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The Fault with Comparative Fault: The Problem of Individual Comparisons in a Modified Comparative Fault Jurisdiction

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Abstract
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Keywords
Contributory negligence, vicarious liability, unit rule, combination rule, torts, modified comparative fault, joint and several liability

Disciplines
Torts
THE FAULT WITH COMPARATIVE FAULT: THE PROBLEM OF INDIVIDUAL COMPARISONS IN A MODIFIED COMPARATIVE FAULT JURISDICTION

MICHAEL K. STEENSON†

Minnesota courts have interpreted the Minnesota Comparative Fault statute as requiring comparison of a plaintiff's negligence with the individual negligence of each defendant. Exceptions to this rule involve joint venture cases. This Article examines the individual comparison rule and explores an alternative rule which provides for a comparison of the plaintiff's negligence with the aggregate negligence of the defendants.

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INTRODUCTION

In 1969, Minnesota adopted a comparative negligence statute modeled after the Wisconsin statute. It provided that a plaintiff’s contributory negligence would not be a bar to recovery unless the plaintiff’s negligence was equal to or greater than the negligence of the person from whom recovery was sought. In multiple party litigation, the Minnesota Supreme Court interpreted the statute to require comparison of the plaintiff’s negligence with the individual negligence of each defendant, rather than with the combined negligence of the defendants as a unit. The only situation where the court compared the plaintiff’s negligence with the aggregate negligence of the defendants was when the defendants engaged in a joint venture.

In 1978, the Minnesota Legislature amended the comparative negligence statute, converting it into a comparative fault statute with new rules of loss reallocation. The supreme court has continued to recognize the individual comparison rule, yet it has also expanded the aggregate comparison rule to include not only joint ventures, but also other joint duty cases.

The individual comparison rule, coupled with the reality of multiple party tort litigation, creates problems because of its rigidity. The current approach, which liberalizes the rule only if a joint duty is present, is ill-suited to resolve the variety of situations which may justify aggregation of fault.

The focus of this Article is on the individual comparison rule, with a particular emphasis on Minnesota law. The Article will first establish the differences between the unit and individual comparison rules, as well as explain the policy justifications for the rules. The Article will then examine the Minnesota comparative fault background, with a detailed look at the legislative history behind the 1978 amendments to the comparative fault statute. Then, assuming that the basic rule is the individual comparison rule, the Article will examine a variety of situations where application of a unit rule exception may be justified. Finally, the author suggests that the legislature amend the comparative fault statute and incorporate a unit rule for all indivisible hazard cases.
I. Modified Comparative Fault: The Individual Comparison Rule and the Unit or Combination Rule - Setting the Stage

Most of the debates over comparative fault forms have focused on pure versus modified comparative fault. Once the decision is made to adopt modified comparative fault, the focus of the courts and legislatures is on whether to adopt an individual comparison or to adopt a unit or combination rule. The courts usually make this decision by interpreting the legislative intent and the policies that influenced the decision.

The policy arguments for each rule are based primarily on the argued unfairness that would result from the alternative rule. The unit or combination rule (unit rule) has been criticized because it frequently results in harshness and injustice. The typical case involves one plaintiff and two defendants, with the plaintiff more at fault than one of the defendants. For example, assume that the plaintiff is twenty-five percent at fault, defendant one is ten percent at fault, and defendant two is sixty-five percent at fault. If defendant two is unable to pay because of insolvency, then defendant one, ten percent at fault and less at fault than the plaintiff, must pay the plaintiff several

1. There are four types of comparative fault:
   (1) the slight-gross form (recovery only if plaintiff's negligence was slight in comparison to defendant's); (2) the even division form (dividing the damages evenly or pro-rata among the parties); (3) one of the two modified forms (plaintiff can recover reduced damages if his negligence was either (a) "not as great as" or (b) "not greater than" that of defendant); (4) the "pure form" (diminished recovery allowed even though plaintiff's negligence is greater than that of defendant).


Courts adopting the pure form of comparative fault assert that the modified systems distort the very principle of comparative fault; specifically, "persons are responsible for their acts to the extent their fault contributes to an injurious result." Li v. Yellow Cab Co., 13 Cal. 3d 804, 824, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975).

2. See, e.g., Mountain Mobile Mix, Inc. v. Gifford, 660 P.2d 883, 885-90 (Colo. 1983) (en banc) (unit rule of comparing negligence best furthers policy of compensating plaintiff when plaintiff is less than 50% at fault); Wong v. Hawaiian Scenic Tours, Ltd., 64 Hawaii 404-05, 642 P.2d 930, 932-33 (1982) (court adopted unit rule stating Wisconsin's individual comparison rule is contrary to spirit and policy of Hawaii laws); Odenwalt v. Zaring, 102 Idaho 1, 4-5, 624 P.2d 383, 387-88 (1981) (individual comparison rule is law of Idaho since legislature intended to adopt Wisconsin's individual comparison rule); Jensen v. Intermountain Health Care, Inc., 679 P.2d 903, 908 (Utah 1984) (under Utah Comparative Negligence Act, total negligence of all defendants should be compared with that of plaintiff).
enty-five percent of the damages.\textsuperscript{3}

The response to this criticism is that the outcome is not a function of comparative fault, but rather, it is a function of the rule of joint and several liability.\textsuperscript{4} The main concern in individual comparison situations is that a defendant, who is only slightly at fault, may bear a disproportionate share of the liability if the primary defendant’s share of the judgment becomes uncollectible.\textsuperscript{5} For example, in a case where the plaintiff is ten percent at fault, defendant one is fifteen percent at fault, and defendant two is seventy-five percent at fault, if defendant two is unable to pay its share of the judgment, then defendant one will be liable for ninety percent of the plaintiff’s damages, even though only fifteen percent at fault.\textsuperscript{6}

The unit rule is also criticized because it permits a plaintiff who is less at fault than the cumulative fault of the defendants, but more at fault than each defendant, to recover against each of the defendants. A plaintiff is not entitled to recover against a single defendant if the plaintiff is more at fault than that defendant. The argument is premised on the belief that it is inconsistent to permit the plaintiff to recover against those defendants when the plaintiff is not entitled to recover against

\textsuperscript{3} See Odenwalt, 102 Idaho at 5, 624 P.2d at 387-89 (court stated unit rule unjust because if “the [defendant] was unable to obtain contribution . . . he would wind up paying the great majority of the damages of a plaintiff whose negligence is two 1/2 times greater than his own.”).

\textsuperscript{4} See Mountain Mobile Mix, 660 P.2d at 889 (“The unfairness that accrues when one tortfeasor is impecunious is a consequence of the doctrine of joint and several liability and not of the combined comparison rule we have adopted.”); Jensen, 679 P.2d at 909-10 n.3.

\textsuperscript{5} See Jensen, 679 P.2d at 909-10 n.3.

\textsuperscript{6} See id.
a single defendant who is less at fault. Courts adopting the unit rule find no such inconsistency.

The criticisms of the individual comparison rule are more varied. The rule is criticized because it reintroduces contributory negligence as a complete defense in a variety of situations where there are multiple defendants. If the purpose of a fifty percent cutoff rule is to deny recovery to a plaintiff who is equally at fault in causing his own injuries, it is arguably inconsistent to make the plaintiff’s right to recovery dependent upon the number of defendants. The problem is compounded if the jurisdiction requires the fault of absent persons to be considered in the apportionment of fault.

The rule is also criticized because it is inconsistent with the rules governing contribution claims. A defendant more at fault than a co-defendant is entitled to recover contribution from that defendant. A plaintiff more at fault than a defendant, however, is not permitted to recover from that defendant under the individual comparison rule.

Legislatures and courts have opted either for the unit rule or the individual comparison rule. If the individual comparison rule is adopted, then only a limited exception to the rule is

7. See Odenwalt, 102 Idaho at 5, 624 P.2d at 387.
8. See Jensen, 679 P.2d at 909.
9. See Mountain Mobile Mix, 660 P.2d at 888.
10. See id.
11. See Negley v. Massey Ferguson, Inc., 229 Kan. 465, 472, 625 P.2d 472, 477 (1981) (stating that the fault of a party who has immunity should “be considered in determining the other defendants’ percentage of fault and liability.”); Lines v. Ryan, 272 N.W.2d 896, 902-03 (Minn. 1978) (citing Connar v. West Shore Equip. of Milwaukee, Inc., 68 Wis. 2d 42, 45, 227 N.W.2d 660, 662 (1975)) (when apportioning negligence, a jury must have opportunity to consider negligence of all parties to the transaction).
13. See, e.g., Odenwalt, 102 Idaho at 10, 624 P.2d at 392 (Bistline, J., dissenting). “Idaho’s comparative negligence law is premised on the proposition that a plaintiff whose damages are as much the result of its own negligence as that of the defendant ought not to recover, but the parties should bear their own losses.” Id.
recognized. As the Wisconsin Supreme Court held in *Reber v. Hanson*, there must be individual comparisons of the fault in multiple party cases, except in situations where "the duty [involved] was joint, the opportunity to protect was equal, and as a matter of law neither the obligation nor the breach of it was divisible."

The legislative and judicial experience with comparative negligence and fault in Minnesota is similar to the experience in other states. The Minnesota Supreme Court interpreted the comparative negligence statute to require individual comparisons of negligence. Legislative attempts to adopt a unit or combination rule in 1978 and 1985 failed, thereby leaving the individual comparison rule as the primary rule in Minnesota. The only clear exception to the rule is the joint duty exception. The next section examines the Minnesota history in greater depth.

