

1978

Stuart v. Hertz Corp., 351 So. 2d 703 (Fla. 1977)

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Recommended Citation

Richard Gordon, *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977), 6 Fla. St. U. L. Rev. 1441 (1978) .
<https://ir.law.fsu.edu/lr/vol6/iss4/8>

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CASE COMMENT

Tort Law—INDEMNITY—ORIGINAL TORTFEASOR UNABLE TO RECOVER FOR AGGRAVATION OF PLAINTIFF'S INJURY BY NEGLIGENT ACTION OF SECOND TORTFEASOR—*Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977).

In *Stuart v. Hertz Corp.*,¹ an automobile owned by Hertz Corporation and driven by a minor, Stafford Holbrook, collided with a motor vehicle driven by Mrs. Ruth Johnson McCutcheon. Mrs. McCutcheon suffered severe orthopedic injuries in the accident and underwent surgery performed by Dr. Frank M. Stuart. Her carotid artery was accidentally severed during the surgery, causing neurological damage and disability.² Mrs. McCutcheon and her husband, Louis N. McCutcheon, filed suit against Hertz Corporation as owner of the automobile and against George Holbrook individually and as father, next friend, and guardian ad litem of Stafford Holbrook, claiming damages for injuries arising out of the accident.³

Mrs. McCutcheon's complaint alleged that as a direct result of Stafford Holbrook's negligent operation of the Hertz vehicle, she was injured about her body extremities and suffered an aggravation of a known preexisting injury. After filing their answer, the defendants filed a third-party complaint against Dr. Stuart (and his insurer) contending that all or part of Mrs. McCutcheon's injuries were the result of Dr. Stuart's negligent and unskilled medical treatment.⁴ The trial court denied Stuart's motion to dismiss the third-party complaint.⁵ The Fourth District Court of Appeal unanimously affirmed the trial court's action.⁶ The district court of appeal reasoned that under the existing facts, an initial tortfeasor causing the

1. 351 So. 2d 703 (Fla. 1977).

2. *Id.* at 704.

3. *Stuart v. Hertz Corp.*, 302 So. 2d 187, 188 (Fla. 4th Dist. Ct. App. 1974), *quashed & remanded*, 351 So. 2d 703 (Fla. 1977).

4. *Id.* at 188-89.

The third party complaint filed by Hertz sought indemnification from Dr. Stuart for his alleged acts of negligence as follows:

"9. That the Third Party Plaintiffs contend that whatever responsibility for damages, if any, may be ultimately determined by a jury would be limited to an orthopedic disability and that the Third Party Defendants are liable for any damages for neurological damages caused by Dr. Stuart's negligence; that the Third Party Plaintiffs are only secondarily liable for the neurological damages and are but passive tortfeasors and as such are entitled to indemnification from the active tortfeasor, DR. FRANK STUART."

Id. at 189.

5. *Id.* at 188.

6. *Id.* at 194.

plaintiff's injury had the right to seek indemnification against a physician for aggravating an injury in the course of treatment.⁷

The Supreme Court of Florida granted conflict certiorari.⁸ The court quashed the decision of the Fourth District Court of Appeal and remanded the case with instructions to grant the doctor's motion to dismiss the third-party complaint.⁹

In a case of first impression in Florida, the central issue was whether a tortfeasor in an automobile accident could bring a third-party action for indemnity against a physician for damages directly attributable to malpractice which aggravated the plaintiff's injuries.¹⁰ The court concluded that such an action could not be brought.¹¹ To hold otherwise, the court reasoned, would alter traditional indemnity law in Florida. It would constitute adoption of a doctrine of partial equitable indemnification between active tortfeasors.¹²

The *Stuart* court feared that third-party indemnity actions of this character would expand the concept of indemnity to the point of making it indistinguishable from contribution.¹³ Moreover, the court reasoned that to allow an active tortfeasor to seek indemnification from a subsequent physician tortfeasor would obfuscate the issue of liability by encouraging original tortfeasors to complicate and prolong litigation through filing third-party malpractice actions.¹⁴ The court believed that embracing such a doctrine would force seriously injured plaintiffs to litigate complex malpractice suits concurrently in order to proceed with personal injury com-

7. *Id.* The court stated: "[T]here is an equitable right to indemnity under certain factual considerations and particularly under the facts present in the case sub judice; a tortfeasor initially causing an injury has the right to seek indemnification against the physician for aggravating injury [sic] in the course of treatment."

