Joint and Several Liability in Minnesota: The 2003 Model

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JOINT AND SEVERAL LIABILITY IN MINNESOTA: THE 2003 MODEL

Michael K. Steenson†

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I. INTRODUCTION

In Minnesota, as in other states, joint and several liability has been a familiar target for tort reform efforts.† In the 2003 session,

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1. See Restatement (Third) of Torts: Apportionment of Liab. § 10 (2000) for a listing of the various reforms of joint and several liability. A glance at the web site of the American Tort Reform Association indicates that joint and several liability modification is a key component of the Association’s successful tort reform
the Minnesota Legislature, motivated by pressure from municipal, business, and insurance interests, amended its joint and several liability rules for the fourth time. The previous changes, in 1978, 1986, and 1988, trimmed the rule of joint and several liability that had been the law in Minnesota since the late nineteenth century. The 2003 amendment is a more serious limitation of the rule of joint and several liability. The new starting assumption is that the liability of two or more tortfeasors will be several, rather than joint, subject to four exceptions where joint and several liability will apply. The first is for a defendant who is more than 50% at fault. The second applies where two or more persons have engaged in a common scheme or plan that results in injury to the plaintiff. The third is where a defendant has committed an intentional tort. The fourth, which was carried over from prior law, applies to defendants who have committed certain environmental torts. In the ordinary case, then, where two or more defendants have tortiously caused indivisible injury or harm to the plaintiff, proportionate liability applies, so each defendant will be responsible for only that defendant’s percentage of the damages.

The amendment raises several issues. One of the issues is what impact the law has in making the starting point for the liability of two or more defendants several, rather than joint, liability. Other questions concern the application of the exceptions, particularly the exceptions for persons who engage in a common scheme or plan and for defendants who commit intentional torts. An overriding question is whether the four enumerated exceptions are in fact the only cases where joint and several liability applies. It is the purpose of this Article to offer a preliminary analysis and suggested interpretation of the 2003 amendment that addresses those questions.


2. See Audio Tape: Hearings Before the Senate Judiciary Committee (Apr. 11, 2005) (on file with author).

Comparative Fault Act, followed by a concise history of joint and several liability in Minnesota, for the purpose of providing the necessary background for interpreting the amendment. It then moves to a discussion of the interpretive issues raised by the amendment, and closes with some general observations about the amendment.

II. COMPARATIVE FAULT IN MINNESOTA

To evaluate the new joint and several liability rules, it is important to place them in the broader context of the Minnesota Comparative Fault Act. There are several key points to be made about the Act before assessing the impact of the 2003 joint and several liability amendment.

A. Modified Comparative Fault, Individual Comparisons, and Absent Tortfeasors

Minnesota is a modified comparative fault jurisdiction. It permits the plaintiff to recover if the plaintiff's "contributory fault was not greater than the fault of the person against whom recovery is sought," although "any damages allowed must be diminished in proportion to the amount of fault attributable to the person recovering." In general, the Act has been interpreted to require individual comparisons of fault. Aggregation of the fault of two or more parties is permitted under only limited circumstances. The supreme court has held that aggregation of the fault of two or

4. Minn. Stat. § 604.01, subd. 1 (2002). When the legislature enacted the comparative negligence statute in 1969, it provided that a plaintiff would not be entitled to recover if the plaintiff's fault was "equal to or greater than" the negligence of the person from whom recovery was sought. See Act of May 23, 1969, ch. 624, § 1, 1969 Minn. Laws 1069.
5. § 604.01, subd. 1. The comparative negligence statute also provided that awards must be reduced by the plaintiff's percentage of negligence.
more defendants will be permitted where two or more parties have engaged in a joint venture and implied that it will be permitted where two or more parties owe a common duty to the plaintiff. Other attempts to expand the aggregation rules have routinely failed, although the losing arguments have been made in cases where there has been no legal relationship between the defendants that would justify treating them as a unit for purposes of comparison to the plaintiff’s fault.

The Minnesota courts have also interpreted the Act to require comparisons of the fault of persons who are not parties to the litigation. In cases involving products liability claims against third parties arising out of workplace injuries sustained by injured employees, it has also required the comparison of an employer’s fault where the employer is joined on a contribution claim by the third party product manufacturer.

B. Claims for Death, Injury to Person or Property, and Economic Loss, Based upon “Fault”

The Comparative Fault Act applies to cases involving claims of

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8. Cambern v. Sioux Tools, Inc., 323 N.W.2d 795, 798-99 (Minn. 1982). In Cambern, 323 N.W.2d at 799, the court cited a Wisconsin case, Reiter v. Dyken, 290 N.W.2d 510, 514 (Wis. 1980), in which the Wisconsin Supreme Court set out the requirements for finding an indivisible duty among two or more defendants: [M]ore 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 of it may be divisible.

9. See Reiter, 290 N.W.2d at 514.
12. See, e.g., Lambertson v. Cincinnati Welding Corp., 312 Minn. 114, 128-30, 257 N.W.2d 679, 688-89 (1977). The supreme court extended Lambertson in Hudson v. Snyder Body, Inc., 326 N.W.2d 149, 158 (Minn. 1982), by holding that an employer less at fault than the plaintiff-employee is also liable to the third party for contribution. In Horton by Horton v. Orbeth, Inc., 342 N.W.2d 112, 116 (Minn. 1984), the court refused to extend its holding in Hudson to cases involving contribution claims against defendants who were not employers and who were less at fault than the plaintiff.
“damages for fault resulting in death, in injury to person or property, or in economic loss.”\textsuperscript{13} In those cases it requires the apportionment of “fault,” which is defined 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 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.\textsuperscript{14}

The definition of “fault” defines the reach of the Comparative Fault Act, and, therefore, the joint and several liability provisions of the Act, including the new amendment.

\textit{C. Loss Reallocation}

Section 604.02, subdivision 2 of the Comparative Fault Act requires reallocation of loss in cases where one party is unable to pay its fair share of a judgment.\textsuperscript{15} That uncollectible share must be reallocated among all the parties who are at fault, including the plaintiff. The loss reallocation provision was limited by the percentage cutoffs provided for in subdivision 1 of section 604.02.\textsuperscript{16} In products liability cases the rule is different. Where the share of a party who is in the chain of manufacture and distribution is uncollectible, that share must be reallocated among the other parties in the chain, and not to the plaintiff.\textsuperscript{17}

\begin{itemize}
\item \textsuperscript{13} \textit{Minn. Stat.} § 604.01, subd. 1 (2002).
\item \textsuperscript{14} \textit{Minn. Stat.} § 604.01, subd. 1a. The definition of “fault” was added in 1978 as part of the legislature’s tort reform package that year. See Act of April 5, 1978, ch. 738, § 6, 1978 Minn. Laws 839.
\item \textsuperscript{15} \textit{Minn. Stat.} § 604.02, subd. 2 (2002).
\item \textsuperscript{16} § 604.02, subd. 1.
\item \textsuperscript{17} § 604.02, subd. 3.
\end{itemize}
D. Contribution

“Contribution is an equitable remedy designed to achieve a fair allocation of damages when one tortfeasor has paid a disproportionate share of an injured party’s judgment.”18 The policy that contribution promotes is fairness, and that concept is recognized in the Comparative Fault Act by the requirement that fault be allocated to parties according to their respective degrees of fault.19 That fault-based loss allocation “is expressed by the requirement that losses be allocated among tortfeasors according to the degree of each party’s culpability,” pursuant to Minnesota Statutes section 604.02, subdivision 1, which provides that “[w]hen there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of [fault] attributable to each . . . .”20

There are two requirements for a contribution claim. There must be common liability and one party must discharge more than his or her fair share of the obligation.21

III. THE EVOLUTION OF JOINT AND SEVERAL LIABILITY IN MINNESOTA

The rule of joint and several liability was well-entrenched in the Minnesota common law prior to legislative modification of the rule.22 Joint and several liability survived the enactment of the comparative negligence statute in 196923 and remained unscathed

19. Id.
20. Id. at 118 n.4.
22. See Maday v. Yellow Taxi Co., 311 N.W.2d 849, 850 (Minn. 1981); Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 40, 142 N.W. 930, 939 (1913); Flaherty v. N. Pac. Ry. Co., 39 Minn. 328, 329, 40 N.W. 160, 160-61 (1888). In the context of contribution and indemnity claims, the court in Hendrickson v. Minnesota Power & Light Co., 258 Minn. 368, 372 n.1, 104 N.W.2d 843, 848 n.1 (1960), defined the term “joint tortfeasors” to include “all cases where there is joint liability for a tort, whether the acts of those jointly liable were concerted, merely concurrent, or even successive in point of time.” Id. at 372 n.1, 104 N.W.2d 848 n.1 (citing Robert A. Leflar, Contribution and Indemnity Between Tortfeasors, 81 U. Pa. L. Rev. 130, 131 n.9 (1932)).
until 1978, when it was modified as part of the legislative tort reform package enacted that year. Following the lead of the Uniform Comparative Fault Act, the rule of joint and several liability was modified by the addition of a loss reallocation provision that reallocated any uncollectible share of a judgment among all the remaining parties to the litigation, including the plaintiff. The reallocation rule was a middle position between full retention of the rule of joint and several liability and complete abolition of the rule in favor of several liability only. As enacted, the reallocation rule read as follows:

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.

The 1978 amendment excluded products liability defendants in the chain of manufacture and distribution from the reallocation rule by providing that an uncollectible share of one of those defendants would be reallocated only to other defendants in the chain of manufacture and distribution. In effect, the 1978 joint and several liability was incorporated in the comparative negligence act.


26. § 8, 1978 Minn. Laws 840 (codified at MINN. STAT. § 604.02, subd. 2 (2002)). The provision was taken verbatim from section 2(d) of the Uniform Comparative Fault Act. 12 U.L.A. 123 (1996).


28. MINN. STAT. § 604.02, subd. 2 (2002).

29. Act of April 5, 1978, ch. 738, § 6, 1978 Minn. Laws 840 (codified at MINN. STAT. § 604.02, subd. 3 (2002)). The impact of this loss reallocation provision is lessened by MINN. STAT. § 544.41, subd. 1 (2002), which provides as follows: In any product liability action based in whole or in part on strict liability in tort commenced or maintained against a defendant other than the manufacturer, that party shall upon answering or otherwise pleading file an affidavit certifying the correct identity of the manufacturer of the product allegedly causing injury, death or damage. The commencement of a product liability action based in
amendment applies a unit rule to those defendants. The rule was next modified in 1986 by an amendment that limited the liability of the state or municipalities in cases where the fault of either is less than 35% to no more than two times their percentage of fault. With that amendment, the statute read as follows:

If the state or a municipality as defined in section 466.01 is jointly liable, and its fault is less than 35 percent, it is jointly and severally liable for a percentage of the whole award no greater than twice the amount of fault, including any amount reallocated to the state or municipality under subdivision 2.

In 1988, the legislature again amended joint and several liability law by adopting a new cutoff for joint and several liability that applied to all other torts cases, save certain cases involving statutorily based environmental liability and the previously exempted category of products liability cases. The new rule provided that “a person whose fault is 15% or less is liable for a percentage of the whole award no greater than four times the percentage of fault, including any amount reallocated to that person under subdivision 2.”

