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Modification of the Doctrine of Joint and Several Liability: Who Bears the Risk?

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Abstract

On November 27, 1971, Aloysia Wood was driving a miniature race car at the Grand Prix Raceway in Walt Disney World when she was injured after another car driven by her fiancé struck hers.

KEYWORDS: risk, doctrine, liability

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I. Introduction

On November 27, 1971, Aloysia Wood was driving a miniature race car at the Grand Prix Raceway in Walt Disney World when she was injured after another car driven by her fiance struck hers. As a result, she sued several defendants, including Walt Disney World.¹ During the trial, she settled with some of the defendants. The jury found for the other defendants. The plaintiff appealed. The appellate court affirmed the decision regarding the remaining defendants, but reversed the decision concerning Walt Disney World, ordering a new

1. Wood v. Walt Disney World Co., 396 So. 2d 769 (Fla. 4th Dist. Ct. App. 1981).

trial.² On retrial, the jury found the plaintiff to be 14% at fault; her fiancé 85% at fault; and Walt Disney World only 1% at fault.³ Nevertheless, the trial court entered judgment against Walt Disney World and its insurers for the full 86% of the plaintiff's damages under the doctrine of joint and several liability.⁴ Under Florida law at that time,⁵ Walt Disney World was liable for the entire 86% of the damages. Once it satisfied that judgment, it could then turn to the fiancé for contribution of his 85% of the judgment.⁶ However, in the event he was insolvent or judgment proof, Walt Disney World would bear the burden of the entire amount.

While the particular facts of this case present an extreme example of the inequitable consequences resulting from the doctrine of joint and several liability, it does serve to illustrate the controversy between the plaintiff and defense bar. Indeed, the defense bar and special interest groups such as insurance companies used this case to argue for the abolition of joint and several liability while the Tort Reform and Insurance Act of 1986⁷ was pending. A major criticism of joint and several

2. *Id.* at 770-71.

3. Walt Disney World had filed a counter claim against the fiancé, alleging that his negligence contributed to the plaintiff's injuries.

4. Walt Disney World Co. v. Wood, 489 So. 2d 61 (Fla. 4th Dist. Ct. App. 1986).

5. Lincenberg v. Issen, 318 So. 2d 386 (Fla. 1975) (holding that multi-party defendants remain jointly and severally liable for the entire amount of damages).

6. FLA. STAT. § 768.31 (1985) (allows contribution among joint tortfeasors based on their relative degrees of fault). The following excerpts from the statute are provided:

(2) RIGHT TO CONTRIBUTION.—

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

(b) 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 his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make a contribution beyond his own pro rata share of the entire liability . . .

(3) PRO RATA SHARES.—In determining the pro rata shares of tortfeasors in the entire liability:

(a) Their relative degrees of fault shall be the basis for allocation of liability.

7. Tort Reform and Insurance Act of 1986, Ch. 86-160, 1986 Fla. Sess. Law Serv. 660 (West).

liability is that a negligent tortfeasor remains jointly and severally liable for the entire amount of the damages, regardless of his particular degree of fault.

The conflict, simply stated, is that between a negligent plaintiff and a negligent defendant, who should bear the risk of the other defendants being insolvent? When a plaintiff is injured, and one defendant is more able to pay than the other, why should the one who can afford to pay not bear the burden, even if he ends up paying more than his proportional share? After all, his negligence was the proximate cause of the plaintiff's injuries. Conversely, why should a defendant found to be only one percent at fault bear the burden of compensating the plaintiff in an amount far greater than his share of the damages, merely because he has more resources than the other, more negligent defendant?

Walt Disney World wondered the same thing, and on appeal to the Fourth District Court of Appeal⁸ argued that the reasons behind the doctrine "have all evaporated."⁹ It asked the court to abolish the doctrine, but the court declined to do so. The court cited precedent¹⁰ and stated that such a change in the law was best left to the supreme court or the legislature.¹¹ The Florida legislature, in response to public pressure for tort reform, modified the doctrine with the passage of the Tort Reform and Insurance Act of 1986.¹²

8. *Walt Disney World Co. v. Wood*, 489 So. 2d 61 (Fla. 4th Dist. Ct. App. 1986).

9. *Id.* at 62.

10. *Id.*

11. *Id.* They did, however, certify a question to the supreme court, asking whether the holding in *Lincenberg v. Issen*, 318 So. 2d 386 (Fla. 1975), mandated an affirmance of the trial court's decision. *Lincenberg* involved a plaintiff who was entirely blameless, where the plaintiff here was not. Further, *Lincenberg* was decided based on a version of the Florida statutes which allowed allocation of liability only in pro rata shares. FLA. STAT. § 768.31(3)(a) (1975) reads: "In determining the pro rata shares of tortfeasors in the entire liability (a) Their relative degrees of fault shall not be considered." The current statute, on the other hand, allows contribution based on the defendant's relative degree of fault. *See supra* note 6. While the Tort Reform Act of 1986 modifies joint and several liability, this case is still important for several reasons. First, the Tort Reform Act applies only to cases which arise after July 1, 1986, so this case must be decided according to previous law. Also, while *Lincenberg* raised the issue of joint and several liability, the court in that case did not address that issue, but chose to comment instead on the issue of contribution among tortfeasors. Further, the court based its decision on an outdated version of the contribution law. Therefore, this case gives the court the opportunity to clarify its position on joint and several liability.

12. Tort Reform and Insurance Act of 1986, Ch. 86-160, 1986 Fla. Sess. Law

This article will examine the historical perspective and current status of joint and several liability, including the related issues of contributory negligence, comparative negligence, comparative fault, and contribution. The article will focus specifically on the multiple tortfeasor situations, especially where one or more of the negligent tortfeasors are absent or insolvent, and the plaintiff is also negligent. Particular scrutiny will be given to the doctrine of joint and several liability, as modified by the Tort Reform and Insurance Act of 1986.¹³ The history and background of the new bill will be examined, along with an analysis of its positive and negative aspects.

II. Background

A. *Development of Comparative Negligence in the United States*

According to some historians, the doctrine of comparative negligence has its roots in the law of ancient Rome and thus actually precedes the doctrine of contributory negligence.¹⁴ Contributory negligence originated as a defense in 1809 in the case of *Butterfield v. Forrester*,¹⁵ and became widely accepted throughout America and England.¹⁶ The *Butterfield* court failed to provide a rationale for its ruling that a plaintiff cannot recover from a negligent defendant if he himself negligently contributed to his own injuries.¹⁷ The concept, however, arises from several common law policies.¹⁸ These include the concepts

Serv. 660 (West).

13. *Id.*

14. V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 9 (1974).

15. In *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926 (1809), the defendant was found negligent in leaving a pole across the road. However, since the plaintiff failed to use due care in avoiding it, the court denied recovery to him, stating "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he did not himself use common and ordinary caution to be in the right." *Id.* at 61, 103 Eng. Rep. at 927.

16. V. SCHWARTZ, *supra* note 14, at 4; Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953). Contributory negligence was first recognized in Florida in *Louisville & N. R.R. v. Yniesta*, 21 Fla. 700 (1886).

17. FLA. SENATE COMM. ON COMMERCE, INTERIM REPORT: HISTORICAL ANALYSIS — CURRENT PERSPECTIVES OF THE DOCTRINE OF JOINT AND SEVERAL LIABILITY AND A REVIEW OF TORT REFORM, at 5, 6 (March 1986) [hereinafter FLA. SENATE COMM. REPORT].

18. Wade, *Comparative Negligence — Its Development in the United States and Its Present Status in Louisiana*, 40 LA. L. REV. 299 (1980).

that a plaintiff must come into court with clean hands,¹⁹ since a plaintiff who is himself at fault cannot be rewarded;²⁰ that a plaintiff's intervening negligence actually became the proximate cause of his injuries;²¹ and that the defense exists to punish plaintiffs for their own lack of due care.²²

As the doctrine of contributory negligence fell into disfavor,²³ courts developed exceptions to it.²⁴ Eventually the federal government and the states²⁵ began to recognize the doctrine of comparative negligence.²⁶ Today, only six states adhere to the doctrine of contributory negligence.²⁷

States which have adopted comparative negligence use one of three forms of the doctrine. The most commonly recognized form, and the one chosen by most legislatures, is the "modified form."²⁸ There are

19. *Id.*; Prosser, *supra* note 16, at 468; FLA. SENATE COMM. REPORT, *supra* note 17, at 6.

20. Wade, *supra* note 18; Prosser, *supra* note 16, at 468; FLA. SENATE COMM. REPORT, *supra* note 17, at 6.

21. Wade, *supra* note 18; Prosser, *supra* note 16, at 468; FLA. SENATE COMM. REPORT, *supra* note 17, at 6.

22. Prosser, *supra* note 16, at 468.

23. The main problem with contributory negligence was the injustice of having a plaintiff, who in many instances was much less negligent than the defendant, bearing the burden of the entire loss. See Prosser, *supra* note 16, at 469. It was considered much more fair to allow the injured plaintiff recovery for his loss, and rather than punishing him by denying him any recovery, merely reduce the amount of his recovery by the percentage of fault he bore.

24. Wade, *supra* note 18, at 300.

25. Florida was the first state to judicially adopt the doctrine. *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

26. For an excellent history on the development of the doctrine, see V. SCHWARTZ, *supra* note 14, Chapter One. See also Wade, *supra* note 18; Prosser, *supra* note 16; FLA. SENATE COMM. REPORT, *supra* note 17; and Timmons & Silvis, *Pure Comparative Negligence in Florida: A New Adventure in the Common Law*, 28 U. MIAMI L. REV. 737 (1974).

27. They are: Alabama, *Birmingham Ry., Light & Power Co. v. Bynum*, 36 So. 736, 139 Ala. 389 (1904); *Baltimore & O. R.R. v. State*, 29 Md. 252 (1868); *Harrison v. Montgomery County Bd. of Educ.*, 295 Md. 442, 456 A.2d 894 (1983); N.C. GEN. STAT. §§ 1-139, 143-299.1 (1983); *Langley v. Boyter*, 286 S.C. 85, 332 S.E.2d 100 (1985); *Southern Ry. v. Pugh*, 97 Tenn. 624, 37 S.W. 555 (1896); *Chesapeake & Ohio Ry. v. Lee*, 5 S.E. 579, 84 Va. 642 (1888).

