Torts

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In this article the authors survey developments in the law of torts by examining Florida cases and significant statutory enactments of the 1976 Florida Legislature.

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I. INTENTIONAL TORTS

A. Assault and Battery

In *Kaczer v. Marrero* the plaintiff brought a negligence action for injuries sustained when the defendant stabbed him in the back. The parties stipulated that the defendant was insane at the time of the act, and the plaintiff subsequently amended his complaint to allege the tort of assault and battery. The trial court directed a verdict for the plaintiff as to liability, and the jury returned a verdict of $20,000 in damages.

The District Court of Appeal, Third District, affirmed and held that an insane person is responsible in a civil action for the tort of assault and battery. The court based its holding on a prior case, *Jolley v. Powell,* which held that an affirmative defense of insanity is not available to a defendant in a wrongful death action. Responding to the defendant's contention that the *Jolley* decision was not controlling since it was expressly limited to unintentional torts, the court held that the common law rule, making an insane person liable in damages for his tortious acts, has not been abrogated in Florida.

*City of St. Petersburg v. Reed* involved an assault and battery action brought against the City of St. Petersburg and a police officer by a youth who had attempted to escape arrest. When the defendant police officer had attempted to apprehend the plaintiff for the felonious crime of breaking and entering an automobile, the youth began to run away, and the police officer shot him in the leg. At trial, the plaintiff won a jury verdict of $50,000.

On appeal, the defendants contended that the trial court had committed reversible error in admitting into evidence a city departmental firearm order, which authorized using firearms to apprehend a fleeing felon only when the officer reasonably believed that the felon had committed a violent crime against another person, or a crime against property that clearly demonstrated a wanton and reckless disregard for human life. Agreeing with this contention, the District Court of Appeal, Second District, held that the state-wide standards for use of deadly force in making an arrest were control-

1. 324 So. 2d 717 (Fla. 3d Dist. 1976).
2. 299 So. 2d 647 (Fla. 2d Dist. 1974).
3. 330 So. 2d 256 (Fla. 2d Dist. 1976).
4. FLA. STAT. § 776.06 (1975).
ling. Under the state standards, when an officer has reasonable grounds to believe one has committed a felony, the officer is entitled to use force which is reasonably necessary to capture him, even to the extent of killing or wounding him; the type of felony committed does not matter. Therefore, the appellate court reversed and remanded the case for a new trial.

B. False Imprisonment and False Arrest

The separate tort actions of false imprisonment\(^5\) and malicious prosecution protect closely related interests, and sometimes they are confused by the courts.\(^6\) In *Carter v. City of St. Petersburg*\(^7\) it was the court's acknowledgement of the similar interests protected, rather than its confusion, which led it to observe: "It is academic that the essential elements of the two actions are distinct." The District Court of Appeal, Second District, made this statement in considering whether to extend the holding of *Goldstein v. Sabella*\(^8\) to a false arrest case.

*Goldstein* was a malicious prosecution case in which the Supreme Court of Florida held that a judgment of conviction, even though subsequently reversed, is conclusive evidence of probable cause unless it was obtained by fraud, prejudice, or other corrupt means. *Carter*, however, involved a false arrest action brought by union members against the city and two police officers as a result of the arrest of the union members while they participated in a labor dispute. After a summary judgment had been granted for the defendants by the trial court, the Second District noted that the only issue to be decided was whether the plaintiffs' convictions in municipal court, though subsequently reversed by the circuit court, conclusively established the existence of probable cause to support their arrests and thus precluded the false arrest action. While the Second District observed that apparently no Florida decisions had applied malicious prosecution holdings directly to false arrest cases, it found the rationale of *Goldstein* to be persuasive and adopted that

\(^{5}\) Except for terminology, false arrest is usually indistinguishable from false imprisonment as a cause of action. Johnson v. Weiner, 155 Fla. 169, 19 So. 2d 699 (1944).


\(^{7}\) 319 So. 2d 602 (Fla. 2d Dist. 1975).

\(^{8}\) Id. at 604.

\(^{9}\) 88 So. 2d 910 (Fla. 1956).
case's holding in affirming the trial court's grant of summary judgment.

In *Manis v. Miller*\(^\text{10}\) the District Court of Appeal, Second District, decided an issue of first impression for the Florida courts: whether a witness may be held liable for false imprisonment where he has made an honest, good faith mistake in identifying a criminal suspect which contributes to the arrest and prosecution of the suspect. In holding that no liability could be imposed, the court reasoned that efficient law enforcement is dependent on the cooperation of the private citizen with law enforcement officials: "Private citizens should be encouraged to become interested and involved in bringing the perpetrators of crime to justice and not discouraged under apprehension or fear of recrimination."\(^\text{11}\)

### C. Malicious Prosecution

Under the rule of *Gallucci v. Milavic*,\(^\text{12}\) a committal order of a justice of the peace raises a presumption of probable cause and forecloses an action for malicious prosecution against the complainant. This presumption may be rebutted, however, by proof that the complainant resorted to fraud or other improper means in securing the order. In the absence of such proof, the committal order resolves the issue of probable cause.

The Supreme Court of Florida was urged to reconsider the *Gallucci* rule in *Rodgers v. W.T. Grant Co.*\(^\text{13}\) Since the District Court of Appeal, First District, viewed its decision as giving conclusive effect to a committal order which was ostensibly an instrumentality of injustice, it certified the following question as one of great public interest: "Does the committal order of a magistrate import probable cause to prosecute and thus bar a subsequent malicious prosecution action, notwithstanding that the motive for its entry was to bar that action?"\(^\text{14}\)

*Rodgers* was an action by a customer against a retail store to recover for the alleged malicious prosecution of the customer on a worthless check charge. Upon being informed of the facts at the preliminary hearing on the worthless check charge, the justice of the

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10. 327 So. 2d 117 (Fla. 2d Dist. 1976).
11. Id.
12. 100 So. 2d 375 (Fla. 1958).
13. 341 So. 2d 511 (Fla. 1976), rev'g 326 So. 2d 57 (Fla. 1st Dist. 1976).
14. 326 So. 2d 57, 66 (Fla. 1st Dist. 1976).
peace, apparently without instigation by the retailer, announced that the charge would be dismissed if the customer would give the retailer a release from liability. When the customer's attorney declined, the justice of the peace responded: "The court doesn't want to put either side in jeopardy, for that matter, so we will bind this over to criminal court on a proper bond." Subsequently, the State's attorney dismissed the charges without further proceedings.

At the trial for the malicious prosecution action, the circuit court found the Gallucci rule to be controlling and entered a summary final judgment in favor of the retailer. The District Court of Appeal, First District, affirmed; but on rehearing, the court noted that ordering the customer bound over to criminal court for her refusal to release what she considered to be a meritorious claim for malicious prosecution was "the kind of conduct that generates well-deserved contempt for the judicial process." Reasoning that it was nevertheless bound by the Gallucci rule, the First District reluctantly affirmed the order of summary final judgment and certified the above question to the Supreme Court of Florida. Upon reviewing the preliminary hearing transcript, the supreme court concluded that the case was not governed by Gallucci. Since the court found the transcript indicated that the magistrate did not order the committal because he found probable cause, it reversed the summary judgment for the retailer, holding that the committal order did not bar the malicious prosecution action.

The effect of the Rodgers holding is to limit the Gallucci rule. A plaintiff in a malicious prosecution action now may overcome the presumption of probable cause arising from a committal order by showing that the committal itself was not based in fact on a finding of probable cause. This attack on the presumption of probable cause is in addition to that of offering proof that the complainant secured the committal order by fraud or other improper means.

D. Defamation: Libel and Slander

1. SLANDER

In Matthews v. Deland State Bank the plaintiff debtor sued a bank for slander of credit. Two years after he had financed a new

15. 341 So. 2d at 513.
16. 326 So. 2d at 65.
17. 334 So. 2d 164 (Fla. 1st Dist. 1976).
car with the bank, the debtor began to experience financial difficulties and was unable to make payments on the car. In addition, the car was in a collision, and the debtor did not have insurance to cover the repairs. Soon after the collision, the debtor contracted with the bank to satisfy the debt by returning the car.

Approximately three years later, the plaintiff wanted to purchase a home and made an application for financing. When it was denied, he contacted the local credit bureau to determine what was on his record and found that it reflected a debt to the bank of about $1,700 on the repossession. The plaintiff then contacted the bank and was informed for the first time that it had lost over $500 on the repossession of the car. He requested the bank to inform the credit bureau that he owed approximately $500 instead of $1,700, but the bank refused to cooperate. Subsequently, the plaintiff made another application for financing and was again refused. Before sending out credit reports on the plaintiff to the mortgage company, the credit bureau in both instances had checked with the bank to determine whether the indicated balance was still owed; on both occasions, the bank had stated that it was. Approximately one year later, the bank informed the credit bureau that the balance due from the plaintiff on the automobile in question should have been reduced to $585.

In reversing the trial court’s entry of a jury verdict against the plaintiff, the District Court of Appeal, First District, held that “disregard for the truth in reporting credit transactions, especially when coupled with the failure to correct the inaccuracies, constitutes libel per se.” 18 Noting that malice is presumed as a matter of law where words are libelous per se, the appellate court concluded that the trial court erred in instructing the jury that the plaintiff had to prove actual malice on the part of the bank before compensatory or punitive damages could be awarded. The First District also adopted the rule enunciated by the District Court of Appeal, Third District, in Saunders Hardware Five and Ten, Inc. v. Low, 19 that punitive damages may be awarded even though the amount of actual damages is not established, where the alleged defamation is actionable per se. Thus, the court held that the trial court also erred in instructing the jury that punitive damages could not be awarded unless an award of compensatory damages was made.

18. Id. at 166. This holding by the court appears to be an extension of its prior decision in Vinson v. Ford Motor Credit Co., 259 So. 2d 768 (Fla. 1st Dist. 1972).
19. 307 So. 2d 893 (Fla. 3d Dist. 1974).
2. LEGISLATION

In 1976 the Florida Legislature amended\textsuperscript{20} chapter 770 of Florida Statutes (1975). Section 770.01 of Florida Statutes (1975)\textsuperscript{21} was amended to make the notice requirements which are a condition precedent to bringing an action for libel or slander applicable to broadcasts. Concomitantly, section 770.02 was amended in order to make the statutory provisions pertaining to corrections, apologies, or retractions by newspapers also applicable to broadcast stations.\textsuperscript{22}

E. Fraud and Deceit

In an action for fraud and deceit, a plaintiff must allege three elements: (1) that the defendant made a representation on which the plaintiff was meant to act; (2) that the representation was false and the defendant knew it was false; and (3) that the plaintiff relied on the representation to his injury.\textsuperscript{23} All three elements must appear with reasonable certainty in the plaintiff's complaint.\textsuperscript{24}

Seeking both compensatory and punitive damages, a vendee in\textit{American International Land Corp. v. Hanna}\textsuperscript{25} brought an action against a vendor for the alleged breach of an installment land sale contract. Having paid for two allegedly waterfront lots, the vendee was contractually entitled to a deed. The vendor offered instead to exchange two other lots in the same subdivision for the vendee's lots. Unknown to the vendee, the vendor had begun construction of a golf course on the vendee's lots. The vendee refused the exchange offer and ultimately filed suit when the vendor persisted in his refusal to issue a deed.