The 15% cutoff was the result of a legislative compromise reached in a different legislative session, which accounts for the more or less arbitrary figure adopted by the legislature. As of 1988, then, the joint and several liability and loss reallocation provisions of section 604.02 of the Comparative Fault Act read as follows:

Subdivision 1. When two or more persons are jointly liable, contributions to awards shall be in proportion to

whole or part on strict liability in tort against a certifying defendant shall toll the applicable statute of limitation relative to the defendant for purposes of asserting a strict liability in tort cause of action. However, in cases where the manufacturer is not available, a party lower in the chain may bear substantial liability. See Marcon v. Kmart Corp., 573 N.W.2d 728, 732 (Minn. Ct. App. 1998), rev. denied (Minn. Apr. 14, 1998) (sled manufacturer bankruptcy resulted in shifting of entire liability for the plaintiff’s injuries to Kmart, the sled retailer). In Marcon, Kmart was held 100% responsible for the plaintiff’s injuries, even though the jury did not assign any percentage of fault to Kmart.

31. MINN. STAT. § 604.02, subd. 1 (2002).
32. For a more detailed analysis of the history of the environmental law amendments, see Michael K. Steenson, Joint and Several Liability Minnesota Style, 15 WM. MITCHELL L. REV. 969, 981-85 (1989).
33. Act of April 12, 1988, ch. 503, § 3, 1988 Minn. Laws 375 (codified at MINN. STAT. § 604.02, subd. 1 (2002)).
the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award. Except in cases where 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, a person whose fault is 15 percent or less is liable for a percentage of the whole award no greater than four times the percentage of fault, including any amount reallocated to that person under subdivision 2.

If the state or a municipality as defined in section 466.01 is jointly liable, and its fault is less than 35 percent, it is jointly and severally liable for a percentage of the whole award no greater than twice the amount of fault, including any amount reallocated to the state or municipality under subdivision 2.

Subdivision 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.

Subdivision 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 the person whose fault is less.
IV. HOW THE RULES WORKED BEFORE THE 2003 AMENDMENT

The following examples illustrate the operation of Minnesota’s joint and several liability rules prior to the 2003 amendment.

Example # 1
(P not at fault; caps not applicable)

P v. D1 (40%) D2 (60%)

1. Assume damages of $10,000 and that D2’s fair share of the judgment is uncollectible.
2. D2’s share ($6000) is reallocated to D1, who is responsible to P for the full $10,000.
3. P is not at fault, so nothing is reallocated to P.
4. D1 has a contribution claim against D2 for $6000.

Example # 2
(P at fault; State or municipality not a party; caps not applicable)

P (20%) v. D1 (20%) D2 (60%)

1. Assume damages of $10,000. Also assume that D2’s share of the judgment is uncollectible.
2. D2’s share ($6000) must be reallocated among the remaining parties, including in this case the plaintiff, who is also at fault. The uncollectible $6000 is reallocated between P and D1 according to their respective percentages of fault. Because they are equally at fault, P and D1 each bear one-half of the uncollectible $6000. Therefore, D1 must pay P $2000 (D1’s fair share of the judgment) plus $3000 (one-half of the uncollectible $6000). D1’s total liability to P is therefore $5000.
3. Absent the reallocation provision, D1 would be obligated to pay P $8000 ($10,000, reduced by P’s percentage of fault).
4. P has a continuing claim against D2 for $3000 and D1 has a contribution claim against D2 for $3000.

Example # 3(A)
(P not at fault; D1 is the state or a municipality; the less than 35% X 2 cap applies)
Example # 3(B)
(P at fault; D1 is the state or a municipality; the less than 35% X 2 cap applies)

P (20%) v. D1 (20%)
    D2 (60%)
1. Assume the same facts as in Part A. The only difference is that P is at fault.
2. D1’s liability to P is still capped at two times D1’s percentage of fault, or 40% of the damages, or $4000.
3. Absent that cap on liability, D1 would be responsible for its fair share of the judgment, $2000, plus one-half of the uncollectible $6000, for a total liability of $5000.
4. P, 20% at fault, therefore bears the remainder of the uncollectible amount, or $4000.
5. P has a continuing claim against D2 for $4000.
6. D1 has a contribution claim against D2 for $2000, the extent to which D1’s payment exceeds D1’s fair share of $2000.

Example # 4(A)
(P not at fault; state or municipality not a party; the 15% or less X 4 cap applies)
P v. D1 (10%)  
D2 (90%)  
1. Assume damages of $10,000.  
2. D1’s liability is limited to no more than four times D1’s percentage of fault. In this case, D1’s liability is limited to four times 10%, or 40% of the damages, or $4000.  
3. Absent the cap on liability, D1 would have paid P $10,000.  
4. D1 has a contribution claim against D2 for $3000, the extent to which D1’s payment exceeds D1’s fair share of 10%.  
5. P, who is not at fault, is responsible for 60% of the damages, or $6000. P has a continuing claim against D2 for $6000.

Example # 4(B)  
(P at fault; state or municipality not a party; the 15% or less X 4 cap applies)

P (10%) v. D1 (10%)  
D2 (80%)  
1. Assume the same facts as in part A. The only difference is that P is at fault.  
2. D1’s liability is limited to no more than four times D1’s percentage of fault. In this case, D1’s liability is limited to four times 10%, or 40% of the damages, or $4000. Absent the cap, D1 would have paid P D1’s fair share of the judgment, $1000, plus one-half of the uncollectible $8000, for a total of $5000.  
3. P, also 10% at fault, bears the remainder of the uncollectible amount, for a total of $5000, or 50% of the damages.  
4. P has a continuing claim against D2 for $4000.  
5. D1 has a contribution claim against D2 for $4000, the extent to which D1’s liability exceeds D1’s fair share of the judgment.

Example # 5(A)  
(P not at fault; D1 and D2 are liable pursuant to environmental response and liability act; caps inapplicable)

P v. D1 (10%)  
D2 (90%)  
1. Assume damages of $10,000.  
2. Assume that D1 and D2 are held liable under the Minnesota Environmental Response and Liability Act and that D2 is unable to pay its fair share of the judgment.
3. P is not at fault, so nothing is reallocated to P.

4. D1, although 10% at fault, is unable to utilize the cap on damages because D1’s liability is based upon one of the exempted class of cases noted in Minnesota Statutes section 604.02, subdivision 1; D1 is therefore liable to P for 100% of the damages, or $10,000.

5. D1 has a contribution claim against D2 for $9000.

**Example # 5(B)**

(P at fault; D1 and D2 are liable pursuant to environmental response and liability act; caps inapplicable)

P (10%) v. D1 (10%)
D2 (80%)

1. Assume damages of $10,000.
2. Assume that D1 and D2 are held liable under the Minnesota Environmental Response and Liability Act and that D2 is unable to pay its fair share of the judgment.
3. D1, although 10% at fault, is unable to utilize the cap on damages because D1’s liability is based upon one of the exempted class of cases noted in Minnesota Statutes section 604.02, subdivision 1; D1 is therefore liable to P for D1’s fair share of the damages, $1000, plus one-half of the damages that are uncollectible from D2 ($4000), for a total of $5000, assuming that the loss reallocation provision applies to defendants who are held liable pursuant to one of the theories identified in Minnesota Statutes section 604.02, subdivision 1.
4. P has a continuing claim against D2 for $4000 and D1 has a contribution claim against D2 for $4000.

**Example # 6**

(P at fault; D1 and D2 are in chain of manufacture and distribution; caps inapplicable)

P (10%) v. D1 (10%)
D2 (80%)

1. Assume damages of $10,000.
2. Assume that D1 is a retailer and D2 is a product manufacturer, and that D2 is unable to pay its fair share of the judgment.
3. D1, although 10% at fault, is unable to utilize the cap on damages because pursuant to Minnesota Statutes section...
604.02, subdivision 3, D2’s fair share of the judgment must be reallocated only to D1, the remaining party who is in the chain of manufacture and distribution, and not to P; D1 is therefore liable to P for 90% of the damages, or $9000.

4. D1 has a contribution claim against D2 for $8000.

V. THE 2003 AMENDMENT

Minnesota Statutes section 604.02, subdivision 1, as amended in 2003, reads as follows:

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%;
(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.  

The 2003 amendment makes significant changes in the joint and several liability rules by amending section 604.02, subdivision 1 of the Comparative Fault Act, but it is important to note that the amendment leaves subdivisions 2 and 3 of section 604.02 unaffected. That means that the loss reallocation provision in subdivision 2 and the special rule that applies to reallocation in products liability cases in subdivision 3 have to be accommodated in any interpretation of the new joint and several liability amendment. It is also important to understand that the amendment did nothing to change the definition of “fault” in

34. Act of May 19, 2003, ch. 1, § 1, 2003 Minn. Sess. Law Serv. 258 (West). The amendment applies to claims arising from events that occur on or after August 1, 2003.
section 604.01, subdivision 1a of the Comparative Fault Act, nor did it change the types of claims for damages that are covered by the Act. The Act continues to apply to personal injury and wrongful death claims, as well as claims for property damage and economic loss. However, those claims have to be based on “fault,” which is limited to tort claims based on negligence, recklessness, strict liability, or breach of warranty other than express warranty.

The 2003 amendment makes several changes in prior law. The major change is that several liability is now the general rule, rather than joint liability. There are now four specific exceptions to the general rule where joint and several liability will apply. Some of those exceptions raise interesting interpretive questions. One is how the common scheme or plan exception will be interpreted and how it will be defined in cases where it is in issue. A second, involving the intentional tort exception, is whether the intent of the amendment is to require comparison of the fault of negligent and intentional tortfeasors. A third is whether those exceptions are the only cases where joint and several liability will apply, or whether there are additional cases, such as vicarious liability cases, that will have to be accounted for in order for the new law to function properly.

The next part of the article briefly notes the legislative history of the amendment. It then examines the four stated exceptions for joint and several liability, followed by a consideration of vicarious liability and other imputed fault cases as additional and necessary exceptions to the rule of several liability. It then analyzes the products liability exception to joint and several liability, which appears to be mandated by section 604.02, subdivision 3 of the Comparative Fault Act. The next part looks at the impact of the 2003 amendment on the loss reallocation and aggregation rules in the Comparative Fault Act, followed by a short discussion of the impact of the amendment on the right of contribution. The final part utilizes a series of examples to explain the operation of the amendment, coupled with the loss reallocation rules.

A. Legislative History

The legislative history of the amendment indicates the concerns about the fairness of the existing rules governing joint and several liability and their impact on governmental entities,
business, and the insurance industry in Minnesota.\(^{35}\) No clear guidance concerning the interpretation of the amendment appears in the history, although Representative Johnson, the author of the bill, testifying before the House Civil Law Committee, indicated that the exceptions to joint and several liability were incorporated in the amendment because they were pre-existing exceptions.\(^{36}\)

### B. Several Liability As the General Rule

Prior to the amendment, subdivision 1 of section 604.02, which introduces joint and several liability, began with the proposition that “[w]hen two 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.”\(^{37}\) The rule of joint and several liability made each defendant individually liable, but also jointly responsible for the entire harm suffered by the plaintiff, subject only to the reallocation and percentage cutoff rules in the statute. Until the 2003 amendment, the norm was joint and several liability when two or more persons were jointly liable. The only limitations on the rule of joint and several liability were added in 1978, 1986, and 1988, in the form of the loss reallocation and percentage-based caps on liability.

