Contribution and Indemnity—An Examination of the Upheaval in Minnesota Tort Loss Allocation Concepts

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Questions concerning the proper method of allocating an injured party's loss generate a surprising amount of litigation in Minnesota each year. The party attempting to shift liability for an injured party's loss must do so by claiming a right to contribution or indemnity from another party. Unfortunately, whether contribution or indemnity is the proper remedy is rarely certain. In an attempt to clarify this uncertainty, the Minnesota Supreme Court in a 1960 decision established specific loss allocation rules for determining whether contribution or indemnity is appropriate. Recent years, however, have witnessed both judicial and legislative changes in these rules. This Note traces the historical development of contribution and indemnity up through the changes created by the recent upheaval in Minnesota contribution and indemnity law. In addition, this Note examines the future of contribution and indemnity in Minnesota.
I. INTRODUCTION

"Equity eschews mechanical rules; it depends on flexibility."

Mr. Justice Frankfurter, for the Court, in Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946).

Contribution and indemnity are remedies that distribute fault among multiple defendants who are commonly referred to as joint or co-tortfeasors. Contribution shifts only a portion of the injured party's loss


To prevent any confusion resulting from the use of the term "joint tortfeasors," this Note will refer to persons jointly responsible for a tort as "co-tortfeasors." The term "joint tortfeasor" is rejected because it lacks precision. It connotes ideas that are unjustifiable, inaccurate, and generally misleading. Although the word "joint" implies concert of action, contribution or indemnity is awarded even in the absence of concert of action. For example, contribution is appropriate when a single indivisible harm is sustained as a result of separate but concurring tortious acts of two or more parties. See, e.g., Lametti v. Peter Lametti Constr. Co., 305 Minn. 72, 232 N.W.2d 435 (1975) (owner of land and construction company were joint tortfeasors when their combined negligence resulted in injury to 14-year-old girl in diving accident in pond on property owner's land). Moreover, although the word "tortfeasor" means wrongdoer, frequently the party granted contribution or indemnity has not committed any moral wrong, with liability being imposed vicariously or resulting from the doctrine of respondeat superior. See, e.g., Lunderberg v. Bierman, 241 Minn. 349, 63 N.W.2d 355 (1954) (automobile owner held liable under financial responsibility statute entitled to indemnity from garage owner).

Originally, the term "joint tortfeasors" applied to those who were vicariously liable for acting in concert to commit a trespass. For example, if one tortfeasor committed a battery as another robbed the injured party, each could be joined in the same action and held liable for the entire damage. The jury was not permitted to apportion the damages. The rationale for permitting joinder in such cases is that the injured party should be allowed...
from one co-tortfeasor to another co-tortfeasor. Indemnity, on the other hand, shifts the injured party's entire loss from one co-tortfeasor to another co-tortfeasor. Because of the close relationship between the doctrines, one learned jurist has commented that "indemnity is only an

to recover on one cause of action when his injuries were caused from the single but jointly

With the advent of liberal procedural codes, the term "joint tortfeaster" was extended
to encompass co-tortfeasors whose independent acts concurred to cause one individual
This includes injuries arising from the concurrent negligence of two persons who harm a
third party, see, e.g., Marier v. Memorial Rescue Serv., Inc., 296 Minn. 242, 207 N.W.2d
706 (1973), the vicarious liability of a master for his servant, see, e.g., Rampi v. Vevea,
229 Minn. 11, 38 N.W.2d 297 (1949) (master held liable for servant's negligent use of
master's automobile), or the breach of a common duty, see, e.g., Krenegel v. Midwest
Automatic Photo, Inc., 295 Minn. 200, 203 N.W.2d 841 (1973) (photo-booth manufacturer,
photo-booth distributor, and department store all held to be "joint tortfeasors").