28. Out of twenty eight states which apply the modified form of comparative negligence, only West Virginia judicially adopted the doctrine. FLA. SENATE COMM. REPORT, *supra* note 17, at 85-86.

two types of the modified form recognized by most states. Each of the modified types allows recovery if the plaintiff's negligence is judged to be below a certain point in comparison with the defendant's negligence, but reduces the amount a plaintiff will recover in proportion to his degree of fault.²⁹

Nine states³⁰ adhere to the "49%" rule³¹ which allows recovery for plaintiffs only if their negligence is less than that of the defendants. Some states compare the plaintiff's negligence with each individual defendant's, and allow recovery only if the plaintiff's negligence is less than any of the defendant's alone.³² Other states aggregate the defendants' negligence, allowing recovery only if the plaintiff's degree of fault is less than all of the defendants' combined.³³ To illustrate, imagine that plaintiff A's share of liability is 40%. Defendants B and C are each 30% at fault. Thus, in some 49% jurisdictions, A would be allowed to recover 60% of his damages since his share of liability is less than B's and C's combined. However, other 49% states would bar any recovery for A since his liability is greater than either of the individual defendants'. Similarly, if each party is found equally at fault (i.e., A, B, and C are all 33⅓% liable), then A will be unable to recover any of his damages. The rationale for the 49% rule is that it is not fair to allow a party who is more at fault to recover from those who are less

29. Schwartz, *Comparative Negligence in Kansas — Legal Issues and Probable Answers*, 13 WASHBURN L.J. 397, 398-99 (1974).

30. ARK. STAT. ANN. § 27-1765 (1979); COLO. REV. STAT. § 13-21-111 (1985); GA. CODE ANN. § 51-11-7 (1982); IDAHO CODE § 6-801 (1986); KANSAS STAT. ANN. § 60-258a (1983); ME. REV. STAT. ANN. tit. 14, § 156 (1980); N.D. CENT. CODE § 9-10-07 (1975); UTAH CODE ANN. § 78-27-38 (1986); and *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W.Va. 1979). Arkansas originally adopted the pure form in 1955, but switched to the 49% rule in 1957. Schwartz, *supra* note 29, at 399 n.19; Wade, *supra* note 18, at 302. Wyoming originally followed the 49% rule, but adopted the 50% variation in June 1986. WYO. STAT. § 1-1-101 (1986).

31. The "49%" rule is also known as the "Wisconsin Rule," as Wisconsin originated this version in 1931 (1931 Wis. Laws 375). However, Wisconsin has since switched to the 50% variation (Wis. STAT. ANN. § 895.045 (West 1983)).

32. Schwartz, *supra* note 29, at 414-15; Fleming, *Foreward: Comparative Negligence at Last — By Judicial Choice*, 64 CALIF. L. REV. 239, 245-46 (1976) [hereinafter Fleming, *Foreward*]; and Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Association v. Superior Court*, 30 HASTINGS L.J. 1465, 1468 (1978) [hereinafter Fleming, *Report*].

33. Schwartz, *supra* note 29, at 414-15; Fleming, *Foreward*, *supra* note 32, at 245-46; Fleming, *Report*, *supra* note 32, at 1468.

culpable.³⁴

The 50% variation of comparative negligence allows recovery for a plaintiff if his negligence is not greater than that of the defendant. The difference, of course, is that in these states, a plaintiff who is equally at fault with the defendant or defendants is not completely barred from recovery. This difference may seem negligible, but in states which do not allow the jury to have knowledge of the effect of an equal verdict, it can be quite devastating.³⁵ For example, a jury that is having trouble apportioning liability may decide to split fault down the middle, intending for the plaintiff to collect 50% of the damages. In a 49% state, the plaintiff would be barred from all recovery. Thus, a majority of states have opted for the 50% variation,³⁶ evidently believing that this is a fairer approach.

The least recognized form of comparative negligence is the so-called "slight/gross" variation. There, the plaintiff can only recover when his fault is "slight" compared to the greater negligence of the defendant. Perhaps the reason that only two states have adopted this version³⁷ is that its vagueness places too much of a burden on plaintiffs and is open to too much confusion.³⁸

The last type of comparative negligence recognized is the "pure" form. The rationale behind comparative negligence is to apportion "damages between mutually negligent parties according to their proportionate share of causal fault."³⁹ States which have adopted the pure

34. Fleming, *Foreward*, *supra* note 32, at 246; Fleming, *Report*, *supra* note 32, at 1468.

35. Fleming, *Report*, *supra* note 32, at 1468; V. SCHWARTZ, *supra* note 14, at 77.

36. CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1986); DEL. CODE ANN. tit. 10, § 8132 (West Supp. 1984); HAWAII REV. STAT. § 663-31 (1976); IND. CODE ANN. § 34-4-33-4.5 (Burns 1986); IOWA CODE ANN. § 668.3 (West Supp. 1986); MASS. GEN. LAWS ANN. ch. 231, § 85 (West 1985); MINN. STAT. ANN. § 604.01 (West Supp. 1986); MONT. CODE ANN. § 27-1-702 (1985); NEV. REV. STAT. § 41.141 (1985); N.H. REV. STAT. ANN. § 507:7-a (West Supp. 1985); N.J. STAT. ANN. § 2A:15-5.1 (West Supp. 1986); OHIO REV. CODE ANN. § 2315.19 (Page 1981); OKLA. STAT. ANN. tit. 23, §§ 13, 14 (West Supp. 1985); OR. REV. STAT. § 18.470 (1985); PA. CONS. STAT. ANN. § 7102 (Purdon 1982); TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (Vernon Supp. 1986); VT. STAT. ANN. tit. 12, § 1036 (West Supp. 1986); WIS. STAT. ANN. § 895.045 (West 1983); and WYO. STAT. § 1-1-101 (1986).

37. N.H. REV. STAT. § 25-1:15 (1985), and S.D. CODIFIED LAWS ANN. § 20-9-2 (1979).

38. FEA. SENATE COMM. REPORT, *supra* note 17, at 23.

39. TIMMONS and SIBBS, *supra* note 26, at 748 n.28.

form⁴⁰ must agree with the Florida Supreme Court's opinion in *Hoffman v. Jones*.⁴¹ There, the court found the pure form "to be the most equitable method of allocating damages in negligence actions."⁴²

In the pure form, the plaintiff is barred from recovery only if the court finds him to be totally responsible for all the damages. The pure form allows courts to apportion liability among each party, with the plaintiff receiving whatever damages he suffered, minus his proportionate share. Thus, theoretically, a plaintiff who is 90% negligent can recover 10% of his damages from the negligent defendant. Opponents of the pure form argue that it is unfair to require a less responsible party to compensate a party who was more at fault.⁴³ In cases where the less responsible defendant was more severely injured, the defendant can actually end up recovering from the plaintiff.⁴⁴ But, as the court in *Hoffman v. Jones* pointed out, liability should depend on the amount of damages caused, not on the injuries suffered.⁴⁵ Proponents of the pure form point to the inequity of barring a plaintiff's recovery if he is 49% or 50% responsible, but allowing him recovery under the same set of facts if he is found 51% responsible. As the Wisconsin Chief Justice once asked, "What is so magical [sic] about being less than, greater than, or equally negligent, that justice must depend on it?"⁴⁶

Since Florida adheres to the pure form of comparative negligence,⁴⁷ the discussion to follow will focus only on that form. As evi-

40. *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975); ARIZ. REV. STAT. ANN. § 12-2505 (West Supp. 1986); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E. 2d 886 (1981); *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984); LA. CIV. CODE ANN. art. 2323 (West 1986); *Placek v. City of Sterling Heights*, 405 Mich. 638, 275 N.W.2d 511 (1979); MISS. CODE ANN. § 11-7-15 (1972); *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983); *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981); N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976); R.I. GEN. LAWS § 9-20-4 (1985); and WASH. REV. CODE ANN. § 4.22.005 (1986). Iowa judicially adopted the pure form in 1982 (*Goetzman v. Wichern*, 327 N.W.2d 742 (Iowa 1982)), but legislatively changed to the 50% form in 1984. (See *supra* note 36.)

41. 280 So. 2d 431 (Fla. 1973).

42. *Id.* at 438.

43. *Timmons and Silvis*, *supra* note 26, at 745 n.29.

44. *Id.*

45. *Hoffman*, 280 So. 2d at 439.

46. FLA. SENATE COMM. REPORT, *supra* note 17, at 19 (quoting *Vincent v. Pabst Brewing Co.*, 177 N.W.2d 513, 520 (Wis. 1970) (Hallows, C.J., dissenting)).

47. *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

denced, by *Walt Disney World*,⁴⁸ complications arise when there are multiple parties to an action. In multiple tortfeasor situations, it is necessary to consider the doctrine of joint and several liability and the issue of contribution among tortfeasors.

B. Definition and Development of Joint and Several Liability

A discussion of joint torts is helpful in understanding the doctrine of joint and several liability. Prosser found that the term "joint tortfeasor" had a different meaning in almost every court.⁴⁹ Originally, the term encompassed situations where two or more defendants acted in concert towards a common end.⁵⁰ Since there was concert of action and joint responsibility, the plaintiff had only one cause of action, and thus could recover only one judgment from either or all of the defendants.⁵¹ In early American cases, defendants were joined in one action only if they acted in concert.⁵² Eventually concurrent tortfeasors⁵³ and even successive tortfeasors⁵⁴ were allowed to be joined as well.⁵⁵ Thus, the term "joint tortfeasor" now applies to any defendant whose negligence combined with that of another to produce a common injury.⁵⁶ The unfortunate result, as Prosser pointed out, "has been to confuse joinder of parties with liability for entire damages."⁵⁷

The idea that all the joint tortfeasors are each liable for the entire amount of the damages caused to the plaintiff "grew out of the com-

48. *Walt Disney World Co. v. Wood*, 489 So. 2d 61 (Fla. 4th Dist. Ct. App. 1986).

49. Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413 (1937).

