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Minnesota Comparative Fault—Statutory Reform

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Minnesota Comparative Fault—Statutory Reform

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MINNESOTA COMPARATIVE FAULT – STATUTORY REFORM

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I. INTRODUCTION

State comparative negligence and fault statutes and judicially adopted procedures vary significantly. They may be relatively simple, setting out only a basic rule providing for modified or pure comparative fault or negligence and reducing the plaintiff's recovery by the plaintiff's percentage of fault,¹ or much more detailed, with directions concerning the type of fault to be compared, the persons whose fault should be considered in the comparison, and the rules governing loss distribution, including joint and several liability and loss reallocation.²

The Minnesota Legislature adopted a comparative negligence statute in 1969.³ In 1978 it was converted to a Comparative Fault Act, which expanded the theories of recovery subject to comparison and made the first inroad of the rule of joint and several liability through adoption of a loss reallocation provision. The rule of joint and several liability was the rule in Minnesota

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¹ See, e.g., COLO. REV. STAT. ANN. § 13-21-111 (West 2015); DEL. CODE ANN. tit. 10, § 8132 (2015); HAW. REV. STAT. § 663-31 (2015); MASS. GEN. LAWS ANN. ch. 231, § 85 (West 2014).

² See, e.g., ARIZ. REV. STAT. ANN. §§ 12-2505; 12-2506 (2014); IOWA CODE ANN. §§ 668.3-5 (2015); PA. CONS. STAT. ANN. § 7102 (West 2014).

³ Act of May 23, 1969, ch. 624, 1969 MINN. LAWS 1069.

when the comparative negligence statute was adopted,⁴ but in subsequent amendments the legislature first chipped away at and, then in 2003, rejected the rule joint and several liability as the default rule in favor of a default rule of several liability, with only limited exceptions where joint and several liability applies.⁵

The Minnesota Comparative Fault Act as it currently stands is a modified comparative fault statute that permits a plaintiff to recover in cases involving claims for personal injury, property damage, wrongful death, and economic loss⁶ against persons who are at fault via a variety of theories, including negligence, reckless misconduct, breach of implied warranty, and strict liability.⁷ The Act bars recovery if the plaintiff's fault is not greater than the fault of the *person* against whom recovery is sought. That means that the base rule is one of individual comparisons of fault, absent a very good reason to aggregate the fault of two or more defendants, traditionally confined to joint ventures, with a hint that other joint duties will justify aggregation.

The legislature was faced with a variety of choices in drafting and amending the Comparative Fault Act, just as the Minnesota Supreme Court has been in interpreting it. This Article highlights the distinct issues that should be resolved in a comprehensive comparative fault statute, looks briefly at the shape of the Minnesota Comparative Fault Act as it currently stands, and then suggests reforms of the Act that are intended to clarify some uncertainties in the Act and to create fairness, symmetry, and balance in the Act. The Comparative Fault Act, with proposed reforms, is set out in the Appendix to this article.

II. MAKING CHOICES

There are several key issues that should be addressed in drafting a comparative fault statute.⁸ One concerns the scope. As used here, that refers to the reach of the causes of action and damages claims subject to the comparative fault act. A second is whether a pure or modified comparative fault system should be adopted and, if a modified form is chosen, what the percentage cutoff should be that will bar recovery. A third concerns the rule of joint and several liability and whether it should be retained or modified. A fourth is defining the persons, including nonparties, whose fault should be subject to allocation. A fifth concerns the contribution and loss reallocation that should apply. The contribution and loss reallocation issues will be resolved in part by the resolution of the joint and several liability issue, as well as the issue of whose fault should be subject to allocation.

⁴ See *Maday v. Yellow Taxi Co.*, 311 N.W.2d 849, 850 (Minn. 1981).

⁵ MINN. STAT. § 604.01, subdiv. 2 (2014).

⁶ *Id.* subdiv. 1 (2014).

⁷ *Id.* § 604.01, subdiv. 1a.

⁸ See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 1 cmt. a (2000); UNIF. APPORTIONMENT OF TORT RESPONSIBILITY ACT, Prefatory Note (2003).

A. SCOPE

The key points involving the scope of a comparative fault statute are the damages claims covered and the definition of fault.

1. DAMAGES

A comparative fault act should specify the claims for damages that are covered. Typically, a comparative fault act will include claims for personal injury, wrongful death, and property, but certain economic loss claims may also be included. Comparative fault principles might be applicable in a range of cases involving economic loss.⁹ As an example, in misrepresentation cases the sole loss the plaintiff might sustain is economic loss, but the plaintiff may also be contributorily negligent. Rather than denying the plaintiff's claim because of contributory fault, a comparative fault approach seems more just. Including claims for economic loss would not mean that comparative fault will apply to contract claims, however, or that it would disrupt the structure of defenses in warranty cases.¹⁰

2. FAULT

The second issue concerning scope is what theories of recovery and defenses should be subject to comparison and allocation. This could range from just a comparison of negligence, to a broader range of theories of recovery and defenses. One of the sticking points is whether intentional misconduct should be included. The Uniform Comparative Fault Act defined “fault” broadly as follows:

“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 enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate

⁹ Mark A. Olthoff, *If You Don't Know Where You're Going, You'll End Up Somewhere Else: Applicability of Comparative Fault Principles in Purely Economic Loss Cases*, 49 *DRAKE L. REV.* 589, 604-20 (2001). The Restatement takes the position that comparative fault principles may apply in cases involving claims for economic loss:

Other types of injuries. The policy considerations for apportioning liability reflected in this Restatement are possibly applicable to cases involving injuries other than personal injury or physical damage to tangible property. On the other hand, those cases may also involve special policy considerations. In light of these competing considerations, this Restatement sometimes may be referred to by analogy in suits for purely nontangible economic loss caused by breach of contract or warranty, fraud, misrepresentation, nonmedical professional malpractice, or, where recognized, negligence; in suits by insureds or others against insurers for inappropriate claims-settlement practices; and in suits for breach of fiduciary relationship, interference with contractual relations, defamation, and invasion of privacy. These principles may also be referred to by analogy when a statutory system calls for apportionment, except when inconsistent with a policy of the statute. For example, a statutory cause of action might not contemplate a right of contribution. *See* § 23. Conversely, the fact that a statutory cause of action does provide for a right of contribution is a possible argument for the application of joint and several liability.

RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 1 cmt. e (2000).