The trial court limited the vendee's recovery to compensatory damages. Holding that the vendee's complaint alleged the independent tort of an intentional, willful, and irrevocable conversion of property, the District Court of Appeal, Second District, reversed and allowed punitive damages.\textsuperscript{26} However, the Supreme Court of

\textsuperscript{20} 1976 Fla. Laws ch. 205 (amending FLA. STAT. §§ 770.01-.02 (1975)).
\textsuperscript{21} FLA. STAT. § 770.01 (Supp. 1976).
\textsuperscript{22} FLA. STAT. § 770.02 (Supp. 1976).
\textsuperscript{23} American Int'l Land Corp. v. Hanna, 323 So. 2d 567 (Fla. 1975); Mizell v. Upchurch, 46 Fla. 443, 35 So. 9 (1903).
\textsuperscript{24} American Int'l Land Corp. v. Hanna, 323 So. 2d 567 (Fla. 1975), rev'g 289 So. 2d 756 (Fla. 2d Dist. 1974).
\textsuperscript{25} Id. For a discussion of other aspects of this case see Boyer, Jamerson, & Surlas,\textit{ Real Property, 1976 Developments in Florida Law}, 31 U. MIAMI L. REV. \textsuperscript{26} (1977).
\textsuperscript{26} Hanna v. American Int'l Land Corp., 289 So. 2d 756 (Fla. 2d Dist. 1974).
Florida reinstated the trial court's order limiting recovery to compensatory damages. Pointing out that real property cannot be the subject of conversion, the court treated the Second District's finding of conversion as an assertion that the complaint alleged the tort of fraud and deceit. The court then held that the vendor's exchange offer did not constitute an affirmative, false representation and that the vendee did not rely upon a false representation to his detriment since he refused the offer. Chief Justice Atkins argued in a dissenting opinion that the complaint sufficiently alleged an independent tort, based on the vendor's purported misrepresentation that the vendee's property consisted of waterfront lots.27

F. Trespass—Invasion of Privacy

In Florida Publishing Co. v. Fletcher28 the Supreme Court of Florida decided a significant issue of first impression: whether there is an implied consent by custom and usage to news media personnel to enter a homeowner's premises subsequent to an emergency situation of public interest. While the plaintiff was absent from the state, her home was severely damaged by fire. After the fire had been extinguished, the fire marshal and a police sergeant entered the residence to make their official investigation. They invited the news media to accompany them, which they testified on deposition was their standard practice.29 The body of the plaintiff's daughter was discovered on a bedroom floor, and when it was removed, a silhouette remained on the floor. Having exhausted their supply of film, the officials requested the photographer of the defendant newspaper publisher to take a picture of the silhouette since it demonstrated that the body was on the floor prior to the fire. The picture taken by the photographer was delivered to the authorities to be made a part of their official file, but it also was delivered to the defendant newspaper which published it along with an account of the fire. The plaintiff first learned of the facts surrounding the death of her

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27. 323 So. 2d at 570.
28. 340 So. 2d 914 (Fla. 1976), rev'd 319 So. 2d 100 (Fla. 1st Dist. 1975).
29. Various news media organizations filed affidavits which stated that it is common custom and usage to permit news media to enter under such circumstances. Id. at 916.
daughter by reading the newspaper story and viewing the published photographs.

Subsequently, the plaintiff sued the newspaper publisher on three counts: Count I alleged trespass and invasion of privacy; Count II alleged invasion of privacy without reference to trespass; and Count III alleged wrongful intentional infliction of emotional distress and sought punitive damages. The trial court dismissed Count II with prejudice and granted a summary final judgment in favor of the publisher on Counts I and III.

On appeal, the District Court of Appeal, First District, reversed as to the granting of summary judgment on Count I. The appellate court noted that while cases have construed custom and usage to imply consent to enter onto business property and into business establishments, as well as onto private residential property of another, no case had held that consent by custom and usage authorizes entry into the private dwelling of another. Observing that the plaintiff neither impliedly nor expressly invited the defendant's employees into her home, the court held that no basis existed for establishing an implied consent by custom and usage. The court further stated that although the plaintiff had conceded that the fire marshall and police rightfully entered the premises in performing their official duties, there was nothing to indicate that those officials had, in the absence of an emergency, authority to invite others to do so. Finally, the court held that although the report published by the defendant was of legitimate public interest and was not, per se, an invasion of the plaintiff's privacy, if the entry by the defendant's employee constituted a trespass, it also constituted a sufficient basis for the tort of invasion of privacy.

The Supreme Court of Florida disagreed and held that the First District erred in reversing the summary judgment for the defendants as to Count I. The supreme court determined that the trial court had properly decided on the basis of the record before it that "it was common usage, custom and practice for news media to enter private premises and homes under the circumstances present here," and thus the entry by the defendant's photographer was lawful and nonactionable.

30. 319 So. 2d 100 (Fla. 1st Dist. 1975).
31. 340 So. 2d at 918.
G. Tortious Interference with Economic Relationships

1. CONTRACTUAL RELATIONS

Babson Bros. Co. v. Allison\textsuperscript{32} involved a suit against a farm equipment manufacturer by one of its dealers, alleging malicious interference with a contract between the dealer and the manufacturer's local distributing affiliate. The manufacturer was a closely held family corporation which had formed distribution companies, including the affiliate in question, in various parts of the country as warehouse operations to distribute its farm equipment. All the stock in both the manufacturing and distribution corporations was held by the Babson family; all the officers and directors of the distribution company were officers and directors of the manufacturer. In serving as a state regional dealer for the defendant manufacturer's equipment, the plaintiff operated under a contract with the local distributing affiliate which by its terms expired after one year, and was terminable at will on notice by either party. Because of alleged dissatisfaction with the plaintiff as a dealer, an employee of the manufacturer sent notice to the plaintiff that his dealership would not be renewed. This employee had been delegated the authority to determine whether dealership agreements would be renewed or canceled. The fact that the employee was associated with the manufacturer, rather than with its local distributing affiliate, formed the basis for the dealer's interference suit.

At trial, the circuit court entered judgment upon a jury verdict against the manufacturer. The District Court of Appeal, First District, reversed, holding on the basis of two independent reasons that the manufacturer could not be liable for contractual interference: (1) the employee had acted within the scope of his authority; and (2) the manufacturer was privileged to interfere with the contract. The manufacturer's privilege was based on its financial interest in the business of its distributing affiliate.\textsuperscript{33} This financial interest was deemed manifested by the common stock ownership of the two corporations as well as by the manufacturer's obvious interest in its distributors' contracts with dealers who sold and serviced its products.

\textsuperscript{32} 337 So. 2d 848 (Fla. 1st Dist. 1976).
\textsuperscript{33} See \textit{Restatement (Second) of Torts} § 769 (Tent. Draft No. 14, 1969), which the court cited in its discussion of privilege based on financial interest.
2. BUSINESS RELATIONSHIPS

In Smith v. Ocean State Bank34 the District Court of Appeal, First District, noted: "[T]ortious interference with a contract and tortious interference with a business relationship are basically the same cause of action. The only material difference appears to be that in one there is a contract and in the other there is only a business relationship."35

The Smith case represents the most recent attempt by a Florida appellate court to delineate the elements of tortious interference with a business relationship. Prior to Smith the District Court of Appeal, Third District, had held that these elements included: (1) the existence of a business relationship not necessarily evidenced by an enforceable contract; (2) the defendant's fraudulent inducement of the plaintiff's business associate causing the latter to act in a way which destroys the plaintiff's business relationship; and (3) damage to the plaintiff as a result of the breach of the relationship.36 Subsequent to this formulation by the Third District, the District Court of Appeal, Fourth District, concluded that fraud was not a necessary element of the tort37 and substituted in place of the element of fraudulent inducement the intentional and unjustified interference with the plaintiff's business relationship by the defendant.38

In Smith the trial court had dismissed a counterclaim alleging tortious interference with a business relationship. On appeal, the First District listed the following four elements as necessary to establish this tort: "(1)[T]he existence of a business relationship not necessarily evidenced by an enforceable contract; (2) knowledge of the relationship on the part of the interferer; (3) an intentional and unjustified interference with that relationship; and (4) damage as a result of the breach of the relationship."39 The appellate court then held that the complaint stated all of these elements and reversed the trial court.

34. 335 So. 2d 641 (Fla. 1st Dist. 1976).
35. Id. at 642.
38. Symon v. J. Rolfe Davis, Inc., 245 So. 2d 278 (Fla. 4th Dist. 1971).
39. 335 So. 2d at 644.
II. NEGLIGENCE

A. Negligent Acts: Duty

A necessary element of a negligence cause of action is a showing by the plaintiff that the defendant owed him a duty and that this duty was breached. In a case of first impression in Florida, the District Court of Appeal, Second District, recently had to decide whether one can owe a duty to an unborn fetus. The plaintiff in Day v. Nationwide Mutual Insurance Co. had been born with severe cerebral damage allegedly caused during an automobile accident which had occurred while he was still in his mother’s womb in his sixth week of gestation. After noting that the overwhelming trend in the United States is to permit recovery for prenatal injuries, the court considered whether a distinction should be made on the basis of the child’s viability at the time of injury. The defendant attempted to analogize to cases holding that there is a right to abortion during the first trimester of a woman’s pregnancy. The Second District found, however, that any “child injured before birth and born alive is a person under the Florida and Federal Constitutions,” and is therefore entitled to the same rights and protections afforded to all persons. The court’s position is the same as that of the Restatement of Torts.

Another case of first impression answered the question of whether a minor dependent child has a derivative claim arising from injuries to his parent if the parent does not die as a result of the alleged negligence. Following the weight of authority set in other jurisdictions, the Second District held in Clark v. Suncoast Hospital, Inc. that a child does not have such a derivative claim and cannot recover damages for his intangible losses.

When a landowner hires an independent contractor to perform certain functions, the landowner is usually not liable for injuries

40. 328 So. 2d 560 (Fla. 2d Dist. 1976). A collateral issue involves the situation where a child is stillborn as a result of such injuries. In Miller v. Highlands Insurance Co., 336 So. 2d 636 (Fla. 4th Dist. 1976), the District Court of Appeal, Fourth District, found that parents of an unborn viable fetus have a wrongful death action against one who negligently brought about the death of the fetus. The Miller case is discussed in part II, section D, infra.
42. 328 So. 2d at 562.
43. Restatement of Torts § 869 (Tent. Draft No. 16, April 1970). Comment (d) to section 869 specifically states that viability of the fetus should not be the determining factor.
44. 338 So. 2d 1117 (Fla. 2d Dist. 1976).
sustained by the contractor's employees during their work. However, if the owner has actual or constructive knowledge of a dangerous condition, he may have a duty to warn those who work for an independent contractor, although notice to the contractor or supervisor is generally a sufficient performance of this duty. In Lake Parker Mall, Inc. v. Carson an employee of an independent electrical contractor was killed in an explosion at an electrical switchboard in the defendant's shopping mall. The plaintiff contended that the mall should be held to the higher standard of care of an electrical utility since the electrical facilities of the mall were extensive. Rejecting this contention, the District Court of Appeal, Second District, held the mall to a standard of ordinary care and refused to hold the mall liable for the independent contractor's failure to make its employees aware of a known danger.

A landowner's duty may be higher to an invitee than to a new licensee. In Hall v. Holton a policeman, who was injured when he fell through a floor during an investigation of an abandoned building, contended that he occupied a higher status than a licensee and therefore a greater duty of care was owed to him by the building owner. The District Court of Appeal, Second District, rejected this argument but still reversed the trial court's summary judgment for the landowner. The duty owed to a licensee is to refrain from wanton negligence, willful misconduct, or intentionally exposing him to danger, and to warn him of a defect or condition which the landowner knows to be dangerous and not readily obvious to the licensee. The court examined the rule used by some courts that before a duty to warn of hidden dangers arises, the owner must be aware of the licensee's presence. Finding this rule to be too narrow, the Second District construed it to "include those circumstances where the owner could reasonably anticipate that the licensee would be on his premises." Since the owner in Holton had been aware that vagrants occupied his building on occasions and that the police periodically investigated the premises, he did not satisfy his burden of showing he had no reason to expect the presence of the officer.

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45. See Florida Publishing Co. v. Lourcey, 141 Fla. 767, 193 So. 847 (1940).
46. See Somers v. Meyers, 171 So. 2d 598 (Fla. 1st Dist. 1965).
47. See Florida Power & Light Co. v. Robinson, 68 So. 2d 406 (Fla. 1953).
48. 327 So. 2d 121 (Fla. 2d Dist. 1976).
49. See Orr v. United States, 486 F.2d 270 (5th Cir. 1973).
50. 330 So. 2d 81 (Fla. 2d Dist. 1976).
51. Id. at 83.
The scope of the duty owed to a student by a county board of public instruction and a school’s supervising principal was the subject of litigation in Oglesby v. Seminole County Board of Public Instruction. A student with known propensities for violence was suspended from public school for creating a disturbance and shortly thereafter assaulted and beat another youth, who died as a result of the injuries. The incident took place off the school’s campus and was not connected with any school program or facility. Suit was filed against the school board and the supervising principal, alleging a breach of their duty to properly supervise the students. The District Court of Appeal, Fourth District, noted the possibility of sovereign immunity but squarely rested its decision to affirm the dismissal of the plaintiff’s complaint on the ground that no such duty was owed:

We simply hold that where a public school student has been suspended from a school and has been removed from the school grounds and all school related facilities and programs, neither the school board nor the supervising principal of the school have any further duty to supervise or oversee the conduct of such suspended student at locations which are off campus and which are non-school related.

Since no duty existed, the court stated it was not necessary to determine whether there was a causal connection.