50. *Id.* at 415; Jackson, *Joint Torts and Several Liability*, 17 TEX. L. REV. 403 (1939); Note, *Contribution Act Construed — Should Joint and Several Liability Have Been Considered First?*, 30 U. MIAMI L. REV. 747, 752 (1976).

51. Prosser, *supra* note 49, at 414.

52. *Id.*

53. *Id.* at 420.

54. Note, *Multiple Party Litigation Under Comparative Negligence in Kansas — Damage Apportionment as a Replacement for Joint and Several Liability*, 16 WASHBURN L. J. 672 (1977).

55. The first case in Florida to recognize joint and several liability where the defendants did not act in concert was *Louisville & N. R.R. v. Allen*, 67 Fla. 257, 65 So. 8 (Fla. 1914), where the court held that "although concert is lacking, [when] the separate and independent acts of negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it." *Id.* at 269, 65 So. at 12 (citation omitted).

56. Prosser, *supra* note 49, at 420.

57. *Id.*

mon law concept of the unity of the cause of action; the jury could not be permitted to apportion the damages, since there was but one wrong."⁵⁸ With the advent of comparative negligence, courts began to allow damages to be apportioned among the joint tortfeasors. However, as one court pointed out, this did not relieve the co-defendants of the entire liability because their individual negligence was the proximate cause of the entire indivisible injury.⁵⁹ Thus, plaintiffs who receive a judgment against two or more co-defendants may choose to enforce the entire judgment against one, some, or all of the defendants,⁶⁰ and they all remain liable to the plaintiff until the entire judgment is completely satisfied.⁶¹ This situation naturally causes consternation among defendants who fear possible collusion between the plaintiff and one or more of the co-defendants. Also of great concern is the possibility that other tortfeasors will be immune or insolvent, leaving one hapless defendant to bear the burden of the entire liability. This was the situation in *Walt Disney World*,⁶² where Walt Disney World, although responsible for only 1% of the plaintiff's injuries, was nonetheless held liable for the entire 86% of her damages.

C. Contribution among Tortfeasors

The concept of contribution is sometimes confused with the doctrine of joint and several liability. Under joint and several liability, each defendant is individually and jointly responsible for the entire amount of the judgment, regardless of his individual degree of fault. Thus, a plaintiff who chooses to enforce the judgment against only one tortfeasor is entitled to receive the entire judgment from that defendant. The concept of contribution among tortfeasors gives to the defendant against whom the plaintiff is attempting to collect the entire judgment the right to look towards his co-defendants for their share of the responsibility. The proportional amount of contribution to be received from co-defendants, and the problem of absent or insolvent

58. *Id.* at 418.

59. *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 582, 589, 578 P.2d 899, 901, 905, 146 Cal. Rptr. 182, 184, 188 (1975). *Accord* *Rozevink v. Faris*, 342 N.W.2d 845, 847 (Iowa 1983); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226; 119 Cal. Rptr. 858 (1975).

60. Note, *supra* note 54, at 673.

61. FLA. SENATE COMM. REPORT, *supra* note 17, at 28.

62. *Walt Disney World Co. v. Wood*, 489 So. 2d 61 (Fla. 4th Dist. Ct. App. 1986).

tortfeasors,⁶³ are issues to consider in discussing contribution.

The common law rule prohibiting contribution among joint tortfeasors originated in the case of *Merryweather v. Nixan*.⁶⁴ While that case involved an intentional tort, it came to stand for the proposition that in any negligence action a wrongdoer could not profit from his own wrongful act.⁶⁵ Until 1975, Florida adhered to the common law view, and did not allow for any contribution. As a result, plaintiffs were able to "pick and choose" from among all the defendants. They could place the burden for the entire loss on the party they felt was most financially able to pay, or, depending on their feelings and/or relationships with the other defendants, use personal rather than economic reasons in their decision.⁶⁶ Thus, through sheer luck, some defendants who were found liable for the damages managed to escape without paying their share, while other defendants had to bear the burden for all the damages. Similarly, plaintiffs took their chances in choosing one defendant above the others in seeking their total damages. They faced the possibility that the chosen defendant may not really have the available resources to pay a judgment.⁶⁷

Recognizing the injustice of allowing one tortfeasor to bear the entire burden of an accident for which he alone was not solely responsible,⁶⁸ Florida abrogated the harsh common law rule with the passage in 1975 of the Uniform Contribution Among Tortfeasors Act.⁶⁹ For a defendant to seek contribution under the 1975 Act, the following requirements must be met: 1) two or more persons must be jointly or severally liable in tort for the same injury to a person; 2) the tortfeasor must not

63. Hereinafter, the terms "absent" and/or "insolvent" tortfeasors should be read to include those tortfeasors who are judgment proof, or immune from liability through some relationship with the plaintiff (e.g., employer/employee; husband/wife; parent/child).

64. 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799).

65. Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 S. CAL. L. REV. 728, 730 (1968); Comment, *Contribution Among Joint Tortfeasors*, 44 TEX. L. REV. 326, 329-330 (1965).

66. For a detailed discussion of the rationale and results of contribution, see Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 S. CAL. L. REV. 728, 730 (1968).

67. *Id.* at 731-32.

68. Prosser, *supra* note 49, at 427.

69. FLA. STAT. § 768.31 (1975). The Uniform Contribution Among Tortfeasors Act was originally drafted in 1939 by the Commissioners on Uniform Laws. Florida adopted the 1955 version of the Act. See Comment, *The Case for Comparative Contribution in Florida*, 30 U. MIAMI L. REV. 713 (1976), for a detailed history of the Act.

have intentionally caused or contributed to the injury; 3) the tortfeasor must have paid more than his pro rata share of the common liability; and, 4) the recovery must be limited to the amount paid by a tortfeasor of his pro rata share of the common liability.⁷⁰ In determining their pro rata shares, the 1975 Act did not consider the relative degrees of fault of the joint tort-feasors.⁷¹ Therefore, since the doctrine of comparative negligence was accepted prior to the 1975 Act, a defendant could actually collect more than his proportionate share from his joint tortfeasors.

To illustrate, assume that Plaintiff A was found 10% liable for damages totalling \$100,000; Defendant B was found 80% negligent; and Defendant C only 10% negligent. Defendant B's share of the damages is \$80,000, while Defendant C's share is \$10,000. Under the doctrine of joint and several liability, Plaintiff A can elect to collect the entire \$90,000 from either B or C. Assume that Plaintiff A chooses to collect the entire amount from Defendant C, whose proportionate share of the liability is really only \$10,000. Since, generally, pro rata shares are calculated "by dividing the number of joint tortfeasors into the amount of the judgment,"⁷² if Defendant C then attempts to receive contribution from Defendant B under the 1975 Act, Defendant C can receive \$45,000 from B (assuming B is not insolvent). This means that Defendant B, who was originally found liable for \$80,000, has paid \$35,000 less than his share, while Defendant C, who was only found liable for \$10,000, ends up paying three and a half times more than he should.

Another example is to consider *Walt Disney World*⁷³ under the 1975 version of the Contribution Act. Walt Disney World, who was only 1% liable, is responsible for 86% of the total damages under the doctrine of joint and several liability. For illustrative purposes, assume that the plaintiff's total damages were \$100,000. Walt Disney World was thus liable for \$1,000, and the fiance was liable for \$85,000. Assuming that Walt Disney World would be liable to collect its pro rata

70. Comment, *Right of Contribution Is Not Barred by Doctrine of Interspousal Immunity in Florida* — *Shor v. Paoli*, 353 So. 2d 825 (Fla. 1977), 7 FLA. ST. U.L. REV. 167, 170 (1979).

71. FLA. STAT. § 768.31(3)(a) (1975). The 1939 version of the Uniform Act contained an optional provision which would have allowed for consideration of the relative degrees of fault, but the 1955 version, which Florida adopted in 1975, did not. Comment, *supra* note 69, at 715.

72. Comment, *supra* note 69, at 715.

73. *Walt Disney World Co. v. Wood*, 489 So. 2d 61 (Fla. 4th Dist. Ct. App. 1986).

share from the fiancé, Disney would receive only \$43,000 in contribution, thus paying \$42,000 more than its share. Similarly, the fiancé, who originally was liable for \$85,000, would have paid only \$42,000. Where all the tortfeasors are present and solvent, the inequity in this situation is obvious. Perhaps that is why the Florida legislature took only one year to modify the rule.⁷⁴ Now, the law allows consideration of each tortfeasor's degree of relative fault. As a result, each defendant can recover any amount he paid over his percentage of fault. To illustrate, consider the example given above with Plaintiff A 10% negligent; Defendant B 80% negligent; and Defendant C 10% negligent with damages totalling \$100,000. Plaintiff A can still collect \$90,000 from Defendant C, but Defendant C can recover \$80,000 from Defendant B. Similarly, with *Walt Disney World*, while Walt Disney World is still liable for 86% of the damages under joint and several liability, it can now collect the full 85% from the fiancé. This assumes, of course, that the co-defendants are all present and solvent.

D. *Absent and Insolvent Tortfeasors*

With the retention of joint and several liability, the present and solvent tortfeasors bear the risk of their co-defendants being absent or insolvent.⁷⁵ In that case, the available tortfeasors would have the responsibility of initially paying for the entire damages. They would be unsuccessful in their attempts to collect contribution from their co-defendants, which would leave them financially burdened with the entire amount. With the abolition of joint and several liability, the plaintiff bears that risk.⁷⁶ Under those circumstances, the jury would apportion the damages between all the parties, leaving the plaintiff with less than the jury awarded him initially. Assume, for example, a case where the plaintiff and three co-defendants are each found 25% negligent, with

74. 1976 Fla. Laws ch. 76-168 (codified at FLA. STAT. § 768.31 (3)(a) (1985)).

75. DiMento, Harrison and Belsky, *Joint and Several Liability: A Study of the Fiscal and Social Impact of a Change in the Doctrine* 7 (December 1985) (unpublished manuscript) (available from University of Florida College of Law) [hereinafter DiMento]. See also Fleming, *Foreward*, *supra* note 32, at 250-59; McNichols, *Judicial Elimination of Joint and Several Liability Because of Comparative Negligence — A Puzzling Choice*, 32 OKLA. L. REV. 1, 12-16 (1979); Note, *Ohio's Comparative Negligence Statute: The Effect on Joint and Several Liability, Absent Defendants and Joinder*, 50 U. CIN. L. REV. 342, 346 (1981).