The 2003 amendment now says that “[w]hen two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each . . . .”\(^{38}\)

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35. See Audio Tape: Testimony of Richard Thomas, Minnesota Defense Lawyers Association, before the Senate Judiciary Committee (April 11, 2003) (on file with author); Audio Tape: Testimony of Glenn Baker, Chairman and CEO, McFarland Trucking, before the House Civil Law Committee (Jan. 29, 2003) (on file with author); Audio Tape: Testimony of John E. Hennen, League of Minnesota Cities, before the House Civil Law Committee (Jan. 29, 2003) (on file with author).

36. Audio Tape: Testimony of Representative Johnson before the House Civil Law Subcommittee (Jan. 23, 2003) (on file with author). For interesting insights into the tort reform issue, with a focus on joint and several liability law, see Richard Thomas, Tort Reform: Crisis Demands Reasoned Response, 27 HENNEPIN LAW. 10 (July/August 2003), and Mark A. Hallberg, Tort Reform: Not a Cure for Malpractice, 27 HENNEPIN LAW. 11 (July/August 2003). Richard Thomas also provided detailed testimony in the Senate and House hearings on the joint and several liability bill.

37. MINN. STAT. § 604.02, subd. 1 (2002) (emphasis added).

38. Act of May 19, 2003, ch. 1, § 1, 2003 Minn. Sess. Law Serv. 258 (West). Other jurisdictions take the position that several liability is the starting point. North Dakota’s comparative fault statute initially provides for several liability, with joint and several liability applicable under only limited circumstances:
The norm is several liability, and joint and several liability becomes the exception. The amendment says that joint and several liability applies only in the four specified categories of cases. The issue is what the change means.

Prior to the 2003 amendment, the starting point for determining the application of the limitations on joint and several liability was the range of cases where two or more defendants acted jointly, concurrently, or successively in causing an indivisible injury or harm to the plaintiff. If the 2003 amendment is to make any sense, the starting point has to be the same. In order for liability to be several only, so that each defendant is held responsible only for the percentage of fault assigned to that defendant, the starting point also has to be a single, indivisible injury or harm caused by defendants who act jointly, concurrently, or successively in causing that injury or harm. If those requirements are not met, there would be no basis for allocating percentages of fault to each defendant. In light of other jurisdictions that have adopted several liability as their starting point, with only limited exceptions

When two or more parties are found to have contributed to the injury, the liability of each party is several only, and is not joint, and each party is liable only for the amount of damages attributable to the percentage of fault of that party, except that any persons who act in concert in committing a tortious act or aid or encourage the act, or ratifies or adopts the act for their benefit, are jointly liable for all damages attributable to their combined percentage of fault.

N.D. CENT. CODE § 32-03.2-02 (1996).


40. The impact of joint and several liability is that defendants may be jointly or individually liable for the whole:

When two or more tortfeasors are jointly and severally liable, each defendant is subject to liability for all of the plaintiff’s damages. The plaintiff can obtain a judgment against all defendants and then enforce it against any one of them, or partly against one and partly against another. The effect is to provide the plaintiff with more than one source of funds but not more than one complete satisfaction.


41. The converse of the rule is that if damages are not apportionable, joint and several liability applies. See Mitchell v. Volkswagenwerk, A.G. 669 F.2d 1199, 1208 (8th Cir. 1982); Mathews v. Mills, 288 Minn. 16, 21-22, 178 N.W.2d 841, 844-45 (1970).

42. Arizona, California, North Dakota, and Wisconsin are good examples. Although the concept is framed slightly differently, the end result is the same. The primary difference in the four states is that California limits several liability to non-economic harm. See ARIZ. REV. STAT. § 12-2506 (A) (2003) (“In an action for personal injury, property damage or wrongful death, the liability of each defendant for damages is several only and is not joint, except as otherwise
for joint and several liability, the position the legislature took in the 2003 amendment is understandable, given its goal of limiting the scope of the rule of joint and several liability.

C. Joint and Several Liability—the Exceptions to Several Liability

The 2003 amendment establishes four explicit exceptions to the rule of several liability. There are other cases where joint and several liability has to apply, however. The two clearest are imputed fault cases such as master-servant and joint enterprise and joint venture cases, and products liability cases where the defendants are in the chain of manufacture and distribution.

1. The 51% Cutoff

Joint and several liability applies to “a person whose fault is greater than 50%.” The 15% and 35% caps are eliminated by the amendment. To illustrate, assume that there are two defendants whose fault combined to cause the plaintiff an indivisible injury, and that the trier of fact assigns 51% of the fault to Defendant 1 and 49% of the fault to Defendant 2. If Defendant 2 is unable to pay its fair share of the judgment, Defendant 2’s share is reallocated to Defendant 1, who is liable to the plaintiff for 100% of the damages because of the rule of joint and several liability. On the other hand, if Defendant 1 is unable to pay, Defendant 2 is liable for only 49% of the plaintiff’s damages because Defendant 2’s liability is several only. In that case, the plaintiff would bear the

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entire burden of the uncollectibility of Defendant 1’s share of the judgment.

If the plaintiff is at fault in any case, the plaintiff’s recovery would also be reduced by the plaintiff’s percentage of fault. The plaintiff would be responsible for a portion of any defendant’s uncollectible share of the judgment pursuant to the loss reallocation provision in Minnesota Statutes section 604.02, subdivision 2

only in a case where one defendant is more than 50% at fault. To put it another way, the loss reallocation provision has potential application only where one of the defendants is jointly and severally liable to the plaintiff.

2. Common Scheme or Plan, Jury Instructions, and Vicarious Liability

The amendment imposes joint and several liability in cases where “two or more persons . . . act in a common scheme or plan that results in injury.” The term appears to be modeled after Wisconsin’s comparative negligence statute, which, in a subdivision headed “concerted action,” provides 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,” although how it will interpreted is an open question.

43. Minn. Stat. § 604.02, subd. 2 (2002).
44. Wis. Stat. § 895.045 (2). The statute exempts punitive damages from the rule. Wis. Stat. § 895.85(5) (2003). Other state statutes may simply use the term “in concert” as an exception where joint and several liability applies, without further defining the term. Other jurisdictions may limit the concept to cases involving intentional torts, or intentional torts and reckless misconduct. Arizona, Idaho, and Washington illustrate these variations on the theme. Arizona Revised Statutes section 12-2506 (F)(1) (2003) defines “[a]cting in concert” as “entering into a conscious agreement to pursue a common plan or design to commit an intentional tort and actively taking part in that intentional tort.” The definition excludes “any person whose conduct was negligent in any of its degrees rather than intentional.” Id. It also provides that “[a] person’s conduct that provides substantial assistance to one committing an intentional tort does not constitute acting in concert if the person has not consciously agreed with the other to commit the intentional tort.” Id. Idaho is similar in providing that “[a] party shall be jointly and severally liable for the fault of another person or entity or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of another party,” and defines “acting in concert” to mean “pursuing a common plan or design which results in the commission of an intentional or reckless tortious act.” Idaho Code § 6-803(5) (Michie 2003). Washington provides that “[a] party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert . . . .” Wash. Rev. Code Ann. §
This exception to the new rule of several liability differs from the other exceptions. If joint and several liability is established by proof of the existence of a common scheme or plan, the impact is that each defendant in the combination should become responsible for any uncollectible share of the other defendant or defendants in the combination. In the event of the insolvency of one party in the scheme or plan, there would be no reallocation outside the combination, as long as there is a single, solvent party remaining in the combination. The rule differs from the other joint and several liability cases because liability in the remaining three exceptions does not depend on the existence of a relationship between the defendants that would justify imputing the fault of one defendant to the others found to have contributed to the plaintiff’s injury.

The “common scheme or plan” language in the amendment gives rise to a range of potential interpretations. The key issue is to determine what sorts of connections must exist among parties in order to justify treating them as a unit for purposes of joint and several liability. The answer to that question will also have significant bearing on the issue of the fault comparisons required by section 604.01, subdivision 1 of the Comparative Fault Act. The next part of this article analyzes the possible approaches to jury instructions in cases where the term may be in issue, followed by a more detailed look at how the term might be interpreted. The final part analyzes the vicarious liability issue and how it relates to common scheme or plan and the joint and several liability issue.

a. Common Scheme or Plan—Jury Instructions

There are various ways to approach the issue of jury instructions in cases where the existence of a common scheme or plan is in issue. One is to leave the term undefined. A second is to define the term using standard dictionary definitions of the key terms. A third is to define the term according to the legally accepted subcategories that fit the general concept of concerted action.

The problem with the first option is that it could potentially include conduct that does not meet any of the standard or accepted categories of cases in which concerted action or joint enterprise or ventures have been found. As an example of the

4.22.070 (1)(a) (West 2003). The definition is not otherwise limited.
potential for expansion of the concept, the result in the Minnesota Supreme Court’s decision in *Delgado v. Lohmar*\(^{45}\) might be compared with the potential result in an undefined case. The case involved injuries to a farmer who was blinded by a shotgun fired by one of a group of four hunters who were grouse hunting on his land without his permission. The hunters were friends who arrived at the hunting site at different times with their own families and their own equipment. They camped on property owned by an uncle of one of the group, but mistakenly trespassed on the plaintiff’s property while hunting. A joint enterprise requires “(1) a mutual understanding 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.”\(^{46}\) While there was a mutual undertaking to hunt grouse, the supreme court held that none of the hunters had a right to control the guns of the other hunters, and that they were therefore not engaged in a joint enterprise.\(^{47}\)

Submitting the issue to a jury without further definition would not necessarily produce the same result, however. The hunters had at least a semblance of a joint plan in their hunting, even if their agreement lacked the elements of a joint enterprise.

An instruction built on dictionary definitions of the words “common” and “scheme” or “plan” might look something like this:

A common scheme or plan is a systematic plan of action or method that has to be worked out beforehand together by two or more persons for the accomplishment of a particular result.

The problem with the dictionary definition is that it could be overinclusive and underinclusive. It could readily include the facts in *Delgado*, even if there were no joint enterprise, but it could also exclude at least some cases in which concerted action has been found. The obvious example is a case involving concerted action that is the result of a spur-of-the-moment decision to engage in potentially destructive conduct. The drag racing case is illustrative.

\(^{45}\) 289 N.W.2d 479 (Minn. 1979).

\(^{46}\) Id. at 482.

\(^{47}\) Id. at 483.

\(^{48}\) The American Heritage Dictionary 372 (4th ed. 2000) defines the word *common* as “[b]elonging equally to or shared equally by two or more; joint: common interest.” *Scheme* is defined as “[a] systematic plan of action. A secret or devious plan; plot. An orderly combination of related parts or elements.” A *plan* is defined as “[a] detailed scheme, program, or method worked out beforehand for the accomplishment of an objective: a plan of attack.” Id. at 1341.
While concerted action might be found in such a case and would justify a finding of joint and several liability, the conduct might not meet the dictionary definition because of the lack of deliberateness in the decision to race.

