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COMMENTS

INTERVENTION, JOINDER, AND ISSUE PRECLUSION: A NEW LOOK AT TORT CLAIM PROCEDURES

[Hart v. Cessna Aircraft Co., 276 N.W.2d 166 (Minn. 1979)].

“Where it has been adjudicated that there never was any responsibility of the defendant to the injured person, there is absent that common liability which is the fundamental basis for contribution.”

American Motorists Insurance Co. v. Vigen, 213 Minn. 120, 127, 5 N.W.2d 397, 400-01 (1942) (the Vigen rule).

“[A] doctrine hardy enough to survive forty Minnesota winters of criticism at home, ostracism elsewhere and discontent within the court which gave it birth must have substantial intrinsic virtues.”


I. INTRODUCTION

Minnesota employs an unusual and controversial method for determining whether contribution should be awarded in tort actions. The Minnesota Supreme Court’s recent interpretation of this technique in Hart v. Cessna Aircraft Co.¹ has thrown into question many generally accepted tort claim procedures. In Hart, the court addressed a difficult loss allocation question² within the context of a suit for contribution.³ Hart

1. 276 N.W.2d 166 (Minn. 1979).
2. See id. at 168-70. In recent years, the Minnesota Supreme Court has confronted risk of loss allocation problems, particularly in contribution and indemnity cases. See, e.g., Lambertson v. Cincinnati Corp., 312 Minn. 114, 257 N.W.2d 279 (1977). The result has been a radical change in tort loss allocation concepts. See Note, Contribution and Indemnity—An Examination of the Upheaval in Minnesota Tort Loss Allocation Concepts, 5 WM. MITCHELL L. REV. 109, 145-64 (1979).
3. Contribution and indemnity are two major forms of tort loss allocation, see, e.g., Bohlen, Contribution and Indemnity Between Tortfeasors, 21 CORNELL L.Q. 552 (1936), that distribute fault among multiple defendants, commonly referred to as joint tortfeasors or cotortfeasors. See Note, supra note 2, at 110 (suggesting that the term “cotortfeasor” is more precise). Contribution is an equitable remedy, see, e.g., Employers Mut. Cas. Co. v. Chicago, St. P., M. & O. Ry., 235 Minn. 304, 310, 50 N.W.2d 689, 693 (1951), that shifts only part of the plaintiff’s loss from one cotortfeasor to another cotortfeasor, while indemnity shifts the entire loss between cotortfeasors. See Note, supra note 2, at 110-11.

The Hart court confronted the difficulty of equitably allocating the risk of loss between a pilot, who had been found not liable in an earlier suit, see Hart v. Vogt, 306 Minn. 476, 238 N.W.2d 590 (1976), and defendant Cessna, which apparently had neither
resolved the contribution problem.\(^4\) The decision is important, however, because its impact upon intervention,\(^5\) joinder,\(^6\) and issue preclusion\(^7\) may spell the end to piecemeal suits. To avoid the pitfalls posed by \textit{Hart,} future plaintiffs may be required to join all tortfeasors at the commencement of suit and defendants may be forced to decide whether or not to intervene and at what cost. Under \textit{Hart,} attorneys have new questions to consider in determining whether and how to initiate or defend tort claim actions.

The case originated when plaintiff's husband died in an airplane crash apparently caused by an accumulation of ice on the plane's wings.\(^8\) Plaintiff brought a wrongful death action against the pilot of the plane.\(^9\) After a jury found the pilot not negligent,\(^10\) plaintiff filed a second action against Cessna, the manufacturer of the airplane.\(^11\) Cessna then impleaded the pilot seeking contribution in the event Cessna was held liable for any damages.\(^12\) The trial court granted summary judgment for the pilot because the finding in the first action that he was not negligent destroyed common liability—an element required for recovery of contribution among cotortfeasors.\(^13\) On appeal, the Minnesota Supreme Court affirmed,\(^14\) but remanded the case for implementation of an "equitable solution."

Although Cessna had neither notice nor opportunity to litigate in the first action, the equitable solution imposed by the court prevents Cessna

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\(^4\) See notes 17-24 infra and accompanying text.
\(^5\) See notes 57-108 infra and accompanying text.
\(^6\) See notes 127-46 infra and accompanying text.
\(^7\) See notes 109-26 infra and accompanying text.
\(^8\) 276 N.W.2d at 167.
\(^9\) Id. at 167.
\(^11\) 276 N.W.2d at 169. The plane had no deicing equipment and federal air regulations required none. Id. at 167. Plaintiff alleged, \textit{inter alia,} negligence in design, manufacture, and sale of the airplane, and breach of implied warranties of merchantability and fitness for a particular purpose. Id. at 168.
\(^12\) Id.
\(^13\) See \textit{id.}
\(^14\) A cotortfeasor seeking contribution from another must satisfy two tests. First, the cotortfeasors must have common liability to the injured party. See \textit{Bunge v. Yager,} 236 Minn. 245, 252, 52 N.W.2d 446, 450 (1952); \textit{American Motorists Ins. Co. v. Vigen,} 213 Minn. 120, 127, 5 N.W.2d 397, 400-01 (1942); \textit{Note, Contribution and Indemnity Among Tortfeasors in Minnesota,} 37 MINN. L. REV. 470, 472 (1953). Second, the cotortfeasor seeking contribution must have paid more than his fair share of the loss. 276 N.W.2d at 168; see, \textit{e.g.,} \textit{Gustafson v. Johnson,} 235 Minn. 358, 364, 51 N.W.2d 108, 112 (1952) (general rule).
\(^15\) 276 N.W.2d at 170.
\(^16\) See \textit{id.} at 169-70.
from suing the pilot for contribution. Nevertheless, Cessna may defend against plaintiff's action by asserting the pilot's negligence or any other defense that would have been available had Cessna been a party to the first suit. Moreover, the pilot whose negligence the jury will determine in the second action may be required to appear at trial for cross-examination by either plaintiff or Cessna. Only Cessna may be held liable to plaintiff, however, because the pilot's non-liability to plaintiff is res judicata. Cessna's potential liability is for its proportionate share of negligence only; therefore, Cessna obtains the benefit of contribution without actually being given that relief. Cessna will have the option to bar relitigation of plaintiff's damages, an issue previously determined in plaintiff's suit against the pilot. As a result of the court's solution in Hart, plaintiff may receive judgment only for Cessna's liability as mea-

17. See id. at 169.

18. See id. On remand, the jury will not be informed of the pilot's non-negligence as determined in the first suit. Id. at 169 n.6. In this cryptic footnote to the Hart opinion, the court states, "In future cases, the trial court shall determine, prior to trial, whether the defendant in a second action may maintain an action for contribution against a defendant successful in a prior action." Id.

19. Id. at 169. The examination of the pilot would be governed by MINN. R. CIV. P. 43.02 (examination of hostile witnesses and adverse parties).

20. See 276 N.W.2d at 169 & n.3. Res judicata extinguishes a claim by merger if the judgment in the first action was in favor of the claimant, and by bar if the judgment in the first action was against the claimant. In Caterpillar Tractor Co. v. International Harvester Co., 120 F.2d 82 (3d Cir. 1941), the court phrased the effects of res judicata as follows:

The [res judicata] effect of a judgment appears in at least three aspects. There is:

1. Merger, by which a judgment for the plaintiff merges his cause of action, so that the original cause of action is terminated and a cause of action on the judgment takes its place. 2. Bar, by which a judgment for the defendant terminates the original cause of action. 3. Collateral estoppel, by which questions of fact and perhaps of law actually litigated in the action are conclusively determined in subsequent actions in which the same questions arise, even though the cause of action may be different.

Id. at 84 n.4. See also RESTATEMENT OF JUDGMENTS § 68, Comment a (1942).

21. See 276 N.W.2d at 169-70. The court hypothesized that "if the jury in the second lawsuit were to find plaintiff 30 percent at fault, [the pilot] 35 percent at fault, and Cessna 35 percent at fault, the total liability of Cessna would be only 35 percent." Id. at 170. If the jury would find as the Hart court hypothesized, Cessna would be in the same position as if Cessna were held jointly and severally liable for 70% of the judgment and had actually received contribution for half the amount from the pilot.

Ironically, the court's equitable solution places plaintiff in the unenviable position of having to defend the pilot from Cessna's assertions of pilot negligence while allowing Cessna to use as evidence any prior inconsistent statements made in the first trial. See MINN. R. EVID. 801(d)(1)(a).

22. 276 N.W.2d at 170. The jury in the first action fixed damages at $175,000.00. See Hart v. Vogt, 306 Minn. 476, 477, 238 N.W.2d 590, 591 (1976). The ramifications of this use of issue preclusion are explored in notes 109-26 infra and accompanying text.
sured by the latter's percentage of negligence. Plaintiff, therefore, carries the risk of a diminished award, or perhaps none at all—the result of suing cotortfeasors in a piecemeal fashion.

II. BACKGROUND ANALYSIS: THE VIGEN RULE

In reviewing the trial court's decision, the Hart court squarely faced the holding of American Motorists Insurance Co. v. Vigen. That holding established the principle, known as the Vigen rule, that a cotortfeasor found not liable in one action cannot be sued for contribution by another cotortfeasor in a subsequent action, even though the cotortfeasors were not adversaries in the first suit. Contribution is barred because common liability, an element of contribution, cannot be satisfied when one cotortfeasor was found not liable to the plaintiff. Vigen applied to cotortfeasors who were both defendants in the first suit, yet failed to cross-claim for contribution or otherwise adversely determine their respective liability.

Spitzack v. Schumacher extended the Vigen rule to prevent a cotortfeasor from suing for contribution even though the cotortfeasor was not a party to the first action. In Spitzack, plaintiff's husband was killed.

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23. See 276 N.W.2d at 170. Assuming as fact the hypothetical stated in note 21 supra, plaintiff would receive $61,250.00 if Cessna chose to bar relitigation of damages.

24. See 276 N.W.2d at 169. If Cessna argued successfully that the total fault for the crash was due to pilot negligence, plaintiff would recover nothing. The same result would occur if Cessna's fault for the crash is equal to or less than plaintiff's fault. See Act of May 23, 1969, ch. 624, § 1, 1969 Minn. Laws 1069, 1069 (comparative negligence statute applicable to Hart) (current version at MINN. STAT. § 604.01(1) (1978)).

25. See 276 N.W.2d at 168-69.

26. 213 Minn. 120, 5 N.W.2d 397 (1942).


28. American Motorists Ins. Co. v. Vigen, 213 Minn. 120, 126-27, 5 N.W.2d 397, 400-01 (1942); see note 3 supra. Promulgation of the Vigen rule required an express overruling of Hardware Mut. Cas. Co. v. Anderson, 191 Minn. 158, 253 N.W. 374 (1934) (finding of non-negligence against first tortfeasor not res judicata for subsequent contribution action by second tortfeasor found negligent in same suit). See 213 Minn. at 126, 5 N.W.2d at 400 ("what was [stated in Hardware] as to the effect of the adjudication on the essential element of the contribution is specifically overruled"). The rule also extends to indemnity actions. Fidelity & Cas. Co. v. Minneapolis Brewing Co., 214 Minn. 436, 8 N.W.2d 471 (1943).