8. The court granted conflict certiorari because of a decisional conflict with the holding of the Third District Court of Appeal in *Mathis v. Virgin*, 167 So. 2d 34 (Fla. 3d Dist. Ct. App. 1964). Article V, § 3(b) of the Florida Constitution provides:

The supreme court:

(3) May review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, that passes upon a question certified by a district court of appeal to be of great public interest, or that is in direct conflict with a decision of any district court of appeal or of the supreme court on the same question of law, and any interlocutory order passing upon a matter which upon final judgment would be directly appealable to the supreme court; and may issue writs of certiorari to commissions established by general law having statewide jurisdiction.

9. 351 So. 2d 703.

10. *Id.* at 704.

11. *Id.* at 705.

12. *Id.* at 706.

13. *Id.*

14. *Id.*

plaints. The court also feared an undermining of the patient-physician relationship.¹⁵

The *Stuart* court followed the Arizona case of *Transcon Lines v. Barnes*.¹⁶ In that case, a wrongful death action was brought against the owner and driver of a truck which had collided with an automobile in which the decedent was a passenger. Although the decedent suffered only back and neck injuries as a result of the accident, she later died of bronchopneumonia—forty-nine days after being placed in the care of a physician.¹⁷ The trucking company filed a cross-complaint for indemnity against the doctor and other medical attendants, stipulating to its negligence in causing the auto accident but expressly denying any liability for wrongful death.

Following a verdict against the trucking company and the physician, the trial court dismissed the cross-claim for indemnity. The Court of Appeals of Arizona affirmed the trial court's decision.¹⁸ The court concluded that the liability of Transcon Lines stemmed from its performance of a negligent act which resulted in injuries to the decedent. These injuries resulted in death when combined with the negligent medical treatment. This was found to be a foreseeable risk flowing from Transcon's original negligence.¹⁹

The *Transcon* court reasoned that since indemnity is an all-or-nothing proposition in terms of damages, it should be an all-or-nothing proposition in terms of fault.²⁰ The court concluded that indemnity between tortfeasors should be allowed only when the whole of the fault is in the one against whom indemnity is sought. Thus, since Transcon Lines was not without fault, it was not entitled to indemnity.²¹

Both Chief Justice Overton and Justice Boyd dissented when this same reasoning was employed by the majority in *Stuart*.²² Justice Boyd concurred with Justice Adkins' opinion that an original tortfeasor should not be permitted to join treating physicians in suits for damages without the permission of the injured plaintiff. He dis-

15. *Id.*

16. 498 P.2d 502 (Ariz. Ct. App. 1972).

17. *Id.* at 503.

18. *Id.*

19. *Id.* at 508.

20. *Id.* at 509.

21. *Id.* at 504. The *Transcon* court also relied substantially on RESTATEMENT (SECOND) OF TORTS § 457 (1965), which provides:

If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner.

22. 351 So. 2d at 707-08.

sented, however, from the majority view that an active tortfeasor should not be allowed to shift an equitable portion of an adverse judgment to others who caused or increased the injuries or damages.²³

Chief Justice Overton also wrote a strong dissent, pointing out that indemnity is a proper remedy when others have been compelled to pay damages which should have been paid by the wrongdoer. He contended that one tortfeasor should not be held responsible for all the plaintiff's injuries without the right of indemnification for the identifiable consequences of another's wrong.²⁴ Overton relied substantially on the reasoning of the California First District Court of Appeal in *Herrero v. Atkinson*²⁵ and that of the Illinois Supreme Court in *Gertz v. Campbell*²⁶ to conclude that an indemnity action by the original tortfeasor against the physician was an appropriate remedy when the negligent tortfeasor was liable for damages directly attributable to the physician's malpractice.