76. DiMento, *supra* note 75, at 7; Fleming, *Foreward*, *supra* note 32, at 250-59; McNichols, *supra* note 75, at 12-16; Note, *supra* note 75, at 346.

two of the defendants insolvent. With joint and several liability retained, the one remaining tortfeasor is responsible to the plaintiff for 75% of his damages, despite the fact that originally he was only 25% negligent. With the abolition of joint and several liability, the remaining tortfeasor is liable to the plaintiff for only 25% of his damages, leaving the plaintiff unable to collect the other 50% of his damages, to which he is entitled. This again raises the question: between a negligent plaintiff and a negligent defendant, which is the more appropriate risk bearer? Since most people agree that an innocent plaintiff should not have to bear the risk of an absent or insolvent defendant, the discussion to follow will focus most often on situations where the plaintiff is negligent.

One suggestion is that the defendants are the more appropriate parties to bear this risk. Their negligence resulted in harm to another, while the plaintiff's negligence was "merely [a] lack of self care."⁷⁷ Of course, when the plaintiff is not negligent at all, it would be unfair to deny that plaintiff full recovery from any defendant.⁷⁸ A better solution would be to retain joint and several liability with the accompanying comparative contribution statute. However, some say that in a one plaintiff/one defendant situation, the plaintiff (negligent or not) always bears the risk that the defendant might be insolvent or judgment proof.⁷⁹ Therefore, why should the risk shift to the defendant just because more tortfeasors are involved?

In any negligence action, two distinct, but often conflicting goals exist: "(1) insuring fair but adequate compensation to injured victims, and (2) providing fair allocation of responsibility among wrongdoers."⁸⁰ To ensure adequate compensation to plaintiffs, joint and several liability must be retained. Conversely, for fair allocation of responsibility among wrongdoers, joint and several liability must be abolished. The entire debate over abolishing joint and several liability can be condensed into one question, that is: Between a negligent plaintiff and negligent defendants, who should bear the risk of one or more defendants

77. Fleming, *Report, supra* note 32, at 1483.

78. *Id.*; FLORIDA BAR, REPORT OF THE TORT LITIGATION REVIEW COMMISSION 72 (1984) [hereinafter FLA. BAR]; McNichols, *supra* note 75, at 13; Note, *supra* note 54, at 680.

79. McNichols, *supra* note 75, at 3; Bartlett v. New Mexico Welding Supply, Inc., 98 N.M. 152, 158, 646 P.2d 579, 585 (N.M. Ct. App. 1982), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).

80. McNichols, *supra* note 75, at 11.

being absent or insolvent?⁸¹ Advocates for the retention of joint and several liability generally favor the defendants bearing the risk, while those who say that plaintiffs should bear the risk advocate for the abolition of joint and several liability. There are persuasive arguments for both positions.

III. Should Joint and Several Liability Be Abolished?

Advocates of joint and several liability point out that one of the major goals of tort litigation is to insure adequate compensation of a plaintiff's injuries. The abolition of joint and several liability would decrease the probability that injured plaintiffs will be adequately compensated.⁸² Critics of joint and several liability argue that the original reasons for applying the doctrine of joint and several liability do not exist anymore. Originally, the reason for requiring that both parties remain liable for the entire damages was that there was no basis upon which to divide the damages. Also, as one court stated, "the law is loath to permit an innocent plaintiff to suffer as against a wrongdoing defendant."⁸³ Opponents of joint and several liability point out that, with the advent of comparative negligence, there is a basis for dividing damages. Further, comparative negligence allows even a negligent plaintiff to recover.⁸⁴

A. Judicial Positions

The Supreme Court of California rejected arguments favoring the abolition of joint and several liability in *American Motorcycle Association v. Superior Court*.⁸⁵ The appellate court had interpreted the holding in *Li v. Yellow Cab Co.*⁸⁶ (which judicially adopted comparative negligence in California) as requiring the elimination of joint and several liability in cases involving multiparty defendants. The supreme court disagreed, retaining joint and several liability. It stated "our adoption of comparative negligence . . . does not warrant the abolition .

81. FLA. SENATE COMM. REPORT, *supra* note 17, at 51.

82. FLA. BAR, *supra* note 78, at 71-72.

83. *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 588, 578 P.2d 899, 905, 146 Cal. Rptr. 182, 188 (1978) (quoting *Finnegan v. Royal Realty Co.*, 35 Cal. 2d 409, 433-34, 218 P.2d 17, 32 (1950)).

84. *Id.* at 588, 578 P.2d at 905, 146 Cal. Rptr. at 188.

85. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

86. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

... of the established 'joint and several liability' doctrine; each tortfeasor whose negligence is a proximate cause of an indivisible injury remains individually liable for all compensable damages attributable to that injury."⁸⁷ The supreme court felt that abandoning the rule would reduce the ability of injured plaintiffs to receive adequate compensation. They further pointed out that the majority of jurisdictions which adopted comparative negligence also retained the joint and several liability doctrine.⁸⁸

Florida courts agreed with the California Supreme Court and retained joint and several liability in cases involving multiparty defendants.⁸⁹ In *Walt Disney World*,⁹⁰ the Fourth District Court of Appeal refused to abolish the doctrine, but certified a question to the Florida Supreme Court, asking whether the holding in *Lincenberg v. Issen*⁹¹ (requiring that multi-party defendants remain jointly and severally liable for the entire amount of the damages) mandated an affirmance of the trial court's decision.⁹²

87. *American Motorcycle Ass'n*, 20 Cal. 3d at 582, 578 P.2d at 901, 146 Cal. Rptr. at 184.

88. *Id.* at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189.

89. *Woods v. Withrow*, 413 So. 2d 1179 (Fla. 1982); *Lincenberg v. Issen*, 318 So. 2d 386 (Fla. 1975); *Walt Disney World Co. v. Wood*, 489 So. 2d 61 (Fla. 4th Dist. Ct. App. 1986); *General Dynamics Corp. v. Wright Airlines, Inc.*, 470 So. 2d 788 (Fla. 3d Dist. Ct. App. 1985); *Department of Transp. v. Webb*, 409 So. 2d 1061 (Fla. 1st Dist. Ct. App. 1981), *approved as modified*, 438 So. 2d 780 (Fla. 1983); and *Moore v. St. Cloud Utilities*, 337 So. 2d 982 (Fla. 4th Dist. Ct. App. 1976), *cert. denied*, 337 So. 2d 809 (Fla. 1976), *rev'd on other grounds*, 355 So. 2d 446 (Fla. 4th Dist. Ct. App. 1978).

90. *Walt Disney World Co. v. Wood*, 489 So. 2d 61 (Fla. 4th Dist. Ct. App. 1986).

91. 318 So. 2d 386 (Fla. 1975).

92. To understand the court's ruling in *Walt Disney World*, a brief discussion of *Lincenberg* is warranted. In *Lincenberg v. Issen*, 318 So. 2d 386 (Fla. 1975), the plaintiff, Mrs. Issen, was a passenger in a car owned and driven by the defendant, Mr. Lincenberg. Lincenberg's car collided with another car, causing injuries to Mrs. Issen. At trial, Issen was found free of any contributory negligence. The jury found Lincenberg 15% negligent, and the owners of the other car 85% negligent, with damages totalling \$20,000. The trial judge was unsure whether he should enter the judgments in favor of the plaintiff in the above stated percentages, or whether he should charge damages in full against all the defendants. Therefore, he certified a question to the Third District Court of Appeal, asking whether it was proper for him to allow a jury to apportion fault between the negligent defendants. *Id.* at 338.

The appellate court decided that the doctrine of comparative negligence was not applicable between a defendant and joint tortfeasors. The appellate court further pointed out that at that time, Florida did not allow contribution among tortfeasors. The

It will be interesting to see how the Florida Supreme Court rules

Florida Supreme Court granted certiorari to review the conflict between the appellate court's decision in *Lincenberg* and its decision in *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

In *Hoffman*, the supreme court stated, "[w]hen the negligence of more than one person contributes to the occurrence of an accident, each should pay the proportion of the total damages he has caused the other party." *Hoffman*, 280 So. 2d at 437. The petitioner in *Lincenberg* asked the supreme court to "adopt a rule of apportionment among joint tortfeasors whereby the jury would determine the proportional percentage of causal negligence of each of the joint tortfeasors," *Lincenberg*, 318 So. 2d at 389, since there was no contribution allowed among joint tortfeasors at that time.

While the decision in *Lincenberg* was pending, the Florida Legislature passed the 1975 Uniform Contribution Among Joint Tortfeasors Act, FLA. STAT. § 768.31 (1975) (see *supra* note 11 for a description of the statute), which allowed for contribution based on pro rata shares, not on the proportion of fault of each of the joint tortfeasors. In *Lincenberg*, the supreme court emphasized its ruling in *Hoffman* that "when the negligence of more than one person contributes to the occurrence of an accident, each should pay the proportion of total damages which he has caused the other party." *Lincenberg*, 318 So. 2d at 391. The court used that to justify the abolition of the "no contribution" rule. The court stated that:

There is no equitable justification for recognizing the right of the plaintiff to seek recovery on the basis of apportionment of fault while denying the right of fault allocation as between negligent defendants. Courts in other states which have receded from the doctrine of no contribution have emphasized the unfairness and injustice of placing the entire burden upon the one who happens to be called upon to pay the entire damages where such payment should in justice be shared by another who shared the responsibility for the injury.

Id.