The duty of a truck repairman as a bailee was examined in Fruehauf Corp. v. Aetna Insurance Co. Suit was brought against the repairman to recover damages for a truck which had been stolen. The bailee had contracted with a guard service to protect his premises. The general rule is that a bailee is not an insurer of property entrusted to him and is liable only if he fails to exercise that degree of care which a reasonably prudent person would use in protecting his own property. In addition to hiring the guards, the bailee’s security precautions included maintaining a chain link fence with barbed wire at the top, lighting the property with numerous mercury vapor lamps, and placing all vehicle keys in a safe place. The District Court of Appeal, First District, noted that it would not usually be necessary for a bailee to employ a guard service to fulfill

52. 328 So. 2d 515 (Fla. 4th Dist. 1976).
53. Id. at 516-17.
54. 336 So. 2d 457 (Fla. 1st Dist. 1976).
his duty of care. As a matter of policy, the court stated it would be unreason-able to impose a higher standard of care simply because a bailee had undertaken something he was not obligated to do. However, the court recognized that a bailee could be negligent in the manner in which the guard service was hired or maintained. There was no such evidence introduced. Likewise, there was no substantial evidence that the guard service was an employee, as distinct from an independent contractor, such that vicarious liability would obtain. Nevertheless, negligence of the bailee might have been found irrespective of any alleged negligence of the guard service. A large hole in the fence, a lighting system which could have been considered inadequate, and a missing truck key provided ample evidence of negligence on the part of the bailee. The court found such negligence to be at least a “concurrent proximate cause,” and affirmed the verdict for the plaintiff.

Under the dangerous instrumentality doctrine an owner of an automobile may be held liable for its negligent operation by one driving the car with permission. Yet, the owner might not be held liable to third parties when an employee drives a car while acting within the control or direction of his employer. In Demshar v. AAA Con Auto Transport, Inc., however, liability did attach to the owner of an automobile when it was being operated by a driver hired to transport the car from Florida to Ohio. The owner of the car argued that the driver of the car was an agent of the transport company, and therefore, that company should be primarily liable for injuries resulting from the accident. However, the bill of lading signed by the owner expressly stated that the driver was not to be an agent of the transport company, but rather an independent contractor. The Supreme Court of Florida, in adopting the Fourth District’s opinion in its entirety, gave this evidence strong weight and found the owner to be liable under the dangerous instrumentality doctrine.

The issue of whether one owes a duty is sometimes preempted by statutes which confer immunity. The Florida Mental Health Act, also known as the Baker Act, was a compendium of rights for
persons confined for treatment of mental illness. As originally enacted, the law provided that, absent bad faith, a doctor or hospital would be immune from civil or criminal liability for actions in connection with admission, treatment, diagnosis, or discharge of a patient to or from such a facility. In *Burroughs v. Board of Trustees* a patient who suffered from alcoholism and deep depression was given a day pass and subsequently was involved in an automobile accident in which other individuals were injured. Suit was filed against the hospital and doctor on the theory that they were negligent since they knew or should have known the patient would be likely to operate an automobile either under the influence of alcohol or medication. The trial court entered summary judgment against the plaintiffs on the ground that the defendants were immune under the Baker Act. The District Court of Appeal, First District, reversed, finding the Baker Act inapplicable to the situation:

[A]s it affects persons other than the patient, his family and any others who may claim by and through the patient . . . the Act has no application to the claims of strangers to the relationship of patient, hospital and doctor who may suffer injury as a result of negligent conduct arising out of that relationship.

Hence, the court found that a cause of action existed without resorting to the 1973 amendment which specifically excludes immunity when negligence is involved.  

The nature of an attorney's duty to his client was examined in *Dillard v. Smith Construction Co.* A contractor who had subcontracted a pile driving job, which was further subcontracted to the one who eventually performed it, brought a legal malpractice action against his attorney. When a claim for extra pile driving came back up the chain of subcontractors, the contractor worried whether he could apply for "final payment" of the contract price without losing his claim against the owner for the extra cost. The

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61. *Fla. Stat.* § 394.459(12) (1971), as amended by 1973 Fla. Laws ch. 73-133, § 3 codified at *Fla. Stat.* § 394.459(13) (1975). The amendment provided that the section would not relieve a person from liability for negligence, but such amendment was subsequent to the time of the incident in this case.

62. 328 So. 2d 538 (Fla. 1st Dist. 1976).

63. 328 So. 2d at 541.

64. See note 61 *supra*.

65. 337 So. 2d 841 (Fla. 1st Dist. 1976).
contract between the owner and contractor specifically provided that "final payment" would constitute a waiver of all claims not previously made. A lawyer's advice was sought, and he suggested obtaining final payment, which resulted in the bar of future claims against the owner. The contractor brought a legal malpractice action against his lawyer asserting that he gave his advice negligently when he suggested accepting final payment, and that he negligently failed to read the contract and release before exercising his judgment that it would be proper. The District Court of Appeal, First District found the first assertion to be without merit since "a lawyer does not guarantee the efficacy of his advice . . ., [and] contractual interpretations . . . do not become actionable simply because a court later rules against his client." The lawyer was found to have espoused a reasonable, although ultimately wrong, position. The allegation that the lawyer was negligent in failing to read the contract and release prior to exercising his professional judgment was found to have merit, however, and it therefore stated a valid cause of action.

The extent of a manufacturer's duty to build a crashworthy automobile has been the subject of much debate over the last ten years. The issue is whether an automobile can be so defective in design as to make the manufacturer liable to a passenger where the passenger's injuries resulted from his impact against the interior of the automobile (the "second impact") subsequent to a collision (the "first impact"). The two leading cases in the nation are Evans v. General Motors Corp. and Larsen v. General Motors Corp. The Evans court answered the question in the negative, finding that the intended purpose of an automobile did not include participation in a collision. The Larsen court, in coming to the opposite conclusion, suggested that the intended use of an automobile encompassed providing a safe means of transportation, even in a crash.

The Supreme Court of Florida in Ford Motor Co. v. Evancho adopted the Larsen rationale and held that a "manufacturer must use reasonable care in design and manufacture of its product to eliminate unreasonable risk of foreseeable injury." Since automo-

66. Id. at 843.
67. 359 F.2d 822 (7th Cir. 1966).
68. 391 F.2d 495 (8th Cir. 1968).
69. 327 So. 2d 201 (Fla. 1976).
70. Id. at 204.
bile crashes are foreseeable as a "frequent and inevitable contingency of normal automobile use,"\textsuperscript{71} the approach is consistent with general negligence principles. The subsequent adoption of strict liability\textsuperscript{72} probably will not have a substantial impact on this doctrine.

B. \textit{Proximate Cause}

In a negligence action the plaintiff must prove that his injuries were proximately caused by the defendant's negligent acts. A negligent defendant may successfully defend, however, by showing that an independent and unforeseeable intervening event was the proximate cause of the injury.\textsuperscript{73} Furthermore, if there is such an intervening cause, the issue of proximate causation may be a question for the court to resolve.\textsuperscript{74}

In \textit{Nance v. James Archer Smith Hospital}\textsuperscript{75} the District Court of Appeal, Third District, encountered the issue of intervening causation. An emergency patient was taken to the hospital because he had been behaving strangely and apparently had taken a pill containing LSD. The hospital ward clerk advised the patient's friends and relatives who had brought him to the emergency room that the hospital lacked the necessary testing facilities to provide proper treatment and suggested that he be taken to a larger hospital. While being driven to another hospital, the patient jumped out of the car, ran crazily through an apartment building, and mortally stabbed a man. The wife of the victim brought a wrongful death action against the hospital contending that it was negligent in turning away an emergency patient who was a clear danger to himself and others. The Third District affirmed a judgment for the hospital, holding as a matter of law that the acts of the patient were an independent intervening cause and were not reasonably foreseeable.

In \textit{National Airlines, Inc. v. Edwards}\textsuperscript{76} a passenger sued an airline to recover for illness and injuries allegedly incurred when she was forced to eat and drink Cuban food after her plane was hijacked to Cuba. The plaintiff alleged that the airline was negligent in permitting the armed hijackers to board the plane. The Supreme Court

\textsuperscript{71} Id.
\textsuperscript{72} West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976).
\textsuperscript{73} Rawls v. Ziegler, 107 So. 2d 601, 604-05 (Fla. 1958).
\textsuperscript{74} Kwoka v. Campbell, 296 So. 2d 629 (Fla. 3d Dist. 1975).
\textsuperscript{75} 329 So. 2d 377 (Fla. 3d Dist. 1976).
\textsuperscript{76} 336 So. 2d 545 (Fla. 1976).
of Florida held that the injuries allegedly suffered as a result of consumption of Cuban food were too remote to be recoverable because the food and drink were active and efficient intervening causes of the injuries.

Two recent Third District cases decided whether the owner of an automobile is responsible for injuries caused by the negligence of a thief who stole the automobile. In *Vining v. Avis Rent-a-Car Systems, Inc.* a rental car was stolen from the airport parking lot where the vehicle was allegedly unattended with the keys in the ignition, a door open, and the lights on. The thief subsequently caused an accident in which the plaintiff was injured. The complaint alleged that the car was left in a condition which attracted attention and that this constituted negligence which proximately caused the plaintiff's injuries. Moreover, the plaintiff contended that the defendant's violation of Florida's "Unattended Motor Vehicle" statute constituted negligence. The appellate court noted that a previous case, *Lingefelt v. Hanner,* had absolved a car owner of liability when injuries were caused by a thief who had stolen a car with an unlocked ignition switch. The court reiterated its holding in *Lingefelt* that even though violation of a state statute is evidence of negligence, the determinative issue is causation. The court proceeded to decide that the criminal act of the thief broke the chain of causation from the original negligence of leaving the keys in the ignition and that the injuries received were not reasonably foreseeable. Since the legal and factual issues were of such importance, however, the court certified this question to the Supreme Court of Florida.

*Schwartz v. American Home Assurance Co.* involved similar facts and issues. In that case a car was stolen which had been left unattended in front of a bar with the key in the glove compartment and a package in the back seat. The thief's subsequent negligence resulted in the death of one pedestrian and injury to another. Because the keys were not left in the ignition, the majority stated that the "Unattended Motor Vehicle" statute was not violated, although

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77. 330 So. 2d 550 (Fla. 3d Dist. 1976).
78. FLA. STAT. § 316.097 (1975). The statutory language provides in pertinent part: "No person driving or in charge of any motor vehicle . . . shall permit it to stand unattended without first stopping the engine, locking the ignition, and removing the key."
79. 125 So. 2d 325 (Fla. 3d Dist. 1960).
80. 334 So. 2d 268 (Fla. 3d Dist. 1976).
the dissenting judge argued that the statute is violated by merely failing to remove the key.\textsuperscript{81} Furthermore, the court relied on its previous decision in \textit{Vining} and affirmed summary judgment for the defendant owner.

An intervening criminal act was held to be foreseeable in \textit{Nicholas v. Miami Burglar Alarm Co.}\textsuperscript{82} The owner of a warehouse had allegedly contracted with a burglar alarm company to notify the police in the event that either an alarm or trouble signal was tripped. Burglars cut two of the alarm's telephone wires which tripped the trouble signal. The telephone company was notified, but the police were never called. The warehouse owner brought suit against the burglar alarm company for its negligent breach of contract, seeking compensatory damages for stolen goods as well as punitive damages.

On certiorari, the Supreme Court of Florida held that "a burglar alarm company under contract to monitor an alarm system may be negligent for failure to inform the police or the warehouse owner of a trouble signal which its employees had received."\textsuperscript{83} The court distinguished cases which precluded liability because of a malfunction in the burglar alarm system since such a malfunction may be unforeseeable. In \textit{Nicholas} the intervening criminal act was found to be reasonably foreseeable; thus, a cause of action existed. The supreme court stated, however, that punitive damages could not be recovered since the allegations did not establish an intentional wrong amounting to a tort, nor did they constitute willful or wanton negligence. Justice Adkins dissented on the issue of punitive damages and suggested that this question should go to the jury.

If an injury is not a reasonably foreseeable consequence of a defendant's negligent act, the act cannot be the proximate cause of the injury. For example, in \textit{Jolly v. Insurance Co. of North America}\textsuperscript{84} a woman came home for lunch to find her house on fire. The fire was almost under control when the fire truck's water tank became exhausted. Moreover, nearby water hydrants were inoperative because of improper maintenance by the Aqueduct Authority. Seeing her house burn to the ground with firemen standing around helpless to take action, the woman became aggravated and upset; she died

\begin{itemize}
\item \textsuperscript{81} See note 78 \textit{supra}.
\item \textsuperscript{82} 339 So. 2d 175 (Fla. 1976).
\item \textsuperscript{83} \textit{Id.} at 177.
\item \textsuperscript{84} 331 So. 2d 368 (Fla. 3d Dist. 1976).
\end{itemize}
two days later. A wrongful death action was brought against the city and water authority for failure to properly maintain the water system. Finding that the alleged negligence was not the proximate cause of the woman's injuries, the District Court of Appeal, Third District, affirmed the trial court's dismissal of the wrongful death complaint. The court held that as a matter of law such a result was not reasonably foreseeable. However, genuine issues of material fact were found to exist concerning causation of the property damage and the city's waiver of immunity by purchasing liability insurance.

