Turkey apply the doctrine. \textit{See} Maloney, \textit{supra} note 13, at 154.


\textbf{19.} 280 So. 2d at 436. As of this writing twenty-five states and Puerto Rico have "general" comparative negligence laws, and more significantly, the rate at which states are adopting comparative negligence laws is accelerating. It should be noted that most states have had \textit{limited} comparative negligence statutes for years. These statutes are usually limited to the subjects of labor and railroads. \textit{See}, e.g., FLA. STAT. § 769.03 (1971); FLA. LAWS 1887, ch. 3744, \textit{codified in} FLA. STAT. § 768.06 (1971), which was held unconstitutional on equal protection grounds in Georgia S. & F. Ry. v. Seven-up Bott. Co., 175 So. 2d 39 (Fla. 1965).


The Connecticut statute is limited to negligence actions arising out of the ownership, maintenance or use of a private motor vehicle. CONN. GEN. STAT. REV. § 38-324 (Supp. 1973).

Three states have non-statutory comparative negligence laws:


There is a difference of opinion among New York trial courts on whether the \textit{Dow Chemical} case actually did adopt comparative negligence. \textit{See} Fisher & Wax, \textit{supra} note 13, at 572 n.9.

\textbf{TENNESSEE:} Bejach v. Colby, 141 Tenn. 686, 214 S.W. 869 (1919); Louisville & N.R.R. v. Cheatham, 118 Tenn. 160, 100 S.W. 902 (1906).

The precise origin of the Georgia law is disputed. GA. CODE ANN. §§ 94-703, 105-603 (1968); Barnett v. Whatley, 87 Ga. App. 860, 75 S.E.2d 667 (1953); Smith v. American Oil Co., 77 Ga. App. 463, 49 S.E.2d 90 (1948); Section 94-703 is by its terms applicable only to railroad-connected accidents. Section 105-603 is poorly drafted. It contains elements of a last clear chance rule and elements of a comparative negligence rule. One group of authori-
Secondly, it was noted that contributory negligence could no longer be justified on the grounds that it provided industry and transportation with a necessary subsidy. The third, and in the court's opinion, the best reason, was that comparative negligence was simply a more equitable and socially desirable system of loss distribution. The most compelling jurisprudential reason, however, was that the new rule would bring the law into closer harmony with the basic attitudes and expectations of the people. The court stated that it had long been recognized that juries often compromise verdicts; that is, juries tend to bring in lower verdicts when they believe a plaintiff to be contributorily negligent, rather than bar his recovery altogether. This has been true despite jury instructions to the contrary, and one court has even given compromise verdicts judicial approval. Thus, in adopting the comparative negligence doctrine, the Supreme Court of Florida has merely made it possible for the jury to take into consideration the plaintiff's causal negligence overtly, without having to ignore the court's instructions. Furthermore, of course, it has encouraged those juries that obey jury instructions to travel, lawfully, a more equitable course in apportioning damages.

3. CHOICE OF THE PURE FORM

Once having decided to adopt a rule of comparative negligence, the court had a difficult choice to make concerning which form to adopt. Out of five possible variations, the court chose the pure form but declined to detail the reasons for its choice, other than to state that the pure form was the most equitable method of allocating damages in negligence actions. Of the five forms, the pure form, as its name implies,
represents the greatest attempt to implement totally the policy behind comparative negligence, i.e., to apportion liability strictly according to the proportionate fault of the parties. Under this form, one may recover something regardless of his degree of negligence as long as his negligence is not the sole cause of his injury. Furthermore, since there is no artificial limit placed on the operation of the rule (as in such other forms as those which bar recovery by parties having negligence equal to or greater than that of their adversaries or by parties having negligence greater than the one from whom recovery is sought, or those barring recovery by one more than "slightly" negligent), both the claimant and counterclaimant have hope of recovery. Only a few jurisdictions have adopted such a plan and the commentators have varied in their reactions toward the thought of letting one who may be guilty of the greater negligence enjoy a recovery simply because he also had the greater damages.

L. Rev. 573 (1968). There are however, divergent viewpoints on just how the system should be implemented and five forms of comparative negligence are presently in operation throughout the country: the pure form; the modified-49% form; the modified-50% form; the slight versus gross form; and the remote contributory negligence form. See Maki v. Frelk, 85 Ill. App. 2d 439, 229 N.E.2d 284, rev'd, 40 Ill. 2d 193, 239 N.E.2d 445 (1967).

25. The modified-49% form is by far the most popular. Under it, one can recover damages diminished by his degree of negligence so long as his negligence is less than that of the adversary or adversaries from whom he seeks recovery. Those states having the modified-49% form are: Arkansas, Colorado, Hawaii, Idaho, Maine, Massachusetts, Minnesota, Oklahoma, Oregon, Utah and Wyoming. See note 19 infra. As stated before, if one's negligence is equal to that of his adversary he may not recover under this form. The modified-49% rule seems to be an unjustified compromise, possibly reflecting the legislative and political process. See Prosser, Comparative Negligence, 51 Mich. L. Rev. 465 (1953). See note 96 infra.

26. This type is known as the modified-50% form. It permits an injured party to recover damages so long as his fault is not greater than that of his opponent. Those states having the modified-50% form are: Connecticut, New Hampshire, Texas, Vermont and Wisconsin. See note 19 infra. For several years Wisconsin had been the leading modified-49% state, but in 1971 (as a result of great pressure from the judiciary to adopt the pure form) its legislature adopted the 50% form. Id.; Vincent v. Pabst Brewing Co., 47 Wis. 2d 120, 177 N.W.2d 513 (1970).

27. Nebraska and South Dakota have a slight-gross rule wherein whose negligence is "slight" as compared to that of another whose negligence is "gross" may recover diminished damages. In addition, Tennessee has a rare form known as "remote contributory negligence." Finally, there is still in effect in the United States the antiquated admiralty rule, applied when property damage is caused by the collision of two ships so that damages are divided equally without regard to comparative degrees of fault. The Max Morris, 137 U.S. 1 (1890).

28. Florida, Mississippi, New York (possibly), Rhode Island, Washington, Puerto Rico. The federal government has adopted this plan in certain areas, such as those covered by the Federal Employers Liability Act, the Jones Act, and the Death on the High Seas Act. See note 19 supra.

29. For an example of the computation process, see notes 38 & 39 infra and accompanying text.

As to the reaction of commentators to "pure" comparative negligence, a non-exhaustive list of those who favor and those who oppose it follows. IN FAVOR: Vincent v. Pabst Brewing Co., 47 Wis. 2d 120, 177 N.W.2d 513 (1970); Prosser, supra note 13, § 67; Krause, No-Fault's Alternative—The Case for Comparative Negligence and Compulsory Arbitration in New York, 44 N.Y. State B.J. 535 (1972); Schwartz, supra note 13; AGAINST: HEFT & HEFT, supra note 13, § 1.50; Gilmore, Comparative Negligence From the Viewpoint of Casualty Insurance, 10 Ark. L. Rev. 82 (1956). One argument against the pure form is that in some cases one who is less responsible for the accident will ultimately be required to compensate the more responsible party. For instance, depending on the damages sustained, one who
4. OPERATION OF THE PURE FORM RULE

The pure form rule set out by the Hoffman court is simply stated, but not so simply administered. The court, however, did attempt to set out in the case the procedure for administering the doctrine, to designate when it was to be applied and to denote the division of functions between the judge and the jury.

If the defendant is not negligent, or if the defendant's negligence is not a legal cause of the damage or injury, or if the plaintiff's own negligence (or which is imputed to him) is the sole proximate cause of his injury, then the plaintiff is barred from any recovery. If, however, both the plaintiff and defendant (or defendants) are negligent and the negligence of both is a legal cause of the injury or damage, then the plaintiff may recover diminished damages.

is 99% negligent may recover from one who is only 1% negligent and this is said to be unjust. However, in practice many courts have closely scrutinized verdicts wherein one party's negligence has been particularly great vis-à-vis the other party, and have either found that the negligence of the first was the sole proximate cause of his injury, or that a remittitur should issue. Lowry v. Seaboard Airline R.R., 171 F.2d 625 (5th Cir. 1948); Florida E.C.R.R. v. Townsend, 104 Fla. 362, 140 So. 196, modified on other grounds, 104 Fla. 362, 143 So. 445 (1932); Louisville & N.R.R. v. Padgett, 71 Fla. 90, 70 So. 998 (1916); Yazoo & M.V.R.R. v. Williams, 114 Miss. 236, 74 So. 835 (1917).

Another example is one in which the plaintiff's negligence is 25% and defendant's negligence is 75%, but the plaintiff sustains only $1,000 damages whereas defendant sustains $10,000 damages. Defendant, 75% negligent, will owe plaintiff 75% times 1,000 or $750 and plaintiff, 25% at fault, will owe defendant 25% times 10,000 or $2,500, leaving defendant with a net recovery of $1,750. The Hoffman court responded to this seeming inequity by stating that "liability . . . in such a case should not depend on what damages (one) suffered, but upon which damages he caused." 280 So. 2d at 439 (emphasis in original).

30. 280 So. 2d at 438-39.
32. The Hoffman court made it very clear that only causal negligence is to be apportioned under the rule, and that any negligence which is not a proximate contributing cause of the accident should be disregarded by the jury. In Florida Cent. & Pac. R.R. v. Williams, 37 Fla. 406, 20 So. 558 (1896), it was held to be error for the court's charge on comparative negligence to omit that the jury should not take into account the negligence of either party that did not proximately contribute to the accident. Accord, Stevenson v. Robinson, 37 So. 2d 568 (Miss. 1948).

Other authorities have taken varying approaches. Prosser would subject the degree of "culpability" rather than of causality to the apportionment rule. Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 481 (1953). Dobbs took the intermediate position, contending that the degree of culpability was to be apportioned once all the negligence in question had been determined to be causal. Dobbs, supra note 13, at 360-61. The Supreme Court of Wisconsin, in Kohler v. Dumke, 13 Wis. 2d 211, 108 N.W.2d 581 (1961), refused to consider the distinction between causal negligence and culpability and left the problem "to the common sense of juries."

33. It is submitted that the Wisconsin approach in Kohler v. Dumke, 13 Wis. 2d 211, 108 N.W.2d 581 (1961) in all probability reflects the wisdom of those who lived with the doctrine. The question of how to live with varying degrees of negligence was the subject of Horn v. Snow White Laundry & Dry Cleaning Co., 240 Wis. 312, 3 N.W.2d 380 (1942), wherein it was held that a jury, which found three instances where the defendant was causally negligent and one instance where the plaintiff was causally negligent, need not apportion the negligence on a three to one ratio. See Kraskey v. Johnson, 266 Wis. 201, 63
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 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 proportional with his negligence and the negligence of the defendant. . . .

... 84

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 defendant. 85

Under the rule just stated, if the plaintiff were found to have been 10% at fault and his total damages were assessed to be $1000 then he would recover $900 ($1000 X 90%) since the defendant's negligence would then be 90% of the total negligence in a two-party situation.

It should be noted that the rule, as stated, is one dimensional in nature. Since in most accidents both parties, or several parties, may receive injuries, and since it is likely that in most cases more than one party is at least partially at fault, the one dimensional rule must be applied first to the plaintiff's claim and then to a defendant's counterclaim. Under the old contributory negligence rule, of course, theoretically neither negligent party could recover. Under comparative negligence, however, both may recover, and in most, if not all cases, a counterclaim will be filed. 3

Thus, two verdicts will be brought in by the jury, one for the plaintiff and one for the defendant on his counterclaim.

N.W.2d 112 (1954) (discussing how to handle the apportionment of varying types of negligence); HERR & HERR, supra note 13, § 1.240 (active versus passive negligence); Schwartz, supra note 13, at 125, 128; Editorial Annot., Comparative Negligence Cases, 18 Def. L.J. 571, 576, 578 (1969).

34. 280 So. 2d at 438. The actual mechanics of apportionment has created little trouble. Although two early cases have contended that the plaintiff's negligence should be compared to that of the defendant (where plaintiff is 25% at fault and defendant is 75%, the apportionment would be 1 to 3 and plaintiff would recover 2/3 of his damages, defendant 1/3 of his), the more recently accepted method of apportionment is to compare the plaintiff's negligence to the total negligence (plaintiff 25% at fault would recover 3/4 rather than 2/3 of his damages and defendant 75% at fault would recover 1/4 not 1/3, on his counterclaim). See Dobbs, supra note 13, at 359-60. The latter method is probably the most "pure" and is the accepted method, but the direct comparison method may prove useful in multi-party actions where one party is either insolvent or unavailable for service. See section III, A, 3, d infra.

35. 280 So. 2d at 438 (emphasis added). Note that the quoted portion is an almost verbatim rendition of Florida's railroad statute. See section II, A, 1 infra.

36. Fla. R. Civ. P. 1.170(a):

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, provided it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction. . . .
In such event the Court should enter one judgment in favor of the party receiving the larger verdict, the amount of which should be the difference between the two verdicts. . . . The Court's primary responsibility is to enter a judgment which reflects the true intent of the jury, as expressed in its verdict or verdicts. 87

For example: 88 If plaintiff were 20% negligent and sustained $20,000 damages, and if the defendant were 80% negligent and also sustained $20,000 damages, there would be a net $12,000 recovery for plaintiff. Defendant would owe plaintiff 80% of $20,000 or $16,000. Plaintiff would owe defendant 20% of $20,000 or $4,000. The court, upon receiving the two verdicts, must set-off the two verdicts and enter a net judgment for the plaintiff of $16,000 less $4,000 or $12,000. Of course if more parties are added, the computation becomes infinitely more complex, and so the chances of pre-trial settlement greatly increase. 89

According to the literal wording of Hoffman then, the jury has a duty to determine the percentage of negligence of each party, to determine the total damages sustained by each party, and to return two verdicts reflecting its findings and computations. It is up to the court to set-off the two verdicts and to enter a judgment in accordance therewith. 40 The Hoffman court, in emphasizing these functions, was alert to the myriad problems

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37. 280 So. 2d at 439 (emphasis added). The court authorized trial judges to require the jury to return special verdicts. See section III, A, 5 infra.

38. See also, Prosser, Comparative Negligence, 51 Mich. L. Rev. 465 (1953), and Schwartz, supra note 13, at 122-25 for other examples.

39. Actually, the decision in Hoffman is woefully deficient in its failure to prescribe what is to happen in multiple party cases. For examples of computation by jury and judge in multi-party situations and the authors' analyses thereof, see section III, A, 4 infra.


In practice, some judges would permit the jury to find total damages and the relative degrees of negligence, but reserve to themselves the duty to compute the reduction. This practice leads to what was called the "double reduction phenomenon"—where the jury would consciously or unconsciously reduce the amount of recovery without regard to proportionate negligence. Thereafter the judge would reduce the amount again according to the percent of negligence returned in the special verdict. In order to solve this problem, the Maine statute was amended to require the jury to return two dollar amounts, reflecting total damages and final net recovery, and to ignore percentages. See Flynn, Comparative Negligence: The Debate, 8 Trial 49, 50 (1972). In the recent case of Acevedo v. Acosta, 296 So. 2d 526 (Fla. 3d Dist. 1974), the court expressly approved the "judicial reduction" method (originally used in Maine) thereby creating a "double reduction phenomenon."

This procedure solves one of the immediate problems which comparative negligence is designed to prevent—a jury making hidden adjustments based on bias—but it still has the potential to cover-up the tracks of a confused jury that may, for instance, misinterpret the court's charge.

On the other hand, under the Hoffman procedure, the jury, preferably with special verdict forms, determines the total losses sustained and the relative degree of fault and then makes the reduction. The court scans the verdicts for any errors or inconsistencies (checks the arithmetic) and effects the set-off. This procedure, it is submitted, avoids the double reduction phenomenon.
surrounding their administration. In order to further assist in the transition from contributory negligence to comparative negligence, it invested the trial judges of Florida with broad discretionary powers to effectuate two basic purposes: 41

(1) To allow a jury to apportion fault as it sees fit between negligent parties whose negligence was part of the legal and proximate cause of any loss or injury; and
(2) To apportion the total damages resulting from the loss or injury according to the proportional fault of each party. 42

In summary, the court in *Hoffman* attempted to set out a rule of comparative negligence with a fairly broad plan for its administration. The court recognized that it was indeed bound by judicial restraints which would not permit it to decide several important collateral questions, 43 and that it could not anticipate many of the problems that were likely to arise in the trial courts. Instead, the court set out its basic purposes, gave trial judges broad discretion to administer the doctrine, and declared that the plan would be applicable or inapplicable to different cases according to their current progress in litigation and, if they were beyond the trial stage, according to certain criteria for having preserved the right on appeal. 44 This then, is the present status of the comparative negli-

41. 280 So. 2d at 440. Note the similarity between the enumerated purposes and the legislative intent section of a statute.
42. Id. at 439. See note 37 supra. See also, Kohler v. Dumke, 13 Wis. 2d 211, 108 N.W.2d 581 (1961), and notes 32 & 33 supra. A literal interpretation of the second of these enumerated purposes suggests that it is the duty of the court to compute the diminished damages (the total damages multiplied by the percentage of fault attributable to the adverse party) and this interpretation was given effect in the recent case of Acevedo v. Acosta, 296 So. 2d 526 (Fla. 3d Dist. 1974). However, the remainder of the opinion, including the portions quoted in the text of this article, clearly indicate that it is the duty of the jury to compute the diminished damages, and that the court is required only to effect the set-off if necessary. See notes 34-37 and accompanying text.
43. As the court pointed out, the status of last clear chance under the comparative negligence rule has been previously determined. Loftin v. Nolan, 86 So. 2d 161 (Fla. 1956); Martin v. Sussman, 82 So. 2d 597 (Fla. 1955) (both holding that there is no place for the last clear chance doctrine under a comparative negligence rule). Contra, Lowell v. Sandersonville R.R., 72 Ga. App. 692, 34 S.E.2d 644 (1945). The court expressly refused to consider the status of assumption of risk and the prohibition against contribution among joint tortfeasors vis-à-vis the comparative negligence rule. 280 So. 2d at 439. The court also failed to mention the particularly knotty issue of whether an insurance carrier may take advantage of the set-off. See section III, B, 2 infra.
44. The court set out five categories of cases in stating how the courts were to implement the *Hoffman* rule. It is to be applied in four of the categories: (1) to those cases in which comparative negligence had already been applied; (2) to cases commenced, but still in the pre-trial stage; (3) to those cases on appeal wherein comparative negligence had been made an issue on appeal; and (4) to all cases commenced after the *Hoffman* decision had become final (July 10, 1973). As to the last category—with regard to *cases* where trial had already begun or wherein a verdict or judgment had already been rendered—the comparative negligence rule was not to be applied, with the exception of those *cases* wherein the comparative negligence rule was properly raised sometime during litigation. The question of what would “properly raise” comparative negligence has already been adjudicated in Thornton v. Elliot, 288 So. 2d 254 (Fla. 1974), quashing 267 So. 2d 56 (Fla. 4th Dist. 1973); Orfaly v. Jeffries, 290 So. 2d 575 (Fla. 3d Dist. 1974); Butler v. Woolco Dep't Store, 284 So. 2d 434
gence doctrine in Florida. However, as will be shown, the above represents only the "tip of the iceberg," and it is the submerged portion which has the greatest potential for mischief.

II. FLORIDA AND FOREIGN PRECEDENT

A. Florida Law: Railroad and Hazardous Occupations Statutes

1. IN GENERAL

In the Hoffman opinion, the supreme court referred to an "earlier railroad statute," under which it was said there existed a body of case law concerning comparative negligence, which should be applicable to the "newly adopted" comparative negligence doctrine. Florida also has a Hazardous Occupations Statute using comparative negligence, but which the court did not cite as authority, probably because of the dearth of cases arising thereunder. Even under the railroad statute, most of the cases involved crossing accidents and provide no precedent for the troublesome issues raised by the Hoffman decision. In fact, most merely reiterate the basic comparative negligence rule as stated in the railroad statute. However, there are a few interesting cases which deserve some attention.

The railroad statute was first enacted in 1887 and was eventually codified in the Florida Statutes (1941) as section 768.06. It provides that where an individual is injured in an accident involving a railroad, and both the plaintiff and the railroad, or one of its servants, are causally negligent, then the plaintiff may recover diminished damages according to the comparative negligence doctrine. The statute remained in effect until 1965 when it was declared to be an unconstitutional denial of equal protection to railroads. Although there has been argument to the contrary, the statute has been held to have instituted a "pure form"

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(A.Fla. 3d Dist. 1973). In Thornton v. Elliott, the trial court, without objection from either counsel, charged the jury on the prohibition against comparative negligence. During its deliberations the jury returned to the courtroom and asked the judge what was to happen if one party were to be found more negligent than the other. The judge merely repeated his charge on the prohibition of the use of comparative negligence. Thus, according to the supreme court, it was sufficient that the jury had "properly raised" the comparative negligence rule to trigger the application of Hoffman.

45. 280 So. 2d at 439.


47. Fla. Laws 1887, ch. 3744.

48. Fla. Laws 1927, ch. 7052. The statute also provides that any injury sustained by one who consents thereto (assumes the risk) may not be compensated under the statute.

comparative negligence rule, and for that reason, the supreme court suggested reliance on the railroad statute cases as precedent in applying \textit{Hoffman}. Although these cases do not solve the more troublesome problems, the following discussion will indicate their value in certain areas.

2. \textbf{LAST CLEAR CHANCE}

There is no doubt as to the status of the last clear chance doctrine under comparative negligence. In \textit{Martin v. Sussman} and again in \textit{Loftin v. Nolan}, the Supreme Court of Florida held that there is no justification for the last clear chance rule under comparative negligence. The court also clearly reasserted this position in \textit{Hoffman}.

3. \textbf{SOLE PROXIMATE CAUSE}

There are several cases dealing with the type of negligence which must be apportioned under the rule and with the question of sole proximate cause. In \textit{Florida Central & Pacific Railroad v. Williams}, a trial judge's failure to instruct the jury that, when apportioning damages under the railroad statute, it should not take into account any negligence of either party which did not proximately contribute to the accident, was held to be reversible error. Therefore, non-causal negligence should not be apportioned under the \textit{Hoffman} rule.