¹⁰ *See* *Peterson v. Bendix Home Sys, Inc.*, 318 N.W.2d 50, 52-55 (Minn. 1982).

damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.¹¹

The Uniform Apportionment of Tort Responsibility Act, which supersedes the Uniform Comparative Fault Act, defines “contributory fault” to include “contributory negligence, misuse of a product, unreasonable failure to avoid or mitigate harm, and assumption of risk, unless the risk is expressly assumed in a legally enforceable release or similar agreement.”¹² The comment to section 2 explains:

[N]o attempt is made in the Act to define “fault”, other than in the term “contributory fault”. This recognizes that the chance of achieving any degree of uniformity on this topic is very problematic, given the different approaches that exist today among the jurisdictions adopting comparative fault. This avoids arguments over whether strict liability in products cases is a type of “fault”, especially when some jurisdictions still base liability in this area, either exclusively or alternatively, on contract law rather than tort law. It also avoids the issue of deciding for all those who consider adopting the Act whether intentional conduct should be compared with other forms of fault and, if so, in what situations. The existing approaches taken in this area are anything but uniform. Thus, an adopting state remains free to resolve these issues in any manner that it wishes.¹³

On the other hand, the Restatement (Third) of Torts: Apportionment of Liability, does provide for the inclusion of intentional torts in the allocation of fault.¹⁴ Having taken that position, however, the Restatement qualifies the impact of including intentional torts in the allocation of fault. There is a distinction between the issue of whether contributory negligence should be a defense to intentional torts and whether it should be subject to allocation in cases involving an intentional tort claim against one defendant and negligence against another.¹⁵ Most courts have taken the position that contributory negligence is not a defense to an intentional tort.¹⁶ The Restatement takes the following position:

The basic concept is that liability should be apportioned among all legally culpable actors according to proportionate shares of responsibility, while affording appropriate redress to victims of intentional torts. Consequently, this Restatement is applicable to all bases of liability, including intentional torts, but provides courts with flexibility to fashion appropriate special rules for victims of intentional torts.¹⁷

¹¹ UNIF. COMPARATIVE FAULT Act § 2 cmt. (1996).

¹² UNIF. APPORTIONMENT OF TORT RESPONSIBILITY ACT § 2(1) (2003).

¹³ *Id.* § 2 cmt.

¹⁴ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1 cmts. b, c (2000).

¹⁵ *Id.* cmt. c.

¹⁶ *Id.*

¹⁷ *Id.*

The Restatement takes the position that “[e]ach person who commits a tort that requires intent is jointly and severally liable for any indivisible injury legally caused by the tortious conduct,”¹⁸ but that:

A person who is liable to another based on a failure to protect the other from the specific risk of an intentional tort is jointly and severally liable for the share of comparative responsibility assigned to the intentional tortfeasor in addition to the share of comparative responsibility assigned to the person.¹⁹

The following illustration shows how the concept works:

A is a guest at a hotel operated by B. B neglects to provide adequate door locks on A's room, as a result of which C, an intruder, gains access to A's room, assaults A, and steals A's property. B is liable for the shares of comparative responsibility assigned both to B and to C, because the risk that made B's conduct negligent was specifically the risk that someone would assault A and steal A's property.²⁰

The Restatement position significantly dampens the effect of considering intentional misconduct in the allocation of fault.

B. PURE OR MODIFIED COMPARATIVE FAULT

In a pure comparative fault system the plaintiff will not be barred from recovery unless the plaintiff is 100 percent at fault, but the plaintiff's recovery will be reduced by her percentage of fault. In a modified comparative fault jurisdiction the plaintiff may be barred from recovery if the plaintiff's fault is equal to or greater than the fault of the defendant, or in some jurisdictions, only where the plaintiff's fault is greater than the defendant's fault. There are principled arguments in favor of each system.²¹ Modified comparative fault is justified because of the perceived fairness in precluding a plaintiff from recovering against a defendant whose percentage of fault is either equal to or less at fault than the plaintiff.

In cases involving multiple parties there are two distinct positions that might be taken in modified comparative systems. One bars the plaintiff from recovery against a defendant if the plaintiff's fault is either equal to or greater than the fault of that defendant. The other bars the plaintiff only if the plaintiff's fault is equal to or greater than the aggregate fault of the defendants. The predominant view is aggregation.²²

Even in an individual comparison of fault jurisdiction fault may be nonetheless be aggregated in certain cases where fairness dictates that two or more persons be treated as a unit for purposes of

¹⁸ *Id.* § 12.

¹⁹ *Id.* § 14.

²⁰ *Id.* cmt. a, illus. 1.

²¹ *Id.* cmt. a, reporters' note.

²² William E. Westerbeke, *In Praise of Arbitrariness: The Proposed 83.7% Rule of Modified Comparative Fault*, 59 U. KAN. L. REV. 991, 1029 (2011).

the comparison. Aggregation rules could apply to either plaintiffs or defendants.²³ Aggregation could fairly apply in the following situations:

- (1) Joint duty.²⁴
- (2) Joint venture.²⁵
- (3) Parties to a common scheme or plan or who have otherwise engaged in concerted action.²⁶
- (4) Parties in the chain of manufacture and distribution.²⁷
- (5) Vicarious liability.²⁸

C. SEVERAL LIABILITY OR JOINT AND SEVERAL LIABILITY WITH EXCEPTIONS

Most jurisdictions have modified the common law rule of joint and several liability in their comparative fault statutes. The approaches vary significantly.

- a. Unmodified joint and several liability. All parties who have acted jointly, concurrently, or successively in causing a single, indivisible injury, are jointly and severally liable for the entire damages award.
- b. Pure several liability. Each defendant is responsible for its fair share of a judgment. No exceptions based on percentage of liability of a defendant..
- c. Several liability, with various exceptions where joint and several liability applies. For example, it could apply:

²³ For a more detailed analysis see Michael K. Steenson, *The Fault with Comparative Fault: The Problem of Individual Comparisons in a Modified Comparative Fault Jurisdiction*, 12 WM. MITCHELL L. REV. 1 (1986).

²⁴ See *Reber v. Hanson*, 51 N.W.2d 505, 507-08 (Wis. 1952) (joint duty of parents to supervise their child); *cf.* *Cambern v. Sioux Tools, Inc.*, 323 N.W.2d 795, 799 (Minn. 1982) (manufacturer of saw and plaintiff's employer did not owe a joint duty to plaintiff); *Reiter v. Dyken*, 290 N.W.2d 510, 514 (Wis. 1980) (no joint duty owed by property owner and plaintiff's employer with respect to safety of premises).

