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Contribution Among Tortfeasors

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CONTRIBUTION AMONG TORTFEASORS

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In many automobile accident cases the acts of more than one person combine to cause injury. In such cases the victim of any tort that is thereby committed can treat the actors as jointly or severally liable. Consequently the injured party may choose to follow one of several courses of conduct relevant to this discussion. He may elect to settle with one tortfeasor for the entire damage. He may elect to sue one tortfeasor severally to judgment and satisfaction. Or he may elect to sue both or all tortfeasors jointly but to obtain satisfaction from only one. In each of these instances the question then arises, can the tortfeasor who satisfies the victim's claim obtain contribution from other tortfeasors? It is commonly assumed by members of The Florida Bar that he cannot because contribution cannot be had between joint tortfeasors, even in negligence cases. As we shall see, this assumption about the law of Florida is supported only by dicta, although the common law did develop a general rule denying contribution among joint tortfeasors. But assume the courts of Florida will and do follow the dicta and deny contribution. The question then arises, would the public interest be better served by a rule allowing contribution among joint tortfeasors?[1] The purpose of this article is to evaluate the Florida practice of denying contribution among joint tortfeasors in terms of certain policy standards believed to be acceptable criteria of the public interest.

CRITERIA OF THE PUBLIC INTEREST

The individual and social costs arising from automobile accidents in Florida are appalling.[2] Statutes and decisions that tend to prevent

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[1]The approval by the Commissioners of Uniform State Laws of the 1955 Uniform Contribution Among Tortfeasors Act focussed attention on this issue. 9 U.L.A. 69 (Supp. 1956).

[2]The consequences in life, physical injury, and property damage of automobile accidents in Florida are statistically portrayed in the following table from the Florida Highway Patrol, Monthly Summary of Motor Vehicle Traffic Accidents in the State of Florida:

these losses are certainly in the public interest. Promulgation of a Model Traffic Ordinance by the Florida Legislature shows that the Legislature has recognized the importance of trying to prevent automobile accidents.[3] One standard that will be used to evaluate the merits of the contribution issue, therefore, will be the extent to which contribution practices tend to prevent automobile accidents.

A major objective of the Financial Responsibility Law, which virtually guarantees an insured defendant, was to assure accident victims at least a minimum compensation.[4] As early as 1917 the Supreme Court of Florida also indorsed the policy of adequate compensation when it greatly broadened the scope of vicarious liability by adopting the theory of dangerous instrumentality.[5] In deference to established legislative and judicial policy, then, contribution will be evaluated according to the extent such practices promote the goal of adequate compensation of accident victims.

	Total Accidents Reported	*Killed*	*Death Rate*	*Injuries*	*Property Damage Accidents*
1946	7,381	736	10.4	5,194	
1947	10,462	786	9.8	6,372	6,064
1948	12,304	685	7.6	6,888	7,577
1949	14,919	673	7.3	8,076	9,352
1950	34,006	871	8.7	12,416	25,260
1951	50,599	876	7.9	15,781	39,546
1952	57,281	890	7.3	19,068	43,799
1953	61,458	951	7.2	20,027	47,316
1954	68,042	970	7.0	21,741	52,511
1955	76,954	978	6.3	25,652	58,806
1956	87,329	1205	7.1	29,629	66,200

[3]FLA. STAT. c. 186 (1957).

[4]*Id.* §324.011, Brooks v. Owens, 97 So.2d 693, 701 (Fla. 1957) (dissenting opinion).

[5]Anderson v. Southern Cotton Oil Co., 73 Fla. 432, 74 So. 975 (1917), Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920). See also May v. Palm Beach Chem. Co., 77 So.2d 468 (Fla. 1955) (automobile owner cannot defend a suit by passenger-wife by invoking driver-husband's marital immunity). Several recent decisions indicate a wavering of the Supreme Court's attitude toward compensation for victims. Weber v. Porco, 100 So.2d 146 (Fla. 1958) (dangerous instrumentality doctrine used to impute negligence of the driver to the owner of the car to bar owner's action against third party); Brooks v. Owens, 97 So.2d 693 (Fla. 1957) (discovery under FLA. R. CIV. P. cannot be used to ascertain the limits of defendant's liability insurance policy); Brailsford v. Campbell, 89 So.2d 241 (Fla. 1956) (claimant under Wrongful Death Act must comply with the Guest Statute by proving gross negligence).

An inevitable by-product of Florida's Financial Responsibility Law, if not an avowed goal, is the allocation of losses caused by automobile accidents to agencies that can distribute them in accordance with principles of good loss distribution.[6] Good loss distribution implies that losses will be allocated to those classes of defendants who can, via prices and premiums, pass the burden on to all of society, or to the group most directly benefiting from the operation of automobiles, the driving public. For several reasons allocation of losses according to principles of good loss distribution is in the public interest.[7] If losses must be borne either by automobile owners without insurance protection or accident victims unable to distribute them, the burden often will be ruinous. On the other hand, if pursuant to good loss distribution losses are allocated to large self-insurers and to defendants covered by insurance, a certain, calculable, and reasonable cost only must be borne by a single defendant. In turn, a large self-insurer to whom a loss is allocated can shift the burden to the consumers of its product; while insurance companies indemnifying automobile owners can pass the burden to their policyholders. Moreover, allocation of losses to large business units, insurance companies, governmental bodies, and the like may aid the cause of accident prevention because such groups can and often do sponsor programs to reduce accidents. A third standard with which to evaluate contribution, then, is the extent to which such practice promotes good loss distribution.

The conception that accident losses should fall on the party at fault pervades tort law. In deference to this long standing policy contribution practices will be evaluated in terms of traditional conceptions of fault.[8] Emphasis, however, will be upon social rather than moral fault; upon humanitarian rather than self-righteous impulses.

In summary, contribution practices will be evaluated in terms of the following standards: (1) Does the practice help to prevent acci-

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[6]The Financial Responsibility Division of the State Treasurer's Office estimated that in 1957 85% of the automobiles registered in Florida had liability or property insurance of at least the statutory minimum.

[7]See 2 HARPER and JAMES, TORTS c. 13 (1956).

[8]In writing this article I have assumed the continuation of the present system of dealing with Florida's automobile accident problem. In so doing I do not intend to imply that the present system, based as it is on traditional concepts of fault as the major criterion of the public interest, is the best or even a satisfactory system.

dents; (2) does the practice promote adequate compensation of accident victims; (3) does the practice promote good loss distribution; and (4) does the practice conform to prevalent conceptions of fault?

THE DOCTRINAL BASIS FOR DENYING CONTRIBUTION

The usual doctrinal justification for the unwillingness of courts at common law to aid persons at fault in the transaction from which the claim arose was the maxim, *in pari delicto.* Underlying the application of the *in pari delicto* doctrine were several considerations of policy. Some courts felt it was morally reprehensible and beneath the dignity of the court to aid a tortfeasor. Some courts may have believed that denying aid to a tortfeasor would deter others from similar misconduct as well as punish the wrongdoer. Other courts argued that saving the time and effort of settling contribution claims by joint tortfeasors would expedite suits for "honest" litigants.

THE FAULT BASIS

The moral code generating the feeling that it is wrong to aid a merely negligent tortfeasor is not familiar to us and probably not widely accepted by the general public. Indeed, some advocates of contribution label this attitude "misplaced prudery."[9] Tortfeasors denied contribution are punished, it is true, but the price of the punishment is that other tortfeasors are, in effect, rewarded for their wrong by being held completely free from liability. Moreover, it can be contended that the lack of a contribution rule produces results offensive to our moral beliefs in that there is a tendency for one joint tortfeasor to bribe injured parties to seek satisfaction from other tortfeasors. To allow contribution will abolish this temptation to bribe the victim. Furthermore, contend its advocates, contribution

[9]"Certainly one who wilfully breaks a contract commits as great, if not a greater wrong, than one who is merely negligent, yet the common law permits contribution in the former case while denying it in the latter." N.Y. LAW REVISION COMM'N REP., RECOMMENDATIONS AND STUDIES 703 (1936). "Even in tort actions contributory negligence is not always a defense, as where the defendant was wilful or reckless, or where the last clear chance rule or a comparative negligence rule or other similar rule operates." RESTATEMENT, RESTITUTION §85 (1936). "Moreover, the 'Wrongdoing' actor himself is less and less often the real defendant in these days of ever widening vicarious liability and ever growing insurance." 2 HARPER and JAMES, TORTS §25.22 (1956).

does not offend but promotes a more refined application of the fault principle by allocating loss either on the basis of the degree of fault attributable to each tortfeasor, or on an assumption of equal fault.

Opponents of contribution deny that in practice contribution will produce a distribution of losses consistent with a refined conception of fault. The average individual rarely, if ever, has to pay out of his own pocket the claim of an automobile accident victim. Insurance companies and large self-insurers whose liability is vicarious, and thus not predicated on fault, pay the vast majority of accident claims. Further, in practice the ultimate incidence of the loss is shifted by insurance companies to their policy holders and by self-insurers to the consumers of their product or the users of their services, as the case may be.

Moral guilt is probably rare, in any event, in the typical automobile negligence case. If moral guilt is present traditional fault considerations can often find expression with the indemnity concept. And whether moral guilt is present or not the usual practice is to grant contribution on the basis of numerical equality. Under such a practice contribution is not necessarily related to degree of fault.

Opponents of contribution reply to the claim that the lack of a contribution rule encourages collusive behavior between tort victims and tortfeasors, by noting that the incentive of victims and impecunious tortfeasors to make deals whereby the entire blame can be thrown on other tortfeasors would still remain if contribution were allowed.[10] Advocates of contribution have also contended that plaintiff's whim or spite, or the "accident" of a successful levy often determines which tortfeasor must pay the victim's claim, if contribution is not allowed. Opponents reply that in practice victims almost always proceed against financially responsible defendants, by design and not by accident, whimsy or spite.[11]

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[10]According to the insurance industry improper collusion is not a serious problem where contribution is not allowed. James, *Replication,* 54 HARV. L. REV. 1178, 1180, n.5 (1941).

[11]THE UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT §5 (1939) (hereinafter cited as 1939 UNIFORM ACT) provided that a release of any tortfeasor would not release him from liability for contribution unless the release provided for a reduction of plaintiff's claim for damages "to the extent of the pro rata share of the released tortfeasor" to avoid the possibility that risk allocation would turn on whim, spite or collusion. "Reports from the states where the Act is adopted appear to agree that it has accomplished nothing in preventing collusion. In most three-party cases two parties join hands against the third, and this occurs even when the case goes to trial against both defendants. 'Gentlemen's agreements' are still

If emphasis is laid upon social rather than moral fault, conceptions of fault can be mustered to oppose adoption of a contribution rule. Ethical and humanitarian impulses are at the root of the conviction that the public interest will be served by legal practices that tend to cause the victims of accidents to be adequately compensated, and that tend to allocate the losses produced by accidents to agencies that can distribute them to large groups of society. The desire to compensate the victims of accidents by allocating losses to good loss distributors is not motivated by envy ("soak the rich"), or by a desire for vengence; but by the desire to alleviate the vast amount of human suffering that will occur if public action is not taken, and by the desire to allocate the losses occasioned by accidents in such a way as not to cause ruinous consequences to those who must bear them. Further, the feeling that it is fair to impose losses on defendants who are merely conduits for distributing losses to large groups when it is fair for the group as a whole to bear them, and the feeling that the group that chiefly benefits from the activity producing the losses ought to bear the burden of those losses are ethical considerations stemming from a very fine humanitarianism. If contribution would prove offensive to the policies of adequate compensation and efficient loss distribution, the ethical and humanitarian impulses which support the policies of adequate compensation and good loss distribution would be frustrated. From this viewpoint, of course, the fault of tortfeasors becomes less important and social needs assume a major role in ethical evaluation.

THE DETERRENT ARGUMENT

The contention that denying contribution to joint tortfeasors will deter others from similar tortious conduct has a powerful persuasive appeal if it is assumed that a causal relation exists between the practice of denying contribution and the occurrence of automobile accidents in Florida. The weakness of the argument, however, is that the existence of the causal relation is highly suspect.[12] Very rarely has

made among lawyers, and the formal release is not at all essential to them. If the plaintiff wishes to discriminate as to the defendants, the 1939 provision does not prevent him from doing so." HANDBOOK OF THE NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS 224 (1955) (hereinafter cited as HANDBOOK), commenting on the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT §46 (1955) (hereinafter cited as 1955 UNIFORM ACT).