It is clear that when the plaintiff's own conduct is the sole proximate cause of his injury, he is barred from any recovery. However, what constitutes sole proximate cause has been questioned, and at times it seems that conduct amounting to assumption of risk (which is a complete bar to recovery under the railroad statute) or even gross, willfull, or

51. 82 So. 2d 597 (Fla. 1955). See note 43 \textit{supra}.
52. 86 So. 2d 161 (Fla. 1956). See note 43 \textit{supra}.
53. 280 So. 2d at 438.
54. 37 Fla. 406, 20 So. 558 (1896). The proximate cause question, by itself, has caused confusion. In \textit{Stringfellow v. Atlantic Coast Line R.R.}, 64 F.2d 173 (5th Cir. 1933), a man and his minor son were killed in a railroad crossing accident. The trial court directed the verdict for the railroad on the ground that the father's negligence was the sole proximate cause of the accident. The United States Court of Appeals for the Fifth Circuit affirmed with regard to the father, but reversed on the son's claim. The majority held that since the father's negligence cannot be imputed to the son, a jury could find that as to the son, the railroad contributed to the accident, even though the father's claim was barred. The lone dissenter, needless to say, found the majority's holding to be logically indefensible, in that the majority found the railroad not negligent as a matter of law as to the father, but at the same time it held that a jury could find the railroad negligent as to the son. The United States Supreme Court agreed and subsequently reversed. \textit{Stringfellow v. Atlantic Coast Line R.R.}, 290 U.S. 322 (1933). On remand the Fifth Circuit held that the father's negligence was not the sole proximate cause of the accident.
55. See \textit{Martin v. Makris}, 101 So. 2d 172 (Fla. 3d Dist. 1958) (holding that, on the facts, the jury had the duty to assign a ratio of negligence to the parties).
56. See note 32 \textit{supra}.}
wanton misconduct,\textsuperscript{57} has unfortunately been labeled sole proximate cause. One case\textsuperscript{68} held that the plaintiff's negligence was "so great" that under the circumstances it constituted the sole proximate cause of the accident. Another case\textsuperscript{69} held that where the plaintiff's conduct indicated recklessness, heedlessness or a lack of prudence amounting to a positive disregard of danger, it constituted the sole proximate cause of the accident. (No mention was made of assumption of risk.)\textsuperscript{60} Finally, several cases have impliedly reached the same conclusion by stating that there must be some "appreciable" negligence on behalf of the defendant-railroad before comparative negligence is applicable.\textsuperscript{61} Therefore, in light of the language contained in these cases, the defense of "sole proximate cause" should be regarded with caution and where a party's conduct amounts to assumption of risk, it should be labeled as such.

4. NEGLIGENCE PER SE

The effect of the negligence per se rule on the comparative negligence doctrine was the subject of at least two cases. In \textit{Kirkpatrick v. Atlantic Coast Line Railroad},\textsuperscript{62} the trial court instructed the jury that the plaintiff was negligent as a matter of law, but that it should determine whether or not the railroad was also negligent. If the jury found the railroad negligent, it was then to apportion the negligence of the parties. The plaintiff objected to this peremptory charge on the ground that under the statute, the question of negligence had to go to the jury. The court, relying on an earlier case,\textsuperscript{63} held that there was no error and that the trial court could take the question of the negligence of either or both parties from the jury, notwithstanding the comparative negligence statute.

5. IMPUTED NEGLIGENCE

There is a long line of cases holding that the comparative negligence doctrine has no effect on Florida law which generally refuses to impute negligence from one party to another except in master-servant cases and a few other instances.\textsuperscript{64} However, if the negligence of the driver of an automobile is found to be the sole proximate cause of the accident, his

\textsuperscript{57} See Florida E.C.R.R. v. Townsend, 104 Fla. 362, 140 So. 196, \textit{modified on other grounds}, 104 Fla. 362, 143 So. 445 (1932) (by implication).
\textsuperscript{58} Lowry v. Seaboard Airline R.R., 171 F.2d 625 (5th Cir. 1948).
\textsuperscript{59} Louisville & N.R.R. v. Padgett, 71 Fla. 90, 70 So. 998 (1916).
\textsuperscript{60} See note 48 \textit{supra}.
\textsuperscript{61} See, e.g., Florida E.C.R.R. v. Townsend, 104 Fla. 362, 140 So. 196, \textit{modified on other grounds}, 104 Fla. 362, 143 So. 444 (1932).
\textsuperscript{62} 259 F.2d 409 (5th Cir. 1958).
\textsuperscript{63} Van Allen v. Atlantic Coast Line R.R., 109 F.2d 780 (5th Cir. 1940).
\textsuperscript{64} Kirch v. Atlantic Coast Line R.R., 38 F.2d 963 (5th Cir. 1930); Avecedo v. Acosta, 296 So. 2d 526 (Fla. 3d Dist. 1974); Covington v. Seaboard Air Line Ry., 99 Fla. 1102, 128, So. 426 (1930); Tampa Elec. Co. v. Bazemore, 85 Fla. 164, 96 So. 297 (1923); Atlantic Coast Line R.R. v. Crosby, 53 Fla. 400, 43 So. 318 (1907).
passenger is barred from recovery. This is not because the driver's negligence will be imputed to his passenger, but because the defendant is simply free from fault.65

6. PLEADING

In Atlantic Coast Line Railroad v. Britton,66 the court held that under the railroad statute, contributory negligence is an affirmative defense which should be pleaded and proved by the defendant, even though it only went to reduce recovery rather than to bar it. However in Britton and in several other cases, Florida courts have stated that a defendant's failure to plead contributory negligence affirmatively did not prevent the defendant from proving contributory negligence at trial, at least where some type of affirmative defense was alleged.67

7. REMITTITUR

The role of the trial judge as overseer of the apportionment process is reflected by several cases concerning remittitur. In light of these cases and of the broad grant of discretion to trial judges concerning the mechanics of apportionment in Hoffman,68 it seems certain that the way has been cleared for judicial use of the remittitur device to insure jury accuracy in following comparative negligence instructions. Although the cases are sometimes unclear as to the ground upon which a remittitur was ordered,69 on repeated occasions trial and appellate courts have ordered remittiturs when it was demonstrated that the jury either failed to apportion negligence at all, or did so incorrectly.70 Particularly where special verdicts are used, impropriety will be readily apparent to the courts.

There are at least two cases71 which demonstrate the use of a double remittitur, where both the trial and appellate courts have ordered remittiturs. In Florida East Coast Railroad v. Buckles,72 the jury awarded the plaintiff $10,000 in damages. The trial court ordered a $6,500 remittitur and the defendant appealed. The Supreme Court of Florida ordered an.

66. 109 Fla. 155, 192 So. 621 (1940); accord, Warfield v. Hepburn, 62 Fla. 49, 57 So. 618 (1912).
68. See notes 38-41 supra and accompanying text.
69. See, e.g., Seaboard Air Line Ry. v. Watson, 94 Fla. 571, 113 So. 716 (1927).
70. Martin v. Rivers, 72 So. 2d 789 (Fla. 1954) (jury verdict of $26,500; remittitur ordered for $16,250); Atlantic Coast Line R.R. v. Terry, 101 Fla. 515, 134 So. 505 (1931) (remittitur of excess over $5,000); Atlantic Coast Line R.R. v. Watkins, 97 Fla. 350, 121 So. 95 (1929) (jury verdict of $10,000; remittitur order for $5,000 because the plaintiff's negligence was "vastly greater" than that of the defendant).
72. 85 Fla. 416, 96 So. 397 (1923).
other remittitur of $2,000, leaving the plaintiff with $1,500, because of the plaintiff's "great comparative fault." In general, the Florida courts rarely hesitate to order a remittitur when warranted, and should not hesitate to do so under comparative negligence.

B. Value of Foreign Precedent

1. IN GENERAL

From the brief review of existing Florida law concerning comparative negligence it is evident that it is insufficient to meet the requirements of Florida attorneys and judges. Therefore, the trial bar and the judiciary must look to other jurisdictions for guidance. The experiences and case decisions of other jurisdictions are helpful, but they are also no panacea. Furthermore, because of the diverse forms of comparative negligence, the law established in many of these jurisdictions is entirely inapplicable in Florida.

An in depth study of all the law provided by state and federal comparative negligence forms is beyond the scope of this article. However, a brief survey of the law of a few jurisdictions is offered in order to demonstrate the values and deficiencies of foreign precedent.

2. FEDERAL COMPARATIVE NEGLIGENCE STATUTES

The federal government has adopted the comparative negligence rule in several statutes, although all are of limited application. These comparative negligence rules are of the pure form variety and are, therefore, of special value in Florida. However, because of their restricted nature, they must be considered with caution.

The Federal Employers Liability Act (F.E.L.A.) is a pure form comparative negligence statute which governs actions brought by railroad employees against their employers who are engaged in interstate commerce. In view of the multitude of cases decided thereunder, the statute should be a valuable source of precedent. Its value, however, is limited. For instance, if both the railroad and its employee are causally negligent and both sustain damages, the employee may recover diminished damages pursuant to the comparative negligence rule. On the other hand, if the railroad attempts to counter-claim for property damage resulting from its employee's negligence, it is barred from recovery because the contributory negligence rule is applied to it. Obviously then, F.E.L.A. cases are of no value with respect to questions of counter-claims and set-offs, which, under Hoffman, are a very vital part of the new Florida rule.

Prior to 1908, assumption of risk was a complete bar to recovery in F.E.L.A. actions. In 1908, however, the act was amended to abolish assumption of risk as a defense altogether. Therefore, only those F.E.L.A. cases decided before 1908 are of value in Florida on the question of what status should be given to the defense under the Hoffman rule. However, the very fact that the defense was abrogated might have some persuasive value to Florida law makers; but this does not necessarily follow since the F.E.L.A. purpose of protecting employees had to have been the overriding consideration in eliminating assumption of risk.

The Jones Act or Merchant Marine Act incorporates the F.E.L.A. provisions by reference. Decisions arising under this Act are, therefore, subject to the same strengths and weaknesses as those construing F.E.L.A. Although the F.E.L.A. provision abolishing assumption of risk was not incorporated into the Jones Act, it appears that the defense has not been recognized.

The Death on the High Seas Act contains a terse provision stating that recovery is reduced by contributory negligence. There are relatively few cases construing it.

3. JURISDICTIONS ADOPTING THE PURE FORM RULE

Mississippi, Rhode Island, Puerto Rico, Washington and possibly New York have pure form comparative negligence laws. Of the five, only the Mississippi law is of any material value at this juncture. The other laws are of too recent origin to have generated much case law of value to Florida.

The Mississippi statute was first enacted in 1910. There is a large body of useful case law decided thereunder, although no case has been

80. See section II, C, 6 infra.
84. See note 19 supra.
85. Miss. Code Ann. § 11-7-15 (1972). The statute contains no provision for special verdicts, and the jury is given a free hand to apportion thereunder with a minimum of judicial guidance.
86. Miss. Laws 1910, ch. 135. This statute, dealing with personal injuries only, was amended in 1920 to include property damages. Miss. Laws 1920, ch. 312.
87. See, e.g., (1) Ideal Cement Co. v. Killingsworth, 198 So. 2d 248 (1967) (remititur); (2) White v. Mississippi P. & L. Co., 196 So. 2d 343 (Miss. 1967) (issue of plaintiff's contributory negligence should rarely be taken from jury); (3) Herrington v. Hodges, 249 Miss. 131, 161 So. 2d 194 (1964) (pleading); (4) Layton v. Cook, 248 Miss. 690, 160 So. 2d 685 (1964); Vaughan v. Bullis, 221 Miss. 589, 73 So. 2d 160 (1954) (where defendant is negligent as a matter of law, the jury may still find the plaintiff negligent as well and apportion damages); (5) Ginn v. Culpepper, 243 Miss. 55, 137 So. 2d 179 (1962) (where defendant's insurer paid the plaintiff and obtained a release, the court granted defendant awards on his
found concerning the troublesome set-off problem for which it was noted above that F.E.L.A. was also of no help. The statute has been the subject of substantial commentary but part of this is only because, being of a pure form, it has been considered a curious deviation from the ordinary comparative negligence law. It seems Mississippi has little to offer in the area of precedent for multiple party comparative negligence litigation and, thus, is of only minimal value in a second troublesome area.

4. JURISDICTIONS ADOPTING THE NON-PURE RULES

Of the twenty-three jurisdictions having non-pure forms of comparative negligence (of which there are twenty jurisdictions having the modified-form rule) Wisconsin's statute, and the case law decided thereunder, is perhaps the most valuable single source of precedent for the Florida trial bar and judges.

The Wisconsin statute has drawn considerable commentary and, like the F.E.L.A., there is a multitude of cases decided thereunder, many of which are of great import. Wisconsin has long been recognized as the leading comparative negligence jurisdiction. Its controversial special verdict system has undergone rigorous judicial and non-judicial analysis, and the state has long recognized contribution among joint tortfeasors.

The history of the Wisconsin statute has been discussed elsewhere. However, a few interesting aspects thereof are appropriate for consideration here. The statute, as originally enacted in 1931, was of the modified-49% form. Although much of the criticism directed towards it concerned counterclaim on grounds that both parties were negligent; (6) Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947) (defense of assumption of risk is a bar to recovery under the comparative negligence statute); (7) Mississippi P. & L Co. v. Whitescarvers, 68 F.2d 928 (5th Cir. 1934) (Mississippi's comparative negligence statute is substantive); (8) Mobile & O.R.R. v. Campbell, 114 Miss. 803, 75 So. 554 (1917) (plaintiff may recover all damages where liability arose from breach of safety statute under which contributory negligence was not a defense); (9) Yazoo & M.V.R.R. v. Williams, 114 Miss. 236, 74 So. 835 (1917); Yazoo & M.V.R.R. v. Carroll, 103 Miss. 830, 60 So. 1013 (1912) (a plaintiff guilty of even gross negligence is not barred as long as the defendant was negligent, but the court will closely scrutinize these cases and order remittitur if warranted); (10) Natchez & S.R.R. v. Crawford, 99 Miss. 697, 55 So. 596 (1911) (upholding the constitutionality of the Mississippi comparative negligence statute).


89. See notes 25-27 supra.


91. See, e.g., Heft & Heft, supra note 13, §§ 1.310, 3.570; Ghiardi & Hogan, supra note 13, at 566.


93. Ellis v. Chicago & N.W. Ry., 167 Wis. 392, 167 N.W. 1048 (1918). See Heft & Heft, supra note 13, ¶ 1.310 (stating that Wisconsin is among a minority of states which have adopted contribution among joint tortfeasors by judicial decision).

94. See notes 19 & 26, supra.
the elaborate and cumbersome special verdict system which it spawned,95 Dean Prosser96 and even the Supreme Court of Wisconsin began to criticize the form of comparative negligence chosen by the Wisconsin legislature. In Spath v. Sereda,97 Lawyer v. Park Falls,98 and Vincent v. Pabst Brewing Co.,99 the highest Wisconsin court expressed its distaste for the modified and preference for the pure form. In Vincent, Chief Justice Hallows declared that he favored the judicial adoption of the pure form.100 Apparently in deference thereto, the Wisconsin legislature amended the statute and adopted the modified-50% form shortly thereafter.101 The Wisconsin experience, therefore, would seem to be that of a judiciary, required by its legislature to administer a modified form of comparative negligence, but desirous of instituting the pure form rule.102

The Wisconsin law and practice, though of great value generally, is of little value with respect to some of the more difficult problems likely to arise in Florida. Prior to the 1971 amendment of the comparative negligence statute, there was little or no opportunity for a set-off to result in Wisconsin (or the problems accompanying it), for the 49% form permitted only the party whose fault was not as great as that of his adversary to recover. Therefore, the pre-1971 case law is of no benefit to Florida in that area. Furthermore, most multi-party litigation arising out of Wisconsin has dealt with the issue of whether the plaintiff's negligence should be compared to the negligence of each defendant individually (thus reducing his chances of recovery), or to all of the defendants as a unit.103 However, as discussed in section III, A, 4, d (2) (a) infra, Wisconsin has a pure form of comparative negligence applied to contribution among tortfeasors, and thus could lend guidance to Florida in the event this state adopts a similar plan for settlement among multiple parties.

Ostensibly the 1971 amendment will give rise to potential set-offs

95. See, e.g., Schwartz, supra note 13, at 131-35. See section III, A, 5 infra.
96. Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 494 (1953). In this article, Dean Prosser states:
    It appears impossible to justify the [Wisconsin modified form] rule on any basis except one of pure political compromise. It is difficult to be happy about the Wisconsin cases, or to escape the conclusion that at the cost of many appeals they have succeeded merely in denying apportionment in many cases where it should have been made.
97. 35 Wis. 2d 308, 151 N.W.2d 68 (1967).
98. 41 Wis. 2d 448, 164 N.W.2d 246 (1969).
99. 47 Wis. 2d 120, 177 N.W.2d 513 (1970).
100. Id. at 131 (dissent). See Flynn, Comparative Negligence: The Debate, 8 Trial 49, 51 (1972).
101. See note 19 supra.
102. Interestingly enough, Wisconsin has always implemented the pure-form rule in contribution cases. See Her & Her, supra note 13, § 1.40, at 13.
103. Assuming that plaintiff, P, is 40% negligent, one defendant, D1, is 30% negligent and the other defendant, D2, is 30% negligent, if plaintiff's negligence is compared to each defendant individually, then under the modified form he may not recover against either of them. However, if the negligence of the defendants is taken as a unit, then plaintiff may recover 60% of his damages.
and helpful multi-party decisions. Therefore, Wisconsin should become a more valuable source of precedent in the future.

C. Effect of Comparative Negligence on Existing Florida Law

1. IN GENERAL

This section offers a brief survey of several areas of Florida law which may affect the comparative negligence rule, or which may be affected by it. A few legal rules and principles will be examined in order to predict their potential interaction with the new apportionment process.

Among the areas to be considered is the status of contributory negligence under existing Florida law, which will be examined in several contexts in order to determine in which instances the defense is and is not available. In those cases to which the defense applies, the effect of the comparative negligence rule will be discussed. One general rule must be kept in mind throughout the discussion of defenses. Whenever conduct amounting to contributory negligence was a complete defense in a civil action prior to the adoption of comparative negligence, the same conduct will continue to be a defense under the comparative negligence doctrine. However, instead of barring recovery, contributory negligence will operate to reduce it pursuant to the apportionment process.

The controversial defense of assumption of risk will also be examined and will be compared with contributory negligence in order to determine whether assumption of risk should be retained intact as a complete bar to recovery, or subjected to the comparative negligence rule, or abolished altogether. Finally, the little understood seat-belt defense will be re-examined in light of the comparative negligence rule.

2. LAST CLEAR CHANCE

The first area to be definitely affected by comparative negligence is the doctrine of last clear chance. The last clear chance rule is now inapplicable in any action to which comparative negligence applies.

3. IMPUTED NEGLIGENCE

The comparative negligence rule will probably have little or no effect on the principles governing imputed negligence in Florida. There appears to be no reason why the apportionment scheme should affect the threshold question of whether the law will charge one with the negligence of another. However, problems may arise concerning the significance

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104. Since all parties may recover if all are found to be equally at fault, set-off seems to be the logical method of “settling up” after trial, unless the Wisconsin courts prohibit its use. See section III, A infra.
105. Schwartz, supra note 13, at 128-29.
106. See notes 43 & 51-53 supra and accompanying text.
107. See section II, A, 5 supra.
of imputed negligence. For instance, when one lends his automobile to another and the borrower negligently strikes a third person therewith, the negligence of the driver is imputed to the owner under Florida's dangerous instrumentality doctrine. 108 How then is the "imputed negligence" to be characterized and apportioned by the jury? This type of "negligence" is definitely not of the same character or degree as that of the driver and it may not even be causal in the technical sense. 109 Even so, it is the public policy of Florida to hold the owner as well as the driver accountable for the injury. Faced with this problem, the court might instruct the jury to apportion "culpability" rather than causal fault, or it could define and explain the public policy involved and leave the entire matter to the jury. Perhaps the most expeditious solution would be to leave the matter to the jury. 110 On the other hand, if the owner negligently entrusts his vehicle to the driver then his negligence can easily be apportioned along with that of the driver and of the injured third party.

The effect of imputed negligence must certainly be reconsidered if Florida adopts contribution among joint tortfeasors. This matter is discussed in section III, A, 4, d of this article.

4. NEGLIGENCE PER SE

Under existing Florida law, if a plaintiff is found to have violated one of a certain class of statutes, or if the question of his negligence is taken from the jury, he is considered to be negligent as a matter of law. Assuming that his conduct causally contributed to his injury, he would have been barred from recovery under the contributory negligence rule. However, under the comparative negligence doctrine there is no reason why negligence per se should not be subjected to the apportionment process.