Thus, on the one hand, the court recognized that where two or more joint tortfeasors contribute to the damages, each should only pay for the damages in proportion to his degree of fault. On the other hand, the court accepted the 1975 version of the Florida Contribution Act and determined that "[t]he trial court by allocating damages on the basis of percentage of fault acted inconsistently with the new law since said act specifically provides for contribution on a pro rata basis with the relative degrees of fault not to be considered." *Lincenberg*, 318 So. 2d at 393 (emphasis in original). Therefore, had this case been decided one year later, after the Florida legislature had modified the Uniform Contribution Among Tortfeasors Act to allow contribution based on the relative degrees of fault of the joint tortfeasor, FLA. STAT. § 768.31(3)(a) (1985), the *Lincenberg* decision would have been quite different. As it stands, the *Lincenberg* court never resolved the issue of its conflict with the *Hoffman* ruling. The court in *Hoffman* emphasized that one of the purposes of the comparative negligence rule was "[t]o apportion the total damages resulting from the loss or injury according to the proportionate fault of each party," *Hoffman*, 280 So. 2d at 439, but the ultimate decision in *Lincenberg* allowed contribution based on pro rata shares, with the tortfeasor's relative degrees of fault not being the basis of allocation.

on *Walt Disney World*, in light of the court's decision in *Lincenberg*. Since the *Lincenberg* court based its decision on an outdated version of the Contribution Act, the supreme court is in a position to revisit that decision. The current Contribution Act allows allocation based on the relative degrees of fault of each joint tortfeasor. The new Tort Reform Act of 1986, which partially abolishes joint and several liability, took effect July 1, 1986. Thus, the supreme court may choose to review its previous decisions and reconsider its position on joint and several liability.

The Supreme Court of Oklahoma did that, and modified joint and several liability in *Laubach v. Morgan*.⁹³ The court considered the rulings in *American Motorcycle Association v. Superior Court* and found the rationale of the California Court of Appeal⁹⁴ more persuasive than that of the California Supreme Court.⁹⁵ Thus, the *Laubach* court ruled that holding multiple tortfeasors liable for the entire amount, when their share of the liability was determined to be less than that, was "inconsistent with the equitable principles of comparative negligence."⁹⁶ The court decided that juries should apportion fault as they see fit and that they should only retain joint and several liability in circumstances where damages cannot be apportioned.⁹⁷ While the *Laubach* decision was made in part because Oklahoma did not allow contribution at that time,⁹⁸ the supreme court later ruled that the passage of Oklahoma's contribution statute⁹⁹ did not require reversal of the ruling that abolished joint and several liability.¹⁰⁰ Later decisions established that the *Laubach* doctrine only applies where the plaintiff is comparatively negligent and not in situations where the plaintiff is free of negligence.¹⁰¹

93. 588 P.2d 1071 (Okla. 1978).

94. *American Motorcycle Ass'n v. Superior Court*, 65 Cal. App. 3d 694, 135 Cal. Rptr. 497 (1977).

95. *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

96. *Laubach*, 588 P.2d at 1075.

97. *Id.*

98. *Id.* at 1074.

99. 1 OKLA. STAT. tit. 12, § 832 (1981).

100. *Berry v. Empire Indem. Ins. Co.*, 634 P.2d 718 (Okla. 1981). See also McNichols, *The Complexities of Oklahoma's Proportionate Several Liability Doctrine of Comparative Negligence — Is Products Liability Next?*, 35 OKLA. L. REV. 193 (1982) [hereinafter McNichols, *Complexities*].

101. McNichols, *Complexities*, *supra* note 100, at 197.

The Supreme Court of Kansas made a similar determination in *Brown v. Keill*.¹⁰² There, the court considered the comparative negligence statute,¹⁰³ which did not specifically address the question of joint and several liability. The court concluded that in passing the comparative negligence statute, the legislature intended to forbid contribution among joint tortfeasors, but abolish joint and several liability.¹⁰⁴ The court decided that the legislature intended to "relate duty to pay to the degree of fault."¹⁰⁵ The court discussed the concept of fairness, and concluded that it was not fair to force a defendant who is 10% negligent to pay 100% of the damages.¹⁰⁶ Of course, the court was considering joint and several liability in light of the "no contribution" rule. However, the court also considered the question of who is the more appropriate risk bearer, and concluded that:

Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the codefendant to pay more than his fair share of the loss. The same is true if one of the defendants is wealthy and the other is not.¹⁰⁷

The Supreme Court of New Mexico discussed decisions made in other jurisdictions regarding joint and several liability. Considering their state's pure comparative negligence system, it refused to retain joint and several liability on the basis that a plaintiff must be favored.¹⁰⁸ The court addressed the arguments raised in *American Motorcycle*,¹⁰⁹ and rejected them. Specifically, the court rejected the argument that a plaintiff's injury is "indivisible." It found the concept of one indivisible wrong to be obsolete, and ruled that it does not apply in comparative negligence cases.¹¹⁰ The court also rejected the argument

102. 224 Kan. 195, 580 P.2d 867 (1978).

103. KAN. STAT. ANN. § 60-258a (1976).

104. 224 Kan. at 202, 580 P.2d at 874.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 159, 646 P.2d 579, 586 (N.M. Ct. App. 1982), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).

109. *American Motorcycle Ass'n*, 20 Cal. 3d at 578, 578 P.2d at 899, 146 Cal. Rptr. at 182 (1978).

110. *Bartlett*, 98 N.M. at 158, 646 P.2d at 585.

that joint and several liability must be retained in order to favor plaintiffs. The court found nothing wrong with a plaintiff bearing the risk of being unable to collect his judgment.¹¹¹ It asked, "[b]etween one plaintiff and one defendant, the plaintiff bears the risk of the defendant being insolvent; on what basis does the risk shift if there are two defendants, and one is insolvent?"¹¹²

Kansas and New Mexico are the only two states to have judicially abolished the doctrine of joint and several liability;¹¹³ Oklahoma is the only state to have judicially modified it.¹¹⁴ Minnesota judicially abolished joint and several liability in 1974,¹¹⁵ except in cases where the plaintiff was entirely free from negligence or unless the defendants were engaged in a joint venture.¹¹⁶ However, accepting the "indivisible injury" argument, the court later reversed its position, retaining the doctrine.¹¹⁷ The majority of states which have judicially considered the issue have retained joint and several liability.¹¹⁸

B. Legislative Positions

Legislatures have not considered the question of whether joint and several liability should be abolished as often as courts have. There are only six jurisdictions where the doctrine of joint and several liability has been statutorily retained in all comparative negligence cases.¹¹⁹ Four states have abolished the rule in favor of several liability.¹²⁰ Seven

111. *Id.*

112. *Id.*

113. Granelli, *The Attack on Joint and Several Liability*, A.B.A. J., July 1985, at 61, 62.

114. *Id.*

115. *Kowalske v. Armour & Co.*, 300 Minn. 301, 220 N.W.2d 268 (1974).

116. *McNichols, Complexities*, *supra* note 100, at 207.

117. *Ruberg v. Skelly Oil Co.*, 297 N.W.2d 746 (Minn. 1980).

118. Note, *The Modification of Joint and Several Liability: Consideration of the Uniform Comparative Fault Act*, 36 U. FLA. L. REV. 288, 297 (1984). For a list of decisions retaining joint and several liability, see *id.* at 297 n.47.

119. Note, *supra* note 118, at 297-98 & n.48. They are: IDAHO CODE § 6-803(3) (1979); ME. REV. STAT. ANN. tit. 14, § 156 (1980); MONT. CODE ANN. § 27-1-702 (1985); N.J. STAT. ANN. § 2A:15-5.3 (West 1986); N.D. CENT. CODE § 9-10-07 (1975); and 9A UTAH CODE ANN. § 78-27-40(2) (1977).

120. N.H. REV. STAT. ANN. § 507-7a (1981); OHIO REV. CODE ANN. § 2315.19(A)(2) (Page 1981); VT. STAT. ANN. tit. 12, § 1036 (West Supp. 1986); WYO. STAT. ANN. § 1-1-109 (1986).

have modified it.¹²¹ Those states which modify the rule generally limit it to those cases where the plaintiff is less negligent than the defendant. Where the plaintiff is more negligent than the defendant, several liability applies.¹²² Of interest is that ten of the eleven states which have legislatively abolished or modified the doctrine adhere to the "50% variation" of comparative negligence.¹²³ Louisiana is the only state which follows the "pure" form of comparative negligence to have legislatively modified the joint and several liability doctrine to limit liability in cases where the plaintiff is more negligent than the defendant. New Mexico is the only state which follows the "pure" form to have judicially abolished the doctrine.

Thus, in general, states which recognize the modified form of comparative negligence have been more likely to change the joint and several liability doctrine than states which adhere to the "pure" form of comparative negligence. This seems strange, considering that those states which adopted the "pure" version accepted the notion that the goal of comparative negligence was to apportion fault equally among all the negligent parties. As the New Mexico court pointed out, one of the goals of comparative negligence is to consider the fault of each party when apportioning damages.¹²⁴ Therefore, it would seem more likely that those states which have embraced the "pure" form of comparative negligence would be more inclined to recognize that the only way to insure that damages are apportioned according to the relative degrees of fault of each party is to eliminate joint and several liability.

C. Options

Courts or legislatures can modify the doctrine of joint and several liability in a variety of ways. One method is to abolish joint and several liability altogether. This would result in the plaintiff alone bearing the burden of any absent or insolvent tortfeasors, regardless of his degree

121. Granelli, *supra* note 113, at 62. They are: IND. CODE ANN. § 34-4-33-5 (Burns 1986); IOWA CODE ANN. § 668.4 (West Supp. 1986); LA. CIV. CODE ANN. art. 2324 (West Supp. 1986); NEV. REV. STAT. § 41.141(3) (1985); OR. REV. STAT. § 18.485 (1985); 42 PA. CONS. STAT. ANN. §§ 7102(b), 8322 (Purdon 1982); TEX. CIV. PRAC. & REM. CODE ANN. § 33.013 (Vernon Supp. 1986).