C. Medical Malpractice

The Medical Malpractice Reform Act of 1975 requires injured parties to submit their malpractice claims to mediation panels for determining the issue of liability before filing an action in any Florida court. In *Carter v. Sparkman* the constitutionality of these mediation panels was challenged on the basis of three theories: (1) that section 768.133 of Florida Statutes (1975) constituted a denial of due process and equal protection under both the state and federal constitutions since it mandated that a plaintiff submit to mediation before filing suit but allowed a physician the option of either submitting his defenses to mediation or waiting until trial; (2) that section 768.133 denied the plaintiff timely access to the courts; and (3) that section 768.134(1) infringed on the constitutional right of the Supreme Court of Florida to regulate practice and procedure in the state courts. In rejecting each of the theories presented, the Supreme Court of Florida construed the statutes pertaining to mediation panels so that they would operate in a manner consistent with the constitution.

In arguing his first theory, the plaintiff pointed out that section 768.134(2) makes the result of mediation proceedings admissible evidence in subsequent court actions where both the plaintiff and physician participate in the mediation, but the statute does not mention the admissibility of a refusal to participate by the phys-

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87. 335 So. 2d 802 (Fla. 1976).
89. U.S. Const. amends V, XIV.
91. Id. art V, §§ 2, 13.
cian. While agreeing with the plaintiff that this arrangement would be unconstitutional if it made a physician's nonparticipation inadmissible, the supreme court construed the statute to mean that where a plaintiff has participated in a mediation proceeding, the physician's failure to participate is admissible evidence in a subsequent civil medical malpractice trial.

In dealing with the plaintiff's third theory, the court examined the language of section 768.134(1), the specific statute under attack. This section provides, in part: "[I]n any civil medical malpractice action, the trial on the merits shall be conducted without any reference to insurance, insurance coverage, or joinder of an insurer as a co-defendant in the suit." The supreme court determined that the legislature intended to bar only "any reference" to the joinder of insurers rather than joinder itself. Noting that "references" to insurance or insurers during the course of trial is a purely procedural matter relating to the conduct of trial proceedings, the court held that the legislature had acted beyond its power to the extent that it had attempted to control such "references." Since the court agreed with the policy behind this part of the statute, however, it adopted the substance of it in promulgating a new rule of procedure for all medical malpractice trials: "Rule 1. 450(e)—In any civil medical malpractice action, the trial on the merits shall be conducted without any reference to insurance, to insurance coverage, or to joinder of an insurer as co-defendant in the suit." 92

In 1976 the Florida Legislature amended the malpractice act. 93 Among the more significant changes, section 627.353 was transferred to section 768.54 94 and changed to state that all health care providers (instead of specifically designated providers) obtaining liability insurance in the amount of $100,000 or more per claim, or otherwise providing equivalent security pursuant to the act, will not be liable for an amount in excess of $100,000 per claim for claims covered by the patient's compensation fund. Section 768.50 95 was created to provide, inter alia, for the reduction of damage awards under certain circumstances by collateral sources of indemnity. 96 This section also limits subrogation rights of insurers 97 and states

92. 335 So. 2d at 806.
that for legal fees based on a percentage of money awarded, the percentage is to be based on the net amount of the award as reduced by the amounts of collateral sources and as increased by insurance premiums paid.\textsuperscript{88}

Three additional new sections were created during this session of the legislature. Section 768.45\textsuperscript{99} sets standards of care for health care providers; section 768.48\textsuperscript{100} requires the use of an itemized verdict. The trier of fact must first itemize the verdict into specified categories.\textsuperscript{101} Each category is to be further itemized to reflect whether it represents past or future damages.\textsuperscript{102} In section 768.51 the legislation provides for alternative methods of paying damage awards where the claimant’s future losses exceed $200,000. The court may, at the request of either party, enter a judgment ordering the damages to be paid in whole or in part by periodic payments.\textsuperscript{103}

D. Wrongful Death Actions

The constitutionality of Florida’s most recent Wrongful Death Act\textsuperscript{104} was challenged again\textsuperscript{105} during the survey period. In \textit{White v. Clayton}\textsuperscript{106} two sisters of a decedent sought, through the administratrix, to recover loss of net accumulations beyond death. The Act limits recovery of net accumulations beyond death to the decedent’s spouse or lineal descendents.\textsuperscript{107} The trial judge denied defendant’s motion to strike the allegation of such damages from the complaint, finding that the restriction to only lineal descendents (or spouse) violated equal protection standards and was therefore unconstitutional.

\textsuperscript{88} \textit{FLA. STAT.} § 768.50(3) (Supp. 1976).
\textsuperscript{99} \textit{FLA. STAT.} § 768.45 (Supp. 1976).
\textsuperscript{100} \textit{FLA. STAT.} § 768.48 (Supp. 1976).
\textsuperscript{101} \textit{FLA. STAT.} § 768.48(1) (Supp. 1976).
\textsuperscript{102} \textit{FLA. STAT.} § 768.48(2) (Supp. 1976).
\textsuperscript{103} \textit{FLA. STAT.} § 768.51 (Supp. 1976).
\textsuperscript{104} \textit{FLA. STAT.} §§ 768.16-.27 (1975).
\textsuperscript{105} The constitutionality of the Act first was challenged in Martin v. United Sec. Servs., Inc., 314 So. 2d 765 (Fla. 1975). \textit{Martin} held that the right of surviving close relatives to recover for their own pain and suffering resulting from the wrongful death of the decedent is a constitutional alternative to the right of survivors to divide damages awarded under the survivor statute for the decedent’s own pain and suffering. The \textit{Martin} court also decided that punitive damages are recoverable under the new law when one or more elements of compensatory damages recoverable under the Act are established. However, only one punitive damage recovery is permitted for each death.
\textsuperscript{106} 323 So. 2d 573 (Fla. 1975).
\textsuperscript{107} \textit{FLA. STAT.} § 768.21(6)(a) (1975).
On certiorari, the Supreme Court of Florida quashed the trial
court's order and held that the Act did not violate the equal protec-
tion clauses of either the Florida or the Federal Constitutions. Not-
ing that the clear "purpose of the act is to provide recovery to those
who need it, specifically the surviving spouse, children, or depen-
dents of the decedent," the supreme court found that the classifi-
cation was not an unreasonable one and, therefore, was constitu-
tional. The court noted that it is a legislative prerogative to enact
changes in the elements of damages or the standards by which they
are recoverable even though damages will be greater in some situ-
tions and less in others.

The constitutionality of the Act was also attacked in Bassett v.
Merlin, Inc. In that case the parents of a decedent over twenty-
one years of age had attempted to recover net accumulations; section
768.21(4) prohibited their recovery for pain and suffering be-
cause the law only allowed such damages for loss of minor chil-
dren. The parents had originally sought to be classified as lineal
descendants, but the District Court of Appeal, Third District, found
that parents were ascendants and not within the scope of the stat-
ute. Upon remand, the decedent's parents attacked the constitu-
tionality of the law on the grounds that it denied parents of an adult
child the right to damages for pain and suffering. Citing White as
controlling, the Supreme Court of Florida upheld the trial judge's
decision that the provision was constitutional.

The Supreme court recently confirmed that Florida's Emanci-
pation Act, which lowered the age of majority from twenty-one to
eighteen, amended the definition of "minor children" in Florida's
Wrongful Death Act. That law originally defined minor children as
"unmarried children under 21 years of age." In Hanley v. Liberty
Mutual Insurance Co. parents of a decedent who was nineteen
years old sought to recover damages for mental pain and suffering
from his wrongful death. The supreme court found that the legisla-
tive intent of the Emancipation Act was explicit in amending all

108. 323 So. 2d at 575-76.
109. Id.
110. 335 So. 2d 273 (Fla. 1976).
111. FLA. STAT. § 768.21(4) (1975).
113. FLA. STAT. § 743.07 (1975).
114. FLA. STAT. § 768.18(2) (1975).
115. 334 So. 2d 11 (Fla. 1976).
laws defining "minors" to conform to the lowered age of majority. Therefore, the court held that the Emancipation Act amended the definition of "minor" in Florida's Wrongful Death Act to mean any unmarried child under the age of eighteen.116

In Davis v. Simpson117 the parents of a stillborn child sought to recover under the Wrongful Death Act, alleging that the negligence of the doctors resulted in the fetus not being born alive. The District Court of Appeal, First District, affirmed the trial court's dismissal, holding that a full-term, viable, but stillborn fetus is not a "person" within the meaning of the Wrongful Death Act. The District Court of Appeal, Fourth District, subsequently came to the opposite conclusion in deciding the same issue in Miller v. Highlands Insurance Co.118 A parent, as personal representative of a seven-month-old viable fetus, brought a wrongful death action claiming that her child would have survived but for the negligence of the defendant in an automobile accident where the unborn child was killed. The evidence indicated that the unborn child was capable of sustaining its own life outside the mother's womb. The issue was whether the unborn child was a "person" as contemplated by Florida Statutes section 768.19 (1975). The Fourth District decided that it was and held that recovery for wrongful death was proper. The court distinguished Stokes v. Liberty Mutual Insurance Co.,119 where parents of a stillborn fetus sought recovery under the former Wrongful Death of a Minor Act.120 The Stokes court had specifically mentioned the possibility of a recovery under the former general Wrongful Death Act121 if the fetus could be established as a "person" under the statute. Furthermore, the Fourth District in Miller specifically disapproved of the First District's decision in Davis.

In determining whether the parents had a cause of action under the Act, the Miller court relied on both a liberal construction of the statutory language and the opinion of the Second District in Day v. Nationwide Mutual Insurance Co.122 Under the new Act, a condition to recovery is that "the event would have entitled the person injured

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116. Id. at 13.
117. 313 So. 2d 796 (Fla. 1st Dist. 1975).
118. 336 So. 2d 636 (Fla. 4th Dist. 1976).
119. 213 So. 2d 695 (Fla. 1968).
120. 1903 Fla. Laws ch. 63-469, §1 (repealed 1972).
122. 328 So. 2d 560 (Fla. 2d Dist. 1976). The Day case is discussed in more detail in part II, section A, supra.
to maintain an action and recover damages if death had not ensued.'

In Day a child born alive was found to have a cause of action against a tortfeasor who allegedly caused the child's prenatal injuries. The Second District, noting that courts throughout the nation are split on the issue, relied on the "public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer" and held that a cause of action would lie for wrongful death.

The court also addressed the question of what damages may be recovered and held that medical expenses (if incurred for the benefit of the viable unborn child itself), funeral expenses, and mental pain and suffering of the unborn child's parents all may be recovered. The court decided, however, that damages for loss of support and services of the stillborn child are not recoverable. The court stated that such damages would be impossible to prove by competent evidence and should "not be addressed on the basis of sheer speculation."

Florida Statutes Section 768.24 (1975) reads as follows:

A survivor's death before final judgment shall limit the survivor's recovery to lost support and services to the date of his death. The personal representative shall pay the amount recovered to the personal representative of the deceased survivor.

The proper construction of this provision was the subject of litigation in Florida Clarklift, Inc. v. Reutimann, where a minor child was killed in an automobile accident. Prior to final judgment in the ensuing wrongful death action, the deceased's mother also died. The trial court allowed the deceased child's personal representative to recover for pain and suffering of the mother prior to her own death but disallowed recovery of punitive damages. On appeal, the District Court of Appeal, Second District, denied the recovery for pain and suffering but allowed punitive damages. The court found that the statute clearly permits the survivor to recover for both lost support and services up to the date of his or her own death. Construing the intent and purpose of the provision to be compensation for economic loss to the temporarily surviving parent's estate, the Second

123. FLA. STAT. § 768.19 (1975).
124. FLA. STAT. § 768.17 (1975).
125. 336 So. 2d at 641.
126. 323 So. 2d 640 (Fla. 2d Dist. 1975).
District disallowed recovery for mental pain and suffering of the parents during the same period for which recovery of lost support and services was permitted. The court stated, however, that punitive damages may be proper. Relying on the opinion of the Supreme Court of Florida in *Martin v. United Security Services, Inc.*,

the Second District found that the award of compensatory damages for medical and funeral expenses was a “sufficient predicate for the jury to consider the award of punitive damages in this action.”

*Smyer v. Gaines* contained two issues of importance in wrongful death actions. In *Smyer* a woman was killed in an automobile accident, and the personal representative filed a wrongful death action seeking damages for the surviving husband and on behalf of the deceased’s parents. Prior to trial, the surviving husband remarried, and the question arose to what extent such evidence was admissible. The District Court of Appeal, First District, held that although the Wrongful Death Act specifically provides that “evidence of remarriage of the decedent’s spouse is admissible,” the evidence may not be considered in mitigation of any elements of damages recoverable by the surviving spouse. The only purpose for which such information is admitted is to divulge the whole truth.

The court was also faced with the issue of whether it would be necessary for parents of a decedent to actually expend funds to hire someone to perform services previously performed by the decedent in order to recover for loss of such services in a wrongful death action. The First District answered this question in the negative.