The case law arising under Florida's comparative negligence railroad statute provides some guidance for combining the negligence per se rule with the comparative negligence doctrine. 111 If, in a two-party action, the defendant is found to be negligent per se, the action should proceed as any other action under the apportionment rule. If the plaintiff is negligent as a matter of law, however, the jury should be instructed that it must first determine whether or not the defendant is negligent as well. Then if the jury finds that the defendant is also causally negligent, it should apportion the negligence of both parties in the usual manner. 112 The court should retain the authority under the comparative

108. Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920).
109. If the owner's negligence is not causal, it is difficult to see how it can be subjected to the Hoffman rule at all. See notes 32, 54 & 55 supra and accompanying text. See also Schwartz, supra note 13, at 128-31.
111. See section II, A, 4 supra.
112. Kirkpatrick v. Atlantic Coast Line R.R., 259 F.2d 409 (5th Cir. 1958); Cline v. Powell, 141 Fla. 119, 192 So. 628 (1939) (by implication); Winfield v. Magee, 232 Miss. 37, 98 So. 2d 130 (1957).
negligence rule to take the question of the negligence of either or both parties from the jury.\textsuperscript{113}

The question remains, however, whether or not a plaintiff's contributory negligence is a defense at all to conduct amounting to negligence per se, for if it is not, there may be no need for instituting the apportionment rule.\textsuperscript{114} In the recent case of \textit{de Jesus v. Seaboard Coast Line Railroad},\textsuperscript{115} the Supreme Court of Florida set out, in hornbook fashion, the law concerning defenses to conduct amounting to negligence per se. Three categories of statutes and ordinances were considered. The first were the strict liability statutes, which are enacted for the purpose of establishing a strict duty of care towards a class of persons who are deemed to be unable to protect themselves, such as a statute prohibiting the sale of firearms to minors. Violation of a statute falling within this category was held to be negligence per se and contributory negligence was held not to constitute a defense thereto.\textsuperscript{116} Second was a category of laws, usually penal in nature, which impose a duty upon someone to protect a particular class of persons from a particular injury, such as a railroad safety statute,\textsuperscript{117} or a seed labeling statute\textsuperscript{118} or a non-traffic city ordinance.\textsuperscript{119} Violation of a law falling within this category was held to be negligence per se, but contributory negligence was held to constitute a defense thereto.\textsuperscript{120} The third category was said to consist of any other statute or ordinance (such as traffic ordinances). Violations of a traffic ordinance were held to be only prima facie evidence of negligence,\textsuperscript{121} and would definitely be subject to comparative negligence apportionment.

The second and third categories of statutes present no particular problem for the bench and bar with respect to the comparative negligence rule. However violation of the strict liability type of statute creates a problem. Should the plaintiff's contributory negligence become a limited defense to negligence per se resulting from the violation of this type of statute in view of the comparative negligence rule, or should it remain no defense at all? Wisconsin subjects the plaintiff's contributory negligence to the apportionment rule in this kind of case.\textsuperscript{122} It may be that the proper body to consider this public policy question is the state legislature which enacts the negligence per se rules.

\begin{thebibliography}{99}
\bibitem{}113. Van Allen v. Atlantic Coast Line R.R., 109 F.2d 780 (5th Cir. 1940).
\bibitem{}114. Now that contributory negligence no longer operates to bar recovery altogether, perhaps there is no need to continue to proscribe the rule in these cases.
\bibitem{}115. 281 So. 2d 198 (Fla. 1973), rev'g 266 So. 2d 108 (Fla. 2d Dist. 1972), noted in 28 U. MIAMI L. REV. 719 (1974).
\bibitem{}116. 281 So. 2d at 200-01; Tamiami Gun Shop v. Klein, 116 So. 2d 421 (Fla. 1959).
\bibitem{}117. 281 So. 2d at 200.
\bibitem{}118. Hoskins v. Jackson Grain Co., 63 So. 2d 514 (Fla. 1953).
\bibitem{}119. Richardson v. Fountain, 154 So. 2d 709, 711 (Fla. 2d Dist. 1963).
\bibitem{}120. 281 So. 2d at 200; Richardson v. Fountain, 154 So. 2d 709, 711 (Fla. 2d Dist. 1963).
\bibitem{}121. 281 So. 2d at 201.
\end{thebibliography}
5. STATUS OF CONTRIBUTORY NEGLIGENCE AS A DEFENSE

The availability of contributory negligence (and like defenses) as a defense to tort liability will not, in most cases, be altered by the adoption of the comparative negligence doctrine. Only the effect of contributory negligence will change. That is to say, whenever contributory negligence barred a plaintiff’s recovery before the adoption of comparative negligence, it will remain a defense under the doctrine, except that the recovery will be diminished rather than barred. Therefore, as in the case of the negligence per se rule, it is necessary to answer two questions: (1) to which actions is contributory negligence not a defense (this question is necessary because even in those cases where contributory negligence was not a defense, it may now be desirable to make it a defense); and (2) in those actions where contributory negligence is a defense, how will it be apportioned under the Hoffman rule? With these questions in mind, several areas of tort law will be surveyed in order to provide a representative sampling of the effect of comparative negligence on existing Florida law.

a. Gross Negligence and Willful, Wanton Conduct

There are at least three degrees of negligence recognized in Florida: ordinary negligence, gross negligence and willful, wanton misconduct.124

It is settled in Florida that contributory negligence is a defense to gross negligence, but that it is not a defense to willful, wanton misconduct. This general rule as stated seems simple enough. However the Florida courts have experienced considerable difficulty distinguishing among degrees of negligence, aided and abetted by their own careless use of terminology. Therefore, there arises the problem of distinguishing between gross negligence and willful, wanton misconduct.

In all probability, part of the reason for the creation of the degrees of negligence was to effectuate Florida’s guest statute, which has been

123. See section II, C, 4 supra.
124. Carraway v. Revell, 116 So. 2d 16 (Fla. 1959). Willful, wanton misconduct, in a civil action, is defined to be the same type of willful, wanton misconduct required to sustain a recovery for punitive damages or to sustain a conviction for manslaughter by culpable negligence. Id.; National Car Rental Sys., Inc. v. Holland, 269 So. 2d 407 (Fla. 4th Dist. 1972); Fla. Std. Jury Instr. (Civil) 3.5 d and comment. Gross negligence is defined to be an act or omission “that a reasonably careful person would know probably and most likely result in an injury or damage to other persons or to property.” Fla. Std. Jury Instr. (Civil) 4.2.
125. Johnson v. Rinesmith, 238 So. 2d 659 (Fla. 2d Dist. 1969).
126. Florida Ry. v. Dorsey, 59 Fla. 260, 52 So. 963 (1910); Florida S.R.R. v. Hirst, 30 Fla. 1, 11 So. 506, 613 (1892); Johnson v. Rinesmith, 238 So. 2d 659 (Fla. 2d Dist. 1969); Glaab v. Caudill, 236 So. 2d 180 (Fla. 2d Dist. 1969).
127. Carraway v. Revell, 116 So. 2d 16 (Fla. 1959); Johnson v. Rinesmith, 238 So. 2d 659 (Fla. 2d Dist. 1969); Glaab v. Caudill, 236 So. 2d 180 (Fla. 2d Dist. 1969).
128. Carraway v. Revell, 116 So. 2d 16, 21 (Fla. 1959). See 280 So. 2d at 437 (wherein the court fails to distinguish between gross negligence and willful, wanton misconduct).
repealed. Furthermore, the Hoffman court characterized the "gross, willful, and wanton negligence doctrine" along with the last clear chance doctrine as efforts to ameliorate the harshness of contributory negligence. Therefore, it is submitted that this artificial and confusing body of law is no longer needed. A plaintiff's contributory negligence should be subjected to the apportionment rule regardless of whether the defendant's conduct is labeled ordinary negligence, gross negligence or willful, wanton misconduct. If this course of action is followed, the comparative negligence rule will operate (in this instance) to simplify Florida law rather than to complicate it.

b. Warranty Liability

An in depth examination of the status of contributory negligence as a defense to warranty liability is beyond the scope of this article. An outline of the problems involved in this confused area of the law is offered however, because of the dearth of case law in Florida on the subject.

The source of much of the confusion surrounding this area is terminology. Legal scholars have never agreed on whether a warranty action is ex contractu or ex delicto in nature. Furthermore, various courts hold contributory negligence, assumption of risk, misuse, and lack of causation to be defenses to warranty liability. The cases, reflecting in part the confusion surrounding terminology, support almost every imaginable proposition. Some courts hold that contributory negligence is a defense to warranty liability, whereas other courts refuse to consider contributory negligence at all. Almost all courts recognize assumption of risk to be a valid defense, although some courts disapprove of the label.

131. 280 So. 2d at 437.
132. This is the Wisconsin solution. See Bielski v. Schulze, 16 Wis. 2d 1, 17, 114 N.W.2d 105, 112-13 (1962). See note 127 supra.
133. See 2 FRUMER & FRIEDMAN, PRODUCTS LIABILITY §§ 16.01[3], 19.08[1] (1973); Epstein, Products Liability: Defenses Based on Plaintiffs' Conduct, 1968 Utah L. Rev. 267; Noel, Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk, 25 VAND. L. REV. 93 (1972); Annot., 4 A.L.R.3d 501 (1965). Warranty liability and strict liability in tort involve similar problems and require similar analysis. Therefore, benefit may be obtained from an examination of cases concerning strict liability, and a comparison of those cases with the cases in this section. See section II, C, 5, c infra.
Misuse is also recognized by every court. However the term “misuse” has been subject to differing interpretations. It is often stated that misuse goes to proximate causation, so that when the consumer misuses the product, the cause of the accident is his conduct rather than the defect. Misuse also tends to negate the existence of a warranty in that the warranty is only intended to extend to normal usage of the product. Finally, misuse can be considered to be a synonym for contributory negligence or assumption of risk. The Uniform Commercial Code appears to consider misuse, contributory negligence and assumption of risk to be defenses to warranty liability, although it emphasizes the aspect of causation.

Despite the use of different labels, a majority of the cases are consistent in that, the conduct which has been held to constitute a defense is similar. Therefore the confusion surrounding defenses to warranty liability could very well be a mere problem of semantics.

As previously stated, there is a dearth of case law in Florida concerning defenses to an action for breach of warranty. In Coleman v. American Universal, Inc., the District Court of Appeal, First District, passed directly on the question at hand. However, it did so in such a manner as to create even more confusion. In Coleman, an action for breach of an implied warranty was brought by the lessee of a defective scaffold against the lessor, to which the lessor pleaded contributory negligence and assumption of risk. The lessee appealed from an adverse judgment, charging as error the court’s instruction on contributory negligence. The First District indicated that the various state courts and the text writers were split on the question of whether contributory negligence is a defense to warranty liability. Then it held that:

In this legal situation, with the authorities fairly evenly divided, we are inclined to the view that contributory negligence is available as a defense in an action for breach of implied warranty, even though it may superficially look as though we are thereby approving a tortious defense in an action ex contractu.

141. U.C.C. § 2-316(3)(b).
142. See note 141 supra.
143. See 2 FRIEMER & FRIEDMAN, PRODUCTS LIABILITY § 16:01(3) (1973).
144. In Power Ski, Inc. v. Allied Chem. Corp., 188 So. 2d 13 (Fla. 3d Dist. 1966), the court, in dicta, stated that “a manufacturer should not be liable for a product which fails because it was improperly compounded, mishandled or misused.” Id. at 14.
145. 264 So. 2d 451 (Fla. 1st Dist. 1972).
146. Id. at 454.
After quoting at length from one text, the court stated that although the trial court’s instruction ostensibly pertained to contributory negligence, it was, in essence, a charge on misuse, or a charge characterizing the plaintiff’s conduct as the sole proximate cause of his injuries. It appears as though this statement materially contributes to the confusion over terminology and will hinder the prospective application of the Coleman case. Therefore, Coleman represents a rough guide to the potential status of contributory negligence (or misuse) in warranty actions.

It is submitted that regardless of the label employed, conduct amounting to contributory negligence or misuse should be subject to the apportionment process in all warranty actions. Conduct amounting to assumption of risk should, however, remain as a bar to recovery in the proper cases, if Florida chooses to retain the doctrine as advocated elsewhere in this article.

c. Strict Liability in Tort

(1) Precedent with Respect to Strict Liability

The same confusion concerning terminology and policy which plagues warranty actions also pervades strict liability actions. Fortunately, however, there is a body of case law in Florida which may provide some guidance to the status of contributory negligence in strict liability actions.

Strict liability imposed by statute is exemplified by Florida’s “dog bite statutes.” Under these statutes dog owners incur strict liability for injuries caused by their dogs, and liability is based on the owner’s obligation as an insurer rather than on negligence. Thus, ordinary contributory negligence has been held not to be a defense to this form of strict liability.

149. See notes 171-73 infra and accompanying text.
150. See section II, C, 6 infra.
153. English v. Seachord, 243 So. 2d 193 (Fla. 4th Dist. 1971), writ discharged, 259 So. 2d 136 (Fla. 1972); Knapp v. Ball, 175 So. 2d 808 (Fla. 3d Dist. 1965); Vandercar v. David, 96 So. 2d 227 (Fla. 3d Dist. 1957).
fense in one statute, and conduct amounting to assumption of risk (or sole proximate cause) has been held to be a defense under both statutes.

In a case of first impression one Florida court recently imposed strict liability on the owner of an animal in the absence of statute. In Issacs v. Powell, the District Court of Appeal, Second District, held the owner of a chimpanzee strictly liable for injuries sustained by a child while feeding it. The dog bite statute, though found to be persuasive, was held to be inapplicable, so that the court was required to extend the strict liability doctrine to non-statutory actions. With respect to potential defenses, the court held that even though liability is "absolute," the owner is not the insurer of the victim. However, "the owner ought not be relieved from such liability by slight negligence or want of ordinary care on the part of the person injured. The latter's act must be such as would establish that, with knowledge of the danger, he voluntarily brought calamity upon himself."

Finally there is strict products liability pursuant to section 402A of the Restatement (Second) of Torts. Although Florida courts have long refused to adopt the strict liability theory in products cases, it is likely that they may soon join the majority of jurisdictions which recognize the doctrine. In fact, section 402A has been applied by the District Court of Appeal, First District, in a recent products liability case. Nevertheless, it is necessary to look to other jurisdictions to determine whether or not defenses to section 402A have been recognized. Comment n to section 402A states:

Since the liability with which this Section deals is not based upon the negligence of the seller, but is strict liability, the rule

154. Fla. Stat. § 767.04 (1973) states in part:
no owner . . . shall be liable . . . to any person . . . when such person shall
miscievously or carelessly provoke or aggravate the dog inflicting such damage; nor shall any such owner be so liable if at the time of any such injury he had displayed in a prominent place on his premises a sign easily readable including the words "Bad Dog."
155. See Knapp v. Ball, 175 So. 2d 808 (Fla. 3d Dist. 1965). See section II, C, 6 infra.
156. English v. Seachord, 243 So. 2d 193 (Fla. 4th Dist. 1971), writ discharged, 259 So. 2d 136 (Fla. 1972).
157. 267 So. 2d 864 (Fla. 2d Dist. 1972).
158. The court cited Fla. Stat. § 767.04 (1973) which is the dog bite statute. It is wholly inapplicable to non-bite injuries. Fla. Stat. § 767.01 (1973) applies to non-bite injuries. See note 152 supra.
159. 267 So. 2d at 866-67. The court quoted Restatement (Second) of Torts § 515 (1965) stating that contributory negligence is not a defense to strict liability imposed for injuries caused by animals, except where contributory negligence amounts to a voluntary and unreasonable exposure to risk. See note 243 infra.
applied to strict liability cases (see § 524) applies. Contributory negligence on the part of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntary and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.164

Several courts have adopted comment n.165 However, other courts have not made a distinction between one’s “failure to discover or foresee dangers which the ordinary person would have discovered [and] negligent conduct after discovery of the danger in the use of the product [which] constitute[s] a defense to an action based on strict liability.”166

Assumption of risk is perhaps the most successful defense to strict liability actions.167 Misuse is also recognized as a defense,168 especially in those instances where the defect was known by the consumer to exist.169 Thus, it appears that certain defenses do exist to strict liability.

(2) Comparative Negligence and Strict Liability

Assuming that certain conduct, whatever the label, amounts to a defense to strict products liability, there remains the question of whether to apply comparative negligence. If it is to be applied, a further inquiry must be made in order to determine how,170 for the jury must be asked to compare the fault of the plaintiff with the liability absolutely incurred by the defendant.

This question was considered by the Supreme Court of Wisconsin in

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164. It should be noted that assumption of risk, as stated in Comment n, is used in its secondary sense and as such it is akin to contributory negligence. Therefore, it should be subjected to the apportionment rule. See notes 194-96 infra and accompanying text.


170. If conduct is labeled assumption of risk however, recovery may be barred altogether and, thus, the contributory negligence rule need not be implemented. See section II, C, 6 infra.
**6. ASSUMPTION OF RISK**

**a. Current Status**

The status of assumption of risk as a defense to tort liability under the comparative negligence rule was purposely left undecided by the *Hoffman* court. It will undoubtedly become a hotly debated issue and one with which Florida attorneys and judges will ultimately have to cope. The problems in determining the role of assumption of risk arise out of three areas: (1) the conflict in case law concerning the distinction between assumption of risk and contributory negligence; (2) the exact nature of the defense itself; and (3) the various policy considerations involved. Since under the contributory negligence doctrine it oftentimes made little difference what label the defense was given (because proof of either assumption of risk or contributory negligence resulted in a complete bar to the plaintiff's recovery), courts in every state have had

171. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).
172. Although the court recognized that its discussion concerning defenses was obiter dicta, it decided that an appropriate guide was necessary should the case be tried on a theory of strict liability in tort. *Id.* at 462, 155 N.W.2d at 65.
173. *Id.* at 462, 155 N.W.2d at 64-65.
174. 280 So. 2d at 439.
175. *See* Fisher & Wax, supra note 13, at 568-69.
176. *See, e.g.*, Gavel v. Girton, 183 So. 2d 10 (Fla. 2d Dist. 1966).
only mixed success in distinguishing the two defenses, even though a majority of courts seem to have tried.\textsuperscript{177}

\section*{b. Definitions}

Contributory negligence is usually defined as conduct (an act or omission) on the part of the plaintiff, or which is imputed to him, which is a contributing legal cause of his injury and which falls under the standard of care to which he is required to conform for his own protection.\textsuperscript{178} On the other hand, assumption of risk has been generally applied to cases where one has voluntarily and deliberately exposed himself to danger or a risk of injury, even though he actually knew of and appreciated the risk and had the opportunity to avoid it.\textsuperscript{179} It is already clear that contributory negligence is no longer a complete bar to recovery under comparative negligence. However, in order to determine whether or not conduct amounting to assumption of risk should be subject to apportionment of fault under the comparative negligence rule, the courts will have to take a discriminating look at the two defenses.

\section*{c. Legal Distinctions}

At first blush it appears that the two defenses are readily distinguishable and have an entirely separate field of operation.\textsuperscript{180} Even the theories underlying the two can readily be distinguished.\textsuperscript{181} Contributory negligence is based on the theory that one who causally contributes to his own injury should not be permitted to recover therefor, whereas assumption of risk is said to rest on a theory of consent and is based on the legal maxim, "volenti non fit injuria."\textsuperscript{182} The defense of contributory negligence admits, in effect, the defendant's negligence. It arises from a lack of due care on the part of the plaintiff in failing to comply with a given standard of care. There is a definite aspect of unreasonableness and therefore fault on behalf of the plaintiff.\textsuperscript{183} Furthermore the conduct involved in contributory negligence must be causally connected with the injury.\textsuperscript{184}

\begin{thebibliography}{99}
\bibitem{Annot.} Annot., 82 A.L.R.2d 1218 (1962) (containing an exhaustive review of cases attempting to distinguish between assumption of risk and contributory negligence). See Dobbs, \textit{supra} note 13, at 373-78.
\bibitem{Restatement} \textit{Restatement (Second) of Torts} § 463 (1965); \textit{Prosser, supra} note 13, § 65, at 416-17.
\bibitem{Seaboard} Seaboard Coast Line R.R. v. Magnuson, 288 So. 2d 302 (Fla. 4th Dist. 1974); Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947).
\bibitem{Byers} Byers v. Gunn, 81 So. 2d 723 (Fla. 1955).
\bibitem{Prescott v. Ralph's} Prescott v. Ralph's Grocery Co., 42 Cal. 2d 158, 265 P.2d 904 (1954); Byers v. Gunn, 81 So. 2d 723 (Fla. 1955); Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947).
\bibitem{Warner v. Markoe} Warner v. Markoe, 171 Md. 351, 189 A. 260 (1937); Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947).
\end{thebibliography}
In cases involving assumption of risk, the defendant's negligence is, in effect, denied in that the very allegation of assumption of risk denies the existence of a duty on the part of the defendant towards the plaintiff. Since the plaintiff consensually, voluntarily and knowingly chooses to place himself in a position of danger vis-à-vis the defendant, there arises no duty on the defendant's behalf to avoid injuring the plaintiff. There need not be any causal connection between the conduct amounting to assumption of risk and the injury or damage, and the plaintiff need not act in an unreasonable manner. In fact, his actions may be eminently reasonable as where the risk is outweighed by the potential benefit involved, as in the case of a professional quarterback or an Apollo astronaut.

There is another line of authority which has viewed the distinction merely as one of degree. In the courts subscribing to this viewpoint, the two defenses are sometimes said to overlap. However, the plaintiff's conduct is sometimes gross or reckless so that it approaches assumption of risk, or more significantly, the plaintiff by voluntarily incurring an unreasonable risk is negligent.

A third line of cases attempts to reconcile the other two by closely examining the nature of assumption of risk. In the leading case of *Meistrich v. Casino Arena Attractions, Inc.*, the court, after conducting a cogent analysis of the nature of risk, determined that there were two aspects or meanings of the defense. One meaning, the

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186. White v. McVicker, 216 Iowa 90, 246 N.W. 385 (1933); Dobbs, supra note 13, at 374.


188. See Dobbs, supra note 13, at 374. In White v. McVicker, 216 Iowa 90, 246 N.W. 385 (1933), the court went to great lengths to explain the concept of reasonableness in assumption of risk:

[T]oward a person fully cognizant and appreciative of a danger—a risk to which the defendant's conduct exposes him—the defendant has no duty of taking care, and therefore is not negligent.

When an action is brought on a tort, the defendant may say: "You may have been as careful as the most careful man; you may have done a thing that many prudent men do, but you have exposed yourself, with full knowledge and of your own accord, to a danger which I have brought about. You have hence shown that you agree to take your chances of this danger. I admit that this was not careless of you. But you did assume the risk."

Id. at 93, 246 N.W. at 386.


190. Byers v. Gunn, 81 So. 2d 723 (Fla. 1955) (demarcation line is difficult to define); Kaplan v. Wolff, 198 So. 2d 103 (Fla. 3d Dist.), cert. denied, 204 So. 2d 328 (Fla. 1967) (overlap); Petrone v. Margolis, 20 N.J. Super. 180, 89 A.2d 476 (App. Div. 1952) (convertible terms).