122. Granelli, *supra* note 113, at 62.

123. See *supra* note 36.

124. Bartlett v. New Mexico Welding Supply, Inc., 98 N.M. 152, 159, 646 P.2d 579, 586 (N.M. Ct. App. 1982), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).

of fault.¹²⁵ Another method is to repeal the doctrine for only non-economic damages. This would result in each defendant remaining jointly and severally liable for all the plaintiff's actual damages, while limiting the defendants' liability for damages such as pain and suffering and punitive damages. In this situation, the plaintiff would be assured of receiving full compensation for the actual damages he suffered. The only risk the plaintiff would bear is the burden of any absent or insolvent tortfeasor's share of the non-economic damages.¹²⁶

A third option is to limit the doctrine so that it applies only where the plaintiff is less negligent than the defendant. If the defendant is less negligent than the plaintiff, several liability will apply, and the defendant will only be liable for his proportionate share.¹²⁷ A fourth option is to limit the doctrine so that it applies only if the defendant is less than 50% at fault. Defendants who are more than 50% at fault would be liable for the entire amount of the damages, while those who are less than 50% negligent would bear only the responsibility for their proportionate amount of the damages.¹²⁸

One more option is to retain joint and several liability in only non-comparative negligence cases. Where the plaintiff is entirely blameless, joint and several liability would still apply. If the plaintiff is comparatively negligent in any degree, the defendants would only be responsible for their proportionate share.¹²⁹ Another option is to adopt a system of modified comparative negligence. This would not change the joint and several liability doctrine, but would abolish the current "pure" system of comparative negligence in favor of one of the modified forms. Its possible benefits would be to decrease the total number of cases filed, thus indirectly affecting the cost of insurance in a positive direction.¹³⁰ A final option would be to adopt a form of the Uniform Comparative Fault Act.¹³¹ This is a system of reallocating damages among all the parties, if one of the party's share is uncollectable. In essence, it abolishes joint and several liability, making defendants responsible for only

125. FLA. SENATE COMM. ON COMMERCE, INTERIM REPORT: HISTORICAL ANALYSIS — CURRENT PERSPECTIVES OF THE DOCTRINE OF JOINT AND SEVERAL LIABILITY AND A REVIEW OF TORT REFORM 71-72 (March 1986) [hereinafter FLA. SENATE COMM. REPORT].

126. *Id.* at 72.

127. *Id.* at 72-73.

128. *Id.* at 73.

129. *Id.*

130. *Id.* at 74.

131. UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 39 (Supp. 1984).

their proportionate share of the damages.¹³²

IV. Florida's Statutory Proposals

The Florida legislature had considered changing Florida's tort reform system for many years. During the 1982-83 legislative session, the legislature considered various proposals for tort reform, but failed to act on any of them.¹³³ In 1983, Florida Senator George Kirkpatrick introduced a bill (which was later withdrawn) which would have abolished joint and several liability altogether.¹³⁴ The Florida Senate subsequently proposed legislation which would have eliminated the doctrine of joint and several liability in causes of actions where comparative negligence applied.¹³⁵ While that bill died in the House,¹³⁶ the groundwork was laid for future tort reform proposals.

The Florida legislature considered various proposals regarding joint and several liability during the 1986 legislative session.¹³⁷ It narrowed them down to five proposals, representing six different variations.¹³⁸ Most have already been discussed above. The proposals were: 1) abolish joint and several liability completely; 2) adopt the Uniform Comparative Fault Act; 3) modify the doctrine by adopting the "percentage of a percentage" approach,¹³⁹ which distributes the absent or

132. FLA. SENATE COMM. REPORT, *supra* note 125, at 74-75. For a detailed discussion of the Act, see Note, *supra* note 118.

133. FLORIDA BAR, REPORT OF THE TORT LITIGATION REVIEW COMMISSION 72 (1984) [hereinafter FLA. BAR].

134. Note, *supra* note 118, at 289 n.5.

135. *Id.* at 288. For a thorough discussion of the bill, see *id.*

136. *Id.* at 289.

137. See DiMento, Harrison and Belsky, Joint and Several Liability: A Study of the Fiscal and Social Impact of a Change in the Doctrine (December 1985) (unpublished manuscript) (available from University of Florida College of Law) [hereinafter DiMento]; FLA. SENATE COMM. REPORT, *supra* note 125; and FLA. BAR, *supra* note 133. They also received input from many professional groups and associations, such as the Florida Academy of Trial Lawyers, the Florida Defense Attorneys Association, the Florida Bar, the Florida Medical Association, various insurance agencies, and lobbyists.

138. FLA. SENATE COMM. ON HEALTH CARE AND INSURANCE, PCB 86-100 Amend. Summary Series No. 65 (April 28, 1986).

139. As mentioned previously, the question of which party is the more appropriate risk bearer permeates the whole discussion of joint and several liability. Rather than require either the negligent plaintiff or the defendants to bear the risk of a joint tortfeasor being absent or insolvent, the percentage of a percentage compromise spreads the loss among all the negligent parties, including the negligent plaintiff.

insolvent defendant's share to the other parties in a proportionate share; 4) apply joint and several liability only when the defendants are more at fault than the plaintiff; 5) apply joint and several liability only if the plaintiff is entirely blameless; and 6) adopt the "percentage of a percentage" approach, which provides for proportional liability, but allow immediate reallocation of the absent or insolvent tortfeasor's share among the plaintiff and remaining defendants.¹⁴⁰

Imagine a typical comparative negligence scenario with a negligent plaintiff who has his damages reduced by his percentage of fault. Assume that Plaintiff A is involved in an automobile accident with defendants B and C. The jury finds Plaintiff A to be 20% negligent, and Defendants B and C 40% negligent each. Plaintiff A sustains \$100,000 worth of damages. Defendant B is insolvent. First, Plaintiff A's recovery is diminished by \$20,000, in recognition of his comparative negligence. A is now entitled to recover \$80,000 from Defendants B and C. However, instead of being able to force either defendant to pay the entire amount, A is only entitled to \$40,000 from B and \$40,000 from C. Since B is insolvent, the question arises as to which party will bear the burden of his share. Under the "percentage of a percentage" approach, after a good faith attempt by A to collect the \$40,000 from B, A can file a motion to modify his judgment against C and require that C pay a portion of B's judgment. Since C was 40% at fault, he would have to pay 40% of B's 40%, or \$16,000. Prior to the modification of joint and several liability, C would have ended up paying the entire \$80,000. If joint and several liability were abolished completely, the plaintiff would have recovered only \$40,000. Under the percentage of a percentage approach, C pays his \$40,000 plus 40% of B's \$40,000, for a total recovery to the plaintiff of \$56,000. Therefore, the plaintiff recovers more than he would had joint and several liability been abolished, and the defendant does not bear the burden of paying the entire amount of the damages.

To consider another example for illustration purposes, let's revisit *Walt Disney World*. There, the plaintiff was 14% negligent. Again, assume for discussion purposes that the total damages are \$100,000. The plaintiff is entitled to collect \$86,000 from the joint tortfeasors. However, the doctrine of joint and several liability is abolished, so the plaintiff is only entitled to recover 1% from Walt Disney World, and must seek the remaining 85% from her fiancé. Assuming that the fiancé (husband at the time of the trial) is either insolvent or immune, under the doctrine of joint and several liability, Walt Disney World would be liable for the entire 86% of the damages. With the modification of joint and several liability, however, the court would enter judgment for the plaintiff in the amount of \$85,000 against her fiancé, and only \$1,000 against Walt Disney World. Since we are assuming that the fiancé is immune or insolvent, Walt Disney World is required to pay a percentage of his liability. Using the "percentage of a percentage" approach, Disney World, which was found 1% negligent, would be required to pay 1% of the fiancé's 85%, or \$850. Therefore, instead of paying \$86,000 under joint and several liability, Disney World would only be liable for \$1850 under the "percentage of a percentage" approach. Obviously, this makes a great difference in the amounts of awards, for both plaintiffs and defendants.

140. FLA. SENATE COMM. ON HEALTH CARE AND INSURANCE, PCB 86-100 Amend. Summary Series No. 65 (April 28, 1986).

The various proposals the Florida legislature considered during the 1986 legislative session can be divided into three groups: those which recommended the total abolition of joint and several liability; those which favored retaining the doctrine; and the majority, which proposed certain modifications to the existing doctrine. The Senate Committee on Health Care and Insurance identified three main issues surrounding the controversy.¹⁴¹ They are insurance rates, economic impact, and fairness.¹⁴²

A. Insurance Rates

Many people in Florida believe that the state is in the midst of an insurance crisis.¹⁴³ The "crisis" concerns the availability and affordability of commercial liability insurance,¹⁴⁴ especially for professionals, businesses, and governmental agencies.¹⁴⁵ Many groups have been unable to secure liability insurance.¹⁴⁶ Those who have gotten insurance complain of excessive rates and decreases in coverage limits.¹⁴⁷ Insurance industry personnel blame the "crisis" on an increase in losses reported by property and casualty insurers over the past three years,¹⁴⁸ much of which the insurance companies blame on the existing tort system.¹⁴⁹ Some groups believe that the "crisis" has been manufactured by the insurance companies as a means of justifying the abolition of joint and several liability, which would save them millions of dollars.¹⁵⁰ Other groups believe the "crisis" is real, but that the insurance companies themselves, and not the tort system, are responsible for the current situation.¹⁵¹

Those who argue that joint and several liability imposes an unfair burden on defendants assume that the parties themselves will be paying

141. *Id.*

142. *Id.*

143. FLA. SENATE COMM. REPORT, *supra* note 125, at 36; DiMento, *supra* note 137, at 3; Tort Reform and Insurance Act of 1986, Ch. 86-160, 1986 Fla. Sess. Law Serv. 660, 668 (West).

144. FLA. SENATE COMM. REPORT, *supra* note 125, at 36.

145. Tort Reform and Insurance Act of 1986, *supra* note 143, at 668.

146. FLA. SENATE COMM. REPORT, *supra* note 125, at 36.

147. *Id.*

148. *Id.* at 37.

149. *Id.* at 39-40.

150. *Id.* at 41; Granelli, *supra* note 113, at 61.