The term "joint tortfeaster" has also been used to describe injuries considered indivisible,
such as the burning of a building by two negligently started fires each of which would
have caused the destruction alone. See Anderson v. Minneapolis, St. P. & S. Ste. M. Ry.,
146 Minn. 430, 179 N.W. 45 (1920). However, the term does not include those results that
by their very nature are capable of some type of logical apportionment, such as where
cotortfeasors each pollute a stream with oil, see Johnson v. City of Fairmont, 188 Minn. 451,
247 N.W. 572 (1933), or where co-tortfeasors inflict separate gunshot wounds upon the
injured party. Cf. Le Laurin v. Murray, 75 Ark. 232, 87 S.W. 131 (1905) (plaintiff suffered
only minor injuries after being beaten by first tortfeaster, but serious injuries resulted when
he was subsequently pistol-whipped by second tortfeaster). In such cases, because of the
obvious difficulties of proof as to apportionment of damages, each co-tortfeaster is held
liable only for the injury he caused and is not jointly liable for the entire damage. See
generally 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 10.1 (1956); W. PROSSER, HANDBOOK

2. See, e.g., Grothe v. Shaffer, 305 Minn. 17, 232 N.W.2d 227 (1975); Samuelson v.
Chicago, R.I. & P. Ry., 287 Minn. 264, 178 N.W.2d 620 (1971); Hendrickson v. Minnesota
Power & Light Co., 258 Minn. 368, 370, 104 N.W.2d 843, 846 (1960), overruled in part.
Tolbert v. Gerber Indus., Inc., ___ Minn. ____, 255 N.W.2d 362, 367-68, 368 n.11

For a general discussion of the doctrine of contribution, see W. PROSSER, supra note 1,
§ 50; Bohlen, Contribution and Indemnity Between Tortfeasors, 21 CORNELL L.Q. 552
(1936); Gregory, Contribution Among Joint Tortfeasors: A Defense, 54 HARV. L. REV. 1170
(1941); Leflar, Contribution and Indemnity Between Tortfeasors, 81 U. PA. L. REV. 130
(1932); Polelle, Contribution Among Negligent Joint Tortfeasors in Illinois: A Squeamish
Damsel Comes of Age, 1 LAV. CHI. L.J. 267 (1970); Turck, Contribution Between Tort-

3. See, e.g., Samuelson v. Chicago, R.I. & P. Ry., 287 Minn. 264, 178 N.W.2d 620
(1970); American Mut. Liab. Ins. Co. v. Reed Cleaners, 265 Minn. 503, 122 N.W.2d 178
(1963); Hendrickson v. Minnesota Power & Light Co., 258 Minn. 368, 104 N.W.2d 843
(1960), overruled in part. Tolbert v. Gerber Indus., Inc., ___ Minn. ____, 255

For a general discussion of the doctrine of indemnity, see Bohlen, supra note 2; Furnish,
Distributing Tort Liability: Contribution and Indemnity in Iowa, 52 IOWA L. REV. 31
(1966); Leflar, supra note 2; Sherk, Common Law Indemnity Among Joint Tortfeasors, 7
ARIZ. L. REV. 59 (1965).
Whether contribution or indemnity is the proper remedy for allocating the injured party's loss among co-tortfeasors is rarely certain. Much of the uncertainty is the result of historical anachronisms, semantic absurdities, and mechanical rules that surround the doctrines of contribution and indemnity. Additional uncertainty in Minnesota results from contribution and indemnity having obtained a high degree of development prior to the recent adoption of comparative negligence and strict liability. For more general materials which include helpful discussions of the problems of multiple-party litigation under comparative negligence, see C. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS (1936); C. HEPT & C. HEPT, COMPARATIVE NEGLIGENCE MANUAL (1971); V. SCHWARTZ, COMPARATIVE NEGLIGENCE (1974); G. WILLIAMS, JOINT TORT AND CONTRIBUTORY NEGLIGENCE (1951); Fleming, Foreword: Comparative Negligence at Last—By Judicial Choice, 64 CALIF. L. REV. 239 (1976); PROSSER, COMPARATIVE NEGLIGENCE, 41 CALIF. L. REV. 1 (1953); Schwartz, Li v. Yellow Cab Co.: A Survey of California Practice Under Comparative Negligence, 7 PAC. L.J. 747 (1976); 51 MICH. L. REV. 465 (1953).