II. THE MINNESOTA BACKGROUND

A. Judicial Adoption of Comparative Negligence

In 1969, Minnesota adopted a comparative negligence statute. Subdivision one of section 604.01 of the statute read as follows:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering. . . . When there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each, provided, however, that each shall remain jointly

14. 260 Wis. 632, 51 N.W.2d 505 (1952).
15. *Id.* at 638, 51 N.W.2d at 508.
17. *See infra* notes 41-50 and accompanying text.
18. *See infra* notes 51-60 and accompanying text.
and severally liable for the whole award.\textsuperscript{21} The first case in which the Minnesota Supreme Court considered whether the statute required individual or aggregate comparisons of fault was \textit{Krengel v. Midwest Automatic Photo, Inc.}\textsuperscript{22} The plaintiff in \textit{Krengel} injured her ankle when she tripped on the riser of an automatic photo booth in a dime store. She brought suit against the dime store, the photo booth manufacturer, and the installer/servicer of the machine. The jury apportioned thirty percent of the fault to the plaintiff, thirty percent to the dime store, thirty percent to the manufacturer, and ten percent to the machine installer/servicer.\textsuperscript{23}

The court stated that the facts of the case indicated "a common or joint duty to protect [the plaintiff], if not, in fact, a joint enterprise."\textsuperscript{24} The court found that the prerequisites of a joint venture were met, making the members of the venture indistinguishable for liability purposes:

As in many cases, here the whole is greater than the sum of its parts. Defendants undertook a common purpose, to install and maintain the booth and to extract a profit from the selling of photos. The resulting common duty and joint opportunity to protect customers translates into equal and overall liability.\textsuperscript{25}

\begin{flushright}
\textsuperscript{22} 295 Minn. 200, 203 N.W.2d 841 (1973).
\textsuperscript{23} \textit{Id.} at 202, 203 N.W.2d at 843.
\textsuperscript{24} \textit{Id.} at 209, 203 N.W.2d at 847.
\textsuperscript{25} \textit{Id.} at 210, 203 N.W.2d at 847. The court has not always clearly distinguished between joint ventures and joint enterprises. In \textit{Delgado v. Lohmar}, 289 N.W.2d 479 (Minn. 1980), however, the court clarified the distinctions. The plaintiff in \textit{Delgado} was accidentally blinded by a shot fired by a member of a hunting party that was on the plaintiff's property without his knowledge or consent. \textit{Id.} at 482.

The defendant who fired the shot settled with the plaintiff. One of the issues in the case was whether the fault of that defendant could be imputed to the other members of the hunting party. Another issue was whether the defendants in the hunting party were engaged in a joint enterprise so that the fault of the defendant who fired the shot should have been imputed to the other defendants in the party. The court stated that two elements are necessary for a joint enterprise. "(1) a mutual undertaking for a common purpose, and (2) a right to a voice in the direction and control of the means used to carry out the common purpose." \textit{Id.} at 482. The court distinguished joint ventures in a footnote, noting that a joint venture arises in business transactions. The four elements for a joint venture are: "(1) contributions by all parties, (2) joint proprietorship and control, (3) sharing of profits but not necessarily of losses, and (4) a contract." \textit{Id.} at 482 n.2.

The joint venture standards were inapplicable in \textit{Delgado}. Applying the joint enterprise standards, the court concluded that no joint enterprise was established\end{flushright}
As a result, the plaintiff was entitled to recover seventy percent of her damages from the jointly liable defendants.

In *Marier v. Memorial Rescue Service, Inc.*,\(^2^6\) the court made clear its intention to adhere to the limited exception for aggregate comparisons of fault established in *Krengel*. *Marier* was a three vehicle collision involving a truck, an ambulance, and a car. The plaintiff—the driver of the car, and the two defendants were each found to be one-third at fault.\(^2^7\) The comparative negligence statute barred recovery if the plaintiff's negligence was equal to or greater than the negligence of the defendant and the plaintiff's negligence was equal to the negligence of each defendant. Consequently, the court held that the plaintiff was barred from recovery.\(^2^8\) In so holding, the court refused to extend the unit rule to cases not meeting the joint liability standards established in *Krengel*.\(^2^9\) In reaching its conclusion, the *Marier* court followed Wisconsin law, which required individual comparisons of fault, rather than the approach of the Arkansas Supreme Court in *Walton v. Tull*,\(^3^0\) where the court required aggregate comparisons of fault.\(^3^1\)

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under the facts of the case, because the group of hunters was engaged in a “recreational activity on a gratuitous and voluntary basis, there was no sharing of equipment or expenses and each person had control of his own gun.” *Id.* at 483.

Whether a joint enterprise or a joint venture, the result should arguably be the same. In a joint enterprise case, the fault of one member of the enterprise is imputed to the remaining members of the enterprise. Those parties are vicariously liable for the fault of the member of the enterprise who was actively at fault. In the Delgado situation, if the hunters had been deemed to be engaging in a joint enterprise, the fault of the hunter who fired the shot would have been imputed to the other hunters, even though they were not actively at fault. As in other imputed fault or vicarious liability cases, there is no basis for splitting the fault that would be assigned to the entity as an enterprise. Accordingly, the fault charged to the enterprise should be compared with the fault of the plaintiff. Individual comparisons of fault would be impossible and inappropriate.

27. *Id.* at 243, 207 N.W.2d at 707.
28. *Id.* at 246, 207 N.W.2d at 709. The court noted, however, that “the legislature might wish to consider the 1971 amendment to the Wisconsin comparative negligence act which permitted recovery by a plaintiff whose negligence was not greater than the negligence of the person against whom recovery is sought.” *Id.* (discussing Wis. Stat. § 895.045 (1971)).
29. *Id.*
31. *Id.* at 893-95, 356 S.W.2d at 26-27; see *Marier*, 296 Minn. at 246, 207 N.W.2d at 709.
B. The 1978 Amendments

The comparative negligence statute was amended in 1978. The amendments made three significant changes to the statute, but they did not change the Marier individual comparison rule. The legislative debates over the amendments raised questions concerning the desirability of the individual comparison rule. An examination of both the amendments and the policy debate demonstrate the impact of the 1978 amendments.

The first change was the inclusion of a broad definition of "fault" in the statute. Despite the Minnesota Supreme Court's application of the comparative negligence statute to strict products liability claims in 1977, the new definition of "fault" significantly expanded the theories of recovery and defenses subject to comparison.

The second change was the adoption of the Wisconsin-modified form of comparative fault. Under the original comparative negligence statute, a claimant was barred from recovery if his negligence equaled or exceeded the negligence of the person from whom recovery was sought. The comparative fault statute now provides that a claimant will not be barred from recovery unless his fault is greater than the fault of the person from whom recovery is sought.

34. The amendment to the Comparative Fault Act created the following definition of "fault":

"Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Act of Apr. 5, 1978, ch. 738, § 7, 1978 Minn. Laws 836, 840 (codified as amended at MINN. STAT. § 604.01, subd. 1a (1984)).
35. See Busch v. Busch Constr., Inc., 262 N.W.2d 377, 393 (Minn. 1977).
36. The original comparative negligence act specifically provided that a claimant's "negligence shall not bar recovery in an action . . . if such negligence was not as great as the negligence of the person from whom recovery is sought . . . ." Act of May 23, 1969, ch. 624, § 1, 1969 Minn. Laws 1069 (codified at MINN. STAT. § 604.01, subd. 1 (1969)).
The third change in the statute was the adoption of a unique loss reallocation provision. The provision requires the reallocation of a defendant's uncollectible share of a judgment to the other litigants, including the claimant, according to their respective percentages of fault. The loss reallocation rule, however, does not provide for the reallocation of loss in products liability cases. In such cases, the uncollectible share of a party in the chain of distribution and manufacture will be reallocated only to the other parties in the chain. The loss reallocation provision as enacted reads as follows:

Subdivision 1. When two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award.

Subd. 2. Upon motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

Subd. 3. In the case of a claim arising from the manufacture, sale, use or consumption of a product, an amount uncollectible from any person in the chain of manufacture and distribution shall be reallocated among all other persons in the chain of manufacture and distribution but not among the claimant or others at fault who are not in the chain of manufacture or distribution of the product. Provided, however, that a person whose fault is less than that of a claimant is liable to the claimant only for that portion of the judgment which represents the percentage of fault attributable to him.

Two of the changes in the comparative fault statute were the result of senate floor amendments to the comparative fault bill.

§ 604.01, subd. 1 eliminated the clause "as great as" and inserted the clause "greater than" into the first sentence of the subdivision. 1978 Minn. Laws 836, 839.


The ordering of these amendments is important in understanding the legislative intent underlying the statute.

At the time the bill was considered on the senate floor, it provided for aggregate comparisons of fault. The fault of the claimant was to be compared with the fault of the persons from whom recovery is sought.\(^\text{41}\)

At this point the bill did not contain the last sentence of subdivision three of section 604.02, but the remainder of the loss reallocation subdivisions was the same. The last sentence of subdivision three was the first floor amendment to the comparative fault bill. The amendment followed a substantial amount of discussion over the problems of low volume sellers in products liability cases. In the event of the insolvency of the product manufacturer, the seller would be held liable for the entire damages award to the plaintiff.\(^\text{42}\) This result would occur even where the low volume seller’s fault was found to be less than the fault of the plaintiff. For example, in a case where the plaintiff is injured by a defective product, the plaintiff could be found five percent at fault, the product manufacturer ninety-four percent at fault, and the intermediate seller one percent at fault. If the manufacturer could not pay, the intermediate seller would be responsible for ninety-five percent of the plaintiff’s damages. To avoid the problems that would result, the last sentence of subdivision three was added.\(^\text{43}\) This sentence eliminated the rule of joint and several liability in cases where a products liability defendant is less at fault than the plaintiff. In such cases, the defendant’s liability is limited to its percentage of fault.

Although this change addressed at least part of the problem, Senator Sieloff pointed out that the amendment would not touch other civil actions, such as automobile accident cases.\(^\text{44}\) To rectify the problem, he offered an amendment that re-

\(^{41}\) See 1978 M\text{inn. S.J.} 5178.


\(^{43}\) 1978 M\text{inn. S.J.} 5178. The amended last sentence of section 604.02, subdivision 3 states: “Provided, however, that a person whose fault is less than that of a claimant is liable to the claimant only for that portion of the judgment which represents the percentage of fault attributable to him.” M\text{inn. Stat.} § 604.02, subd. 3 (1984).

\(^{44}\) See Senate Debate on H.F. No. 338, supra note 41.
turned the bill to the individual comparison rule that was the prevailing law under the comparative negligence statute.

The arguments presented by Senator Sieloff in favor of the individual comparison rule and by Senator Davies in favor of the unit rule, illustrate the philosophical basis for the split of opinion on the issue in the senate. The arguments are similar to those considered by the courts in deciding whether the individual or unit comparison rule is justified. Senator Davies argued that an aggregate comparison of fault was justified, based upon his view that the tort system is a compensation system. Under this view, it is irrelevant which defendant satisfies the judgment because the plaintiff’s right to recover should be based on need, regardless of the number of defendants involved in the litigation.

In response, Senator Sieloff argued that tort law should not be administered like a welfare system, and that fault is still the basis of the tort litigation system in Minnesota. Senator Sieloff’s view prevailed, and the bill was amended a second time to provide for a comparison of the fault of the claimant to the fault of the person from whom recovery is sought.

The third floor amendment to the bill was a change to the Wisconsin-modified form of comparative fault. Under the Wisconsin-modified form, a claimant will not be barred from recovery unless his fault is greater than the fault of the person from whom recovery is sought.