151. FLA. SENATE COMM. REPORT, *supra* note 125, at 41-42.

for the damages.¹⁵² More likely, their insurance carriers will bear the burden.¹⁵³ Advocates for the retention of joint and several liability believe that the insurance fund, and not the victims, is better able to absorb the many contingencies which would otherwise be borne by plaintiffs, particularly those who are uninsured or underinsured.¹⁵⁴ They feel that "deep pocket defendants" such as insurance companies can more easily handle the burden of paying damages than can the injured victims.¹⁵⁵ Also, they believe that compensating accident victims is a desirable social goal. This can best be accomplished by spreading the loss through the conduit of liability insurance, which would pass the cost to the consumer public.¹⁵⁶ On the other hand, those who advocate the abolition of joint and several liability argue that the price of lawsuits, and thus the cost of liability insurance, will be decreased if joint and several liability is abolished.¹⁵⁷

One study investigated the possibility that the abolition of joint and several liability would lead to a decrease of the insurance "crisis."¹⁵⁸ It compared states which abolished the doctrine with those that retained it, and found no conclusive evidence that states with several liability were any less affected by the "crisis."¹⁵⁹ While the data is not conclusive, the study did find that insurance expenditures did not increase any more often in joint and several liability states than in states which have abolished the doctrine.¹⁶⁰

The Florida legislature believed that the insurance "crisis" was real,¹⁶¹ and passed the Tort Reform and Insurance Act of 1986 in response.¹⁶² A discussion of the entire Act is beyond the scope of this

152. Fleming, *Report*, *supra* note 32, at 1469.

153. *Id.*

154. McNichols, *supra* note 75, at 15.

155. Granelli, *supra* note 113, at 63.

156. Fleming, *Foreward*, *supra* note 32, at 242.

157. McNichols, *supra* note 75, at 15.

158. DiMento, *supra* note 137, at 3.

159. *Id.*

160. *Id.*

161. The Tort Reform and Insurance Act of 1986 begins, "WHEREAS, the Legislature finds that there is in Florida a financial crisis in the liability insurance industry, causing a serious lack of availability of many lines of commercial liability insurance" Tort Reform and Insurance Act of 1986, *supra* note 143, at 668.

162. Section 2 of the Tort Reform and Insurance Act of 1986 reads:

The Legislature finds and declares that a solution to the current crisis in liability insurance has created an overpowering public necessity for a comprehensive combination of reforms to both the tort system and the insur-

article, but the act does make certain changes to existing insurance laws as well as modifying the current tort system.¹⁶³

B. *Economic Impact*

In discussing the economic impact and fairness issues, once again, the ultimate question is, who should bear the risk of one or more of the joint tortfeasors being insolvent? As mentioned before, retaining joint and several liability increases the plaintiff's chances of being fully compensated for his losses, while abolishing the doctrine increases the possibility that he will have to look elsewhere for compensation.¹⁶⁴ As the authors of one study point out, when joint and several liability is abolished, it is more likely that public assistance will be relied upon and less likely that the contributing agency will receive any recovery from the party or parties at fault. Thus, the incidence is shifted from injurers and their insurers to taxpayers in general.¹⁶⁵ Therefore, if the abolition of joint and several liability ultimately increases the demand for public assistance, then either the funds must be increased or some current users must be denied assistance.¹⁶⁶ Either way, society ends up paying, either as a result of increased insurance costs, or through reliance on social services.

Advocates of joint and several liability also maintain that the doctrine motivates corporations and governmental agencies to be more safety conscious.¹⁶⁷ They argue that a decrease in their liability will have a negative effect on their risk management processes.¹⁶⁸ A plaintiff's negligence results in harm to himself only, whereas a defendant's negligence results in harm to others. Society places a greater emphasis on deterring conduct that is harmful to it, as opposed to conduct that is

ance regulatory system. This act is a remedial measure and is intended to cure the current crisis and to prevent the recurrence of such a crisis. It is the purpose of this act to ensure the widest possible availability of liability insurance at reasonable rates, to ensure a stable market for liability insurers, to ensure that injured persons recover reasonable damages, and to encourage the settlement of civil actions prior to trial.

Id. at 670.

163. For a summary of the changes, see *infra* note 182.

164. DiMento, *supra* note 137, at 12.

165. *Id.* at 17.

166. *Id.*

167. FLA. SENATE COMM. REPORT, *supra* note 125, at 55.

168. *Id.*

harmful only to individuals. Therefore, the abolition of joint and several liability would not increase deterrence.¹⁶⁹ Conversely, it could be argued that corporations and agencies would continue to use adequate risk management procedures, because even with the abolition of joint and several liability, they would still be liable for their proportionate share of the damages. Further, this would give plaintiffs an added incentive to take precautions and minimize their risk of incurring damages.¹⁷⁰

A final economic impact of the abolition of joint and several liability can be found in the tort system itself.¹⁷¹ The Tort Litigation Review Commission considered the current and future status of the Florida tort system and concluded that the abolition of joint and several liability would have several effects on the current tort system: 1) It would lead to an increase in the number of parties in each case, since each of the parties would try to get every possible defendant before the court; 2) Defendants would fight among themselves, attempting to minimize their degree of fault by testifying against each other, rather than by presenting a joint defense; 3) The use of proximate cause as a defense against the plaintiff's negligence will be intensified; and 4) Vicarious liability would be affected, even abrogated, possibly necessitating an increase in the amount of liability insurance purchased.¹⁷² The above would result in increased litigation, with resulting increase in expenses, as well as placing an increased administrative burden on the courts.¹⁷³

The abolition of joint and several liability also has an impact on settlements. With joint and several liability retained, the "deep pocket" defendant (e.g., the insurance company) has no bargaining power to settle. He is more likely to settle for an amount which would exceed his proportionate share to avoid having to pay more after the judgment is entered.¹⁷⁴ Similarly, the plaintiff is less likely to settle with the deep pocket defendant if he is concerned about the other joint tortfeasor's ability to pay.¹⁷⁵ With the abolition of joint and several liability, one of two possibilities may occur. Plaintiffs may be less likely to settle, preferring to join all possible defendants in the suit. Conversely, plaintiffs

169. FLA. BAR, *supra* note 133, at 73.

170. FLA. SENATE COMM. REPORT, *supra* note 125, at 56.

171. *Id.* at 56-57; FLA. BAR, *supra* note 133, at 75-76.

172. FLA. BAR, *supra* note 133, at 75-76; FLA. SENATE COMM. REPORT, *supra* note 125, at 56-57.

173. FLA. BAR, *supra* note 133, at 75.

174. FLA. SENATE COMM. REPORT, *supra* note 125, at 59.

175. *Id.*

may be more likely to settle, since they could better predict the potential liability of each defendant.¹⁷⁶ While hard data is lacking on this issue,¹⁷⁷ the Florida legislature believed that modifying joint and several liability would have a positive impact on the rate of settlements in Florida.¹⁷⁸

C. Fairness

This article has already discussed the issue of fairness. To summarize, the basic question is, where the plaintiff is also negligent, who is the more appropriate risk bearer in the event that one or more of the joint tortfeasors are absent or insolvent? With the advent of comparative negligence (and the finding that fault can be divided and apportioned) it is no longer valid to argue that injuries are indivisible and that there is no way to determine each individual's tortfeasor's degree of negligence.¹⁷⁹ The conflict remains that it is unfair to require a defendant to pay more than his proportionate share of the damages, but it is also unfair to require an innocent plaintiff to incur the loss.¹⁸⁰ Most people agree that the fairness argument is only valid where the plaintiff is comparatively negligent. Where the plaintiff is free from negligence, the plaintiff should be allowed to seek full recovery from any defendant. The issue of fairness would then arise among the defendants.¹⁸¹ While there are still some groups which advocate for either the total repeal or the total retention of the doctrine, most seem to recognize that a compromise is in order.

V. The Tort Reform and Insurance Act of 1986

As mentioned previously, the Florida legislature, in response to what it perceived as a "crisis" in the insurance industry, passed legislation which modified tort and insurance law in Florida.¹⁸²

176. *Id.* at 60; DiMento, *supra* note 137, at 26.

177. DiMento, *supra* note 137, at 28.

178. In the introduction to the Tort Reform and Insurance Act of 1986, the legislature stated that one of the purposes of the new Act is to "encourage the settlement of civil actions prior to trial." Tort Reform and Insurance Act of 1986, *supra* note 143, at 670.

179. FLA. SENATE COMM. REPORT, *supra* note 125, at 49.

180. *Id.*

181. FLA. BAR, *supra* note 133, at 72.

182. Tort Reform and Insurance Act of 1986, Ch. 86-160, 1986 Fla. Sess. Law

The section of the Tort Reform Act of 1986 which modifies joint and several liability is entitled "Comparative Fault."¹⁸³ This section

Serv. 660 (West). A summary of the bill, as reported in the Fla. Senate Staff Analysis and Economic Impact Statement is as follows:

Among other things, the bill:

- 1) authorizes financial institutions to participate in reinsurance and Florida insurance exchanges (sec. 3);
- 2) authorizes commercial liability risks to be group insured (sec. 6);
- 3) requires the appellate court to set aside a final order of the department in certain rate-related proceedings (sec. 7);
- 4) significantly increases the department's rate review and enforcement authority (sec. 9);
- 5) creates a property/casualty insurance excess profits law (sec. 10);
- 6) authorizes creation of a commercial property/casualty joint underwriting association (sec. 13);
- 7) expands the types of health care providers that can self-insure and authorizes CPAs, architects, engineers, veterinarians, land surveyors, and insurance agents to self-insure (secs. 14 & 15);
- 8) establishes notice requirements for cancellation, non-renewal, and renewal of premium of commercial liability policies (sec. 16);
- 9) authorizes the creation of commercial self-insurance funds (sec. 25-40);
- 10) modifies the application of the doctrine of joint and several liability (sec. 60);
- 11) limits when punitive damages may be pled, specifies to whom they are to be distributed, and caps the maximum amount of awards of such damages in certain cases (secs. 51 & 52);
- 12) provides for offers and demands for judgments in all civil cases (sec. 58);
- 13) caps noneconomic damages in civil actions at \$450,000 (sec. 59);
- 14) requires, under certain circumstances, periodic payment of future damages exceeding \$250,000 (sec. 57);
- 15) creates a five member Academic Task Force for Review of the Insurance and Tort Systems (sec. 63); and
- 16) mandates a limited freeze and reduction, and a filing, of insurance rates for certain commercial lines of insurance.

FLA. SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, June 9, 1986.