“primary meaning,” anticipates the classic assumption of risk case where the plaintiff is acting reasonably but nevertheless voluntarily and knowingly incurs a risk. An example is where a spectator or participant is struck by a stray ball at a baseball game. The primary aspect of assumption of risk operates as a denial of the defendant’s negligence in that the conduct of the plaintiff, because it is reasonable, negates any duty on behalf of the defendant. Assumption of risk in this sense is a complete bar to recovery. The other or secondary meaning of assumption of risk anticipates that the plaintiff’s conduct is unreasonable in that the ordinary reasonable man would not have incurred the particular risk in light of the potential benefit to be obtained. This secondary meaning of assumption of risk closely resembles contributory negligence and may be identical to it, as in the case where one continues to use a known dangerous instrument or remains in an automobile driven by a negligent driver. As Dean Prosser has stated:

[T]he plaintiff’s conduct in encountering a known risk may be in itself unreasonable. . . . If that is the case, his conduct is a form of contributory negligence, in which the negligence consists of making the wrong choice and voluntarily encountering a known unreasonable risk. In such cases it is clear that the defenses of assumption of risk and contributory negligence overlap . . . with a considerable area in common, where neither excludes the possibility of the other. Assumption of risk in this sense is subject to the apportionment rule.

d. Policy Considerations

Quite apart from the legal distinctions between the two defenses are the policy considerations. The disfavor in which assumption of risk is held and the new spirit of comparative negligence militate against retention of assumption of risk as a separate defense or at least as a bar to recovery. An Illinois court considered the effect of the amendment to the Federal Employers’ Liability Act (F.E.L.A.) abolishing the defense of assumption of risk, and stated that the amendment reflected a public policy decision to do away with that defense. Two Wisconsin

193. See note 188 supra and accompanying text.
195. Springrose v. Willmore, 292 Minn. 23, 192 N.W.2d 826 (1971); James, Assumption of Risk, 61 Yale L.J. 141 (1952). Assumption of risk, in its secondary sense, seems particularly suited to cases involving “implied assumption of risk” where a passenger in an automobile is held to have impliedly assumed the risk of riding with a negligent driver. Springrose v. Willmore, supra; McConville v. State Farm Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962).
196. PROSSER, supra note 13, § 68, at 440-41 (emphasis added).
197. PROSSER, supra note 13, § 68. Dobbs, supra note 13, at 373.
abolishing assumption of risk as a complete bar to recovery in Wisconsin, have done so basically as a matter of public policy. Furthermore several states through recent statutory enactments have abolished assumption of risk either as a separate defense or as a complete bar.\textsuperscript{201}

e. Other Jurisdictions

Those states which have the comparative negligence rule are in disagreement over the proper status of assumption of risk. Mississippi,\textsuperscript{202} Georgia,\textsuperscript{203} Arkansas,\textsuperscript{204} South Dakota\textsuperscript{205} and Nebraska\textsuperscript{206} have retained the defense of assumption of risk as a complete bar to recovery in tort.

In \textit{Saxton v. Rose},\textsuperscript{207} a widow brought an action against the owner of a truck in which the decedent was riding when he was killed and also against the driver who was an employee of the owner. On a record indicating that the driver-employee was a known habitual drunk and that he was drunk on the night in question, the court held that the decedent "incurred the risk" by voluntarily and knowingly submitting himself to the risk of injury and was therefore barred from any recovery. The court stated that contributory negligence is limited to cases where the plaintiff has done or omitted to do something which contributes to the legal cause of the accident, and concluded "that assumption of risk is 'venturousness' on the part of the person injured while contributory negligence is his 'carelessness'."\textsuperscript{208}

The Mississippi court probably did not consider the two aspects of assumption of risk because it is doubtful that the decedent acted reasonably in taking a ride with one whom he knew to be intoxicated. Instead, the court seemed to distinguish the defenses on the basis of deliberateness versus lack of deliberation. Furthermore, the court confused the issue by stating that the defendants "are not liable for the death of the deceased,

\textsuperscript{201} See also Parker v. Redden, 421 S.W.2d 586 (Ky. 1967); Williamson v. Smith, 83 N.M. 336, 491 P.2d 1147 (1971).

\textsuperscript{202} Bishop v. Johnson, 36 Wis. 2d 64, 152 N.W.2d 887 (1967); McConville v. State Farm Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962).

\textsuperscript{203} See also Parker v. Redden, 421 S.W.2d 586 (Ky. 1967); Williamson v. Smith, 83 N.M. 336, 491 P.2d 1147 (1971).

\textsuperscript{204} Mississippi Export R.R. v. Temple, 257 So. 2d 187 (Miss. 1972); Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947).

\textsuperscript{205} But see Watson v. Hollman, 169 Miss. 585, 153 So. 669 (1934).


\textsuperscript{208} V. Goetz, 82 S.D. 192, 143 N.W.2d 859 (1966).


Saxton, because of his own negligence in assuming the risk involved...

There is another group of states which, since adopting comparative negligence, have refused to recognize assumption of risk as a bar. Wisconsin and Minnesota by case decision,210 and several other states by statute,211 have either abolished assumption of risk altogether or have equated it with contributory negligence for purposes of the comparative negligence statute. Until 1962, Wisconsin held that assumption of risk was a complete bar to recovery in tort actions and hence not subject to its comparative negligence statute.212 Then in McConville v. State Farm Insurance Co.,213 the Wisconsin Supreme Court held that implied assumption of risk no longer would be a defense separate from contributory negligence in automobile guest cases.214 Although the court considered assumption of risk in its secondary sense (an unreasonable exposure to a known hazard), the court seemed basically interested in obviating the harsh results of the assumption of risk doctrine as a matter of public policy215 and to keep within the spirit of the comparative negligence statute.216 McConville has been extended to include the master-servant relationship,217 torts arising out of violations of safe-place statutes,218 and products liability cases.219

Minnesota has also abolished, at least in part, assumption of risk as a bar to recovery in tort. However the Supreme Court of Minnesota used

209. Id at 821, 29 So. 2d at 648 (emphasis added). Had the court considered the secondary meaning of assumption of risk, it is submitted that it would have found the decedent's conduct unreasonable and, therefore, applied the comparative negligence statute.


211. See note 201 infra.

212. See Baird v. Cornelius, 12 Wis. 2d 284, 107 N.W.2d 276 (1961); Knipfer v. Shaw, 210 Wis. 617, 246 N.W. 328 (1933).

213. 15 Wis. 2d 374, 113 N.W.2d 14 (1962).

214. Id at 378, 113 N.W.2d at 16.

215. Id at 384, 113 N.W.2d at 19.

216. Id at 384-85, 113 N.W.2d at 20.


219. Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967) (strict liability). See section II, C, 5, c infra. Another reason why the Wisconsin courts have abolished assumption of risk as a separate defense is that under its comparative negligence statute, cases would often go to the jury on a charge of assumption of risk alone instead of on both assumption of risk and contributory negligence instructions, so that the jury would not be given a chance to reject assumption of risk and choose contributory negligence. Baker v. Herman Mut. Ins. Co., 17 Wis. 2d 597, 117 N.W.2d 725 (1963). But see Cleveland v. City of Miami, 263 So. 2d 298 (Fla. 3d Dist. 1971). Another instance where assumption of risk can create havoc is where there is a two car accident and the passenger in one car sues both drivers but is found to have assumed the risk of his driver's negligence. In that situation the other driver would seem to bear the entire loss, and the passenger would recover in full. See Dobbs, supra note 13, at 378.
a somewhat different rationale. In *Springrose v. Wilmore*, a case factually similar to *McConville*, the court reversed a judgment for an automobile passenger on a finding below that the passenger had implicitly assumed the risk. The court recognized the two meanings (primary and secondary) of assumption of risk and stated that assumption of risk, in its primary sense, relates to the issue of whether the defendant had a duty towards the plaintiff at all in light of the plaintiff's assumption of risk, and that it relates to the limited duties owed to patrons of sports events. With respect to the secondary meaning the court stated that: "The doctrine of implied assumption of risk must, in our view, be recast as an aspect of contributory negligence, meaning that the plaintiff's assumption of risk must be not only voluntary but, under all the circumstances, unreasonable." Wisconsin and Minnesota are representative of the states which have abolished assumption of risk by case law and provide explanations for such action. However, several other states by statute have also recently abolished the defense while adopting the comparative negligence rule in the same statute.

f. Florida

Although Florida has had specialized comparative negligence statutes for quite some time, no case has been found dealing with assumption of risk in connection with comparative negligence. This is partially the result of the fact that the railroad statute specifically excepted assumption of risk from its apportionment provisions and the hazardous occupation statutes expressly abolished assumption of risk as a defense. The possible significance which can be gleaned from the opposing views reflected by these statutes has been discussed elsewhere. Therefore, in the absence of action by the Florida Legislature, it is necessary to look to the Florida common law in order to find potential solutions to the problem.

Even though the Florida courts have ostensibly distinguished between the defenses of assumption of risk and contributory negligence, there have been some inconsistencies. In *Byers v. Gunn*, a teenage girl

220. 292 Minn. 23, 192 N.W.2d 826 (1971).
221. Id. at 24, 192 N.W.2d at 827. The necessary implication arising from this statement is that primary assumption of risk should be a bar to recovery.
222. Id. (emphasis added).
223. See note 201 supra.
224. See notes 45-49 supra and accompanying text.
228. Id. at 569.
229. Compare Fowler v. Liquid Carbonic Corp., 121 So. 2d 49 (Fla. 1st Dist. 1960), with Martin v. Plymouth Cordage Co., 209 So. 2d 481 (Fla. 1st Dist. 1968), and Bartholf v. Baker, 71 So. 2d 480 (Fla. 1954).
230. 81 So. 2d 723 (Fla. 1955).
brought an action for personal injuries she sustained when she was jolted from the fender of a car driven by a friend. The Supreme Court of Florida upheld the trial court's refusal to give a peremptory charge on assumption of risk and contributory negligence and recognized that a distinction existed between the two defenses:

At times the line of demarcation between contributory negligence and assumption of risk is exceedingly difficult to define. A generally safe rule to follow is that the latter involves a choice made more or less deliberately and negatives liability. Contributory negligence, on the other hand, implies the failure of the plaintiff to exercise due care. Some courts have stated that assumption of risk is a mental condition of willingness, whereas contributory negligence is more a matter of conduct.\(^{281}\)

The court in *Fowler v. Liquid Carbonic Corp.*,\(^{282}\) followed the Byers decision, stating that "we recognize and cleave to the distinction between the affirmative defenses of contributory negligence and assumption of risk."\(^{283}\) The court pointed out that since the case went to the jury on both defenses, they could have decided for the defendant on either or both, but that the evidence warranted a finding of assumption of risk.\(^{284}\) Some eight years later, however, the same court stated that "[t]he doctrine of assumption of risk is only an engraftment upon the well-established law applicable to contributory negligence."\(^{285}\)

In two relatively recent cases the Florida courts have again looked into the differences between assumption of risk and contributory negligence. In one case,\(^{286}\) a wrongful death action was brought against a driver of a car carrying several teenagers involved in a one-car accident. The plaintiff appealed from an adverse judgment alleging as error an instruction on assumption of risk. In affirming, the court noted that contributory negligence may consist of a failure to discover or appreciate an unreasonable risk, or an intentional exposure to known dangers. In the latter instance the "plaintiff’s conduct may indicate his consent or willingness to encounter the danger and relieve the defendants of responsibility, and hence the controversial defense of assumption of risk may also be available as a defense overlapping contributory negligence."\(^{287}\)

In *Cleveland v. City of Miami*,\(^{288}\) the Supreme Court of Florida

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\(^{281}\) Id. at 727. *But cf.* Annot., 82 A.L.R.2d 1218, 1226 n.16 (1962) ("A 'mental state of willingness' is manifested only by 'conduct.'").

\(^{282}\) Id. at 721.

\(^{283}\) Id. at 725.

\(^{284}\) 121 So. 2d 49 (Fla. 1st Dist. 1960).

\(^{285}\) Id. at 727.

\(^{286}\) Id. Accord, *Evans v. Green*, 251 So. 2d 318 (Fla. Dist.), *cert. denied*, 253 So. 2d 706 (Fla. 1971).

\(^{287}\) Martin v. Plymouth Cordage Co., 209 So. 2d 481 (Fla. 1st Dist. 1968).

\(^{288}\) Kaplan v. Wolff, 198 So. 2d 103 (Fla. 3d Dist. 1967).

\(^{289}\) *Id.* at 107, quoting *Prosser*, supra note 13, § 64, at 434.

\(^{290}\) 263 So. 2d 573 (Fla. 1972); *quashing* 250 So. 2d 298 (Fla. 3d Dist. 1971).
quoted the Florida Standard Jury Instruction on assumption of risk and the accompanying committee note:

The committee recommends that the charge on assumption of risk not be given as a matter of course as a second charge on contributory negligence and that it be given only in those cases where the jury may find that claimant 'more or less deliberately' and willingly exposed himself to the specific risk which resulted in his injury and damage.

It seems apparent that the Florida courts have not as yet found a need to delve into the nature of assumption of risk. Instead, they have consistently held that assumption of risk, although somehow different, is an aggravated form or an extension of contributory negligence, differing from contributory negligence in degree only. At best, the courts have found the distinction to be one of deliberateness as opposed to an unreasonable lack of deliberation. As the foregoing discussion has demonstrated, this type of bare-bones analysis may prove insufficient to resolve the application of assumption of risk to comparative negligence.

It is submitted that, at the very best, the problem of assumption of risk is not one for the legislature. The all or nothing approach of some legislatures is admittedly expedient but because of the complex distinctions between contributory negligence and assumption of risk the problem is best left to the courts. There is little doubt that the policy considerations and the spirit of comparative negligence amount to compelling arguments for the abolition of assumption of risk as a separate defense. However, there are cases in which there is also a public policy argument for retaining assumption of risk, and there are indeed valid distinctions between assumption of the risk and contributory negligence.

If the Florida courts should adopt the distinction between primary and secondary assumption of risk and determine that only primary assumption of risk (where the plaintiff reasonably incurs a risk) shall be a bar to recovery, then assumption of risk will remain a bar in those few cases to which the defense is particularly suited. In the majority of automobile guest cases, however, the secondary meaning of assumption of risk

239. FLA. STD. JURY INSTR. (CIVIL) 3.8 (1967).
240. Id. (emphasis added). See note 221 supra and accompanying text.
241. Byers v. Gunn, 81 So. 2d 723 (Fla. 1955).
242. See note 201 supra.
243. Where the plaintiff acts unreasonably in making his choice, it is said that there is merely one form of contributory negligence, . . . [b]ut this is a distinctive kind of contributory negligence, in which the plaintiff knows the risk and voluntarily accepts it; and it has been held to differ from contributory negligence which merely fails to discover the danger in several minor respects. Thus assumption of risk is governed by the subjective standard of the plaintiff himself, whereas contributory negligence is measured by the objective standard of the reasonable man.

Prosser, supra note 13, § 68, at 456 (footnotes omitted).
will be applied and any assumption of risk, like plaintiff's contributory negligence, will be subject to the Hoffman rule.244

7. THE SEAT BELT DEFENSE

An individual's failure to wear seat belts when riding in an automobile raises a number of medical and legal controversies.245 This is particularly true in light of the comparative negligence doctrine.

Absent a statutory mandate246 or "special circumstances,"247 it is generally held that an occupant of a vehicle is under no duty to wear available seat belts. In those jurisdictions which so hold, failure to wear them is inadmissible for any purpose.248 However, a number of jurisdictions hold to the contrary.249 For example, in Bentzler v. Braun,250 the Supreme Court of Wisconsin held that there was a common law duty to make use of available safety belts, stating:

While we agree with those courts that have concluded that it is not negligence per se to fail to use seat belts where the only statutory standard is one that requires the installation of the seat belts in the vehicle, we nevertheless conclude that there is a duty, based on the common law standard of ordinary care, to use available seat belts independent of any statutory mandate.251

Even in those jurisdictions which impose a duty, the question of causation remains. In general, since the failure to wear seat belts has nothing to do with the occurrence of the accident, it has been held that there is no causal connection between the failure to wear the safety

244. See Springrose v. Willmore, 292 Minn. 23, 24, 192 N.W.2d 826, 827 (1971).
246. Federal legislation and a majority of state statutes concerning seat belts have merely required that restraints be made available in motor vehicles. There are no state statutes which require their use, although a recent federal statute requires the use of seat belts in all trucks and buses engaged in interstate commerce. In fact, some state statutes specifically provide that failure to "buckle-up" shall not constitute contributory negligence. See Fischer, supra note 245, at 131-32 and nn.5-16.
250. 34 Wis. 2d 362, 149 N.W.2d 626 (1967).
251. Id. at 385, 149 N.W.2d at 639.
device and the injuries sustained.\textsuperscript{252} Furthermore, evidence of failure to “buckle-up” has been held to be inadmissible in situations where a defendant wishes to take advantage of the doctrine of avoidable consequences or the mitigation of damages rule.\textsuperscript{253}

In Florida, the failure of a party to wear available seat belts is inadmissible for any purpose.\textsuperscript{264} However, in light of the \textit{Hoffman} decision, since a plaintiff’s failure to wear seat belts would not \textit{bar} his recovery, there appears to be no policy reason why the jury should not be able to consider this conduct, as was done in \textit{Bentzler v. Braun}.

That the seat belt defense \textit{should} be recognized in Florida is especially true in view of statistical findings that seat belts reduce highway fatalities and minimize injuries,\textsuperscript{265} and in view of recent federal and state statutes requiring that belts and harnesses be made available in all motor vehicles.\textsuperscript{266} Admittedly, the failure to wear seat belts does not contribute to the cause of an accident; however, it is a concurrent cause of injuries, for in many cases an occupant of a vehicle would not have been injured (or as severely injured) but for his failure to wear his seat belt.\textsuperscript{267} (Of course, competent evidence is required to prove the causal connection between the injuries sustained and the failure to “buckle-up”).\textsuperscript{258}

III. Specific Problem Situations

A. Multiple Party Problems

1. Introduction

The success or failure of Florida’s new comparative negligence doctrine could very well depend upon how the courts or the legislature decide to handle multiple party claims. In its decision in \textit{Hoffman}, the Supreme Court of Florida seems to have “reserved ruling” in this area.

First, the court indirectly avoided the issue of how to apportion damages (\textit{i.e.}, the actual steps to be taken by both judge and jury) in

\begin{itemize}
  \item \textsuperscript{252} Brown v. Kendrick, 192 So. 2d 49 (Fla. 1st Dist. 1966); Kavanagh v. Butorac, 140 Ind. App. 139, 221 N.E.2d 824 (1966); Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968).
  \item \textsuperscript{253} See Fischer, \textit{supra} note 245, at 143-45 and nn.89-97.
  \item \textsuperscript{254} Pashal v. Pinkard, 228 So. 2d 633 (Fla. 1st Dist. 1969); Chandler Leasing Corp. v. Gibson, 227 So. 2d 889 (Fla. 3d Dist. 1969); Brown v. Kendrick, 192 So. 2d 49 (Fla. 1st Dist. 1966).
  \item \textsuperscript{256} See note 246 \textit{supra}.
  \item \textsuperscript{257} “The question, . . . is not whether the guest’s negligence contributed to the cause of the accident but, rather, whether it contributed to the injuries.” Bentzler v. Braan, 34 Wis. 2d 362, 387, 149 N.W.2d 626, 640 (1967). Furthermore, in \textit{Evancho v. Thiel}, 297 So. 2d 40 (Fla. 3d Dist. 1974), whether a defective automobile seat track may be the proximate cause of injuries sustained by a person occupying the seat, was held to be a jury question, despite the fact that the defect did not contribute to the cause of the automobile accident.
  \item \textsuperscript{258} See note 249 \textit{supra}.
\end{itemize}
negligence litigation in which more than two parties were involved. The only guidelines prescribed were for the apportionment between "plaintiff and defendant." Thus, there was no instruction given as to a situation involving a plaintiff suing more than one defendant, not to mention the more complex problem encountered when three or more parties are all suing one another.

Second, the court directly declined to comment on the effect of the decision on the Florida common law rule of no contribution between joint tortfeasors. The District Court of Appeal, Third District, after first noting the common law rule, has interpreted the Hoffman decision as one that "recognized the continued existence of that rule," despite the fact that a plain reading of Hoffman leaves the question utterly unresolved.

Thus, Florida's comparative negligence law is at present lacking in a very important area. The railroad statute cases and those under Florida's Hazardous Occupations Statute seemingly fail to provide any precedent for handling multiple party cases, and the Third District has already indicated that it will interpret inaction by the Supreme Court of Florida as an endorsement of common law policies which were designed for contributory rather than comparative negligence. It is, therefore, the purpose of this article to propose a plan for handling such cases, to provide sample problems for consideration, and to discuss the strengths and weaknesses of various possible avenues available to the courts as they fashion a "new" common law in the wake of Hoffman.

259. The court told how to apportion between a single plaintiff and single defendant, and how to treat a counterclaim by the defendant against that plaintiff. 280 So. 2d at 438-39.

260. The District Court of Appeal, Third District, has already been asked to rule upon a certified question as to whether to ask the jury to apportion the fault of two defendants where the plaintiff was not himself contributorily negligent. Issen v. Lincenberg, 293 So. 2d 777 (Fla. 3d Dist. 1974). The district court replied in the negative.

This situation could arise in at least two ways: (a) the plaintiff's negligence could be unquestioned by the defendants; or (b) the jury could be instructed not to apportion the negligence of the defendants if it first failed to find the plaintiff guilty of any contributory negligence.

261. See section III, A, 6 infra.

262. 280 So. 2d at 439.

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

264. See section II, A supra.

265. Id. As Judge Wisdom of the United States Court of Appeals for the Fifth Circuit recently observed in a federal multiple party case arising under Florida's Hazardous Occupations Statute: "[W]e are forced to consider the proper method of computation under Chapter 769 when there are multiple defendants to be an open question, unanswered by the Florida courts." Orr v. United States, 486 F.2d 270, 279 (5th Cir. 1973) (decided after Hoffman).