The legislative history is important in understanding that the last sentence of subdivision three of section 604.02 does not support the aggregation of fault in products liability cases. The subdivision states that a defendant in the chain of manufacture and distribution is liable to a plaintiff who is more at fault, but only for its percentage of fault. In conclusion, it seems clear from the legislative history of the amendments that the legislature intended to carry over the individual comparison rule to the comparative fault statute.

45. Id.
46. Id.
47. 1978 MINN. S.J. 5178. The amendment specifically eliminated the phrase “total fault attributable to the persons,” and inserted the phrase “fault of the person.” Id.
48. Id.
50. MINN. STAT. § 604.02, subd. 3.
C. The 1985 Proposed Amendment to the Act.

In 1985, a bill to amend the comparative fault statute was introduced in the legislature.\(^{51}\) As initially introduced, the bill would have barred recovery only if the claimant’s fault was greater than the fault of the persons from whom recovery is sought. The bill thus adopted the unit rule in all cases. The civil law subcommittee of the senate judiciary committee amended the bill to limit the liability of a defendant less at fault than the claimant to the defendant’s percentage of fault. The bill would have adopted the unit rule in subdivision one of section 604.01:

Subdivision 1. Contributory fault shall not bar recovery in an action by any person or his legal representative to recover damages for fault resulting in death or in injury to person or property, only if the contributory fault was not greater than the combined fault of the person all persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the person recovering. The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each party; and the court shall then reduce the amount of damages in proportion to the amount of fault attributable to the person recovering.\(^{52}\)

Subdivision one of section 604.02 would have contained the limitation on liability:

Subdivision 1. When two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award. Provided, however, that a person whose fault is less than that of a claimant is liable to the claimant only for that portion of the judgment that represents the percentage of fault attributable to that person.\(^{53}\)

The bill would have also deleted the last sentence of subdivision three of section 604.02, which limited the liability of a defendant whose fault is less than the fault of the claimant in

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52. Id.
53. Id.
products liability cases. The last sentence of subdivision one would have eliminated joint and several liability for those defendants found less at fault than the claimant. In such cases, the defendant less at fault than the claimant would be liable only for its share of the judgment.

The bill would have eliminated one of the primary complaints of the unit rule—that the unit rule can impose liability on a defendant for the entire damages award, less the plaintiff's percentage of fault, when the defendant is liable for only a small percentage of fault. The bill would have ensured that the defendant would pay only according to its percentage of fault. The bill, as amended, passed the civil law subcommittee and the senate and house judiciary committees. It did not, however, reach the floor of either house.

Those testifying before the senate and house subcommittees expressed concern over the impact of the bill. The primary concern was that insurance rates would rise with the adoption of an aggregate comparison rule. No statistical data in either Minnesota or any state adopting either the aggregate comparison rule or pure comparative fault was offered to support the claim. The arguments in favor of the bill tracked the arguments which the courts have accepted in adopting the unit rule. Attention focused on the fact that the plaintiff's chances for recovery diminish depending on the number of defendants joined in the litigation.

One of the primary concerns expressed was over the products liability or hazardous waste cases. In situations where a product passes through the hands of several companies in the chain of manufacture and distribution, or where a hazard is created by the conduct of several manufacturers, as in the asbestos cases, the problem a plaintiff faces is that the dangerous product or hazardous substance that caused his injuries is not

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54. Id.
56. See 1985 MINN. S.J. 1205 (unbound supp.).
57. See 1985 MINN. H.J. 2460 (unbound supp.).
59. See Civil Law Subcommittee Hearings, supra note 58.
the focus of the comparison, but rather, the number of defendants who contributed to the hazard or failed to discover the product defect. There was some support, primarily by Senator Sieloff, for the proposition that aggregation or a unit rule would be justified in such cases. There was also significant concern that an unlimited aggregation rule would apply to situations such as automobile accident cases, where unrelated defendants, through concurrent acts of negligence, cause injury to the plaintiff.60

The approach taken in this Article responds to that concern. Assuming the general application of the individual comparison rule, this Article takes the position that there are various situations, such as products liability cases, where aggregation is justified, either because the duty owed by multiple defendants to the plaintiff is joint or common, or because the hazard created by the defendants is indivisible. The theory transcends the limited joint duty exception adopted by the Wisconsin Supreme Court,61 but falls short of an aggregation rule such as that adopted by the Arkansas Supreme Court.62

The remainder of this Article assumes the individual comparison rule as a starting point, but supports a method of analysis that permits use of the unit rule in cases such as those that were the concern of the legislative committees considering the aggregation bill.

III. POTENTIAL APPLICATIONS OF THE UNIT RULE

The types of situations that may justify application of a unit rule range from vicarious liability cases, the easiest type of case, to cases in which two or more parties have acted independently to create an indivisible hazard that causes harm to the plaintiff, the most difficult type of case. Fault may be imputed in certain situations. In others, lack of the necessary relationship between the defendants precludes imputing fault from one defendant to another. The nature of the relationship between defendants or the way a particular hazard arises, may still justify application of a unit rule.

60. Id.
61. See Reber, 260 Wis. 632, 51 N.W.2d 505.
The most obvious cases that justify treating two or more defendants as a single unit are situations involving vicarious liability; specifically, motor vehicle driver and owner or master and servant cases. In such cases, the active fault of the motor vehicle driver or servant is imputed to the motor vehicle owner or master. Strictly speaking, fault is not aggregated in such situations. Rather, the fault that would be attributed to the motor vehicle driver and owner unit, or to the master and servant unit is simply not split. As the Minnesota Supreme Court stated in *Larsen v. Minneapolis Gas Co.*, a pre-comparative negligence case:

Where there are multiple defendants and one or more of them is liable to the plaintiff solely on the basis of negligence imputed to it by virtue of its relationship with one of the other defendants, the one guilty of the negligent conduct and the one to whom the negligence is imputed are to be treated as one party for purposes of determining the fair share of the verdict each defendant must pay.

Although *Larsen* involved the unit rule in the context of a contribution claim, the outcome must be the same when the issue is the comparison of the fault of the plaintiff to the fault of two or more defendants where one of the defendants is vicariously liable for the active fault of another.

The reason that fault is not split in vicarious liability cases is illustrated in *Garbincius v. Boston Edison Co.*, a diversity case that arose out of an accident which resulted in the death of the plaintiff. The plaintiff’s decedent drove his automobile into an excavation that was dug by the Charles Contracting Company, pursuant to a contract with defendant Boston Edison Company. In a special verdict question, the jury found the decedent five percent at fault, Boston Edison Company thirty-five percent at fault, and Charles Contracting sixty percent at fault. The defendants argued that the jury should have been...
instructed to compare the fault of the decedent against each defendant separately.69 The court first determined that Boston Edison was only vicariously liable and that Boston Edison was entitled to indemnity from Charles Contracting.70 As a result, the court then rejected the defendants’ argument that there should have been separate comparisons of fault:

The accident happened because, as the jury found, the measures taken to warn of the excavation and guard against its danger were not adequate. The warning system consisted of planks at the excavation, wooden horse barricades and flashing lights. It was against the adequacy of this warning system that decedent’s conduct had to be compared. There was no way that it could have been measured against each defendant.71

Thus, in vicarious liability cases, there is no logical way to split the fault of the active tortfeasor from the passive fault of the vicariously liable party.

The vicarious liability issue may arise in many types of cases. For example, the issue often arises in master-servant cases, in motor vehicle owner and driver cases, in cases involving employers of independent contractors, or, potentially, in any situation where a party passively at fault is entitled to indemnity from an actively at fault party.

The Minnesota Supreme Court has considered the problem of aggregation in a case involving the liability of an employer for the acts of an independent contractor. In Conover v. Northern States Power Co.,72 the aggregation issue arose in a case in which the plaintiff was an employee of the Donovan Construction Company, an independent contractor hired by Northern States Power Company (NSP) to move certain secondary power lines from old poles to new, taller poles.73 The plaintiff was injured when he fell off of one of the old poles, which had broken at its base.74

The plaintiff received workers’ compensation benefits from his employer and then brought suit against NSP.75 Donovan

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69. Id. at 1178.
70. Id. at 1176-77.
71. Id. at 1178.
72. 313 N.W.2d 397 (Minn. 1981).
73. Id. at 399-400.
74. Id. at 400.
75. Id. The suit was a third-party action brought by the plaintiff against NSP pursuant to MINN. STAT. § 176.061, subd. 5. Id.
was not made a party to the action, although the trial judge submitted the negligence of Donovan to the jury. The jury found that NSP was seventy-five percent negligent and that Donovan was twenty-five percent negligent.\textsuperscript{76} Consequently, the plaintiff was not negligent according to the jury's findings.\textsuperscript{77}

The plaintiff appealed from the trial court's granting of NSP's motion for judgment notwithstanding the verdict, and in the event the judgment was vacated, a new trial.\textsuperscript{78} One of the issues raised on appeal was whether NSP was vicariously liable to the plaintiff for the negligence of NSP's independent contractor, Donovan Construction Company.\textsuperscript{79}

The supreme court held that NSP was not vicariously liable for Donovan's negligence.\textsuperscript{80} Although the general rule is that the employer of an independent contractor is not liable for the negligence of the contractor, there are numerous exceptions to the rule. The exceptions are based on the policy that the employer should not be permitted to avoid responsibility for the personal safety of another by delegating responsibility to the independent contractor for the proper conduct of certain types of work.\textsuperscript{81} One example noted by the court is contained in section 416 of the Restatement (Second) of Torts (Restatement). The court quoted the section as follows:

One who employs an independent contractor to do work which the employer should recognize is likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to others (sic) by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.\textsuperscript{82}

The "others" who might be harmed by the work clearly in-

\textsuperscript{76} 313 N.W.2d at 400.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id. The other issues were whether the trial court erred in holding that NSP was not liable to the plaintiff for any personal negligence as a matter of law and whether the trial court erred in granting a conditional new trial. Id.
\textsuperscript{81} Id. at 403-04.
\textsuperscript{82} Id. at 404 (quoting RESTATEMENT (SECOND) OF TORTS § 416 (1965) (emphasis by the court)).
cludes third persons who might be injured on the job site. After noting that the authorities on the issue are split, the court concluded that the term "others" does not include employees of the independent contractor. The court stated that its holding avoided "needless conceptual and practical difficulties and does not give due consideration to the employer-independent contractor relationship." The reason behind the nondelegable duty rule is to preclude the employer from shifting responsibility to the independent contractor, by contract, for hazardous work that involves a risk of injury to the general public and adjoining property owners. The court concluded that the rule is inapplicable in cases where the injury is sustained by the employee who is under the direction and control of the independent contractor.