E. Attractive Nuisance

To hold a landowner liable for bodily harm to trespassing children caused by an artificial condition maintained upon the land, four elements must be present: (1) the landowner must know or have reason to know that children are likely to trespass; (2) the landowner must recognize that an unreasonable risk of death or serious bodily harm exists; (3) the child, because of his youth, must fail to discover the condition or not realize the danger involved; and (4) the landowner’s utility from maintaining the condition must be

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127. 314 So. 2d 785 (Fla. 1975).
128. 323 So. 2d at 643.
129. 322 So. 2d 655 (Fla. 1st Dist. 1976).
slight as compared to the risk to the children.\textsuperscript{131}

In \textit{Hayes v. Criterion Corp.}\textsuperscript{132} the parents of a child who was killed in a construction drainage ditch brought a wrongful death action against the corporation which had constructed the ditch. The child died when a tunnel which he and other children had dug in the ditch collapsed upon him. The ditch had been constructed adjacent to the subdivision in which the child lived by the corporate defendant at the time of developing the subdivision. The corporation owned land on both sides of the ditch, and the land beyond the ditch was unimproved at the time of the accident. Although the corporation had erected a fence between the subdivision and the ditch, there was no fence on the opposite side of the ditch facing the open field.

The trial court entered a directed verdict for the defendant, and on appeal, the District Court of Appeal, Second District, affirmed. In deciding whether the ditch constituted an attractive nuisance, the appellate court assumed the existence of elements (1), (3), and (4) mentioned above, and focused its attention on element (2). Concluding that the ditch did not pose a hidden danger, the court held that it did not constitute an attractive nuisance since the defendant could not have been reasonably expected to foresee that children might dig a tunnel into the side of the ditch so deep that it would ultimately collapse on them. The court reasoned that "[t]o hold that this drainage ditch constituted an attractive nuisance would make landowners virtual insurers of the safety of all children who happened to be playing in any drainage ditch in Florida."\textsuperscript{133}

\textbf{F. \textit{Res Ipsa Loquitur}}

Florida courts have established three requirements for applicability of the doctrine of \textit{res ipsa loquitur}: (1) the instrumentality which caused the injury must have been within the exclusive control of the defendant; (2) the injury was not the result of any voluntary action or contribution on the part of the plaintiff; and (3) the accident would not have occurred had the defendant used due care.\textsuperscript{134}

\textsuperscript{131} Cockerham v. R.E. Vaughan, Inc., 82 So. 2d 890 (Fla. 1955).
\textsuperscript{132} 337 So. 2d 1026 (Fla. 2d Dist. 1976).
\textsuperscript{133} \textit{Id.} at 1029.
Although the doctrine is available in products liability cases, it is reversible error for a trial court to fail to instruct the jury that if it applies the doctrine of res ipsa loquitur, it must find that the instrumentality which caused the injury was in "the exclusive control of the defendant at the time the negligent act or omission, if any, must have occurred." For the purposes of applying res ipsa loquitur, control does not necessarily mean actual physical control at the time of the injury; it may be sufficient that the defendant was in exclusive control at the time of the indicated negligence.

In an exploding bottle case, the injured plaintiff must show that the bottle was not subjected to unusual atmospheric or temperature changes and was not handled improperly after leaving the possession and control of the manufacturer. In *Steele v. Royal Crown Bottling Co.*, the District Court of Appeal, Third District, explained this requirement:

[A] plaintiff is not required to do the impossible by accounting for every moment of a bottle's existence from the time it leaves a defendant manufacturer's possession and control; it is enough if he produces sufficient evidence of careful handling in general, and of the absence of unusual incidents, to permit reasonable persons on the jury to conclude that, more likely than not, the explosion was due to the defendant's negligence.

The *Steele* case involved a suit by a grocery store customer against a soft drink manufacturer for injuries sustained by the customer as a result of a bottle explosion. In checking out some groceries, the customer had picked up the soft drink bottle in order to separate it from her own purchases. The bottle shattered in her hand, propelling pieces of glass into her eye. When the customer brought an action alleging that the product was not safe for its intended purpose and that the manufacturer was guilty of negligence, the trial court directed a verdict in favor of the manufacturer. Deciding


139. 335 So. 2d 586, 588 (Fla. 3d Dist. 1976). See also Lauck v. Publix Mkt., Inc., 335 So. 2d 589 (Fla. 3d Dist. 1976).
that the doctrine of res ipsa loquitur applied, the Third District reversed the trial court’s entry on final judgment.

In Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.\(^ {140} \) the District Court of Appeal, Fourth District, liberally applied the res ipsa loquitur doctrine in a case involving a tire blowout. A personal injury action was brought against the tire’s seller, who had installed the tire on the plaintiff’s truck. The tire blew out after having been driven by the plaintiff for only one month and 9,520 miles, even though the tire company’s personnel had asserted that the tire could be expected to last for 80,000 to 120,000 miles. After the trial court had entered final judgment for the plaintiff, the tire seller appealed, contending that the res ipsa loquitur doctrine was inapplicable because of the length of time the tire was out of its custody and the long distance driven. The Fourth District, however, agreed with the plaintiff's argument that sufficient evidence had been presented to show that due care had been used in the handling and utilization of the tire after it had left the possession of the tire company. Reasoning that "the law does not require an injured person to eliminate each and every remote possibility of injury to the tire up to the time of its explosion,"\(^ {141} \) the court affirmed the judgment for the plaintiff.

In a well-reasoned dissent Judge Walden argued that since the tire was not within the defendant’s exclusive control at the time of the blowout, the case should have been remanded for a new trial without an instruction to the jury on res ipsa loquitur. His criticism was that under the rationale of the majority opinion, "res ipsa loquitur would be available in every products liability case, regardless of possession and other classical criteria, so long as plaintiff testified or produced evidence that plaintiff was not negligent in the use of the product."\(^ {142} \)

A third case dealing with the question of control is Commercial Union Insurance Co. v. Street.\(^ {143} \) In deciding whether res ipsa loquitur could be the basis for an elevator company’s liability in a personal injury action, the District Court of Appeal, Second District, was confronted with a case of first impression for the Florida courts. The elevator company had manufactured and installed an elevator in a hospital, and the maintenance agreement stipulated that the

140. 336 So. 2d 1221 (Fla. 4th Dist. 1976).
141. Id. at 1224.
142. Id.
143. 327 So. 2d 113 (Fla. 2d Dist. 1976).
hospital was in possession and control of the elevator. Despite this agreement, the elevator company in fact maintained the hospital elevator. The Second District held that res ipsa loquitur is applicable to a defendant who manufactures, installs, and maintains an automatic passenger elevator even though the maintenance contract stipulates that possession and control pass to the building owner. Stating that "[t]he crucial point is the actual control of the elevator system, rather than the contractual agreement," the court suggested that a different result might be reached where the elevator is manufactured, installed, and maintained by different parties.

G. Comparative Negligence

In establishing comparative negligence as the law of Florida, the supreme court purposely left open many questions regarding the practical application of that doctrine. In Santiesteban v. McGrath the trial judge directed a verdict for the plaintiff solely on the issue of liability. At the same time, the judge instructed the jury to consider the plaintiff’s negligence and to reduce the damages in proportion to the amount the plaintiff was at fault. In response to special interrogatories, the jury stated that the plaintiff had been ten percent negligent and the defendant ninety percent negligent while the total amount of damages incurred by the plaintiff was $6,000.

On appeal to the District Court of Appeal, Third District, the plaintiff contended that once the court gave a directed verdict finding the defendant negligent, it was precluded from submitting the issue of the plaintiff’s negligence to the jury. The Third District affirmed the trial court’s instruction and held that the trial judge’s directed verdict only determined as a matter of law that the defendant’s negligence was a legal cause of the plaintiff’s injuries, but not necessarily the sole legal cause.

The proper use of special verdicts and special interrogatories in cases involving comparative negligence has been difficult to ascertain. Hoffman v. Jones specifically authorized the use of special verdicts for apportioning damages on the basis of relative degrees

144. Id. at 114.
146. 320 So. 2d 476 (Fla. 3d Dist. 1975).
147. 280 So. 2d 431, 439 (Fla. 1973).
of fault. However, the supreme court in Lincenberg v. Issen\textsuperscript{148} cautioned that special verdicts on the issue of the relative degrees of fault between joint tortfeasors are not dispositive of the issue of contribution, but may be used to assist the trial judge in performing his equity responsibility. Whether special verdicts must be submitted when requested in order to compare the negligence of a plaintiff and defendant was decided in Florida East Coast Railway v. Lawrence.\textsuperscript{149} After examining the Hoffman and Lincenberg cases, the works of several commentators, and authority from other states, the District Court of Appeal, Fourth District, held that if contributory negligence is at issue, special verdicts should be required at the timely request of any party or at the discretion of the court. Believing that the issue is one of great public interest, however, the court certified the question to the Supreme Court of Florida.\textsuperscript{149,1}

H. Contribution Among Joint Tortfeasors

1. LEGISLATION

In 1975 the Florida Legislature passed the Uniform Contribution Among Tortfeasors Act,\textsuperscript{150} which provides a joint tortfeasor who has paid more that his pro rata share of the liability the right to seek contribution from other joint tortfeasors.\textsuperscript{151} The 1975 law made it clear that in assessing a joint tortfeasor’s pro rata share of the liability, the relative degrees of fault were not to be considered.\textsuperscript{152} Furthermore, the Supreme Court of Florida in Lincenberg v. Issen,\textsuperscript{153} decided that special interrogatory verdict forms attempting to allocate a percentage of fault among several joint tortfeasors generally should not be permitted. The Lincenberg court also said that joint

\hspace{1cm} 148. 318 So. 2d 386, 393 (Fla. 1975).
\hspace{1cm} 149. 328 So. 2d 249 (Fla. 4th Dist. 1976).
\hspace{1cm} 149.1. Subsequent to the writing of this article, but prior to the final printing of this issue, the Supreme Court of Florida decided, in response to the certified question, that special verdicts shall be required in all jury trials involving comparative negligence. Furthermore, in nonjury trials, the court should make finding of record required by special verdicts. The court also held that the decision was to be applied prospectively only. Lawrence v. Florida East Coast Ry. Co., \textsuperscript{150}328 So. 2d \textsuperscript{328}2d (Fla. 1977).
\hspace{1cm} 150. FLA. STAT. § 768.31 (1975), as amended by 1976 Fla. Laws ch. 76-186 (codified at FLA. STAT. § 768.31 (Supp. 1976).
\hspace{1cm} 151. FLA. STAT. § 768.31(2)(g) (1975).
\hspace{1cm} 152. FLA. STAT. § 768.31(3)(a) (1975), as amended by 1976 Fla. Laws ch. 76-186 (codified at FLA. STAT. § 768.31(3)(a) (Supp. 1976).
\hspace{1cm} 153. 318 So. 2d 386 (Fla. 1975).
and several liability was retained under the Act. The jury would be required to apportion the relative degrees of fault between the plaintiff on the one hand and the several defendants as a group on the other. Each defendant found liable would be jointly and severally liable for the entire amount of damages but could seek contribution in equal shares from other tortfeasors if he had paid more than his pro rata share of the liability. This result seemed inconsistent with the apportionment principles established by the Supreme Court of Florida in Hoffman v. Jones, and it has been criticized by commentators as well as by members of the bar.

The 1976 Florida Legislature responded to this criticism by amending Florida Statutes section 769.31(3)(a) to read: "[The joint tortfeasors'] relative degrees of fault shall be the basis for allocation of liability." Joint and several liability still exists under the new law, but now, if one of two joint tortfeasors is adjudged to be only 15% at fault and he has paid to a faultless plaintiff the entire amount of damages, he may recover the excess 85% from the other joint tortfeasor rather than 50% as was permitted under the former law. Special interrogatories now seem to be necessary so that proper allocations of fault can be determined. The part of the Lincenberg opinion cautioning against their use has been impliedly superseded by this statutory amendment. The 1976 legislative change brings more order and consistency to Florida's apportionment system: Each person will pay the proportion of the total damages he has caused the other party unless one joint tortfeasor is execution proof or cannot be joined in the action.

2. CASE LAW

Although the right to contribution among joint tortfeasors has been firmly established by the legislature and the courts, a question arises as to whether contribution may be sought from a joint

154. It has been asserted that the Lincenberg case actually presented the issue of whether joint and several liability should be preserved and the court's summary treatment of that issue while focusing on the collateral issue of contribution was unfortunate. 30 U. MIAMI L. REV. 747, 755-59 (1976).
155. 280 So. 2d 431 (Fla. 1973).
157. 1976 Fla. Laws ch. 76-186, § 1 (amending FLA. STAT. § 768.31(3) (a) (1975).)
159. FLA. STAT. § 768.31 (Supp. 1976); Lincenberg v. Issen, 318 So. 2d 386 (Fla. 1975).
tortfeasor who is not directly liable to the plaintiff because of some form of immunity. For example, would contribution be allowed from an alleged joint tortfeasor who is the husband and parent of the injured plaintiffs, even though he would be immune from direct suit? Furthermore, would an employer be liable to a third-party tortfeasor for contribution as a result of injuries to an employee if the employee’s action against the employer is limited by the Workmen’s Compensation Act?