In *Herrero*, plaintiff Alice Lorenzo was severely injured in an automobile accident due to defendant Herrero's negligence. About eighteen months later, she entered the hospital for surgery made necessary by the accident. Lorenzo died during the operation because of the negligence of hospital personnel in administering a blood transfusion. The plaintiff's estate filed a wrongful death action against Herrero, who then filed a cross-complaint for declaratory relief and indemnity against the doctors and the hospital.²⁷

On appeal, the California First District Court of Appeal reversed the trial court's dismissal of the cross-complaint. The court concluded that Herrero should have been allowed the indemnity he sought. The court ruled that the hospital and doctors should bear that portion of the damages caused by their own negligent conduct.²⁸ The court noted that the original negligence of Herrero could be regarded as the proximate cause of the damages flowing from the subsequent malpractice of the cross-defendants and that the plain-

23. *Id.* at 707. Justice Boyd, in his dissent, concluded that although Hertz Corporation would not be allowed to join Dr. Stuart as a third-party defendant, it should be permitted to allege and prove any malpractice and have the judgment amount reduced to the extent that the malpractice contributed to the total amount of damages. Justice Boyd reasoned further that it was fundamentally unfair and unjust to require Hertz or the Holbrooks to pay for the doctor's negligence. He felt that although his opinion might conflict with existing legal concepts regarding indemnity, it followed the ancient common law principle that each person must be accountable for his own misconduct.

24. *Id.* at 708.

25. 38 Cal. Rptr. 490 (1st Dist. Ct. App. 1964).

26. 302 N.E.2d 40 (Ill. 1973).

27. 38 Cal. Rptr. at 492.

28. *Id.* at 494.

tiff could recover jointly and severally against all parties found liable.²⁹ The court felt, however, that there was no reason why the ultimate burden of damages should not be distributed among the various defendants under equitable principles.³⁰

In the Illinois case, *Gertz*, the plaintiff, a minor, was struck by a negligent motorist while standing on the shoulder of a road. The motorist later filed a third-party complaint against the treating physician, contending that the physician's negligence and malpractice had resulted in amputation of the plaintiff's right leg. Although the trial court dismissed the third-party action, an appellate court reversed, and the Illinois Supreme Court agreed with the appellate court's holding that the motorist had a right to bring the action for indemnity for damages attributable to malpractice.³¹

The *Gertz* court maintained that what the negligent motorist sought was "not repugnant" to the notion of indemnity.³² The court held that the defendant was not seeking to pass on any consequences of his own fault but was merely asserting that he should not be required to bear the burden of consequences flowing solely from the physician's malpractice. The court reasoned that if the motorist were precluded from seeking indemnity from the doctor, the result would be an indefensible enrichment of the doctor at the expense of the motorist.³³ Moreover, since the defendant had no control over the selection of the doctor or his subsequent conduct, the court felt that there was nothing he could have done to prevent the independent negligence of the physician. Thus, the motorist had a right to be indemnified for those damages proximately caused by the malpractice.³⁴

Florida has traditionally followed the common law rule that a tortfeasor is responsible for all injuries which flow naturally from the original tortious act.³⁵ That rule, as stated by the Florida Supreme Court in *J. Ray Arnold Lumber Corp v. Richardson*,³⁶ provides that an original tortfeasor is liable for all injuries to the plaintiff, including even those aggravated or increased through the negligence of a treating physician.³⁷ This rule is followed by a majority of jurisdic-

29. *Id.* at 493.

30. *Id.* For further discussion of *Herrero*, see Annot., 8 A.L.R.3d 629 (1970).

31. 302 N.E.2d at 45.

32. *Id.* at 44.

33. *Id.* at 45.

34. *Id.* See also Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 146-47 (1932).

35. 302 So. 2d at 190.

36. 141 So. 133 (Fla. 1932).

37. *Id.* at 135. The court also stated:

tions.³⁸

It should be emphasized that adoption of a third-party indemnification practice in *Stuart* would not have altered this traditional concept of tort recovery. Instead, indemnification would simply provide one tortfeasor with the means to be compensated or indemnified for those clearly identifiable consequences of another's wrong. In his dissent in *Stuart*, Chief Justice Overton pointed out that Hertz's third-party complaint against Dr. Stuart did not disturb the existing Florida law that a tortfeasor remains responsible for all injuries which flow from the original tortious act. In addition, the chief justice said that he would have reaffirmed the holding of the Florida Supreme Court in *J. Ray Arnold Lumber Corp.*³⁹

As asserted by the California First District Court of Appeal in *Herrero* and by the Fourth District Court of Appeal in *Stuart*, a third-party complaint such as Hertz's does not alter a plaintiff's right to sue whom he chooses and to recover against any one or all of the defendants he names who are ultimately found liable.⁴⁰ The plaintiff is not concerned with the claims of the named defendants against one another or the claims of the defendant against third parties. Regardless of any distribution of liability among the defendants through indemnification, a plaintiff may satisfy his judgment against one or all of the tortfeasors he sues who are found liable.⁴¹

A reading of rule 1.180 of the Florida Rules of Civil Procedure, which relates to third-party practice, and a review of the commentaries which have discussed that rule, indicate that the present third-party procedure is available in situations involving reimbursement or indemnification. Rule 1.180 provides in part:

The rule in such cases is as follows:

"Where one who has suffered personal injuries by reason of the negligence of another exercises reasonable care in securing the services of a competent physician or surgeon, and in following his advice and instructions, and his injuries are thereafter aggravated or increased by the negligence, mistake, or lack of skill of such physician or surgeon, the law regards the negligence of the wrongdoer in causing the original injury as the proximate cause of the damages flowing from the subsequent negligent or unskillful treatment thereof, and holds him liable therefore."
Texas & Pacific Ry. Co. v. Hill, 237 U.S. 208 . . . [1915].

Id.

38. See, e.g., *Chicago City Ry. v. Saxby*, 72 N.E. 755 (Ill. 1904). See also W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 44, at 278 (4th ed. 1971). This rule has also been stated in 57 AM. JUR. (SECOND) *Negligence* § 149, at 507, as follows: "[A] wrongdoer is liable for the ultimate result, although the mistake or even the negligence of the physician who treated the injury may have increased the damage which would otherwise have followed from the original wrong."

39. 351 So. 2d at 708.

40. 302 So. 2d at 187.

41. *Id.* at 189.

(a) **When Defendant May Bring in Third Party.** At any time after commencement of the action a defendant as a third party plaintiff may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.⁴²

The editor of *Florida Civil Practice Before Trial* points out:

Third party practice is the procedure available to a defendant (or counter-defendant or third party defendant) to join a person who is not a party to the action in circumstances arising out of the same set of facts when the added party is or may be liable to compensate, reimburse or indemnify the defendant for the plaintiff's claim.⁴³

Consider these principles as they relate to the facts in *Stuart*. We are presented with a defendant who has been charged with tortious conduct giving rise to multiple and diverse personal injuries to the plaintiff. Under Florida law, that defendant is held responsible for any damages flowing from his original negligent act.⁴⁴ This defendant, however, by way of a third-party action, seeks indemnification from another alleged wrongdoer who may be liable to the original defendant for all or a portion of the plaintiff's claim.⁴⁵ This right to indemnification depends on the principle that everyone is responsible for the consequences of his own wrong, and, if others have been compelled to pay damages which ought to have been paid by the wrongdoer, they may recover from him.⁴⁶ Hence, a treating physician who aggravates or causes independent injuries through his own negligence should be liable to the original tortfeasor who has been compelled to pay the total amount of the plaintiff's damages.

Florida appellate courts have recognized by three distinct theories the right of a tortfeasor to seek indemnification from another tortfeasor.⁴⁷ The Third District Court of Appeal has permitted indemnification when it was predicated on the existence of an express contract to indemnify.⁴⁸ The Florida Supreme Court has allowed in-

42. FLA. R. CIV. P. 1.180.

43. THE FLORIDA BAR, CONTINUING LEGAL EDUCATION, FLORIDA CIVIL PRACTICE BEFORE TRIAL § 26.2 (3d ed. 1975).

44. *J. Ray Arnold Lumber Corp. v. Richardson*, 141 So. 133.

45. *Chappell v. Scarborough*, 224 So. 2d 791 (Fla. 1st Dist. Ct. App. 1969).

46. See generally Comment, *Indemnity Among Joint Tortfeasors*, 43 MISS. L.J. 670 (1972); Note, *Contribution and Indemnity Among Tortfeasors*, 31 MONT. L. REV. 69 (1969).

47. See *Olin's Rent-A-Car Sys., Inc. v. Royal Continental Hotels*, 187 So. 2d 349 (Fla. 4th Dist. Ct. App. 1966); *Fincher Motor Sales, Inc. v. Lakin*, 156 So. 2d 672 (Fla. 3d Dist. Ct. App. 1963). See generally *Stuart v. Hertz Corp.*, 302 So. 2d 187.