Because of the difference in their historical bases, it has been steadfastly maintained that indemnity and contribution are fundamentally different doctrines, and therefore “full contribution” and “partial indemnity” are contradictions in terms. This unswerving belief is based on historical anachronisms and semantic quibbling and has given birth to a number of anomalies and absurdities which become apparent in the context of strict liability.

Id. at 726-27 (footnote omitted).

7. See MINN. STAT. § 604.01 (1976) (contributory negligence not bar to recovery where negligence of individual bringing action not as great as defendant's negligence), as amended by Act of Apr. 5, 1978, ch. 738, §§ 6-7, 1978 Minn. Laws 839 (to be codified as MINN. STAT. § 604.01(1)) (converting statute into comparative fault statute where only

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products liability. Loss allocation problems are compounded further by the trend in tort litigation of involving multiple parties in tort actions. Unfortunately, the weight of this uncertainty is placed ultimately upon

8. In 1962, the doctrine of strict products liability, fundamentally different from the statutory "implied warranty" remedies then available, became law when Justice Traynor convinced a majority of California's Supreme Court that an injured consumer should have a direct remedy against the remote seller of the defective product that caused his injuries. See Greenman v. Yuba Power Prods. Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). For Traynor's first judicial expression of this doctrine, see his famous concurring opinion in Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944).

Among academics, the person most often associated with the notion of a separate "nonnegligence," "nonprivity" remedy in tort is, of course, the late Dean William L. Prosser. For a classic illustration of his position in this regard, see Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 MINN. L. REV. 791 (1966). This position eventually was incorporated in the RESTATEMENT (SECOND) OF TORTS § 402A (1965). The current version of § 402A, approved in 1964, reads as follows:

§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The doctrine of strict liability in tort as set out in RESTATEMENT (SECOND) TORTS § 402A (1965) was first discussed and approved in Minnesota in McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967). However, actual application of the doctrine had to wait for subsequent cases. See, e.g., Waite v. American Creosote Works, Inc., 285 Minn. 288, 204 N.W.2d 410 (1973) (finding of strict liability because of defective firepole); Farr v. Armstrong Rubber Co., 288 Minn. 83, 179 N.W.2d 64 (1970) (finding of strict liability because of defective tire).

9. See Furnish, supra note 3, at 32 ("The complexities inherent in the substance and procedure of contribution and indemnity practice are not likely to decrease with time, for our society today presents an increasing number of fact situations in which tort liability may be imposed against more than one party.").

The increase in multi-party lawsuits probably results, in part, from the abolition of the privity requirement in most tort actions; once privity is abolished, suit may be brought not only against the party who sold the injurious product to the injured party but also against any member of the chain of distribution who sent the product through the stream of commerce. See, e.g., McCormack v. Hankscraft Co., 278 Minn. 322, 333-34, 154 N.W.2d 488, 497 (1967) (privity not required in strict product liability action); Beck v. Spindler, 256 Minn. 543, 563, 99 N.W.2d 670, 683 (1959) (privity not required in implied warranty action).
the practitioner, who has received little practical assistance from the inadequate development and enunciation of the principles underlying contribution and indemnity.10

In 1960, the Minnesota Supreme Court sought to clarify the guidelines for implementing contribution and indemnity. In *Hendrickson v. Minnesota Power & Light Co.*,11 the court held that a common liability12 must exist between co-tortfeasors before contribution could be awarded13 and established five rules for determining when indemnity is appropriate.14 Recent years, however, have witnessed an upheaval in Minnesota tort loss allocation concepts. The reason for this upheaval is two-fold.