The District Court of Appeal, First District, recently has answered both of these questions in the negative. In *Mieure v. Moore* the plaintiff was driving an automobile occupied by his wife and children when he ran into a tractor-trailer which allegedly was parked negligently. When Moore and his family sought damages for their injuries, the defendant filed a counterclaim and a third-party complaint seeking contribution from Moore.

The court noted that it was well established in Florida that spouses may not sue each other, nor may minor children sue their parents in tort. The court examined the statutory language in the Uniform Contribution Among Tortfeasors Act which provides for contribution only when two or more persons become jointly or severally liable in tort for the same injury to a person. Deciding that Moore was not a joint tortfeasor since he would not be liable in tort for the same injury to his wife and children, the First District affirmed the trial court’s dismissal of the action for contribution.

In dictum the First District noted that the intra-family immunity doctrine might be inconsistent with the more recent comparative negligence and contribution among joint tortfeasors doctrines. The latter doctrines apportion damages according to relative degrees of fault, whereas the former allows negligent tortfeasors who are related to the injured party to escape liability. The court stated, however, that only the Supreme Court of Florida had the authority to overrule such precedent.

In *United Gas Pipeline Co. v. Gulf Power Co.* a supplier of natural gas sought indemnity and contribution from its customer for the fatal injuries sustained by employees of that customer as a result

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160. 330 So. 2d 546 (Fla. 1st Dist. 1976).
163. 330 So. 2d 546, 547 (Fla. 1st Dist. 1976).
164. 334 So. 2d 310 (Fla. 1st Dist. 1976).
of a gas explosion during the course of their employment. The widows of the employees received full workmen's compensation benefits from the employer-customer and then sued the supplier on the theory that it was negligent in failing to odorize the gas.

Applying the Supreme Court of Florida's decision in Noa v. United Gas Pipeline Co., the First District found that a gas supplier had a nondelegable duty to odorize the gas delivered to its customer and that failure to do so was active negligence. Therefore, no indemnity would lie. With respect to the claim for contribution, the court again examined the statutory language: "The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability." and "[the right exists] when two or more persons become jointly or severally liable." The court held that because the legislature had established workmen's compensation benefits as the sole liability of an employer, while the supplier's liability was based upon common law negligence, there could be no "common liability" between the employer and supplier to the deceased employees' families. Thus the action for contribution against the employer was dismissed. Moreover, the court stated that its holding followed the majority rule among the states.

The Uniform Contribution Among Tortfeasors Act provides that if a plaintiff executes a release to one of several joint tortfeasors, it discharges the released tortfeasor from all liability for contribution to any of the other tortfeasors. The Act also states that the release of one tortfeasor does not discharge any other tortfeasors from liability unless its terms so provide. However, if there has been a specific release of certain parties which includes the phrase, "and any and all other persons and/or corporations who are or may be liable for injuries or damages sustained as a result of the subject accident," then the court may dismiss the action against all alleged joint tortfeasors.

165. 305 So. 2d 182 (Fla. 1974).
171. Hester v. Gatlin, 332 So. 2d 660 (Fla. 2d Dist. 1976); Dean v. Lifter, 336 So. 2d 393 (Fla. 3d Dist. 1976).
Johnson v. Ludwig peripherally involved several of the issues discussed above. A driver of a leased automobile drove into a second vehicle which was stationary on a highway. The second vehicle was propelled into a third automobile and injured the plaintiff, who had been standing between the second and third cars. The plaintiff sued the driver of the first automobile and the company from which it was leased as well as their insurance carriers, alleging that the driver’s negligence was reckless and wanton.

The leasing company filed a cross-claim against its lessee for indemnity. After the lessor settled with the plaintiff, the plaintiff executed a release discharging the liability of the lessor and its insurance carrier and “any other person, corporation . . . charged with responsibility for injuries to [plaintiff] . . . on or about the [date of accident].” The lessee-driver, anticipating his indemnity obligation to the lessor, filed a cross-claim for contribution against the driver of one of the cars involved.

The District Court of Appeal, Third District, found that on its face the claim for contribution did not state a cause of action. However, the court said that on remand the trial court should determine several issues including: (1) whether the lessee’s liability for indemnity would entitle him to be classified as a “tortfeasor who has paid more than his pro rata share of the common liability”; (2) what effect the release would have on cross-defendants who were not parties to the plaintiff’s action; (3) whether the lessee was guilty of wanton conduct; and (4) whether the cross-defendant was guilty of negligence. Assuming that the payment to the lessor would be in excess of the lessee’s pro rata share of the liability, that the lessee was not wanton so as to prohibit his recovering for contribution, and that the cross-defendant was negligent, the action for contribution still might be inappropriate because Florida Statutes section 768.31(5)(a) (Supp. 1976) possibly could bar a claim for contribution where the release included a general clause regarding “any other person.” The District Court of Appeal, Second District, found in Hester v. Gatlin that such a “catch-all” clause in the release did preclude an action for contribution by one of three alleged joint tortfeasors against the others even though the release specifically named only two of the three alleged tortfeasors.

172. 328 So. 2d 35 (Fla. 3d Dist. 1976).
173. FLA. STAT. § 768.31(2)(c) (Supp. 1976).
174. 332 So. 2d 660 (Fla. 2d Dist. 1976).
It is fairly common for a defendant to seek contribution or, in the alternative, indemnity. However, if a defendant's third-party complaint expressly seeks only indemnity, but in effect states a cause of action for contribution, the court may allow an action for contribution in the event indemnity would not lie. In Lindsey v. Austin, for example, a patient filed a medical malpractice action against a surgeon who had removed a corn from the patient's toe. Subsequently, infection, osteomyelitis, and gangrene resulted in the necessary amputation of the toe. The surgeon filed a third-party complaint against the doctor who had treated the toe after the surgical removal of the corn.

The complaint alleged that the surgeon was at most a passive tortfeasor, that the other doctor was the active tortfeasor, and specifically asked for indemnification. The trial court dismissed the action for indemnity. On appeal, the District Court of Appeal, Third District, reversed and found the complaint stated a valid action for contribution although it did not state an action for indemnity. The complaint's language, "whatever responsibility for damages, if any, may be ultimately determined by a jury, would be limited to the initial surgery," was sufficient for a contribution claim since it would be up to the jury to determine the extent of liability as between the two doctors. This case should not be read as saying that anytime a third-party complaint alleges indemnity, an action for contribution will lie. However, if the facts alleged in the complaint are sufficient for a contribution suit, the complaint will withstand a motion to dismiss which is based on the ground that "contribution" is not specifically requested.

I. Indemnity

Like contribution, indemnity permits a relatively innocent tortfeasor who has paid money to the plaintiff to recover from one or more other joint tortfeasors. Unlike contribution, however, indemnity permits recovery of the entire amount paid and is not based on allocating a portion of the fault to each of the joint tortfeasors. The most common indemnity actions arise out of vicarious liability suits; for example, the owner of an automobile who is held

175. 336 So. 2d 486 (Fla. 3d Dist. 1976).
176. See VTN Consol. v. Coastal Eng'r Assocs., 341 So. 2d 226 (Fla. 2d Dist. 1976); Stuart v. Hertz Corp., 302 So. 2d 187, 190 (Fla. 4th Dist. 1974).
responsible for the driver's negligence under the dangerous instrumentality doctrine can seek indemnity from the driver, or an employer who is held responsible for the actions of his employees acting within the scope of their employment under the doctrine of respondeat superior might seek indemnity from the employee. Courts have also created an action for indemnity if one of the tortfeasors is "passively" negligent whereas another is "actively" negligent. This active-passive distinction was created to avoid harshness since there was no common law right to contribution between tortfeasors. Some cases, which may be distortions of the contribution doctrine, have permitted a tortfeasor to receive indemnification from a doctor who aggravated the injury during the course of treatment. It is also clear that one may contract for a right of indemnity.

The Uniform Contribution Among Tortfeasors Act specifically states that "this act does not impair any right of indemnity under existing law." Therefore, the active-passive distinction is still viable and in the proper case may establish complete indemnification. This principle was recognized in Florida Power Corp. v. Taylor. There an employee of a contractor was injured when he attempted to measure the distance between the ground and a high voltage transmission line by extending a surveyor's rod near the power line. An action was brought against the power company, which in turn filed a third-party complaint against the contractor and the canal authority for indemnity and contribution. The trial court entered summary judgment against the power company on the third-party action. The power company's indemnity argument was based on passive negligence and on a provision contained in the conveyance

177. See, e.g., Roth v. Cannel, 242 So. 2d 491 (Fla. 3d Dist. 1970), rev'd on other grounds sub nom. Roth v. Old Republic Ins. Co., 269 So. 2d 3 (Fla. 1972); Fincher Motor Sales, Inc., v. Lakin, 156 So. 2d 672 (Fla. 3d Dist. 1963); Hutchins v. Campbell, Inc., 123 So. 2d 273 (Fla. 2d Dist. 1960).

178. See, e.g., Maybarduk v. Bustamante, 294 So.2d 374 (Fla. 4th Dist. 1974); Winn-Dixie Stores, Inc. v. Fellowa, 153 So.2d 45 (Fla. 1st Dist. 1963), modified sub nom. Winn-Dixie Stores, Inc. v. Pepsi-Cola Bottling Co., 160 So. 2d (Fla. 1964).


181. FLA. STAT. § 768.31(2)(f) (Supp. 1976).

182. 332 So. 2d 687 (Fla. 2d Dist. 1976).
to the canal authority of property in which the power company retained an easement. The provision stated that any roads built by or for the canal authority should be no closer than twenty-five feet from the power lines. The road in question had been raised about six feet in violation of the restrictions. The power company contended that the injury was a direct result of the negligence in building up the road so that it was six feet closer to the power lines, and at most the power company was passively negligent in failing to discover the dangerous condition which was caused by the canal authority.

The District Court of Appeal, Second District, decided that if the power company had actual notice of the condition it would be actively negligent and would be denied indemnity. The court stated that if, however, there was no actual knowledge on the part of the power company, it might give rise to an inference that its negligence, if any, was passive. Thus, the decision whether the power company's negligence was active or passive depended on whether the power company actually knew of the elevation; therefore, the court held that a question of fact existed, and summary judgment should not have been granted.

An action for indemnity may lie even if the original complaint characterizes the initial defendant's activities as constituting the active negligence. In *Crawford Door Sales Co. v. Donahue* the plaintiff was injured when a door fell on her. Plaintiff sued both the installer and the manufacturer of the door. The complaint against the installer alleged active negligence and the cross-claim by the installer against the manufacturer alleged that the manufacturer was actively negligent and that the installer should be indemnified. The District Court of Appeal, Second District, held that the cross-claim stated a valid cause of action, relying on the Third District's opinion in *Central Truck Lines, Inc. v. White Motor Corp.* and on the general purpose of third-party practice of avoiding two suits if they can be tried together.

If it cannot be demonstrated that the negligent acts of several parties, each owing a duty to the plaintiff, were separable in time or effect, and the responsibilities of the parties could not be stipulated, then an action for indemnification will be dismissed.

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183. 321 So. 2d 624 (Fla. 2d Dist. 1975).
184. 316 So. 2d 579 (Fla. 3d Dist. 1975).
Leesburg Hospital Association v. Carter a patient filed a malpractice action against a hospital because she suffered a heart attack from lack of proper care while in the hospital. The hospital filed a third-party complaint against a doctor who was not an employee of the hospital on theories of indemnification and contribution. The plaintiff contended that the hospital personnel negligently disregarded the results of certain tests performed on the patient and failed to call a physician when her vital signs became critical. The hospital alleged that the doctor (third-party defendant) was negligent in leaving the patient unattended during the time he was performing surgery on another patient and that he failed to respond to calls notifying him of the plaintiff's worsening condition. The District Court of Appeal, Second District, held that the complaint for indemnification could not be sustained on an active-passive theory, for both the doctor and hospital were allegedly guilty of active negligence. Furthermore, the court discussed the rationale of Stuart v. Hertz Corp., in which the Fourth District allowed indemnity where a physician aggravated injuries previously caused by another. Although the facts of the two cases seemed similar, the Leesburg court distinguished Hertz in that the latter involved acts committed "against the plaintiff which were demonstrably separate in time and effect." In Leesburg the acts were closer in time and combined to produce a single injury such that the defendants were joint tortfeasors. Hence, only an action for contribution was permitted.