48. *Mims Crane Serv., Inc. v. Insley Mfg. Corp.*, 226 So. 2d 836 (Fla. 2d Dist. Ct. App.

demnity when it was based on the violation of a duty between tortfeasors.⁴⁹ Under this concept of indemnity, both tortfeasors are at fault and both are potentially liable to the person injured, even though they are not in *pari dilecto*.⁵⁰

In addition, the First District Court of Appeal has recognized a principle of indemnity based on the degree of wrongful conduct between multiple tortfeasors.⁵¹ This concept of indemnity comes into play when the active negligence of one tortfeasor and the passive negligence of another combine and proximately cause an injury to a third party. The passively negligent tortfeasor who is compelled to pay damages is entitled to indemnity from the actively negligent tortfeasor.⁵²

At this point it is important to recognize the basic distinction between contribution and indemnity. Contribution involves a distribution of loss among joint tortfeasors by requiring each to pay a proportionate share based on his degree of responsibility.⁵³ In contrast, indemnity shifts the burden of liability from one tortfeasor who has been compelled to pay damages to another tortfeasor whose actions were completely independent.⁵⁴

The *Holbrooks* and *Dr. Stuart* were not joint tortfeasors. There was no concert of action in their conduct. Neither had control over the acts of the other. Thus, the recent holding of the Supreme Court of Florida in *Lincenberg v. Issen*,⁵⁵ which abolished the rule against contribution between joint tortfeasors, has little applicability to this case. Contribution was not an issue in *Stuart*.

However, the rationale used by the court to end the ban on contribution in *Lincenberg* is consistent with allowing a third-party indemnity action in *Stuart*. In *Lincenberg*, the court emphasized the unfairness and injustice of placing the entire burden on the party who happens to be called on to pay the damages when payment should be shared by another who was partly responsible for the

1969). In *Mims*, the court stated: "Although it has been said that the right to indemnity springs from a contract, express or implied, the modern cases note that contract furnishes too narrow a basis, and the principles of equity furnish a more satisfying basis for indemnity." *Id.* at 839 (quoting 41 AM. JUR. (SECOND) *Indemnity* § 2 (1968)).

49. *Seaboard Air Line Ry. v. American Dist. Elec. Protective Co.*, 143 So. 316 (Fla. 1932).

50. For a clear statement of this rule, see *Fidelity & Cas. Co. v. Northwestern Tel. Exch. Co.*, 167 N.W. 800 (Minn. 1918).

51. *Winn-Dixie Stores v. Fellows*, 153 So. 2d 45, 49 (Fla. 1st Dist. Ct. App. 1963).

52. See also *Chicago & Ill. M. Ry. v. Evans Constr. Co.*, 208 N.E.2d 573 (Ill. 1965).

53. See 18 AM. JUR. (SECOND) *Contribution* § 2 (1968).

54. See 41 *id.* *Indemnity* § 3.

55. 318 So. 2d 386 (Fla. 1975). See also Note, *Contribution and Indemnity in California*, 57 CALIF. L. REV. 490, 516 (1969).

injury.⁵⁶ Fairness and justice would seem to dictate the same reasoning in *Stuart*.

The problem encountered by the Florida Supreme Court in *Stuart* was that the third-party complaint filed by Hertz did not fit neatly within any of the previously recognized tests: neither the express contract test, the duty test, nor the active-passive test. It is clear that there was no express or implied contract between Hertz and Dr. Stuart. Nor can it be said that Dr. Stuart breached any duty owed to Hertz. Furthermore, Hertz could not effectively assert that its negligence, which gave rise to the original injury to Mrs. McCutcheon, was passive or secondary, while Dr. Stuart's negligence was active or primary. Moreover, Hertz did not appear to be attempting to shift its entire loss to Dr. Stuart (as is ordinarily the case in indemnification), but instead was seeking indemnification for whatever damages it would be compelled to pay as a result of Dr. Stuart's negligence.⁵⁷

Despite the aversion of the Florida Supreme Court to third-party actions of this type, courts in other jurisdictions have recognized the right of indemnification for the aggravation of injuries to the plaintiff by a subsequent tortfeasor when equity so dictates. Consistently with the decisions in both *Gertz* and *Herrero*, the Court of Appeals of New York has ruled recently that where a third party is found to have been responsible for a part, but not all, of the damages for which a defendant is held liable in negligence, the damages attributable for that part are recoverable by the primary defendant.⁵⁸

A number of other courts have also permitted third-party actions by the original tortfeasor against a physician who aggravated the plaintiff's injury on a theory of subrogation.⁵⁹ A third-party action

56. The court in *Lincenberg* also used the language of *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973), in which the court adopted the doctrine of comparative negligence for Florida. In *Hoffman*, the court said that contemporary conditions must be met with contemporary standards which are realistic and better calculated to obtain justice among all the parties involved. The court said: "Whatever may have been the historical justification for it, today it is almost universally regarded as unjust and inequitable to vest an entire accidental loss on one of the parties whose negligent conduct combined with the negligence of the other party to produce the loss." *Id.* at 436.

57. 302 So. 2d at 192.

58. *Dole v. Dow Chem. Co.*, 282 N.E.2d 288 (N.Y. 1972). In *Dow*, an employee of a milling company died while cleaning his employer's grain storage bin which only recently had been fumigated with a poisonous substance manufactured by a chemical company. The decedent's estate sued the chemical company for negligence in failing to label the fumigant properly. The chemical company then asserted its own right of recovery against the employer grain company for breach of an independent duty to its employee. The court held that the chemical company was entitled to maintain a third-party complaint against the employer for apportionment of the total wrongful death damages.

59. *Clark v. Halstead*, 93 N.Y.S.2d 49 (App. Div. 1949). For further discussion of *Clark*,

of this kind is premised on the theory that the original tortfeasor is subrogated to any right of action which the injured person may have had against the physician for malpractice.⁶⁰

The holding in *Stuart* apparently represents an attempt by the Florida Supreme Court to restrict the doctrine of indemnification to those inflexible outlines which Florida courts have relied on in the past. The evident judicial policy is based on artificial distinctions and frustrates the achievement of just and equitable solutions in matters involving multiple tortfeasors. The *Stuart* decision, with its reliance on the archaic pronouncements in *Transcon*, is inconsistent with the recognized goals in tort law of equitable loss-sharing by all wrongdoers, effective loss distribution over a large segment of society, and rapid compensation to an injured plaintiff.⁶¹

Moreover, the court's insistence that such third-party actions will cloud the issues in the injured party's complaint totally ignores the need for judicial economy in settling all matters arising out of the same transaction in one combined proceeding. It ignores as well the policy which favors promoting settlements out of court. In addition, there is no equitable justification for recognizing a right of defendants to seek contribution from each other on the basis of their apportioned faults while denying that right to an initial tortfeasor whose liability for damages is increased by the actions of a subsequent party acting on his own.⁶² As Justice Dekle remarked in his special concurrence in *Ward v. Ocha*,⁶³ relating to Florida's comparative negligence rule:

In the present posture of the matter, for "equal justice" on a comparative basis, any involved party should be brought into the matter in such position as he actually appears, and the limitation on our own Florida third party practice which stands in the way of this should be revamped accordingly The object is to have a full and fair evaluation by the jury of the extent of each party's actual liability.⁶⁴

Finally, the denial of a right of indemnification under the circum-

see 49 MICH. L. REV. 292 (1950). See generally Annot., 8 A.L.R.3d 639 (1966). See also *Greene v. Waters*, 49 N.W.2d 919 (Wis. 1951).

60. *Fisher v. Milwaukee Elec. Ry. & Light Co.*, 180 N.W. 269 (Wis. 1920). In *Fisher*, the court held that a railway company whose original negligence caused the fracture of an employee's wrist was entitled to subrogate part of its loss from a treating physician who had set the fracture so negligently as to cause partial loss of the use of the arm.

61. See *Contribution and Indemnity in California*, supra note 55.

62. *Lincenberg v. Issen*, 318 So. 2d at 390.

63. 284 So. 2d 385 (Fla. 1973).

64. *Id.* at 388 (footnote omitted).

stances in *Stuart* is simply not in keeping with modern societal values.⁶⁵ Nothing in the *Stuart* decision indicates that the various defendants (neither Hertz nor the Holbrooks) played any part in the selection of either Dr. Stuart or the hospital where he negligently performed the operation. Also, there is no indication that the defendants had even the slightest opportunity to protect themselves against the doctor's negligence. Yet both defendants have been held liable at law for the damages resulting from Dr. Stuart's negligence.

There is no logical reason why the ultimate burden of damages should not be distributed equitably among the various defendants. The determining factor in such cases should be fairness.⁶⁶ And the outcome in *Stuart* is simply not fair.

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65. See also Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517 (1952).

66. See Leflar, *supra* note 34.