[12]Leflar turned the deterrence argument into a contention for contribution by

a writer contended that withholding contribution would deter careless driving,[13] although occasionally a court will assert such a relation exists when it invokes the *in pari delicto* doctrine. There is no evidence to support the assumption that a deterrent factor operates. Analytically, it is doubtful that a field study would establish a causal relationship. Most motorists probably would not know that a contribution rule existed if one were adopted. Even if motorists were aware of a contribution rule, they do not usually directly contemplate having an automobile accident and weigh the contribution risk. And assuming that many motorists do directly contemplate the possibility of an accident, the fear of death, serious physical injury and large damage awards does not appear to make a significant contribution to careful driving. How, then, can it be sensibly assumed that the imposition of the risk of being denied contribution would deter the careless driver?[14]

Administration of Contribution

Opponents of contribution have asserted that neither a trial judge nor a jury is capable of coping with the extremely difficult problems of relative fault and apportionment of damages which a contribution rule would create. The denial of contribution at common law, like the development of joint and several liability in tort, enabled the courts to avoid the administrative burdens of determining relative fault and apportioning damages.

For several reasons the above contentions appear to me as inconclusive. First, Florida courts have had the experience of administering a comparative negligence statute which requires both an appraisal of relative fault and the apportionment of damages, and apparently have not concluded that the problems are insurmountable or unreasonably difficult.[15] We also know that juries often respond to evidence of contributory negligence by reducing plaintiff's damage

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arguing that the chance that a tortfeasor who does not have to respond to a contribution suit may go scot-free, may encourage wrongdoing. Leflar, *Contribution and Indemnity Between Tortfeasors,* 81 U. PA. L. REV. 130, 133 (1932).

[13]Gregory contended that the lack of a contribution rule would engender a "sense of utter irresponsibility on the part of all people who wish to enjoy the pleasures of risk-creating activity and at the same time eschew its responsibilities." Gregory, *Contribution Among Joint Tortfeasors: A Defense,* 54 HARV. L. REV. 1170-71 (1941).

[14]Leflar, *supra* note 12, at 134.

[15]FLA. STAT. §§768.06, 769.03 (1957).

award.[16] Third, the application of the indemnity concept in joint tortfeasor cases often involves a judgment as to the relative fault of the parties. Of course, indemnity claims do not require an apportionment of damages. Finally, the problem of apportioning damages can be avoided by basing contribution on the assumption that the parties were equally at fault. To base contribution on an assumption of equal fault, however, detracts from the contention that contribution allocates tort losses pursuant to a more refined conception of fault.

There is one aspect of the administration of a contribution rule that has an important bearing on the advantages of contribution. If adoption of a contribution rule includes a procedure allowing contribution in the injured party's action, adoption of a general comparative negligence statute may become undesirable because of the multiplicity of issues that would be raised.[17] Of course, contribution could be allowed only in separate suits.

THE EQUALITY ARGUMENT

The ideal of equality of treatment before the law has prompted advocacy of a contribution rule. Conceptions of equality are closely related to the concept of unjust enrichment. In contexts other than joint tortfeasor cases contribution is freely allowed one of several co-obligors who has discharged all or more than his proportionate part of the common burden. In such cases the maxim "Equality is equity" is often invoked to justify extension of relief. Similar considerations can apply to joint tortfeasor cases.

The weakness of the equality before the law argument for contribution is its superficiality. It takes a vague idea of equality as a major premise from which to deduce the conclusion that contribution is undesirable. Equality requires only that equals be treated equal. Who are equals cannot be deduced from the premise of equality.[18] Furthermore, the argument gives no consideration to the social consequences of a contribution rule.

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[16]The Chicago Jury Studies demonstrated this. Seasoned trial lawyers long suspected the truth. Kalven, *How Jurors Think,* U. Chi. Magazine, Nov. 5, 1955, p. 5.

[17]The prospect of cross-claims for contribution among multiple parties being superimposed upon the issues a comparative negligence statute would raise led James to conclude that "These things would lead . . . to an almost fantastic complexity." James, 8 VA. L. WEEKLY DICTA COMP. 1 (1956).

[18]"Hence a positive legal order may make any difference whatsoever between human beings the basis of a different treatment of its subjects, without getting

CONTRIBUTION AND COMPENSATION OF VICTIMS

As previously noted it is established legislative and judicial policy to promote adequate compensation of automobile accident victims. Would the adoption of a general rule allowing contribution among joint tortfeasors frustrate or promote the goal of proper compensation? James has made the most persuasive case that a contribution rule would offend the policy of providing adequate compensation for accident victims.[19]

James argued that contribution would make it harder to settle joint tortfeasor cases. Specifically, a joint tortfeasor will hesitate to settle if contribution is allowed because he will reason that the inability of the injured party to protect him from contribution claims by other tortfeasors makes settlement undesirable.[20]

Adequate compensation for traffic accident victims requires prompt payment to victims. The delays incident to litigation insure that the damage award in litigated cases will not be forthcoming promptly. Consequently it is desirable that the great majority of claims be settled without litigation. Most estimates indicate that ninety per cent or more of all claims are settled without resort to litigation and that more than ninety per cent of all litigated claims are settled before judgment. In view of the usual victim's need for prompt payment, the present practice of a high percentage of settlements should be encouraged and not deterred.[21]

James contended further that contribution would offend the policy of adequate compensation because victims could no longer play tortfeasors off against each other with the threat of settling with

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in conflict with the principle of equality, which is too empty to have practical consequences." KELSEN, WHAT IS JUSTICE? 15 (1957).

[19]James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156, 1158 (1941); Book Review, 19 U. CHI. L. REV. 158 (1936).

[20]The 1955 UNIFORM ACT §4(b), HANDBOOK, *supra* note 11, at 223, provides that a "good faith" settlement "discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor." A settling tortfeasor was not protected against contribution under the 1939 UNIFORM ACT unless he could get the injured party to accept a release expressly providing that the victim's damages against other tortfeasors were reduced "to the extent of the pro rata share of the released tortfeasor." 1939 UNIFORM ACT §5, 9 U.L.A. 163 (1951).

[21]The inequality of bargaining power between victims and claims adjusters or lawyers acting as claim adjusters will often impede adequate payment for settling. Delay puts victims at even further disadvantage and works to reduce the sum paid in settlement.

one tortfeasor for only a small part of the total damage and proceeding against non-settling tortfeasors for the balance. Contribution would deprive the victim of this tactical advantage and reduce the risk a non-settling tortfeasor would have to run. Separate settlements would become harder to secure and victims would have to persuade the toughest tortfeasor in order to secure a settlement in which all tortfeasors were released. Consequently, settlements would be fewer, smaller, and longer delayed.

James' arguments cut deep. If in practice the existence of a contribution rule in Florida would mean fewer, smaller and later settlements, our policy of adequate compensation of automobile victims would suffer. But would these predictions bear out in practice? It is not clear that these consequences necessarily would follow a contribution rule. First, it is possible to have a contribution rule under which a joint tortfeasor who made a good faith settlement would be protected against contribution proceedings. Section 4 of the 1955 Uniform Contribution Among Tortfeasors Act provides for such protection.[22]

Moreover, assuming the enactment of a contribution rule under which a settling tortfeasor would not be protected against contribution, it does not necessarily follow that tortfeasors would always, or even usually, conclude that settlement is undesirable. If in a high percentage of cases the injured person is without the counsel of an experienced attorney or claims adjuster who knows both the value of the claim and how to negotiate the most advantageous settlement, a tortfeasor may be able to settle the claim for a small fraction of its value in the hands of an experienced negotiator. The cheapness of such a settlement could be enough to persuade a tortfeasor to run the risk of later contribution proceedings. As James has noted[23] a tortfeasor could also react to a cheap settlement opportunity under contribution by bringing other tortfeasors into the settlement, thereby eliminating the risk of a later contribution suit; or by delaying settlement until the eve of the trial; or by not settling at all because the availability of contribution would lessen the gamble involved. The possibilities James mentions seem to me just as probable as the possibility that a tortfeasor would react to an opportunity for a cheap settlement by running the risk of contribution proceedings. However, if tortfeasors react to an opportunity for a cheap settlement by settling

[22]See note 20 *supra.*

[23]Letter from Fleming James, Jr., to the author, Oct. 22, 1957.

only the claim against him, or by bringing in the other tortfeasors,[24] settlements will not be discouraged. It is true, however, that if his reaction is to delay or to refuse settlement altogether, tort victims will not be adequately compensated.[25] The force of the contention that settlements may not be deterred, even under a contribution rule which does not protect a settling tortfeasor against contribution, depends both on how often cheap releases are available and how often, despite the availability of a cheap release, tortfeasor would not settle.

There remains James' contention that contribution would deprive the injured person of the tactical advantage of playing off one tortfeasor against the other by threatening to settle with one tortfeasor for a small part of the total damage and holding non-settling tortfeasors for the balance. This argument apparently assumes that the injured person is represented by an experienced negotiator of personal injury settlements skilled in such tactics. In cases where victim is not represented by an experienced negotiator and does not know either of or how to use this bargaining technique its destruction as a result of a contribution rule is not a serious loss.[26] But in every case where the injured party or his representative would use the advantage to get a speedier, fairer settlement loss of the tactic would frustrate the policy of insuring adequate compensation of automobile accident victims.

Advocates of a contribution rule contend that its adoption would not breed litigation. The above analysis indicates that settlements would be deterred. As a consequence damage suits would increase. Furthermore, the incentive for insurance companies and large self-insurers to make voluntary arrangements to share the loss might be decreased under contribution. As a result many suits for contribu-

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[24]If tortfeasor reacts to a cheap release plus contribution risk by bringing other tortfeasors into the settlement, settlement is promoted, not deterred. It may not be an adequate settlement, but fairer settlements can hardly be promoted by withholding contribution.

[25]Tortfeasor could react to an opportunity to secure a cheap release by settling *all* of the victim's damage claim. No doubt this would happen more often if the settling tortfeasor could then have contribution from the other tortfeasors as provided by the 1955 UNIFORM ACT §1 (d), HANDBOOK, *supra* note 11, at 199, 218. Here again settlements would be promoted by contribution.

[26]James reacted to an assertion that the use of this bargaining technique by plaintiff to force settlement by one tortfeasor is "collusive" by replying: "This is free use of vituperative word. To practical lawyers it seems perfectly legitimate for the plaintiff to make what he can out of the no-contribution rule." James, *supra* note 19, at 1161, n.13.

tion would be brought. It seems to me, therefore, that the burden of increased litigation must be counted a disadvantage of a contribution rule.

In yet another way contribution may conflict with Florida's policy of adequate compensation. In a given case any of a number of circumstances may exist which would cause the plaintiff to believe that it is good tactics to sue only one joint tortfeasor.[27] For example, if plaintiff is injured as a result of the concurrent negligence of *A* and *B*, plaintiff may decide to sue *B* alone, because (1) *A* is not financially responsible and plaintiff wants to avoid the risk that a jury would hold *A* alone responsible; (2) plaintiff was a guest in a car driven by *A* and plaintiff wants to avoid the risk that a jury would identify "driver and passenger and impute the former's negligence" to the latter;[28] (3) plaintiff is "unwilling to prejudice the driver's own claims by trying to prove that his negligence contributed to the accident"; (4) plaintiff is afraid of confusing the jury with a multiplicity of issues; (5) plaintiff expects *A* to be a valuable witness in proving the case against *B;* (6) plaintiff believes that his case against *B* is clearer and that the amount of his judgment against *B* will be higher if only the clearer case of negligence is presented;[29] (7) plaintiff prefers to sue in the federal courts and joinder of all possible defendants would destroy the necessary diversity or the desired venue.[30] If a contribution rule is accompanied by a rule allowing a joint tortfeasor sued alone to bring in other tortfeasors against whom plaintiff must take judgment, he will be deprived of a tactical device which he might otherwise employ to secure a more adequate damage award.[31] Contri-

[27]"Where some of the defendants are insured and some are not, the plaintiff may choose to sue only the insured, but if he does not do so, he may be sure that these defendants will bring in the uninsured defendant wherever third party practice permits, and will undertake to place the entire responsibility upon the defendant. Generally speaking, it is part of wisdom for the plaintiff not to join the uninsured driver if plaintiff thinks he will be brought in by other defendants. His failure to sue him and the fact that another defendant brings him into the case may lead the jury to believe that he is uninsured and irresponsible and therefore may influence the jury in returning a verdict against the insured defendants alone, or against them and the uninsured defendant jointly and severally." Allen, *Evaluation and Settlement of a Personal Injury Claim for Damages,* 14 WASH. & LEE L. REV. 1, 24-25 (1957). See also James, *supra* note 19, at 1162-64; Note, 68 HARV. L. REV. 697 (1955).

[28]James, *supra* note 19, at 1162-64.

[29]Note, 68 HARV. L. REV. 697 (1955).

[30]*Ibid.*

[31]*E.g.,* the 1939 UNIFORM ACT §7 (2) provided: "The plaintiff shall amend his

bution can be allowed, of course, without provision for defendants to implead other tortfeasors.[32]

CONTRIBUTION AND LOSS DISTRIBUTION

I believe that it is wise policy for Florida to seek to distribute accident losses to good loss distributors.[33] Rules and practices which enable victims to hold liable large self-insurers and insurance companies are socially desirable because these groups tend to be able through prices and premiums to distribute the burden of legal liability to the segment of society most directly benefiting from the use of the product or service. As a result a small, perhaps negligible, cost to individual members of a large group is substituted for what may be a crushing burden on a single defendant. Would the adoption of a general rule allowing contribution further good loss distribution?

Contribution may enable efficient loss distributors to allocate part of the loss over to tortfeasors who cannot distribute it. James' examination of eighty-nine cases listed under the fifth paragraph of the title "Contribution" in the Fourth Decennial Digest led him to conclude that contribution is usually sought in two classes of cases. One, an efficient loss distributor (an insurance company or a large self-insurer) sues another efficient loss distributor for contribution. Two, an efficient loss distributor sues an inefficient loss distributor (an uninsured individual, or an individual who cannot reallocate the loss through the price of his product or services). He found no case in which an uninsured individual sought contribution against a good loss distributor. The first type of case does not justify a contribution rule because, since litigants of this class are perennial defendants, contribution claims cancel out in the long run, and because often they voluntarily agree to share the burden of liability. The second type of case definitely offends the principle of good loss distribution. Assuming efficient loss distributors will seldom sue financially irresponsible tortfeasors for contribution, the evidence indicates they

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pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant." See Florida Fuel Oil v. Spring Villas, Inc., 95 So.2d 581 (Fla. 1957); note 54 *infra*.

[32]The 1955 UNIFORM ACT does not provide for third party practice.

[33]*E.g.*, Florida's dangerous instrumentality doctrine by holding the owner of the automobile, although the owner was neither driving nor present, enables the victim to hold a liability insurance company.

will often pursue financially responsible uninsured individuals. The absence of any cases of uninsured individuals seeking contribution from good loss distributors suggests that contribution will rarely be used to achieve good loss distribution. So, James concludes, contribution will rarely, if ever, be used to allocate loss from an inefficient to an efficient loss distributor, but will often be used to allocate loss from an efficient to an inefficient loss distributor. Little good can result from allocating loss through contribution from one good loss distributor to another because of voluntary contribution arrangements and because contribution claims will equalize in the long run.

It seems at least theoretically possible that contribution would promote good loss distribution in some cases, although I have no idea how often such cases actually occur in Florida. Assume *P* is injured as a result of the concurrent negligence of *A* and *B*, and that both *A* and *B* are financially responsible individuals, although not good loss distributors. If *P* sues *A* and *B* or *A* alone to judgment and collects from *A* in full, the availability of contribution allowing *A* to shift part of the loss to *B* would tend to promote the objectives of good loss distribution. Because contribution would sometimes enable *A* to avoid financial ruin; and it would always cause the loss to be allocated over two instead of one tortfeasor.[34] Certainly, in the case assumed good loss distribution is not offended. Florida's Financial Responsibility Statute no doubt insures that the case supposed will rarely occur[35] because either *A* or *B* or both will usually be insured and thus good loss distributors, at least to the extent of policy coverage. But assume both *A* and *B* are fully insured and thus good loss distributors, and assume that *P* collects full damages from *A* after suing *A* and *B* to judgment. If contribution is available to *A* and his insurance company is subrogated thereto whereby part of the loss may be allocated to *B*, and his insurance policy covered a contribution risk, two insurance companies and their policy holders share the loss instead of one company and its policy holders. The policy of good loss distribution is again promoted to the extent that the loss is distributed over a broader societal base, although withholding contribution would not entail financial ruin for *A*. James argues that contribution claims between insurance companies and large self-insurers will cancel out in the long run and that at any rate these defendants often enter into voluntary contribution agreements. But James found that

[34]The best loss distribution, of course, is over large groups of society as a whole. Nevertheless, some distribution may occur among only two tortfeasors.

[35]See note 6 *supra*.

in a substantial number of cases contribution was sought by an insurance company or large self-insurer against another such company.[36] Apparently, then, voluntary contribution agreements alone cannot be relied upon to secure contribution among these classes of defendants. Contribution claims among perennial defendants may cancel out in the long run, but the finding of a substantial number of suits among such defendants by James suggests perennial defendants often doubt the averaging process. It may be significant, however, that insurance companies long opposed the enactment of the 1939 Uniform Contribution Among Tortfeasors Act.[37]

Another case in which contribution could result in better loss distribution comes to mind. Suppose *A* is insured but *B* is not, although he is financially responsible. Because *P* is not represented by an experienced negotiator, *A* is able to buy a release very cheaply, persuading *P* to look to *B* for the balance of his damages. *P* then sues *B* and recovers a judgment much more than twice the amount *A* paid for his release. If *B* cannot allocate part of the loss to *A* by way of contribution proceedings, most of the loss must be borne by one who is not a good loss distributor. On the other hand, if contribution is available to *B* better loss distribution will occur.[38]

A recent Pennsylvania decision[39] has important implications for the best loss distribution policy. In *Fuller v. Fuller,* a wife and minor child suffered personal injury in a collision between a boxcar and a car driven and owned by the husband. The railroad paid a judgment against it and proceeded against the company insuring joint tortfeasor-husband for contribution. A clause in the insurance policy excepting coverage of claims by members of the family of the insured residing in his household was construed to exempt the carrier from liability for the contribution claim.[40]

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[36]James examined 89 cases. In 46 cases a contribution rule would have allowed relief. To 9 of his inquiries there was no response, so that his conclusions were based on 37 replies. In 23 of these 37 cases an insurance company or large self-insurer sought contributions against an uninsured individual. James, *supra* note 19, at 1165-66.

[37]The Association of Casualty and Surety Companies no longer opposes the 1939 Act and does not oppose the 1955 Act. Letter from Robert N. Gilmore, Jr., Associate Counsel, to author, Nov. 6, 1957.

[38]Under some contribution statutes, *e.g.,* 1955 UNIFORM ACT §4(b), if *A's* settlement was in "good faith" he would be discharged from liability for contribution to *B.* If contribution is accompanied by such a rule, my argument will not apply.

[39]Fuller v. Fuller, 380 Pa. 219, 110 A.2d 175 (1955), 60 DICK. L. REV. 286 (1956).

[40]The policy contained the following provisions: "This policy does not apply

The railroad company seeking contribution in the *Fuller* case was a good loss distributor so that exempting joint tortfeasor's insurance carrier from liability for insured's contribution risk did not, under the circumstances, seriously infringe the best loss distribution policy. But suppose that a financially responsible individual (not a good loss distributor) is substituted for the railroad company as joint tortfeasor. If the insurance carrier is not liable for insured's contribution risk in this circumstance, the loss must fall on either the insured or his joint tortfeasor. In either event, good loss distribution is not achieved because both are likely to be poor loss distributors.

Presumably, if the victims in the *Fuller* case had not been insured's wife and child residing in his household, the carrier would have been liable for insured's contribution risk. Even so, cases coming within the exclusion clause of the policy in the *Fuller* case must occur very frequently. Consequently if Florida were to exempt insurance carriers from liability under such circumstances, much of the force would be taken from the contention that contribution would produce better loss distribution where a financially responsible tortfeasor could proceed against an insured tortfeasor. On the other hand, since under Florida's Financial Responsibility Law about 90% of all automobiles on Florida highways have at least minimum coverage, it is quite probable that financially responsible tortfeasors will be good loss distributors too. Inability of insured tortfeasors to press contribution claims against insurance carriers for other tortfeasors would not greatly infringe the loss distribution policy, as we have seen.

Another aspect of the *Fuller* case has a bearing upon loss distribution. A wife and minor daughter recovered against a railroad company although the husband-parent, the driver of the car in which

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. . . (d) under Coverage A, to bodily injury to or death of any employee of the insured . . . residing in the same household as the insured. . . . Coverage A — Bodily Injury Liability. To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages . . . because of bodily injury . . . sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile." A jury had found both the insured husband and the railroad liable as joint tortfeasors to the wife and daughter. The court reasoned that to require the insurance company to indemnify insured husband against the contribution claim by the railroad would in effect make the policy applicable to liability imposed upon insured for damage for bodily injuries sustained by members of his family residing in his household.

they were riding, was concurrently negligent. This holding is possible because husband-parent's negligence is not imputed to the wife and minor daughter. But if the railroad company is allowed contribution against the husband, the final incidence of half of the loss will rest upon the family unit, unless the husband is insured by a policy covering the contribution risk. If the husband is covered by insurance against this risk, better loss distribution results. But if he is not, a poor loss distributor must accept half the loss, the family relationship which the marital and filial immunities are designed to protect, may be imperiled,[41] and by indirection the negligence of the husband is imputed to the wife and child to the extent of half their damages.[42] These consequences can be avoided by refusing contribution against a tortfeasor who would not have been liable to the victim because of marital or filial immunity.[43]

Advocates of contribution might also contend that subrogation of insurance carriers to the contribution rights of insureds will be reflected in lower insurance rates which in turn will cause more insurance coverage. A wider insurance coverage will aid the cause of adequate compensation as well as the cause of good loss distribution.[44] However, as James has noted, the insurance industry can experience a net gain (or net reduction of operating expense) only to the extent that subrogation to contribution claims exceeds expenditures to indemnify insureds against contribution claims.[45] For this to be true subrogation claims to contribution would have to come largely from uninsured individuals. As a consequence, the net gain realized would probably have negligible effects on rates.[46]

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[41]*But see* Bohlen, Book Review, 45 YALE L.J. 1528, 1531 (1936), where the position is taken that allocating half the loss to the family group is unlikely to create family dissension.

[42]1 HARPER and JAMES, TORTS 717, n.14 (1956), commenting upon Di Benedictis v. United States, 103 F. Supp. 462 (W.D. Pa. 1952).

[43]Most states have so held. Yellow Cab Co. v. Dreslin, 86 App. D.C. 327, 181 F.2d 626 (1950); Annot., 19 A.L.R.2d 1003-06 (1951). Lack of the "common liability" prerequisite for contribution is the usual ground.

[44]The 1955 UNIFORM ACT §1 (e), HANDBOOK, *supra* note 11, at 220, subrogates the liability insurance carrier. The Commissioners' comment on subsection (e) indicates that states allowing contribution have not agreed on the right of an insurance company to be subrogated to the right of contribution.

[45]James, *supra* note 19, at 1159, n.10.

[46]The opposition of the organized insurance industry to contribution suggests that they made a similar analysis of their chances for a net gain. James, *supra* note 10, at 1178, 1182.

CONTRIBUTION AND CERTAIN JUDICIAL PRACTICES

Several practices of the courts have a bearing on the merits of the contribution issue. For one, there is a tendency for courts that have denied themselves the right to use the contribution concept to invoke the indemnity device, especially in some types of cases. Other courts show a willingness to fit contribution claims with appealing features within one of the several exceptions to the common law rule of no contribution. Still other courts have shown a remarkable tolerance of rather patent attempts to circumvent the rule against contribution. Each of these practices will be examined for its implications for the merits of contribution.

The Indemnity Approach

Many observers have reported the tendency of courts that have adopted a no-contribution rule to invoke the indemnity concept when persuaded that a plaintiff should not be left with the loss and a plausible case for indemnity is presented.[47] The Illinois experience

[47]N.Y. LAW REVISION COMM'N REP. 28 (1952) (see also p. 37 where it is noted that there is a large area in which there is no clear test as to whether contribution or indemnity applies); Bohlen, *Contribution and Indemnity Between Tortfeasors,* 22 CORNELL L.Q. 469, 475-79, 483 (1937); Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale,* 37 IOWA L. REV. 517 (1952); Hodges, *Contribution and Indemnity Among Tortfeasors,* 26 TEX. L. REV. 150 (1947); Meriam and Thornton, *Indemnity Between Tortfeasors,* 25 N.Y.U.L. REV. 845 (1950); 32 CHI.-KENT L. REV. 298 (1954); 45 HARV. L. REV. 349 (1931); 19 U. CHI. L. REV. 388, 397-400 (1952); 4 VAND. L. REV. 907 (1951); 140 A.L.R. 1306 (1942); Bohlen, Book Review, 45 YALE L.J. 1528, 1532 (1936). The tendency may in part represent confusion about the difference between contribution and indemnity. The annotation in 140 A.L.R. 1306 (1942) and the language of Wheeler v. Slagle, 137 Tex. 341, 153 S.W.2d 449, 140 A.L.R. 1301 (1942), are prime examples. An early Florida decision manifested the same confusion. Seaboard Air Line Ry. v. American Dist. Elec. Protective Co., 106 Fla. 330, 143 So. 316 (1932). Florida has since corrected the error. Suwannee Valley Elec. Cooperative, Inc. v. Live Oak, P. & G.R.R., 73 So.2d 820 (Fla. 1954). Indemnity shifts all the loss. Contribution shifts only a part of the loss. The distinction is neatly illustrated in Selz, Schwab & Co. v. Suthman, 62 Ill. App. 624 (1st Dist. 1896). Contrary to the assertion in 140 A.L.R. 1306 (1942) and in the *Seaboard Air Line* case there was no general rule against indemnity at common law. The English decision which ushered in the no contribution rule expressly excepted one type of indemnity case. Merryweather v. Nixan, 8 Term Rep. 186, 101 Eng. Rep. 1337 (1799). "The decision [Merryweather v. Nixan] has been made the basis of statements that with few exceptions there can be neither indemnity nor contribution between tortfeasors. Such statements are not true with regard to

as reflected by *Gulf, Mobile & Ohio R.R. v. Arthur Dixon Transfer Co.*[48] is a good example of indemnity doing work that a contribution rule could better perform.[49] An employee of a railroad company riding on a box car was crushed between defendants parked trailer and the box car. The railroad company settled with the employee after notifying defendant that it would look to defendant for full reimbursement. The trial court struck the railroad company's complaint asking indemnity, apparently on the theory that the plaintiff was a joint tortfeasor whose real claim was for contribution. On appeal the complaint was construed to allege that the railroad was guilty of only "passive technical" negligence while defendant was guilty of "active and primary" negligence. Thus construed the complaint was held to state a cause of action for indemnity.

The experience of Texas and New York in distinguishing proper cases for indemnity from proper cases for contribution is also suggestive of how what might better be treated as a contribution case can be brought within the indemnity concept. Texas has a statute allowing contribution between joint tortfeasors, provided that a common law cause of action for indemnity does not exist.[50] Consequently the Texas courts have been forced to distinguish indemnity from contribution. They have not been successful, however, in devising a "test" for making the distinction. The resulting flexibility allows the court to invoke either concept.[51] A similar freedom to classify

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indemnity; there are many situations in which indemnity can be obtained, including those where the person seeking it was negligent in committing the tort." RESTATEMENT, RESTITUTION §85 (1937). But it is true that American courts later used Merryweather v. Nixan as authority for the proposition that there could be no contribution or indemnity among joint tortfeasors. The practical result is that an indemnity claimant must fit his case into one of the several lines of exceptions to the no indemnity among joint tortfeasors rule. The advocate should note, however, that he will find more flexible exceptions to the no indemnity rule than to the no-contribution rule.

[48]343 Ill. App. 148, 98 N.E.2d 783 (1st Dist. 1951).

[49]See the comments in 32 CHI.-KENT L. REV. 298 (1954); 19 U. CHI. L. REV. 388 (1952).

[50]TEX. REV. CIV. STAT. ANN. art. 2212 (1925).

[51]*Compare* Humble Oil & Ref. Co. v. Martin, 148 Tex. 175, 222 S.W.2d 995 (1949), *with* Wheeler v. Slazer, 137 Tex. 341, 152 S.W.2d 449, 140 A.L.R. 1301, (1942). The *Wheeler* case justified a decision that indemnity and not contribution was available by invoking the theory that if one of two joint tortfeasors has breached a duty owed by it to the other tortfeasor, the latter, if blameless, may have indemnity from the former. Hodges proposed the theory of the *Wheeler* case as a general test for determining whether indemnity should be awarded. Hodges,

with an eye toward result is available to the Florida courts.

The New York statute allowing contribution makes a joint judgment against the tortfeasors a condition precedent to the contribution award.[52] New York also has a third party practice statute,[53] very similar to Rule 14 (a) of the Federal Rules of Civil Procedure.[54] The New York Court of Appeals early construed these two statutes not to allow a joint tortfeasor sued alone to implead other joint tortfeasors for the purpose of contribution.[55] On the other hand a joint tortfeasor sued alone can implead if he can show a case of indemnity.[56] The consequence has been a rash of New York cases deciding on the pleadings that an attempt by a joint tortfeasor sued alone to implead

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supra note 47, at 151, 162. The history of the litigation in the *Humble Oil* case, *supra,* challenges the usefulness of the test. See Davis, *supra* note 47, at 545-46. *Cf.* Annot., 140 A.L.R. 1306 (1942). Other writers have proposed "unitary principles" to explain and justify the award of indemnity. Davis, *supra* at 547, proposed the "disproportionate duties" test under which "indemnity should be allowed *against* the one who breached the less exacting duty," and purported to distinguish his test from a judicial test of "great difference in fault of the two tortfeasors." Leflar, *supra* note 12, at 148, proposed essentially the same test as Hodges; did indemnitor commit a tort against indemnitee, distinct and independent from any tort committed by indemnitor and indemnitee against the injured third party? Bohlen, *supra* note 47, at 478, argued that "justifiable reliance is . . . the soundest ground upon which the right to indemnity can be placed." That is if indemnitee justifiably relied on the assumption that indemnitor would not commit a tort against the injured person, indemnitee can have indemnity against indemnitor. See also 19 U. CHI. L. REV. 388-401 (1952). Greater "control" of the situation by the indemnitor has also been cited as a rationale for indemnity. 45 HARV. L. REV. 349, 352 (1931). I do not believe these so-called tests fully explain or adequately justify indemnity awards. As explanations they are patently incomplete descriptions of the multitude of factors influencing the outcome of indemnity litigation. As justifications for the decisions in indemnity cases, they give insufficient recognition to the issues of policy involved. Compare the orientation to policy of Meriam and Thornton, *supra* note 47, at 862. The point of referring to so-called tests for indemnity at this stage, however, is to show how flexible the indemnity concept can be in the hands of a court with convictions about the merits of the case before it and chafing at the restraints of the no-contribution rule.

[52]N.Y. CIV. PRAC. ACT. §211-a.

[53]*Id.* §193-a.

[54]*Compare* FLA. R. CIV. P. 1.13(8); Florida Fuel Oil v. Spring Villas, Inc., 95 So.2d 581 (Fla. 1957); Pan American Surety Co. v. Jefferson Constr. Co., 99 So.2d 726 (3d D.C.A. Fla. 1958).

[55]Fox v. Western N.Y. Motor Lines, Inc., 257 N.Y. 305, 178 N.E. 289 (1931). As a result, contribution in New York turns on the injured person's election to join the tortfeasors or sue them separately.

[56]N.Y. LAW REVISION COMM'N REP. 38-39 (1952).

other joint tortfeasors will stand or fall depending on the court's classification of the defendant's claim in his third party complaint as one for contribution or indemnity.[57] Very "slight differences in the duty owed or the culpability of persons failing to perform that duty" have supplied the basis for an allowance of indemnity on the theory that the third party plaintiff was guilty of only "passive" negligence while the third party defendant was guilty of "active" negligence.[58]

While it does not follow that the New York courts would have been as willing to label a claim as one for indemnity if New York had not had a contribution rule, the practice illustrates a technique with which a court limited by a no contribution rule can shift all the loss to another tortfeasor, although the court would rather have the tortfeasors share the loss. Actually, the cases have tended to define categories of fact which justify an allowance of indemnification not based on a contract. Some of these categories of fact appear to leave little freedom to award relief in the name of indemnity although the court would prefer to allow contribution. The claim of a master for indemnification from a servant whose tort caused the master to become vicariously liable to a third party is an example. Since the master is blameless his entire loss is allocated to the wrongdoing servant, and no question of contribution is raised.[59]

Categories of fact have been defined, however, in which a wrongdoing tortfeasor is allowed indemnification against another tortfeasor.[60] The cases involving wrongdoing tortfeasors in which courts have invoked language such as "active-passive," or "last clear chance" as justifications for awarding indemnity are the cases most apt to be used to circumvent a no contribution rule in the automobile accident context. To extend relief the courts need only to label the negligence of the indemnitee as "passive," or find that indemnitor had the "last clear chance."[61]

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[57]*Id.* at 28.

[58]*Ibid.*

[59]These observations hold for all indemnity claims by one vicariously liable for the tort of his indemnitor, as principal against agent, hired against independent contractor and automobile owner against driver. RESTATEMENT, RESTITUTION §96 (1937). For a general survey of situations where indemnity between tortfeasors is allowed see *id.* §§89-98.

[60]The courts openly compare the fault of the litigants in these cases. The inconvenience of apportioning damages is avoided, however, because indemnity allows the entire loss to be shifted.

[61]Other word formulas for allowing indemnity exist, of course. Cohen v. Noel,

The characterization of the negligence of joint tortfeasors as "active-passive" is probably the most flexible technique for awarding indemnity because the words do not refer to any definite factual criteria. By a careful choice of words to describe the conduct of the tortfeasors the advocate for either party can invoke the classification scheme to justify his claim. A garage owner has dim lights in his garage. A patron drives a car into a ladder in the garage. Was garage owner's negligence "active," in that he had dim lights; or was it "passive," in that he failed to have bright lights? Was the driver guilty of "active" negligence in driving carelessly or "passive" negligence in failing to drive carefully?[62] The terms are not made more precise by relating them to the "misfeasance-nonfeasance" or the "omission-commission" dichotomies,[63] nor by reference to motion or lack of motion on the part of the actors.[64]

The leading case using the last clear chance doctrine as a technique for awarding indemnity is *Nashua Iron & Steel Co. v. Worcester and Nashua R.R.*[65] Although occuring before the automobile and its

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165 Tenn. 600, 56 S.W.2d 744 (1933) ("primary cause"—"secondary cause"); Chicago Ry. v. Conway Co., 219 Ill. App. 220 (1920) (indemnitee's act merely "malum prohibitum"). Davis, *supra* note 47, at 543-44, lists a number of "catch words." Florida employed the "not in pari delicto" formula in Seaboard Air Line Ry. v. American Dist. Elec. Protective Co., 106 Fla. 330, 143 So. 316 (1932). Leflar, *supra* note 12, at 156, observed of the "not in pari delicto" formula: "[I]t cannot possibly serve and never has served as a complete and accurate measure for the right to indemnity between tortfeasors in the cases as they arise. It is used to support decisions already arrived at. More or less substantial differences in degrees of fault could be discovered between tortfeasors in a great many joint liability cases in which the law has never suggested any grant of indemnity to the one least at fault." Another technique for justifying an indemnity award is to deny that indemnitor and indemnitee were "joint" tortfeasors for the purpose of the no indemnity among joint tortfeasors rule, although they are "joint" for the purpose of joinder of causes of action. Purple Swan Safety Coach Co. v. Egyptian Trans. Co., 256 Ill. App. 442 (1930); Des Moines v. Barnes, 238 Iowa 1192, 30 N.W.2d 170 (1947); N.Y. LAW REVISION COMM'N REP. 713-14 (1936). Successive injuries are not necessarily joint. HARPER and JAMES, TORTS 1124 (1956); PROSSER, TORTS 230 (1955). Indemnity can be awarded in the name of subrogation. Clark v. Halstead, 276 App. Div. 17, 93 N.Y.S.2d 49 (3d Dep't 1949).

[62]The Tennessee court classified the garage owner's negligence as "active" and that of the driver as "passive" and awarded indemnity to the latter. Cohen v. Neal, 165 Tenn. 600, 56 S.W.2d 744 (1933). See Davis, *supra* note 47, at 539-43.

[63]Meriam and Thornton, *supra* note 47, at 859.

[64]Gulf, M. & O. R.R. v. Arthur Dixon Transfer Co., 343 Ill. App. 148, 157, 98 N.E.2d 783, 788 (1951).

[65]62 N.H. 159 (1882).

attendant social problems made its appearance, the facts of the *Nashua* decision supply an easy analogy to the facts of many automobile accident cases. Plaintiff in *Nashua* alleged that defendant's negligence frightened plaintiff's horse and caused it to run over and injure one Clapp. Clapp sued plaintiff, recovered judgment and obtained satisfaction. Plaintiff therefore asked indemnity. In overruling defendant's demurrer, the appellate court assumed that plaintiff's negligent mismanagement of the horse caused him to be liable to Clapp but stated that if after plaintiff's negligence, defendant could have avoided frightening the horse and injuring Clapp while plaintiff could not, plaintiff was entitled to indemnity.

Plaintiff thus got the benefit of the last clear chance rule. The technical requirements of last clear chance as a justification for indemnity seem to be the same as in the ordinary negligence case defended on the basis of contributory negligence. If these are met plaintiff's negligence does not bar his claim for indemnity.[66]

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[66]The last clear chance justification of indemnity in joint tortfeasor cases found expression in RESTATEMENT, RESTITUTION §97 (1937), although it is made more restrictive by the requirement that the tortfeasor having the last clear chance must have engaged in "reckless or intentionally wrongful conduct." The reporter's notes admit, however, that the cases are not so conservative. *Id., Explanatory Notes* 162. The following cases have used last clear chance to avoid indemnity: Colorado & Sou. Ry. v. Western Light Power Co., 73 Colo. 107, 214 Pac. 30 (1923); Colonial Motor Coach Corp. v. New York Cent. R.R., 131 Misc. 891, 228 N.Y. Supp. 508 (1928); Knippenberg v. Lord & Taylor, 193 App. Div. 753, 184 N.Y. Supp. 785 (1st Dep't 1920); Austin Elec. Ry. v. Faust, 63 Tex. Civ. App. 91, 133 S.W. 449 (1911). *Compare* Kimbriel Produce Co. v. Mayo, 180 S.W.2d 504 (Tex. Civ. App. 1944), *error refused;* Hodges, *supra* note 47, at 163-65. Leflar, *supra* note 12, at 152, could find no reason of policy for refusing to apply the last clear chance doctrine to indemnify claims. Technical grounds for using last clear chance in this context are: (1) Plaintiff seeking indemnity was not negligent as to a defendant who had a last clear chance to avoid the accident, even if plaintiff was negligent as to injured third party; (2) as between plaintiff and defendant the negligence of defendant who had the last clear chance is to be regarded as the sole cause of the accident. As Bohlen noted, however, use of last clear chance to justify indemnity is inconsistent with two classes of cases commonly allowing indemnity. A master supplied with a dangerously defective tool which he turns over to an employee to use has the last clear chance to avoid, by making a proper inspection, injury to the employee. Nevertheless, the master is allowed indemnity from the manufacturer or supplier. A municipality may have the last clear chance of avoiding injury to third persons as a result of dangerous defects in a highway caused by a defendant in indemnity. Yet, in such cases the municipality has been allowed indemnity against one causing the defect. The active-passive approach is commonly used in these two classes of cases. It should not be assumed, however, that different results always

What significance does the practice of using indemnity to do the work of contribution have for the question of whether Florida needs a contribution statute? I cannot supply a reliable answer.

The practice has been cited as a reason why a contribution rule is not needed. The leading opponent of contribution, James, cited cases employing indemnity this way, to support his argument that contribution would not improve justice even on the fault principle. James argued that the fault principle could be given sufficient recognition with the indemnity doctrine because "cases where the fault of tortfeasors is grossly disproportionate are apt to fall within existing rules which give one of them a right of indemnity against another."[67]

On the other hand, the practice of using indemnity to do the work of contribution can be cited as a reason for a contribution rule. The existence of the practice suggests an over-indulgence of the urge to invoke conceptions of fault. Under the practice the relative fault of the parties is compared and indemnification extended to the party less at fault against the party most at fault. As a consequence the party less at fault escapes entirely, while the party most at fault is made to bear all the loss. A contribution rule would avoid the all or nothing approach of indemnity and allow risk allocation to be more precisely apportioned to fault.

The liberal use of indemnity instead of contribution may also have a bearing on the policy of insuring adequate compensation of accident victims. "Since the rule of indemnity shifts the *whole* burden of the liability, there is a strong incentive for litigation."[68] Consequently, the practice tends to breed litigation and impede settlement procedures. It is not clear, however, that making contribution available would correct this. Contribution statutes do not abolish in-

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follow last clear chance than follow the active-passive approach to indemnity. Austin Elec. Ry. v. Faust, *supra,* is typical of a line of cases employing the active-passive approach although last clear chance would fit equally as well. Leflar, *supra* note 12, at 153.

The last clear chance cases should also be compared with the successive tort cases in which tortfeasor *A,* held liable for additional injury caused by the later negligence of tortfeasor *B,* is allowed indemnity against *B* to the extent of damages caused by *B.* Morrison v. Madaglia, 287 Mass. 46, 191 N.E. 133 (1934) (successive auto collisions); Clark v. Halstead, 276 App. Div. 17, 93 N.Y.S.2d 49 (3d Dep't 1949) (negligence of physicians treating victim's injuries increased plaintiff's liability to victim); 2 HARPER and JAMES, TORTS 1124 (1956).

[67]James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism,* 54 HARV. L. REV. 1156, 1168 (1941).

[68]N.Y. LAW REVISION COMM'N REP. 39 (1952).

demnity claims and as long as both the indemnity and contribution concepts are available in the same jurisdiction, the vague boundary between the two will continue to breed disputes concerning which concept is applicable.[69]

Furthermore, the practice of invoking indemnity to do the work of contribution tends to frustrate the policy of best loss distribution. James argued that contribution is often used by efficient loss distributors against inefficient loss distributors. If, in the absence of a contribution rule, the courts tend to invoke indemnity, all and not just part of the loss, as under contribution, is allocated to a poor loss distributor. On these assumptions it can be contended that contribution promotes good loss distribution by reducing the amount of loss allocated by good to poor loss distributors. The argument must assume, however, that adoption of a contribution rule would reduce poor loss distribution by way of indemnity more than it would promote poor loss distribution with contribution. I am unable to evaluate the accuracy of this assumption.

On the whole I think that a decision whether to adopt a contribution rule can properly be made without regard to the practice of using indemnity to do the work of contribution. No precedents are available to indicate whether the Florida courts would use indemnity this way. Moreover, the practice gives rise to conflicting implications for policy in the automobile accident context. Finally, the practice probably affects only a very small part of the total number of joint tortfeasors cases arising out of Florida automobile accidents.

Exceptions

Before a decision to adopt or reject a contribution rule is made due regard should be given to the classes of cases traditionally considered as "exceptions" to the no-contribution rule. While none of these theories have furnished the basis for a decision by the Florida Supreme Court, the broad language of at least one case indicates that the Court would be quite willing to invoke an exception if convinced of the merits and given a plausible factual basis to support the theory.[70]

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[69]The experience of New York and Texas confirms my observation that the problem of distinguishing cases for indemnity from cases for contribution would continue to promote litigation although a contribution rule was available.

[70]Seaboard Air Line Ry. v. American Dist. Elec. Protective Co., 106 Fla. 330, 143 So. 316 (1932). A survey of the principal exceptions to the contribution rule

One exception to the no-contribution rule may be broadly described as contribution between persons whose liability to the tort victim rests solely upon respondeat superior.[71] Several types of cases come within this heading. If a judgment is obtained against the members of a partnership because of a tort of a servant of the partnership and one partner pays the judgment, he may have contribution against the other partners.[72] Contribution is also allowed between joint employers held liable on respondeat superior theory for the tort of a common employee.[73] Finally, if several creditors through innocent mistake or ignorance have a sheriff convert the chattels of a third person by an attachment, a creditor forced to pay the entire claim can have contribution from the other creditors.[74]

Another exception to the no-contribution rule arises when two or more tortfeasors neglect the performance of a continuing duty with which they are jointly charged. In such case a tortfeasor who pays the entire claim may secure contribution from the other joint tortfeasors. Thus if two counties are jointly responsible for the upkeep of a bridge, a county which has been made to pay a claim for negligent failure to repair the bridge may secure contribution from the other county.[75] If adjoining landowners jointly erect a wall which col-

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might well begin with classes of cases in which indemnity claims are recognized. Indemnity claims are often referred to as an exception to the no-contribution rule. This classification seems to me purely a matter of convenience to the writer.

[71]The exceptions are discussed in 13 AM. JUR., *Contribution* §§39-48 (1938), and RESTATEMENT, RESTITUTION §§99-101 (1937).

[72]The leading case is Bailey v. Bussing, 28 Conn. 455 (1859). See also RESTATEMENT, RESTITUTION §99 (1937).

[73]Hobbs v. Hurley, 117 Me. 449, 104 Atl. 815 (1918); *cf.* George's Radio, Inc. v. Capital Transit Co., 75 App. D.C. 187, 126 F.2d 219 (1942). Several writers have noted the curious inconsistency of the courts' refusing to allow contribution between previously unconnected principals. "Yet no case has been found in which it is even suggested that separate principals of independently wrongdoing agents should be subject to contribution the same as joint principals for a single wrongdoing agent, or be treated in any respect otherwise than as personally wrongdoing tortfeasors are treated." Leflar, *supra* note 12, at 130, 143. Bohlen, *supra* note 47, at 562, suggests that the reason for this "apparent anomaly" is that most torts are committed by servants of corporations, that it is natural to regard corporations as "in peculiar degree affected by the wrongdoing of their servants," and that if the rule were otherwise a corporation could have contribution against a personal tortfeasor while the latter could not have contribution against a corporation.

[74]Farwell v. Becker, 129 Ill. 261, 21 N.E. 792 (1889); RESTATEMENT, RESTITUTION §101 (1937).

[75]Armstrong County v. Clarion County, 66 Pa. 218 (1870).

lapses due to negligent construction and causes injury to a third person, a landowner required to pay the damage claim may have contribution against other landowners.[76] Another example of this exception involves officers of a corporation who neglect to file reports required by statute. If creditors of the corporation force one officer to pay damages, that officer may be allowed contribution against the others.[77]

One other line of cases illustrates the willingness of the courts to avoid application of the no-contribution rule where good reasons for doing so exist. Suppose the victim settles with one joint tortfeasor giving him a covenant not to sue. If the victim then brings suit against other joint tortfeasors, can defendants introduce evidence of the consideration received by plaintiff for the covenant not to sue? One argument used by plaintiffs to exclude such evidence is that to allow it to reduce defendant's damages would, in effect, allow contribution among joint tortfeasors.[78] However, judicial abhorrence of the prospect of double recovery, plus the persuasive force of the avoidable consequences rule have more often led the courts to credit defendant with the consideration paid by settling joint tortfeasors, without much apparent concern that the no-contribution rule was being infringed.[79]

Presumably, all of the foregoing exceptions to the no contribution

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[76]Ankeny v. Moffett, 37 Minn. 109, 33 N.W. 320 (1887).

[77]Nickerson v. Wheeler, 118 Mass. 295 (1875).

[78]Technically, to credit defendant with consideration received for a covenant not to sue differs from contribution in that the share of the loss borne by the settling tortfeasor is set by bargaining between victim and settling tortfeasor; while contribution rules usually distribute loss according to some fixed percentage. The practical result of crediting defendant, however, is much the same as obtains under a contribution rule. In some cases plaintiff has argued that the "collateral source" rule should exclude evidence of the consideration paid for the covenant not to sue. If there is a basis for holding that the person paying for the covenant not to sue was not a tortfeasor, Grimm v. Globe Printing Co., 232 S.W. 676 (Mo. 1921), or not a "joint" tortfeasor, the collateral source rule may be invoked and defendant not credited. Papenfus v. Shell Oil Co., 254 Wis. 233, 35 N.W.2d 920 (1949).

[79]Aldridge v. Norris, 337 Ill. App. 369, 86 N.E.2d 143 (1949); Greiner v. Hicks, 231 Iowa 141, 300 N.W. 727 (1941). The earlier cases are collected in Annot., 104 A.L.R. 931 (1936). The Florida law is FLA. STAT. §54.28(2) (1957). If victim sues *A*, one joint tortfeasor, to judgment and obtains satisfaction, *B*, the other joint tortfeasor, can use the satisfied judgment against *A* as a bar. But consult the Rhode Island court's construction of the 1939 UNIFORM ACT §3 as abrogating the common law principle that complete satisfaction of a judgment releases all other tortfeasors. Hackett v. Hyson, 72 R.I. 132, 48 A.2d 353 (1946). See also 68 HARV. L. REV. 685, 695 (1955).

rule would be recognized by the Florida Supreme Court if a proper case for their application was presented. On that assumption the case for a contribution rule is weakened; because whatever justifications for allowing contribution may exist, the availability of these exceptions will often offer Florida courts a means to allow it. To this extent, there is no need of a general contribution rule.

Tolerance of Circumvention

Apparent attempts by joint tortfeasors, or those behind them, to circumvent the rule against contribution have taken two forms. In one line of cases indemnitors of one joint tortfeasor have claimed the right of contribution against other joint tortfeasors although the indemnitee had no such right to which indemnitor could be subrogated.[80] The usual holding in this line of cases, that the indemnitor cannot have contribution against a joint tortfeasor unless the indemnitee would have had such right, appears to foil the ruse.[81] But, except where subrogation to contribution rights are denied altogether, the courts have indicated that if under the circumstances the indemnitee could have had contribution against his joint tortfeasor the indemnitor can too; and have perhaps been most willing to hold that under the circumstances indemnitee could have had contribution.[82]

In the other line of cases a joint tortfeasor against whom judgment has been entered has sought to enlist the aid of the policy favoring free alienability of the rights of judgment creditors.[83] Instead of running the risk that a direct payment to the judgment creditor would be held to be a satisfaction, some joint tortfeasors have procured a straw man to take an assignment of the judgment creditor's rights. If this ruse is successful, recovery under the judgment assigned can approximate the sum available in indemnity proceedings. And it can be successful because to avoid infringing the policy of free

[80]In some of these cases the indemnitor has taken an assignment of the judgment and sought contribution as an assignee-stranger.

[81]Royal Indemnity Co. v. Becker, 122 Ohio St. 582, 173 N.E. 194 (1930); Annots., 171 A.L.R. 271 (1947); 75 A.L.R. 1486 (1931).

[82]Technical grounds can be that the tortfeasors were not "joint," *cf.* Slater v. Ianni Constr. Co., 268 Mich. 492, 256 N.W. 495 (1934); or that the tortfeasors were not guilty of equal culpability. Underwriters at Lloyds v. Smith, 166 Minn. 388, 208 N.W. 13 (1926), and cases cited Annot., 75 A.L.R. 1486, 1488 (1931).

[83]Annot., 75 A.L.R. 1468, 1471 (1931).

alienability, the courts must treat each case as presenting a question of fact:[84] did assignee act in behalf of a joint tortfeasor when he purchased the assignment or not.[85] Consequently, a joint tortfeasor who is fearful that he may have to pay his victim's judgment in full[86] has a fighting chance of avoiding all the loss by the straw man-assignee device. Large corporate joint tortfeasors with subsidiaries have a situation tailor-made for the straw man-assignee device.[87]

NEW PROBLEMS TO FACE

One other consequence of a rule allowing contribution among joint tortfeasors remains to be considered. Adoption of a contribution rule surely will spawn a number of new problems that do not exist in a jurisdiction that honors the no-contribution rule. The experience of states that have had a contribution rule for an extended period of time foretells the problems to expect.

Would intentional tortfeasors be allowed contribution? If not, would conduct characterized as "wilful," "wanton," or "gross" be treated as the equivalent of "intentional" for the purpose of disqualifying a tortfeasor from contribution? The 1939 Uniform Contribution Among Tortfeasors Act was silent as to these issues: but the 1955 Uniform Act provides that an intentional tortfeasor cannot obtain contribution.[88] On the other hand, several legal writers advocate

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[84]Gale Lumber Co. v. Bush, 227 Mass. 203, 116 N.E. 480 (1917).

[85]Evidence that joint tortfeasor supplied the funds for the purchase is critical.

[86]The ethical aspects of the straw-man assignee device are worthy of careful consideration. Apparently a voluntary agreement by all tortfeasors to share the loss, either before or after the negligent act giving rise to liability, would be enforceable and not subject to the defense of illegality. RESTATEMENT, RESTITUTION §102, comment *e* (1937); RESTATEMENT, CONTRACTS §575 (1932).

[87]Hunter v. Chicago Lumber & Coal Co., 156 La. 19, 100 So. 35 (1924); Pennsylvania Co. v. West Penn Ry., 110 Ohio St. 516, 144 N.E. 51 (1924). In the latter case one joint tortfeasor owned 23,192 of 23,363 total shares in the subsidiary that purchased the judgment. Still the subsidiary was allowed to enforce the judgment. Of course the corporate veil may be pierced.

[88]1955 UNIFORM ACT §1 (c). The statute leaves it optional with a jurisdiction to include or exclude "wilful or wanton" conduct. Some justification for excluding various types of intentional tortfeasors from contribution appears in the comment to subsection (c). The first no-contribution case, Merryweather v. Nixan, 8 Term Rep. 186, 101 Eng. Rep. 1337 (1799), denied contribution to intentional tortfeasors. Subsequent English cases so confined it, Reath, *Contribution Between Persons Jointly Charged for Negligence,* 12 HARV. L. REV. 176 (1898), and so did

extending contribution to intentional tortfeasors.[89] Consequently, a cost of adopting a contribution rule is, at the least, the effort expended by court or legislature in making the necessary study of the intentional tortfeasor issue. The problem could be left open for judicial decision, but this would create uncertainty about the Florida Supreme Court's views which would persist until a case involving the point slowly made its way to that court.

The statutes of several states allowing contribution provide that the rendition of a joint judgment is a condition precedent to relief. Section 211-a of the New York Civil Practice Act is perhaps the better known example.[90] If Florida adopted a contribution rule eventually it would have to decide whether a joint judgment would be a prerequisite to relief.[91] This question is interrelated with the rights of a settling tortfeasor to contribution,[92] and the desirability of providing for third party practice. A joint judgment would establish the existence and the amount of the common liability of which a contribution claimant must discharge more than his pro rata share. On the other hand, a joint judgment requirement might discourage settlement procedures because a tortfeasor who, in good faith, settled the entire claim of a victim would be barred from contribution. Further, a third party practice would become impossible. Finally, the course of action of the tort victim would determine the availability of contribution. It is apparent that the joint judgment issue is sufficiently knotty to merit very careful study before it is resolved. The time and effort expended in making such a study would constitute another cost of a contribution rule.

Adoption of a contribution statute would raise important and difficult questions concerning the application of Florida's Survival

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early American cases. After the concept of joint tort was expanded to include concurrent negligence, however, the no-contribution rule was extended to include negligent tortfeasors.

[89]N.Y. LAW REVISION COMM'N REP. 705 (1936); Gregory, *supra* note 13, at 366-69; Leflar, *supra* note 12, at 139-40.

[90]See also MO. REV. STAT. ANN. §3658 (1939); TEX. REV. CIV. STAT. ANN. art. 2212 (Supp. 1951); W. VA. CODE ANN. §5482 (1949). Advantages and disadvantages of requiring a joint judgment are set forth in N.Y. LAW REVISION COMM'N REP. 706 (1936).

[91]See Gregory, *Contribution Among Tortfeasors,* 1938 WIS. L. REV. 365, 369-72; Tuft, *Contribution Between Joint Tortfeasors,* 24 CALIF. L. REV. 546, 552-53 (1936); N.Y. LAW REVISION COMM'N REP. 706, 726-35 (1936).

[92]Consolidated Coach Corp. v. Burge, 245 Ky. 631, 54 S.W.2d 16, 85 A.L.R. 1086 (1932).

Statute,[93] Wrongful Death Statute,[94] Statute of Limitations,[95] Workmen's Compensation Act,[96] and Guest Statute.[97]

What would be the effect of the death of a joint tortfeasor? Would his estate continue to be liable for contribution? Would his estate be allowed to maintain suit for contribution? Florida has never had to answer questions such as these. If a contribution rule were adopted, it might be desirable to amend section 45.11 of the Florida Statutes to answer the above questions.[98]

The 1955 Uniform Contribution Among Tortfeasors Act expressly provides that contribution is available in case joint tortfeasors cause the wrongful death of a third person.[99] Would the Florida Supreme Court so construe the Wrongful Death Statute, or should a contribution rule be introduced by statute and express provision made for the case where the victim is wrongfully killed?

Adoption of a contribution rule in Florida would raise several limitations problems.[100] Would the fact that a cause of action for contribution is closely connected to a personal injury cause the Florida courts to classify contribution as a tort action, or would the Florida courts, as have many courts, classify contribution as a quasi-contractual action? Actions based on an unjust enrichment theory, as are quasi-contract, are governed by the three year limitations period in Florida.[101] On the other hand, a cause of action for wrongful death is governed by a two-year limitation,[102] and a cause of action for negligence is governed by a four year limitation.[103] Furthermore,

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[93]FLA. STAT. §45.11 (1957).

[94]*Id.* §§768.01-.04.

[95]*Id.* §95.11 (5) (e).

[96]*Id.* c. 440, especially §440.39.

[97]*Id.* §320.59.

[98]In general, see Dauber, *The New Jersey Joint Tortfeasors Contribution Law,* 7 RUTGERS L. REV. 380, 388-89 (1953).

[99]1955 UNIFORM ACT §1 (a).

[100]See Godfrey v. Tidewater Power Co., 223 N.C. 647, 27 S.E.2d 736, 149 A.L.R. 1183 (1943); Ainsworth v. Berg, 253 Wis. 438, 34 N.W.2d 790, *modified on rehearing,* 253 Wis. 445a, 35 N.W.2d 911 (1948); Dauber, *supra* note 98, at 392-93; Larson, *A Problem in Contribution: The Tortfeasor with an Individual Defense Against the Injured Party,* 1940 WIS. L. REV. 467, 480-483; 67 HARV. L. REV. 896 (1954).

[101]FLA. STAT. §95.11 (5) (e) (1957); Stranahan, Harris & Co. v. Hillsborough County, 154 Fla. 658, 18 So.2d 789 (1944); Ball v. Roney, 112 Fla. 186, 150 So. 240 (1933).

[102]FLA. STAT. §768.04 (1957).

[103]Warner v. Ware, 136 Fla. 466, 182 So. 605 (1938) (holding that §95.11 (4) is

when would a cause of action for contribution "accrue"?[104] Finally, suppose a shorter limitations period is applicable for victim's suit against joint tortfeasor *A* than for suit against joint tortfeasor *B*, and that the shorter period has run. If victim obtains judgment against *B*, would *A* also be protected against a contribution suit by *B*?[105] The foregoing and other limitations issues would ultimately have to be resolved if Florida adopted a contribution rule.

Section 440.11, Florida Statutes (1957), provides that the liability of an employer to pay a compensation award after electing to come within chapter 440 shall be exclusive and "in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . ." Section 440.39 provides that if the employee's injury or death is wrongfully caused by a third party the employee or his dependents pursue their common law remedy against the third party. If the employee accepts compensation, employer becomes subrogated, in part, to employee's cause of action against the tortfeasor.[106]

If an injured Florida employee sues a third party tortfeasor for negligence and the evidence shows the employer sufficiently at fault to support a claim by third party against employer for contribution,[107] would the exclusive liability clause of the Workmen's Compensation Act bar a contribution claim by third party against the employer? To allow the contribution claim would allow, in effect, an action against the employer. But to deny the contribution claim would force

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applicable). *But compare* a malpractice suit, Slaughter v. Tyler, 126 Fla. 515, 171 So. 320 (1936) (holding that FLA. STAT. §95.11 (5) (e) (1935) and a 3-year period apply).

[104]1955 UNIFORM ACT §3 (c), (d), Comm'rs Note.

[105]67 HARV. L. REV. 896 (1954) (commenting on Littlewood v. George Wimpey & Co., 2 All E.R. 915 (C.A. 1953), holding that contribution would be barred). *Compare* Godfrey v. Tidewater Power Co., 223 N.C. 647, 27 S.E.2d 736 (1943); Annot., 149 A.L.R. 1186 (1944).

[106]Fidelity & Cas. Co. v. Bedingfield, 60 So.2d 489 (Fla. 1952); Note, 4 U. FLA. L. REV. 390 (1951).

[107]Or for indemnity. The indemnity issue can arise now. The cases in other jurisdictions on the latter issue have reached opposite results. See Note, 42 VA. L. REV. 959 (1956). Comparable issues have been raised under the Longshoremen's and Harbor Workers' Compensation Act, 44 STAT. 1424 (1927), 33 U.S.C. §§901-50 (1952). Weyerhauser S.S. Co. v. Nacirema Operating Co., 78 Sup. Ct. 438 (1958); Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956); Weinstock, *Employer's Duty to Indemnify Shipowners*, 103 U. PA. L. REV. 321 (1954).

third party to pay all damages although under a contribution rule he would normally have to pay only his pro rata share. The question would be further complicated in cases where employee had accepted compensation and the employer had become subrogated to the extent of his payments to employee's cause of action against the third party.[108] Here, again, a very careful study of the question of the availability of a contribution claim by third parties against employers covered by the Workmen's Compensation Act would become a necessity, sooner or later, if a contribution rule were adopted in Florida.

The Florida Guest Statute[109] requires a showing of more than ordinary negligence before a guest can recover from his host. Suppose a guest is injured by the concurrent negligence of host and a third party. If guest proceeds to judgment and satisfaction against the third party, would the third party be allowed contribution (if it were in effect) from the host? Must host driver be guilty of more than ordinary negligence before a contribution claim against him would lie?[110] This is another problem that would be created by the adoption of a contribution rule in Florida.

Assuming the adoption of a contribution rule in Florida, what would be the ratio of contribution among the joint tortfeasors?[111] Would contribution be based on the degree of fault of each tortfeasor, comparative culpability,[112] or would contribution be based on a conception of numerical equality, that is, total damages divided by the number of tortfeasors?[113] Assuming that contribution would be based on a conception of numerical equality, if there were more than two joint tortfeasors and one is insolvent or leaves the jurisdiction, would

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[108]A recent New Jersey case held the employer immune from contribution. Farren v. New Jersey Turnpike Authority, 31 N.J. Super. 356, 106 A.2d 752 (App. Div. 1954). See also Bertone v. Turco Products, 252 F.2d 726 (3d Cir. 1958). Apparently this is the usual holding. *But see* Maio v. Faks, 339 Pa. 180, 14 A.2d 105 (1940); *compare* Brown v. Southern Ry., 204 N.C. 668, 169 S.E. 419 (1933) (allowing third party to use contributory negligence by employer as a bar to employer's subrogation claim).

[109]FLA. STAT. §320.59 (1957).

[110]Patterson v. Tomlinson, 118 S.W.2d 645 (Tex. Civ. App. 1938); Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721 (1934).

[111]See Dauber, *supra* note 98, at 282-84; Gregory, *Contribution Among Tortfeasors,* 1938 WIS. L. REV. 365, 372-75; Tuft, *supra* note 91, at 550; Annot., 122 A.L.R. 520, 525 (1939); 1955 UNIFORM ACT §§1 (b), 2.

[112]Ark., Del., Hawaii, and S.D. apply the comparative culpability rule when apportioning damages for contribution. 9 U.L.A. 17 (Supp. 1597).

[113]The numerical equality conception as a basis for apportioning damages for

the "equity rule"[114] apply? If the equity rule applied would paying tortfeasors continue to have a cause of action against absent or insolvent tortfeasors?

Another problem that would surely arise if Florida were to adopt a contribution rule involves the tortfeasor with an individual defense or personal immunity.[115] The question of the liability for contribution of a tortfeasor for whom the statute of limitations has run against the injured person's claim has been discussed, as has the liability for contribution of an an employer covered by the Workmen's Compensation Act. The liability of a tortfeasor who has purchased a covenant not to sue from the injured party to contribute to other joint tortfeasors will be given separate treatment below.

Suppose that *P* is injured as a result of the concurring negligence of *X* and *Y*, that *X* is the spouse of *P*, or a filial relation exists between *X* and *P*, or a family relationship. In Florida *X* has a defense against an action by *P*. But suppose *P* proceeds to judgment and satisfaction against *Y*: can *Y* now obtain contribution from *X*? In a number of husband and wife type cases the courts have held that contribution could not be had from a spouse if the spouse had a defense against an action by the injured person.[116] The merits of cases of this type are far from free of doubt. Careful study of the personal immunity-individual defense problem should precede adoption of a contribution rule.

Several different problems involving settlements would arise if Florida adopted a contribution rule. Whether a contribution rule is in effect or not an injured person has to be careful that in settling with one joint tortfeasor, the others are not also discharged under the rule that a release of one joint tortfeasor releases all. Both the 1939 and the 1955 Uniform Contribution Among Tortfeasors Acts provide that a release of one joint tortfeasor does not release the

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contribution is much more prevalent. The 1955 UNIFORM ACT §§1 (b), 2 adopts it.

[114]Whereby each contributor is liable also for a portion of the pro rata share of insolvent or absent tortfeasors.

[115]See Larson, *supra* note 100, at 467; Tuft, *supra* note 91, at 551; Annot., 19 A. L. R.2d 1003 (1951).

[116]See Kennedy v. Camp, 14 N.J. 390, 102 A.2d 595 (1954); see also 42 GEO. L.J. 560 (1954), 8 RUTGERS L. REV. 552 (1954), both of which criticize the holding in the *Kennedy* case that contribution was not available. An example of the filial relationship is Zutter v. O'Connell, 200 Wis. 601, 229 N.W. 74 (1930). See also Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721 (1934) (joint tortfeasor host driver had an assumption of the risk defense against injured guest).

others "unless its terms so provide."[117] In Florida, since 1957, a release or covenant not to sue "as to one tortfeasor" does not discharge other tortfeasors.[118] Apparently, then, the danger to injured persons that a settlement with one joint tortfeasor releases all has been minimized.

Would a joint tortfeasor who in good faith settled the injured person's entire claim be allowed contribution against other joint tortfeasors who did not participate or consent to the settlement?[119] The cases in other jurisdictions have tended to allow a settling tortfeasor to obtain contribution if the injured party also released other tortfeasors and the settlement was in good faith.[120] Such holdings appear to promote the policy favoring settlements and the clearing of over-burdened court calendars. Exactly what are the elements of a prima facie case for contribution for settling tortfeasors, however, is still subject to some disagreement. For example the cases are in conflict on the issue of whether settling tortfeasor must prove that the sum paid in settlement was reasonable.[121]

But what of the right of a tortfeasor who effects only a partial settlement or satisfaction of a judgment against him? Because other joint tortfeasors are not discharged by a partial settlement both the 1939 and 1955 Uniform Contribution Among Tortfeasors Act deny contribution to the settling tortfeasor. As long as the liability of non-settling tortfeasors to the injured party is unliquidated and undetermined a good case against contribution in favor of a partially settling tortfeasor can be made.[122] The case against contribution is

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[117]1955 UNIFORM ACT §4(a); 1939 UNIFORM ACT §4.

[118]FLA. STAT. §54.28 (1957).

[119]On this issue see Gregory, *Contribution Among Tortfeasors,* 1938 WIS. L. REV. 365, 391; Note, 68 HARV. L. REV. 697 (1955); N.Y. LAW REVISION COMM'N REP. 740-43 (1936). The 1939 UNIFORM ACT §2(3) provides: "A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement." See also 1955 UNIFORM ACT §1(d).

[120]Consolidated Coach Corp. v. Burge, 245 Ky. 631, 54 S.W.2d 16, 85 A.L.R. 1086 (1932), is representative. O'Keefe v. Baltimore Transit Co., 201 Md. 345, 94 A.2d 26 (1953), held that settling tortfeasor need not notify other tortfeasors although the injured party had filed suit against all. Where statutes require a joint judgment as a condition precedent to contribution these holdings are not possible.

[121]*Compare* Consolidated Coach Corp. v. Burge, *supra* note 120, *with* Western Cas. & Surety Co. v. Milwaukee Gen. Constr. Co., 213 Wis. 302, 251 N.W. 491 (1933).

[122]See Lacewell v. Griffin, 214 Ark. 909, 219 S.W.2d 227 (1949); N.Y. LAW REVISION COMM'N REP. 741 (1936).

not so clear once the liability of non-settling tortfeasors has become determined and liquidated. Whether partial satisfaction of a judgment can support a contribution claim should reflect holdings on whether in a later suit by the injured person against non-settling tortfeasors the judgment settles the maximum amount of recovery.[123]

Would a joint tortfeasor who has paid part of the injured party's claim and taken a covenant not to sue be liable for contribution if a judgment was later rendered against the other joint tortfeasors?[124] To answer this question yes is to diminish incentive for settlement; to answer it no is to run the risk of collusion between the settling tortfeasor and the injured person. Section 5 of the 1939 Uniform Contribution Among Tortfeasors Act attempted to balance the competing policies of promoting settlements and discouraging collusion by providing that a settling tortfeasor did not secure immunity from contribution unless the release was given before a right to contribution accrued; and unless it contained an express provision that the injured person's claim against non-settling tortfeasors was reduced to the extent of the released tortfeasor's pro rata share of the common liability.[125] Apparently Section 5 was not effective in preventing collusion, but it did discourage settlements by one tortfeasor. Attorneys for the injured person were reluctant to accept a release giving up the injured party's pro rata share of the common liability because they had no way of knowing what they were giving up. Tortfeasors, on the other hand, did not want to settle unless they could secure immunity from contribution. To meet these objectives Section 4 (b) of the 1955 Uniform Contribution Among Tortfeasors Act provides that a release in good faith "discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor."[126]

In states that do not have a statutory provision covering the matter, the tendency has been to hold that the released tortfeasor continues to be liable to make contribution.[127] Of course a settling

[123]N.Y. LAW REVISION COMM'N REP. 742-43 (1936).

[124]In general, see Dauber, *supra* note 98, at 386; Larson, *supra* note 100, at 467; Notes, 68 HARV. L. REV. 697, 704 (1955); 1950 WIS. L. REV. 684; Annot. 8 A.L.R.2d 196 (1949); 1939 UNIFORM ACT §§4, 5; 1955 UNIFORM ACT §4; N.Y. LAW REVISION COMM'N REP. 707-08, 743-45 (1936).

[125]In the absence of such a provision in the release the injured person's claim against non-settling tortfeasors is usually reduced only to the extent of the consideration received by the injured person. FLA. STAT. §54.28 (2) (1957) expressly so provides.

[126]1955 UNIFORM ACT §4 (b), Comm'rs Note.

[127]Employers Mut. Cas. Co. v. Chicago, St. P., M. & O. Ry., 235 Minn. 304,

tortfeasor can often protect himself against the ill effects of a holding that he continues liable for contribution. For example, the tortfeasor may insist upon a "save harmless" clause in the settlement with injured party; and/or extract a promise from the injured person to satisfy to the extent of tortfeasors' pro rata share any judgment obtained against other tortfeasors.[128]

Adoption of a contribution rule in Florida would raise new problems in insurance law. Would an insurance company paying a claim against insured joint tortfeasor be subrogated to insured's claim for contribution against other joint tortfeasors?[129] The decisions on the point in other states were sufficiently in conflict to cause an express provision allowing subrogation to be inserted in the 1955 Uniform Contribution Among Tortfeasors Act.[130]

Does a joint tortfeasor's liability insurance policy include the risk of a contribution claim against the insured so that the insurance company is liable therefor? More specifically, would the standard coverage clauses by which insurance companies assume to pay any liability imposed upon the insured for damages because of bodily injury caused by accident and arising out of the ownership or use of the automobile impose upon insurance companies in Florida a duty to pay contribution claims against insured?[131] The wording of the in-

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50 N.W.2d 689 (1951); Blauvelt v. Village of Nyack, 141 Misc. 730, 252 N.Y. Supp. 746 (Sup. Ct. 1931); State Farm Mut. Auto. Ins. Co. v. Continental Cas. Co., 264 Wis. 493, 59 N.W.2d 425 (1953). See also McKenna v. Austin, 77 App. D.C. 228, 134 F.2d 659 (1943); Annot., 8 A.L.R.2d 196 (1949).

[128]Apparently this is the practice of insurance companies in Wisconsin. Notes, 68 HARV. L. REV. 697, 704 (1955); 1950 WIS. L. REV. 684, 686. Similar instruments are set forth in Robertson v. Trammel, 83 S.W. 258, 260 (Tex. Civ. App. 1904); and in Baylor Univ. v. Bradshaw, 52 S.W.2d 1094, 1095 (Tex. Civ. App. 1932).

[129]See 1955 UNIFORM ACT §1 (e); 8 APPELMAN, INSURANCE §4933 (1942); N.Y. LAW REVISION COMM'N REP. 203 (1945).

[130]§1 (e). The Commissioner's note indicates that Minnesota, Underwriters at Lloyds v. Smith, 166 Minn. 388, 208 N.W. 13 (1926), and Wisconsin, Frankfort Gen. Ins. Co. v. Milwaukee Elec. Ry. & Light Co., 169 Wis. 533, 173 N.W. 307 (1919), have subrogated the insurer; while North Carolina refused to subrogate. Lumbermen's Mut. Cas. Co. v. United States Fidelity & Guaranty Co., 211 N.C. 13, 188 S.E. 634 (1936). New York also subrogates. Travelers Ins. Co. v. McLane, 240 App. Div. 939, 267 N.Y. Supp. 784 (4th Dep't 1933). See also PROSSER, TORTS 248, n.65 (2d ed. 1955).

[131]See Dauber, *supra* note 98, at 390-91. Wisconsin has held insurance companies liable for contribution. Forecki v. Kohlberg, 237 Wis. 67, 295 N.W. 7 (1941); 8 APPELMAN, INSURANCE §4913 (1942). The N.Y. LAW REVISION COMM'N REP. 201-04 (1945) indicated that an insurer would "probably . . . not" be liable.

surance policy may control the issue. In *Fuller v. Fuller*[132] a provision of the policy provided: "This policy does not apply . . . (d) under Coverage A (standard bodily injury coverage clause), to bodily injury to or death of any employee of the insured . . . or to the insured or any member of the family of the insured residing in the same household as the insured." The injured parties, wife and child, obtained a joint and several judgment against husband and railroad company. Railroad company paid the judgment and issued attachment executions against the husband, naming his insurer as garnishee. On appeal it was held that the quoted exclusion clause did not allow recovery against garnishee.

From the standpoint of policy it may be desirable to deny insurance companies the right to become subrogated to their insured's contribution claims. Since the premium paid to the company is presumably full consideration for the risk of liability, subrogation would be a windfall to the company and would often allow allocation of part of the risk to a poor loss distributor. The savings, if any, on premiums paid by policyholders if subrogation were permitted is probably inconsequential.

On the other hand, from the standpoint of policy it seems desirable to seek to hold insurance companies liable to make contribution. Good loss distribution results from such a holding.

A number of procedural problems would be presented by the adoption of a contribution rule in Florida.[133] A decision would have to be made whether contribution claims would be confined to a separate action or litigated in the injured party's action. If litigation of contribution issues were permitted in the injured party's action, would a defendant have to make his contribution claim then? If the injured party were to join only one joint tortfeasor would the defendant be allowed to bring in other joint tortfeasors as third party defendants?[134] Would a contribution claimant always have to show

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[132]380 Pa. 219, 110 A.2d 175 (1955); 60 DICK. L. REV. 286 (1956).

[133]On the procedural phases of contribution see Gregory, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS (1936); *Procedural Aspects of Securing Tort Contribution in the Injured Plaintiff's Action,* 47 HARV. L. REV. 209 (1933); *Tort Contribution Practice in New York,* 20 CORNELL L.Q. 269 (1935); Tuft, *supra* note 91, at 702. The statute of limitations problem was discussed, *supra* p. 205, as was the joint judgment issue, *supra* p. 204.

[134]Florida does not permit third party practice. Florida Fuel Oil v. Spring Villas, Inc., 95 So.2d 581 (Fla. 1957); Pan American Surety Co. v. Jefferson Constr. Co., 99 So.2d 726 (3d D.C.A. Fla. 1958).

that he had paid more than his pro rata share of common liability? If so, trial of plaintiff's and defendant's claims together would not be possible unless litigation of contingent claims became possible. Moreover, a new kind of judgment would have to be rendered on a successful contribution claim tried in the injured party's action because a claimant who has not discharged his liability to the injured party would not be entitled to an executable judgment for contribution.[135] Further, the successful contribution claimant might want to appeal the judgment against him in the plaintiff's favor. And suppose on appeal that plaintiff's judgment against the successful contribution claimant is affirmed but the contingent judgment for the contribution claimant is reversed and a new trial ordered. Would plaintiff then be able to execute his judgment? It is obvious that a snakepit of procedural issues would be raised by the adoption of a contribution rule.[136]

CONCLUSION

As the law of Florida now stands the way is open to adopt contribution either by statute or by decision. Although there is a general consensus among members of The Florida Bar that contribution is not available between joint tortfeasors, the only support in the cases for this assumption are dicta.[137] In *Seaboard Air Line Ry.*

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[135]The practice in Wisconsin is to allow the successful contribution claimant to take a "contingent judgment." Walt v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926). The contingency is that judgment creditor pay more than his pro rata share of the judgment in favor of the injured party.

[136]A model statute resolving the procedural issues described in the text is set forth in GREGORY, LEGISLATIVE LOSS IN NEGLIGENCE ACTIONS 44-45 (1936). The model statute is discussed in Gregory, *Tort Contribution Practice in New York,* 20 CORNELL L.Q. 269, 278 (1935). I have by no means exhausted the issues that a contribution rule would breed. *E.g.,* conflicts of laws, Dauber, *supra* note 98, at 393; bankruptcy, Dauber, *supra* note 98, at 389; and res judicata, 1955 UNIFORM ACT §3 (f), problems would appear.

[137]The consensus of the bar is probably based on the following language of Seaboard Air Line Ry. v. American Dist. Elec. Protective Co., 106 Fla. 330, 332, 143 So. 316 (1932); "Generally, one of two joint tortfeasors cannot have contribution from the other. But there are exceptions to this rule, one of which is in that class of cases where although both parties are at fault and both liable *to the person injured* such as an employee of one of them, yet they are not in pari delicto as to each other, as where the injury has resulted from a violation of the duty which one owes the other, so that as between themselves, the act or omission of the one from whom *indemnity* is sought is the primary cause of the injury."

Co. v. American District Electric Protective Co.[138] the railroad's declaration asked full recovery for the damages it had been forced to pay an injured employee. Plaintiff's claim thus was for indemnity, which shifts all the loss; and not for contribution, which shifts only part of the loss. The decision does show that Florida will grant *indemnity* to a joint tortfeasor under some circumstances.[139] The way is open, then, for the Florida Supreme Court to hold that contribution is available among joint tortfeasors guilty only of negligence.[140]

For the reasons set forth below I recommend that Florida *not* adopt a contribution rule.

With the possible exception of cases of intentional torts, I would give little weight to traditional conceptions of fault in dealing with the contribution problem. The context in which contribution problems most often arise in Florida is the traffic accident field. The typical joint tort arising from automobile accident involves only concurrently negligent behavior. I do not believe that a court sacrifices its dignity when it lends its aid to a negligent automobile driver. So far as I can tell the extension of indemnity to negligent drivers under cover of the active-passive dichotomy has not detracted from the dignity of the courts. Nor do I believe that it is morally reprehensible to aid a negligent driver. In the typical negligence case arising out of automobile accidents moral guilt is rare. Further, the development of so many exceptions to the no-contribution rule suggests that the courts themselves do not give much weight to the notion that it is morally bad to aid a negligent tortfeasor. To the contrary, development of the last clear chance doctrine, passage of a comparative negligence

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[138]Note 137 *supra*. See also Crenshaw Bros. Produce Co. v. Harper, 142 Fla. 27, 194 So. 353 (1940); American Dist. Elec. Protective Co. v. Seaboard Air Line Ry., 139 Fla. 451, 190 So. 820 (1939); American Dist. Elec. Protective Co. v. Seaboard Air Line Ry., 129 Fla. 518, 177 So. 294 (1937). In Wolfe Constr. Co. v. Ellison, 127 Fla. 808, 174 So. 594 (1937), the no-contribution rule was used to justify a holding that an alleged joint tortfeasor found guilty by the jury could not challenge a judgment rendered on a finding by the jury that another alleged joint tortfeasor was not guilty.

[139]See also Suwannee Valley Elec. Cooperative, Inc. v. Live Oak, P. & G. R.R., 73 So.2d 820 (Fla. 1954), in which indemnity was allowed a joint tortfeasor found not to be *in pari delicto*.

[140]The judiciaries of several jurisdictions have adopted a contribution rule without the aid of statute. The District of Columbia, Minnesota, Pennsylvania (before the statute), Tennessee, and Wisconsin (before the statute) are so listed in 9 U.L.A. 14 (Supp. 1956). Twenty-two other jurisdictions have contribution statutes.

statute governing suits against railroads,[141] and the practice in many other cases of extending the aid of the courts to parties technically at fault indicates that moral evaluations have undergone a change. A new ethical conception is making its way to general acceptance and is replacing the kind of right and wrong conceptions that sustain the *in pari delicto* doctrine. This new ethic holds it is both just – because humane – and efficient – because wise policy – to adapt the laws and practices of the courts so as to minimize the losses automobile accidents produce, fairly compensate the victims of accidents that cannot be prevented, and spread the loss over all or a large part of society.[142]

I do not believe that a refined conception of fault requires that a contribution rule be adopted. Almost always contribution is granted on a ratio based on numerical equality. Under such practice contribution is not necessarily related to degree of fault. Of course contribution could be based on comparative fault. This would require, however, not only that the fault of tortfeasors be compared, but that the courts assume the often difficult administrative burden of apportioning damages.[143]

Furthermore, even a refined conception of fault seems out of place in the automobile accident context. A high percentage of the claims arising from traffic mishaps are asserted against defendants who are not at fault in any way, but only vicariously liable. The operation of Florida's dangerous instrumentality doctrine, which makes the vicarious liability of the owner of the car a virtual cinch, plus the effect of the Financial Responsibility Laws, insure that in most cases the parties ultimately paying the damages, at least to the extent of policy coverage, are insurance companies who are free of fault. Even a refined conception of fault offers no solution to the issue whether one insurance company, free of fault, should bear all the loss or be allowed to allocate part of it via contribution to another insurance company

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[141]FLA. STAT. §768.06 (1957).

[142]"[M]achinery began enormously to multiply the hazards of work and life; at the same time production and distribution came to be conducted predominantly by organized groups, the expansion of markets made possible low unit overhead costs, and we acquired more experience in the business of insurance. Gradually, we concluded it was not only unfair but inefficient to make injured individuals bear losses casually related to our new scale of economic operations when these losses might readily and painlessly be spread among those who benefitted by the operations." HURST, LAW AND THE CONDITIONS OF FREEDOM 105 (1956).

[143]The doctrines of indemnity, last clear chance, and contributory negligence show a willingness of the courts to compare fault. But these doctrines do not require damages to be apportioned. Note, 45 HARV. L. REV. 349, 354 (1930).

also free of fault. Thus, even a contribution rule based on comparative fault would not in practice insure a risk allocation in accordance with degree of fault, except in the very few cases and to the extent that a joint tortfeasor was not insured and was not acting as the representative of another.

The insurance industry has been notably lacking in enthusiasm for a contribution rule. Apparently the same is true of large self-insurers. That contribution could implement a refined conception of fault does not seem important to these, the usual defendants in tort suits. Practically, defendants of these classes can and often do secure contribution without a contribution rule by voluntary agreement to share the damages burden. If an agreement to share damages cannot be reached, the tendency for contribution claims to cancel out may minimize the importance of the lack of a contribution rule. Finally, assuming some companies have to bear a larger burden than they would under a contribution rule, the incidence of the additional burden, if it is large enough to require an adjustment of rates, may be passed on to policyholders by means of premiums charged.

I have no basis for believing that adoption of a contribution rule would minimize collusion between injured persons and one tortfeasor. To the contrary, reports to the Commissioners on Uniform State Laws "appear to agree that it (Section 5 of the 1939 Uniform Contribution Act) has accomplished nothing in preventing collusion."[144] I assume, therefore, that the collusion problem will not differ sufficiently under contribution to influence the merits of the contribution problem.

I believe that a contribution rule has little constructive to offer the cause of accident prevention. Most claims arising from traffic mishaps are based on negligence. Even assuming that the driving public would know of the contribution risk if a contribution rule were adopted, I doubt that careless driving would be deterred. The fear of serious physical injury, large damage awards, and death has not deterred many drivers from carelessness. The additional risk of a contribution claim likewise would probably have little or no effect on such drivers. Moreover, modern accident prevention studies emphasize that factors quite unrelated to the chance of legal liability are the chief causes of accidents.[145]

Adoption of a contribution rule would increase the litigation burden of Florida courts. If it is assumed that contribution would dis-

[144]1955 UNIFORM ACT §4 (b), Comm'rs Note.

[145]The literature of accident prevention is summarized in 2 HARPER and JAMES,

courage settlements, and the experience under the 1939 Uniform Contribution Act verifies the assumption[146]—then suits by injured persons would be increased. Suits by injured persons would in turn be augmented by claims for contribution. The burden of contribution claims could be minimized by adequate third party practice provisions. However, such provisions would deprive the injured party of control over the parties to the lawsuit. The consequence would be discouraging to the policy of providing adequate compensation of accident victims.

Support for the contention that contribution better conforms to popular conceptions of fairness and is more comprehensible to laymen is far from convincing. About half of the states still do not have a contribution rule of any form.[147] Further, the weight of the popularity of contribution factor is reduced to the extent that popularity rests upon vague notions of equality.

Unless a tortfeasor who purchases a partial release or a covenant not to sue is protected against contribution claims by his joint tortfeasors, part of tortfeasor's incentive to settle will be diminished. On the other hand, if protection of a settling tortfeasor against contribution can be granted only if the injured party agrees to reduce his damage claim against other joint tortfeasors to the extent of the pro rata share of the released tortfeasor, the incentive of the injured party to settle will be diminished.[148] Accordingly, in order not to diminish incentives for settlement and thus confound proper compensation of injured parties, it is desirable that a contribution rule be accompanied by a rule that a separate, good faith settlement will protect a settling tortfeasor against contribution claims.[149] Even if a tortfeasor often can secure a very cheap settlement, and conceding that he might react to such an opportunity by delaying settlement until trial, bringing other tortfeasors into the settlement, by not settling at all, or by settling and running the risk of contribution, the need to compensate victims would still require that a tortfeasor obtaining a good faith settlement be protected against contribution proceedings. Because if his response to a cheap settlement opportunity is to not settle at all, or to delay settlement, prompt and proper compensation of injured parties will not be obtained. The possibility of reducing incentives to settle, or of delaying settlements is reason enough to justify refusal

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TORTS §§11.4, 12.4 (1956).

[146]1955 UNIFORM ACT, Comm'rs Note §4(b).

[147]1955 UNIFORM ACT, Comm'rs Prefatory Note.

[148]1939 UNIFORM ACT §5.

[149]1955 UNIFORM ACT §4.

to adopt a contribution rule which does not also protect a tortfeasor settling in good faith from contribution proceedings.

Contribution would often deprive injured parties of the tactical advantage of playing tortfeasors off against each other, thereby discouraging settlements. If contribution includes a third party practice provision, injured parties will lose control over the parties to the suits and this may be reflected in the damage award.

Contribution may often be used to allocate part of the loss produced by an accident from good loss distributors to poor loss distributors. On the other hand, contribution may seldom be used to allocate loss from poor loss distributors to good loss distributors.

Subrogation of insurance carriers to the contribution claims of their insureds, if contribution were adopted, is not likely to be reflected in premium rates unless carriers are also freed from contribution claims against their insureds. The lack of support for a contribution rule by the insurance industry may indicate that they expect little advantage from contribution.

A flexible court, fully aware of the potentialities of the indemnity device, can often extend complete relief to a party whom the court believes has a meritorious contribution claim. The Florida Supreme Court has no precedents which would interfere with a flexible use of indemnity in joint tortfeasor cases.

Florida has no precedents which would preclude it from allowing contribution in the name of the several exceptions the common law developed to the no contribution rule. Availability of these conceptions reduces the need for a general contribution rule, even if the need for a contribution rule were to be assumed.

Joint tortfeasors may be able to circumvent the rule against contribution by the use of a straw-man assignment.[150] The claim of an indemnitor of a joint tortfeasor for subrogation may induce the court to find that contribution can be granted.

Finally, if adoption of a contribution rule included a procedure whereby contribution could be obtained in the injured party's action, the issues that would be raised at the trial would become so complicated that a comparative negligence statute would become undesirable.[151]

In fine, it would be unwise for Florida by statute or by decision to adopt a contribution rule.

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[150]I pass no judgment on any question of ethics that may be involved.

[151]See note 17 *supra*.

University of Florida Law Review

VOL. XI SUMMER 1958 NO. 2