First, the Minnesota Supreme Court has decided several cases that have changed or abrogated three of Hendrickson’s requirements for loss allocation among co-tortfeasors.15 In the area of contribution law, the court has permitted contribution between co-tortfeasors who did not share a common liability to the injured party.16 Thus, whether common liability will be required before contribution may be granted is at present uncertain.17 In the area of indemnity law, the court’s decisions in three cases have created an uncertainty as to the allocation of loss under two of Hendrickson’s indemnity rules among co-tortfeasors whose liability is based upon negligence, breach of implied warranty, or strict liability.18

10. See Furnish, supra note 3, at 32.
13. 258 Minn. at 371, 104 N.W.2d at 847.
14. Although the Hendrickson rules are set out in their entirety and discussed in notes 137-84 infra and accompanying text, the following is a summary of the five situations to which they apply. The first is when the indemnitee proves that his liability to the injured party is derivative or vicarious to that of the indemnitor. The second is when the indemnitee proves that he incurred liability at the direction of or for the indemnitor. The third situation is when the indemnitor breached a duty owed the indemnitee, and the fourth is when the indemnitee proves that his liability to the injured party is the result of his failure to discover the negligence of the indemnitor. The fifth situation is when the indemnitee proves the existence of an express contract for indemnity. See Hendrickson v. Minnesota Power & Light Co., 258 Minn. 368, 372-73, 104 N.W.2d 843, 848 (1960), overruled in part, Tolbert v. Gerber Indus., Inc., ____ Minn. ____, 255 N.W.2d 362, 367-68, 368 n.11 (1977) (abrogating Rule 4).
15. For an examination of the upheaval in Minnesota loss allocation cases, see notes 207-70 infra and accompanying text.
17. Whether Lambertson should be construed as abrogating the common liability requirement in all contribution actions is discussed in notes 209-29.1 infra and accompanying text.
18. See notes 230-70 infra and accompanying text.
Second, amendments to the Minnesota comparative negligence statute alter the method in which loss will be allocated between co-tortfeasors in causes of action arising on or after April 15, 1978. The change in legislative tort loss allocation concepts mainly affects situations in which a co-tortfeasor is insolvent. Additionally, under the new comparative fault statute, loss is allocated among co-tortfeasors in proportion to the jury's findings of relative fault regardless of the specific type of fault alleged.

The purpose of this Note is to clarify the uncertainty created by the recent upheaval in Minnesota tort loss allocation concepts. First, the current status of contribution and indemnity in Minnesota will be analyzed by examining various rationales for the two doctrines, the guidelines that initially were established for applying the doctrines, and the changes in the law created by the recent Minnesota decisions. Second, the question of where Minnesota contribution and indemnity law is going will be discussed. Finally, the effect of the new Minnesota comparative fault statute on contribution and indemnity claims will be examined.

II. TRADITIONAL COMMON LAW PRINCIPLES OF CONTRIBUTION AND INDEMNITY

Essentially equitable remedies, contribution and indemnity are not intended to affect the rights of the injured party. The injured party

20. See notes 299-308 infra and accompanying text.
21. See Act of Apr. 5, 1978, ch. 738, §§ 6-8, 1978 Minn. Laws 839 (to be codified as MINN. STAT. § 604.01-02); notes 303-12 infra and accompanying text.
22. See notes 27-41 infra and accompanying text.
23. See notes 83-206 infra and accompanying text.
24. See notes 207-70 infra and accompanying text.
25. See notes 271-96 infra and accompanying text.
26. See notes 297-314 infra and accompanying text.
27. See Huggins v. Graves, 210 F. Supp. 98, 105 (E.D. Tenn. 1962) (contribution an equitable remedy, therefore jury's verdict advisory only), aff'd, 337 F.2d 486 (6th Cir. 1964); Northern Pac. Ry. v. Zontelli Bros., 161 F. Supp. 769, 772 (D. Minn. 1958) (contribution, which has its genesis in equity, now enforceable at law), aff'd, 263 F.2d 194 (8th Cir. 1959); Hendrickson v. Minnesota Power & Light Co., 258 Minn. 368, 371, 104 N.W.2d 843, 847 (1960) ("In the modern view, principles of equity furnish a more satisfactory basis for indemnity.")); Tolbert v. Gerber Indus., Inc., 78 Minn. 422, 425, 425 N.W.2d 758, 760 (1984) (overruled in part, employers Mut. Cas. Co. v. Chicago, St. P., M. & O. Ry., 235 Minn. 304, 310, 50 N.W.2d 689, 693 (1951) ("Contribution is based on the simple demand of justice, often expressed in the maxim that 'equality is equity.'"); Theobald v. Angelos, 44 N.J. 228, 237, 208 A.2d 129, 134 (1965) ("Contribution... stems from the maxim that equality is equity.").
28. Nees v. Minneapolis St. Ry., 218 Minn. 532, 541, 16 N.W.2d 758, 764 (1944) ("[T]he question of liability as between the two tortfeasors is immaterial in determining the liability of either to the injured person.").
retains the right to sue any co-tortfeasor and may seek execution against any co-tortfeasor from whom a judgment is obtained. More importantly, the injured party's rights are not affected by the inability of a co-tortfeasor to secure contribution or indemnity. Therefore, under traditional common law principles, if a co-tortfeasor is insolvent or not subject to the court's jurisdiction, the full loss falls upon the other co-tortfeasors.

Authorities disagree as to the theoretical basis of contribution and indemnity. Some state that the doctrines are based on a theory of implied contract. As applied to contribution, this theory poses difficulties because in most cases neither an express nor an implied contract exists between the co-tortfeasors. Similarly, indemnity often is granted without a prior relationship having existed between the co-tortfeasors. Thus, granting contribution or indemnity based on an implied contract is an obvious fiction. A second theory offered to support the doctrines is that of quasi-contract. The rationale for this theory is that payment

29. See id. at 541, 16 N.W.2d at 763 ("[T]he injured person may nevertheless sue the actors jointly or severally and recover against one or all.").

The tort victim nevertheless is entitled to only one satisfaction of a judgment in his favor. Winzler & Kelly v. Superior Court, 48 Cal. App. 3d 385, 392, 122 Cal. Rptr. 259, 263 (1975); see Restatement of Judgments § 95 (1942).

30. See Note, Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants, 50 S. Cal. L. Rev. 73, 108 (1976) ("[T]he operation of the loss allocation mechanisms is of no concern to the plaintiff.").


32. See Powell v. Barker, 96 Ga. App. 592, 596, 101 S.E.2d 113, 117 (1957) (right of contribution an equitable one "applied on the theory that there is an implied contract on the part of one judgment debtor to contribute to another who has paid more than his share of the obligation").

In Blackford v. Sioux City Dressed Pork, Inc., 254 Iowa 845, 118 N.W.2d 559 (1962), a workman employed by a contractor to clean a plant was injured. He sued the plant owner who then sought indemnity from the contractor. The court implied a contract by the contractor to do the work safely and allowed indemnity. Id. at 850, 118 N.W.2d at 563-64.


34. See Hodges, Contribution and Indemnity Among Tortfeasors, 26 Tex. L. Rev. 150, 152 (1947).

35. See Hendrickson v. Minnesota Power & Light Co., 258 Minn. 368, 370, 104 N.W.2d 843, 846 (1960) ("The principles governing contribution and indemnity are similar both in origin and in character. In modern law these principles comprise the subject that is treated under the general title of restitution."); overruled in part, Tolbert v. Gerber Indus., Inc., ___ Minn. ___, ___, 255 N.W.2d 362, 367-68, 368 n.11 (1977) (abrogating Rule 4); Kennedy v. Camp, 12 N.J. 390, 398, 102 A.2d 595, 600 (1954) ("All who are equally bound are equally relieved by the payment; and contribution is simply the equalizing of
by one co-tortfeasor does not relieve other co-tortfeasors of their share of the burden; the application of either doctrine therefore prevents unjust enrichment. This rationale also is inappropriate because the non-paying co-tortfeasor may not have been unjustly enriched, or even enriched at all.

At least two additional theories have been offered to support the awarding of indemnity. First, some courts have suggested that a breach of an implied warranty provides the theoretical basis for indemnity. This view is inappropriate because in most cases in which indemnity is granted the indemnitor has not sold any merchandise to the indemnitee. Second, some courts have suggested that the action arises out of tort. Such theorizing is erroneous because the tort of the indemnitor against the indemnitee is distinct from any tort committed by the indemnitor and indemnitee against the injured party.

Perhaps the most accurate rationale offered for either doctrine is that both lie within a court's inherent power to ensure justice and equity. Leflar states that contribution is based on a theory of unjust enrichment:

The theory of unjust enrichment fits the facts of the tortfeasor case as well as it fits those of any contribution case. One person has discharged a burden which both in law and conscience was equally the liability of another; if contribution be not allowed, the net assets of the other will be increased at the expense of the one.

Leflar, supra note 2, at 138.

36. See Leflar, supra note 2, at 136 (applying the unjust enrichment rationale to contribution actions); id. at 147 (applying the unjust enrichment rationale to indemnity actions).

37. See Turck, supra note 2, at 16 (no "enrichment" when nonpaying tortfeasor is immune from suit).


40. See Hodges, supra note 34, at 153.

41. Leflar states that the precise theory upon which contribution is based is unimportant as long as equity is done:

Actually, it seems not to make much difference what formal explanation is accepted, so long as it is understood that the right to contribution is not necessarily based on a voluntary consensual transaction between the parties. The essential thing is the attempt to be fair as between persons subjected to a common legal liability.

Leflar, supra note 2, at 137 (footnote omitted). Similarly, after examining the various rationales for indemnity, Leflar concludes: "[T]he obligation to indemnify is not a consensual one; it is based altogether upon the law's notion— influenced by an equitable
To understand contribution and indemnity more fully, the scope of these remedies and the specific requirements necessary for their implementation will be discussed.

A. Contribution

I. Scope of the Contribution Remedy

The scope of the contribution remedy can be analyzed most effectively by examining two questions. First, to whom is the remedy extended, and second, what is the measure of recovery?

a. Parties Allowed Contribution

In early times no common law right to contribution was recognized. This rule derived from Lord Kenyon's pronouncement, in the eighteenth century English case *Merryweather v. Nixan*, that he had never heard of an action by one joint tortfeasor against another to recover a portion of the judgment paid to the injured party. Because *Merryweather* involved an intentional tort, subsequent English and early American decisions refused contribution when co-tortfeasors acted intentionally and permitted contribution when co-tortfeasors were negligent. Later background—of what is fair and proper between the parties.” *Id.* at 146-47; see *Sorenson v. Safety Flate, Inc.*, 298 Minn. 353, 361, 216 N.W.2d 859, 864 (1974) (“[I]ndemnity is an equitable doctrine which does not lend itself to hard-and-fast rules and must turn on the facts of each case.”).

42. *See* Leflar, *supra* note 2, at 130.
44. *See* id.
45. *Id.* Lord Kenyon's short dissertation of the facts indicates there had been an action in trover with a resulting joint judgment against the co-tortfeasors who apparently had acted in concert in committing the tort. After the injured party had levied on Merryweather for the entire judgment, Merryweather sought from his co-tortfeasor a “contribution of a moiety.” *Id.*

As even more dramatic example of the common-law courts' unwillingness to aid co-tortfeasors to reallocate loss is the famous Highwayman's Case, *Everet v. Williams* (Ex. 1725), *noted in* 9 L.Q. Rev. 197 (1893), where one highwayman sued his fellow robber for an accounting of their plunder. The suit was dismissed and both of the plaintiff's solicitors were assessed costs and fined fifty pounds for contempt. As for the parties, they were subsequently executed.