The Conover court was also concerned about the difficulties involved in administering a rule that would permit imputation of the fault of the independent contractor to the employer where the independent contractor's employee sustains injury:

Under the Restatement rule, it would be said that Donovan's 25% negligence consisted of Donovan's breach of NSP's nondelegable duty of care for the safety of Donovan's employee. If this be so, there are some troublesome consequences. Assume plaintiff had also sued the supplier of the pole on a products liability claim. If NSP's duty is labeled "nondelegable," it might be argued that Donovan's negligence should be aggregated with NSP's for the purpose of comparison with the supplier's fault, and that it might also be aggregated for the purpose of comparison with the plaintiff's own fault. Moreover, for the purpose of determining a contractor's contribution under Lambertson v. Cincinnati Corp. . . . the jury would have to distinguish, in appropriate cases, between the contractor's breach of his own duty and his breach of the employer's nondelegable duty. We do not think it desireable, nor necessary, to introduce these kinds of problems into the fault apportionment

83. 313 N.W.2d at 404.
84. Id.
85. Id.
86. Id.
87. Id. at 405.
88. Id.
Conover actually presents an easy case. The duty of the employer is such that the independent contractor's fault will not be imputed to the employer, at least where the injury is to the employee of the contractor. It is questionable, however, whether the same result would be achieved in a case where the complicating factor of the employee's injury is not present. The nondelegable duty rule should apply where the injury is to a third party. In such cases, the fault of the independent contractor would be imputed to the employer of the contractor and the employer would be vicariously liable. As in a vicarious liability case, the fault would not be treated any differently from a case involving a claim against a motor vehicle owner and driver. In both situations, the person to whom the fault is imputed is the person who has the ultimate responsibility for the damages sustained by the third party. If the employer of the contractor is held vicariously liable for the fault of the independent contractor, then the contractor's fault would have to be imputed to the employer. The employer in such a case is without personal fault. As in the Larsen case, there is an inadequate basis for splitting fault. Absent any personal fault on the part of the employer, there is no basis for submitting separate questions on the fault of the employer and independent contractor to the jury.

In summary, in vicarious liability cases where the active fault of one party is imputed to a party who is passively at fault, there is no basis for splitting fault. Both the actively at fault defendant and the defendant or defendants who are vicariously liable must be treated as a unit.

B. Vicarious Liability Coupled with Active Fault

Complications may arise in cases where the party held vicariously liable is also held personally at fault. One of the court's concerns in Conover was that a jury would be required to distinguish between the contractor's breach of his own duty and his breach of the employer's nondelegable duty, at least in the context of a contribution claim by the employer against the contractor. Other situations could readily arise. For example, a motor vehicle owner may be negligent in loaning his car

89. Id.
90. Id. at 406.
to someone who drives the vehicle negligently. The owner is vicariously liable for the negligence of the driver, but is also liable for negligently entrusting the motor vehicle to the driver. The owner’s fault consists of active fault and vicarious liability. In allocating loss, the jury would be required to consider the fault of the driver, as well as the fault of the motor vehicle owner in permitting the unfit driver to use the motor vehicle. As in the nondelegable duty situation, the motor vehicle owner’s fault is vicarious in one sense and active in another. Therefore, the jury would be required to apportion fault for the separate negligent acts of the owner and driver, just as fault was apportioned between NSP and Conover. For purposes of comparing the fault of the motor vehicle owner and driver to the plaintiff’s fault, however, it seems clear that the fault of the driver would have to be imputed to the owner. The owner would therefore be held liable for his own negligence in entrusting the car to the driver, as well as the driver’s negligence in driving the car.

As an example, assume that the jury determines that the motor vehicle owner is thirty percent at fault for entrusting the motor vehicle to the driver, that the driver is thirty percent at fault, and that the plaintiff is forty percent at fault. If the duties of the two defendants are viewed as separate duties, then the plaintiff’s fault would be compared to the individual fault of each defendant. As a result, the plaintiff would be denied recovery because her fault would be greater than the fault of each individual defendant. The motor vehicle owner is both vicariously liable and negligent for permitting the driver to use the motor vehicle. The motor vehicle owner is thus responsible for his own fault (thirty percent) in entrusting the vehicle to the driver, and vicariously liable for the driver’s negligence (thirty percent). Therefore, the motor vehicle owner should be held responsible for sixty percent of the fault. This conclusion would permit the plaintiff to recover sixty percent of her damages against the motor vehicle owner.

A rule permitting imputation of the fault of the driver to the owner, even where the owner is also negligent, should also justify imputing the fault of the independent contractor to the employer of the contractor. If there is an additional question concerning the employer’s affirmative negligence, as in Conover, the jury would resolve the problem by determining what percentage of fault to assess against both the employer and in-
dependent contractor. It should be unnecessary for the jury to distinguish between ordinary duties and nondelegable duties. If the employer of the independent contractor is held liable, based upon the standards applicable to owners of land, then a jury instruction covering that standard should be sufficient to ensure consideration of the employer's fault. A jury instruction covering the obligation of the employer to provide a safe place to work would establish the independent contractor's obligation.

In any situation involving vicarious liability, it may be that there will be both vicarious liability and personal fault of the person who is vicariously liable. In such situations, the active fault of both persons will have to be split and compared, and separate instructions on the duties of the defendants will be warranted. This result, however, should not obscure the fact that the person held vicariously liable will be charged with a dual responsibility. Any contrary rule would place the plaintiff at a significant disadvantage, one that would be directly contrary to the function of vicarious responsibility.91

C. Common and Joint Duties

1. Joint Duties

The fault of two or more parties may be treated as a unit in common and joint duty cases. The joint duty exception to the individual comparison rule serves to explain some cases, but the rule has arguably been applied too restrictively to serve as an exclusive standard for determining when a unit rule should be applied. In Minnesota, the rule was specifically adopted in Cambern v. Sioux Tools, Inc.,92 a post-comparative fault act case. The plaintiff in Cambern was injured in the course of her employment with Bayliner Boats.93 The plaintiff was using a high speed electric drill with a circular drill made by Sioux Tools.94 As she was drilling holes, the bit of the drill stuck in a hole and twisted violently, causing her to sustain a disabling arm injury.95 The drill was unsafe because its vibrations would frequently loosen the forward handle. As a result, the drill

91. See generally, Prosser & Keeton, supra note 4, § 70.
92. 323 N.W.2d 795 (Minn. 1982).
93. Id. at 796.
94. Id.
95. Id.
operator had to tighten the handle. There was evidence that the employer, Bayliner Boats, did not properly train the plaintiff how to operate the drill.96

The jury found the plaintiff to be thirty-five percent at fault, the manufacturer, Sioux Tools, twenty percent at fault, and Bayliner, the employer, forty-five percent at fault. The critical issue was whether the plaintiff would be entitled to recover against Sioux Tools, even though the percentage of fault assigned by the jury to Sioux Tools was less than the fault of the plaintiff.97

The supreme court began its analysis with a statement of the Minnesota position on aggregation. "Absent proof of an economic joint venture, current Minnesota law is clear that defendants' fault is not to be aggregated in applying our Comparative Fault Statute."98 The plaintiff urged the court to adopt an additional aggregation exception, based upon the joint and overlapping duties owed by Bayliner Boats and Sioux Tools to the plaintiff. The argument rested in part on the non-delegable duty of the manufacturer of the drill to make a safe product and to warn of dangers inherent in the use of the drill. Although the employer had a duty to warn of the known dangers of drill use, the plaintiff argued that the employer’s omission consisted of a failure to do what the manufacturer should have originally done. Based on this analysis, the plaintiff argued that the joint fault of the defendants should be considered as a single unit for comparison purposes.99 The Minnesota Supreme Court rejected the plaintiff’s argument because the duties owed to the plaintiff by Bayliner and Sioux Tools were separate and distinct in nature and degree.100

In arriving at its conclusion on the joint duty issue, the court relied on a Wisconsin Supreme Court decision, Reiter v. Dyken.101 The Reiter court articulated a more general standard for deciding whether a joint duty exists, thereby justifying ag-

96. Id. at 799.
97. Id. at 796.
98. Id. at 798.
99. Id.
100. Id. at 798. The court stated the following in rejecting the plaintiff’s argument, "[p]utting to one side the nearly impossible task of having a jury sort out what portions of fault "overlap," the short answer is that each defendant here owed plaintiff separate, distinct duties, duties that differed in nature and degree." Id.
101. 95 Wis. 2d 461, 290 N.W.2d 510 (1980).
gregation of fault. The plaintiff in *Reiter* was a real estate agent who was injured when she fell on a sloped, icy sidewalk while showing a house to prospective purchasers. She brought suit against the lister of the property and the property owners. The special verdict form submitted the negligence of the plaintiff, the owner, and the plaintiff’s employer to the jury. The jury assigned a greater percentage of negligence to the plaintiff than to the owners. Although the Wisconsin Supreme Court had previously indicated an intent to allow aggregation in all comparative negligence cases, it decided in *Reiter* to adhere to its established rule limiting aggregation to joint duty cases. The primary reason for the limitation was the strong legislative history underlying the Wisconsin comparative negligence statute. The history established that the legislature intended individual comparisons of negligence to be the rule. The Wisconsin Supreme Court held that the property owners and plaintiff’s employer did not owe the plaintiff a joint duty to exercise reasonable care, because of the differences in the duties owed to the plaintiff. The owner’s duty was based on negligence principles applicable to owners and occupiers, and the employer’s duty was predicated on the Wisconsin safe place statute. In order to have a joint duty, the court stated the following:

More is required than identical acts or omissions before the negligence of separate individuals may be combined for comparison purposes in determining liability. In addition, the duty breached and the opportunity to fulfill that duty must be the same, and neither the obligation nor the breach

102. *Id.* at 467, 290 N.W.2d at 516.
103. *Id.* at 463, 290 N.W.2d at 512.
104. The jury found the plaintiff fifty percent negligent, the owners thirty percent negligent, and the plaintiff’s employer twenty percent negligent. *Id.* at 464, 290 N.W.2d at 512.
106. 95 Wis. 2d at 474-75, 290 N.W.2d at 514.
107. *Id.* at 469-71, 290 N.W.2d at 515-16.
108. The court indicated that significant changes in Wisconsin’s contributory negligence system should be made by the legislature. The court specifically stated that the legislature “is more capable of fashioning and implementing the kind of comprehensive solution that the multiple tortfeasor situation requires.” *Id.* at 474, 290 N.W.2d at 517.
109. *Id.* at 467-68, 290 N.W.2d at 514.
of it may be divisible.\textsuperscript{110}

The joint duty rule set forth in \textit{Reiter} was first formulated by the Wisconsin Supreme Court in a 1952 case, \textit{Reber v. Hanson}.\textsuperscript{111} In this case, a child was fatally injured when he was struck by a truck. The defendant asserted that the accident was caused by the parent’s failure to supervise the activities of their child.\textsuperscript{112} The Wisconsin Supreme Court held:

\begin{quote}
[T]he duty of parents to protect their child is the duty of both parents and it is not divisible so that either parent has half a duty (or some other fraction) for the breach of which he or she may be penalized, to that extent but no more, under the comparative negligence statute. Both parents are under the whole duty of protecting the child, to the limits of reasonable care, against known and present dangers and such duty is not divisible.\textsuperscript{113}
\end{quote}

Two other Wisconsin cases, \textit{Schwenn v. Loraine Hotel Co.},\textsuperscript{114} and \textit{Maruizza v. Kenower},\textsuperscript{115} further illustrate both the application and the shortcomings of the joint duty rule as formulated in \textit{Reber}.