J. Assumption of Risk

Comparative negligence has been in effect in Florida since 1973. Nevertheless, more than three years later, it is still uncertain whether assumption of risk is a complete bar to a plaintiff's action or whether it merely reduces his damages in proportion to his own fault, as does contributory negligence. In Rea v. Leadership Housing, Inc. the District Court of Appeal, Fourth District, had held that the distinction between contributory negligence and assumption of risk was inconsequential. The Fourth District recently reaf-

185. 321 So. 2d 433 (Fla. 2d Dist. 1975).
186. 302 So. 2d 187 (Fla. 4th Dist. 1974).
187. 321 So. 2d 433, 434 (Fla. 2d Dist. 1975).
189. 312 So. 2d 818 (Fla. 4th Dist. 1975).
firmed that holding in Trammel v. Reliance Insurance Co.\textsuperscript{190}

The District Court of Appeal, First District, followed the Fourth District's lead and held in Parker v. Maule Industries, Inc.\textsuperscript{191} that assumption of risk should be merged with contributory negligence and be used to reduce a plaintiff's damages in proportion to his degree of fault.\textsuperscript{192} The First District again held in Manassa v. New Hampshire Insurance Co.\textsuperscript{193} that giving an instruction on assumption of risk was error. Similarly, the Second District found in Hall v. Holton\textsuperscript{194} that assumption of risk had merged with the concept of comparative negligence.

The Third District, however, previously had decided in Dorta v. Blackburn\textsuperscript{195} that the decision of the Supreme Court of Florida in Hoffman v. Jones\textsuperscript{196} was silent on the issue and noted that other jurisdictions employing comparative negligence retained the defense of assumption of risk. Therefore, the court concluded that the doctrine was still valid as a complete defense in a negligence action. Although the First and Fourth Districts subsequently held to the contrary, the Third District recently noted in Weedman v. Sunland Roller Rink, Inc.\textsuperscript{197} that it would continue to treat assumption of risk as a complete bar to recovery until the Supreme Court of Florida ruled to the contrary.

Such a conflict among the Districts should be reconciled by the Supreme Court of Florida. Although the supreme court has not actually addressed the issue, one might read certain language in West v. Caterpillar Tractor Co.\textsuperscript{198} as indicating that assumption of risk would not constitute a complete bar to recovery. There the issue was what constitutes a valid defense in strict liability cases. The supreme court stated:

The defendant manufacturer may assert that the plaintiff was negligent in some specified manner other than failing to discover or guard against a defect, such as assuming the risk, or misusing the product, and that such negligence was a substantial proxi-
mate cause of the plaintiff's injuries or damages. The fact that plaintiff acts or fails to act as a reasonable prudent person, and such conduct proximately contributes to his injury, constitutes a valid defense. In other words, lack of ordinary due care could constitute a defense to strict tort liability.

We now have comparative negligence, so the defense of contributory negligence is available in determining the apportionment of the negligence by the manufacturer of the alleged defective product and the negligent use made thereof by the consumer. The ordinary rules of causation and the defenses applicable to negligence are available under our adoption of the Restatement rule. If this were not so, this Court would, in effect, abolish the adoption of comparative negligence.199

The principles involved in the above quoted language tend to indicate that the supreme court would more likely than not decide that assumption of risk should be used to apportion, rather than bar, the plaintiff's recovery. Since the conflict among the districts is likely to continue, it is important that the supreme court address itself specifically to this issue.199.1

Although recognizing assumption of risk as a complete defense in an appropriate case, the District Court of Appeal, Third District, noted that in order to be guilty of assumption of risk, one not only must know of the existence of a condition which constitutes peril but also must be aware of and appreciate the danger and voluntarily expose himself to the risk. In Alexander v. Fiftieth St. Heights, Co.200 a lessee of an apartment was injured in an explosion involving gas passing through an uncapped pipe which entered her apartment. The lessee had occupied the apartment for 2 1/2 months and was aware that the pipe entered her apartment. The District Court of Appeal, Third District, found that the lessee was not shown to have been guilty of assumption of risk, absent some indication that she actually was aware of and appreciated the danger of a possible explosion, and that if such apprehension existed, she voluntarily submitted herself to such risks.

199. Id. at 90 (emphasis added).
199.1. Subsequent to the writing of this article, but prior to the final printing of this issue, the Supreme Court of Florida resolved this conflict among the districts by holding that the affirmative defense of implied assumption of risk is merged into the defense of contributory negligence and that principles of comparative negligence will apply in all cases where such defense is raised. Blackburn v. Dorta, ___ So. 2d ___ (Fla. 1977).
200. 334 So. 2d 161 (Fla. 3d Dist. 1976).
K. Damages

1. PUNITIVE DAMAGES

The issue of whether a jury should be allowed to consider an award of punitive damages where a defendant’s negligence is coupled with intoxication was decided by the Supreme Court of Florida in *Ingram v. Pettit*.201 Except for conflicting evidence of whether the defendant applied his brakes before his car struck the rear of the plaintiff’s vehicle, there was no evidence that the defendant had been driving abnormally prior to the collision. As the supreme court noted, the case was before it solely because the defendant had submitted to a breathalyzer test which showed his blood alcohol content to be .26% on a scale in which the legal presumption of intoxication arises at .10%.202

Placing a heavy emphasis on the state policy that drunken drivers are a menace to public safety and are to be discouraged by punishment,203 the court stated as its *ratio decidendi*:

[We hold that juries may award punitive damages where voluntary intoxication is involved in an automotive accident in Florida without regard to external proof of carelessness or abnormal driving, provided always the traditional elements for punitive liability are proved, including proximate causation and an underlying award of compensatory damages. We do not hold that intoxication coupled with negligence will always justify an award of punitive damages. We affirmatively hold that the voluntary act of driving “while intoxicated” evinces, without more, a sufficiently reckless attitude for a jury to be asked to provide an award of punitive damages if it determines liability exists for compensatory damages.204]

The supreme court stated further that the term “intoxicated,” as used within the decision, is equivalent to the degree of intoxication required in Florida Statutes section 860.01 (1975) pertaining to automobile manslaughter.

201. 340 So. 2d 922 (Fla. 1976).
203. The majority opinion stated: “Driving in an intoxicated condition is an intentional act which creates known risks to the public. We believe that the potentiality of an adverse award of punitive damages is a suitable corollary to those criminal laws designed to discourage this reckless disregard for the public safety.” 340 So. 2d at 925.
204. Id. at 924.
As pointed out in the dissenting opinion, the scope of the majority’s holding appears somewhat unclear—its wording seems to suffer from some degree of internal inconsistency:

The majority opinion... says that the traditional elements such as proximate causation and an underlying award of compensatory damages must still be proved. But what does this mean—that the accident caused injury or that the intoxication, without more, caused the accident to occur? If the latter, then the position is untenable in a situation such as we have at bar where there is no evidence at all that the intoxication caused any irregularities in the operation of the vehicle. If the former, then, notwithstanding the lip service paid to it, the concept of proximate causation has gone by the boards.205

The dissenting opinion suggested that the majority had, in effect, extended the strict liability concept to the recovery of punitive damages. Thus, it concluded that under the majority holding an injured party need only show the occurrence of an accident and evidence of intoxication in order to subject a defendant to the assessment of punitive damages.

2. COMPENSATORY DAMAGES

The Florida Automobile Reparations Reform Act provides that any person injured in an automobile accident who suffers permanent disfigurement “may recover damages in tort for pain, suffering, mental anguish and inconvenience”;206 however, the Act fails to define the word “disfigurement.” In Gillman v. Gillman207 the District Court of Appeal, First District, held that a permanent scar may constitute permanent disfigurement within the meaning of the statute. The question whether a particular scar is a disfigurement is one of fact and when properly placed in issue may not be decided by summary judgment.

In a recent Second District case it was held that the right of a person to seek damages for the loss of the services of his or her spouse is not limited to those services which customarily arise out of the marital relationship.208 In the absence of a double recovery, a spouse may recover the reasonable value of services customarily

205. Id. at 926.
207. 319 So. 2d 165 (Fla. 1st Dist. 1975).
208. Rumsey v. Manning, 335 So. 2d 25 (Fla. 2d Dist. 1976).
performed without compensation in that spouse's business by the
other spouse, where such services are lost by reason of injuries suf-
fered in an accident caused by a third party. 209

III. STRICT LIABILITY

A. Strict Products Liability in Tort

The Supreme Court of Florida officially adopted the concept of
strict products liability in tort in West v. Caterpillar Tractor Co. 210
The United States Court of Appeals for the Fifth Circuit 211 had
certified questions to the Supreme Court of Florida concerning the
state's law regarding a manufacturer's strict liability in tort, as
distinguished from breach of warranty of merchantability, for injury
to a bystander or user of a product. Additionally, the Fifth Circuit
asked what sort of conduct, if any, would create a defense of contri-
butory or comparative negligence to either a strict liability action
or one based on breach of implied warranty.

The West case arose out of a wrongful death action against the
manufacturer of a "caterpillar grader." A construction company
had been operating the grader on a street when it struck Mrs. West,
causing severe internal injuries which resulted in her death several
days later. Evidently, Mrs. West had been standing on a street
corner talking to a friend and waiting for a bus when the grader
passed her going forward. A few minutes later the bus approached,
and Mrs. West began to cross the street to meet it when she was
struck down by the grader, which was now working its way back
down the street in reverse. There was evidence that Mrs. West had
looked to the left before crossing the street and had been looking in
her purse as she crossed the intersection. At no time did she look to
the right so as to see the grader. Plaintiff settled with the construc-
tion company prior to the trial. The wrongful death action against
the manufacturer was grounded on two counts. The first was a claim
of negligent design in that there was no audible warning system
when the grader was in reverse, there was an inadequate rear view
mirror, and there was a blind spot when the grader was operated in

209. Id.
210. 336. So. 2d 80 (Fla. 1976). In Linder v. Combustion Eng'r. Inc., ___ So. 2d ___
(Fla. 1977), the supreme court set forth rules regarding the application of strict liability to
pending litigation.
211. West v. Caterpillar Tractor Co., 504 F.2d 967 (5th Cir. 1974). The case was in federal
court pursuant to diversity of citizenship jurisdiction.
reverse. The second was a claim for breach of implied warranty or
strict liability based on the same alleged design defects.

The federal district judge instructed the jury on three possible
theories of recovery: negligence, breach of implied warranty of mer-
chantability, and strict liability in tort. Furthermore, the court in-
structed the jury to consider whether Mrs. West's actions consti-
tuted contributory negligence, but it failed to give an instruction on
assumption of risk.

The jury returned a verdict against the manufacturer. In re-
sponse to special interrogatories, the jury found that the manufac-
turer was liable on all three counts, that the damages totaled
$125,000, and that Mrs. West's negligence contributed to the acci-
dent to the extent of thirty-five percent. The trial judge refused to
apply comparative negligence principles on the ground that contribu-
tory negligence was not a defense to a strict liability action and
awarded the full amount to the plaintiff, less the amount received
in settlement with the construction company. The defendant ap-
pealed to the United States Court of Appeals for the Fifth Circuit,
which led to the certification to the Supreme Court of Florida.

The supreme court examined in detail the state's decisions in
products liability suits and concluded that, in effect, the Florida
courts have imposed strict or absolute liability on manufacturers for
placing products on the market knowing they would be used without
inspection for defects which cause injury to persons. Therefore, the
court concluded that the prior decisions were "in conformity with
the principles set forth in the Restatement (Second) of Torts §
402A... [and] [s]uch a recognition by the Court is no great
new departure from present law and, in most instances, accom-
plishes a change of nomenclature."

212. Plaintiff settled with the construction company prior to trial for $35,000. Therefore
the judgment against Caterpillar Tractor Co. was $90,000 ($125,000 - $35,000).
213. Restatement (Second) of Torts § 402A (1965) provides:
(1) One who sells any product in a defective condition unreasonably dangerous
to the user or consumer or to his property is subject to liability for physical harm
thereby caused to the ultimate user or consumer, or to his property, if ¶ (a) the
seller is engaged in the business of selling such a product, and ¶ (b) it is expected
to and does reach the user or consumer without substantial change in the condition
in which it is sold,
(2) The rule stated in Subsection (1) applies although ¶ (a) the seller has exer-
cised all possible care in the preparation and sale of his product, and ¶ (b) the
user or consumer has not bought the product from or entered into any contractual
relation with the seller.
214. 336 So. 2d at 86.
Although specifically adopting the doctrine of strict liability as stated by section 402A of the Restatement of Torts, the supreme court went one step further by holding such doctrine also protects reasonably foreseeable bystanders as well as consumers or users of the product.215

Having decided that a manufacturer may be found liable under strict liability in tort, as distinguished from implied warranty of merchantability, the court considered whether the defense of contributory or comparative negligence should be permitted under either theory. With respect to defenses to a strict liability action, the supreme court referred to the comments of the Restatement (Second) of Torts section 402A and held that:

Contributory negligence of the user or consumer or bystander in the sense of a failure to discover a defect, or to guard against the possibility of its existence, is not a defense. Contributory negligence of the consumer or user by unreasonable use of a product after discovery of the defect and the danger is a valid defense . . . . The fact that plaintiff acts or fails to act as a reasonable prudent person, and such conduct proximately contributes to his injury, constitutes a valid defense. In other words, the lack of ordinary due care could constitute a defense to strict tort liability.216

Noting that Florida has adopted the doctrine of comparative negligence, the supreme court held that apportionment should apply in actions where contributory negligence is a defense to strict liability. Finally, the supreme court held that contributory negligence is a defense in an action for breach of an implied warranty of merchantability. Therefore, whether suit is brought in strict liability or for breach of an implied warranty, the injured person is required to show he has exercised ordinary due care. The court examined but rejected the argument that since contributory negligence is a tort defense and breach of implied warranty is a contract action, contributory negligence should not be applied to an implied warranty case.217

One possible problem in adopting the doctrine of strict liability in tort is the potential conflict with the warranty and disclaimer

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215. The Restatement (Second) of Torts had left open the question of whether nonusers or nonconsumers should be permitted recovery in strict liability.
216. 336 So. 2d at 90.
217. Id. at 91-92.
provisions of the Uniform Commercial Code. Strict liability would eliminate the notice requirement, restrict the effectiveness of disclaimers, and abolish what is left of the privity requirement. However, the supreme court found that since the legislature had not specified that the UCC remedies were exclusive, there should be no impediment to adoption of the strict liability doctrine.