266. The court has retained the doctrines of joint and several liability and of no contribution among joint tortfeasors. See Issen v. Lincenberg, 293 So. 2d 777 (Fla. 3d Dist. 1974); Rader v. Variety Children's Hosp., 293 So. 2d 778, 779 (Fla. 3d Dist. 1974). See also note 270 infra.

267. Of course, as in other cloudy areas of comparative negligence discussed herein, the door is wide open for the legislature to fashion a statutory law which will give direction to the common law process.
2. THE THREE ALTERNATIVES

With respect to the treatment of multiple party litigation, it seems that there are three major choices available under comparative negligence. The first and best plan would appear to be the adoption of what will be known herein as the "total implementation" of pure comparative negligence or, more simply, as "plan one". This, it is submitted, is the natural consequence of the implementation of the two purposes stated by the Supreme Court of Florida:

(1) To allow a jury to apportion fault as it sees fit between negligent parties whose negligence was part of the legal and proximate cause of any loss or injury, and

(2) To apportion the total damages resulting from the loss or injury according to the proportionate fault of each party.\[^{268}\]

Under the proposal set forth below for the execution of this plan, it is suggested that in all multiple party situations, Florida can accomplish the equitable purposes which prompted the adoption of the rule; furthermore, it can do so without having to allow contribution among joint tortfeasors. This plan would, however, require the courts to recognize that under pure comparative negligence, the common law doctrine of joint and several liability has been abrogated, for otherwise one defendant could, in derogation of the stated purposes, be apportioned a responsibility for satisfying damages greater than his own proportionate share of fault.\[^{269}\]

The second alternative, "plan two," would not require that joint and several liability be eliminated, but would instead recognize the practice of contribution among joint tortfeasors. Despite the ruling of Florida’s District Court of Appeal, Third District, to the contrary,\[^{270}\] if joint and several liability is to be retained, contribution must be permitted in order to accomplish the objective of equating liability with fault. As will be

\[^{268}\] See text accompanying notes 41 & 42 supra.

\[^{269}\] See text accompanying note 268 supra. This language can be interpreted to mean that where one of several tortfeasors is not made a "party," his negligence would not be considered in the apportionment of fault. This proposition is discussed more fully in section III, A, 3 infra.

Meanwhile, consider, for example, a situation in which a plaintiff’s own negligence is 33\(\frac{1}{3}\)% the cause of his injuries. He joins as defendant, one of two negligent tortfeasors, each of whom were also 33\(\frac{1}{3}\)% responsible for causing plaintiff's injuries. Under the common law doctrine of joint and several liability, the plaintiff could sue and collect (from only one of the two tortfeasors) the entire 66\(\frac{2}{3}\)% of the damages to which he would be entitled. Cf., \[^{271}\] e.g., Rader v. Variety Children’s Hosp., 293 So. 2d 778 (Fla. 3d Dist. 1974), wherein, despite the Hoffman decision, an aggrieved hospital patient was able to collect from the negligent attending physician his entire damages, despite concurrent negligence by the hospital, against which no contribution was permitted. \[^{272}\]

\[^{270}\] Rader v. Variety Children's Hosp., 293 So. 2d 778 (Fla. 3d Dist. 1974). No doubt, after the pronouncements in Hoffman and in Gilliam v. Stewart, 391 So. 2d 593 (Fla. 1974), concerning the inability of a district court to overrule the Supreme Court of Florida, the higher court will have to take the initiative in these matters.
illustrated in the hypothetical situations considered below, the ultimate result under this plan would seldom differ from that accomplished under "plan one." The main difference would be that the entire burden of joining and/or collecting from a third party tortfeasor would rest on whichever defendant the plaintiff chose to sue, with the plaintiff himself having no real incentive to bring in all parties.

Finally, the last alternative is to retain both joint and several liability and the prohibition against contribution among joint tortfeasors. This proposal is not advocated by the writers for, if adopted, it would seem to leave unfinished Florida's attempt to adopt a more equitable system of loss distribution. Nevertheless, its one redeeming factor is its simplicity. For the same reason as the one for avoiding contribution among tortfeasors under "plan one," there is still something to be said for the advantage of avoiding the multiplicity of litigation that could occur with contribution; and, similarly, there may be some truth to the idea that joint and several liability should be retained in order to discourage complex, multiple party litigation. Nevertheless, these arguments are countered by two others. First, jurisprudentially, there is greater defensibility to a system that attempts equity to all. Second, the practical problems under either "plan one" or "plan two" are not so insurmountable or even so difficult as to cost the public more than the equity of pure comparative negligence is worth. By the use of special verdicts or interrogatories and the retention by the judiciary of the function of performing the mathematical computations required, much of the possibility of error can be removed from multiple party litigation. Furthermore, as will be indicated in the ensuing subsections, the encouragement of joinder of all parties will provide a greater likelihood of settlement (which of course expedites rather than impedes litigation) and with the special verdicts and the joinder of all parties in one suit, the phantom of duplicative litiga-

271. See section III, A, 4, c infra.
272. As to the desirability of joining all parties in a single action, see note 273 infra and accompanying text.
273. Frank E. Maloney, In the article cited most frequently by the Supreme Court of Florida in its opinion in Hoffman, argued that in theory, joinder of all parties in one suit is the best practice. However, he concluded that the American jury system would be more prone to error than the English and Canadians who successfully encouraged liberal joinder. He urged Florida to adopt comparative negligence, but not to promote joinder of all joint and several tortfeasors, nor to adopt contribution among such tortfeasors. Maloney, supra note 13, at 164-67; see also Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 503-08 (1953).
But cf. Dobbs, supra note 13, at 381: The importance of settling a controversy in one suit is emphasized under comparative negligence, because the apportionment between two parties in one suit would not necessarily be res judicata in a second suit against a third party arising out of the same accident, even though the third party's negligence was appropriately figured in the first suit.
274. See note 282 infra and accompanying text.
276. Where some parties are not willing to litigate or cannot be found or have settled
tion fades away or is replaced by a relatively simple method of motion practice.277

3. THE "BEST PLAN": TOTAL IMPLEMENTATION OF PURE COMPARATIVE NEGLIGENCE

a. The Policy and Purposes of Hoffman Require It

As stated in section III, A, 2, the policy and purposes of pure comparative negligence announced in Hoffman dictate a plan that, as much as is practicable, must assign to each negligent tortfeasor liability proportionate with his own degree of fault.278 In a case involving plaintiff, P, defendant, D₁, and another defendant, D₂,279 if D₁ is said to be "jointly and severally liable" with D₂ and can be required to pay the full amount which P may be entitled to recover (after taking into account P's own negligence), then D₁ will have been inequitably treated unless he may in turn look to D₂ for contribution.280

b. Contribution Among Tortfeasors Would Not be Required

Consider the following simple example:281

<table>
<thead>
<tr>
<th>PARTY</th>
<th>NEGLIGENCE</th>
<th>TOTAL DAMAGES TO PARTY</th>
</tr>
</thead>
<tbody>
<tr>
<td>P</td>
<td>10%</td>
<td>$10,000</td>
</tr>
<tr>
<td>D₁</td>
<td>20%</td>
<td>0</td>
</tr>
<tr>
<td>D₂</td>
<td>70%</td>
<td>0</td>
</tr>
</tbody>
</table>

JUDGE'S DETERMINATION282

D₁ owes P 20% of $10,000 or $2,000.
D₂ owes P 70% of $10,000 or $7,000.
P himself bears the remaining $1,000.

their claims, their negligence will still be determined in the initial suit provided certain safeguards have been met.
277. Dobbs, supra note 13, at 367, stating that where the negligence of all tortfeasors has been determined, one tortfeasor who has paid more than his share may obtain contribution from another by motion to the court.
278. As used in this section, the word "degree" of fault will mean the percentage of the total cause of the injury to a plaintiff which a finder of fact would ascribe to each tortfeasor.
279. See Fisher and Wax, supra note 13, at 571 on "Multiple Parties."
280. See section III, A, 4, infra. See also Ward v. Ochoa, 284 So. 2d 385, 388 (Fla. 1973) (Dekle, J., concurring).
281. The effect of counterclaims is considered infra in section III, A, 6, a.
282. This assumes a special verdict system whereby the jury's function would be kept simple, in an effort to avoid error. The jury in this case, assuming no counterclaims had been filed by D₁ and D₂, might simply be asked:
Under the traditional concepts of joint and several liability in Florida, \( P \) could enforce against \( D_1 \) a recovery of \$9,000, the total owed to \( P \) by both tortfeasors. Clearly, injustice to \( D_1 \) would result from such a plan, unless he in turn could look to \( D_2 \) for the recovery of \$7,000 in contribution, which is not allowed under traditional Florida common law. But if \( P \)'s only remedy were to collect \$2,000 and no more from \( D_1 \), and \$7,000 and no more from \( D_2 \), there would be no injustice at all.

By its decision "to allow a jury to apportion fault as it sees fit between negligent parties,"\(^1\)\(^2\)\(^3\), it seems that the court has ruled sub silentio that there can now only be joint and several liability where the jury would be unable to make a logical apportionment. This follows from the fact that the effect of the comparative negligence rule is to liberalize the established law with respect to damages created by the concurrent acts of two or more tortfeasors. Long ago, the Supreme Court of Florida stated that if "the damages suffered [by a plaintiff] are rendered inseparable, [the defendants] are jointly and severally liable."\(^2\)\(^3\)\(^4\) But if the jury is now allowed to "apportion fault as it sees fit," there is no reason that the percentage of fault cannot automatically be converted into a percentage of the monetary damages found by the same jury to be recoverable for a given injury. Hence, in every case, the fault and damages attributable to each tortfeasor could be ascertained and an aggrieved party would be required to recover from each tortfeasor the damages for which each was responsible.\(^2\)\(^5\)

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283. Reserving to the court the task of assigning the amount of money owed is, in a simple case like this one, merely to maintain uniformity with the practice that should be followed in more complicated cases involving damages and percentages not lending themselves to easy mathematical computation, as well as in the majority of cases which will find counterclaims filed by defendants against the plaintiff and each other. See note 303 and sections III, A, 3, d, (1) & (2) infra.

284. 280 So. 2d at 439.


286. The effect would be that single accident cases, now being apportionable, will be treated as double accident cases in the past, where it was said that "a jury should apportion the damages if they can do so [in a logical and reasonable manner] but if there
c. The Burden of Joining Third Parties Would Be Shared

Obviously, the decision to execute "total implementation" of pure comparative negligence is a policy decision involving which party, \( P \) or \( D_s \), should bear the burden of reaching a third party such as \( D_s \). Under this proposal, it is submitted that appropriate rules and sanctions could easily be promulgated to encourage both the plaintiff, \( P \), and the defendant, \( D_s \), to bring \( D_s \) into the initial suit. The objective of joining all parties in one action would minimize the number of actions burdening the court system, and the presence of all parties before the trier of fact will provide a better opportunity for the truth to be ascertained. Every effort should be made to resolve a multiple party question in a single suit,\(^{287}\) and, thus, the means for encouraging the joinder of all parties must be considered.

Looking first to the incentive of the plaintiff to join all parties,\(^{288}\) it is clear from the very nature of the apportionment system that he would desire to do so in order to obtain a complete recovery. It is therefore suggested that very little additional incentive to the plaintiff would be needed. It may be, however, that in the absence of the joint and several liability of tortfeasors, some plaintiffs would avoid suing two or more defendants for tactical reasons, expecting to join them in separate suits.\(^{289}\) For this reason, it might be advantageous to adopt a rule that would definitely bar subsequent litigation against one who could have been but was not made a party to the original suit, absent proof that a good faith effort was made for service in the initial action.\(^{290}\)

 Conversely, by analogy

can be no apportionment then the defendant is liable for the entire damages." Washewich v. LeFave, 248 So. 2d 670, 672 (Fla. 4th Dist. 1971). Comparative negligence has now supplied the "logical and reasonable manner" in many cases where apportionment would previously have been impossible. However, the question now raised is: What should be done where the jury is unable to apportion damages, finding that each tortfeasor by his negligence could be 100% at fault? It may be that under such circumstances, the precedent for "joint and several liability" should be retained. See generally Randle-Eastern Ambulance Serv., Inc. v. Millens, (Case No. 73-523), ___ So. 2d ___ (Fla. 2d Dist. 1974).

287. But see note 273 supra.

288. In jurisdictions where all defendants have been jointly and severally liable to the plaintiff, for obvious reasons a plaintiff has been disposed to sue first the one with "deep pockets" so that once a judgment has been obtained, he could collect it. This, of course, assumes that the party with the deepest pockets is amenable to service of process. But even where two or more potential defendants are solvent, it is easy to see why many plaintiffs would prefer to sue only one in order to avoid the consequences at trial of having two or more adverse parties subjecting their witnesses to cross examination, making objections, and otherwise complicating his case.

289. See note 288 supra. There is some hardship to the trial lawyer who must contend with the objections, cross-examinations and other confusion engendered by multiple counsel.

290. There is ample precedent in Florida under constructive service of process cases for an adequate definition of a "good faith effort." Furthermore, "long-arm statutes" now make many more defendants amenable to service of process than ever before. Very few persons who have property or a job are able to disappear and avoid service of process by a diligent plaintiff. Those who can disappear are frequently insolvents, whose joinder may make very little difference. Thus, the situations involving insolvent and nonjoinable tortfeasors are similarly treated. See text of section III, A, 3, d infra.
to section 2-607(5)(a) of the Uniform Commercial Code, it may be that Florida could make one who is notified of an action against him but refuses to come in and defend, bound to accept whatever judgment may be rendered against him.\footnote{291}

A defendant can likewise be encouraged to join third parties by appealing to his selfish interests, and the one likely to be of most effect will be his desire to diminish his own fault in the eyes of the jury by pleading as an affirmative defense the negligence of a third party. Just as in the proposal for encouraging joinder by a plaintiff, it would be a simple matter to require proof by a defendant of a “good faith effort”\footnote{292} to join a non-party before permitting him to raise that non-party’s negligence as an affirmative defense. However, before rules encouraging joinder can be useful, the basic rule allowing third party practice needs to be amended. As suggested by Justice Dekle in his concurring opinion in \textit{Ward v. Ochoa} a change will be needed in rule 1.180 of the Florida Rules of Civil Procedure, since that rule currently allows a defendant to bring in a third party only when such party “is or may be liable to him [the defendant] for all or part of the plaintiff’s claim against him.”

Of course, if the proposal that the objectives of \textit{Hoffman} be fully implemented gains acceptance, defendants will no longer be jointly and severally liable. And even if they were, in the absence of the adoption of a rule allowing contribution among joint tortfeasors, it could never be said that one defendant would be liable to the other for all or part of the plaintiff’s claim against him. Therefore, the joinder rule would need to be liberalized to allow one defendant to bring in another defendant even though the latter may not be liable to the former.\footnote{294}

d. Three Solutions to the Insolvent Third Party Problem

(1) An Extension of the “Total Implementation of Pure Comparative Negligence”

Where a defendant is amenable to service of process, but turns out to be insolvent or execution-proof after a judgment is rendered against

\footnote{291. While this idea may also be analogized to the federal rules regarding consolidation of multi-district litigation, due to the differences between the state and federal systems, conflict of laws and full faith and credit problems may arise which, of course, the federal courts need not face.}

\footnote{292. See note 291 supra.}

\footnote{293. 284 So. 2d 385 (Fla. 1973). As stated by Justice Dekle:}

\footnote{294. Of course, in a multiple party situation, it may be expected that one defendant would be liable to the other on an independent claim arising out of the same incident.}
him, the situation could be handled in the same manner as that where a defendant is not joinable. Under “plan one” this would mean that the plaintiff would be called upon to bear the loss occasioned by such an event. This method would be the most theoretically consistent with the purposes of Hoffman already discussed, and is defensible as a practical matter on three bases. First, as suggested by Justice Dekle, there is no longer any reason to maintain the rule against dividing liability among joint tortfeasors since “in most instances tortfeasors are financially reliable through insurance coverage.” Second, there is no more reason that one should be insured against liability for that portion of an injury to a plaintiff that is not attributable to his own negligence than that a plaintiff himself should insure against the eventuality of an uninsured tortfeasor. This is particularly true in light of Florida’s no-fault and uninsured motor vehicle coverage. Finally, as will be discussed in subsection III, A, 6 infra, where $D_i$ has stated a counterclaim against $P$, the effect will often be to average out the amount of loss suffered by either $D_i$ or $P$, regardless of which of them is left to bear the burden for a non-joinable or execution-proof $D_i$. In addition to the foregoing, it may also be noted that in any event the contributorily negligent plaintiff, who can only recover a part of his damages from one of two or more defendants, is still more equitably treated under pure comparative negligence than under contributory negligence where he would have been completely barred from recovery, regardless of his damages.

(2) The “Compromise” Plan

Despite the appeal of the argument for theoretical purity, there is a reluctance expressed by many writers to permit the burden of loss occasioned by an insolvent or nonjoinable tortfeasor to fall entirely upon a “plaintiff” when there is a solvent defendant tortfeasor available. It has been little noted that under pure comparative negligence, the mere fact that one party is a “plaintiff” does not necessarily mean he is less at fault than one sued by him as a “defendant.” However, some sympathy seems to automatically attach to these labels. The consensus of those who

295. Ward v. Ochoa, 284 So. 2d 385, 388 (Fla. 1973). Florida’s Financial Responsibility Laws now require proof of liability insurance in order to have a vehicle inspected. Of course, not all multiple party negligence actions involve automobile accidents but more and more individuals, as well as most corporate entities, are now carrying liability coverage.


297. See also Dobbs, supra note 13, at 369-70.

298. See note 305 infra. Under this proposal, admittedly, there would be instances where one tortfeasor might be completely absolved of liability at the expense of another. It is submitted that in terms of the simplicity and efficiency gained thereby, and considering the relatively small number of times this would occur, the price would not be too great to pay.

299. See, e.g., Maloney, supra note 13, at 168, with respect to “the socially undesirable feature of placing more of the burden of loss on an injured party who is usually in the poorest position to bear it.”
have recently considered the issue of who, under comparative negligence, should bear the burden of the nonjoinable or insolvent tortfeasor, seems to be that there is need for a compromise.\textsuperscript{300} Therefore, it has been proposed as a reasonable alternative to placing all the burden on either the plaintiff or defendant, that the plaintiff’s and defendant’s negligence be directly compared by the court after the jury has apportioned damages and fault among all tortfeasors.\textsuperscript{301}

The “compromise” is simply illustrated using the same hypothetical figures as in section III, A, 3, b \textit{supra}. Assuming that \(D_1\) was insolvent or unavailable and that \(P\) was able to satisfy the court of this fact either before or after judgment was initially rendered,\textsuperscript{302} the court would recompute the liability of \(D_1\) as follows:\textsuperscript{303} Whereas \(P, D_1,\) and \(D_3\) were orig-

\begin{enumerate}
\item \textbf{Judge’s Determination}
\begin{align*}
D_1 & \text{ owes } P 20\% \text{ of } $10,000 \text{ or }$2,000 \\
D_3 & \text{ owes } P 70\% \text{ of } $10,000 \text{ or }$7,000 \\
\text{and } & \text{ P bears 10\% of } $10,000 \text{ or } $1,000 \text{ of his own loss.}
\end{align*}
\item \textbf{Judge’s Determination Amended Where }D_3\textbf{ Insolvent [see also accompanying text].}
\begin{align*}
D_1 & \text{ owes } P 66\frac{2}{3}\% \text{ of } $10,000 \text{ or }$6,666.67 \text{ rather than } $2,000 \text{ as in “a”.} \\
P & \text{ bears } 33\frac{1}{3}\% \text{ of } $10,000 \text{ or }$3,333.33 \text{ rather than } $1,000 \text{ as in “a”.}
\end{align*}
\item \textbf{Judge’s Determination same as above but with Counterclaim}
\begin{align*}
P & \text{ owes } D_1 33\frac{1}{3}\% \text{ of } $9,000 \text{ or }$3,000 \text{ rather than } $900 (10\% \text{ of } $9,000 \text{ if } D_3 \text{ not insolvent).} \\
D_1 & \text{ bears } 66\frac{2}{3}\% \text{ of } $9,000 \text{ or } $6,000 \text{ rather than } $1,800 \text{ (20\% \text{ of } $9,000 \text{ if } D_3 \text{ not insolvent).}
\end{align*}
\end{enumerate}
inally found respectively to be 10%, 20% and 70% negligent, with \( D_1 \) owing \( P \) only 20% of his $10,000 damages, the negligence of \( P \) will be directly compared to that of \( D_1 \) and found to be in the ratio of 10 to 20. Hence, under the compromise, judgment will be rendered as if \( P \) were 33 1/3% negligent and \( D_1 \) were 66 2/3% negligently at fault. Therefore, the judge's determination would be:

\[
D_1 \text{ owes } P \quad 66 \frac{2}{3}\% \text{ of } \$10,000 \text{ or } \$6,666.67, \text{ rather than } \$2,000.
\]

\( P \) himself bears the loss of \$3,333.33 instead of only \$1,000.

Clearly, the burden is thereby distributed according to the proportionate degrees of negligence of \( P \) and \( D_1 \), and thus is an "acceptable" compromise.804 Such a plan should meet with no resistance from those who fear to overburden a plaintiff who has been wronged, since in those instances where a jury finds the plaintiff to be without contributory negligence, the application of the "compromise" rule would result in \( D_1 \) paying 100% of that which he and \( D_2 \) would have owed.805

Nevertheless, there may be those who would object to the compromise solely on the basis that regardless of how seldom it may occur, an insolvent or nonjoinable \( D_2 \) might be absolved from the possibility of being reached at some future date by those who have suffered at his expense. While it has already been noted that insurance should protect \( P \) and perhaps \( D_1 \) to some extent, and expediency would encourage the adoption of a policy that would finalize proceedings after one initial court action, it should be observed that the "compromise" plan need not fail due to disagreement on this minor point. As suggested earlier by analogy to section 2-607(5)(a) of the Uniform Commercial Code, a \( D_2 \) who had been notified and given opportunity to defend but refused to do so could be bound to accept any determination of fact made against him in that proceeding. And certainly, with or without that refinement, as against such a defendant, a separate action in his home jurisdiction could always be undertaken in the absence of a bar thereto. As to either an insolvent party (who subsequently may come into money) or a party non-

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804. The compromise, however, has not been "acceptable" to the Supreme Court of Wisconsin. See note 306 infra and accompanying text.

305. The result is the same as if the rule of joint and several liability were applied under the contributory negligence doctrine where, in theory only, no plaintiff ever recovered if he were contributorily negligent. It is thought that under comparative negligence, the jury will not be tempted to "wink" at a plaintiff's negligence. Yet situations may exist where the plaintiff may truly be without fault. In some cases, under the "compromise" he will be entitled to full recovery from the solvent tortfeasor as under the "deep pockets" rule. E.g., where \( P = 0\% \) negligent, \( D_1 = 20\% \) negligent, and \( D_2 = 80\% \) negligent, but \( D_2 \) is insolvent or unavailable, direct comparison of the negligence of \( P \) and of \( D_1 \) indicates 0 to 20 which is a mathematical impossibility and results in \( D_1 \) being 100% responsible, the same result as under the joint and several liability rule.
joinable for jurisdictional reasons (who is found in a subsequent suit), a prevailing $P$ or $D_1$ could be made to share equitably with the other party to the compromise any net recovery made by him.

(3) The Status Quo: Retention of Joint and Several Liability Without Contribution Among Tortfeasors

Although the pure form's total implementation has been resisted, it would seem that the "compromise" related above would be welcome in any comparative negligence jurisdiction. However, such is not the case. Wisconsin, the leading comparative negligence state, has persisted in casting the entire burden of the insolvency or unavailability of a third party tortfeasor on the defendant, $D_1$. In that state, the concept of joint and several liability has been retained. However, this rule is made less harsh by two refinements thereto: (1) Wisconsin has a "modified 50%" form of comparative negligence, so that if $P$'s negligence is greater than that of $D_1$, $P$ can recover nothing from $D_1$; and, (2) if $D_1$ does have to pay $D_2$'s obligation to $P$, $D_1$ is entitled to contribution under a rule which utilizes the "pure form," allowing contribution even from an insolvent $D_2$ who may even have been less negligent than $D_1$.

Nevertheless, the Wisconsin rule has been the subject of criticism for allowing the plaintiff "to pursue either or both joint tortfeasors for the recovery of the damages due him without regard to the collectibility of the joint tortfeasors as between each other." And, as noted in the preceding section, the majority of recent commentators have rejected the Wisconsin idea and advocated the "compromise" of comparing directly the negligence of solvent parties and thus distributing losses between them. In any event, no one seems to consider the retention of the current Florida status quo—joint and several liability without contribution—as a viable alternative. 

306. Walker and Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721 (1934); Chille v. Howell, 34 Wis. 2d 491, 149 N.W. 2d 600 (1967) (citing and re-affirming the Walker rule). Dean Prosser, in drafting the statute by which Arkansas adopted "pure" comparative negligence in 1955, is said to have intended the Walker rule to be followed. It was adopted despite arguments in favor of a "compromise" plan. Dobbs, supra note 13, at 368-69.

307. Thus, if the negligence of $P$, $D_1$, and $D_2$ were apportioned at 20%, 10%, and 70%, respectively, and $D_2$ was insolvent, $P$ could recover nothing. On the other hand, if $P$ were 10% negligent, $D_1$ were 20%, and $D_2$ 70%, with $D_2$ again insolvent, $P$ could recover from $D_1$ for the liability of both $D_2$ and $D_2$, $D_1$ would then have a claim in contribution against $D_2$. The inequity here is in the fact that it is unlikely $D_1$ will ever collect from $D_2$. Furthermore, while uninsured motor vehicle coverage is commonly purchased by one to protect himself, it may be contended by an insurance company that such coverage would not contemplate the insolvency of a contribution defendant.

308. Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962) (adopting the rule).

See Section III, A, 4 infra.

309. Heft & Heft, supra note 13, § 1.350, at 64.

310. But cf. Issen v. Lincenberg, 293 So. 2d 777 (Fla. 3d Dist. 1974).
4. THE “SECOND BEST” PLAN: CONTRIBUTION AMONG JOINT TORTFEASORS

Florida, though having the rule of joint and several liability among tortfeasors, does not as of this writing permit one joint tortfeasor who has "borne an unequal proportion of the common burden" he shares with another to exact contribution from that other. For this situation to be changed, it appears that either Florida’s Supreme Court or its legislature will have to take affirmative action.

This section is devoted to the consideration of the viability and desirability of taking such an affirmative step (which is only suggested in the event the state is not prepared for the "full implementation of comparative negligence" called for under "plan one"). In addition, it is intended to call attention to certain of the possible repercussions on existing Florida law which should be taken into account before the adoption of any plan permitting contribution among joint tortfeasors.

a. Why Allow Contribution?

The most compelling reason for allowing contribution among joint tortfeasors is its fairness. It makes good legal sense that if $B$ and $C$ together owe $A$ $100, and if $B$ pays the entire $100 to $A$, he in turn should be able to ask $C$ to contribute his "proportionate share." The equity of this rule has ample precedent in Florida contract law, and there would seem to be a very rational basis for its extension to the law of torts, especially under a comparative negligence rule whose object is the equation of liability with fault. In fact, a type of indemnity often referred to by the court as "contribution" has already been applied in Florida for over forty years as between certain joint tortfeasors who were distinguished from one another as not being "in pari delicto," simply because the negligence of one was categorized as "active" and that of the other as

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311. HEFT & HEFT, supra note 13, § 1.300, at 51. The three essential elements required for contribution among tortfeasors have been stated as follows:

1. two or more parties must be joint negligent wrongdoers;
2. two or more parties must have common liability because of the negligence;
3. one party must have borne an unequal proportion of the common burden.

Id. (emphasis added).


313. See notes 269 & 270 supra.

314. What a "proportionate share" would be is the subject of discussion under section III, A, 4. c infra, entitled "Implementation of Contribution Should Be Pure."


316. "To apportion the total damages . . . according to the proportionate fault of each party" was one of the purposes of adopting comparative negligence. 280 So. 2d at 439.
It is now only reasonable in the spirit of *Hoffman v. Jones* that if joint and several liability is retained, making it possible for one tortfeasor to be liable to pay for the negligence of another, that contribution should be allowed in order to distribute their liability according to their proportionate fault.

Nevertheless, there has been some reluctance on the part of Florida courts to "embark upon such a perilous journey" as would be occasioned by their recognition of contribution. The District Court of Appeal, Third District, has indicated that it hesitates to do so not only because the supreme court refrained from so doing in *Hoffman*, but also because they "find no adequate reason is brought forward for the abrogation of this rule of long standing." The District Court of Appeal, Fourth District, has concurred, citing the Third District decisions with approval.

If a jurisprudential argument is needed, it would seem that the objective of equating liability with fault, as discussed above, would satisfy the court. As to the more practical objection that contribution may result in a burden to the courts, it is submitted first that this alone is never a sufficient reason for perpetuating injustice, and second, that the practice of requiring special verdicts by which the percentage of liability of all parties would be determined by the jury in a single action could permit the procedural burden of contribution to be reduced to mere motion practice.

b. How Does "Plan Two" (Contribution) Differ From "Plan One"?

In result, it is submitted that contribution would be almost as equitable a route to travel as the full implementation of pure comparative

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317. The line of cases which purport to allow "contribution among joint tortfeasors" where the negligence of one is "active" and the other "passive" seems to stem from a confusion between "contribution" and "indemnity." Seaboard Air Line Ry. v. American Dist. Elec. Protective Co., 106 Fla. 330, 143 So. 316 (Fla. 1932) (a case of master-servant indemnity).

Subsequent cases interpreted Seaboard to distinguish between "active" and "passive" negligence of parties where negligence of one is imputed to the other due to contract. Winn Dixie Stores, Inc. v. Fellows, 153 So. 2d 45 (Fla. 1st Dist. 1963); Fidelity & Cas. Co. v. T. P. Herndon & Co., 196 So. 2d 196 (Fla. 1st Dist. 1966); Stembler v. Smith, 242 So. 2d 472 (Fla. 1st Dist. 1970) (no contribution where negligence of both tortfeasors was "active").

318. See Rader v. Variety Children's Hosp., 293 So. 2d 778 (Fla. 3d Dist. 1974), discussed in notes 269 & 270 supra.

319. Id. But cf. Orr v. United States, 486 F.2d 270, 278 (5th Cir. 1973), where the Fifth Circuit in essence posed the converse question of whether Florida could still be retaining its longstanding rule of joint and several liability without contribution after the decision in *Hoffman*.

320. Maybarduk v. Bustamante, 294 So. 2d 374 (Fla. 4th Dist. 1974).

321. See Orr v. United States, 486 F.2d 270, 278 n.11 (5th Cir. 1973), quoting *Hoffman*, 280 So. 2d at 438: "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."

322. See notes 278 & 282 supra; cf. note 274 supra.
negligence from the outset of a multiple party case.\textsuperscript{328} In fact, from the standpoint of "purity" of loss distribution, it differs little, if at all, provided "pure" comparative negligence is applied in contribution proceedings.\textsuperscript{824} The principal distinction would be in the policy determination of who should bear the loss engendered by an insolvent or non-joinable tortfeasor.\textsuperscript{325}

In the discussion of "plan one," it was submitted that the principles of \textit{Hoffman} required that each tortfeasor be responsible for only that amount of injury caused by his own proportionate share of the fault.\textsuperscript{326} Therefore, it was urged that joint and several liability be abrogated and that, in effect, separate judgments be rendered in favor of a plaintiff against each defendant for only so much of the plaintiff's damages as that defendant had caused. The clear implication in a situation where one of two tortfeasors was insolvent or not joinable in the action was that the plaintiff would be forced to absorb the loss with the possibility of a later recovery if he had made a good faith effort at joinder. In the alternative,\textsuperscript{327} a "compromise" was outlined whereby the percentages of negligence of the plaintiff and the joined defendant could be directly compared. Under that plan, the loss occasioned by the third tortfeasor's absence or insolvency would be shared according to the relative negligence of the other two. Furthermore, there would be "encouragement" to both the plaintiff and the defendant to seek out and join other tortfeasors,\textsuperscript{328} as the interests of both would be served by their presence or at least by the right to have their negligence considered by the finder of fact.

In contrast, under the plan allowing contribution among joint tortfeasors, the burden of loss occasioned by the insolvent or unavailable tortfeasor can be made to fall upon any one defendant who is both solvent and available. This is true since each tortfeasor is "jointly and severally liable" with each other tortfeasor for all the damages to the plaintiff except those found to have been attributable to the plaintiff's own contributory negligence. Thus, after having been called upon to pay $D_1$'s portion of the damages as well as his own, $D_1$ is left with the burden of trying to collect contribution from an elusive or insolvent $D_2$. As has been observed by a Wisconsin commentator, letting the plaintiff "pursue either or both joint tortfeasors for recovery of all his collectible damages without regard to the collectibility of the joint tortfeasors as between each other" is something with which critics can "rightly find fault."\textsuperscript{329}

Aside from the shift from the plaintiff to the defendant of the burden for a third party's presence or collectibility, the other major difference
between contribution and “plan one” seems to be in the added complication of a second action for contribution. In Wisconsin, for example, the enforcement of the right to contribution requires the contribution plaintiff to plead and prove four elements:

(1) His own negligence;
(2) negligence of the joint tortfeasor;
(3) that the settlement made by the paying wrongdoer was fair and reasonable; and
(4) that the liability is common liability.  

This pleading and proof could be largely a matter of res judicata or collateral estoppel in a suit against a contribution defendant whose negligence was determined in the initial action. However, it appears that such a preliminary computation as this need not be a prerequisite to contribution, unless specifically made so, and thus the possibility of a multiplicity of law suits could become a real one. While there may be some merit to an argument that the initial suit between the plaintiff and the defendant who would later become the contribution plaintiff could be less complicated if the negligence of other tortfeasors were not considered by the trier of fact, it is obvious that if contribution is to be allowed, the second suit’s increased complexity would ultimately outweigh the advantage of a simpler initial proceeding. For that reason, the same argument is made under contribution as under “plan one,” that the joinder of all tortfeasors should be encouraged in the initial suit. Then, if all parties were to be joined or to have their negligence initially determined, in light of the consequent simplicity of the second suit, the decision whether to adopt “plan one” or contribution as a method of insuring the fulfillment of the objectives of Hoffman would again be reduced to the policy decision of whom to burden with the ultimate responsibility of collecting from the nonjoinable or execution-proof party.

c. Computation Under Contribution

Assuming, for the sake of argument, that joint and several liability is to be retained and contribution is to be permitted, the question that immediately arises is: How will contribution be computed?

Historically, there is a basis for the method of “pro rata” contribution among tortfeasors which is still followed in admiralty actions in the United States, and, according to Prosser, would be considered the general rule in most states having contribution. Under that school of

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331. See Maloney, supra note 13, at 167 n.196, for Maloney’s statement, without supporting argument, that contribution in Florida is unnecessary.
333. Prosser, supra note 13 § 50, at 309. It should be noted that none of the states cited by Prosser for this proposition were comparative negligence states.
thought each tortfeasor is required to share equally in the payment of damages sustained by the plaintiff in the initial action. Thus, if plaintiff, \( P \), 10% negligent and having \$10,000 in damages, sues defendant, \( D_1 \), 20% negligent, and defendant, \( D_2 \), 70% negligent, \( P \) may recover from \( D_1 \) the entire \$9,000 to which he is entitled after deducting the 10% caused by his own negligence. However, when \( D_1 \) seeks contribution from \( D_2 \), instead of recovering \$7,000 (70% of \$10,000), he recovers only \$4,500 because the two tortfeasors share the loss equally. The inequity to \( D_2 \) is apparent. However, the redeeming social feature to this plan is its simplicity in the contribution suit, which may be the reason it was retained by the writers of the current Uniform Contribution Among Tortfeasors Act.\(^3\)

The "equal division" rule stated above was followed by England \textit{inter alia}, until the Maritime Convention Act of 1911, which adopted an apportionment according to the fault principle.\(^5\) Since Florida has chosen a plan of pure comparative negligence based upon apportionment according to fault, it would make little sense for the state to choose any form of apportionment among contribution parties which would prove less equitable than its comparative negligence rule. Wisconsin has already proven the unworkability of attempting to utilize the equal division system in a comparative negligence state,\(^6\) and has adopted a "pure form" of comparative negligence to be applied in contribution actions even though it still retains a "modified" comparative negligence doctrine as between the original plaintiff and defendant(s).\(^6\) For this reason, if Florida adopts a pure form of contribution to go with its comparative negligence doctrine, Wisconsin contribution cases since 1962 can provide an excellent source of persuasive authority.

In altering its method of apportionment in contribution, the Supreme Court of Wisconsin noted four "devices of procedure and practice" utilized in their state which made contribution according to the proportionate percentages of causal negligence "pragmatically sound as well as realistically just."\(^6\) As delineated by one analyst, these were:

1. Use of the special verdict
2. Ability to join directly automobile insurance carriers
3. Permission for pleading of contribution
4. Fixing of a percentage of the plaintiff's contributory negligence (in the initial suit).\(^8\)

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\(^3\) UNIFoRM LAWS Amw. § 1(b), at 68 (Supp. 1961).
\(^5\) Maloney, supra note 13, at 152-53.
\(^6\) Wisconsin adopted contribution by judicial decision in Ellis v. Chicago & N.W. Ry., 167 Wis. 392, 167 N.W. 1048 (1918). It is the only comparative negligence state to do so other than by statute. \textit{HEFT \& HEFT}, supra note 13, § 1.310, at 52.
\(^7\) Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).
\(^8\) \textit{Id.}\ at 8, 114 N.W.2d at 108.
\(^8\) \textit{HEFT \& HEFT}, supra note 13 § 1.310, at 54.
Since Florida already permits direct action against liability insurers, and under *Hoffman* also has a discretionary form of the first factor and a mandatory form of the fourth, all that remains is to permit defendants to plead contribution in their answers and thus have the percentages of negligence of all tortfeasors assuredly fixed in the initial action.

As to steps in computing contribution, there seem to be two leading ways suggested for a jurisdiction intending to utilize the comparative negligence of the joint tortfeasors in distributing the burden of liability between them. The first would initially compute the diminished damages of the plaintiff (that is, reduce his total damages to the amount which he is entitled to recover after consideration of his own contributory negligence, if any); then after one tortfeasor had paid the “diminished damages” to the plaintiff, ratable apportionment of that amount would be made according to the ratio of the contribution parties’ percentages of negligence. This is illustrated by the following example:

<table>
<thead>
<tr>
<th>Party</th>
<th>Negligence</th>
<th>Total Damages</th>
<th>Diminished Damages</th>
<th>Obligation to Pay</th>
</tr>
</thead>
<tbody>
<tr>
<td>$P$</td>
<td>10%</td>
<td>$10,000</td>
<td>$9,000</td>
<td>$1,000</td>
</tr>
<tr>
<td>$D_1$</td>
<td>30%</td>
<td>$0</td>
<td>$0</td>
<td>$3,000</td>
</tr>
<tr>
<td>$D_2$</td>
<td>60%</td>
<td>$0</td>
<td>$0</td>
<td>$6,000</td>
</tr>
</tbody>
</table>

Assuming $D_1$ paid $P$ $9,000, $D_1$ could then seek contribution from $D_2$ for 60/90 of $9,000, or $6,000 under the ratable apportionment rule.

The second method of computation would simplify the above procedure by looking strictly to the original “obligation to pay” calculated directly by using only the contribution defendant’s percentage of damages multiplied by the original plaintiff’s damages. This second method would closely approximate the “total implementation of pure comparative negligence” as advocated in section III, A, 3 *supra*, with the exception that there would be joint and several liability and the burden of an insolvent $D_2$ would fall upon $D_1$, rather than $P$. $D_2$’s obligation to $D_1$ would be computed by multiplying $10,000 by 0.60, rather than multiplying $9,000 by 60/90.

Obviously, the method whereby the “diminished damages” are calculated first and used as the basis for contribution obtains the same result, but it is submitted that for the sake of mathematical simplicity the second


341. The authors concur with the recommendation of Dobbs that special verdicts by which the negligence of all parties would be fixed should be made mandatory in multiple party actions. Dobbs, *supra* note 13, at 367. Pleading contribution could be a type of third party practice for joining contribution defendants, the need for which has been discussed in note 293 *supra* and accompanying text.

method is preferable. This is more readily apparent where all three tortfeasors, \( P, D_1, \) and \( D_2 \), are suing each other, with \( D_1 \) and \( D_2 \) counterclaiming and crossclaiming against \( P \) and each other, respectively, and particularly if the jury fails to find the damages of each party to equal some easily divisible number, or if it finds percentages of negligence which do not combine to form fractional ratios.

Assume, for example, that \( P \)'s damages were \$10,808, and that the respective percentages of negligence were 17\%, 44\%, and 39\%. Though the computation is by no means simple, it is far less burdensome to multiply the total \$10,808 by 0.39 to arrive at \( D_2 \)'s obligation to reimburse \( D_1 \), than to multiply \( 39/44 \) times the diminished damages computed by multiplying \$10,808 by 0.17, and subtracting the product from \$10,808. Therefore, the 100\% fractional method is recommended for uniform use. Again, it will be important that special verdicts be used in the initial action so that the exact percentages and figures will be available for contribution purposes. The increased complication of counterclaims, crossclaims, and set-offs will be considered in section III, A, 6 infra, but it consists, essentially, of performing the same operation outlined above, for each plaintiff, counter-plaintiff, and cross-plaintiff, and then setting off the amounts owed by all parties to each other.

d. Interrelationship of Contribution and Other Aspects of Florida Law

Adopting a rule allowing contribution among joint tortfeasors, like adopting a rule allowing pure comparative negligence, cannot be accomplished in a vacuum. Just as there were certain areas of Florida law on which the Hoffman court felt compelled to rule (such as the doctrines of last clear chance and gross, willful and wanton negligence), contribution, if adopted will have its repercussions. In particular, the effect of contribution and the counter-effect on it will be considered herein with respect to two basic areas: (1) the doctrine of assumption of risk and other doctrines incompatible with common liability, and (2) the role of settlements, including the practice of effecting releases.

(1) Contribution and the Doctrine of Assumption of Risk and Other Doctrines Incompatible with Common Liability

(a) The Common Liability Requirement

Traditionally, the right to obtain contribution is held only by a joint tortfeasor. As Prosser has noted, the distinction between contribution

343. There are, of course, other areas about which the court will ultimately have to make a decision, not the least of which is the doctrine of assumption of risk. See section II, C, 6 supra.

344. HEPF & HEPF, supra note 13 § 1.320, at 56.
and indemnity is that contribution is a distribution of loss (as among equals), while indemnity is the shifting of an entire loss from one who has paid to another who has not paid, but on whom the law or a contract has imposed the greater duty to pay.\textsuperscript{345} In order for contribution to be applicable, there must first exist what the law refers to as common liability. Whether or not common liability exists between two tortfeasors is determined as of the time of an accident’s occurrence;\textsuperscript{346} for one tortfeasor to be liable for contribution, the contribution defendant must have been originally liable to the initial plaintiff and have had no special immunity with respect to him.\textsuperscript{347} Thus, his liability must have been “common” with that of the paying tortfeasor who has become the contribution plaintiff,\textsuperscript{348} and who paid more than his fair share of the damages claimed by the plaintiff in the initial tort action.

(b) Assumption of Risk

Consequently, where the initial tort action plaintiff has assumed the risk of the negligence of one tortfeasor (such as the host driver in whose car he was riding),\textsuperscript{349} there can be no contribution obtained from that host driver by another tortfeasor driver, because no common liability ever existed. In fact, under assumption of risk, the host driver would never have been liable at all to the initial plaintiff. Clearly, this ramification should be considered in deciding whether or not to retain the doctrine of assumption of risk.\textsuperscript{350}

Assuming that assumption of risk is found worthy of retention, the decision whether to adopt contribution takes on a new dimension. Under “plan one” above, where a defendant is liable only for that amount of damage for which he is causally responsible, the fact that another defendant tortfeasor is immune from suit would result in no injustice to the first defendant at all. Conversely, under contribution, with the retention of joint and several liability, one joint tortfeasor may definitely suffer injustice. Putting the question of assumption of risk in the “plan one” perspective, with the plaintiff bearing the burden of immunity engendered by his “assumption of the risk,” allows a more objective consideration of the merits of retaining or rejecting the assumption of risk doctrine than is possible under the contribution situation where the defendant bears that entire burden.\textsuperscript{351}

\begin{footnotes}
\item[345] Prosser, supra note 13, at 308-10.
\item[346] Heft & Heft, supra note 13 § 1.320, at 56.
\item[347] Prosser, supra note 13, at 309.
\item[348] The right of contribution is said to be “inchoate” until payment is made by one sharing common liability with another such that the first has paid more than his proportionate share. Equity causes the ripening of the right because the non-paying party has been unjustly enriched.
\item[350] For a discussion of this question, see section II, C, 6 supra.
\item[351] See note 355 infra and accompanying text. As considered in section III, A, 3, d supra, the plaintiff may be in a better position to bear the burden than a defendant.
\end{footnotes}
(c) Other Areas Affected by the Common Liability Requirement

The effect of allowing contribution among tortfeasors has also been considered in conjunction with situations involving governmental or inter-spousal immunities, liability by statute, workmen’s compensation liability, gross negligence and wrongful death actions. In each of these areas, a reassessment is valuable in light of the possible adoption of contribution among tortfeasors in this state.

In each of the above areas, some courts maintain that there is a lack of common liability between the “ordinarily negligent” tortfeasor and a member of the class of tortfeasors affected thereby. The governmental and inter-spousal immunities are self-explanatory, in that one who is not liable because of immunity clearly does not share “common liability” with another. Furthermore, it has also been held, in Wisconsin, for example, that where liability for negligence is imposed by statute (such as in the case of the imputed negligence of a minor to the one signing for his driver’s license, or the case of an employer’s workmen’s compensation liability being statutorily prescribed), there is no common liability with one found liable under the normal rules of negligence. Similarly, one found guilty of “gross negligence” would not share common liability with one guilty of “ordinary negligence,” and beneficiaries entitled to sue under a wrongful death statute do not share common liability (or any liability) for the torts of a decedent in whose name they are permitted to sue.

The idea that these disparities should be continued after a state’s adoption of pure comparative negligence has come under attack by one well known legal writer. Dan Byron Dobbs, noting that the rationale of some courts was to prohibit contribution where there was a lack of “common liability,” while others simply cited “public policy” in support of a particular immunity, has aptly observed:

While [allowing certain immunities] made good sense when the plaintiff was entitled to recover only if he was free from negligence, it does not make such good sense to place all liability on one negligent defendant while letting a negligent plaintiff recover without suffering himself a share of [the] third party’s immunity.

The writers of this article concur. Furthermore, as Dobbs also proposed, in the case where one tortfeasor is liable because the negligence of another is imputed to him, under pure comparative negligence he should

352. By statute, Florida has prescribed that a negligent employer who pays workmen’s compensation to his injured employee is not liable to a joint tortfeasor sued by the employee for a separate recovery on the same injury. Fla. Stat. § 440.11 (1973). See also section II, C, 3 supra.
353. HERT & HERT, supra note 13 § 1.320, at 56.
354. Dobbs, supra note 13, at 368.
stand completely in the shoes of the one for whom he is responsible, and thus be susceptible to a suit for contribution.\textsuperscript{355} Likewise, it would appear that a beneficiary in a wrongful death action should also be imputed the negligence of the deceased for whose death he is seeking recovery, so that the computation of the damages recoverable by that beneficiary in a pure comparative negligence state will be proportionately reduced by that negligence, in the same way that any actual negligence on the part of the beneficiary himself in causing the decedent's death should reduce his recovery.

In conclusion, as a general rule of thumb, it is proposed that the "new" common law respecting negligence in Florida should be shaped in such a way that the exceptions are few. For the reason stated by Dobbs, the courts are urged to avoid adopting immunities or artificial distinctions which would hinder the operation of "pure" comparative negligence. More specifically, in a day when statutory liability, imputed negligence, strict liability, negligence per se and other doctrines are imposing liability, there is no reason why Florida, if adopting contribution among tortfeasor should also adopt the doctrine of common liability.\textsuperscript{356}

(2) The Effect of a Prior Settlement and Release on Contribution

(a) Usage in Other Jurisdictions

It is generally conceded that compromise and settlement are favored creatures of the courts, in that settlement tends to reduce the burden on the court system. Consequently, the effect on settlement had by comparative negligence and its contemplated refinements such as contribution among tortfeasors is an important consideration for Florida lawmakers.

The general rule, according to Prosser,\textsuperscript{357} has been that a party who settles with a plaintiff and in return receives either a release or a covenant not to sue is not relieved from the duty of contribution in states which permit joint tortfeasors to recover from one another under that doctrine. Clearly, such a rule is not conducive to settlement, since its effect is to leave a settling party in a position where it still must defend against a contribution claim. Therefore, the opposite position was taken by the new

\textsuperscript{355} For example, suppose $S$, the servant of $M$, is jointly liable with $T$, another tortfeasor, for the injury to $P$, a plaintiff. Where joint and several liability is recognized, after obtaining a verdict whereby $T$ is found 40% responsible and $S$ 60% responsible for the injury, $P$ may choose to recover his entire damages from $T$. It is, therefore, submitted that $T$ should be entitled to contribution from either $S$ or $M$, assuming $M$ would be properly liable under the doctrine of respondeat superior. Of course, $M$ in turn could seek indemnity from $S$ for so much as $M$ may pay to $T$ in contribution (or to $P$, if joined in the original suit).

\textsuperscript{356} There is no redeeming social policy reason for including these complications in an already complicated area of law. Comparative negligence should simplify rather than complicate, and all those whom the law makes "liable" for negligence should be subject to "comparative liability" with the negligence of another.

\textsuperscript{357} PROSSER, supra note 13, at 309. See the original UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, 9 UNIFORM LAWS ANNOTATED § 4 (1939).
Uniform Contribution Among Tortfeasors Act, which prescribes a total and absolute discharge to such a settling defendant.\textsuperscript{358} This rule certainly provides incentive to settle, but it leaves open the question of the equity of allowing one joint tortfeasor to make a fast deal with the plaintiff at the expense of another joint tortfeasor who is thereby left to bear the brunt of the litigation.\textsuperscript{359}

As may be expected, since rules espousing two opposite extremes have existed, there is also a compromise rule in effect in certain jurisdictions. For example, the New Jersey rule provides for a pro rata reduction of the amount remaining due,\textsuperscript{360} an idea which Prosser claims is criticized as tending more to discourage than to encourage settlement. On the other hand, the Supreme Court of Wisconsin elected to adopt a rule allowing contribution according to percentage of fault and predicted that “substantially more settlements will result.”\textsuperscript{361} The ensuing procedure for settlement in Wisconsin, where contribution is of the “pure form” comparative negligence variety,\textsuperscript{362} could provide an excellent example for Florida to follow.

The ultimate result of settlement in Wisconsin seems to be that (1) the plaintiff and defendant negotiate and arrive at an estimated percentage of fault which is likely to be assessed against the defendant; (2) this is converted to a dollar amount for the purposes of settlement; (3) a release or covenant not to sue is drawn up whereby the settling tortfeasor is discharged for “that percentage of negligence found attributable to the settling tortfeasor”;\textsuperscript{363} and, (4) the release or covenant also contains a provision whereby the settling defendant does not lose his right to contribution but is protected against contribution being obtained by another.

It is easily understood why the Wisconsin trial bar was “apprehensive that proper releases could not be drawn under Bielski v. Schulze (the leading case) which would preserve rights of contribution against the nonsettling tortfeasor.”\textsuperscript{364} Nevertheless, this was accomplished by a method prescribed by the Wisconsin court: “[T]he plaintiff must agree, to satisfy such percentage of the judgment he ultimately recovers as the settling tortfeasor's causal negligence is determined to be of all the causal negligence of all the co-tort-feasors.”\textsuperscript{365} In other words, when the settling tortfeasor's negligence is ultimately determined, the release puts him in the same position as if he had paid the exact amount of damages required.

\textsuperscript{358} Uniform Contribution Among Tortfeasors Act, 9 Uniform Laws Annotated § 1(b) at 68 (Supp. 1961). Prosser, supra note 13, at 310 indicates that the reason for the new “total discharge” rule was to encourage settlement.
\textsuperscript{359} Cf. Ward v. Ochoa, 284 So. 2d 385 (Fla. 1973), discussed infra in text accompanying note 373.
\textsuperscript{360} Theobald v. Angelos, 44 N.J. 228, 208 A.2d 129 (1965).
\textsuperscript{361} Bielski v. Schulze, 16 Wis. 2d 1, 13, 114 N.W.2d 105, 111 (1962).
\textsuperscript{362} Id.
\textsuperscript{363} Heft & Heft, supra note 13 § 4.200, at 10.
\textsuperscript{364} 16 Wis. 2d 1, 114 N.W.2d 105 (1962); Heft & Heft, supra note 13 § 4.220, at 13.
\textsuperscript{365} Bielski v. Schulze, 16 Wis. 2d 1, 13, 114 N.W.2d 105, 111 (1962).
of him, whether it turns out that he settled for more or less than the amount which would have been assessed at trial. No problem is presented by the fact that settling tortfeasors are not present at trial, since "both plaintiff and defendant are entitled to have the percentage of the nonsettling tortfeasor's negligence determined."

(b) Florida Law on the Subject

Florida, long before adopting comparative negligence, passed legislation governing releases and covenants not to sue. Among other things provided by the Florida statute are the following rules: (1) a release as to one party does not discharge any other party; (2) a release in return for a partial satisfaction of a plaintiff's claim results in a set-off reducing the damages awarded in a judgment against a party not released; and, (3) the existence of a release is not to be made known to the jury. All of the above appear to be completely consistent with the objects of comparative negligence set forth in Hoffman. In fact, Dean Maloney, in his 1958 article advocating comparative negligence in Florida, actually argued that the Uniform Contribution Among Tortfeasors Act not be adopted here partly because the Florida legislature had already accomplished one of the goals of the Act by enacting legislation allowing release and settlement against one party without releasing others.

The set-off aspect of the Florida statute is also compatible with comparative negligence, and would seem to fit nicely into the adoption of either the plan for total implementation of comparative negligence advocated herein or a Wisconsin-style plan for contribution and settlements. It will be remembered that under "plan one" there would be no joint and several liability and therefore there would be no need for any set-offs (since any defendant who had not settled would be held responsible only for the percentage of damages caused by his own negligence). Under the Wisconsin plan for contribution discussed above, the types of releases prescribed are tantamount to enforcing a set-off such that the other defendants are not liable for that part of the fault ascribed to a settling defendant. It should be noted that their operation is

366. See Heft & Heft, supra note 13, § 4.200 and appendix III for discussion of releases and recommended forms to be followed.
369. Maloney, supra note 13, at 167 n.196.
370. For a construction of Fla. Stat. § 768.041 (1973) as to uninsured motorist coverage and a resistance to contribution among tortfeasors, see Nearhoof v. International Sales-Rents Leasing Co., 251 So. 2d 717 (Fla. 3d Dist. 1971).
371. See discussion in Heft & Heft, supra note 13, § 4.220, at 15.
couched in terms of allowing the nonsettling, jointly liable tortfeasor to be liable for all the damages not yet paid, then to have the plaintiff indemnify the settling tortfeasor against any contribution he may be required to pay (in the event he had obtained a favorable settlement by paying initially less than the amount for which the verdict ultimately made him responsible).

One relatively recent judicial creation effecting the Florida law regarding release and settlement should also be considered for the sake of completeness. The "Mary Carter agreement" is a device whereby one co-defendant secretly contracts with the plaintiff that he will go to trial and defend himself, while at the same time the plaintiff agrees to release the co-defendant from all but a certain amount of liability mutually agreed upon. It is self-evident that in a comparative negligence state a certain amount of tactical advantage could inure to a plaintiff if a settling joint tortfeasor would remain in the case and testify in such a way as to diminish the plaintiff's liability in the eyes of the jury, as well as to inculpate the non-settling tortfeasors. For this reason, even in a case not involving comparative negligence, the Florida Supreme Court has held that it is reversible error for a trial judge to refuse to order any Mary Carter agreements to be produced for discovery and to admit them into evidence upon proper introduction at trial. The court did not view a set-off under Florida Statutes section 768.041(2) of the amount settled upon in the release to be curative of the error or to render the failure to admit the existence of a Mary Carter agreement before a jury to be harmless error. Thus, it should be noted that while the ordinary settlement and release whereby the settling tortfeasor bows out of litigation is governed by section 768.041(3) and shall not be made known to the jury, if a Mary Carter is entered into and the settling party is to remain in litigation, its existence must be disclosed.

In his concurring opinion in Ward v. Ochoa, the case just described, Justice Dekle rightly ascertained that underlying the whole Mary Carter question was the serious question of whether the court should reconsider the rule against contribution among joint tortfeasors. It seems clear that reconsideration must occur, as has been urged in prior subsections of this article. But regardless of whether Florida adopts "plan one" or "plan two" for accomplishing Justice Dekle's stated purpose of "'equal justice' on a comparative basis," the decision in Ward is a good one, particularly for a comparative negligence state.

5. THE IMPORTANCE OF SPECIAL VERDICTS

It has been a recurring theme of this article that with the adoption of comparative negligence, there is a definite need for the systematic use

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of special verdicts. While William Schwartz found authority for the propositions that special verdicts destroy the value of the jury as an instrument for translating the law into "the answer from the man in the street," and that the special verdict device is one that complicates court room procedure, the authors of this article concur with those who believe that special verdicts are both necessary for the sake of equity and practical in their implementation.

Two reasons are advanced in urging that special verdicts not only be made optional, as announced in Hoffman, but also be made uniformly mandatory, either by legislation or judicial decree. First, in order to effectuate many facets of a plan for the optimum use of pure comparative negligence, the device is almost a prerequisite. And, second, since Florida is in the rare position of consciously embarking on a new excursion into the formulation of the common law of negligence, it has an equally rare opportunity to provide from the outset a means of monitoring its experiment. In short, the special verdict will enable review by the judiciary, the legislature and by legal scholars which will reveal much more fully the reactions of juries under the new system.

As to the practical need for special verdicts, it should be recalled that throughout the discussion of multiple party problems, it has been readily apparent that room for purely mathematical error is always a possibility. Consequently, the special verdict is advisable both because (1) it may be used in such a way as to put the mathematical computations in the hands of the judge rather than the jury; and (2) it provides a means for appellate review of such computations, by whomever made. And even in situations which do not involve multiple parties, it should be recognized that the comparative negligence system's goal of truly apportioning liability according to fault may be better realized by using the special verdict. As Maloney observed: The special verdict will "protect a defendant from an overly sympathetic jury." More specifically,

[a] jury which on general principles would return a large verdict in favor of a pretty woman and against a railroad company [not to mention an insurance company sued under Florida's direct action provisions] may well hesitate to return special findings which it knows to be against the evidence.

Maloney has further pointed out, even at the writing of his article which was relied upon so heavily by the Supreme Court of Florida in Hoffman, that Wisconsin's comparative negligence law has been regarded as successful, and Mississippi's has been the subject of criticism, mainly

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374. See notes 274, 282, 303, 341 & 367 supra and accompanying text.
375. Schwartz, supra note 13, at 131-35.
376. 280 So. 2d at 439.
377. Maloney, supra note 13, at 171.
378. Maloney, supra note 13, at 172, citing Prosser, Comparative Negligence, 51 Minn. L. Rev. 465, 502 (1953).
because Wisconsin has a required special verdict procedure, whereas Mississippi has not.\textsuperscript{779}

In addition, the special verdict can scarcely be denied usage if three other problem areas under comparative negligence are to be successfully and efficiently resolved. First, in the area of the insolvent or non-joinable third party, it has been observed that special findings are needed in order to preserve properly a finding of negligence in such a way as to permit any later action against such party without the need for relitigating the issue of negligence.\textsuperscript{780} Similarly, in the event that this state adopts a rule allowing contribution among joint tortfeasors, the special verdict has again been cited as a critical part of the solution to avoiding the relitigation of negligence in a subsequent action for contribution.\textsuperscript{781} Finally, with reference to the promotion of settlements and releases, the special verdict would again be a necessity in computing the negligence to be ascribed to the settling as well as the nonsettling parties.\textsuperscript{782}

Prosser observed three main reasons for the adoption of special verdicts in conjunction with the adoption of comparative negligence: (1) it allows for the correction of jury error (a remittitur may save a new trial); (2) it forces detailed consideration by the jury rather than allowing it to jump to a conclusion on a "gut reaction"; and (3) it enables the court to avoid the necessity of using long, complicated jury instructions which would open the door to reversible error.\textsuperscript{783}

One further consideration remains, however. One of the most persuasive criticisms of the Wisconsin special verdict system has been that it is unduly complicated and cumbersome. Although the authors favor special verdicts, there is no reason why the Wisconsin system need be adopted. Instead, the "federal rule special verdict"\textsuperscript{784} may be used. It consists of a general verdict accompanied by written interrogatories, a device not altogether new to Florida.\textsuperscript{785} Finally, the intricacy of the verdict may be reduced to a minimum by including blanks on the general verdict form for total damages sustained by each party, the degree of fault attributable to each party and the reduced damages, which are the total damages multiplied by the percentage of fault.\textsuperscript{786}

In view of the above outlined approach, it appears that the most prudent course of action for Florida judges is the immediate uniform adoption of special verdicts in comparative negligence actions.

\begin{footnotesize}
\begin{enumerate}
\item[379.] Maloney, supra note 13, at 172. See, e.g., Ghiardi & Hogan, supra note 13, Appendix II; Herz & Herz, supra note 13, Appendix III for sample special verdicts.
\item[380.] See note 303 supra.
\item[381.] See note 341 supra and Dobbs, supra note 13, at 367.
\item[382.] See note 367 supra.
\item[383.] Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 502 (1953).
\item[384.] Fed. R. Civ. P. 49(b).
\item[385.] Fla. R. Civ. P. 1.481. "In all actions when punitive damages are sought, the verdict shall state the amount of punitive damages separately from the amounts of other damages awarded."
\item[386.] See note 282 supra. For an example of the simplified special verdict, see Acevedo v. Acosta, 296 So. 2d 526 (Fla. 3d Dist. 1974).
\end{enumerate}
\end{footnotesize}
6. THE MULTIPLIER EFFECT: INCREASED COMPLEXITY WITH ADDITIONAL PARTIES

a. Counterclaims, Crossclaims and Set-offs

(1) The Multiplier

While the Supreme Court of Florida in Hoffman prescribed a means for computing the liabilities of parties in a two-party situation, it failed to do so in those situations involving more than two parties; therefore, the procedure to be used in such instances requires a certain amount of extrapolation and imagination. Three alternative plans have been proposed as solutions to this problem.

For the purposes of the discussion below, it will be assumed that either “plan one” or “plan two” as described earlier will be adopted, thus permitting the true proportionate distribution of fault among all parties, even in multiple party situations.

The decision to adopt comparative negligence, if it is to be a meaningful one in multiple party situations, will of necessity result in an increase in the complexity of multiple party litigation. If the doctrine of joint and several liability is to be considered abolished, or if, in the alternative, contribution among tortfeasors is to be permitted, then a plaintiff will no longer be able to satisfy his damages by joining a single tortfeasor, \( D_1 \), if a second tortfeasor, \( D_2 \), also contributed to his harm.

The multiplied complication becomes evident with the addition of successively increasing numbers of tortfeasors, particularly in light of the fact that with the abolition of the complete bar formerly imposed by contributory negligence, each “defendant” who has himself sustained damages can now in good faith become a counter- or cross-plaintiff. While the Hoffman decision provided for the eventuality of two negligent parties suing each other and each being entitled to recover, the proposed solution of setting off their liabilities is not so simple a matter when three or more parties bring suits against one another. The following examples will be illustrative of a procedure which, if followed, may prove to be a satisfactory method of computation in such a situation.

(2) Examples

The following are examples demonstrating in a three-party situation the division of labor and methods for judge and jury: (1) the jury’s duty

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387. See section III, A, 1 supra.
388. Section III, A, 2 supra and succeeding sections discuss the alternatives of the “Total Implementation of Pure Comparative Negligence,” the use of contribution among joint tortfeasors, and the possibility of retaining the status quo rule of joint and several liability without adopting contribution.
389. See note 293 supra.
390. This is true even under the contribution alternative suggested in section III, A, 4 supra, since a defendant, \( D_1 \), would be constrained to join the other tortfeasor, \( D_2 \), in order to have the negligence of all parties determined in a single trial.
391. See also notes 282, 303 & 342 supra and accompanying text for other examples.
will be to compute each party's negligence, the total damages of each, and the net recovery to which each is entitled after taking into account his contributory negligence; (2) the judge's function will be to compute the individual recoveries and to effect the set-offs. Assume that P, the initial plaintiff, sued D₁ and D₂ for P's $10,000 damages suffered in an automobile accident, and that D₁ and D₂ each counterclaimed against P and cross-claimed against each other for their own $10,000 and $50,000 respective damages suffered in the same accident.

### (1) JURY DETERMINATION

<table>
<thead>
<tr>
<th>PARTY</th>
<th>NEGLIGENCE</th>
<th>TOTAL DAMAGES</th>
<th>DIMINISHED DAMAGES²⁹²</th>
</tr>
</thead>
<tbody>
<tr>
<td>P</td>
<td>10%</td>
<td>$10,000</td>
<td>$9,000</td>
</tr>
<tr>
<td>D₁</td>
<td>20%</td>
<td>$10,000</td>
<td>$8,000</td>
</tr>
<tr>
<td>D₂</td>
<td>70%</td>
<td>$50,000</td>
<td>$15,000</td>
</tr>
</tbody>
</table>

(2) JUDGE'S DETERMINATION (possible methods)

#### (a) P's Recovery under Each Method²⁹³

1. **Preferred Method**²⁸⁴
   - a. D₁ owes P 20% of $10,000
     (total) = $2,000.
   - b. D₂ owes P 70% of $10,000
     (total) = $7,000.

2. **Diminished Damages Method**
   - a. D₁ owes P 20/90 of $9,000
     (diminished) = $2,000.
   - b. D₂ owes P 70/90 of $9,000
     (diminished) = $7,000.

#### (b) D₁'s Recovery under Each Method

1. **Preferred Method**
   - a. P owes D₁ 10% of $10,000
     = $1,000.
   - b. D₂ owes D₁ 70% of $10,000
     = $7,000.

2. **Diminished Damages Method**
   - a. P owes D₁ 10/80 of $8,000
     = $1,000.
   - b. D₂ owes D₁ 70/80 of $8,000
     = $7,000.

#### (c) D₂'s Recovery under Each Method

1. **Preferred Method**
   - a. P owes D₂ 10% of $50,000
     = $5,000.
   - b. D₁ owes D₂ 20% of $50,000
     = $10,000.

2. **Diminished Damages Method**
   - a. P owes D₂ 10/30 of $15,000
     = $5,000.
   - b. D₁ owes D₂ 20/30 of $15,000
     = $10,000.

### (d) The Set-Off²⁹⁵

- a. Between P and D₁, P recovers a net of $1,000.
- b. Between P and D₂, P recovers a net of $2,000.
- c. Between D₁ and D₂, D₁ recovers a net of $3,000.

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²⁹² Diminished damages (sometimes referred to as “recoverable damages”) are computed by reducing the claimant's total damages by the proportion of his damages caused by his own contributory negligence.

²⁹³ Of course, in actual practice two methods would not have to be used, although the two do provide a “check” on each other for correctness.

²⁹⁴ The “preferred method” is first illustrated in note 282 supra. Its use avoids the extra steps involved in the “diminished damages” method, and is also mathematically simpler. See “plan one” as advocated in section III, A, 3 supra.

²⁹⁵ As to the advisability of denying to insurance companies the benefit of set-offs, see section III, B, 2 infra.
The reader should notice that as between $P$ and $D_1$, each of whom sustained the same amount of damages, the one who was less negligent recovered the net set-off. However, as between $D_1$ and $D_2$, although $D_1$'s percentage of negligence was less than one third as great as $D_2$'s, $D_2$ won a modest net set-off from $D_1$. This result is indicative of the role played by the damages sustained by the parties under pure comparative negligence. In a "modified" rule state, such as Wisconsin, $D_2$ would have been barred from recovering against $D_1$ in any capacity other than as a contribution plaintiff. However, under Wisconsin's pure form contribution (in the wake of the *Bielski* decision), $D_2$ could have recovered contribution from $D_1$.

Two other points should be evident. First, if the jury were to find the percentages of negligence to be less easily used in multiplication and division, and if it also found the damages of the parties to be in "odd" numbers, as illustrated in section III, A, 4, c *supra*, the "preferred" method would be a simpler and, thus, superior method of computation. Second, it should be obvious that with such "odd" numbers, and with the addition of other parties, the problem of set-off would be much better left in the hands of the judge than in those of the jury.

b. Tendency Toward Settlement

Considering the complexity of multiple party litigation under comparative negligence, it may be tempting for Florida lawmakers to sacrifice purity of result in favor of the retention of the rule favoring joint and several liability and opposing contribution among joint tortfeasors. However, only a small part of the total number of accidents giving rise to negligence actions involves multiple parties, who have all sustained injuries. Furthermore, it appears that of those accidents which do fall into the multiple party category, seldom are more than three parties involved. It is submitted that under the plans proposed in this article for the division of functions between judge and jury, the difficulty of handling such cases will not be too great.

Nevertheless, there is also a favorable psychological and economic phenomenon which should help to persuade lawmakers of the value of permitting a pure form apportionment of fault among multiple parties: the more complex the case, the greater the incentive for the parties to settle. Dean Prosser observed this phenomenon in an article written in 1953. He found "astonishingly few cases in which the question of multiple parties [had] reached the appellate courts under any 'comparative negligence' act." He finally concluded that the cases of multiple parties

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396. See note 337 *supra* and accompanying text.
397. See text following that which accompanies note 342 *supra*.
398. See section III, A, 2 *supra* for a discussion of the merits of this alternative.
400. Id. at 507.
were either "sufficiently few in number, or . . . disposed of with so little difficulty in the trial courts, that they [had] not been a major problem on appeal."  

Furthermore, this phenomenon has been found to be a reality in Wisconsin. It has been said that the fact that all parties under the Wisconsin plan can be joined in one action has been a definite factor encouraging settlement. This has already been advocated in this article as a wise plan for Florida to follow. There is no reason to believe that the effect on settlements will not be the same in this state as in Wisconsin. Thus, liberal joinder rules in Florida should be encouraged.

**B. Insurance Ramifications**

1. **IN GENERAL**

In our post-industrial revolution society, any change in tort law or any new tort doctrine will have insurance consequences. This is especially true of the comparative negligence doctrine, in that it has been promoted as an alternative to "no-fault" insurance. The overall effect of the comparative negligence rule on insurance is probably impossible to fathom and is definitely beyond the scope of this article. Therefore, only a few representative areas in which insurance and comparative negligence intersect will be examined.

2. **THE SET-OFF PROBLEM**

   a. The Problem Defined

   The most perplexing comparative negligence problem concerning insurance is whether the insurance carrier should be subjected to the set-off principle. In a two-party action, for instance, the question is whether an insurer must pay claims based on the two individual verdicts, or whether it should be responsible only for the net (set-off) judgment. This problem has been the subject of extensive debate among the commentators and has even prompted statutory action. The Arkansas

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401. Id. at 508. Prosser finally decided that he would leave multiple party apportionment, "theoretically perfect as it may be," to the Canadians "until the American jury is [sic] eliminated or at least improved." The proper use of special verdicts by Florida trial courts should control the jury problem feared by Prosser.


403. See section III, A, 4, d (2) (a) supra on settlements.

404. Krause, No-Fault's Alternative—The Case for Comparative Negligence and Compulsory Arbitration in New York, 44 N.Y.S.B.J. 535 (1972). If comparative negligence is indeed an alternative to no-fault insurance, there seems to be little justification for having both.

405. The Hofman decision expressly requires that when two verdicts (one for each litigant) are returned, the court must off-set one against the other and render one judgment reflecting the net amount. See notes 37-40 supra and accompanying text.

406. Dobbs, supra note 13, at 383; Fisher & Wax, supra note 13, at 570; Flynn, Comparative Negligence: The Debate, 8 TRIAL 49, 52 (1972); Leflar, Walker & Bethell, supra note 13; Leflar & Wolfe, supra note 13; Schwartz, supra note 13, at 126.
legislature went so far as to abandon the pure form rule altogether, in an apparent attempt to avoid the problem. However, the authors have found no reported cases dealing with the issue, which tends to indicate that in a pure form state like Mississippi there must be no real problem. Due to the absence of actual appellate cases, an illustrative example will be set out below, accompanied by a discussion of the legal and policy considerations involved, and, hopefully, a beneficial suggestion.

b. An Illustrative Example

The following example is taken from an actual case, litigated in Arkansas, which was apparently never appealed but which became the subject of a panel discussion between a legal scholar and a judge.

Two insurance companies are the litigants. One is insisting that there should be a set-off and the other is insisting that there should not be. The facts stated briefly are about as follows: A man driving a car had a collision insurance policy with one insurance carrier and liability insurance with another insurance company. He was involved in an accident, and his collision carrier reimbursed him and then sued the other driver for subrogation. The other driver promptly counterclaimed for both property damages and personal injuries. At the trial the counterclaimant received a verdict for personal injuries that exceeded the verdict which the plaintiff was given on his property damage. The attorneys presented to the court a precedent for a judgment wherein the liability carrier was given the benefit of the plaintiff's verdict for property damage as a set-off to the personal injuries. Now, the collision carrier says, "You got the money that we are entitled to. We are subrogated to those rights, and we want our money back." So... the collision carrier [is] now suing the liability carrier to recover the amount of the set-off.... [T]he defendant liability carrier has demurred to the complaint, arguing that the plaintiff stands only in the position of its insured, and, since they have extinguished their liability to the insured, he has no right against them and therefore, has the collision insurance carrier.

These sources contain several excellent examples and represent some of the best analysis of the problems involved.

407. R.I. GEN. LAWS ANN. § 9-20-4 (Supp. 1972) (prohibiting casualty insurers from taking advantages of the set-off). It should be noted, however, that the casualty insurers benefit from the prohibition at the expense of liability insurers (see text accompanying note 410 infra) and, therefore, the legislature ought to have addressed itself to whether the prohibition also applies to the liability insurer. See notes 411-416 infra and accompanying text.

408. The set-off problem only arises in jurisdictions having the pure form rule and the modified-50% rule because under the other forms, there can be only one recovery and, hence, no set-off. Fisher & Wax, supra note 13, at 570. See note 19 supra.


410. Leflar & Wolfe, supra note 13, at 72.

411. This example can be diagrammed in the following manner:
The liability insurer wants to be subjected to the set-off in order to incur liability for the lesser "net" judgment, rather than for the gross verdict amount. It argues that its policy provisions require it to pay "all sums to which the insured becomes legally obligated to pay" and that since the judgment (as opposed to the verdicts) is the "legal" obligation to pay, it should only pay the net amount reflected in the judgment.\textsuperscript{412} Furthermore, it asserts that the policy usually gives the insurer all defenses available to the named defendant so that it should be able to plead set-off as a defense.\textsuperscript{413} Under this theory, it is obvious that the liability insurer would then pay a relatively smaller portion of the total damages involved, as compared to what it would be obligated to pay without the set-off.\textsuperscript{414} Consequently, with the set-off, the individual insureds are subjected to much greater individual liability. In light of the widespread use of collision insurance however, the insureds may nevertheless be fully compensated.

The collision carrier wants no part of the set-off inasmuch as it would diminish most subrogation claims and seriously jeopardize small

\begin{itemize}
\item [(1)] Assume that A is the claimant and B is the counterclaimant and that A is 60\% at fault and sustained $10,000 damages, whereas B is 40\% at fault and sustains $10,000 damages.
\item [(2)] The individual verdicts are computed as follows:
\begin{itemize}
\item B owes A 40\% of $10,000 or $4,000
\item A owes B 60\% of $10,000 or $6,000
\end{itemize}
\item [(3)] The set-off is computed as follows:
\begin{itemize}
\item B owes A $4,000
\item A owes B $6,000
\item A owes B $2,000
\end{itemize}
\item [(4)] The above illustrate the result where no insurance is present. Assuming that both A and B are insured and that each has separate collision and liability insurers (for ease of explanation), the monetary differences caused by permitting both types of insurer to take advantage of the set-off, on one hand, and prohibiting them therefrom, on the other, can be illustrated as follows:

<table>
<thead>
<tr>
<th>Where insurers are subject to set-off</th>
<th>Where insurers are not subject to set-off</th>
</tr>
</thead>
<tbody>
<tr>
<td>A's collision insurance pays A $10,000 and has no subrogation claim against B</td>
<td>A's collision insurance pays A $10,000 and has a subrogation claim of $4,000 against B</td>
</tr>
<tr>
<td>A's liability insurance pays B $2,000 (B's net judgment against A)</td>
<td>A's liability insurance pays B $6,000 (B's pre-set-off verdict against A)</td>
</tr>
<tr>
<td>B's collision insurance pays B $10,000 and has a $2,000 subrogation claim against A</td>
<td>B's collision insurance pays B $10,000 and has a $6,000 subrogation claim against A</td>
</tr>
<tr>
<td>B's liability insurance pays A zero (since B received the net judgment)</td>
<td>B's liability insurance pays A $4,000 (A's pre-set-off verdict against B)</td>
</tr>
</tbody>
</table>

When the two alternatives are compared it is readily apparent that the liability insurers benefit greatly from the set-off, (e.g., if the insurers are subjected to the set-off, A's liability insurer would pay B $2,000 instead of $6,000, and B's liability insurer would pay A nothing instead of $4,000). On the other hand, the collision carriers' subrogation rights have been diminished by the set-off (e.g., A's collision insurer has no right of subrogation against B as opposed to a $4,000 subrogation claim where there is no set-off, and B's collision insurer has a $2,000 subrogation claim against B as opposed to one for $6,000 where there is no set-off). Therefore, the set-off enables the liability insurer to pay a lesser amount while at the same time it diminishes the collision carriers' subrogation claims.

412. Fisher & Wax, supra note 13, at 570; Leflar & Wolfe, supra note 13, at 72-73.
413. Dobbs, supra note 13, at 383.
414. See note 411, supra.
subrogation claims.\textsuperscript{415} Since the collision carrier has no greater right against the other party (or his insurer) than does its insured, its subrogation claim would be diminished or even cancelled by the set-off process.\textsuperscript{416}

c. No Clear-Cut Solution

The commentators generally favor excluding insurers from the set-off process,\textsuperscript{417} although most admit that there is no clear answer,\textsuperscript{418} and most agree that regardless of the position taken with respect to insurers, individual litigants should always be afforded the set-off.\textsuperscript{419} Furthermore, it has been stated that the set-off would tend to eliminate small subrogation claims,\textsuperscript{420} but that “this would not necessarily be an undesirable result.”\textsuperscript{421}

The ultimate question is whether it makes any difference how the issue is resolved. If, in automobile accident cases, both parties are fully insured (have liability and collision coverage) then it would probably make no difference at all. However, if one or both parties do not carry collision coverage, then the party or parties would not be adequately protected by insurance and the insurers would receive a tremendous benefit from the set-off. This consideration alone may be sufficient to tip the scale in favor of no set-off for insurers.

All in all, the policy considerations favor the no set-off for insurers argument and, as stated previously, this is the position taken by the majority of commentators.\textsuperscript{422} However, ruling is reserved until one final factor is programmed into the insurer set-off decision. The potential conflict of interest problem which arises in the set-off for insurers context must also be considered.

3. POTENTIAL CONFLICT OF INTEREST SITUATIONS

a. Conflict Concerning Set-off

The first of two potential conflict of interest situations directly concerns the set-off problem discussed above. The typical insurance policy affords control of the conduct of the defense to the insurer and the insurer’s attorney, who usually represents the interests of both the insurer and the insured. Clearly, the insured may wish to assert his own great amount of damages and low degree of negligence in a counterclaim, as

\textsuperscript{415} It is noteworthy, however, that often a liability insurer is also the collision carrier, in which case, as to it, the monetary difference may be insignificant. Leflar, Walker & Bethell, \textit{supra} note 13, at 93.
\textsuperscript{416} See note 411, \textit{supra}.
\textsuperscript{417} Leflar, Walker & Bethell, \textit{supra} note 13, at 93; Schwartz, \textit{supra} note 13, at 125-26.
\textsuperscript{418} Leflar & Wolfe, \textit{supra} note 13, at 72.
\textsuperscript{419} See note 406 \textit{supra}.
\textsuperscript{420} Dobbs, \textit{supra} note 13, at 383.
\textsuperscript{421} Schwartz, \textit{supra} note 13, at 127.
\textsuperscript{422} See note 406 \textit{supra}.
well as the high degree of negligence of the other party. However, there
is obviously no monetary incentive for the insurer to prove high damages
and low negligence on the part of its insured if the insurer is not per-
mitted to reap the benefit of any set-off, for if the liability insurer must
pay the total damages caused by its insured, it has no interest in vigorously
asserting the negligence of the other party. On the other hand, if the
insurer is subjected to the set-off, it will endeavor to prove high damages
and low negligence on the part of its insured in order to decrease its po-
tential liability. Thus the insured would benefit directly from his insurer's
endeavors, especially in those instances where the judgment is likely to be
in excess of policy limits and, at the other extreme, in those cases where
his recovery on the counterclaim may engender a net recovery in his
favor.423

The significance of this conflict of interest is lessened considerably
by two factors. First, in those cases where the potential conflict arises,
the insured can (and should) retain independent counsel to protect his
interests. Secondly, even though there may be no direct monetary incen-
tive for the insurer to prove high damages and low negligence if the
insurer is not subjected to the set-off, it is submitted that the attorney,
who represents both insurer and insured, will nevertheless be required
to protect the insured's interests as a matter of professional obligation.
Finally, in the event that the insurer attempts to restrain the attorney
from going "all out" in defense of the insured (or fails to cooperate in
some manner) the attorney would have an ethical duty to recommend
independent counsel.

Although this potential conflict of interest has been cited as a reason
why insurers should be subjected to the set-off,424 in light of the fore-
going it is submitted that its effect on the set-off issue is not of itself
enough to warrant allowing the insurers to benefit from the set-off at the
expense of the public.

In the final analysis, the policy question raised is whether to put the
motoring public in the position of having to obtain collision coverage in
order to protect themselves from their own comparative contributory
negligence. The upper middle class citizen generally does so; thus, the
real issue is whether the liability insurer, who has the benefit of compul-
sory insurance legislation requiring all Florida drivers to purchase its
protection, should be required to insure fully the risks of its insured's
liability against the driver not adequately covered by collision insurance.
The authors suggest that this question be answered in the affirmative.

b. Conflict of Interest in Settlement

It is well-recognized in Florida law that a liability insurer, having
the right to control litigation, has a duty to exercise good faith toward

423. See Dobbs, supra note 13, at 383.
424. Id. See Schwartz, supra note 13, at 126.
its insured in making any decision to accept a compromise or settlement offer. In making such a decision, the insurer has been charged with considering its insured's interests as well as its own. Consequently, the decision to accept a settlement offer has been most critical where the insured was being sued for an amount in excess of the policy limits, while an offer for settlement may have been made within such limits. Thus, the dilemma of the insurer has been in determining whether it can choose to defend litigation, and perhaps exonerate itself, at the risk of exposing the insured to a personal judgment in excess of policy limits. A failure to exercise good faith in making such a decision—including good faith toward defending a count for punitive damages for which it ordinarily owes the insured no duty—may result in the insurer being liable for any judgment against the insured in excess of the limits of the policy.

Now, under comparative negligence, it appears that the insurer will be faced with a second conflict of interest problem. The gravamen of the problem will revolve around counterclaims by defendants. Where on one hand, failure to settle by the insurer has the potential of costing the insured money by requiring him to pay a judgment in excess of his policy limits, on the other hand, settlement by an insurer may now cost the insured by depriving him of an opportunity to recover a net recovery (after set-off) on his counterclaim. What is novel, since the advent of Hoffman, is the situation where a negligent defendant may seriously raise a counterclaim for his own damages without being barred by his contributory negligence. With the advent of such counterclaims, and particularly where the insured counter-plaintiff has substantial damages and an opportunity for a net recovery (after set-off), it may be that the insurer in control of the litigation will now be faced with a conflict of interest problem if it decides to settle. By agreeing to settle, the insurer would generally deprive the insured of the opportunity for a recovery on his counterclaim. It may be that where the counter-plaintiff’s claim is so substantial as to warrant these kinds of considerations, the only proper and fair course of action for the insurer would be to suggest that the insured consult independent counsel before agreeing to let the insurer settle.

428. At the least, the insurer would have to show full disclosure, but as in other areas of law, the courts might be reluctant to find a "knowing and intelligent waiver" of one's rights absent advice of impartial counsel. The caveat for the courts is not to set a costly precedent of requiring an insurer to cause its insured to retain independent counsel except in cases where his counterclaim is truly a meritorious and substantial one.

Another question regarding insurers is the possible conflict due to the effect of set-offs, discussed in section III, B, 3, a supra.
4. INSURANCE RATES

The effect of the comparative negligence doctrine on insurance rates has interested several commentators as well as the insurance industry. Although there is a general agreement that rates are not significantly affected by the doctrine,\(^\text{429}\) none of the commentators is prepared to say so with certainty. The primary reason therefore is that insurance rates are subject to many variables, most of which have a much more volatile effect than does comparative negligence, and most of which are difficult, if not impossible, to measure.

Support for the conclusion that comparative negligence has little or no effect on rates is based on two factors. First, there has been no observable jump in insurance rates after several jurisdictions (which have been the subjects of surveys) have adopted the doctrine.\(^\text{430}\) Secondly, there has been, until recently, a general agreement that, upon adoption of the comparative negligence rule, the frequency of claims increases whereas the average size of individual claims decreases.\(^\text{431}\) This theory has been challenged recently and there are now statistics which indicate that the frequency of claims will decrease upon adoption of comparative negligence.\(^\text{432}\) But before any conclusion can be drawn from insurance rates, much more empirical evidence appears to be needed.

IV. CONCLUSION

Comparative negligence complicates the law of negligence, but it is certainly a more equitable system of loss distribution than the contributory negligence scheme. Of the several types of comparative negligence, the pure form is not only the most equitable, but is potentially as simple to administer as any, especially when designed with sufficient forethought to avoid the creation of the myriad exceptions which have crept into so much of the common law.

The effective administration of the doctrine depends on several factors which, because of its pervasive effect on the law of torts, are not capable of efficient consideration except in the totality of the system. Among those steps which must be undertaken in a harmonious pattern are the abolition of the now obsolete doctrines that distinguish between

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430. See note 429 supra.

431. Id.

different types of negligence, or that afford artificial immunities to certain parties which would thwart the comparison of their negligence with that of others. Similarly, the doctrine of joint and several liability, the effectuation of adequate releases so as to promote settlements, and the handling of insolvent and nonjoinable parties must be simultaneously tackled.

The authors commend the Supreme Court of Florida for having had the courage to embark on this new common law adventure, and hereby submit for the consideration of that court, the trial bar and the legislature, the fruits of what is hoped will be a useful presentation of their thoughts and research on these subjects.