²⁵ See *Krengel v. Midwest Automatic Photo, Inc.*, 295 Minn. 200, 208-10, 203 N.W.2d 841, 847-48 (1973).

²⁶ See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 15 (2000), which provides that “[w]hen persons are liable because they acted in concert, all persons are jointly and severally liable for the share of comparative responsibility assigned to each person engaged in concerted activity.” The rule that justifies joint and several liability should also justify aggregation.

²⁷ See MINN. STAT. § 604.02, subdiv. 3 (2014) (providing for reallocation of uncollectible share of a party in the chain only among other parties in the chain).

²⁸ See *id.* § 13 (2000), which provides that:

A person whose liability is imputed based on the tortious acts of another is liable for the entire share of comparative responsibility assigned to the other, regardless of whether joint and several liability or several liability is the governing rule for independent tortfeasors who cause an indivisible injury.

- (1) Where a party is more than 50% (or some other percentage) at fault.
- (2) Where parties participated in a common scheme or plan or engaged in concerted action.
- (3) Where the fault of one party is imputed to another.
- (4) Where a party's fault consists in the failure to prevent the tortious conduct of another.
- (5) Where parties have committed certain torts, such as environmental pollution.
- (6) Where parties are in the chain of manufacture and distribution in a products liability case.

There are other situations where joint and several liability might apply, of course. That would turn on a legislative judgment that certain classes of defendants or certain types of harm should be subject to broader shared responsibility for injuries or damages than would be achieved under a strict several liability rule.

D. CONTRIBUTION AND LOSS REALLOCATION

Issues concerning contribution and loss reallocation are tied to the joint and several liability issue. In general, contribution and loss reallocation will apply only in cases where a party is required to pay more than its fair share of a judgment. Severally liable parties pay only their share of the judgment. In those cases there is no basis for a contribution claim.

A comparative fault statute might also include a loss reallocation provision. Loss reallocation differs from a contribution claim. A contribution claim arises when a defendant, who paid more than its fair share of an obligation, seeks to recover for the excess amount from another at-fault party who has not paid its fair share of the obligation. Loss reallocation applies if that at-fault party is unable to pay its fair share; in that case the defendant will seek to shift that uncollectible amount to the remaining parties to the litigation, according to their respective percentages of fault. An at-fault plaintiff could be included in the reallocation formula.

E. WHOSE FAULT IS COMPARED?

The key issue in deciding whose fault will be considered in the allocation of fault is whether the fault of nonparties will be considered. The Uniform Comparative Fault Act²⁹ and the Uniform Apportionment of Tort Responsibility Act³⁰ take the position that the fault of nonparties should not be considered, with the exception of persons who have settled their claims with the plaintiff. The primary rationales for excluding nonparties are (1) that the range of nonparties whose fault

²⁹ UNIF. COMPARATIVE FAULT ACT § 1 cmt. (1996).

³⁰ UNIF. APPORTIONMENT OF TORT RESPONSIBILITY ACT § 2(1) (2003).

might be considered is too amorphous to define and, (2) that considering the fault of nonparties unfairly skews the trial process.³¹

The Restatement (Third) of Torts: Apportionment of Liability is more nuanced in its approach to the issue. The position taken on whether the fault of nonparties is considered turns on the type of comparative fault. Where unmodified joint and several liability is the prevailing rule, the Restatement takes the position that the fault of nonparties, other than settling parties, should not be considered.³² That places the burden of joining nonparties squarely on the defendants in the litigation. At the other extreme, if the prevailing rule is pure several liability the burden shifts to the plaintiff to join nonparties. If they are not joined, their fault will still be considered in the allocation of fault.³³ There are variations on the themes, depending on what rules a state adopts for joint and several liability and loss reallocation.

Once the decision is made to include nonparties in the allocation of fault, however, it becomes important to define whose fault should potentially be considered. There are several possibilities for inclusion.

- a. Parties to a lawsuit or other persons who have settled their claims pursuant to a release or other settlement device that discharges a person from all liability for contribution and preserves the claimant's cause of action against the remaining parties to the lawsuit, but at the same time preserves the plaintiff's claim against other persons or parties who may be liable on the same claim, unless the release or settlement device specifically provides otherwise.
- b. Governmental entities and employees who are immune from liability because of immunity from planning decisions or common law immunity for discretionary decisions at the operational level, or other persons and entities who are granted a limited immunity by statute because they engage in activities the legislature has determined should be insulated from liability as a matter of policy.
- c. Persons against whom a statute of limitations or repose has run.
- d. Identified persons who may be liable, but are not subject to service of process.

A legislature may take differing positions on the issue, but once the decision is made to consider the fault of nonparties the gate is opened to a broad range of persons who may be found to be at fault but are not joined in the litigation.

With respect to immune persons, care has to be taken in distinguishing between persons or entities who are immune because they owe no duty to the plaintiff, as in the case of the statutory (discretionary) immunity of governmental entities for policy making decisions at the planning level, and government officials that a legislature or court has decided to shield from liability because they have engaged in discretionary decision-making at the operational level. The

³¹ *Id.* Prefatory Note.

³² RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § A19 cmt. d (2000).

³³ *Id.* § B19 cmt. b.

governmental entity claiming statutory immunity is not liable because it owes no duty to the injured person, which means that its fault should not be subject to comparison. On the other hand, the fault of a government official who claims a qualified immunity could be considered in any allocation of fault, most certainly if the immunity is overcome by a showing that the official engaged in willful or wanton conduct (violation of a known rule, regulation, or statute, for example), and arguably, even if the immunity is not overcome and the official is found to be only negligent and therefore not liable. The fault of the official could be submitted, even if the official is not a party to the litigation.

Other immunities may shield persons or entities from liability because of legislative judgments that the activities in which those persons engage in is worthy of qualified protection. The immunities may be overcome by a showing that the conduct of the person claiming the immunity was willful, wanton, or reckless. As is the case with public officials; the fault of the persons claiming the immunity could be considered in the allocation of fault upon a showing of negligence, even if the proof is not sufficient to overcome the immunity.³⁴

III. MINNESOTA'S CHOICES

This section explains the basics of the Comparative Fault Act as interpreted by the Minnesota courts.

A. SCOPE

Minnesota's Comparative Fault Act specifies both the damages and theories of recovery and defenses that are subject to allocation. It adopts a modified comparative fault system that bars the plaintiff from recovery if the plaintiff's fault is greater than the fault of the person from whom recovery is sought.