The third option is more flexible. It would define the joint and several liability issue according to the type of conduct at issue. If the issue is whether there is a joint venture, then the jury would be instructed on the elements of a joint venture. If the issue concerns aiding and abetting, then the issue could be defined in terms that have been previously accepted by the supreme court. Most of the time the issue would be resolved as a matter of law for the court, but in cases where the question is in issue, a more detailed definition according to the plaintiff’s theory would be necessary to avoid the imprecision inherent in the use of the term either without further definition or with only a dictionary definition.

\[b. \quad \text{Common Scheme or Plan}\]

A useful baseline for considering the joint and several liability issue is the Restatement (Third) of Torts: Apportionment of Liability. Section 15 of the Restatement takes the following position on the liability of persons who act in concert:

When 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 comments to section 15 make it clear that where persons act in concert, they are jointly and severally liable for the individual shares of responsibility assigned to each person, and that the rule supersedes any “abolition or modification of joint and several liability.”\(^{49}\) The comments to section 15 rely on section 876 of the Restatement (Second) of Torts to define the liability of “Persons Acting in Concert”:

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


\(^{50}\) \textit{Id.} cmt. a.
duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.\(^{51}\)

The comment to clause (a) develops the concerted action concept:

Parties are acting in concert when they act in accordance

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\(^{51}\) Restatement (Second) of Torts § 876 (1979). Prosser and Keeton discuss “concerted action” in their chapter on joint tortfeasors. The discussion is lengthy but essential to an understanding of the concept of “common scheme or plan” in the current Minnesota statute governing joint and several liability:

The original meaning of a “joint tort” was that of vicarious liability for concerted action. All persons who acted in concert to commit a trespass, in pursuance of a common design, were held liable for the entire result. In such a case there was a common purpose, with mutual aid in carrying it out; in short, there was a joint enterprise, so that “all coming to do an unlawful act, and of one party, the act of one is the act of all of the same party being present.” Each was therefore liable for the entire damage done, although one might have battered, while another imprisoned the plaintiff, and a third stole the plaintiff’s silver buttons. All might be joined as defendants in the same action at law, and since each was liable for all, the jury would not be permitted to apportion the damages. The rule goes back to the early days when the action of trespass was primarily a criminal action; and it has survived also in the criminal law. This principle, somewhat extended beyond its original scope, is still law. All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer’s acts done for their benefit, are equally liable.

Express agreement is not necessary, and all that is required is that there be a tacit understanding, as where two automobile drivers suddenly and without consultation decide to race their cars on the public highway. There are even occasional statements that mere knowledge by each party of what the other is doing is sufficient “concert” to make each liable for the acts of the other; but this seems clearly wrong. Such knowledge may very well be important evidence that a tacit understanding exists; but since there is ordinarily no duty to take affirmative steps to interfere, mere presence at the commission of the wrong, or failure to object to it, is not enough to charge one with responsibility. It is, furthermore, essential that each particular defendant who is to be charged with responsibility shall be proceeding tortiously, which is to say with the intent requisite to committing a tort, or with negligence. One who innocently, and carefully, does an act which happens to further the tortious purpose of another is not acting in concert with the other.

with an agreement to cooperate in a particular line of conduct or to accomplish a particular result. The agreement need not be expressed in words and may be implied and understood to exist from the conduct itself. Whenever two or more persons commit tortious acts in concert, each becomes subject to liability for the acts of the others, as well as for his own acts. The theory of the early common law was that there was a mutual agency of each to act for the others, which made all liable for the tortious acts of any one.\textsuperscript{52}

The comments explain clause (b):

Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance. If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other’s act. This is true both when the act done is an intended trespass . . . and when it is merely a negligent act.\textsuperscript{53}

The comment to clause (c) says that one who

\textit{[P]ersonally participates in causing a particular result in accordance with an agreement with another . . . is responsible for the result of the united effort if his act, considered by itself, constitutes a breach of duty and is a substantial factor in causing the result, irrespective of his knowledge that his act or the act of the other is tortious.}\textsuperscript{54}

The difference from clause (b) lies in the lack of knowledge that the conduct of others is tortious.

Although not specifically modeled on section 15 of the Restatement (Third) of Torts and section 876 of the Restatement (Second) of Torts, the common scheme or plan exception to the Minnesota rule of several liability seems adequately explained by the Restatement provisions, and it offers a scheme for testing the limits of the statutory language. It is also supported by the

\textsuperscript{52} \textit{Restatement (Second) of Torts} § 876 cmt. a (1979).

\textsuperscript{53} \textit{Id.} cmt. d.

\textsuperscript{54} \textit{Id.} cmt. e. The comment explains with an example: “[E]ach of a number of trespassers who are jointly excavating a short ditch is liable for the entire harm done by the ditch, although each reasonably believes that he is not trespassing.” \textit{Id.}
Minnesota cases, whether they are characterized as aiding and abetting, conspiracy, or joint enterprise and joint venture cases.

_Witzman v. Lehrman, Lehrman & Flom_ involved a suit by a beneficiary, under three trusts for which her brother served as trustee, against the accounting firm that served as her brother's accountants. The suit alleged that the accounting firm was “jointly and severally liable for [the brother’s] breach of trust under a theory of joint tortious conduct/aiding and abetting.” The theory was based on the Restatement (Second) of Torts section 876(b).

The court held that section 876 could be applied to the claim against the accounting firm because it was “not convinced that public policy requires a wholesale exclusion of professionals from aiding and abetting liability.” The court then detailed the elements of a claim for aiding and abetting the tortious conduct of another:

1. The primary tort-feasor must commit a tort that causes an injury to the plaintiff;
2. The defendant must know that the primary tortfeasor’s conduct constitutes a breach of duty; and
3. The defendant must substantially assist or encourage the primary tort-feasor in the achievement of the breach.

In an earlier case, _Bukowski v. Juranek_, the plaintiff sued on the grounds that the accountant was liable for other breaches of duty associated with the management of the trusts.

55. 601 N.W.2d 179 (Minn. 1999).
56. Id. at 182.
57. Id. at 185-86 (citing Greenwood v. Evergreen Mines Co., 220 Minn. 296, 309, 19 N.W.2d 726, 733 (1945) (quoting Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 40, 142 N.W. 930, 939 (1913))).
58. Witzman, 601 N.W.2d at 186. The cases the court noted are _Leon v. Washington County_, 397 N.W.2d 867, 872 (Minn. 1986) and _Olson v. Ische_, 343 N.W.2d 284, 289 (Minn. 1984). Both cases held that the facts were insufficient to establish a claim under section 876.
59. 601 N.W.2d at 187.
60. Id.
61. 227 Minn. 313, 35 N.W.2d 427 (1948).
several defendants under a conspiracy theory, alleging that they conspired to attack him. In noting that the defendants were not liable for conspiracy for their initial discussions involving the plaintiff, given the lack of any relationship between those discussions and the subsequent injuries to the plaintiff, the court said that in order for a conspiracy to exist, "the minds of the alleged conspirators must meet upon a plan or purpose of action to achieve the contemplated result." 62 The plaintiff also alleged that one of the defendants was liable because he "advised, counseled or directed" the attack on the plaintiff, even though he "did not personally participate in the attack upon the plaintiff," and requested a jury instruction to that effect. The court held that the plaintiff’s requested instruction accurately stated the law, although it concluded that the trial court’s instructions adequately encompassed the principle. 63

There are numerous Minnesota cases involving claims that a joint enterprise exists, although many fewer where the courts have actually found the existence of a joint enterprise. 64 The Minnesota Supreme Court has said that a joint enterprise exists where there is “(1) a mutual undertaking for a common purpose, and (2) a right to some voice in the direction and control of the means used to carry out the common purpose.” 65 There are four elements to a joint venture, however:

(1) contribution—combining either money, property, time, or skill in a common undertaking; (2) joint proprietorship and control—the parties having a proprietary interest and a right of control over the subject matter; (3) sharing of profits—but not necessarily of losses; and (4) contract—either express or implied. 66

62. Id. at 318, 35 N.W.2d at 429.
63. Id. at 319, 35 N.W.2d at 430.
64. It is important to recognize that the Minnesota Supreme Court has noted that the joint enterprise exception has been utilized primarily in automobile accident cases. See Delgado v. Lohmar, 289 N.W.2d 479, 483 (Minn. 1979) (noting that most joint enterprise cases involve automobiles). The court of appeals, however, has applied the concept more broadly. See Dang v. St. Paul Ramsey Med. Ctr., Inc., 490 N.W.2d 653, 657 (Minn. Ct. App. 1992) (surveying Minnesota Supreme Court joint enterprise cases).
65. See, e.g., Mellett v. Fairview Health Servs., 634 N.W.2d 421, 424 (Minn. 2001); Olson v. Ische, 343 N.W.2d 284, 288 (Minn. 1984); Murphy v. Keating, 204 Minn. 269, 273, 283 N.W. 389, 392 (1939).
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The basic difference between a joint venture and a joint enterprise is that “[a] business relationship is needed for a joint venture but not for a joint enterprise.”\(^\text{67}\) If there is a joint enterprise or venture, the fault of each member of the enterprise or venture is imputed to the other members.

As with aiding and abetting or conspiracy cases, the elements of a joint enterprise and joint venture seem to fit the common scheme or plan language, even though the elements are not specifically couched in those terms. The question is whether the language is broad enough to accommodate other exceptions.

Comment b to section 15 of the Restatement (Third) of Torts: Apportionment of Liability discusses other cases where joint and several liability may be appropriate, based on their similarity to concerted action cases:

A number of other situations similar to concerted activity or vicarious liability may be sufficient to impose joint and several liability on tortfeasors who engage in certain conduct or have a specific relationship. Thus, one who directs tortious conduct by another, even though not technically the employer of the tortious actor, may be subject to joint and several liability for injury. As with liability for concerted activity, the rule stated in this Comment does not address or change the law governing the relationships or circumstances that justify holding all parties jointly and severally liable. When the underlying law does so prescribe, all parties are jointly and severally liable for the full extent of harm caused by each.

Section 877 of the Restatement (Second) of Torts applies to cases where one person directs or permits the conduct of a third person:

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

(a) orders or induces the conduct, if he knows or should know of circumstances that would make the conduct tortious if it were his own, or

(b) conducts an activity with the aid of the other and is negligent in employing him, or

(c) permits the other to act upon his premises or with his

\(^{67}\) Olson v. Ische, 343 N.W.2d 284, 288 (Minn. 1984).