183. Section 60 of the Tort Reform and Insurance Act of 1986 reads:

Section 60. Section 768.81, Florida Statutes, is created to read:

768.81 Comparative fault.—

(1) DEFINITION.—As used in this section "economic damages" means past lost income and future lost income reduced to present value; medical and funeral expenses; lost support and services; replacement value of lost personal property; loss of appraised fair market value of real property; costs of construction repairs, including labor, overhead, and profit; and any other economic loss which would not have occurred but for the

codifies Florida's common law comparative negligence rule, retaining the "pure" version as adopted in *Hoffman v. Jones*.¹⁸⁴ It retains joint and several liability in cases where the total damages do not exceed \$25,000. For cases where the award is greater than \$25,000, "liability for damages is based on each party's proportionate fault, except that each defendant who is equal to or more at fault than the claimant is jointly and severally liable for all economic damages."¹⁸⁵

Thus, where the total amount of the damages does not exceed \$25,000, the doctrine of joint and several liability is alive and well. In those cases, the defendants bear the risk of an absent or insolvent tortfeasor, and the plaintiff is assured of receiving his total compensa-

injury giving rise to the cause of action.

(2) **EFFECT OF CONTRIBUTORY FAULT.**—In an action to which this section applies, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded an economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

(3) **APPORTIONMENT OF DAMAGES.**—In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.

(4) **APPLICABILITY.**—

(a) This section applies to negligence cases. For purposes of this section, "negligence cases" includes, but is not limited to, civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories. In determining whether a case falls within the term "negligence cases", the court shall look to the substance of the action and not the conclusory terms used by the parties.

(b) This section does not apply to any action brought by any person to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by chapter 403, chapter 498, chapter 517, chapter 542, or chapter 895.

(5) Notwithstanding the provisions of this section, the doctrine of joint and several liability applies to all actions in which the total amount of damages does not exceed \$25,000.

Tort Reform and Insurance Act of 1986, Ch. 86-160, 1986 Fla. Sess. Law Serv. 660, 774 (to be codified at FLA. STAT. § 768.81 (1986)).

184. 280 So. 2d 431 (Fla. 1973).

185. FLA. SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT at 25, June 9, 1986.

tion. It is unknown why the legislature picked that amount, as opposed to \$50,000, or \$100,000. Perhaps they felt that \$25,000 was the maximum amount that in good faith they could require defendants to pay. How much of an effect this change in the current system will have depends on the percentage of tort cases in which damages exceed \$25,000.

The Administrative Office of the Courts in the Eleventh Judicial Circuit of Florida (Dade County) conducted a Tort Litigation Study in 1986 to update a previous study that was done in 1983.¹⁸⁶ From the thirty judges in the General Jurisdiction Division, they selected six sections at random. They reviewed all tort cases disposed of in 1984 by these six sections; all tort cases which were closed by either jury or bench trials for every section for the first six months of 1985; and a 20% sample of all tort cases closed by all the sections during 1985, for a total of approximately 3500 tort cases studies.¹⁸⁷

In the majority of cases settled by a jury or bench trial in the Eleventh Judicial Circuit, the damages awarded to the plaintiff were \$25,000 or less.¹⁸⁸ If this is representative of other circuits, then, in the majority of cases, the doctrine of joint and several liability will continue to exist. Plaintiffs can be assured of receiving adequate compensation for their injuries from whichever defendants are present and solvent. Critics of the new legislation argue that this solution deprives

186. FLA. SENATE COMM. REPORT, *supra* note 125, at 134 (Appendix C).

187. *Id.* at 134-67.

188. Eight-hundred twenty cases were disposed of in 1984. Of those, one-hundred six cases were disposed of by either a bench or jury trial. The jury found for the plaintiff in seventy-two of those cases, and for the defendant in thirty-four of them. In fifty out of the seventy-two cases where the plaintiff was awarded damages, the amount awarded was \$25,000 or less. Thus, in almost 70% of the cases, the plaintiff received damages of \$25,000 or less. *Id.*

Two-hundred seventy-seven cases were disposed of in the first six months of 1985 for all sections, two-hundred six of which were resolved following a jury or bench trial. Of those, the plaintiff was successful in one-hundred thirty-four of the cases; the defendant won seventy-two of them. In eighty-two of the one-hundred thirty-four cases which the plaintiff won (approximately 60% of the cases), the damages awarded were less than \$25,000. *Id.*

Seven-hundred ninety-six cases were studied in the 20% sample of all sections in the general jurisdictions for 1985. Of those, only sixty-three cases were resolved following a jury or bench trial. The majority were dismissed, or resolved by some other disposition. The plaintiff was successful in forty-eight of the cases; the defendant in sixteen. There, thirty-five of the forty-eight cases (approximately 73%) resulted in an award to the plaintiff of \$25,000 or less. *Id.*

those plaintiffs who need compensation the most. Plaintiffs who are the most severely injured (those who were awarded damages in excess of \$25,000) must bear the risk of the absent or insolvent tortfeasor.

However, a counter argument is that the new legislation only abolishes joint and several liability for non-economic damages where the plaintiff is more at fault than the defendant. Non-economic damages include pain and suffering, and punitive damages. These are the areas in which critics of the current tort system believe excessive awards are being given to plaintiffs. However, as can be seen by the study conducted in the Eleventh Judicial Circuit, the majority of awards given are not in excess of \$25,000. Economic damages include past and future lost income; lost support and services; medical and funeral expenses; and replacement value of lost personal property.¹⁸⁹ Those who are concerned about the plaintiff receiving adequate compensation for actual damages suffered should not object to the new legislation, since joint and several liability is still available for economic damages unless the plaintiff is more at fault than the defendant.

As mentioned previously, most people agree that a plaintiff who is entirely blameless should not bear the risk of an absent or insolvent defendant.¹⁹⁰ Under this legislation, the innocent plaintiff is protected, for economic damages anyway. The innocent plaintiff will still run the risk of not being adequately compensated for his non-economic damages. However, this approach does represent a fair compromise between the two positions. Indeed, this is the approach taken by most of the other states which have modified the joint and several liability doctrine.¹⁹¹ Also, this legislation protects not only the entirely blameless plaintiff, but any plaintiff whose fault is equal to or less than that of the defendant. Therefore, the only plaintiffs who will not be able to benefit from joint and several liability are those who are more at fault than the defendant.

Under *Hoffman v. Jones*,¹⁹² Florida adopted the "pure" form of comparative negligence, recognizing that a negligent plaintiff is not barred from collecting damages from one or more negligent defendants unless his negligence is 100%. Therefore, a law which abolishes joint and several liability for plaintiffs who are found 51% or more at fault

189. Tort Reform and Insurance Act of 1986, Ch. 86-160, 1986 Fla. Sess. Law Serv. 660, 774 (to be codified at FLA. STAT. § 768.81 (1986)).

190. FLA. BAR, *supra* note 133, at 72.

191. See *supra* text accompanying notes 85-124.

192. 280 So. 2d 431 (Fla. 1973).

seems inconsistent with the *Hoffman* principles. Also, considering the viability of the "percentage of a percentage" approach,¹⁹³ a better alternative would have been to utilize that solution for non-economic damages, rather than abolish joint and several liability altogether for those types of damages. However, in general, the Tort Reform Act of 1986 does result in a fairer approach to the allocation of damages in situations where the joint tortfeasors might be absent, insolvent, or immune from litigation.

VI. Conclusion

Originally, contributory negligence barred any recovery for plaintiffs in a negligence action. With the advent of comparative negligence (in its "pure" form in Florida) plaintiffs are able to recover damages, regardless of their amount of fault. Their total damages are merely reduced by the percentage of negligence they bore. Under the doctrine of joint and several liability, plaintiffs can receive a settlement from any of the defendants against whom they received a judgment. Defendants often paid more than their fair share, but plaintiffs could collect their entire loss. Under the common law rule of no contribution, this was particularly difficult for the defendants, for they could not receive any compensation from their joint tortfeasors if they happened to get charged with the total amount of the damages. With the passage of the Uniform Contribution Among Tortfeasors Act, defendants were able to seek contribution from their joint tortfeasors. Originally they were only able to receive the amount based on their pro rata shares, but eventually they were able to receive (theoretically, anyway) the entire amount they were required to pay over the amount of their proportionate fault. Of course, if any of the joint tortfeasors were absent, immune, or insolvent, the remaining defendant(s) remained liable for the entire amount.

Critics of the system maintained that this placed a great burden on the "deep pocket" defendants, particularly insurance companies. They blamed the tort system for the insurance "crisis" which resulted in many groups not being able to get, or afford, adequate liability insurance. Responding to the perceived "crisis," the Florida Legislature passed the Tort Reform and Insurance Act of 1986. Among other things, the bill modifies the insurance and tort law.

The doctrine of joint and several liability created much of the controversy, and was the focus of this article, along with the question of

¹⁹³ See *supra* note 129.

who should bear the risk of the joint tortfeasors being unable to contribute their fair share of the damages.

Florida's new legislation modifies the doctrine considerably. Now, joint and several liability exists in its entirety only in cases where damages do not exceed \$25,000. For those cases which do exceed that amount, both economic and non-economic damages are affected. Joint and several liability is abolished for all non-economic damages in excess of \$25,000. Where economic damages exceed \$25,000, joint and several liability is retained only if the plaintiff is equally or less negligent than the defendant.

Since the majority of cases that are tried will probably have verdicts of less than \$25,000, most plaintiffs should not be affected by the new law. However, for those cases with excess damages, the plaintiff will bear the risk of the absent or insolvent tortfeasor. A better solution would be to adopt the "percentage of a percentage" approach, which spreads the risk of the insolvent or absent tortfeasor among the remaining parties. Further, in light of Florida's "pure" comparative negligence stance, it would have been more consistent to limit the doctrine only if the plaintiff was entirely blameless, and not if the plaintiff is equally or more negligent than the defendant. That solution is more appropriate to those "modified" comparative negligence jurisdictions.

However, in general, the new law represents a good compromise between the two positions. Retaining joint and several liability completely places an undue burden on defendants; abolishing it is unfair to plaintiffs. The result of the new law is an attempt to provide fair and adequate compensation to plaintiffs, while also considering a more fair type of allocation of responsibility among the defendants. Thus, the new law comes close to meeting the two distinct and conflicting goals of tort law.

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