1. DAMAGES

The Minnesota Comparative Fault is similar to other comparative fault acts in its application to wrongful death claims and to personal injury and property damage, but it also applies to economic loss claims. It specifically covers actions "to recover damages for fault resulting in death, in injury to person or property, or in economic loss."³⁵

2. FAULT

The Minnesota Comparative Fault Act defines "fault" broadly:

"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

³⁴ Two separate special verdict questions would have to be answered in these cases. The first question would ask whether the person to whom the immunity applies is liable under the higher culpability standard. If that standard is met, fault would be subject to apportionment. If the higher standard is not met, the second question would be whether the person was negligent. If the party (or person) is found to be causally negligent, the issue then becomes whether the fault of the party (or person) should be considered in the apportionment question, notwithstanding the fact that there could be no liability because the immunity is not overcome.

³⁵ MINN. STAT. § 604.01, subdiv. 1 (2014).

constituting an express consent or primary assumption of risk, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages, and the defense of complicity under section 340A.801. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault. The doctrine of last clear chance is abolished.

Evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages may be considered only in determining the damages to which the claimant is entitled. It may not be considered in determining the cause of an accident.³⁶

The definition includes negligence, reckless misconduct, breach of warranty, and strict tort liability. The defenses include secondary assumption of risk and contributory negligence, as well as failure to mitigate damages or unreasonable failure to avoid injury.³⁷ The definition does not include intentional misconduct, although intentional tortfeasors are jointly and severally liable to the plaintiff.³⁸

B. MODIFIED COMPARATIVE FAULT AND INDIVIDUAL COMPARISONS OF FAULT

Minnesota Statutes section 604.01, subdivision 1, provides that a plaintiff will not be barred from recovery unless the plaintiff's fault is greater than the fault of the *person* from whom recovery is sought. The Minnesota Supreme Court has interpreted the statute to require individual comparisons of fault,³⁹ with only a limited exception to the rule for joint ventures,⁴⁰ and, potentially, cases involving joint duties.⁴¹

C. SETTLEMENTS

Subdivisions 2 – 5 of the Comparative Fault Act deal with the impact of settlements:

Subd. 2. Personal injury or death; settlement or payment. Settlement with or any payment made to an injured person or to others on behalf of such injured person with the permission of such injured person or to anyone entitled to recover damages on account of injury or death of such person shall not constitute an admission of liability by the person making the payment or on whose behalf payment was made.

Subd. 3. Property damage or economic loss; settlement or payment. Settlement with or any payment made to a person or on the person's behalf to others for damage to or

³⁶ *Id.* § 604.01, subdiv. 1a.

³⁷ The defenses effectively merge into a single defense of contributory negligence. *See* 4A MINN. PRAC. SERIES, JURY INSTR. GUIDES - CIVIL 242-43 (6th ed. 2014).

³⁸ MINN. STAT. § 604.02, subdiv. 1(3) (2014).

³⁹ *See* *Marier v. Mem'l Rescue Serv., Inc.*, 296 Minn. 242, 246, 207 N.W.2d 706, 708 (1973).

⁴⁰ *See* *Krengel v. Midwest Automatic Photo, Inc.*, 295 Minn. 200, 208-10, 203 N.W.2d 841, 847-48 (1973).

⁴¹ *See* *Cambern v. Sioux Tools, Inc.*, 323 N.W.2d 795, 799 (Minn. 1982).

destruction of property or for economic loss does not constitute an admission of liability by the person making the payment or on whose behalf the payment was made.

Subd. 4. Settlement or payment; admissibility of evidence. Except in an action in which settlement and release has been pleaded as a defense, any settlement or payment referred to in subdivisions 2 and 3 shall be inadmissible in evidence on the trial of any legal action.

Subd. 5. Credit for settlements and payments; refund. All settlements and payments made under subdivisions 2 and 3 shall be credited against any final settlement or judgment; provided however that in the event that judgment is entered against the person seeking recovery or if a verdict is rendered for an amount less than the total of any such advance payments in favor of the recipient thereof, such person shall not be required to refund any portion of such advance payments voluntarily made. Upon motion to the court in the absence of a jury and upon proper proof thereof, prior to entry of judgment on a verdict, the court shall first apply the provisions of subdivision 1 and then shall reduce the amount of the damages so determined by the amount of the payments previously made to or on behalf of the person entitled to such damages.⁴²

D. SEVERAL LIABILITY WITH JOINT AND SEVERAL LIABILITY EXCEPTIONS

Section 604.02 covers several liability, the exceptions to joint and several liability, and loss reallocation. Subdivision 1 establishes the default rule of several liability (each defendant pays only its fair share of the judgment), with four enumerated exceptions where joint and several liability will apply:

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

- (1) a person whose fault is greater than 50 percent;
- (2) two or more persons who act in a common scheme or plan that results in injury;
- (3) a person who commits an intentional tort; or
- (4) a person whose liability arises under chapters 18B - pesticide control, 115 - water pollution control, 115A - waste management, 115B - environmental response and liability, 115C - leaking underground storage tanks, and 299J - pipeline safety, public nuisance law for damage to the environment or the public health, any other environmental or public health law, or any environmental or public health ordinance or program of a municipality as defined in section 466.01.

Subdivision 2 establishes a rule of loss reallocation, which provides for the reallocation of an uncollectible share of an obligation among the remaining parties to the litigation:

⁴² MINN. STAT. § 604.01, subdivs. 2-5. The supreme court limited the application of subdivision 5 in *Rambaum v. Swisher*, 435 N.W.2d 19, 22-23 (Minn. 1989) (settlement amount in *Pierringer* release cannot be credited against defendant's liability).

Subd. 2. Reallocation of uncollectible amounts generally. 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.

Subdivision 3 establishes a specific rule for the reallocation of loss in products liability cases where the parties are in the chain of manufacture and distribution:

Subd. 3. Product liability; reallocation of uncollectible amounts. 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 the person whose fault is less.

E. WHOSE FAULT IS COMPARED?

The Minnesota Supreme Court has interpreted the Comparative Fault Act to permit the inclusion of certain nonparties in the allocation of fault. The court has permitted consideration of the fault of a settling defendant,⁴³ a person involved in related litigation,⁴⁴ a defendant severed from a lawsuit because of the filing of a petition in bankruptcy,⁴⁵ and, more recently, an identified person who contributed to the plaintiff's injury but was not joined in the litigation.⁴⁶

IV. A MORE BALANCED COMPARATIVE FAULT ACT?

The Minnesota Comparative Fault Act, as interpreted by the courts, lacks fairness, balance, and symmetry. The rule of individual comparisons of fault, a distinct minority rule, works to the disadvantage of injured persons. The problem is compounded because the supreme court has permitted the aggregation of the fault of two or more defendants only under limited circumstances and because the court has permitted the assignment of fault to nonparties. The greater the number of persons to whom fault is allocated, the greater the likelihood that the fault of a plaintiff will exceed the fault of some or all of those defendants and the greater the likelihood that the defendants in the suit will be held only severally liable.

⁴³ See *Frey v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978).

⁴⁴ See *Lines v. Ryan*, 272 N.W.2d 896 (Minn. 1978).

⁴⁵ See *Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289 (Minn.1986).

⁴⁶ See *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68 (Minn. 2012).

The ability of an injured person to recover is further limited because of the default rule of several liability adopted by the legislature in 2003. There are limited exceptions where joint and several liability is preserved, but the list is incomplete.

What follows is Minnesota's Comparative Fault Act with suggested amendments intended to both clarify and create a greater degree of fairness, balance, and symmetry in the Act. The suggested additions are underlined. Any deleted language is noted with a strike-through. The comments following each section explain the reasons for the suggested changes.

Minn. Stat. § 604.01. Comparative fault; effect

Subdivision 1. Scope of application. Contributory fault does not bar recovery in an action by any party or a non-party's person's legal representative to recover damages for fault resulting in death, in injury to person or property, or in economic loss, if the contributory fault was not greater than the fault of the party against whom recovery is sought, except as provided in subdivision 2, but any damages allowed must 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.

Subd. 2. Aggregate comparisons of fault. Contributory fault does not bar recovery in an action by any person or the person's legal representative to recover damages for fault resulting in death, in injury to person or property, or in economic loss, if the contributory fault described in subdivision 1 is not greater than the aggregate fault of the parties or persons in the following cases:

- (1) where the parties or persons are engaged in a joint venture;
- (2) where the parties or persons owe a joint duty to the claimant;
- (3) where the parties or persons acted in a common scheme or plan or engaged in concerted action that resulted in injury;
- (4) where the parties or persons are product manufacturers, sellers, and their intermediaries in the chain of manufacture and distribution;
- (5) where the parties or persons are product manufacturers who created an indivisible risk of injury;
- (6) where one party or person committed a tortious act and another party or person was at fault in failing to prevent the tortious conduct of the party who committed the tortious act;
- (7) where the parties or persons are an agent or servant of another party or person and the party or person for whom the agent or servant was acting;
- (8) where the parties' or persons liability arises under chapters 18B - pesticide control, 115 - water pollution control, 115A - waste management, 115B - environmental response and liability, 115C - leaking underground storage tanks,

and 299J - pipeline safety, public nuisance law for damage to the environment or the public health, any other environmental or public health law, or any environmental or public health ordinance or program of a municipality as defined in section 466.01.

Subd. ~~4a~~ 3. 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 or primary assumption of risk, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages, and the defense of complicity under section 340A.801. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault. The doctrine of last clear chance is abolished.

Evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages may be considered only in determining the damages to which the claimant is entitled. It may not be considered in determining the cause of an accident.

Subd. ~~2~~ 4. Personal injury or death; settlement or payment. Settlement with or any payment made to an injured person or to others on behalf of such injured person with the permission of such injured person or to anyone entitled to recover damages on account of injury or death of such person shall not constitute an admission of liability by the person making the payment or on whose behalf payment was made.

Subd. ~~3~~ 5. Property damage or economic loss; settlement or payment. Settlement with or any payment made to a person or on the person's behalf to others for damage to or destruction of property or for economic loss does not constitute an admission of liability by the person making the payment or on whose behalf the payment was made.

Subd. ~~4~~ 6. Settlement or payment; admissibility of evidence. Except in an action in which settlement and release has been pleaded as a defense, any settlement or payment referred to in subdivisions 2 and 3 shall be inadmissible in evidence on the trial of any legal action.

Subd. ~~5~~ 7. Credit for settlements and payments; refund. All settlements and payments made under subdivisions 2 and 3 shall be credited against any final settlement or judgment; provided however that in the event that judgment is entered against the person seeking recovery or if a verdict is rendered for an amount less than the total of any such advance payments in favor of the recipient thereof, such person shall not be required to refund any portion of such advance payments voluntarily made. Upon motion to the court in the absence of a jury and upon proper proof thereof, prior to entry of judgment on a verdict, the court shall first apply the provisions of subdivision 1 and then shall reduce the amount of the damages so determined by the amount of the payments previously made to or on behalf of the person entitled to such damages. The amount of a settlement received by a person pursuant to a Pierringer release may not be offset against the liability of the remaining defendant or defendants to a lawsuit.

Subd. 8. Persons whose fault may be considered in allocation of fault. Fault may be assigned to:

(1) parties to the litigation.

- (2) any identified person who is not a party to the litigation. For purposes of this subdivision, “identified person” includes
- (a) government employees who are not liable because of official immunity and government entities who are not liable because of vicarious official immunity, but not government employees or entities who are immune from liability because of statutory immunity;
 - (b) persons who are immune from liability because of statutory immunity other than governmental immunity;
 - (c) persons who are immune from liability because the statute of limitations has run on the claimant’s claims against them.
- (3) parties to a lawsuit who have settled their claims pursuant to a release, covenant not to sue, covenant not to enforce judgment, or similar agreement entered into by a claimant and a person that discharges that person from all liability for contribution and preserves the claimant’s cause of action against the remaining parties to the lawsuit.
- (4) a person or deceased person who is represented by a legal representative who is a party to the lawsuit.

COMMENTS

Subdivision 1

Subdivision 1 remains primarily the same as it is in § 604.01. It retains the modified comparative fault rule and the rule of individual comparisons of fault, but there is an important addition. It provides for the comparison of the fault of the claimant to the aggregate fault of two or more defendants as provided in subdivision 2.

Subdivision 2

The supreme court has held that fault of two or more parties should be aggregated in a limited number of cases. Subdivision 2 expands the cases in which aggregation will be allowed. It closely tracks the cases in which joint and several liability will apply, but does not extend aggregation to all cases involving multiple defendants. It applies only in cases where the nature of the relationship between multiple parties or the commonality of an unusual risk they create justifies treating those parties as a unit for purposes of fault allocation. It also uses the term “persons” to cover cases where the fault of nonparties will be considered in the allocation of fault.

An exception for joint ventures was recognized in *Krengel v. Midwest Automatic Photo, Inc.*, 295 Minn. 200, 209, 203 N.W.2d 841, 847 (1973). In *Cambern v. Sioux Tools, Inc.*, 323 N.W.2d 788, 795, 799 (Minn. 1982 (dictum)), the supreme court recognized the possibility of aggregation in a case involving a joint duty, but held that there was no joint duty owed by an employer and product manufacturer in that case.

Subparts (1) and (2)

A joint duty, which may overlap or subsume joint ventures, requires a showing that the acts or omissions of the defendants were identical and “the duty breached and the opportunity to fulfill that duty must be the same, and neither the obligation nor the breach of it may be divisible.” *Reiter v. Dyken*, 290 N.W.2d 510, 514 (Wis. 1980), cited in *Cambern v. Sioux Tools, Inc.*, 323 N.W.2d 795, 798 (Minn. 1982). This is parallel to the joint and several liability requirement in section 604.02.

Subpart (3)

The common scheme or plan exception in subpart (3) is intended to be parallel to the exception for joint and several liability in section 604.02, subdivision 1(2), which imposes joint and several liability on “two or more persons who act in a common scheme or plan that results in injury.” That term may be the equivalent of “concerted action.” Wisconsin’s comparative negligence statute provides in a section titled “concerted action,” that “if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action” except for punitive damages as provided in section 895.043(5). Wis. Stat. Ann. § 895.045 (2) (West. 2015).

In *Richards v. Badger Mut. Ins. Co.*, 749 N.W.2d 581, 595 (Wis. 2008) (citations omitted), the Wisconsin Supreme Court interpreted concerted action as requiring something more than causal negligence. The court noted that:

There are three factual predicates necessary to proving concerted action: First, there must be an explicit or tacit agreement among the parties to act in accordance with a mutually agreed upon scheme or plan. . . Parallel action, without more, is insufficient to show a common scheme or plan. *Id.* Second, there must be mutual acts committed in furtherance of that common scheme or plan that are tortious acts. . . Third, the tortious acts that are undertaken to accomplish the common scheme or plan must be the acts that result in damages.

Subpart 4

Subpart 4 applies to persons who are product manufacturers or sellers in the chain of manufacture and distribution. It is parallel to Minn. Stat. § 604.02, subdivision 3, the special reallocation provision that applies to parties in the chain of manufacture and distribution. That section provides that if an amount is uncollectible from a person in the chain of manufacture and distribution, that amount must be reallocated to the other parties in the chain. Given the fact that all persons in the chain have combined to sell a defective product, any fault individually assigned to those persons should be aggregated for purposes of comparison to the fault of the person seeking recovery. Wisconsin deals with the issue by providing for the comparison of the fault of the plaintiff to the product, with separate comparisons of fault among parties in the chain. *See Fuchsgruber v. Custom Accessories, Inc.*, 628 N.W.2d 833, 839-40 (Wis. 2001); *City of Franklin v. Badger Ford Truck Sales, Inc.*, 207 N.W.2d 866, 872 (Wis. 1973). The Minnesota Supreme Court has not specifically applied those decisions in its products liability cases but Justice Simonett’s separate opinion in *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 158 (Minn. 1982) (Simonett, J., concurring in part and dissenting in part), suggesting that the fault of passive intermediaries in the chain need not be submitted in a products liability case, accomplishes the same result. Given the impact of Minn. Stat. § 544.41 (2014), which provides for the dismissal of

intermediaries subject to strict liability claims as long as a solvent manufacturer is subject to jurisdiction in Minnesota, the fault of the dismissed intermediaries may not be subject to the allocation of fault in the first place, however.

Subpart 5

Subpart 5 covers cases where products liability defendants create an indivisible hazard. Current law requires individual comparisons of fault. *Erickson v. Whirlpool Corp.*, 731 F. Supp. 1426 (D. Minn. 1990); *Tester v. American Standard, Inc.*, 590 N.W.2d 679, 681 (Minn. Ct. App. 1999). Subpart 5 requires aggregate comparisons of fault where two or more products liability defendants create an indivisible harm to the plaintiff. There are cases where a person injured by the collective actions of product manufacturers is significantly disadvantaged because of the number of manufacturers who may have contributed to the hazard to which the injured person was exposed, sometimes over a long period of time, as in the asbestos cases. *See, e.g., Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289 (Minn. 1986) (fault apportioned to plaintiff and eight asbestos manufacturers). Applying liability in these cases is parallel to the treatment of defendants who are subject to joint and several liability because of their violation of certain environmental statutes. The policy rationale for imposing liability on multiple product manufacturers who create an indivisible risk of injury draws strong support from the policies underlying products liability theory as noted in *McCormack v. Hanksraft Co.*, 278 Minn. 322, 338, 154 N.W.2d 488, 500 (1967).

Subpart 6

Subpart 6 permits the aggregation of fault of a person who has committed a tortious act with the fault of a person who was at fault in failing to prevent that tortious action. It is based on Restatement (Second) of Torts § 877 (1979) and Restatement (Third) of Torts § 14 (2000). It is intended to include cases where an employer is liable based on a negligent hiring, retention, or supervision theory, although it has other applications. *E.g., ADT Sec. Servs., Inc. v. Swenson*, 687 F. Supp. 2d 884, 8984 (D. Minn. 2009) (security company responsible for intentional tort facilitated by alarm failure).

Subpart 7

Subpart 7 provides for aggregation in cases involving imputed fault. It treats as a unit a person who committed the tortious act and the person to whom the tortious acts of that person are imputed. It is based on Restatement (Third) of Torts: Apportionment of Liability § 13 (2000), which provides that “[a] person whose liability is imputed based on the tortious acts of another is liable for the entire share of comparative responsibility assigned to the other, regardless of whether joint and several liability or several liability is the governing rule for independent tortfeasors who cause an indivisible injury.”

Subpart 8

This subpart reintroduces Minn. Stat. § 604.02, subdiv. 1(4), which provides for joint and several liability in cases involving liability arising under certain environmental health statutes. While the persons creating the common hazard may have acted independently, the rationale for imposing joint and several liability in those cases should also justify treating those persons as a unit for purposes of the allocation of fault.

Subdivisions 3, 4, 5, 6, 7, and 8

Subdivision 1a in § 604.01, is renumbered as subdivision 3. Subdivisions 3, 4, 5, and 5 are retained from current § 604.01, but they are renumbered. Subdivision 5, as renumbered, is retained from the existing statute, but with the understanding that it is at least in part inconsistent and inapplicable in cases involving *Pierringer* release principles, as held in *Rambaum v. Swisher*, 435 N.W.2d 19, 22-23 (Minn. 1989). The addition of the last sentence incorporates that understanding.

Subdivision 7 is a new provision that defines whose fault is subject to comparison. The supreme court took the position that the fault of non-parties could be considered in *Lines v. Ryan*, 273 N.W.2d 896, 902-03 (Minn. 1978) and reaffirmed that position in *Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289, 293 (Minn. 1986) and *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68 (Minn. 2012). Those cases do not fully resolve the issues involved in determining when the fault of non-parties should be considered in the allocation of fault. Subdivision 7 takes a more specific approach to the issue in enumerating the cases in which the fault of non-parties may be considered. In addition, subdivision 2 makes all parties who are in the chain of manufacture and distribution liable as a unit to the claimant.

There are notice problems that will arise in cases where a party seeks to allocate fault to a nonparty. That issue is not specifically addressed in this proposed legislation. It would be better addressed by rule, rather than statute.⁴⁷

Minn. Stat. § 604.02. Joint liability.

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

- (1) two or more parties who owe a joint duty to the claimant;
- (2) two or more parties who were engaged in a joint venture;

⁴⁷ As an example, Arizona permits allocation of fault to nonparties. The procedural rule requires a party who seeks to include a nonparty to “provide the identity, location, and the facts supporting the claimed liability of such non-party.”⁴⁷ 16 ARIZ. REV. STAT. § 12-2506 (2016).

Arizona Rules of Civil Procedure, Rule 26(b) (5). The rule reads in full as follows:

Any party who alleges, pursuant to A.R.S. § 12-2506(B), that a person or entity not currently or formerly named as a party was wholly or partially at fault in causing any personal injury, property damage or wrongful death for which damages are sought in the action shall provide the identity, location, and the facts supporting the claimed liability of such non-party within one hundred fifty (150) days after the filing of that party's answer. The trier of fact shall not be permitted to allocate or apportion any percentage of fault to any non-party whose identity is not disclosed in accordance with the requirements of this subsection except upon written agreement of the parties or upon motion establishing good cause, reasonable diligence, and lack of unfair prejudice to other parties.

- (23) ~~two or more persons~~ parties who act in a common scheme or plan ~~that results in injury~~ or concerted action resulting in injury or damage to the person seeking recovery;
- (4) two or more parties who are product manufacturers, sellers, or other intermediaries in the chain of manufacture and distribution;
- (5) two or more parties who are product manufacturers, sellers, or other intermediaries who create an indivisible risk of injury;
- (6) a party who committed a tortious act and a party who was at fault in failing to prevent the tortious conduct of another that party;
- (7) a person whose liability is imputed based on the tortious acts of another and the person who commits the tortious act;
- (48) ~~a person~~ two or more parties whose liability arises under chapters 18B - pesticide control, 115 - water pollution control, 115A - waste management, 115B - environmental response and liability, 115C - leaking underground storage tanks, and 299J - pipeline safety, public nuisance law for damage to the environment or the public health, any other environmental or public health law, or any environmental or public health ordinance or program of a municipality as defined in section 466.01.
- (+9) a ~~person~~-party whose fault is greater than 50 percent.

~~Subd. 2. Reallocation of uncollectible amounts generally. 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. Product liability; reallocation of uncollectible amounts. 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 the person whose fault is less.~~

COMMENTS

This section retains the default rule of several liability, but expands the exceptions to which joint and several liability will apply. It includes the four exceptions from current § 604.02, subdiv. 1, but adds other exceptions where fairness dictates that the rule of joint and several liability should apply. This section deletes subdivision 2, which is moved to a new section 604.03. It deletes

current § 604.02, subdivision 3, because that subdivision is unnecessary, given the nature of the relationship between defendants in the chain of manufacture and distribution, the rationale for the application of products liability theory to all those defendants, and the potential for exclusion of one or more of those defendants pursuant to Minn. Stat. § 544.41.

The existing legislation applies joint and several liability to an intentional tortfeasor. The inclusion of that exception creates confusion insofar as it provides the basis for an argument that the fault of an intentional tortfeasor should be compared as against the fault of a negligent defendant. Removing that exception eliminates the basis for that argument. Intentional tortfeasors in any event are fully liable for any damages they cause if fault cannot be apportioned.

Minn. Stat. § 604.03. Contribution and loss reallocation

- (1) Any party who has a cross-claim for contribution against any other party and who is jointly and severally liable for the entire damages award is entitled to contribution if that party has paid more than its allocated share of the judgment and the party from whom contribution is sought has paid less than that party's allocated share of the damages award. Parties described in § 604.02 (1) – (8) are responsible for any uncollectible amount that is the responsibility of any other party in that subpart.
- (2) Any party to whom loss is reallocated under this subdivision has a continuing contribution claim against the party whose share of the judgment was uncollectible.
- (3) Nothing in this subdivision precludes the assertion of a contribution claim in a separate proceeding against persons who were not parties to the litigation.

COMMENTS

This subdivision is parallel to § 604.01, subdivision 2, covering aggregate comparisons of fault. In the cases where fault is aggregated for purposes of comparison to the claimant's fault it is appropriate to also treat those defendants as units for purposes of joint and several liability and aggregation. Accordingly, if one party in the unit is unable to pay its equitable share of a judgment, that uncollectible share becomes the responsibility of the remaining parties in that unit.

V. CONCLUSION

These proposals for amending the Minnesota Comparative Fault Act are intended to remove some of the inequities in the Act that are created by (1) the individual comparison rule; (2) the default rule of several liability, with only limited exceptions for joint and several liability; and (3) judicial interpretations of the Act that permit consideration of the fault of nonparties in the allocation of fault. Taken together, the system makes a person's right to recovery dependent on the number of persons who may have contributed to an accident or incident resulting in injury. Where there are multiple parties or persons whose fault is considered in the allocation of fault the chances of a plaintiff obtaining a full recovery are reduced.

A more radical proposal might be to move the Minnesota Comparative Fault Act to a system of pure comparative fault, or at least to a system where a plaintiff's fault is compared to the

aggregate fault of all persons whose fault combined to cause the indivisible injury to the plaintiff. This proposal is more measured in maintaining the existing structure but tweaking it by providing for aggregate comparisons of fault in a broader array of cases than currently is permitted and using the same exceptions where aggregate comparisons are permitted to establish parallel rules for joint and several liability.

The proposal also defines the kinds of cases in which the fault of nonparties may be considered. That part of the proposal goes beyond existing Minnesota law in an attempt to define with more specificity whose fault may be considered in the allocation of fault.

Even if reform stops short of these proposed recommendations, they highlight the problems with the Comparative Fault Act as it is currently constituted and suggest avenues for change to the Act to avoid the glaring inequities in Minnesota's comparative fault scheme.

APPENDIX

The Statute with Proposed Amendments Integrated.

Minn. Stat. § 604.01. Comparative fault; effect

Subdivision 1. Scope of application. Contributory fault does not bar recovery in an action by any party or a non-party's person's legal representative to recover damages for fault resulting in death, in injury to person or property, or in economic loss, if the contributory fault was not greater than the fault of the party against whom recovery is sought, except as provided in subdivision 2, but any damages allowed must 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.

Subdiv. 2. Aggregate comparisons of fault. Contributory fault does not bar recovery in an action by any person or the person's legal representative to recover damages for fault resulting in death, in injury to person or property, or in economic loss, if the contributory fault described in subdivision 1 is not greater than the aggregate fault of the parties in the following cases:

- (1) where the parties are engaged in a joint venture;
- (2) where the parties owe a joint duty to the claimant;
- (3) where the parties acted in a common scheme or plan or engaged in concerted action that resulted in injury;
- (4) where the parties are product manufacturers, sellers, and their intermediaries in the chain of manufacture and distribution;
- (5) where the parties are product manufacturers who create an indivisible risk of injury;
- (6) a party who committed a tortious act and a party who was at fault in failing to prevent the tortious conduct of that party;

- (7) a party who was acting as an agent or servant of another party and the party for whom the agent or servant was acting;
- (8) where the parties' liability arises under chapters 18B - pesticide control, 115 - water pollution control, 115A - waste management, 115B - environmental response and liability, 115C - leaking underground storage tanks, and 299J - pipeline safety, public nuisance law for damage to the environment or the public health, any other environmental or public health law, or any environmental or public health ordinance or program of a municipality as defined in section 466.01.

Subdiv. 3. 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 or primary assumption of risk, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages, and the defense of complicity under section 340A.801. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault. The doctrine of last clear chance is abolished.

Evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages may be considered only in determining the damages to which the claimant is entitled. It may not be considered in determining the cause of an accident.

Subdiv. 4. Personal injury or death; settlement or payment. Settlement with or any payment made to an injured person or to others on behalf of such injured person with the permission of such injured person or to anyone entitled to recover damages on account of injury or death of such person shall not constitute an admission of liability by the person making the payment or on whose behalf payment was made.

Subdiv. 5. Property damage or economic loss; settlement or payment. Settlement with or any payment made to a person or on the person's behalf to others for damage to or destruction of property or for economic loss does not constitute an admission of liability by the person making the payment or on whose behalf the payment was made.

Subdiv. 6. Settlement or payment; admissibility of evidence. Except in an action in which settlement and release has been pleaded as a defense, any settlement or payment referred to in subdivisions 2 and 3 shall be inadmissible in evidence on the trial of any legal action.

Subdiv. 7. Credit for settlements and payments; refund. All settlements and payments made under subdivisions 2 and 3 shall be credited against any final settlement or judgment; provided however that in the event that judgment is entered against the person seeking recovery or if a verdict is rendered for an amount less than the total of any such advance payments in favor of the recipient thereof, such person shall not be required to refund any portion of such advance payments voluntarily made. Upon motion to the court in the absence of a jury and upon proper proof thereof, prior to entry of judgment on a verdict, the court shall first apply the provisions of subdivision 1 and then shall reduce the amount of the damages so determined by the amount of the payments previously made to or on behalf of the person entitled to such damages.

Subdiv. 8. Persons whose fault may be considered in allocation of fault. Fault may be assigned to:

- (1) parties to the litigation.
- (2) any identified person who is not a party to the litigation. For purposes of this subdivision, “identified person” includes
 - (a) government employees who are not liable because of official immunity and government entities who are not liable because of vicarious official immunity, but not government employees or entities who are immune from liability because of statutory immunity;
 - (b) persons who are immune from liability because of statutory immunity other than governmental immunity;
 - (c) persons who are immune from liability because the statute of limitations has run on the claimant’s claims against them.
- (3) parties to a lawsuit who have settled their claims pursuant to a release, covenant not to sue, covenant not to enforce judgment, or similar agreement entered into by a claimant and a person that discharges that person from all liability for contribution and preserves the claimant’s cause of action against the remaining parties to the lawsuit.
- (4) a person or deceased person who is represented by a legal representative who is a party to the lawsuit.

Minn. Stat. § 604.02. Joint liability.

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

- (1) two or more parties who owe a joint duty to the claimant;
- (2) two or more parties who were engaged in a joint venture;
- (3) two or more parties who engaged in a common scheme or plan or engaged in concerted action resulting in injury or damage to the person seeking recovery;
- (4) two or more parties who are product manufacturers, sellers, or other intermediaries in the chain of manufacture and distribution;
- (5) two or more parties who product manufacturers, sellers, or other intermediaries who create an indivisible risk of injury;
- (6) a party who committed a tortious act and a party who was at fault in failing to prevent the tortious conduct of another that party;

- (7) a person whose liability is imputed based on the tortious acts of another and the person who commits the tortious act;
- (8) two or more parties whose liability arises under chapters 18B - pesticide control, 115 - water pollution control, 115A - waste management, 115B - environmental response and liability, 115C - leaking underground storage tanks, and 299J - pipeline safety, public nuisance law for damage to the environment or the public health, any other environmental or public health law, or any environmental or public health ordinance or program of a municipality as defined in section 466.01.
- (9) A party who is more than 50 percent at fault.

Minn. Stat. § 604.03. Contribution and loss reallocation

- (1) Any party who has a cross-claim for contribution against any other party and who is jointly and severally liable for the entire damages award is entitled to contribution if that party has paid more than its allocated share of the judgment and the party from whom contribution is sought has paid less than that party's allocated share of the damages award. Parties described in § 604.02 (1) – (8) are responsible for any uncollectible amount that is the responsibility of any other party in that subpart.
- (2) Any party to whom loss is reallocated under this subdivision has a continuing contribution claim against the party whose share of the judgment was uncollectible.
- (3) Nothing in this subdivision precludes the assertion of a contribution claim in a separate proceeding against persons who were not parties to the litigation.