29. See, e.g., American Motorists Ins. Co. v. Vigen, 213 Minn. 120, 127, 5 N.W.2d 397, 400-01 (1942).

30. See id. at 121, 5 N.W.2d at 398; Note, supra note 27, at 161; note 46 infra and accompanying text.


32. Id. at 148-49, 241 N.W.2d at 645. Extending the Vigen rule to a situation in which cotortfeasors are sued separately was foreshadowed as early as 1964. See Anderson v. Gabrielson, 267 Minn. 176, 126 N.W.2d 239 (1964), noted in Note, supra note 27, at 160-65. The Anderson court stated:

[Assume that A is injured in a collision between B and C and A sues B alone]
when struck by a vehicle in a car-pedestrian accident. In the first action, plaintiff brought a wrongful death action against both the driver and the owner of the vehicle. These defendants then impleaded a bar owner for contribution, alleging that the bar owner caused decedent’s death by illegally selling him intoxicants. The court dismissed the complaint against the bar owner and the jury found the defendants less negligent than the deceased. Defendants, therefore, were not liable to plaintiff. In her second action, plaintiff sued the bar owner under the dram shop law. The bar owner impleaded the original defendants for contribution, but the trial court dismissed the complaint relying upon the Vigen rule. The Minnesota Supreme Court affirmed, denying the bar owner the right to recover contribution from defendants whose liability had been extinguished in the first action.

The Vigen rule arose when two defendants were sued in the same action but did not become formal adversaries on the contribution issue. Spitzack extended Vigen to cotortfeasors who were sued in separate actions by the injured plaintiff. This is the Vigen-Spitzack rule.

Both Vigen and Spitzack denied contribution among cotortfeasors despite the fact that the cotortfeasors were not adverse parties in the first suit. Many courts and commentators have criticized the Vigen rule for without C’s knowledge. B is exonerated and the time to appeal expires. If A subsequently sues C and obtains a judgment, under the Vigen rule C is barred from recovering contribution against B, although C had neither notice nor an opportunity to be heard in the litigation which foreclosed his rights.

267 Minn. at 180 n.9, 126 N.W.2d at 242 n.9. This is precisely what occurred in Hart. See 276 N.W.2d at 168, 169 n.3.

33. 308 Minn. at 144, 241 N.W.2d at 643.
34. Id.
35. Id.
36. Id. In Spitzack, after the respondents sought to implead the bar owner in the first action, the latter opposed inclusion by a motion to dismiss or, in the alternative, severance. See Appellant’s Brief and Appendix at 5 n.2, Spitzack v. Schumacher, 308 Minn. 143, 241 N.W.2d 641 (1976). The trial court dismissed defendant’s third-party action. 308 Minn. at 144, 241 N.W.2d at 643.

The jury in the first suit found decedent 95% negligent and defendants 5% negligent.

Id.

37. See Act of May 23, 1969, ch. 624, § 1, 1969 Minn. Laws 1069, 1069 (current version at MINN. STAT. § 604.01 (1) (1978)).
38. 308 Minn. at 144, 241 N.W.2d at 642; see MINN. STAT. § 340.95 (1978).
39. 308 Minn. at 144-45, 241 N.W.2d at 643.
40. Id. at 148-49, 241 N.W.2d at 645.
41. See American Motorist Ins. Co. v. Vigen, 213 Minn. 120, 120, 5 N.W.2d 397, 397 (1942).
43. This phrase, the Vigen-Spitzack rule, was coined by the Hart court. See 276 N.W.2d at 169.
44. See, e.g., Wright, Joinder of Claims and Parties Under Modern Pleading Rules, 36 MINN. L. REV. 580, 595 & n.63 (1952) (citing authorities criticizing Vigen); 12 ALA. L. REV. 208, 210 (1959); 56 HARV. L. REV. 477 (1942); 41 MICH. L. REV. 508 (1942); 37 MINN. L.
extending res judicata\textsuperscript{45} to foreclose the contribution claim of a non-adversary party who never litigated the issue.\textsuperscript{46} In defense of the rule, Pro-

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REv. 470, 479 (1953); 27 MINN. L. REV. 519 (1943). Criticism of the Vigen rule has reached the ears of other courts, \textit{see}, \textit{e.g.}, Liberty Mut. Ins. Co. v. Curtiss, 327 So. 2d 82, 86 (Fla. Dist. Ct. App.) (Vigen rule has little currency elsewhere and is heavily criticized), \textit{appeal dismissed}, 341 So. 2d 291 (Fla. 1976), as well as the Minnesota Supreme Court. \textit{See}, \textit{e.g.}, Anderson v. Gabrielson, 267 Minn. 176, 180, 126 N.W.2d 239, 242 (1964); Radmacher v. Cardinal, 264 Minn. 72, 75-76, 117 N.W.2d 738, 741 (1962); Mocuik v. Svoboda, 253 Minn. 562, 566-67, 93 N.W.2d 547, 550 (1958); Bocchi v. Karnstedt, 238 Minn. 257, 261, 56 N.W.2d 628, 631 (1953).
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45. Res judicata, or claim preclusion as it is sometimes called, \textit{see}, \textit{e.g.}, Restatement (Second) of Judgments § 74, Comment d, at 7-8 (Tent. Draft No. 3, 1976); Vestal, \textit{Res Judicata/Claim Preclusion: Judgment for the Claimant}, 62 NW. U.L. REV. 357 (1967), denotes that a valid, final judgment, when rendered on the merits, "is an absolute bar to a subsequent action, between the same parties or those in privity with them, upon the same claim or demand." 1B Moore's Federal Practice ¶ 0.405[1], at 621 (2d ed. 1974); accord, Youngstown Mines Corp. v. Prout, 266 Minn. 450, 473, 124 N.W.2d 328, 340 (1963); \textit{see} Scott-Peabody & Assoc. v. Northern Leasing Corp., 273 Minn. 236, 239, 140 N.W.2d 614, 616 (1966). Thus, res judicata differs from collateral estoppel in that the former extinguishes a claim on the same cause of action between the parties or their privies, while the latter bars relitigation of issues regardless of whether the cause of action is the same in the second suit as in the first. \textit{See}, \textit{e.g.}, Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326 (1955). The public policy behind res judicata centers on the need to end litigation, \textit{see} Bratnober v. Illinois Farm Supply Co., 169 F. Supp. 85, 89 (D. Minn. 1959), that parties ought not to be permitted to litigate the same issues more than once, and that when a right or fact has been judicially tried and determined by a court of competent jurisdiction, judgment thereon is conclusive. \textit{See} Herreid v. Deaver, 193 Minn. 618, 259 N.W. 189 (1935). \textit{See also} Moschzisker, \textit{Res Judicata}, 38 YALE L.J. 299, 299-300 (1929) (three-fold objective of res judicata is to conserve court time, protect persons from repeated litigation, and promote peace and harmony in the community by giving permanence to disputes between parties).
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46. \textit{See} Note, supra note 27, at 161. The term "adversary parties," as used in the statement that cotortfeasors must have been adversary parties in a prior action for res judicata to conclude their liability \textit{inter se}, has been held to mean those who by the pleadings are arrayed on opposite sides. Merrill v. St. P. City Ry., 170 Minn. 332, 334, 212 N.W. 533, 533 (1927), \textit{overruled on other grounds}, American Motors Ins. Co. v. Vigen, 213 Minn. 120, 5 N.W.2d 397 (1942); \textit{see}, \textit{e.g.}, Casey v. Balunas, 19 Conn. Supp. 365, 113 A.2d 867 (1955); Pearlman v. Truppo, 10 N.J. Misc. 477, 159 A. 623, \textit{opinion adopted}, 10 N.J. Misc. 772, 160 A. 334 (1932). The Pearlman court felt the question to be an easy one: What is meant by adverse parties scarcely needs definition. Its significance is apparent from the expression itself. They must be opposite parties to an issue between them. The issue must be proffered by one and controverted by the other. They must be arrayed on opposite sides of the issue which must be raised by appropriate cross-pleadings between the defendants themselves, so that each may have control of the proceedings to enable him to exhaust the question of liability \textit{inter se}. It is not enough that they, by their separate answers, deny liability and claim that the accident was due to the negligence of the other as such pleading only goes to answering the claim of the plaintiff and tenders no issue to which the other defendant may demur or reply to or join issue upon so as to settle the liability one to the other.
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\textit{Id.} at 478-79, 159 A. at 624. \textit{But see} Lynch v. Chicago Transit Auth., 62 Ill. App. 2d 220, 210 N.E.2d 792 (1965); Gish Realty Co. v. Central City, 260 S.W.2d 946 (Ky. 1965). Courts have expressly declared, however, that the mere attempt to escape liability by
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Professor Wright has suggested that the opportunity to litigate contribution in the first action through the use of cross-claims prevents some of the injustice that might otherwise result. 47 The Minnesota Supreme Court also has recognized that the harsh effects of Vigen are mitigated by the opportunity to implead or intervene. 48 Furthermore, the court has stated that the Vigen rule does not depend upon res judicata for its operation; throwing the burden or blame on a codefendant does not make the codefendants adversaries. See, e.g., Merrill v. St. P. City Ry., 170 Minn. at 333, 212 N.W. at 533, overruled on other grounds, American Motorists Ins. Co. v. Vigen, 213 Minn. 120, 5 N.W.2d 397 (1942); Pearlman v. Truppo, 10 N.J. Misc. at 478-79, 159 A. at 624, opinion adopted, 10 N.J. Misc. 772, 160 A. 334 (1932); Snyder v. Marken, 116 Wash. 270, 199 P. 302 (1921).

The current position proposed by the American Law Institute reflects an affinity for the Vigen rule:

§ 82 Parties Aligned on the Same Side

Parties who are not adversaries to each other under the pleadings in an action involving them and a third party are bound by and entitled to the benefits of issue preclusion with respect to each other and which are essential to the judgment rendered.

Restatement (Second) of Judgments § 82 (Tent. Draft No. 2, 1975). The important concern is whether the co-parties had “an opportunity and incentive to litigate the issues arising between them that is equivalent to that between parties whose opposition is defined through the pleadings.” Id., Comment a, at 40. Thereafter, a Vigen rule illustration is given:

A, the owner of a building, sues B, a gas utility, and C, a contractor doing repair work on the building, contending that through the negligence of both a gas line in the building was ruptured, resulting in an explosion that demolished the building. B and C each contend that he was not negligent and that the other was. If they have a full and fair opportunity to litigate these contentions, a judgment in favor of A against C but in favor of B is preclusive of the issue that B was not negligent in a subsequent action between C and B.

Id. § 82, Illustration 1; see Creeco Co. v. Northern Ill. Gas Co., 73 Ill. App. 218, 219 N.E.2d 257 (1966). Apparently, the trend is toward the Restatement’s position. See Restatement (Second) of Judgments, supra, Reporter’s Note, at 43. See generally Vestal, Preclusion/Res Judicata Variables: Parties, 50 Iowa L. Rev. 27 (1964). It should be noted, however, that exoneration of a co-tortfeasor does not necessarily prove that the elements of liability never existed; instead, exoneration may result from plaintiff’s inability to carry his burden of proof. See Note, supra note 27, at 164-65. Thus, it appears that the conclusiveness of a judgment in a Vigen situation depends upon concepts of waiver, judicial economy, and due process notions of a full and fair opportunity to litigate. See, e.g., Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 & n.7 (1979).

47. See Wright, supra note 44, at 595-96 n.64 (favoring compulsory cross-claims when no Vigen-type rule extant). The failure to cross-claim for contribution may constitute a waiver of the need to be adversaries by the pleadings. The court should then look to whether the parties were adversaries in fact. See note 46 supra.

48. See Spitzack v. Schumacher, 308 Minn. 143, 241 N.W.2d 641 (1976), wherein the court reflected:

While the Vigen rule has been frequently criticized, its potentially harsh application has been effectively minimized by modern third-party practice. It is now possible for the diligent tortfeasor to litigate the issue of contribution contemporaneously with the main action by means of intervention, impleader, or cross-claim.

Id. at 147 n.1, 241 N.W.2d at 644 n.1.
instead, it focuses upon the nonexistence of common liability—an essential requirement for contribution.\(^4\)\(^9\) Recently, the Restatement (Second) of Judgments\(^5\)\(^0\) supported a developing trend towards applying Vigen in situations in which the cotortfeasors are aligned on the same side, even if they are not adversaries by the pleadings. Spitzack, however, apparently has never been expressly adopted by another jurisdiction.

The refusal of other jurisdictions to extend the bar against receiving contribution to a nonparty cotortfeasor as in Spitzack may reflect a strong policy consideration. Finding a defendant not negligent does not necessarily mean that the defendant was in fact not negligent; rather, it could mean that the plaintiff failed to meet his burden of proof. An absent cotortfeasor should not be precluded from seeking contribution because of plaintiff's possible failures. A cotortfeasor seeking contribution may well present a more vigorous attack on the other cotortfeasor's position. After all, a cotortfeasor has only one chance at recovering contribution, but, a plaintiff injured by two defendants has, because of joint and several liability, two chances to recover for his injuries. Furthermore, it would be manifestly unfair to categorize the interests of the absent cotortfeasor as "adequately represented" by the plaintiff for two reasons. First, the absent cotortfeasor's defense might include not only an attack on the other cotortfeasor, but also an attack on the plaintiff. Second, as stated above, the plaintiff, having another chance at recovery available, might not present the best case possible.

After Spitzack extended the Vigen rule to dismiss the contribution claim of a cotortfeasor who was not a party to the first action, it became clear that the new Vigen-Spitzack rule could succumb to a constitutional due

49. See Bunge v. Yager, 236 Minn. 245, 252, 52 N.W.2d 446, 450 (1952). In an attempt to soften criticism, the court stated:

   It is clear that the decision in the Vigen case is based upon the theory that the doctrine of res judicata is not involved, but that an action for contribution rests upon a common liability of joint tort-feasors to an injured party and the payment of more than his share by one of the codefendants; and that when the nonliability of one of the codefendants is established in the original action there can be no right to contribution for the reason that there is no common liability.

Id.; see 276 N.W.2d at 168 n.2. Notwithstanding the above protestation, it seems evident that use of the prior judgment is an estoppel against the other cotortfeasor. See American Motors Ins. Co. v. Vigen, 213 Minn. 120, 127, 5 N.W.2d 397, 401 (1942) (Stone, J., concurring) (defendants may use judgments in original action as conclusive evidence that there was no liability to plaintiffs). But cf. Reddington v. Beefeaters Tables, Inc., 72 Wis. 2d 119, 122, 243 N.W.2d 401, 404 (1976) (per curiam) (on rehearing) (common liability determined as of time of accident; prior determination of no liability not effective against other cotortfeasor in subsequent action for contribution).

50. Restatement (Second) of Judgments § 82 (Tent. Draft No. 2, 1975); see note 46 supra.

51. See note 63 infra.
process attack. Potentially, the rule could apply to bar the contribution claim of a nonparty cotortfeasor who had neither notice nor opportunity to litigate in the first action. Facing this exact situation in Hart, and desiring not to twice vex the pilot for the same cause, the court attempted to breathe life into the Vigen-Spitack rule through an "equitable solution." Instead, the ramifications of the Hart solution require an evaluation of Vigen-Spitack's continued vitality.


53. In Spitzack v. Schumacher, 308 Minn. 143, 241 N.W.2d 641 (1976), Justice Kelly warned:

If either notice or opportunity to litigate had been denied [to the precluded party], I would have favored reversal because the element of common liability would have been conclusively decided against appellant in an action in which he could not have been heard. Such a result would offend my notions of fairness, due process, and affording appropriate remedies for wrongs. Minn. Const. art. 1, § 8.

Id. at 149, 241 N.W.2d at 645 (Kelly, J., concurring) (footnote omitted) (emphasis in original). More recently the United States Supreme Court adhered to this notion of constitutional protection. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party nor a privy and therefore has never had an opportunity to be heard.") (emphasis added); cf. Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 329 (1971) (due process prohibits collaterally estopping litigants who never appeared in a prior action); Bernhard v. Bank of America Nat’l Trust & Savings Ass’n, 19 Cal. 2d 807, 811, 122 P.2d 892, 894 (1942) (due process mandates that no person be deprived of personal or property rights by a judgment without notice and an opportunity to be heard).

In a factual situation similar to Spitzack, the Wisconsin Supreme Court disallowed preclusive use of a prior determination of nonliability against a nonparty to that prior suit. See Reddington v. Beefeaters Tables, Inc., 72 Wis. 2d 119, 125c, 243 N.W.2d 401, 403 (1976) (per curiam) (on rehearing). The Reddington court, after noting the common liability requirement for contribution, rejected the Spitzack approach because common liability is to be determined "as of the time the accident occurs," not when the contribution claim is asserted. Id. Extinguishing the liability as to one cotortfeasor does not affect the right of the remaining cotortfeasor to seek contribution. See id. The court recognized that the principles involved were those of res judicata. Id. There are, however, factual differences between Reddington and Spitzack. In Reddington, Beefeaters cross-complained for contribution, but the court erroneously dismissed the cross-complaint before the jury reached a verdict. Id. at 125c, 243 N.W.2d at 404. In Spitzack, after the respondents sought to implead the bar owner in the first action, the latter opposed inclusion by a motion to dismiss or, in the alternative, severance. See Appellant’s Brief and Appendix at 5 n.2, Spitzack v. Schumacher, 308 Minn. 143, 241 N.W.2d 641 (1976). The trial court dismissed. Id. at 5.

54. See 276 N.W.2d at 169 n.3.

55. See id. at 169. The policy is that "a party should not be twice vexed for the same cause, and that it is for the public good that there be an end to litigation." Houser v. Mealey, 263 N.W.2d 803, 807 (Minn. 1978) (quoting Shimp v. Sederstrom, 305 Minn. 267, 270, 233 N.W.2d 292, 294 (1975)).

56. See 276 N.W.2d at 169.
To assess the impact of Hart on tort claim procedures, one must inquire into the relationship between Hart and Spitzack. Has Hart impliedly overruled Spitzack, or does each decision continue in force, confined to its own procedural history? Answering this question requires an examination of both contribution and the allocation of burden and risk when suing piecemeal.

As to the technical right to recover contribution, the Hart court stated that the facts before it fell within the Vigen-Spitzack rule. Like the bar owner in Spitzack, Cessna had not been a party to the first judgment. Common liability, the basis for the Vigen-Spitzack rule, had not been satisfied because the jury found the pilot not liable in the first action. Therefore, the Vigen-Spitzack rule controlled to deny Cessna contribution.

Although Spitzack involved a cotortfeasor who had an opportunity to litigate in the first action, Hart involved a cotortfeasor who did not. If this difference is important, perhaps the Hart court’s reliance on Spitzack was misplaced. Nevertheless, the court in Hart refused to modify the common liability rule to do so “would have been inappropriate” when a jury had already found the cotortfeasor not negligent.

On a superficial level, this answers the inquiry: Hart does not overrule Vigen-Spitzack regarding the common liability element of contribution. This answer fails, however, to focus upon how Hart and Spitzack allocate the burden and risk of suing piecemeal in tort actions. Spitzack merely placed the burden on the second cotortfeasor by denying the claim for contribution. Hart not only altered what would normally be Cessna’s joint and several liability, but placed the onus of Cessna’s relief on

57. Id. at 168.
58. Id.
60. 276 N.W.2d at 168-69. The court noted that the requirement of common liability had been modified under some circumstances to achieve equitable results. Id. at 169; see Lambertson v. Cincinnati Corp., 312 Minn. 114, 130, 257 N.W.2d 679, 689 (1977).

Recently, the Minnesota Supreme Court reaffirmed its requirement of common liability as an element of contribution. See Conde v. City of Spring Lake Park, 290 N.W.2d 164, 165-66 (Minn. 1980). According to Conde, neither Lambertson nor Hart abolished the requirement.

61. 276 N.W.2d at 169.
62. See 308 Minn. at 148-49, 241 N.W.2d at 645.
63. Joint and several liability allows the injured party to recover the entire award from any defendant against whom a judgment is received. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 46 (4th ed. 1971); Note, Reconciling Comparative Negligence, Contribution, and Joint and Several Liability, 34 WASH. & LEE L. REV. 1159, 1166, 1170 (1977). Minnesota has adopted this rule, see Ankeny v. Moffett, 37 Minn. 109, 110, 33 N.W. 320, 321 (1887) (Mitchell, J.), and extended it to cover concurrent negligent acts. See, e.g., Mathews v. Mills, 288 Minn. 16, 20, 178 N.W.2d 841, 844-45 (1970); Dyson v. Schmidt, 260 Minn. 129, 139, 109 N.W.2d 262, 269 (1961); Thorstad v. Doyle, 199 Minn. 543, 553,
plaintiff by limiting plaintiff's potential recovery. The implications of *Hart* are both important and unclear. Are plaintiffs required to bear the burden and risk of suing piecemeal in future tort actions? Or, do non-party cotortfeasors have an affirmative burden to intervene to protect their right to contribution?

Language in *Hart* supports the conclusion that the plaintiff bears the burden and risk of suing only one cotortfeasor when, if the jury finds the first cotortfeasor not liable, the plaintiff commences a second suit against another cotortfeasor. This differs from *Spitzack*, in which the court placed the burden of suing piecemeal on the second cotortfeasor defending in the second action.

More likely, however, *Hart* does not overrule *Spitzack* concerning the burden and risk; the cases are reconcilable on notice grounds. *Spitzack* involved a cotortfeasor who had been served originally with a third-party complaint, and who therefore had the opportunity to litigate a contribution claim in the first action. On the other hand, *Hart* involved a cotortfeasor who had neither notice nor opportunity to litigate its contribution claim. Under *Spitzack*, whenever a defendant impleads a third

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In recent years, much has been written about multiple-party litigation in comparative negligence jurisdictions. The problems encompass joint and several liability, contribution and indemnity, and joinder and settlement. *See generally Comment, Comparative Negligence in California: Multiple Party Litigation, 7 PAC. L.J. 770 (1976); Note, Contribution and Indemnity Collide with Comparative Negligence—The New Doctrine of Equitable Indemnity, 18 SANTA CLARA L. REV. 779 (1978); Note, Multiple Party Litigation in Comparative Negligence: Incomplete Resolution of Joinder and Settlement Problems, 32 Sw. L.J. 669 (1978); Note, Reconciling Comparative Negligence, Contribution, and Joint and Several Liability, supra; Note, supra note 2.*

64. 276 N.W.2d at 169; *see* notes 23-24 *supra* and accompanying text.

65. 276 N.W.2d at 169. After setting forth the dilemma facing the court, *see* note 3 *supra*, the opinion prefaced the "equitable solution" with this broad language:

"The plaintiff does have, and should have, the right to control his own lawsuit—to sue or not to sue whomever he chooses. However, if there are two or more possible defendants and plaintiff elects to sue them piecemeal, it is he who should bear any risk imposed by using that procedure."

276 N.W.2d at 169; *see* notes 23-24 *supra* and accompanying text.

66. *See* note 62 *supra* and accompanying text.

67. *See* notes 32-40 *supra* and accompanying text.

68. *See* Spitzack v. Schumacher, 308 Minn. 143, 144, 241 N.W.2d 641, 643 (1976); *notes* 47-48 *supra* and accompanying text.

69. 276 N.W.2d at 169 n.5; *note* 17 *supra* and accompanying text.
party as a cotortfeasor, the impleaded cotortfeasor must choose between inclusion in the suit or possible preclusion from recovering contribution. The plaintiff does not suffer as a result of suing piecemeal if the first defendant bails him out by impleading a second defendant. 70 But, when the defendant in the second action has had neither notice nor opportunity to defend in the first action, the defendant will retain the benefit of contribution—some limitation on liability—at the plaintiff's expense. 71

This reconciliation of Hart and Spitzack still leaves an important area uncovered. Must a cotortfeasor who has actual knowledge of a suit, but who has not been served with process, intervene in a tort action to prevent a contribution claim from being extinguished by the Vigen-Spitzack rule? The question assumes critical importance for the attorney whose client may be liable in tort to an injured plaintiff. If Hart governs this situation, intervention will be unnecessary, 72 but, regrettably, Spitzack appears to indicate that intervention will be required. 73

IV. MANDATORY INTERVENTION AND THE RIGHT TO CONTRIBUTION

Whether to require intervention of a nonparty cotortfeasor who has notice of a claim is more than an academic issue. The question may arrive before the Minnesota courts relatively soon, perhaps in the context of a products liability suit. Under recent law, an attorney for a products liability claimant must give notice "to all persons against whom the claim is likely to be made," 74 including the "time, place and circumstances . . . giving rise to the claim and an estimate of compensation or other relief to be sought." 75 Because all persons within the chain of manufacture and distribution are entitled to notice, 76 the problem of requir-

70. But cf. Note, supra note 27, at 169-70 & n.33 (suggesting that defendant should be required to send notice to all third parties who could be found liable; failure to notify allows cotortfeasors to relitigate fault determination). Relying upon a defendant to implead a third party is not necessarily a good risk, however, because under present practice the defendant probably loses nothing by failing to implead other cotortfeasors.

71. This is the result of Hart. See 276 N.W.2d at 169-70.

72. Cf. id. at 169 (plaintiff bears risk of suing defendants piecemeal).


74. MINN. STAT. § 604.04(1) (1978).

75. Id. The notice must be given within six months after entering into an attorney-client relationship. Id.

Although the statute specifies that "[a]ctual notice of sufficient facts to reasonably put a person against whom the claim is to be made or his insurer on notice of a possible claim satisfies the notice requirements [of the statute]," id., whether this type of notice will suffice to require intervention is doubtful. See notes 105-08 infra and accompanying text.

76. See MINN. STAT. § 604.04(1) (1978).
ing intervention\textsuperscript{77} to preserve the right of contribution seems imminent.

Under the \textit{Vigen-Spetizack} rule, a determination of no liability in a prior action precludes a nonparty cotortfeasor from asserting a claim for contribution against the original defendant.\textsuperscript{78} If Minnesota requires intervention to prevent a contribution claim from being extinguished by the \textit{Vigen-Spetizack} rule, the attorney for the nonparty cotortfeasor must choose between the Scylla of inclusion in the tort claim action and the Charybdis of preclusion from recovering contribution. The choice must be made after weighing the costs of litigation and the potential liability of the intervenor, both to the injured party and to other possible claimants.\textsuperscript{79} In any event, the preclusive effect of an initial judgment coerces third-party intervention.\textsuperscript{80}

\textsuperscript{77} Minnesota provides for intervention of right and permissive intervention. \textit{Compare} MINN. R. Civ. P. 24.01 (intervention as of right) \textit{with id.} 24.02 (permissive intervention). The trial court uses its discretion to allow permissive intervention when a person seeks to assert a claim or defense having a question of law or fact in common with the main action. \textit{See id.} The court weighs the benefits of intervention against the potential delay in trial or prejudice "to the adjudication of the rights of the original parties." \textit{Id.} Intervention as of right, however, is mandatory. MINN. R. Civ. P. 24.01 states that:

\begin{quote}
Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
\end{quote}

\textit{Id.} The rule probably encompasses tort claim actions despite the absence of the word "occurrence." The difference between the counterclaim rule and the intervention rule implies the inclusion of tort claims in the latter rule. The word "occurrence," which is found in the federal counterclaim rule, was specifically deleted from the Minnesota rule in order to make tort counterclaims noncompulsory. \textit{See} House v. Hanson, 245 Minn. 466, 472-73, 72 N.W.2d 874, 878 (1955); 1 J. HETLAND & O. ADAMSON, MINNESOTA PRACTICE 486 (1970). \textit{Compare} MINN. R. Civ. P. 13.01 \textit{with} FED. R. Civ. P. 13(a). The intervention rule, however, comports with its federal counterpart and does not exclude tort actions. \textit{Cf.} Avery v. Campbell, 279 Minn. 383, 387-88, 157 N.W.2d 42, 45-46 (1968) (helicopter lessor sought to intervene as of right to set aside default judgment against pilot-lessee when intervenor, although not named party to default proceeding, was potentially liable under lease agreement).

The absence of the term "occurrence" may, however, reflect the belief that a party would be foolish to intervene in a tort action, thereby subjecting himself to potential liability, not only in the action involved, but as to other claims as well. \textit{Cf.} Note, \textit{supra} note 27, at 165 ("Even if notice is given, the potential contribution claimant may be required to make an unhappy choice between forfeiting his claim and litigating in an inconvenient forum where he may expose himself to other causes of action as well as the very cause of action in question.").

\textsuperscript{78} \textit{See} 276 N.W.2d at 168.

\textsuperscript{79} \textit{See} Note, \textit{supra} note 27, at 165.

\textsuperscript{80} \textit{See} McCoid, \textit{A Single Package for Multiparty Disputes}, 28 STAN. L. REV. 707, 719-20 (1976). The preclusive effect approach has also been advanced in situations in which the defendant gives notice of suit to another tortfeasor. \textit{See} Note, \textit{supra} note 27, at 69-70 & n.33 (1964) (defendant would be required to give notice to all possible cotortfeasors, who,
Extending the preclusive effect of the *Vigen-Spitzack* rule to a nonparty raises constitutional questions. May a nonparty cotortfeasor be compelled to intervene at the risk of losing a potential claim for contribution? Two United States Supreme Court decisions indicate opposing viewpoints. In *Chase National Bank v. Norwalk*, Justice Brandeis wrote, "the law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger." This language intimates that intervention cannot be coerced. Unfortunately, the opinion does not state if the prohibition reflects due process considerations or merely the absence of legislation requiring intervention. On the other hand, in *Provident Tradesmens Bank & Trust Co. v. Patterson*, Justice Harlan suggested what might be termed a federal common law requirement of compulsory intervention. While recognizing the general principle that a nonparty is not estopped by a judgment in a prior suit, Justice Harlan stated: "it might be argued that [the non-party] should be bound by the previous decision because, although technically a nonparty, he had purposely bypassed an adequate opportunity to intervene." Perhaps, then, intervention may be coerced. The question remains unsettled.

Extension of the *Vigen-Spitzack* rule to a nonparty has the same preclusiveness if they failed to intervene, would be bound by any adjudication). The preclusive approach, which almost amounts to compulsory intervention, *see* McCoid, *supra*, at 718, goes further than the approach of merely encouraging intervention. *See*, *e.g.*, 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1610, at 103 (1972) (encouraging nonparties to intervene by notifying them of pendency of the action, resulting in bringing in of rule 19(a) parties). But see *Semmel, Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457, 1475 (1968) (preferring mandatory joinder of parties over preclusion, but advocating preclusion if notice given and outsider fails to intervene).

Under rule 13, a party who does not assert a compulsory counterclaim in the pending action may be precluded from advancing the claim in a subsequent suit. *See* MINN. R. CIV. P. 13.01. This differs, however, from the coercion of mandatory intervention. Under rule 13.01, the person forced to elect between inclusion or possible preclusion is already in the action. Coercing intervention, however, forces a person not a party to the pending action to elect between inclusion in the suit, or, in the instance of *Vigen-Spitzack*, possible preclusion of the contribution right.

Although the court in *Hart* reasoned that the *Vigen-Spitzack* rule depends upon notions of common liability rather than upon res judicata, *see* 276 N.W.2d at 168-69; *Bunge v. Yager*, 236 Minn. 245, 252, 52 N.W.2d 446, 450 (1952), the preclusive effect of a prior adjudication is apparent. *See* Radmacher v. Cardinal, 264 Minn. 72, 76, 117 N.W.2d 738, 741-42 (1962).

81. 291 U.S. 431 (1934) (mortgagee not bound by judgment against mortgagor obtained after mortgagee acquired interest).
82. *Id.* at 441.
84. *See id.* at 114 (dictum).
85. *Id.*; *see* Chase Nat'l Bank v. Norwalk, 291 U.S. 431, 441 (1934).
86. 390 U.S. at 114. Justice Harlan specifically declined to decide whether, under the facts of that case, the nonparty should be bound by the prior decision. *Id.*
sive effect as mandatory intervention legislation. Accordingly, the two methods of preclusion may be profitably compared. Mandatory intervention forces the nonparty to choose between inclusion in the pending action or preclusion by the final judgment. The Vigen-Spitzack rule tends to coerce intervention in a pending action by the threat that a final judgment will preclude any claim for contribution. For both methods of preclusion the question becomes: "must the outsider be made a party, or do notice and opportunity to be heard suffice to compel an outsider's choice between [intervention] and preclusion?"

In considering this question, the Vigen-Spitzack rule's effect on litigants must be recognized. The preclusive effect of the rule coerces intervention to protect the right to contribution at the cost of subjecting the cotortfeasor to possible liability for the injured party's losses. Coercing intervention by holding the relief of contribution as hostage may violate the Minnesota Constitution, which protects contribution as a right. This constitutional protection derives from Carlson v. Smogard. In Carlson, the supreme court struck down a workers' compensation statute that summarily denied a third party's indemnity claim against an employer. The Carlson court based its decision upon due process and the "remedy for every wrong" clause of the Minnesota Constitution. That clause prohibits the deprivation of common law rights when a reasonable substitute has not been provided. Because the Minnesota Supreme Court has always permitted contribution between negligent cotortfeasors, contribution appears to be a common-law right in Minnesota. Thus,

87. For a recent proposal for mandatory intervention legislation, see Comment, Non-parties and Preclusion by Judgment: The Priority Rule Reconsidered, 56 CALIF. L. REV. 1098, 1122-33 (1968).
88. See id. at 1124.
89. See notes 78-80 supra and accompanying text.
90. McCoid, supra note 80, at 721.
91. The cotortfeasor may be liable for other claims as well. See note 79 supra and accompanying text.
92. See notes 93-101 infra and accompanying text.
94. Id. at 369, 215 N.W.2d at 620.
95. Id. The "remedy for every wrong" clause of the Minnesota Constitution reads in part: "Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character . . . ." MINN. CONST. art. I, § 8.
96. See Agin v. Heyward, 6 Minn. 110 (Gil. 53) (1861).
97. See, e.g., Ankeny v. Moffett, 37 Minn. 109, 33 N.W. 320 (1887) (Mitchell, J.); Note, supra note 14, at 471-72; Note, supra note 2, at 121-22.
98. Language in Tracy v. Streater/Litton Indus., 283 N.W.2d 909 (Minn. 1979), supports the conclusion that contribution is a common-law right protected by the "remedy for every wrong" clause:

The cases before us concern only the contracting parties and must be distinguished from those involving the abrogation of third party common-law rights. Accordingly, our invalidation of a provision which abrogated such a right with-
the right to contribution takes on a constitutional dimension that entitles the cotortfeasor to a hearing, thereby precluding, in the words of Justice Brandeis, the imposition of the burden of intervention.\textsuperscript{99} Justice Kelly apparently sensed the application of this constitutional protection when he wrote in \textit{Spitzack}:

\begin{quote}
If either notice or opportunity to litigate had been denied \ldots I would have favored reversal because the element of common liability would have been conclusively decided against appellant in an action in which he could not have been heard. Such a result would offend my notions of fairness, due process, and affording appropriate remedies for wrongs. Minn. Const. art. 1, \S\ 8.\textsuperscript{100}
\end{quote}

Thus, denying the right of contribution to a party for mere failure to intervene in a prior action might be unconstitutional, unless, as in \textit{Hart}, the court substitutes a remedy for the right taken away.\textsuperscript{101}

Turning to the relationship between \textit{Hart} and \textit{Spitzack}, one can see an important distinction. \textit{Spitzack} required a cotortfeasor to elect between litigating in an action to which he could assert a valid procedural defense,\textsuperscript{102} or face possible preclusion of the right to contribution.\textsuperscript{103} No such election was available to defendant Cessna in \textit{Hart}. Despite the inequity of coercing a cotortfeasor to intervene in a tort action, thereby subjecting him to potential liability, \textit{Spitzack} is constitutionally defensible upon the ground that the defendant drivers served process on the bar owner, impleading the latter for contribution.\textsuperscript{104} The extension of \textit{Spitzack} to \textit{Hart} possibly contravened notions of due process, fair play, and substantial justice, however, because no notice, by service of process or otherwise, was given to defendant Cessna. Only the court’s “equitable solution” mitigated this harm.

When a cotortfeasor has notice of a suit but has not been served with

\footnotesize{\textsuperscript{99}Chase Nat'l Bank v. Norwalk, 291 U.S. 431, 441 (1934); see notes 81-82 supra and accompanying text.}

\footnotesize{\textsuperscript{100}Spitzack v. Schumacher, 308 Minn. 143, 149, 241 N.W.2d 641, 645 (Kelly, J., concurring) (emphasis in original).}

\footnotesize{\textsuperscript{101}The court took away Cessna's right to contribution but substituted an equivalent remedy altering Cessna's joint and several liability, imposing upon Cessna liability only for its own negligence. See notes 17-24 supra and accompanying text.}

\footnotesize{\textsuperscript{102}See Appellant's Brief and Appendix at 5 n.2, Spitzack v. Schumacher, 308 Minn. 143, 241 N.W.2d 641 (1976).}

\footnotesize{\textsuperscript{103}See Spitzack v. Schumacher, 308 Minn. 143, 148-49, 241 N.W.2d 641, 644-45 (1976).}

\footnotesize{\textsuperscript{104}The defendant drivers impleaded the bar owner for contribution, alleging that the bar owner caused the decedent's death by illegally selling him liquor. See 308 Minn. at 144, 241 N.W.2d at 643.}
process, the *Vigen-Spitzack* rule should not apply to coerce intervention. First, the inclination of a nonparty is to ignore, as none of his business, pending litigation in which the individual has not been served with a summons and complaint. The nonparty does not expect to litigate in this situation. It seems unfair, therefore, to subject the nonparty to choose between inclusion in the suit, with some potential liability, and the possible loss of a contribution claim by staying out of the litigation. Second, courts normally do not require persons to elect between inclusion or preclusion without first subjecting them to service of process and the court's jurisdiction. Thus, an individual with a valid defense to service of process need not choose between defending or defaulting. Furthermore, if contribution is a constitutionally protected right in Minnesota, due process or the "remedy for every wrong" clause would be violated by denying the claim to a person not within the jurisdiction of the court. Finally, the policy behind intervention "lies in offering protection to nonparties," not in coercing them to litigate their claims. For all these reasons, it would seem that *Spitzack* should not be extended to place nonparty cotortfeasors in the dilemma of choosing between intervention and loss of a claim for contribution. Unfortunately, given the result in *Hart*, it is not clear how this problem will be avoided.

V. Issue Preclusion

As part of its "equitable solution," the *Hart* court allowed defendant Cessna to preclude plaintiff from relitigating the amount of damages previously determined in plaintiff's suit against the pilot. Thus, a party in Cessna's position could, in a future case, relitigate the issue of damages if the prior award was thought to be excessive, or limit the amount of damages to the prior award if thought to be reasonable or low. Because this defensive use of issue preclusion, or defensive collateral estoppel,
contravenes the normal requirement of essentiality, the court’s "equitable solution" should be explored.

As one of its elements, collateral estoppel requires that the issue to be precluded from relitigation be essential to the judgment rendered. In subsequent suit, assert collateral estoppel against a party to that prior litigation. See Travelers Ins. Co. v. Thompson, 281 Minn. 547, 555, 163 N.W.2d 289, 294 (1968) (life insurance company in declaratory judgment action may use issue preclusion against a defendant who was convicted in criminal proceeding to prevent recovery under policy), appeal dismissed, 395 U.S. 161 (1969); Lustik v. Rankila, 269 Minn. 515, 519-20, 131 N.W.2d 741, 744 (1964) (in personal injury action, nonparty used collateral estoppel against party to previous suit).

Allowing a nonparty to prior litigation to assert issue preclusion in a subsequent action contravenes the "mutuality rule." See, e.g., Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912) ("It is a principle of general elementary law that the estoppel of a judgment must be mutual."). "Under this mutuality doctrine, neither party could use a prior judgment as an estoppel against the other unless both parties were bound by the judgment." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-27 (1979); see Gustafson v. Gustafson, 178 Minn. 1, 5, 226 N.W. 412, 413 (1929); Nowak v. Knight, 44 Minn. 241, 243, 46 N.W. 348, 349 (1890). But cf. Gammel v. Ernst & Ernst, 245 Minn. 249, 256-57, 72 N.W.2d 364, 369-70 (1955) (recognizing mutuality rule but noting certain exceptions such as when a plaintiff deliberately selects his forum and unsuccessfully presents his proof). Gammel relied upon Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 172 A. 260 (Super. Ct. 1934). The Coca-Cola Co. court stated:

The requirement of mutuality must yield to public policy. To hold otherwise would be to allow repeated litigation of identical questions, expressly adjudicated, and to allow a litigant having lost on a question of fact to re-open and retry all the old issues each time he can obtain a new adversary not in privity with his former one.

*Id.* at 133, 172 A. at 263. Both the American Law Institute, see Restatement (Second) of Judgments app. § 88 (Tent. Draft No. 3, 1976), and the United States Supreme Court, see Parklane Hosiery Co. v. Shore, 439 U.S. at 331-32 (allowing district courts broad discretion in determining when collateral estoppel should be applied and setting forth a balancing test), have abandoned the mutuality requirement, although some state courts have recently reaffirmed adherence to the rule. See, e.g., Daigneau v. National Cash Register Co., 247 So. 2d 465 (Fla. 1971); Lukacs v. Kluesner, 154 Ind. App. 452, 456, 290 N.E.2d 125, 127 (1972); Keith v. Shiefen-Stockham Ins. Agency, Inc., 209 Kan. 537, 545, 498 P.2d 265, 273 (1972); Howell v. Vito's Trucking & Excavation Co., 386 Mich. 37, 191 N.W.2d 313 (1971).

Collateral estoppel may be used either "offensively" by a plaintiff seeking to foreclose a defendant from litigating an issue the defendant had previously litigated in an action against another party, see, e.g., Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (defendants in private suit estopped from relitigating issues adversely determined in prior SEC action); Pacific Indem. Co. v. Thompson-Yeager Inc., 260 N.W.2d 548, 559 (Minn. 1977), or it may be used "defensively" by a defendant seeking to prevent a plaintiff from asserting a claim the plaintiff had previously litigated. See, e.g., Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971) (determination of patent invalidity in prior action bars plaintiff from relitigating validity of patent in subsequent action against a different defendant), overruling Triplett v. Lowell, 297 U.S. 638 (1936).

Since plaintiff in *Hart* cannot relitigate the amount of damages and Cessna may either relitigate the amount or let the prior determination stand, see 276 N.W.2d at 170, the Hart court effectively conferred upon Cessna the right to use "defensive" collateral estoppel.

111. *E.g.*, Hauser v. Mealey, 263 N.W.2d 803, 806 (Minn. 1978) (essential to judg-
the prior action. Relitigation of an issue imposes a burden on the parties and the courts. To avoid this burden, collateral estoppel effect is only given to essential issues—those to which careful consideration is given because of their importance to the outcome of the first lawsuit. It is recognized that the interest in providing a considered determination of an issue outweighs any burden imposed by relitigation. 112

Scholars advance at least two justifications for restricting collateral estoppel to essential issues. First, determination of a non-essential issue does not bear sufficient indicia of correctness to warrant issue preclusion. 113 Because the judgment did not turn on the issue decided, the jury may not have considered it carefully. The jury may also have compromised quickly to finish its deliberations, knowing full well that by finding the alleged cotortfeasor not negligent, the award would be meaningless to the action before them. 114 Second, when a litigant is successful, any adverse jury determination normally cannot be appealed by that liti-

Other courts follow the essentiality requirement. See, e.g., Fibreboard Paper Prods. Corp. v. Machinists Local 1304, 344 F.2d 300, 306 (9th Cir. 1965); In re Estate of Simmons, 64 Cal. 2d 217, 222-23, 411 P.2d 97, 100, 49 Cal. Rptr. 369, 372 (1966); Schneberger v. United States Fidelity & Guar. Co., 213 N.W.2d 913, 917 (Iowa 1973) (citing Purdes v. Carvel Hall, Inc., 301 F. Supp. 1256, 1263 (S.D. Iowa 1969)). The requirement is now the general rule, see 1B MOORE’S FEDERAL PRACTICE ¶ 0.441[2], at 3777 (2d ed. 1974), and the current stand of the American Law Institute:

§ 68. Issue Preclusion—General Rule

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 4, 1977). “A party precluded from relitigating an issue with an opposing party, . . . is also precluded from doing so with a [nonparty].” id. § 88 (Tent. Draft No. 3, 1976), when “the issue was the same as that involved in the present action and was actually litigated and essential to a prior judgment that is valid and final.” Id., Comment a. See generally Vestal, RES JUDICATA/Preclusion: Expansion, 47 S. CAL. L. REV. 357, 359-60 (1974).

112. See RESTATEMENT (SECOND) OF JUDGMENTS § 68, at 10, Comment h (Tent. Draft No. 4, 1977).


114. See MINN. R. CIV. P. 49.01(2) (in actions involving comparative fault statute, court shall inform jury of the effect of its answers to the percentage of fault questions).
Such an adverse determination is not essential to the judgment rendered for the successful litigant; therefore, the determination is not a proper subject for issue preclusion.

In Hart, the finding of pilot non-negligence in the first action made determination of the damages issue unnecessary. Although the special verdict form required an answer to the damage issue, nothing turned upon that answer. The supreme court underscored this conclusion. Despite plaintiff's request for additur or a new trial as to damages, the court addressed only the issue of pilot negligence in appellate review of the first Hart action. Having upheld the jury's finding of no negligence, the court never reached plaintiff's requests regarding damages. Yet, the Hart court held that plaintiff could not relitigate the issue unless Cessna so desired.

An issue collaterally estopped from relitigation is not subject to appellate review. Because of this, a future plaintiff subject to the Hart solution may find the issue of damages determined and foreclosed without careful consideration by any court or deliberative body. Although a party to a civil case has no constitutional right to appellate review of either the decision or a particular issue, the Hart procedure may compound an inequity produced in a previous suit. Considering that the Hart court attempted to fashion an "equitable solution," this would be

116. See note 10 supra and accompanying text.
117. Use of the special verdict form does not change the result. A determination of no liability requires no finding of damages. An award is meaningless to a judgment that plaintiff take nothing by his action. Arguably, a cautionary court instruction as to the importance of the award finding might suffice to cause careful consideration of the issue, but this is speculative, especially if the jury knows that the case before it will not turn on the issue of damages.
119. See id. at 47.
121. See id. at 478, 238 N.W.2d at 591.
122. See 276 N.W.2d at 170.
123. See RESTATEMENT (SECOND) OF JUDGMENTS § 68, at 10, Comment h (Tent. Draft No. 4, 1977).
124. See In re Appeal of O'Rourke, 300 Minn. 158, 164, 220 N.W.2d 811, 815 (1974) (Minnesota Constitution does not "either expressly or by necessary implication, guarantee to the individual a right of appeal to this court"); cf. City of Minneapolis v. Wilkin, 30 Minn. 140, 144, 14 N.W. 581, 583 (1883) ("Independently of any express constitutional guaranty, a person has no constitutional right to have his case reviewed on appeal."). Because the greater power to deny review of a case necessarily includes the lesser power to deny review of an issue, a person has no constitutional right in Minnesota to appellate review. But cf. Griffin v. Illinois, 351 U.S. 12, 19 (1956) (denial of appellate review in criminal case in which state law provides full direct appellate review is unconstitutional when denial is based on poverty or some other invidious discrimination).
an unusual result. How this difficulty is resolved will depend upon subsequent interpretations of Hart.

The unusual use of issue preclusion by the Hart court could be limited in its effect by deeming damages as sui generis—an issue that must be decided in case the appellate court finds liability as a matter of law, reverses the trial court, and reinstates the damage award. This view of damages, as an issue always essential to the judgment rendered, validates the use of issue preclusion by the court. Nevertheless, to insure a well considered determination of the damages issue and to mitigate the potential inequity of subsequent issue preclusion, the court should instruct the jury as to the importance of the damages award.

Alternatively, one may view the Hart decision outside of the contribution analysis and see the Minnesota Supreme Court embarking on a new approach to the use of issue preclusion. Under the new approach, collateral estoppel would apply when the parties to a prior suit had fully and fairly litigated an issue and both parties had a sufficient stake in the outcome such that resolution of the issue derived from a full adversarial conflict. In such situations, a nonparty may, in a subsequent suit, bar relitigation of the issue decided. Certainly such a result would further policies of judicial economy and consistent verdicts, and give the plaintiff incentive to join all possible defendants in the first suit. Notwithstanding the benefits of this new approach, the determination of a nonessential issue still could be inequitably barred from relitigation.

VI. JOINDER OF TORTFEASORS

With its impact upon joinder of parties at the commencement of suit, the Hart decision may achieve its greatest effect. Under the rules of civil procedure, an injured plaintiff may elect between joining all tortfeasors responsible for the injury in a single action or suing them separately. Before Hart, it seemed that no risks or burdens attached to using either method; the law imposed upon each cotortfeasor joint and several lia-

125. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329-30 (1979) ("[D]efensive collateral estoppel gives a plaintiff a strong incentive to join all potential defendants in the first action if possible."). Interestingly, the Court stated that if a plaintiff could have joined as a party in a prior action, offensive collateral estoppel should be denied. Id. at 331. If a defendant could have intervened, should defensive collateral estoppel be denied? Cf. Kisch v. Skow, 305 Minn. 328, 233 N.W.2d 732 (1975) (per curiam) (cotortfeasor who did not intervene denied right to challenge failure of plaintiff to join all defendants).

126. See notes 111-15 supra and accompanying text.

127. See F. JAMES & G. HAZARD, supra note 113, § 10.8, at 469-70; Prosser, Joint Torts and Several Liability, 25 CALIF. L. REV. 413, 414-17 (1937).

128. Cf. Kisch v. Skow, 305 Minn. 328, 233 N.W.2d 732 (1975) (per curiam) (joint tortfeasors not "necessary" or "indispensable" parties; therefore, failure to join does not prevent subsequent suit against other joint tortfeasor).
bility. Thus, an injured plaintiff reigned as master of the lawsuit, exercising an unfettered right to choose whom and when to sue.

Many attorneys join everyone in sight. Nevertheless, several reasons may prompt the decision not to join all cotortfeasors. First, an absent cotortfeasor may possess a particularly good defense that will adversely reflect upon plaintiff’s claim. Second, prosecuting multiple defendants may portend delay and increase costs, unnecessary evils with joint and several liability. Third, the presence of particular counsel for a potential defendant may prompt plaintiff’s attorney to decide against joinder. Fourth, plaintiff may desire a test suit against only one of several possible defendants. Finally, the cotortfeasor may not be amenable to suit in plaintiff’s chosen forum. An analysis of the Hart court’s “equitable solution” compels the conclusion that plaintiffs no longer possess an “unfettered right” to elect whom to sue in any one action. Through its potential for reducing recoveries and subjecting counsel to legal malpractice claims, Hart actually coerces joinder of cotortfeasors. In so doing, the decision raises numerous questions as to its scope and equitable application.

The pressures upon a plaintiff to join all potential defendants parallel the burdens of intervening to protect a contribution claim. The plaintiff will bear the burden of suing piecemeal when the use of such a procedure forecloses the cotortfeasor’s right of contribution. Apparently, the plaintiff will have the burden in all cases in which the cotortfeasor, sued separately, was not served with process in plaintiff’s unsuccessful first suit. Furthermore, if Hart overrules Spitzack as to who bears the burden of suing piecemeal, then future plaintiffs will always run a risk when all potential defendants are not joined. The risk is a diminished or entirely negated award in a second action against a second cotortfeasor. This can occur when the jury in the second action decides that the previously exonerated defendant was at fault.

The potential for such a harsh result increases when one considers the impact of Frey v. Snelgrove. Under Frey, a cotortfeasor who executes a

129. See note 63 supra.
130. See 1 J. Hetland & O. Adamson, supra note 77, at 508, 608-09. To some extent, complete mastery is diminished by modern declaratory judgment practice.
132. See Comment, supra note 63, at 785 n.95.
133. See notes 23-24 supra and accompanying text.
134. See note 146 infra and accompanying text.
135. See notes 87-108 supra and accompanying text.
136. See note 65 supra and accompanying text.
137. See notes 23-24 supra and accompanying text.
138. 269 N.W.2d 918 (Minn. 1978).
Pierringer release with the plaintiff normally is not a party to plaintiff’s suit against the non-settling defendant. Nonetheless, the jury allocates fault between both cotortfeasors. An absent party’s fault is calculated in the jury’s determination of the award. In Lines v. Ryan, the court extended Frey to a non-Pierringer release situation. Because Frey and Lines require the court to submit to the jury the fault of an absent tortfeasor, the following scenario might occur:

Suit #1: Driver A sues driver B alone for injuries sustained in an automobile accident. B defends by contending that A and driver C caused the injuries. The jury awards $20,000, but finds A thirty-five percent at fault, B thirty percent at fault, and C thirty-five percent at fault. Result: A takes nothing by his action.

139. The Minnesota court relied upon a recent law review article, Simonett, Release of Joint Tortfeasors: Use of the Pierringer Release in Minnesota, 3 WM. MITCHELL L. REV. 1 (1977), as the “definitive” analysis of Pierringer releases. See 269 N.W.2d at 922.

140. See 269 N.W.2d at 922.

141. See id.

142. 272 N.W.2d 896 (Minn. 1978).

143. Lines involved the consolidation of two actions, Lines’ complaint against Ryan and Jones’ complaint against both Lines and Ryan. See id. at 899. Lines contended that the trial court erred by instructing the jury, relative to his complaint against Ryan, to compare the negligence of Jones, even though Jones was not a party to Lines’ case against Ryan. Id. at 902. The supreme court upheld the trial court’s decision. See id. For case authority, the Lines court relied upon Frey v. Snelgrove, 269 N.W.2d 918 (Minn. 1978) and Connar v. West Shore Equip., Inc., 68 Wis. 2d 42, 227 N.W.2d 660 (1975). The Connar court stated the principle as follows:

It is established without doubt that, when apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tort-feasors either by operation of law or because of a prior release. Id. at 44-45, 227 N.W.2d at 662, quoted in Lines v. Ryan, 272 N.W.2d at 902-03.

The Lines court also cited as support the Minnesota Jury Instruction Guides, 4 MINNESOTA PRACTICE JIG II, 148 S, Comment (2d ed. 1974). See 272 N.W.2d at 903. The comment clearly shows that the comparison of a nonparty’s negligence or fault is not confined to Pierringer release actions. See 4 MINNESOTA PRACTICE JIG II, supra, at 128, Comment.

In 1978, the Minnesota Legislature substantially changed Minnesota tort law. See Act of Apr. 6, 1978, ch. 738, 1978 Minn. Laws 836 (codified in scattered sections of MINN. STAT. chs. 541, 544, 549, 604). The changes included enactment of a comparative fault statute. See id. §§ 6-7, 1978 Minn. Laws at 839-40 (codified at MINN. STAT. §§ 604.01(1)-(1a) (1978)). The Minnesota law closely parallels the Uniform Comparative Fault Act. See UNIFORM COMPARATIVE FAULT ACT § 1(b). The Uniform Comparative Fault Act specifically limits fault determination to parties and ignores “other persons who may have been at fault with regard to the particular injury but who have not been joined as parties.” Id. § 2, Commissioner’s Comment.

Arguably, by enacting part of the Uniform Act, the Legislature changed the law of Frey and Lines. This argument lacks some force, however, when it is remembered that the Uniform Act is pure comparative fault, see id. § 2, and that Minnesota still requires a defendant’s fault at least to equal plaintiff’s before an award of damages can be made. See MINN. STAT. § 604.01 (1978).
Suit #2: A now sues C alone for the same injuries. C attempts to implead B for contribution but is barred from doing so by the Vigen-Spitzack rule. Under Hart, C elects to bar relitigation of the damages and contends that the collision was due to the fault of A and B. The jury finds A thirty-five percent at fault, B thirty-five percent at fault, and C thirty percent at fault. Result: A takes nothing by his action.\footnote{Hart requires the jury to redetermine the fault of the first tortfeasor. 276 N.W.2d at 169 n.6. Arguably, neither Frey nor Lines require this result when the first cotortfeasor’s fault has been previously adjudicated. Thus, without Hart and Spitzack, the problem could be resolved by the jury allocating to A 35% and to B 65% of the fault. Then, in the contribution action between B and C, the jury could apportion fault equally. The result would leave A with 65% of the new award, with B and C equally liable. The result could also be a severely diminished award. In Suit #2, if the jury found A 10% at fault, B 70% at fault, and C 20% at fault, A would recover only $4,000. An insolvent tortfeasor might not defend against the action even if joined, and a judgment against such a tortfeasor might be reopened. See MINN. R. CIV. P. 60.02. Under normal circumstances, failure to join a cotortfeasor does not subject an attorney to malpractice liability. Joint and several liability of all tortfeasors, coupled with the almost impossible proof of both causation and damages in a malpractice action, usu-} Thus, a five percent shift in fault allocation results in the plaintiff losing the entire award. Application of the Hart doctrine in this manner emphasizes the harshness of penalizing a plaintiff for failure to join all tortfeasors; had plaintiff sued both defendants in the first action above, sixty-five percent of the award could have been recovered. Hart also raises some important questions concerning the scope of the Vigen-Spitzack rule. Will it apply if the absent party was not amenable to suit in plaintiff’s forum? For example, assume that drivers A and B, both residents of Minnesota, collide in Wisconsin with driver C, a resident of Wisconsin. If plaintiff A decided to sue in Minnesota, driver C would have a valid defense to any service of process outside Minnesota. If, in a subsequent suit against C in Wisconsin, the Wisconsin court applied the Hart rule, A would be in an unenviable position. C could prevent the relitigation of damages and use B’s negligence to diminish any recovery from C. Is it fair to force the injured party to bear the risk of separate suits?

Another question is whether Hart should apply if a reasonable plaintiff could not have known of the existence or potential liability of an absent party until during or after trial. Admittedly, this is an unusual situation, but it could occur. Furthermore, if an insolvent tortfeasor is left out of the original suit and later becomes solvent,\footnote{An insolvent tortfeasor might not defend against the action even if joined, and a judgment against such a tortfeasor might be reopened. See MINN. R. CIV. P. 60.02. Under normal circumstances, failure to join a cotortfeasor does not subject an attorney to malpractice liability. Joint and several liability of all tortfeasors, coupled with the almost impossible proof of both causation and damages in a malpractice action, usu-} should Hart apply to plaintiff’s subsequent suit against that tortfeasor?

These are hard cases showing how an extension of Hart could lead to inequitable results, but an attorney must consider the possible application of Hart to separate lawsuits. In addition to the potential loss of recovery, a second factor coerces joinder of all tortfeasors at the commencement of suit—the potential for legal malpractice.\footnote{Under normal circumstances, failure to join a cotortfeasor does not subject an attorney to malpractice liability. Joint and several liability of all tortfeasors, coupled with the almost impossible proof of both causation and damages in a malpractice action, usu-}
VII. ALTERNATIVE RESOLUTIONS

The impact of Hart upon tort claim procedures raises numerous issues. After Hart, however, the elements of legal malpractice are more easily proved and the attorney who fails to join all tortfeasors may be liable to the client for any difference between the amount recovered and the amount awarded as damages.

In Minnesota, a client suing his attorney for legal malpractice must prove four elements: (1) that an attorney-client relationship existed; (2) that certain acts constituted negligence or breach of contract; (3) that the negligence or breach was the proximate cause of the damage; and (4) that "but for" such negligence or breach of contract, the client would have been successful. Godbout v. Norton, 262 N.W.2d 374, 376 (Minn. 1977) (quoting Christy v. Saliterman, 288 Minn. 144, 150, 179 N.W.2d 288, 293-94 (1970)), appeal dismissed, 437 U.S. 901 (1978); see R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 416, at 498-500 (1977) (plaintiff must prove each element). It is normally impossible to prove all of these elements in a malpractice claim for increased damages because the jury must decide the outcome of an earlier case, Titsworth v. Mondo, 95 Misc. 2d 233, 242, 407 N.Y.S.2d 793, 798 (Sup. Ct. 1978), "the suit within a suit" problem. See Coggin, Attorney Negligence... A Suit Within A Suit, 60 W. VA. L. REV. 225, 225 (1958); Symposium—Legal Malpractice, 14 HAWAII B.J. 3, 13-14 (1978). In a Hart situation, however, the plaintiff-client can prove each element. The first, an attorney-client relationship, is given. The second element is that failure to join all cotortfeasors in the first suit constitutes negligence. The third element, proximate cause, is proved by the causal link between nonjoinder and loss of recovery as outlined in the Hart decision. The fourth element is easily demonstrated. Had C been joined in suit #1 hypothesized above, see note 144 and accompanying text, plaintiff would have recovered $13,000 because of C's joint and several liability. Because C was sued separately and the right to contribution was foreclosed, plaintiff recovered nothing. The result would not differ much if plaintiff, instead of losing the entire award, received a diminished one. See Hart v. Cessna Aircraft Co., 276 N.W.2d 166, 170 (Minn. 1979).

In the analogous New York decision of Titsworth v. Mondo, 95 Misc. 2d 233, 242, 407 N.Y.S.2d 793 (Sup. Ct. 1978), the client brought a malpractice claim against former counsel. Plaintiff settled the first action for personal injuries with the defendant and then sued the attorney for counsel's failure to allege an adequate amount of damages. See id. at 237, 407 N.Y.S.2d at 794. The Titsworth court held that these allegations were sufficient to preclude summary judgment for defendant. See id. at 245, 407 N.Y.S.2d at 799. The Iowa court, however, is of the view that a client cannot recover for counsel's failure to allege an adequate amount of damages because deciding on the amount of the ad damnum clause is peculiarly within the lawyer's judgment and the court cannot determine the proper amount. See Baker v. Beal, 225 N.W.2d 106, 113 (Iowa 1975).

Collectibility is a necessary element to be proved by a plaintiff, Symposium—Legal Malpractice, supra, at 14; see, e.g., Sitten v. Clements, 257 F. Supp. 63, 67 (E.D. Tenn. 1966), aff'd per curiam, 385 F.2d 869 (6th Cir. 1967); R. MALLEN & V. LEVIT, supra, § 418, at 511; Note, A Modern Approach to the Legal Malpractice Tort, 52 IND. L.J. 689, 692-93 (1977), and insolvency of the defendant is a defense to the tort. Id. at 693. The Titsworth court stated that if plaintiff proved he would have recovered in the first suit had it gone to trial, that the judgment would have been collected, and that the attorney's negligence was the proximate cause of the loss, then plaintiff could recover as damages the amount of the claim lost by settlement. See Titsworth v. Mondo, 95 Misc. 2d at 244-45, 407 N.Y.S.2d at 798-99. But cf. Glenna v. Sullivan, 310 Minn. 162, 170, 245 N.W.2d 869, 873 (1976) (per curiam) ("To allow a client who becomes dissatisfied with a settlement to recover against an attorney solely on the ground that a jury might have awarded them more than the settlement is unprecedented." (footnote omitted)). Titsworth shows that when a client can prove an
and problems both for attorneys and the court. Instead of resolving these issues and problems on a case-by-case application of Vigen-Spitzack, the Minnesota Supreme Court should institute one of the following alternatives: make cotortfeasors rule 19\textsuperscript{147} parties to compel their joinder, or overrule both Hart and Spitzack.

A. Rule 19 Parties

Rule 19.01 of the Minnesota Rules of Civil Procedure defines a class of persons who are needed for a just adjudication.\textsuperscript{148} A person falls into this class if, in his absence, complete relief cannot be accorded to the existing parties or if he has an interest relating to the controversy and "the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring [additional] or . . . inconsistent obligations by reason of his claimed interest."\textsuperscript{149} A rule 19 party who is subject to the service of process must be joined in the action.\textsuperscript{150} If he is not subject to process, then the court must weigh several factors to determine whether to dismiss the action or proceed without the absent person.\textsuperscript{151} Because of the importance of this rule to piecemeal suits, a question arises: Are cotortfeasors rule 19 parties in Minnesota?

Generally, cotortfeasors have been classified as "proper" parties to be joined permissively under rule 20\textsuperscript{152} or sued separately. In Kisch v. attorney's negligence decreased a recovery, the client can recover the amount of the claim lost, an element uniquely provable in the Hart situation.

The primary defense available to the attorney is the well-known legal principle that "an attorney is not liable for an error as to a legal principle which is debatable or uncertain." R. Mallem & V. Levit, supra, § 215, at 307 (footnote omitted); see, e.g., Meagher v. Kavli, 256 Minn. 54, 60-61, 97 N.W.2d 370, 375 (1959). With Hart, however, it is unclear how an attorney can escape liability for nonjoinder, especially considering the court's explicit language that plaintiffs who use piecemeal suits will bear the burden of any foreclosure of contribution rights. See note 65 supra and accompanying text.

An attorney who desires to sue tortfeasors separately should be able to escape malpractice liability if the client decides to use the piecemeal procedure after there has been full disclosure of the "relevant considerations." See ABA Code of Professional Responsibility EC 7-8. While joinder decisions were once mechanical considerations within the province of the lawyer's judgment, see id. EC 7-7, Hart changes nonjoinder into a procedure that may substantially prejudice the rights of a client. As such, whether or not to join additional parties is now a decision exclusively within the authority of the client and binding upon the attorney. Id.

\begin{enumerate}
\item \textsuperscript{147} Minn. R. Civ. P. 19.01.
\item \textsuperscript{148} See id.
\item \textsuperscript{149} Id.
\item \textsuperscript{150} See id.
\item \textsuperscript{151} See id. 19.02.
\item \textsuperscript{152} See id. 20.
\end{enumerate}
the Minnesota Supreme Court indicated that cotortfeasors were not rule 19 parties. The court stated that a cotortfeasor with joint and several liability normally constituted a permissive party only and an injured person could sue potential defendants piecemeal. No risk would attend plaintiff's act no matter how he chose to proceed. The court rendered the *Kisch* decision seven months before *Spitzack* was decided, however, and the latter may indeed change the character of joinder.

Under the *Vigen-Spitzack* rule, an absent cotortfeasor may lose his right to contribution through the disposition of an action to which he is not a party. The cotortfeasor's absence, therefore, impairs his ability to protect his right of contribution. Thus, *Spitzack* transforms cotortfeasors into rule 19 parties, to be joined when feasible.

The *Hart* solution alters this analysis. To some degree, the *Hart* decision protects the absent cotortfeasor from loss of contribution. The cotortfeasor, then, is not a rule 19 party because his ability to protect his interest is not impaired. By shifting the burden of suing piecemeal to the plaintiff, however, *Hart* prevents the plaintiff from securing complete and final relief. True, a plaintiff suing piecemeal may be seen to waive this protection, but the interests involved are not just those of the plaintiff. Policies of judicial economy and prevention of inconsistent judgments also lie behind the rules of joinder. Thus, the absent cotortfeasor should be a rule 19 party because only then may the parties secure complete and final relief. By requiring joinder under rule 19, the supreme court could remove the *Hart* trap and further the important judicial goals of economy and consistency.

In *Henris Food Products Co. v. Home Insurance Co.*, a Wisconsin federal district court ruled that cotortfeasors in Minnesota were rule 19 parties. In that case, plaintiff stored food in a warehouse in Minnesota. An insurance policy covered the food so stored. Chemicals also were stored in the warehouse. When chemical vapors permeated the food

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153. 305 Minn. 328, 233 N.W.2d 732 (1975) (per curiam).
154. See id. at 330-31, 233 N.W.2d at 733-34.
155. See id. at 331, 233 N.W.2d at 734.
156. See notes 17-21 supra and accompanying text.
157. See notes 23-24 supra and accompanying text.
159. 474 F. Supp. 889 (E.D. Wis. 1979).
160. See id. at 893-94.
161. Id. at 890.
162. Id.
163. Id.
packages,164 plaintiff sued the insurance company, and the insurance company impleaded the owner of the chemicals for indemnity.165 The chemical company moved for dismissal or severance because the Minnesota warehouser was an absent rule 19 party.166 The court agreed, reasoning that Spitzack required this result.167 Because the Minnesota warehouser was not amenable to suit in Wisconsin, having insufficient contacts with the forum, the court stayed third-party proceedings pending either the warehouser’s voluntary intervention or resolution of the action pending in Minnesota state court where all parties were present.168

Henri's Food Products Co. underscores Spitzack's transformation of cotortfeasors into rule 19 parties. But the federal court did not consider the Hart decision. Arguably, the absent warehouser would be protected from any adverse determination unless notice of the suit would require the warehouser’s intervention. Reading Hart in this manner would have been too speculative for the federal court. Until Minnesota expressly decides the question, it seems reasonable to view cotortfeasors as rule 19 parties.

If cotortfeasors are rule 19 parties, a defendant can move to dismiss a suit for the plaintiff’s failure to join all cotortfeasors,169 as required by rule 19.170 The court can then order their joinder or dismiss the suit when the absent cotortfeasor is not amenable to service of process.171

If, however, the defendant does not object to plaintiff’s failure to join, what sanctions should be imposed? In Kisz the cotortfeasor who was absent from the first action was not permitted to quash service of process in the second action.172 No sanction was imposed upon either the plaintiff or the original defendant. This reflected the court’s belief that a rule violation must be challenged in the original proceeding wherein the violation occurred.173 The court’s holding, explicitly limited to the Kisz facts,174 prevented the cotortfeasor from claiming prejudice for an alleged error in an earlier proceeding against the other cotortfeasor when,

164. The food itself was not affected. Chemical residues, however, were left on the cartons containing the bottled dressing, the inside packing, and the outside of the bottles, including the labels and the bottlecaps. Id. at 890-91.
165. See id. at 893.
166. Id.
167. Id. at 894.
168. See id. It should be noted that the court did not say that the warehouser’s failure to intervene would permit the continuation of third-party proceedings.
169. See MINN. R. CIV. P. 12.02(6).
171. See MINN. R. CIV. P. 19.01.
172. See Kisch v. Skow, 305 Minn. at 334-35, 233 N.W.2d at 737.
173. See id. at 334, 233 N.W.2d at 736.
174. See id. at 333 n.10, 233 N.W.2d at 735 n.10.
informed as to that action, the absent cotortfeasor failed to intervene. Because of potential prejudice to the parties that can result from Vigen-Spitzack and Hart, the Kisch decision should not be given precedential value. Sanctions are necessary. If the defendant knows of the existence of another tortfeasor not joined and fails to make a proper motion, the defendant should not receive the benefit of the Vigen-Spitzack rule—possible prevention of the other tortfeasor’s suit for contribution. If the plaintiff fails to name the absent cotortfeasor as a rule 19 party and then sues that cotortfeasor in a second action, the court should quash the subsequent service of process, or apply Hart and protect the new defendant by limiting his liability. The effect of this procedure would be the emasculation of the Vigen-Spitzack rule. Plaintiffs will not want to bear the burden of suing piecemeal and defendants will not want to increase their exposure to liability for contribution. Therefore, cotortfeasors will either be joined or impleaded. Separate suits should then vanish and Vigen-Spitzack will become an antiquated rule, lurking in the background as a coercive force, but rarely applied.

B. Overrule Spitzack and Hart

Rule 19 status for cotortfeasors is a mechanical means of limiting Vigen to its own facts—when cotortfeasors are present in the first action and actually litigate their liability to the plaintiff, the judgment rendered should be binding for purposes of contribution, despite the absence of any formal adversary position established by the pleadings. The best method of resolving the various issues and problems raised by Hart and Spitzack would be to overrule both decisions and refuse to extend Vigen beyond its facts. Common liability could then be fixed at the time of the accident and extinguished only by litigation between cotortfeasors. Constitutional and judicial problems would not have to depend upon the

175. See id. at 334-35 & n.14, 233 N.W.2d at 736 & n.14.
176. Cf. Note, supra note 27, at 169-70 & 170 n.33 (suggesting that defendant should be required to send notice to all third parties who could be found liable; failure to notify allows cotortfeasor to relitigate fault determination).
177. This is required by MINN. R. CIV. P. 19.03.
178. Wisconsin takes the view that plaintiff’s inability to win in his claim against one cotortfeasor does not automatically preclude a second cotortfeasor’s action for contribution. See Reddington v. Beefeaters Tables, Inc., 72 Wis. 2d 119, 125c, 243 N.W.2d 401, 403 (1976) (per curiam) (on rehearing). New Jersey takes a similar view. See Markey v. Skog, 129 N.J. Super. 192, 200, 322 A.2d 513, 518 (Law Div. 1974) (defendant cannot be deprived of his inchoate right by reason of plaintiff losing his right of direct action against the other cotortfeasor).

In Reddington, the Wisconsin Supreme Court stated:

[T]he cause of action for contribution is separate and distinct from the underlying claim by the injured party. The common liability necessary to support the cause of action for contribution is to be determined as of the time the accident occurs and not as of the time the claim for contribution is asserted. . . . The fact that an existing common liability to the injured party is subsequently extin-
plaintiff presenting a good case against the defendant to preserve the absent cotortfeasor’s right of contribution. If separate actions occur, then the second defendant would implead or sue separately the first defendant for contribution. No rule would prevent it.

VIII. CONCLUSION

The Hart solution raises many procedural questions in tort claim actions that substantially affect the interests of both parties and nonparties. The quandary over whether to intervene or lose a possible contribution claim is now a major consideration for absent tortfeasors. By coercing joinder, the solution ends piecemeal suits, or places a substantial risk on plaintiff’s counsel if all parties are not joined. Hart’s unique use of issue preclusion opens the door for possible change in the prerequisites for collateral estoppel, substantially loosening the normal restraints. These questions will require extensive case-by-case analysis unless the court overrules Hart and Spitzack, or makes cotortfeasors rule 19 parties.

By recognizing cotortfeasors as rule 19 parties, the court can provide a partial solution to the intervention and joinder problems. A person subject to the service of process will be joined and need not intervene. The contribution claim will then be litigated or determined in that action. A person not subject to the service of process, however, will have to decide whether actual notice of the suit requires his intervention at the risk of losing a claim for contribution.

Joinder will be compulsory. As a practical matter this removes the problems of a diminished recovery and a malpractice claim for counsel’s failure to join all tortfeasors. Nevertheless, it spells the end of piecemeal suits and raises the problem of how burdens should be allocated when the person to be joined is beyond the jurisdiction of the court.

By the second alterantive—overruling Hart and Spitzack—the court will restore to the plaintiff his “unfettered right” to sue when and whom he pleases. Contribution will be determined solely by action between the tortfeasors, thereby placing a procedural burden on the defendant to implead others he believes responsible. Defendants who do not want to relitigate their potential liability will take advantage of this procedural device. If impleader is not allowed or some procedural rule defeats its use, the trial should proceed. To avoid further problems for the courts and tortfeasors, however, the question of contribution should be left to litigation among those responsible for the injury.

guished as to one of the joint tort-feasors is immaterial insofar as the right of the remaining joint tort-feasors to seek contribution from him is concerned.

72 Wis. 2d at 125c, 243 N.W.2d at 403 (citations omitted). This appears to be the general rule when tortfeasors are sued separately. See id. See generally Annot., 24 A.L.R.3d 318 (1969).