\(^{68}\) RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 15 cmt. b (2000).
instrumentalities, knowing or having reason to know that
the other is acting or will act tortiously, or
(d) controls, or has a duty to use care to control, the
conduct of the other, who is likely to do harm if not
controlled, and fails to exercise care in the control, or
(e) has a duty to provide protection for, or to have care
used for the protection of, third persons or their property
and confines the performance of the duty to the other,
who causes or fails to avert the harm by failing to perform
the duty.\(^{69}\)

Most of the cases noted in clause (a) of section 877 would be
covered because they are the act of a principal or master,\(^{79}\) but the
rule transcends those cases to cover any situation where a person
orders or induces conduct, “if he has or should have knowledge of
the conditions under which it is to be done.”\(^{71}\) Clause (a) makes a
person “who accomplishes a particular consequence . . . as
responsible for it when accomplished through directions to
another as when accomplished by himself.”\(^{72}\) Cases such as
Bukowski v. Juranek\(^{73}\) are broad enough to encompass that principle,
as well as the concerted action concept.

Clause (b) “has frequent application to cases in which an
employer is conducting a business and negligently employs
incompetent or dangerous servants or is negligent in not giving
them directions.”\(^{74}\) The employer is liable in these cases “not only
because of the relation between the parties, but also because of his
own tortious conduct,” but it also applies where there is no master-
servant relationship.\(^{75}\) Minnesota readily follows and applies the
theory in negligent hiring cases.\(^{76}\)

69. Restatement (Second) of Torts § 877 (1979).
70. Id. cmt. a.
71. Id.
72. Id.
73. 227 Minn. 313, 35 N.W.2d 427 (1948).
Eaton’s Dude Ranch, 307 Minn. 280, 283, 239 N.W.2d 761, 762 (1976) (“It is
settled that a corporate officer is not liable for the torts of the corporation’s
employees unless he participated in, directed, or was negligent in failing to learn
of and prevent the tort.”).
75. Restatement (Second) of Torts § 877 cmt. c. (1979).
76. See, e.g., Ponticas v. K.M.S. Investments, 331 N.W.2d 907, 910-11 (Minn.
1983) (negligent hiring of caretaker who committed sexual assault on tenant in
apartment building). For a detailed discussion of all facets of employment-related
torts, see Timothy P. Glynn, The Limited Viability of Negligent Supervision, Retention,
Hiring, and Infliction of Emotional Distress Claims in Employment Discrimination Cases in

http://open.mitchellhamline.edu/wmlr/vol30/iss3/2
Clause (c) makes a master “liable for the activity of servants on his land or with his chattels although the activity is beyond the scope of their employment, if he knows or has reason to believe that they are or will be negligent.”\textsuperscript{77} Clause (c) applies also “to one who permits others not his servants to use his land as licensees and to one who has legal power to exclude another from his land and acquiesces in the other’s use of the land,” and “to one who gives a chattel to another or who acquiesces in the taking of his chattel by another.”\textsuperscript{78} The Minnesota Supreme Court has recognized negligent entrustment theory.\textsuperscript{79} How far the theory would be extended is an open question.

Clause (d) applies in cases where a person has “voluntarily

\begin{itemize}
\item \textsuperscript{77} \textit{RESTATEMENT (SECOND) OF TORTS} § 877 cmt. d. (1979).
\item \textsuperscript{78} \textit{Id.}
\item \textsuperscript{79} \textit{See, e.g.,} Axelson v. Williams, 324 N.W.2d 241, 243-44 (Minn. 1982) (recognizing negligent entrustment claim based on \textit{RESTATEMENT (SECOND) OF TORTS} § 390 (1965)).
\item \textsuperscript{80} The theory has potential application in cases involving liquor liability, where there are at least two potential defendants, including a bar held liable pursuant to the Civil Damages Act, \textit{MINN. STAT.} § 340A.801, subd. 1 (2002), and an illegally served intoxicated person who subsequently causes injury to a third person, or a social host who negligently or otherwise illegally provides alcohol to a minor who subsequently causes injury either to himself or herself or a third person. There are two forms of social host liability in Minnesota. \textit{MINN. STAT.} § 340A.801, subd. 6 (2002) provides that “[n]othing in this chapter precludes common law tort claims against any person 21 years old or older who knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years.” It permits the imposition of liability on a social host who is at fault in providing the underage person with alcohol. In this case, a cause of action exists in favor of the person who becomes intoxicated as well as innocent third persons, although the fault of the intoxicated person is taken into consideration. \textit{See} Van Wagner v. Mattison, 533 N.W.2d 75, 79-80 (Minn. Ct. App. 1995). \textit{MINN. STAT.} § 340A.90, subd. 1 provides a statutory cause of action against a social host 21 or older who provides or permits alcohol to be provided to a person younger than 21. The cause of action does not exist in favor of the intoxicated person, however. \textit{Id. subd. 1(c).} In \textit{Macleary} v. \textit{Hines}, 817 F.2d 1081, 1085 (3d Cir. 1987), the Third Circuit, applying Pennsylvania law, relied on section 877(c) of the \textit{RESTATEMENT (SECOND) OF TORTS} (1977) in holding that “a social host may be liable for knowingly and intentionally making available premises under the host’s control with the knowledge and intention that the premises will be used by minors for the purpose of consuming alcohol.” The argument, based on section 15 of the \textit{RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIA.} (2000), is that the similarity of section 877 cases to concerted action cases justifies imputation of the fault of the intoxicated person to the person who provided that person with alcohol. The argument could also be extended to cases involving the liability of a bar pursuant to the Civil Damages Act.
taken charge of an insane or otherwise dangerous person.\textsuperscript{81} As examples, the clause applies to prison guards or officers who have “custody of or a duty to control a criminal or other person” who they have “reason to know will cause harm if he escapes,” and to parents who have a minor child with manifested dangerous propensities.\textsuperscript{82}

Clause (e) applies where a person, either by contract or entering into relations with another person, undertakes a duty to affirmatively protect the other person from harm.\textsuperscript{83} Where the duty exists, it is nondelegable and the person who violates the duty is liable, even for the tortious conduct of a third person to whom the duty was delegated.\textsuperscript{84}

Section 878 of the Restatement (First) of Torts covers common duties:

Each of two or more persons who fail in the performance of a common non-contractual duty is liable for the entire harm of which such failure is the legal cause.\textsuperscript{85}

The comments to section 878 state that “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.”\textsuperscript{86} There is some indication that Minnesota would accept a common duty analysis also and that the common duty analysis would justify the conclusion that joint and several liability would also apply.\textsuperscript{87}

\textsuperscript{81} Restatement (Second) of Torts § 877 cmt. e. (1977).
\textsuperscript{82} Id.
\textsuperscript{83} Id. cmt. f.
\textsuperscript{84} Id. See Daly v. Bergstedt, 267 Minn. 244, 253-54, 126 N.W.2d 242, 248-49 (1964) (noting existence of nondelegable duty to keep premises safe in slip-and-fall accident in defendant’s store).
\textsuperscript{85} Restatement (First) of Torts § 878 (1939).
\textsuperscript{86} Id. cmt. a.
\textsuperscript{87} Those conclusions would of course have been possible prior to the amendment, but for different reasons. The concept would have been important for determining whether aggregation is appropriate in the fault comparison required by Minn. Stat. § 604.01, subd. 1 (2002). It has continuing importance with respect to that issue. 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).
c. Vicarious Liability

There are cases beyond the “common scheme or plan” language for which room has to be made in any understanding of joint and several liability. The Restatement (Third) of Torts: Apportionment of Liability, notes that vicarious liability or other imputed fault cases also have to be treated as cases in which joint and several liability will apply.\(^{88}\) Section 7, comment j, and section 13 explain the concept. Section 13, which covers vicarious liability, reads as follows:

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.

Comment a to section 13 explains:

In a number of contexts, the responsibility of one actor is legally imputed to another, and vicarious liability is imposed. The most familiar is respondeat superior—the liability of a principal for the tortious acts of an agent and of a master for tortious acts of a servant . . . . In some circumstances the employer of an independent contractor may be held liable for the negligence of a contractor . . . . Nondelegability rules impose liability on a principal who hired an agent to perform a task. Many statutes make the owner of an automobile liable for the tortious acts of a driver using the automobile with permission of the owner. Retailers and other nonmanufacturer sellers of products may be held strictly liable for a defect attributable to the manufacturer, in effect imposing vicarious liability on the retailer . . . . Some statutes impose vicarious liability on parents for their children’s tortious acts.\(^{89}\)

Comment j to section 7 reads as follows:

When a party is liable solely on the basis of another person’s tortious conduct, there is no direct responsibility to assign to the party to whom liability is imputed. In that situation, the party who committed the tortious acts or omissions and the party to whom liability is imputed are


\(^{89}\) Id. § 7 cmt. a.
treated as a single unit for the assignment of responsibility. For example, an employer who is vicariously liable for the negligence of an employee and the employee are treated as a single entity. Similarly, an innocent retailer and a manufacturer of a defective product are treated as a single entity.\footnote{90}{Id. cmt. j (citations omitted).}

The Reporters’ Note to comment b of section 13 states that “[m]ost state statutes abolishing or modifying joint and several liability do not address explicitly whether a vicariously liable party remains fully liable for any fault attributed to the agent. A few statutes modifying joint and several liability state explicitly that vicariously liable parties remain jointly and severally liable.”\footnote{91}{Id. Reporters’ Note (citing ARIZ. REV. STAT. ANN. § 12-2506(D)(1) (West 1994); IDAHO CODE § 6-803(5) (Michie 1998); WASH. REV. CODE ANN. § 4.22.070(1)(a) (West 1994)).}

While the Minnesota Supreme Court has characterized the liability of master and servant as joint and several liability,\footnote{92}{See, e.g., Schneider v. Buckman, 433 N.W.2d 98, 101 (Minn. 1988). See id. at 103 (Simonett, J., concurring specially).} and the 2003 amendment does not specifically include vicarious liability in the four stated exceptions, the amendment should have no effect on these sorts of vicarious liability cases. Where there is vicarious liability, whether based on the intentional or negligent torts of the employee, the fault assigned to the actively at-fault employee simply folds into and becomes the responsibility of the vicariously liable party.\footnote{93}{See id. at 103 (Simonett, J., concurring specially).} That is the clear point of section 13 of the Restatement. There is simply no fault to split in the first place. The Minnesota Supreme Court took exactly that position in \textit{Larsen v. Minneapolis Gas Co.}\footnote{94}{282 Minn. 135, 149, 163 N.W.2d 755, 764 (1968); see also Polaris Indus. v. Plastics, Inc., 299 N.W.2d 414, 420 (Minn. 1980) (characterizing a gas tank seller’s liability as vicarious).} in holding that fault should not have been split among a vicariously liable contractor and an actively at-fault subcontractor. The Restatement achieves the same result by not labeling vicarious liability as joint and several liability.\footnote{95}{RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 13, Reporters’ Note (2000) notes that courts addressing the issue of the liability of a vicariously liable defendant where legislation has abrogated joint and several liability “have concluded that full liability survives for vicariously liable parties.” The Reporters’ Note cites Miller v. Stouffer, 11 Cal. Rptr. 2d 454, 460-61 (Cal. Dist. Ct. App. 1992) (holding that California’s Proposition 51, eliminating joint and several liability for noneconomic loss, did not affect the doctrine of respondeat superior, which makes an employer liable regardless of proof of the employer’s fault, and that an...} Whatever analytical route the
courts take, the new amendment will have to be interpreted so that it will not bar imposition of joint liability on a vicariously liable party.

In Minnesota, those cases will have to include master-servant and principal-agent cases and other vicarious liability cases such as Larsen, as well as cases involving statutorily imposed joint and several liability. As an example of the latter, section 540.18 of the Minnesota Statutes provides the following:

The parent or guardian of the person of a minor who is under the age of 18 and who is living with the parent or guardian and who willfully or maliciously causes injury to any person or damage to any property is jointly and severally liable with such minor for such injury or damage to an amount not exceeding $1000, if such minor would have been liable for such injury or damage if the minor had been an adult. 96

While there is no mention in the 2003 amendment of statutorily imposed joint and several liability, it has to be accommodated in any interpretation of the amendment.

There may be additional cases where the fault of one party will be imputed to another, as previously noted. Vicarious liability and concerted action cases may overlap, as the Restatement (Third) of Torts: Apportionment of Liability points out, 97 and irrespective of whether the other cases are considered as concerted action, vicarious liability, or other imputed fault cases, the courts will have

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96. MINN. STAT. § 540.18, subd. 1 (2002). There are others. See, e.g., MINN. STAT. § 86B.341, subd. 2(a) (2002) (“[t]he owner and operator of a watercraft are jointly and severally liable for any injury or damage caused by the negligent operation of a watercraft whether the negligence consists of a violation of the provisions of the statutes of this state or neglecting to observe ordinary care in the operation as the common law requires”); MINN. STAT. § 346.56, subd. 4 (2003) (“[a] person or organization who plans or assists in the development of a plan to release, without permission, an animal lawfully confined for science, research, commerce, or education, or who otherwise aids, advises, hires, counsels, or encourages another to commit the act is jointly and severally liable for all damages under subdivision 3”); MINN. STAT. § 347.01 (a)(2002) (“[o]wners or keepers of any dog or dogs, that kill, wound, or worry any domestic animal or animals, shall be jointly and severally liable to the owner of such animal or animals for all damages done by such dog or dogs”).

to determine whether some or all of them constitute necessary exceptions to the now general rule of several liability.

3. Intentional Torts

The 2003 amendment provides that “a person who commits an intentional tort” is jointly and severally liable for the entire damages award to the plaintiff.\(^{98}\) This part of the amendment raises distinct issues. Imposing joint and several liability on an intentional tortfeasor is straightforward. Minnesota law has previously provided as much. If the amendment does only that, the only issue, which also existed prior to the amendment, is determining how to submit cases to a jury when they involve claims against one or more defendants on the basis of intentional torts and claims against other defendants based on negligence.

The most significant issue is whether the intent of this part of the amendment is to provide for the apportionment of fault in cases where one or more of the defendants are held liable under an intentional tort theory.\(^{99}\) If it does, it raises issues concerning the interpretation of the Comparative Fault Act in its entirety. In cases involving the liability of two or more intentional tortfeasors or an intentional tortfeasor and a negligent tortfeasor or tortfeasors, the defendants have an interest in limiting their liability through the application of comparative fault principles. Assuming that there is no relationship among the defendants that would bring them within the common scheme or plan exception, the policy argument is that a defendant whose liability is based on negligence should be no worse off when a co-defendant has committed an intentional tort than a tort based on negligence or reckless misconduct.\(^{100}\) However, the policy argument in favor of

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\(^{98}\) ACT OF MAY 19, 2003, CH. 71, § 1, 2003 Minn. Sess. Law Serv. 258 (West). The amendment applies to claims arising from events that occur on or after August 1, 2003. *Id.*


\(^{100}\) See Medina v. Graham’s Cowboys, Inc., 827 P.2d 859, 863 (N.M. Ct. App. 1992): It would seem inconsistent with [several liability] to hold a negligent tortfeasor responsible for the entirety of the damage if the concurrent...
permitting the allocation of negligence in those cases depends on whether there is statutory or judicial sanction for the comparison of intentional tort liability with negligence. It seems clear that the supreme court has the authority to shape the Comparative Fault Act according to overriding principles of tort law. In cases where the court has done that, however, the overriding principles have justified the court in limiting the defenses available to the defendant, the Comparative Fault Act notwithstanding.

Taken at face value, however, the retention of joint and several liability for intentional torts in no way affects the liability of tortfeasors who are joined in the same action and held liable on the basis of negligence. While the intentional tortfeasor is jointly and severally liable for the entire damages award to the plaintiff, any defendant joined in the same action and held liable on the basis of negligence for the same action would also be liable for all the plaintiff’s damages, assuming that there is no basis for apportionment. The only way to avert that result is to compare the fault of the intentional and negligent tortfeasors. The tortfeasor happens to have committed an intentional tort rather than a negligent tort. Why should a negligent tortfeasor be worse off when the concurrent tortfeasor is “evil” rather than merely inattentive?  

Id. at 863 (declining, however, to apportion fault between an employee who committed an intentional tort and his employer who was held liable on the basis of negligent hiring and supervision and failure to provide a safe premises for its bar patrons).

101. For example, in Kansas State Bank & Trust Co. v. Specialized Transportation Services, Inc., 819 P.2d 587, 606-07 (Kan. 1991), the Kansas Supreme Court held that the Kansas Comparative Fault Act did not permit the comparison of intentional torts and negligence. The case also illustrates how cases involving the submission of both intentional tort, in that case battery, and negligence claims may be submitted on the same special verdict form. Separate questions were submitted concerning the intentional tort of one defendant and the negligence of two other defendants in failing to prevent the battery. Fault was apportioned only among the two negligent defendants. Only a single damages issue was submitted. See id. at 605.

102. Joint and several liability requires an indivisible injury, and in most cases involving a combination of negligent and intentional acts it would be difficult to apportion the damages. Washington requires that apportionment, however, even though the definition of “fault” in Washington’s comparative fault act (see WASH. REV. CODE § 4.22.015 (2003)) does not include intentional torts. Tegman v. Accident & Med. Investigations, Inc., 75 P.3d 497, 502-03 (Wash. 2003). The court required separate determinations of the damages caused by the intentional tortfeasor in the case and the negligent tortfeasors. The court reached that result because its construction of the comparative fault act, which made only “at-fault” defendants subject to the statutory rules governing joint and several liability. Because “fault” does not include intentional torts, the court concluded that damages had to be separated.
language of the definition of “fault” in the Act would have to be
ignored to reach that result, however. “Fault” includes negligence,
reckless conduct, strict liability, and breach of warranty other than
express warranty. The definition does not include intentional torts.
The Uniform Comparative Fault Act, the model for Minnesota’s
definition of fault, specifically excluded intentional tort liability
from the definition. The comment to section 1 of the Uniform
Act makes it clear that the definition of “fault” does not include
intentional torts, but the comment also states that “a court
determining that the general principle should apply at common
law to a case before it of an intentional tort is not precluded from
that holding by the Act.”

The Minnesota Supreme Court has consistently held that
contributory negligence is not a defense to intentional torts, and
that comparative fault principles do not apply to intentional torts.
Finding that fault comparisons can include intentional torts would
require construing the 2003 amendment providing for joint and
several liability for intentional tortfeasors as a legislative mandate
for the comparison and would also require the court to repudiate
its own precedent, in particular the precedent precluding the
assertion of a defense of contributory negligence as a defense to an
intentional tort.

103. The definition of “fault” was initially taken from the Uniform
104. UNIF. COMPARATIVE FAULT ACT § 1 cmt. (1977).
105. See, e.g., Florenzano v. Olson, 387 N.W.2d 168, 176 n.7 (Minn. 1986);
Farmers Ins. Exchange v. Vill. of Hewitt, 274 Minn. 246, 258, 143 N.W.2d 230, 238
106. See, e.g., Farmer’s State Bank of Darwin v. Swisher, 631 N.W.2d 796, 801
(Minn. 2001); Florenzano v. Olson, 387 N.W.2d 168, 175 (Minn. 1986); Kelzer v.
Wachholz, 381 N.W.2d 852, 854 (Minn. Ct. App. 1986). Notwithstanding the
supreme court’s pronouncements, there are cases in which fault has been
compared among defendants, some of whom committed intentional torts. In
Gregor v. Clark, 560 N.W.2d 744 (Minn. Ct. App. 1997), a battery and negligence
action, the trial court apportioned fault among seven defendants. The issue on
appeal concerned the propriety of reallocation of the uncollectible shares of five
defendants to two of the defendants who were solvent, even though they were
responsible for only a minimal share of the damages. Id. In Crea v. Bly, 298
N.W.2d 66, 66 (Minn. 1980), the trial court in a case involving a battery against
the plaintiff apportioned one-third of the fault to the three defendants in the case,
including the defendant who committed the battery, a second defendant who
encouraged him to do so, and a third defendant, which was the bar that served
alcohol to the defendant who encouraged the action. The supreme court reversed
the case as to the bar and did not comment on the propriety of apportioning fault
among a negligent defendant and two defendants who would have been held
liable under an intentional tort and aiding and abetting theory. Id.
Should the courts determine that intentional tort liability is subject to comparison along with negligent misconduct, the common scheme or plan construction becomes even more important. The court would have to resolve the further question of whether the fault of the intentional wrongdoer should be imputed to and become the responsibility of the negligent tortfeasor. The Restatement (Third) of Torts: Apportionment of Liability takes the position that where the governing law provides that the liability of an intentional wrongdoer is imputed to the negligent wrongdoer whose negligence consisted of a failure to prevent that conduct, the fault of the intentional wrongdoer is imputed to the negligent tortfeasor:

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.\(^{107}\)

The Restatement would be relevant in any case where vicarious liability is imposed for the intentional tort of another.\(^{108}\)

Section 14 of the Restatement (Third) of Torts takes the position 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."\(^{109}\)

If the governing law provides for the imposition of liability under these circumstances, the Restatement’s position is that joint and several liability applies.\(^{110}\)

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\(^{107}\) Restatement (Third) of Torts: Apportionment of Liab. § 13 (2000). The Restatement takes the position that "[w]hen one or more parties is held liable solely because of the tortious acts of another actor, the factfinder should treat the actor and all such vicariously liable parties as a single entity for the purpose of assigning comparative responsibility." Id. cmt. d. They are treated as a single entity, irrespective of the rule on joint and several liability. Id.


\(^{110}\) Id. cmt. a.
4. Environmental Harm

Minnesota Statutes section 604.02, subdivision 1, as amended in 2003, imposes joint and several liability on:

(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.\(^\text{111}\)

The exception originally appeared in 1988, when the legislature adopted the 15% cutoff, which limited the liability of defendants, other than the state and municipalities, to no more than four times their percentage of fault if they were found to be 15% or less at fault. Defendants held liable pursuant to the specified environmental claims were precluded from taking advantage of the cutoff. The same language is retained in the 2003 amendment, but now the impact is to make those defendants jointly and severally liable for the harm or damage they cause. That means that they are now unable to take advantage of the 50% cutoff for joint and several liability. The impact is that any defendant who is found 50% or less at fault will still be jointly and severally liable for the damage or harm caused to the plaintiff.

5. Products Liability Cases

The 2003 amendment leaves section 604.02, subdivision 3, which governs products liability cases, untouched. It reads as follows:

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

\(^{111}\) Act of May 19, 2003, ch. 1, § 1, 2003 Minn. Sess. Law Serv. 258 (West).
for that portion of the judgment which represents the percentage of fault attributable to the person whose fault is less.

The impact is to impose a unit rule on defendants in the vertical chain of manufacture and distribution.\(^{112}\) Marcon v. Kmart Corp.,\(^{113}\) a court of appeals decision, illustrates how subdivision 3 works. The plaintiff was injured while sliding on a sled manufactured by Paris Manufacturing Corp. and sold by Kmart. The jury in the case found that the sled was defective because of inadequate warnings or instructions and assigned 100% of the fault to Paris Manufacturing. Based upon those findings the trial court found that Paris Manufacturing and Kmart were jointly and severally liable to the plaintiff. Kmart argued on appeal that subdivision 1 of section 604.02 applied, and that because its fault was under the 15% cap, and because the jury found it to be 0% at fault, it should be liable for 0% of the damages award. The court of appeals affirmed, based in part on section 544.41, subdivision 2 (d),\(^{114}\) which permits the imposition of liability on a defendant in the chain of manufacture and distribution in cases where the manufacturer of the product is unable to satisfy any judgment against it, and in part on section 604.02, subdivision 3, which requires reallocation of an uncollectible share of a judgment among the remaining parties in the chain of manufacture and distribution. The court concluded that subdivision 3 overrode the 15% cap on liability.\(^{115}\)

Similarly, in cases where the fault of more than one party in the chain of manufacture and distribution is submitted to the trier of fact,\(^{116}\) subdivision 3 would now preclude the 50% cutoff from applying. The parties in the chain would be considered a single unit, jointly and severally responsible for all the fault attributed to

\(^{112}\) Section 604.02, subdivision 3 is inapplicable to unrelated product manufacturers that are horizontally rather than vertically involved in selling their products. Tester v. American Standard, Inc., 590 N.W.2d 679, 680-81 (Minn. Ct. App. 1999).


\(^{114}\) MINN. STAT. § 544.41, subd. 2(d) (1996).

\(^{115}\) Marcon, 573 N.W.2d at 732.

\(^{116}\) Parties lower in the chain may be subject to dismissal pursuant to MINN. STAT. § 544.41 (2002), if the manufacturer is solvent and subject to jurisdiction in Minnesota. Parties lower in the chain would be joined if the manufacturer is bankrupt (see, e.g., In re Shigellosis Litigation, 617 N.W.2d 1 (Minn. Ct. App. 2002)), or if the plaintiff is able to demonstrate that the party was more involved in the manufacturing process, pursuant to one of the exceptions in the statute.
all parties in the chain.

The position is supported by the comments to section 13 of the Restatement (Third) of Torts: Apportionment of Liability, which notes cases where fault is in effect imputed or vicarious, including products liability cases where retailers and other nonmanufacturing sellers are subject to liability for a defect the manufacturer introduced into the product.\textsuperscript{117} It was also recognized by Justice Simonett in his separate opinion in \textit{Hudson v. Snyder Body, Inc.},\textsuperscript{118} a pre-subdivision 3 case in which a dealer sold a defective truck, but was not assigned a percentage of fault by the jury. Justice Simonett noted that the dealer’s liability stemmed “solely from its passive role as the retailer of a defective product furnished to it by the manufacturer.”\textsuperscript{119} He described the dealer’s liability as “vicarious” or in a “derivative sense as the inert seller in the marketing chain.”\textsuperscript{120}

The most important point to be drawn from this is that the 2003 amendment did nothing to alter subdivision 3 of section 604.02. The subdivision survives intact.

6. Loss Reallocation

Section 604.02, subdivision 2 of the Comparative Fault Act was not directly changed by the 2003 amendment, although its role was substantially diminished through the adoption of several liability as

\begin{footnotesize}
\begin{enumerate}
\item[117.] Restatement (Third) of Torts: Apportionment of Liab. § 13 cmt. a (2000).
\item[118.] 326 N.W.2d 149, 158 (Minn. 1982) (Simonett, J., concurring in part and dissenting in part).
\item[119.] Id. at 158 (quoting Farr v. Armstrong Rubber Co., 288 Minn. 83, 97, 179 N.W.2d 64, 73 (1970)).
\item[120.] Hudson, 326 N.W.2d at 158. The Wisconsin Supreme Court has taken a similar position in Fachsgruber v. Custom Accessories, Inc., 628 N.W.2d 839 (Wis. 2001). The plaintiff in the case was injured when a jack handle broke when he was lifting it out of the box in which it came. He brought suit against the manufacturer, distributor, and retailer of the jack, alleging negligence and strict liability. The distributor argued that Wisconsin’s comparative negligence statute, which after a 1995 amendment provided for individual comparisons of fault and made only defendants 51% or more negligent jointly and severally liable, was intended to protect “an innocent member of the chain of distribution” who in no way contributed to the product’s defective condition, and further that no reasonable jury could find it 51% or more at fault, which required its dismissal. The supreme court rejected the argument, concluding that Wisconsin law in a products liability case “is plaintiff-to-product, and secondarily, in multiple defendant cases, the defendants to each other, for purposes of contribution.” \textit{Id.} at 836, 839-40.
\end{enumerate}
\end{footnotesize}
the general rule in cases involving indivisible injuries caused by joint, concurrent, or successive acts of two or more at-fault defendants. The simple reason is that the elimination of joint and several liability in favor of a general rule of several liability will remove the need for reallocation. The remaining issue is how the loss reallocation rule operates in cases where joint and several liability applies.

The reallocation rule could apply in cases involving a defendant who is more than 50% at fault. The 2003 amendment provides for joint and several liability, so in a sense the reallocation is superfluous in that it would mandate reallocation to that defendant of any share of a judgment of a defendant who is less than 50% at fault and unable to satisfy his or her liability. It would presumably apply also in cases where the plaintiff is at fault, to permit a defendant who is held jointly and severally liable to include the plaintiff in the reallocation.

The result should differ in cases involving joint and several liability where there is a finding that one of the defendants is liable for an intentional tort, where the defendants have participated in a common scheme or plan, where a defendant is vicariously liable for the fault of another, or in products liability cases.

If the courts determine that fault is apportionable in cases involving a combination of intentional and negligent torts, the intentional tortfeasor would be unable to reallocate any uncollectible share of a judgment of a negligent tortfeasor. Reallocation would be a one-way street, running to the intentional tortfeasor, unless a case would arise where the negligent tortfeasor would be found more than 50% at fault, in which case that defendant would also be subject to joint and several liability. Also,

121. THE RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § C21 (b) (2000) limits reallocation in any case where one of the defendants is an intentional tortfeasor or is a person who has acted in concert, is vicariously liable, or is a tortfeasor who fails to protect the plaintiff from the specific risk of an intentional tort:

Reallocation... is not available to any defendant subject to joint and several liability pursuant to § 12 (intentional tortfeasors) or § 15 (persons acting in concert). Any defendant legally liable for the share of comparative fault assigned to another person pursuant to § 13 (vicarious liability) or § 14 (tortfeasors who fail to protect the plaintiff from the specific risk of an intentional tort) may not obtain reallocation of the liability imposed by those Sections.

Id.

122. MINN. STAT. § 604.02, subd. 3 (2002).
the uncollectible share of a defendant who committed an intentional tort could be reallocated only to a defendant whose negligence consisted of a failure to prevent the intentional tort from occurring in the first place.

In vicarious liability cases the responsibility of the vicariously liable party for the fault of the actively at-fault party would preclude reallocation to the plaintiff. In cases where two or more defendants are held liable pursuant to a common scheme or plan, those defendants will be held liable as a single unit, and any uncollectible share of one of the defendants who participated in the scheme or plan would be reallocated only to the other defendants in the scheme or plan. Once again, the reallocation rule would mandate the same result that is required by the amendment. The difference from the first category of joint and several liability cases, however, is that the uncollectible share of a defendant in the scheme or plan would not be reallocated to the plaintiff.

If two or more defendants have participated in a common scheme or plan that results in injury or damage to the plaintiff, they are jointly and severally liable to the plaintiff. If one of the defendants in the scheme or plan is unable to satisfy his or her share of the judgment, that defendant’s share would be reallocated to the other defendant or defendants in the scheme or plan. In effect, a unit rule applies. Even if the plaintiff is at fault, there would be no reallocation of the uncollectible share to the plaintiff because of the unit rule.

The amendment continues the joint and several liability of defendants who cause one of the specified environmental harms. The joint and several liability rule would make all defendants who caused the harm responsible for any defendant’s uncollectible share of the judgment. Given the fact that the defendants in cases involving those harms typically would be unrelated, a unit rule would be inapplicable, and reallocation would also include an at-fault plaintiff as well as defendants held liable under a different theory of recovery.

123. Vicarious liability cases, if deemed to be joint and several liability cases, potentially could be seen as subject to the reallocation rule, although not based on the direct fault of the master. Because the master and servant would be treated as a unit, and fault would not be separately assigned to the master, the servant’s responsibility for the plaintiff’s damages could be reallocated only to the master.
7. Contribution

The amendment states that “[w]hen two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each.” The language is identical to the prior language in Minnesota Statutes section 604.02, subdivision 1, with the exception of the substitution of the word “severally” for “jointly.” The issue is whether the change of “jointly” to “severally” should in any way limit contribution and the basic equitable principles that support it.

The limitations of joint and several liability by the amendment will of course eliminate any need for contribution in cases where a party is 50% or less at fault. By definition, any party in that situation is only severally liable and cannot be liable for any more than his or her fair share of the judgment. A party who is more than 50% at fault, however, may be held liable for the entire judgment. If so, the plaintiff would be entitled to collect the entire judgment from that defendant, even if other defendants were solvent and able to satisfy their shares of the judgment. For example, if Defendant 1 is 60% at fault and Defendant 2 is 40% at fault in a case where damages are set at $10,000, and D1 pays the plaintiff 100% of the damages, Defendant 1 would have paid a disproportionate share of the judgment. The equitable considerations underlying contribution would seem to dictate permitting Defendant 1’s contribution claim against D2 to the extent of the overpayment of $4000. Both Defendant 1 and Defendant 2 are liable to the plaintiff. The contribution claim does no more than impose liability on Defendant 2 according to the percentage of fault the trier of fact assigned to him or her. The consequence is that each party has paid his or her fair share of the judgment. Of course, if Defendant 2 is insolvent, the contribution claim will exist, but the reality is that Defendant 1 will bear the entire loss pursuant to the rule of joint and several liability.

The right of contribution may also exist in cases where two or more defendants are jointly and severally liable pursuant to the environmental liability exception in the amendment. The 50% cutoff is inapplicable in those cases, so a defendant whose fault is less than 50% could be held jointly and severally liable for the entire judgment. For example, if Defendants 1, 2, 3, and 4 are

125. See supra notes 18-20 and accompanying text.
each 25% at fault, the plaintiff could collect the entire judgment from any of the defendants. Any defendant paying more than his or fair share of the judgment would have a contribution claim against the remaining defendants to the extent of the overpayment.

Gauging the potential for contribution in cases where the common scheme or plan exception applies is more problematic. The reason is that in at least some of those cases, liability may be imputed or vicarious. In vicarious liability cases the remedy would be indemnity rather than contribution, but, assuming active fault on the part of all defendants, nothing should preclude contribution claims among those defendants.

Intentional tortfeasors are not entitled to contribution. If, however, the courts were to determine that the amendment now requires a comparison of intentional torts with those based on negligence, the result would potentially change. Given a rationale of comprehensive comparative fault, the intentional wrongdoer whose fault is subject to comparison would have a strong claim for contribution.

8. Examples

The following examples illustrate the operation of Minnesota’s joint and several liability rules after the 2003 amendment.

Example # 1

(P not at fault; 50% exception; one D’s fault exceeds 50%)

P v. D1 (60%) D2 (40%)

1. Assume damages of $10,000 and that D2’s fair share of the judgment is not collectible.
2. Because D1 is more than 50% at fault, D1 is jointly and severally liable to P for 100% of the damages.
3. D1 has a contribution claim against D2 for $4000, the amount

by which D1’s payment to P exceeds D1’s fair share of the judgment of $6000.

**Example # 2**
(P not at fault; 50% exception; no D’s fault exceeds 50%)

P v. D1 (50%)  
D2 (50%)

1. Assume damages of $10,000 and that D2’s fair share of the judgment is not collectible.
2. Because D1 is not more than 50% at fault, D1 is obligated to pay P 50% of the damages, or $5000. Joint and several liability does not apply.
3. P, who is not at fault, bears the entire burden of D2’s uncollectible share. P does have a continuing claim against D2 for $5000.

**Example # 3**
(P at fault; 50% exception; one D’s fault exceeds 50%; reallocation)

P (20%) v. D1 (60%)  
D2 (20%)

1. Assume damages of $10,000 and that D2’s fair share of the judgment is not collectible.
2. D2’s share must be reallocated between P and D1, according to their respective percentages of fault, pursuant to Minnesota Statutes section 604.02, subdivision 2. P must bear one-fourth of the uncollectible $2000, or $500, and D1 three-fourths, or $1500. D1 thus pays P its fair share, or $6000, plus $1500 pursuant to the reallocation, for a total of $7,500.
3. P has a continuing claim against D2 for $500 and D1 has a contribution claim against D2 for $1,500.

**Example # 4**
(P at fault; common scheme or plan exception; no reallocation to P)

P (10%) v. D1 (10%)  
D2 (80%)
1. Assume damages of $10,000, that D1 and D2 are both negligent, that they have participated in a “common scheme or plan,” and that D2’s share of the judgment is uncollectible.

2. D2’s share of the judgment is reallocated to D1, even though D1 is not more than 50% at fault; D1 pays P $10,000, reduced by P’s percentage of fault, or $9000.

3. D1 has a contribution claim against D2 for $6000.

4. Reallocation pursuant to Minnesota Statutes section 604.02, subdivision 2 does not apply to reallocate any percentage of loss to P because D1 and D2 are treated as a unit for purposes of the reallocation provision.

Example # 5
(P not at fault; intentional tort exception, with assumption that fault is compared)

P v. D1 (50%) D2 (50%)

1. Assume damages of $10,000.

2. Assume that D1 committed an intentional tort on P and that D2 was negligent in failing to prevent the tort from occurring.

3. Assume that the courts determine that fault may be allocated between D1 and D2, and that D2’s share of the judgment is uncollectible, or that P seeks to recover the entire damages award against D1. In either case D1 is liable to P for the full damages award.

4. If D1’s fair share of the judgment is uncollectible, or if P seeks to recover the entire damages award from D2, D2 may be liable for 100% of the damages to P, the 50% limitation notwithstanding, if D1’s fault is imputed to D2.

Example # 6
(P not at fault; intentional tort exception with assumption that fault is not compared)

P v. D1 D2

1. Assume damages of $10,000.

2. Assume that D1 committed an intentional tort on P and that D2 was negligent in failing to prevent the tort from occurring.
3. Assuming that fault is not compared, based on the conclusion that the Comparative Fault Act does not permit the comparison of intentional and negligent wrongdoing, each D would be liable to P for the full amount of P’s damages.

4. D2 would have a contribution or indemnity claim against D1 for $10,000.

**Example # 7**

(P at fault; environmental harm exception; reallocation applies)

<table>
<thead>
<tr>
<th>P (20%)</th>
<th>D1 (20%)</th>
<th>D2 (60%)</th>
</tr>
</thead>
</table>

1. Assume damages of $10,000.
2. Assume that D1 and D2 are strictly liable for environmental pollution based on one of the categories noted in Minnesota Statutes section 604.02, subdivision 2, as amended in 2003, and that D2’s fair share of the judgment is uncollectible.
3. D1 is jointly and severally liable with D2; however, if the loss reallocation provision in Minnesota Statutes section 604.02, subdivision 2 applies, rather than a unit rule, D2’s fair share of the judgment must be reallocated among D1 and P, in which case D1 is responsible to P for its fair share of the judgment, $2000, plus one-half of D2’s fair share, $6000, or $3000, for a total of $5000, and P is also responsible for one-half of the uncollectible $6000.
4. P has a continuing claim against D2 for $3000 and D1 has a contribution claim against D2 for $3000.

**Example # 8**

(P at fault; Minnesota Statute section 604.02, subdivision 3 applies; no reallocation to P)

<table>
<thead>
<tr>
<th>P (10%)</th>
<th>D1 (10%)</th>
<th>D2 (80%)</th>
</tr>
</thead>
</table>

1. Assume damages of $10,000.
2. Assume that D1 is a retailer and D2 is a product manufacturer, and that D2 is unable to pay its fair share of the judgment.
3. D1, although 10% at fault, is unable to utilize the cap on damages because pursuant to Minnesota Statutes section 604.02, subdivision 3, D2’s fair share of the judgment must be
reallocated only to D1, the remaining party who is in the chain of manufacture and distribution and not to P); D1 is therefore liable to P for 90% of the damages, or $9000.

4. D1 has a contribution claim against D2 for $8000.

VI. THE BLACK AND GRAY LETTER OF JOINT AND SEVERAL LIABILITY

What follows is a summary of the 2003 amendment and how it appears to work.

1. The several and joint and several liability rules in the amendment are triggered only if two or more defendants act jointly, concurrently, or successively in causing indivisible injury, property damage, or economic loss to the plaintiff.

2. The general rule is that each defendant is only severally liable. That means that each defendant is responsible only for his or her own percentage of damages, and not the damages caused by any other defendant.

3. Joint and several liability applies to:
   a. A defendant who is more than 50% at fault;
   b. Two or more defendants who have engaged in a common scheme or plan that results in injury to the plaintiff;
   c. A defendant who has committed an intentional tort;
   d. A defendant who has caused a specified environmental harm;
   e. Two or more defendants who are in the chain of manufacture and distribution;
   f. Two or more defendants who are in a relationship such that the fault of one of the defendants is imputed to the other, including, at a minimum, to two or more defendants where one defendant is vicariously liable for the fault of another.

4. If the damages or harm are apportionable, each defendant is responsible only for the damages that the defendant caused; the joint and several liability rules are inapplicable where harm is apportionable.

5. Joint and several liability does not preclude loss reallocation pursuant to Minnesota Statutes section 604.02, subdivision. 2, unless the relationship between the defendants is such that the
loss must be reallocated only among the parties in that relationship.

VII. CONCLUSION

The 2003 amendment to Minnesota’s Comparative Act can be assessed in various ways. Whether it will have the economic impact its proponents suggest it will have is a question that is not susceptible of a ready answer now, or perhaps in the immediate future. From a fairness standpoint, any assessment of the amendment has to take into consideration the full reach of the Comparative Fault Act. It is important to understand that on balance the Act works to the disadvantage of the plaintiff in a variety of ways. The plaintiff cannot recover if the plaintiff’s fault is greater than the fault of any individual against whom recovery is sought. Aggregate comparisons of the fault of two or more defendants are not permitted except in limited cases. The fault of non-parties may also be taken into consideration in allocating fault. Those factors combine to restrict tort recoveries.

In addition, as the illustrations suggest, the repeal of the former caps on damages will result in plaintiffs being required to bear an even greater share of the damages that are uncollectible because of the insolvency of one of the defendants. The loss reallocation provision in Minnesota Statutes section 604.02, subdivision 2, remains, and it has potential applicability in some of the cases where joint and several liability applies. It most certainly would apply in cases where one defendant is more than 50% at fault and another defendant is insolvent and in cases involving defendants who have committed environmental torts. It most certainly would not apply in cases involving products liability defendants in the chain of manufacture and distribution. Whether it applies in cases where one defendant has committed an intentional tort or in cases where two or more defendants have participated in a common scheme or plan depends on how those provisions are interpreted by the courts. If loss reallocation applies, plaintiffs are subject to an additional limitation on recovery, in addition to the joint and several liability limitations.

The amendment appears to limit joint and several liability to four specified instances, but it will have to be read more broadly. The amendment will have to be interpreted to account for the products liability cases noted in section 604.02, subdivision 3. The
amendment also must be construed to account for vicarious liability cases and other imputed fault cases, even if the common scheme or plan category does not take them into consideration. The Restatements provide some guidance in establishing an analytical path for viewing the common scheme or plan language, as well as understanding where vicarious liability fits into the scheme. The courts, of course, have the prerogative to determine whether there is a sufficient relationship among two or more defendants to justify imputing the fault of one defendant to the other defendant or defendants. And, while the supreme court has liberally construed the comparative negligence and fault acts in other contexts, there hardly seems to be a legislative mandate to broadly expand cases in which joint and several liability will apply.

129. See, e.g., Larsen v. Minneapolis Gas Co., 282 Minn. 135, 149, 163 N.W.2d 755, 764 (1968).

130. See, e.g., Sandborg v. Blue Earth County, 615 N.W.2d 61, 62 (Minn. 2000) (holding that contributory negligence could not be a defense in a case where a prisoner committed suicide, the suicide was reasonably foreseeable, and the jailer had a duty to guard against the suicide); Tomfohr v. Mayo Found., 450 N.W.2d 121, 125 (Minn. 1990) (holding that psychiatric patient’s suicide could not be considered as contributory negligence when the hospital’s duty was to guard against the suicide); Seim v. Garavalia, 306 N.W.2d 806, 812 (Minn. 1981) (holding that the inclusion of strict liability and contributory negligence as comparable forms of fault in the Comparative Fault Act did not mandate making contributory negligence a defense to a claim based on the dog-bite statute, MINN. STAT. § 347.22 (1980)); Busch v. Busch Constr., Inc., 262 N.W.2d 377, 393-94 (Minn. 1977) (construing comparative negligence statute to reach strict liability claims and holding that a consumer’s negligent failure to inspect a product or to guard against its existence is not a defense to a strict liability claim); Zerby v. Warren, 297 Minn. 134, 139-40, 210 N.W.2d 58, 62-63 (1973) (holding that comparative negligence act did not mandate contributory negligence as a defense where the defendant violated a statute intended for a specific class of persons—children).