In products liability actions against manufacturers, both strict liability and breach of implied warranty may be pleaded, as well as traditional allegations of negligence. To hold a manufacturer liable under strict liability in tort, the plaintiff must demonstrate the manufacturer's connection to the allegedly defective product, prove that the product is defective and unreasonably dangerous, and establish the proximate causal connection between the defect and the ultimate injuries or damages suffered by the plaintiff. With the adoption of strict liability, one might question the necessity of also pleading breach of implied warranty of merchantability since disclaimers of merchantability are not a defense to strict liability, and there are no notice or privity requirements in a strict liability cause of action. If the standard of strict liability ("defective condition unreasonably dangerous to the user or consumer or to his property") is the same as "unmerchantability," then there would seem to be no purpose in alleging implied warranty; but if the strict liability standard is more difficult to prove, then an allegation of breach of warranty would continue to be useful. However, the supreme court in *West* suggested that the standard of "defect unreasonably dangerous" did not introduce a notion different than that of "unmerchantability." Future case law must determine whether the two standards are necessarily the same.

### B. Animals

Florida's "dog bite" statute makes a dog owner, with certain exceptions, the insurer against damage by his dog. In *Harris v.*

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220. "[D]isclaimers [would be restricted] to situations where it can be reasonably said that the consumer has fully assumed the risk . . . ." 336 So. 2d at 88.
222. See note 220 supra.
223. 336 So. 2d at 88.
Moriconi\(^{225}\) the issue was whether a child’s actions constituted “carelessly provoking” the dog, thus giving the owner a defense under the statute. A 5½-year-old child, legally on the dog-owner’s property, accidentally rode her bicycle over the dog’s tail. When the child returned to comfort the dog, it bit her on the face causing injury. An action was brought against the dog’s owner pursuant to Florida Statutes section 767.04 (1975) to recover damages.

There was no evidence of mischievous aggravation; therefore, the issue was whether the child’s actions were “careless” within the meaning of the statute. The District Court of Appeal, First District, held that “careless,” as used in the dog bite statute, was synonymous with the definition of negligence. Therefore, since the child was under the age of six,\(^ {226}\) her actions could not be “careless” or “negligent,” and the dog owner would be absolutely liable. Judge Rawls dissented on the grounds that the statute should control over common law, and the statutory exception regarding careless or mischievous action specifically contemplates “any person,” including a child.

The general provision holding dog owners liable “for any damage done by their dogs to sheep or other domestic animals or livestock, or to persons”\(^ {227}\) was the subject of litigation in Smith v. Allison.\(^ {228}\) The plaintiff was riding his motorcycle on the street with a car approaching him from the opposite direction when he observed in the middle of the road a dog which suddenly ran in front of him. In attempting to avoid hitting the dog, the plaintiff crashed his motorcycle and received injuries. Suit was brought against the defendant, who had custody of the dog. The dog was actually owned by the defendant’s parents.

The District Court of Appeal, Third District, held that the statute was inapplicable in the present case. The court noted that the statute’s original intent was to protect an agrarian society and that although it had approved the statute’s application in a case where a dog ran into a car,\(^ {229}\) it decided that there must be some limitation on the scope of absolute liability for damages caused by

\(^{225}\) 331 So. 2d 353 (Fla. 1st. Dist. 1976).
\(^{227}\) FLA. STAT. § 767.01 (1975) (emphasis added).
\(^{228}\) 332 So. 2d 631 (Fla. 3d Dist. 1976).
\(^{229}\) See Allstate Ins. Co. v. Greenstein, 308 So. 2d 561 (Fla. 3d Dist. 1975).
animals. Therefore, since the dog itself did not inflict any damage, the court refused to apply absolute liability. Moreover, the Third District cautioned that the element of ownership is "of immense importance in actions such as this one" and noted there is a clear burden on the plaintiff to show actual ownership and not merely possession or custody.

In response to this ruling, the plaintiff contended the cause should have been submitted to the jury as a negligence case based on a Metropolitan Dade County Ordinance ordering those who have custody of dogs to prevent them from running stray on the streets. On rehearing, the court stated that an inference that the defendant was negligent was not justified merely because the dog was on the street. Furthermore, there was evidence that the dog was regularly kept inside a fenced yard but had somehow escaped on the date of the accident. Therefore, the court affirmed its prior decision.

IV. GOVERNMENTAL TORT LIABILITY

A. Municipal Corporations

The scope of municipal sovereign immunity is presently unsettled in Florida. The uncertainty which encompasses this area emanates from two sources. The first source of this confusion is the state supreme court decisions of Hargrove v. Town of Cocoa Beach and Modlin v. City of Miami Beach, coupled with the subsequent cases attempting to interpret them. The second source arises from the still uncertain effect of the recently enacted Florida statute

230. 332 So. 2d at 634.
232. Metro Dade Co., Code § 5-6 (1959) provides in pertinent part:
   (a) No responsible party owning or having possession, charge, custody or control of any dog shall cause or permit or allow the dog to stray, run, be, go or in any other manner to be at large in or upon any public street, sidewalk or park or on private property of others without the express or implied consent of the owner of such private property. This section shall not apply to any dog or dogs when the dog is actually engaged in the sport of hunting in authorized areas and supervised by a competent person.
233. 332 So. 2d at 634-35.
235. 96 So. 2d 130 (Fla. 1957).
236. 210 So. 2d 70 (Fla. 1967).
which waives sovereign immunity.

The District Court of Appeal, Fourth District, acknowledged this uncertainty in Gordon v. City of West Palm Beach: 238 "We are frank to admit that the current status of municipal tort liability is not at all clear . . . ." 239 In Gordon the father of a motorcyclist who died from a collision with an automobile at the intersection of a street and alley brought a wrongful death and survival action against the city. The complaint alleged that the city was negligent in the design, construction, and maintenance of the intersection and in failing to warn of a known hazardous condition. The plaintiff also alleged that the city's traffic engineer was negligent in failing to erect traffic control devices at the intersection.

Finding the doctrine of governmental immunity applicable, the circuit court dismissed the complaint. On appeal, the District Court of Appeal, Fourth District, reviewed the leading cases of Hargrove v. Town of Cocoa Beach 240 and Modlin v. City of Miami Beach 241 and held that the Modlin decision only applies to municipal torts involving governmental functions, not to those involving proprietary functions. 242 Based on these determinations, the court delineated the following conclusions as to the current status of municipal tort liability: (1) a municipality has the same tort liability as a private corporation in performing proprietary activities or services; (2) a municipality is liable in tort under the doctrine of respondeat superior for governmental activities "only when such tort is committed against one with whom the agent or employee is in privity, or with whom he is dealing or is otherwise in contact in a direct transaction or confrontation," 243 and (3) a municipality remains immune to tort liability with regard to those activities characterized as judicial, quasi-judicial, legislative, or quasi-legislative. Furthermore, the

238. 321 So. 2d 78 (Fla. 4th Dist. 1975).
239. Id. at 79.
240. 96 So. 2d 130 (Fla. 1957).
241. 201 So. 2d 70 (Fla. 1967).
242. The Hargrove decision appeared to repudiate the proprietary-governmental function distinction in abolishing sovereign immunity for "executive" actions of a municipality. However, the holding in Hargrove was later restricted and modified in Modlin where the Supreme Court of Florida held that in order for a municipality to be liable for a tort arising from the performance of a governmental function, the duty owed to the claimant by the allegedly negligent municipal officer must be "something more" than the duty owed by that officer to the general public. 201 So. 2d at 75-76.
243. 321 So. 2d at 80, quoting City of Tampa v. Davis, 226 So. 2d 450, 454 (Fla. 2d Dist. 1969).
court noted that the construction, maintenance, and repair of municipal streets have long been held to be a proprietary, rather than governmental, function.\textsuperscript{244} Thus, the court held that the plaintiff's allegations of negligence constituted a cause of action against the city and reversed the trial court's dismissal as to it. However, upon finding the installation and maintenance of traffic control devices to be a governmental function, the court affirmed the dismissal of the complaint as to the traffic engineer, who apparently owed no special duty to the motorcyclist.

The \textit{Gordon} court noted that its decision appeared to be in conflict with that of \textit{Nobles v. City of Jacksonville}\textsuperscript{246} where the District Court of Appeal, First District, had held as a matter of law that the City of Jacksonville was not liable for the negligent maintenance of a bridge. The Fourth District construed \textit{Nobles} as interpreting the \textit{Hargrove} and \textit{Modlin} cases to mean that municipal tort liability exists only where there is a direct relationship between a negligent city agent and the person injured.

Subsequently, in \textit{City of Tallahassee v. Elliot}\textsuperscript{246} the District Court of Appeal, First District, stated that the Fourth District had misinterpreted the facts and holding of \textit{Nobles}. The First District emphasized that \textit{Nobles} did not hold that the construction, maintenance, and repair of streets were not proprietary services, but instead held that the City of Jacksonville was not charged with the duty of construction, maintenance, or repair of a bridge owned by the State of Florida since this duty was the state's. The First District went on to hold in \textit{City of Tallahassee} that the city was not entitled to the dismissal of a complaint alleging negligence in the maintenance of a drainage ditch and culvert since the maintenance of a city drainage system is a proprietary function.

A question not presented in \textit{Gordon} or \textit{City of Tallahassee}, and one which has yet to be answered by a Florida appellate court, adds to the present uncertainty: what is the effect of the act waiving sovereign immunity\textsuperscript{247} on municipal liability? As previously discussed, judicial decision has abrogated municipal immunity for negligence involving proprietary functions, as well as for negligence

\textsuperscript{244} 321 So. 2d at 79; \textit{accord}, Trumpe v. City of Coral Springs, 326 So. 2d 192 (Fla. 4th Dist. 1976).
\textsuperscript{245} 316 So. 2d 565 (Fla. 1st Dist. 1975).
\textsuperscript{246} 326 So. 2d 256 (Fla. 1st Dist. 1975).
\textsuperscript{247} \textit{FLA. STAT.} § 768.28 (1975).
involving governmental functions of the executive branch where a special duty was owed to the injured person. Thus, in light of the $50,000/$100,000 limit imposed by the act, a question arises as to whether the act, in effect, modifies the partial common law abrogation by now limiting the liability of a municipality in instances where it was previously unlimited. A recent Florida Attorney General Opinion answers this question in the negative, and it is submitted that this opinion represents the better view.

B. State Sovereign Immunity

In Circuit Court of Twelfth Judicial Circuit v. Department of Natural Resources the Department of Natural Resources was sued by the parents of a child who was killed in a state park. Having paid an entrance fee, the child was killed by an alligator while she was swimming in an artificial lake within the park. The Department’s alleged liability was predicated on theories of negligence, strict liability in tort, and breach of contract. Unable to rely on the present statutory waiver of sovereign immunity because the child’s death occurred before the effective date of Florida Statutes section 768.28 (1975), the parents alleged that the Department had waived sovereign immunity by engaging in the proprietary function of operating the park. The plaintiffs contended that the sovereign immunity provision of the Florida Constitution does not preclude waiver of sovereign immunity by means other than legislative enactment or constitutional amendment. The Supreme Court of Florida rejected this contention, however, and held that the Department of Natural Resources was protected from suit by sovereign immunity. The court found the governmental-proprietary distinction, which has been utilized as a test for waiver of sovereign immunity in cases involving municipalities, to be inapplicable to actions involving the state or its agencies.

248. 321 So. 2d at 80.
251. 339 So. 2d 1113 (Fla. 1976).
252. Fla. Const. art. X, § 13: "Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating."