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**APPORTIONMENT FROM
HOFFMAN v. JONES THROUGH THE 2011 LEGISLATIVE SESSION**

In *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973) the Florida Supreme Court abandoned the longstanding contributory negligence doctrine, replacing it with a "more equitable system of determining liability and a more socially desirable method of loss distribution." The Supreme Court's rationale was as simple as it was compelling. When the negligence of more than one person contributes to the occurrence of an accident, each should pay the proportion of the total damages he has caused the other party.

Notwithstanding this pronouncement, it took decades for the equitable principles espoused in *Hoffman* to evolve to their current position. A series of judicial and legislative reforms beginning with *Hoffman* and continuing through the legislature's 2011 session have steadily advanced Florida closer to the "most equitable result" the Supreme Court envisioned in *Hoffman*. In fact, the Florida legislature recently clarified that "crashworthiness" cases were not excepted from comparative negligence principles and that automobile manufacturers (like other defendants) must not be burdened with liability disproportionate to their relative fault.

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The **Hoffman** promises have not yet fully prevailed. In fact, there remain instances in which defendants suffer liability for the fault of others. The 2011 statutory revisions clarify the legislature's earlier intent with respect to comparative fault. The indivisible injury articulated in **Gross v. Lyons**, 763 So. 2d 276 (Fla. 2000) is outdated, inconsistent with legislative intent and ripe for judicial or legislative repeal.

Until 1973, Florida maintained the rule that a plaintiff's contributory negligence constituted an absolute bar to his tort recovery. Everything changed in **Hoffman**, which repealed that longstanding rule. The Supreme Court explored the history of contributory negligence, weighed its usefulness and ultimately abandoned it.

However, among the questions **Hoffman** left open was how comparative negligence squared with Florida's then-existing rule prohibiting contribution among tortfeasors. Eventually the Supreme Court adopted the Uniform Contribution Among Joint Tortfeasors Act, F.S. § 768.31. The Supreme Court thus maintained the judicially created doctrine of joint and several liability and rejected, "pure apportionment," which several states had already adopted.

In **Fabre v. Marin**, 623 So. 2d 1182 (Fla. 1993) the Supreme Court described **Hoffman** as "the first step toward equating liability with fault" and said that through F.S. § 768.81, the legislature had taken another step. The Supreme Court noted that "F.S. § 768.81 was enacted to replace joint and several liability with a system that requires each party to pay for non-economic damages only in proportion to the percentage of fault by which that defendant contributed to the accident."

Despite steady progress, the evolution toward true fault-based liability soon suffered setbacks in 2000 from the Supreme Court's decision in **Gross**, which held F.S. § 768.81 inapplicable when an injury is "indivisible." In **Gross**, the plaintiff claimed injuries from an automobile collision. Three months after that collision, she was in a second crash and subsequently had spine surgery.

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The defendant admitted fault in the first crash, but contended the plaintiff's injuries were either preexisting or caused by the second crash. After being instructed the plaintiff could not recover any loss caused by the second accident, the jury returned a defense verdict.

On appeal, the DCA reversed, holding that if the injuries could not be apportioned between the two crashes, the defendant was responsible for the entirety of the damages. The Supreme Court adopted this approach.

Later, in *D'Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2002), the Supreme Court held that comparative fault principles would "not ordinarily apply" in crashworthiness cases. Crashworthiness claims, also called "secondary collision" or "enhanced injury" claims, involve an initial accident with enhanced injuries allegedly caused by a product defect unrelated to the initial crash. These claims presupposed an accident but sought damages for only injuries *beyond* those which would have resulted absent the alleged defect.

In 2006, the legislature revised F.S. § 768.81, eliminating the sliding scale and making apportionment applicable to *all* economic and noneconomic damages in *all* negligence cases, including products and strict liability cases. Additionally, the legislature just recently revised F.S. § 768.81, expressly overruling *D'Amario* and requiring fact finders to "consider the fault of all persons who contributed to the accident when apportioning fault between or among them."

The 2011 amendment for "crashworthiness" cases was a significant event but the evolution is not quite complete. Among the issues which remain is judicial recognition that the 2011 amendment applies retroactively to causes of action already accrued, and judicial or legislative recognition that *Gross* and its "indivisible injury" rule are outdated and inconsistent with the legislative intent.

The 2011 amendment was a direct response to *D'Amario*. The legislature expressly stated its intent to overrule *D'Amario*,

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which it concluded led to "to inequitable and unfair results." The legislature further explained the rule adopted in *D'Amario* "fails to apportion fault for damages consistent with Florida's statutory comparative fault system, codified in F.S. § 768.81." Because of this failure to comply with the statute, the legislature made the amendment retroactively applicable.

Given the legislature's 2011 amendment expressly overruling *D'Amario*, it is time to recognize the "indivisible injury" exception which *Gross* created is equally inconsistent with the legislative commitment to fault-based liability.

The revisions made by the 2011 Florida legislature have advanced the cause in tort law as "the equation of liability with fault." Another significant advancement in the evolution will be to correct the error in *Gross*, which recognizes an indivisible injury exception.

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