In \textit{Schwenn}, the plaintiff was injured when she jaywalked across the street in front of the Loraine Hotel, intending to take one of the taxis parked at the end of the hotel driveway. She fell on a rutted accumulation of snow and ice. The jury found her one-third negligent and the defendants, the Loraine Hotel Company and Yellow Cab Company, two-thirds negligent.\textsuperscript{116} The court concluded that both defendants exercised control over the driveway for purposes of snow removal.\textsuperscript{117} The court held, however, that the trial court erred in combining the negligence of the defendants.\textsuperscript{118} The court applied the joint duty standard from \textit{Reber}, but distinguished the facts of that case:

The basis for the court’s holding in that case is not present here. Even if the duty of the defendants to maintain the driveway safe were considered equal, the opportunity to so

\textsuperscript{110} Id. at 467, 290 N.W.2d at 514.
\textsuperscript{111} 260 Wis. 632, 51 N.W.2d 505 (1952).
\textsuperscript{112} Id. at 635-36, 51 N.W.2d at 507.
\textsuperscript{113} Id. at 637, 51 N.W.2d at 508.
\textsuperscript{114} 14 Wis. 2d 601, 111 N.W.2d 495 (1961).
\textsuperscript{115} 68 Wis. 2d 321, 228 N.W.2d 702 (1975).
\textsuperscript{116} 14 Wis. 2d at 603, 111 N.W.2d at 496.
\textsuperscript{117} Id.
\textsuperscript{118} Id. at 609, 111 N.W.2d at 499-500.
maintain it may or may not have been equal. The hotel had someone on duty at the driveway at all times, while the cab company employees might be there only sporadically, especially if the taxi business was good. This is a matter for the jury.\textsuperscript{119}

In Mariuzza, the plaintiff, an invitee of a lessee, was injured when she slipped and fell on a patch of ice while descending a flight of stairs. The jury found her forty percent negligent, the lessee forty percent negligent, and the lessor twenty percent negligent.\textsuperscript{120}

One of the issues in the case was whether the trial court correctly refused to combine the negligence of the defendants for purposes of comparison to the plaintiff's negligence.\textsuperscript{121} The supreme court upheld the trial court, holding that there was no basis for combining the negligence of the defendants. Applying the joint duty analysis, the court stated that:

In the case before us, not only would the duties, particularly as to warning a guest of ice on the rear steps, be different as between tenant and landlord, but the opportunities to remove the ice or warn the guest were not equal between the tenant on the premises and the landlord living in California.\textsuperscript{122}

The court held that it would have been error to combine the negligence of the landlord and tenant.\textsuperscript{123}

In both Schwenn and Mariuzza the plaintiff was confronted with a hazard that two defendants had individual obligations to correct, but failed to do so. It is questionable whether a technical difference in the duty formulations that apply to each defendant, or a difference in the opportunity to fulfill those duties should preclude application of a unit rule.

Whether the joint duty rule should be abandoned as the exclusive test for determining when the unit rule applies should depend on the explanation for the joint duty exception. Similarly, consideration should be given to whether the explanation provides a sufficient basis for limiting the use of the unit rule to joint duty cases. The explanation for the joint duty exception is based on the inability to separate a single duty into

\begin{itemize}
  \item \textsuperscript{119} \textit{Id. at} 610, 111 N.W.2d at 500.
  \item \textsuperscript{120} \textit{68 Wis. at} 324, 228 N.W.2d at 704.
  \item \textsuperscript{121} \textit{Id. at} 325, 228 N.W.2d at 704.
  \item \textsuperscript{122} \textit{Id. at} 326, 228 N.W.2d at 705.
  \item \textsuperscript{123} \textit{Id.}
\end{itemize}
measurable components. It may include vicarious liability cases, although fault does not have to be imputed for the joint duty rule to apply.

The explanation contains no implicit policy justifications for the limitation of the unit rule only to joint duty cases. Instead, the Wisconsin cases have exhibited a wooden application of the rule, with no clear analysis of why the use of the unit rule should be so rigidly limited.

2. Common Duties

To correct the shortcomings of the joint duty rule as the sole means of determining when the unit rule should apply, a broader theory for viewing multiple defendant cases is needed. A solid starting point is section 878 of the Restatement (Second) of Torts. Section 878 provides one means of determining when two or more defendants will be jointly and severally liable.124 While section 878 was not formulated with the aggregation issue in mind, it can readily be applied as a standard for the resolution of that issue. Section 878 applies to situations where a common duty exists among individuals, and failure to follow the duty results in a tort. In this case, each person is liable for the total harm resulting from the failure to follow the common duty. The rule rests upon the common obligation each party owes to avoid causing injury to the plaintiff.125

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124. Aggregation, or application of the unit rule, should also be justified where the defendants have engaged in concerted action. Section 876 of the Restatement (Second) of Torts, covers persons acting in concert. It reads as follows:

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

(a) does a tortious act in concert with the other or pursuant to a common design with him, or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance or encouragement to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Restatement (Second) of Torts § 876 (1977). The theory applies in situations where intentional torts have been committed by those acting in concert, and it also applies in cases where there is negligent action by two or more defendants. See id., comments a-e. Parties may act in concert without an express agreement. The agreement may be implied to exist from the conduct of the parties, as in a situation where two car drivers suddenly and without consultation agree to race on a public highway. See Prosser & Keeton, supra note 4, § 46.

125. Restatement (Second) of Torts § 878. Section 878 provides: "If two or more persons are under a common duty and failure to perform it amounts to tortious
Neither the obligation nor the opportunity to fulfill the duty need be the same. As the comment points out, one party may have the burden of performance, but there still may be a common duty.\textsuperscript{126}

One of the illustrations to section 878 involves a situation similar to that in \textit{Mariuzza}. The comment's illustration provides:

A rents a house to B, with a covenant in the lease that upon notice of defects A will keep the premises in repair. B subleases the house to C, with a similar covenant. C moves into the house. After six months the plaster in the parlor ceiling becomes dangerously defective. C notifies A and B requesting repair, but neither A nor B performs his covenant. The ceiling falls and injures C. Both A and B are subject to liability to C for the entire harm.\textsuperscript{127}

Although there was no covenant in \textit{Mariuzza}, and the injury was not to a tenant, the duty was owed to the guest of the tenant by both the owner of the building and the lessee of the building. In the illustration, both A and B owed an obligation, pursuant to different covenants, to make the repairs. While the duty may have been the same, the opportunity to fulfill the duty was not necessarily the same. According to the Restatement, however, it is not necessary that the opportunity to fulfill the duty be the same. Moreover, the parties may have contracted for the performance of the duty by one of the parties. Under the Restatement rule, neither the duty nor the opportunity to fulfill the duty need be the same.

In situations where two or more defendants have the obligation to correct a hazardous condition, there is no clear reason conduct, each is subject to liability for the entire harm resulting from the failure to perform the duty.\textsuperscript{127} \textit{Id.}

\textsuperscript{126} \textit{Id.} Comment a to § 878 provides:

In some situations two or more persons have a duty to perform an act or remedy a condition. In these cases the performance of the duty by either relieves the other from liability. If the duty is not performed, each is liable for all the harm resulting from its breach. This is true although as between themselves one of them has the burden of performance and although their interests in the subject matter are unequal. Thus the rule applies to partners or persons engaged in a common enterprise made liable for the nonperformance of a nondelegable duty, and to co-owners of any form of tangible things that do harm, such as joint tenants of a dangerously defective building that falls upon persons in the highway. \textit{Id.} comment a.

\textsuperscript{127} \textit{Id.} comment a, illustration 2.
why the duty must be equal. In *Morden v. Mullins*,\textsuperscript{128} the court concluded that two adjacent lakeshore property owners, who jointly constructed, maintained, and used a floating boat dock, had a common duty to ensure that the float would not cause injury, notwithstanding the fact that the co-owners obligations to fulfill the duty might be unequal:

Co-owners or tenants in common owe to third persons a duty to exercise ordinary care in maintaining their property in such manner as to avoid injury to third persons, and this is true although the actual management of the property is by agreement vested exclusively in one of the owners.\textsuperscript{129} Despite the co-ownership of the float, the court held that it was a jury question as to whether one of the co-owners was negligent at all in the maintenance of the float.\textsuperscript{130} One of the co-owners alleged that the negligence in the maintenance of the float was solely attributable to the other co-owner.\textsuperscript{131}

Both owners are liable as such for negligence in the maintenance of the property, and where both knew and acquiesced in either leaving the float overnight in a navigable part of the lake, without lights or reflectors, and under the other conditions alleged, indubitably it is a jury question as to whether these facts constituted improper maintenance of the equipment, and whether such maintenance is chargeable to either or both of the defendants.\textsuperscript{132}

It thus appears that a common duty may exist even in situations where there is no imputed negligence. The common duty rests upon the obligation of each party to avoid the hazard. Even though negligence must be proven against each defendant, the unitary nature of the obligation establishes that the duty is no more divisible than in situations where there is imputed negligence.

In *Schwenn*, the same analysis could be applied. In this case, the taxi cab company and hotel had effective control over the slippery area.\textsuperscript{133} Both defendants had the obligation to correct that condition, and both were found negligent for failing either to warn of or to correct the dangerous condition. Even if the

\begin{footnotes}
\textsuperscript{128} 115 Ga. App. 92, 153 S.E.2d 629 (1967).
\textsuperscript{129} Id. at 93, 153 S.E.2d at 630 (citing Restatement (Second) of Torts, § 878).
\textsuperscript{130} Id. at 94, 153 S.E.2d at 630.
\textsuperscript{131} Id. at 93-94, 153 S.E.2d at 630.
\textsuperscript{132} Id. at 94-95, 153 S.E.2d at 631.
\textsuperscript{133} 14 Wis. 2d at 607, 111 N.W.2d at 498.
\end{footnotes}
parties had an equal duty to maintain the driveway in a safe condition, the Schwenn court would have refused to combine the fault of the defendants because the opportunity to fulfill the duty might not have been exactly the same. For purposes of finding a common duty, however, this requirement would seem to be the least essential.

The critical factor in the analysis should be that two or more parties have control, or the right to control over, a particular instrumentality or condition, and fail to exercise reasonable care to prevent injury to the plaintiff. If both factors are present, a unit rule that tracks section 878 of the Restatement rather than the joint duty rule in Reber v. Hanson, is more satisfactory. As a matter of fairness, the plaintiff's right to recover is not diminished by the number of defendants who have the duty and ability to correct a dangerous condition but fail to do so. The focus is on the hazard created by the defendants, rather than on the separate fault of the defendants.

3. Common Duties, Products Liability, and the Chain of Distribution

The Wisconsin Supreme Court appears to have applied just such an analysis in products liability cases. In City of Franklin v. Badger Ford Truck Sales, Inc., a products liability case, a fire truck was damaged when it tipped over while making a turn on the way to answering a fire alarm. Suit was brought by the City of Franklin against Badger Ford Truck Sales, Inc., which handled the sale of the truck, Gunite Division of Kelsey Hayes, the manufacturer of the truck wheels, and Ford Motor, the manufacturer of the chassis. The issue concerned the method of submitting such a case to the jury. The court took the following position:

The comparative negligence question would have answered what percentage of negligence was to be attributed to the city and what percentage to the defendants. The problem comes, in a multiple defendant case, that no similar allocation of comparative negligence was included in the verdict as to each of the defendants. From the standpoint of the

134. The joint duty rule in Reber was that the "duty to protect was joint, the opportunity to protect was equal, as a matter of law neither the obligation nor the breach of it was divisible." 260 Wis. at 633, 51 N.W.2d at 505.
135. 58 Wis. 2d 641, 207 N.W.2d 866 (1973).
136. Id. at 647-48, 207 N.W.2d at 869.
plaintiff, it is enough that, under strict liability and without regard to the exercise of all possible care, the seller, assembler and maker are held liable to it for the defective construction of the wheel. However, as between multiple defendants, as to their right to contribution from any one of the others, it is not enough. On the finding that the defective wheel caused the accident, the trial court found all three defendants liable to the plaintiff. Left unanswered and unanswerable was, as between these multiple defendants, what percentage of the judgment was to be allocated to each in determining the right to contribution between them.\(^{137}\)

The special verdict form that was submitted to the jury asked them to apportion 100 percent of the negligence, first to "the defective condition of the wheel," and second, to the plaintiff.\(^{138}\)

In *Franklin*, the court's treatment of the fault of multiple defendants has the same effect as application of the joint duty rule from *Reber*. The fault of the defendants is treated as a unit for purposes of comparison to the plaintiff's negligence, even though the prerequisites of joint duty were not established. The case, however, might be covered by the common duty standards from section 878 of the Restatement.\(^{139}\)

*Franklin* is clearly a deviation from the joint duty rule applied in *Reber*. While the defendants might owe different duties to the plaintiff, or have different opportunities to avoid the product defect, all three defendants contributed to or failed to discover the defect in the truck. The resulting risk was indivisible, and as in the vicarious liability and joint duty cases, the obligations of the defendants could be separated. The obligations must be separated for purposes of contribution. The risk created by the defendants is an indivisible risk, as the court pointed out in *Garbincius*.\(^{140}\)

Extending the unit rule to cases such as *Franklin* could be justified by the application of the common duty rule in section 878. The logic of such an extension is apparent. If the de-

\(^{137}\) Id. at 651-52, 207 N.W.2d at 871.
\(^{138}\) Id. at 651, 207 N.W.2d at 870-71.
\(^{139}\) Restatement (Second) of Torts § 878. The comment to this section states that the rule applies to "persons engaged in a common enterprise." The rule applies even though their interests in the subject matter are of unequal proportion. Id. comment a.
\(^{140}\) 621 F.2d at 1176.
fendants in Franklin acted pursuant to a formal contract that contained the elements necessary for a joint venture, then the unit rule would apply. This would justify comparing the plaintiff's fault to the aggregate fault of the defendants, even though, as in Krengel, it would be possible to assign individual percentages of fault to the defendants for failing to correct the product defect.141 As in Garbincius, the plaintiff is confronted with a single hazard, which several defendants contributed to or failed to discover.142

From the plaintiff’s perspective, however, the hazard is the same irrespective of the formal relationship among the defendants. To illustrate, assume that the facts are the same as in Krengel; specifically, that the same defendants manufactured, distributed, serviced, and placed the photo booth in the dime-store. In addition, assume that the plaintiff’s fault is equal to or greater than the fault of the three defendants. Also assume that there is no contract creating a formal joint venture. A strict application of the individual comparison rule makes the plaintiff's right to recover turn on the presence of the written agreement between the defendants.

Application of the common duty analysis from the Restatement avoids this inconsistency by focusing on the indivisible nature of the risk created by the defendants. In addition, the liability of one or more parties may be derivative in products liability cases involving several defendants in the chain of manufacture and distribution. Multiplying the number of defendants who are liable because they are conduits in the chain of distribution, or because they negligently fail to discover the product defect, does not alter the nature of the hazard.

The Minnesota Supreme Court has also considered how to treat parties in the chain of manufacture and distribution in Hudson v. Snyder Body, Inc.,143 through a concurring and dissenting opinion of Justice Simonett. The plaintiff in Hudson was injured when a dump truck box dropped on his shoulder. Suit was brought against Perfection-Cobey Company, the manufacturer of the hoist that raised the box of the dump truck; Pote- mac Ford Truck Sales, Inc., the dealer that supplied the chassis on which the box was mounted; and Snyder, the truck assem-

141. 295 Minn. 200, 203 N.W.2d 841.
142. 621 F.2d 1171.
143. 326 N.W.2d 149 (Minn. 1982).
bler. 144 Perfection impleaded the plaintiff's employer, Jack L. Olsen, Inc., requesting contribution or indemnity. The jury found each defendant liable to the plaintiff on negligence and strict liability theories. The jury apportioned twenty percent of the fault to the plaintiff, thirty-five percent to Snyder, twenty-five percent to Perfection, zero percent to Potomac, and twenty percent to Olsen. 145

One of the issues in the case was whether the jury's findings that Potomac was strictly liable and negligent could be reconciled with the finding of zero percent fault. The majority resolved the problem by stating that the evidence did not support a finding of negligence on the part of Potomac. 146 As a result, only the strict liability finding remained. The court concluded that although Potomac sold Olsen a defective truck, the jury found that Potomac was not responsible for the defect in the truck. The court found the jury's answers, so characterized, to be consistent. 147

Justice Simonett, concurring in part and dissenting in part, would have directly addressed the problem. He likewise found the jury's findings to be consistent, but he offered a different explanation:

As the majority opinion points out, this only means the jury found that Potomac sold a defective truck but that Potomac 'was not responsible for the defect.' I do not understand the majority to mean by this that Potomac is not liable to plaintiffs in strict liability, only that Potomac's liability 'stems solely from its passive role as the retailer of a defective product furnished to it by the manufacturer.' . . . In other words, Potomac is liable to plaintiffs but only in a vicarious or derivative sense as the inert seller in the marketing chain. This is not the kind of conduct that needs to be included in a comparative fault question, and the jury properly ignored it. Potomac should be found liable to plaintiffs but entitled to indemnity from the other defendants . . . 148

The problem of adding redundant defendants to the fault comparison question is clearly recognized. The fault of the de-

144. Id. at 151.
145. Id. at 154.
146. Id. at 157.
147. Id.
148. Id. at 158 (Simonett, J., concurring in part and dissenting in part) (citation omitted).
fendant, who is only derivatively liable, should not be the subject of a separate assessment of fault by the jury any more than would the fault of a vicariously liable master or automobile owner.

The only potential impediment to the adoption of the analysis suggested by Justice Simonett in *Hudson* is the legislative history underlying the 1978 amendment to the comparative fault statute. If a party strictly liable and negligent is not included in the comparative fault comparison, then that party and all others in the chain of distribution would be liable for the fault of the party who was actively at fault, the party who manufactured the product. If the manufacturer is unable to pay its share of the judgment, then a party lower in the chain of manufacture and distribution would be liable for the full share of the manufacturer's fault.

Given the individual comparisons of fault that the legislature appeared to support in 1978 when the comparative negligence statute was converted into a comparative fault statute, and given the particular emphasis on products liability cases, it is questionable whether the individual comparisons of fault can be avoided without violating the legislative intent. The return of the comparative fault statute to individual comparisons of fault indicates a legislative concern that parties in the chain of manufacture and distribution should be able to avoid liability when less at fault than the plaintiff. This stems from a concern in 1978 that a party whose fault is less than the fault of the plaintiff would be held liable for the damages sustained by the plaintiff, less the plaintiff's percentage of fault.

The Uniform Comparative Fault Act,149 provided the model for two of the changes in the Minnesota comparative negligence act.150 The intent was to broaden the responsibility among parties in the chain of manufacture and distribution. The Act's broad definition of fault provides for the comparison of all basic theories of recovery, including negligence, strict liability, and breach of implied warranty. Such a broad definition


facilitates the comparison, even in situations that could ultimately fit within the indemnity rules established by the Minnesota Supreme Court.

If the fault of the intermediary is not included in the comparison question on the special verdict form, the jury will not have an opportunity to assess a percentage of fault against the defendant. As recognized in Franklin, that percentage may be important for purposes of determining the amount of contribution that will be appropriate, if it is determined that contribution, rather than indemnity, is the appropriate remedy.151 In addition, separate percentages would have to be assessed for purposes of applying subdivision three of Minnesota Statutes section 604.02, which states that a defendant whose fault is less than the fault of the plaintiff will be held liable only for his percentage of fault.152

Given the uncertainty that exists over the status of contribution and indemnity rules in products liability cases in Minnesota, the safest route may be to submit individual comparisons of fault. A unit rule could then be applied to aggregate the fault of the defendants in the chain, based on a common duty analysis.153

While concern was expressed in the 1978 Minnesota Legislature over products liability problems,154 there are three additional considerations that may support application of the unit rule. First, in 1985, when considering the aggregation bill, the legislative committees expressed concern over a requirement of individual comparisons in products liability cases.155 The application of the unit rule depends on how binding the legislative intent expressed in the 1978 legislature is on the comparison question. It seems quite clear that the legislature did not consider the problems that the individual comparison rule creates for a person injured by the actions or inactions of multiple defendants.

Finally, any concern expressed over the problems involved in holding intermediaries in the chain of manufacture and dis-

151. 58 Wis. 2d at 652, 207 N.W.2d at 871-72.
152. MINN. STAT. § 604.02, subd. 3.
154. See Senate Debate on H.F. No. 338, supra note 42.
155. See Civil Law Subcommittee Hearings, supra note 58.
tribution strictly liable has been alleviated somewhat by the adoption of Minnesota Statutes section 544.41. The statute permits a party lower in the chain to opt out from strict liability if there is a solvent manufacturer subject to personal jurisdiction in Minnesota.

If the Franklin rule is adopted, the method of dealing with the problem is different from the method that would have been applied by Justice Simonett in Hudson. The justification, however, is the same. Both methods are designed to avoid the problems created by the addition of parties in the chain of distribution whose liability is only derivative.

If neither method is followed in products liability cases, another approach remains. A method could be used that tracks the indemnity rules that have been applied in products liability cases in Minnesota. If the fault of an intermediary in the chain of manufacture and distribution is derivative, as was the fault of Potomac in Hudson, it may be justifiable to impute the fault of the intermediary to the product manufacturer. Assume, for example, that a jury finds the plaintiff forty percent at fault, the product manufacturer thirty percent at fault, and the intermediary thirty percent at fault. If the intermediary's fault is derivative, that fault would be imputed to the manufacturer, who would then be responsible for sixty percent of the plaintiff's damages. The intermediary would not be held liable because its fault is less than the fault of the plaintiff. The result is justified exactly because the intermediary's fault is derivative.


157. Id.

158. The Minnesota Supreme Court has not yet considered the relationship between aggregation rules and the rule governing indemnity. The position taken in this Article is that aggregation, or application of the unit rule, is justified whenever two or more defendants are in a relationship to each other such that one defendant is entitled to indemnity from the other.

The basic indemnity rules were summarized by the Minnesota Supreme Court in Hendrickson v. Minnesota Power & Light Co., 258 Minn. 368, 104 N.W.2d 843 (1960). The court stated that indemnity is justified in the following situations:

(1) Where the one seeking indemnity has only a derivative or vicarious liability for damage caused by the one sought to be charged.
(2) Where the one seeking indemnity has incurred liability by action at the direction, in the interest of, and in reliance upon the one sought to be charged.
(3) Where the one seeking indemnity has incurred liability because of a breach of duty owed to him by the one sought to be charged.
(4) Where the one seeking indemnity has incurred liability merely because of failure, even though negligent, to discover or prevent the misconduct of the one sought to be charged.
4. Common Duties and Indivisible Hazards

A final area that creates problems is where the injury to the

(5) Where there is an express contract between the parties containing an explicit undertaking to reimburse for liability of the character involved. Id. at 372, 104 N.W.2d at 848.

In its attempt to achieve substantial justice in individual cases without being bound by "hard-and-fast" rules, the court has allowed indemnity without classifying cases within any of the Hendrickson rules. Utilizing primary/secondary or active/passive distinctions to justify the grant of indemnity, the court generated a set of flexible rules to support indemnity awards.

The court re-evaluated its traditional indemnity rules in 1977 in Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362 (Minn. 1977), a products liability case. After isolating the first three categories of indemnity, based on the distinction that in those cases the party seeking indemnity has not been culpably at fault, the court concentrated on the fourth indemnity category. The court found that the fourth category of indemnity differed from the first three because it permitted an award of indemnity even to a party who was negligent. Id. at 367. The court found that the usual distinctions between active and passive, or primary and secondary fault that had been used to determine whether indemnity would be appropriate in category four cases, were confusing and necessitated complex analysis. The court purported to abolish those distinctions and instead to allocate loss in such cases according to contribution based upon relative fault. Id.

However, notwithstanding the holding in Tolbert, the supreme court has left open the availability of indemnity in products liability cases, even in those cases that initially appear to fit within the fourth indemnity category. In Frey v. Montgomery Ward & Co., 258 N.W.2d 782 (Minn. 1977), a products liability case which ostensibly fit within the fourth category of indemnity, the court raised the possibility that category three indemnity might be appropriate, even though the retailer of the defective product was found to be negligent.

More recently, in Polaris Indus. v. Plastics, Inc., 299 N.W.2d 414 (Minn. 1980), the court was also presented with a case that seemingly fell within the fourth category. Polaris, a snowmobile manufacturer, entered into an agreement with Plastics, Inc., to purchase 26,000 plastic gas tanks for its snowmobiles. Plastics had ordered the polyethylene resin necessary to make the gas tanks from Fusion Rubbermaid. The tanks performed satisfactorily during the winter months, but in warmer weather the plastic material absorbed gasoline and more than 23,000 tanks failed. Seven thousand of the tanks were replaced. Polaris brought suit against Plastics for the loss incurred as a result of the defective tanks. Plastics joined Fusion Rubbermaid, seeking indemnity.

The jury found Plastics negligent with respect to the information supplied concerning the suitability of the tanks for snowmobiles. Plastics was also found liable on the basis of breach of express warranty and implied warranties of merchantability and fitness for a particular purpose. Id.

The trial court awarded Plastics indemnity from Fusion. On appeal Fusion argued that the trial court should have submitted the comparative negligence of Plastics and Fusion to the jury, and that Fusion should only be liable for contribution. The supreme court held that although the trial court might have submitted the comparative negligence issue to the jury under other circumstances, it was proper to refuse to do so under the facts of the case. Id. at 420.

The indemnity award was sustained on two bases. First, although application of Tolbert would appear to require contribution rather than indemnity, the court held that Tolbert was inapplicable because the events giving rise to the litigation occurred
plaintiff is the result of an indivisible hazard to which several

eight or nine years before Tolbert was decided, and therefore Tolbert was inapplicable whether or not Plastics had relied on the decision. Id.

Second, the court determined that the indemnity award was justified on the basis of the first indemnity category in Hendrickson. Given the fact that Fusion misled Plastics with assurances that the polyethylene resin had been tested without any indication of failure, and that Plastics relied on those assurances, in the court’s opinion Plastics was merely a conduit for supplying Polaris with Fusion’s misinformation. Id. The court held that indemnity was justified because the party seeking indemnity “has only a derivative or vicarious liability for the damage caused by the one sought to be charged.” Id.

Resolution of the indemnity claim based on a reclassification of cases that ostensibly fall within the four Hendrickson categories of indemnity seemingly avoids the problems the supreme court had with the active/passive analysis used to resolve products liability indemnity claims prior to Tolbert.

The fluidity of the rules generally applied to determine whether indemnity is appropriate is illustrated by the similarity in indemnity nomenclatures. For example, the first four Hendrickson indemnity categories could readily be reshaped to fit within three, more general indemnity tests, the “active-passive,” “primary-secondary,” and “implied contractual indemnity” tests. See Landes & Posner, Joint and Multiple Tortfeasors: An Economic Analysis, 9 J. Leg. Stud. 517, 532-35 (1979). Depending on the fact situation, the “primary-secondary” test could encompass the first four Hendrickson categories. Implied contractual indemnity could readily encompass the third category in Hendrickson, and the fourth category could readily fit within either the “active-passive” or “primary-secondary” rules.

It is this fluidity in indemnity classifications, see id. at 533-35, and the consistency in the policy justifications for the indemnity rules, see id. at 535-37, that makes decisions such as those in Polaris possible and understandable. The generic similarity of indemnity tests is thus illustrated, whether indemnity in products liability cases is based on “active-passive” or “primary-secondary” indemnity, or the vicarious or derivative liability indemnity category under the court’s reclassification in that case. In vicarious or derivative liability cases, granting indemnity to the person held vicariously liable justifiably limits the harshness of the vicarious liability rule which results in the imposition of a form of strict liability on the party seeking indemnity. As a matter of fairness, the loss is shifted to the party who is actively at fault. Cf. id. at 533-35. To the extent that “derivative” liability fits within this indemnity category, indemnity is justified because of the justifiable reliance by the party seeking indemnity on the representations of the party from whom indemnity is sought. See Polaris, 299 N.W.2d at 420.

In the second Hendrickson category, where the party seeking indemnity has incurred liability because he acted at the direction and in the interest of the one from whom indemnity is sought, indemnity is supported because of the justifiable reliance on the directions given by the party sought to be charged. The party who induces the other to act, presumably for his own benefit, should bear the responsibility for the acts of the agent.

In the third Hendrickson category, the party seeking indemnity has been held liable because of the breach of a duty owed to him by the party from whom indemnity is sought. If, pursuant to contract or otherwise, the party from whom indemnity is sought has assumed the duty to act, the burden to avoid injury may be shifted to that party. The reliance factor again is important in supporting indemnity in such situations.

In the fourth category, the party seeking indemnity has been held liable because of a failure even though negligent, to discover or to prevent the misconduct of the
parties have contributed. The problem could arise in various cases, including those involving hazardous working conditions, pollution and hazardous waste cases, and dram shop cases.

one sought to be charged. The reliance factor appears to be of critical importance in determining the appropriateness of indemnity. Where the party seeking indemnity has not only an opportunity, but also has a duty to inspect the product, indemnity may be precluded. Under such circumstances, an alternative description of the result is that reliance on the other party's expertise is not justifiable. The Minnesota Supreme Court has used the term "concurrent" fault to describe such situations.

Landes and Posner have offered an additional justification for the indemnity rules. Aside from promoting deterrence, they have argued that the indemnity rules are intuitively efficient. By shifting the entire loss to the party who is deemed primarily liable, indemnity avoids suboptimal results by insuring that there will not be an overinvestment in safety by requiring two parties to exercise reasonable care when reasonable care exercised by only one of the parties would avoid the injury. In these alternative care cases, the indemnity rules result in a shifting of loss to the party who is best able to avoid the loss. See Landes & Posner, supra, at 533-35.

The policy justifications of reliance and economic efficiency are the common thread running through the supreme court's indemnity decisions, despite the indemnity classifications that are superficially used to justify indemnity. Based upon Polaris and Frey, it seems that even after Tolbert, considerations other than simple classification of indemnity claims will continue to be important. Where the court deems it important to protect the reliance interest, or where it is apparent that loss should be imposed on the party best able to avoid the loss, indemnity may be appropriate, even if the facts initially seem to fit within the fourth Hendrickson indemnity category.

In any case where indemnity is appropriate, aggregation is justified. If the Hendrickson categories of indemnity are utilized as guidelines, any case that falls within the first three categories should justify application of the unit rule to the defendants who are in the position of the indemnitor and indemnitee. Any apparent category four products liability case that is reclassified should also justify application of the unit rule.

It is arguable that aggregation is appropriate even in cases that fit within Hendrickson's fourth category of indemnity cases. The circumstances of category four cases may require contribution rather than indemnity as the means of allocating loss among parties in the chain of distribution. It is still possible, however, to utilize the active-passive fault distinction to determine when aggregation will be appropriate. If a party is negligent in failing to discover a product defect, Tolbert precludes indemnity in favor of contribution. The rights of the defendants inter se, however, should not influence the treatment of these defendants for purposes of the fault comparison issue. Where there is negligent but passive conduct on the part of the manufacturer in marketing a defective product, fault may be split among the defendants. Application of the unit rule is justifiable because of the derivative nature of the retailer's liability, as in other vicarious liability cases.

In the alternative, if indemnity is not allowed in category four products liability cases, and if individual comparisons are held to be the rule, it is nonetheless arguable that the passive fault of a party lower in the chain of distribution should be imputed to the product manufacturer who was actively at fault in introducing a defective product into the stream of commerce. Therefore, even in cases where a plaintiff's fault is greater than the fault of an intermediary in the chain of distribution, that intermediary's fault should be imputed to the manufacturer who has a nondelegable duty to make a product safe.
Borel v. Fibreboard Paper Products Corp.159 is a good illustration of the problem. Borel was a suit by an industrial insulation worker against certain manufacturers of insulation materials that contained asbestos. The plaintiff alleged that he contracted asbestosis and mesothelioma because of his exposure to the defendants' products over a thirty-three year period.160 The court noted the causation problems that arise:

In the instant case, it is impossible, as a practical matter, to determine with absolute certainty which particular exposure to asbestos dust resulted in injury to Borel. It is undisputed, however, that Borel contracted asbestosis from inhaling asbestos dust and that he was exposed to the products of all the defendants on many occasions. It was also established that the effect of exposure to asbestos dust is cumulative, that is, each exposure may result in an additional and separate injury. We think, therefore, that on the basis of strong circumstantial evidence the jury could find that each defendant was the cause in fact of some injury to Borel.161

Because of the indivisible nature of the injury sustained by the plaintiff, the court concluded that the defendants would be held jointly and severally liable for those injuries.162

Borel differs from other products liability cases, such as Franklin163 and Hudson,164 because the dispersal of fault in those cases is the result of the joinder of several parties in the chain of manufacture and distribution. In such cases, some of the parties have failed to discover the fault of the other parties. In cases such as Borel, several defendants have contributed to an indivisible hazard through the marketing of their own products and through independent, unrelated conduct.

If the unit rule is applied to products liability cases to justify aggregating the fault of unrelated defendants in the chain of manufacture and distribution, based on the rationale that the focus should be on the hazard created by the product, the unit rule can be applied just as readily to cases such as Borel. The hazard created by the active conduct of several parties is an

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159. 493 F.2d 1076 (5th Cir. 1973).
160. Id. at 1081.
161. Id. at 1094.
162. Id. at 1096.
163. 58 Wis. 2d 641, 207 N.W.2d 866.
164. 326 N.W.2d 149.
indivisible hazard. The most logical comparison of the plain­tiff's fault is to the hazard to which he was exposed, rather than to the individual percentages of fault assigned to the several asbestos manufacturers joined in the litigation.

The same approach should apply in cases in which several defendants have discharged pollutants that injure the plaintiff or damage the plaintiff's property. The unit rule can also be applied in dramshop cases where several dramshops have made illegal sales of intoxicating liquor. The activities of several defendants in a case involving air or water pollution may result in an indivisible hazard that cannot be broken into ap­portionable harms.\textsuperscript{165} The illegal sale of intoxicating liquor by several dramshops may combine to create a single hazard, the intoxicated driver. In each case, as in other joint and common duty cases, the plaintiff's right to recover diminishes in inverse proportion to the number of defendants who contribute to the hazard. Application of the unit rule avoids this problem.

Extension of the unit rule to cases in which defendants have acted independently, but their actions have created an indivisible hazard, may be supported as a logical application of the common duty analysis. Extension may be criticized because there is no apparent means of limiting the scope of the unit rule once that extension is made. It might be argued that application of the unit rule to industrial hazard, pollution, or dram shop cases, would also require application of the unit rule to cases such as automobile accident cases, where two or more drivers have driven negligently and created a risk of in­jury to the plaintiff, who is harmed in the ensuing collision.

There are several answers to the problem. It might be argued that in cases such as industrial hazard or pollution cases, the fault of the plaintiff is likely to be passive, whereas in automobile accident cases the fault of the plaintiff is likely to create a risk of injury to the defendants as well as himself. Also, it is arguable that injured persons are most likely to be victimized by the individual comparison rule in the industrial injury, pol­lution, or dram shop cases. While there may be multiple vehicle collisions, the number of participants is not likely to equal those in the other indivisible hazard cases. Finally, it might be argued that the indivisible hazard cases are distinguishable

\textsuperscript{165} For standards applicable to apportionment of damages, see Mitchell v. Volkswagenwerk AG, 669 F.2d 1199 (8th Cir. 1982) (applying Minnesota law).
from the automobile accident cases because the defendants will generally create dissimilar risks of injury. In the indivisible hazard cases, the defendants will have created similar risks of injury which contribute to and perhaps magnify the risk of injury to the plaintiff.

The line that separates the two types of cases may be ragged. Drawing the line short of applying the unit rule in all cases of joint and several liability, so that it applies only where the defendants have through the breach of the same duty created the same risk of injury to the plaintiff, may be justified because it corrects what are likely to be the most significant abuses created by the individual comparison rule.

IV. A Statutory Resolution

Once the decision is made to adopt a modified comparative fault statute or rule, legislatures and courts have had to choose between individual comparisons or aggregate comparisons of fault. The criticisms of both rules assume that there is no middle ground that would justify aggregation in some, but not all, multiple party cases. The major problem with the individual comparison rule is that the plaintiff’s recovery diminishes in inverse proportion to the number of persons who have contributed to a hazardous condition or failed to discover or correct it.

There are various legislative or judicial adjustments to the rule which could be made to resolve part of the problem. For example, the comparative fault statute could be amended to make it clear that only the fault of parties in the lawsuit should be considered. Alternatively, the rule of joint and several liability could be coupled with an aggregate comparison rule as a tradeoff for the plaintiff’s right to recover against defendants less at fault than the plaintiff.

There is a middle ground that has not been considered. Legislative adoption of the theory of the indivisible hazard would justify aggregation in various areas that have created particular problems for persons faced with multiple party litigation. An amendment to the Minnesota comparative fault act which would accomplish that result is as follows:

Contributory fault shall not bar recovery in an action by any person or his legal representative to recover damages for fault resulting in death or injury to person or property,
if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the person recovering.

If the actions or inactions of two or more persons result in the creation of or failure to correct an indivisible hazard, their fault shall be combined. In such cases, contributory fault of a person or his legal representative shall not bar recovery if the contributory fault was not greater than the fault of the persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the person seeking recovery.

The theory resolves at least some of the problems created by the individual comparison rule, without constituting a complete acceptance of the aggregation rule.

CONCLUSION

The primary debate over comparative fault is whether pure or modified comparative fault should be adopted. Once modified comparative fault is adopted, the comparison question focuses on whether there should be individual or unit comparisons of fault.

The debate over the issue has polarized around two positions taken by the courts in Arkansas and Wisconsin, which developed early and became the model for other jurisdictions deciding the issue. The alternatives were either to adopt an aggregate comparison approach or an individual comparison rule. The only clear exception to the individual comparison rule is when two or more parties have a joint duty to exercise reasonable care.

Given the variety of multiple party cases that may arise, it is obvious that the joint duty rule is not broad enough to fairly resolve the different types of cases that may call for application of a unit rule. The basic approach taken in this Article has focused more on the hazard created by multiple parties, rather than on individual comparisons of the plaintiff’s fault with the individual fault of the defendants who have created or failed to discover or correct a hazardous condition. There are several parts to the rule.

First, vicarious liability cases should always combine the fault of the passively and actively at fault parties. There is no basis for splitting fault in such cases. If fault is split, for contribution purposes, in a vicarious liability case such as a joint venture,
the fault should be aggregated for purposes of comparison to the plaintiff’s percentage of fault.

Second, in cases where the joint duty exception applies, the fault of the parties who owe the joint duty should be aggregated. Aside from vicarious liability cases, the joint duty exception is the clearest exception to the individual comparison rule. The remaining exceptions depend on the closeness of the fact situations to the joint duty rule.

Third, where there is not a joint duty, but a common duty that satisfies the elements of the Restatement, the fault of all parties who breach that common duty should be aggregated. The common duty rule absorbs and broadens the joint duty rule.

Fourth, even in cases that may not meet the requirements of the common duty rule, extension of the unit rule to cases involving the creation of indivisible hazards by several defendants is justified.

In all situations in this Article where the suggestion is made that the unit rule applies, the problem facing claimants is the same—the greater the number of defendants, the less likely that the plaintiff will recover.

The primary counter argument that may be made to the adoption of a more flexible unit rule is that a plaintiff not entitled to recover against a single defendant less at fault than the plaintiff will be entitled to recover against several defendants less at fault than the plaintiff. However, for purposes of illustration, if the focus is on the hazard created by a single defendant or multiple defendants, there is no inconsistency. In each situation, the basic focus is on the plaintiff’s fault as balanced against the hazard created by the individual defendant or multiple defendants. If the plaintiff is more than one-half at fault in causing his own injuries, recovery is denied. On the other hand, if the plaintiff is one-half at fault or less, and the hazard to which the plaintiff is exposed is one-half or more responsible for the plaintiff’s injury, the plaintiff is entitled to recover, irrespective of the number of defendants who were involved in creating the indivisible hazard.

Use of the unit rule in such cases represents a fair approach to the problems created by multiple party litigation.