46. Nineteenth century English courts granted to negligent tortfeasors either indemnity or contribution, whichever was appropriate. For examples of cases allowing indemnity, see *Betts v. Gibbins*, 111 Eng. Rep. 22, 29 (K.B. 1834) (“where one party induces another to do an act . . . not clearly in itself a breach of law,” indemnity is proper); *Adamson v. Jarvis*, 130 Eng. Rep. 683 (C.P. 1827) (auctioneer innocently selling stolen goods may recover if levied against). Illustrative of early cases allowing contribution are *Pearson v. Skelton*, 150 Eng. Rep. 533, 534 (Ex. 1836) (partner recovered contribution because “the rule that wrong-doers cannot have redress or contribution against each other, is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act”); *Wooley v. Batte*, 172 Eng. Rep. 188 (N.P. 1826) (recovery from a partner for a partnership liability).
American courts extended the rule prohibiting contribution to include all torts. This resulted in the adoption in the majority of American jurisdictions of a rule barring any reallocation of loss among co-tortfeasors.

Early American cases refusing contribution to a tortfeasor whose actions were intentional include: Hunt v. Lane, 9 Ind. 248, 250-51 (1857); Peck v. Ellis, 2 Johns. Ch. 131, 136-38 (N.Y. 1816) (trespass and carrying away timber); Rhea v. White, 40 Tenn. (3 Head) 83 (1859) (joint conversion of slaves); Atkins v. Johnson, 43 Vt. 28 (1870) (publication of a libel); Spalding v. Administrator of Oakes, 42 Vt. 129 (1869) (jointly keeping ram known to be dangerous). The rule denying contribution to co-tortfeasors who acted intentionally was stated as follows in Bailey v. Bussing, 28 Conn. 455 (1859):

A guilty trespasser . . . can not be allowed to appeal to the law for an indemnity, for he has placed himself without its pale by contemning it, and must ask in vain for its interposition in his behalf.

Id. at 458-59.

For examples of early American cases allowing contribution to a negligent tortfeasor, see Bailey v. Bussing, 28 Conn. 455 (1859) (between joint operators of a stage for injury to passenger); Acheson v. Miller, 2 Ohio St. 203 (1853) (creditors jointly levied on wrong property); Armstrong County v. Clarion County, 66 Pa. 218 (1870) (party injured on jointly maintained bridge); Thweatt’s Adm’r v. Jones, 22 Va. (1 Rand) 328 (1823) (tobacco inspectors failed to deliver tobacco).

Prosser blames the extension of the rule denying contribution to negligent co-tortfeasors on the development of modern code pleading which allowed joinder of even negligent co-tortfeasors:

But once the door was thrown open to joiner in one action of those who had merely caused the same damage, the origin of the rule and the reason for it were lost to sight. The great majority of our courts proceeded to apply it generally, and refused to permit contribution even where independent, although concurrent, negligence had contributed to a single result.

W. PROSSER, supra note 1, § 50, at 306 (footnote omitted).

This argument is not very persuasive because, with the advent of various “no-fault” compensation systems, tort law has shifted its focus from punishing the wrongdoer to
Today, however, a majority of American jurisdictions have recognized compensating the victim. See Franklin, Replacing the Negligence Lottery: Compensation and Selective Reimbursement, 53 VA. L. REV. 774 (1967):

Today one can muster substantial evidence of society's desire to shift the focus from the defendant and his conduct to the victim and his plight. This is revealed, for example, in the way the legal system today handles personal injury cases, especially those cases in which the courts have altered the very basis of liability from fault to strict liability. Whether the expansion in the defective product area is viewed as an extension of warranty law or as a development of tort law, the crucial point is that many victims who previously had to prove fault in this important area are now able to recover without such a showing.

Id. at 785 (footnote omitted). See generally Palmer, Social Engineering in New Zealand and the United States: A Comparison of Approaches to Tort Reform, 4 WM. MITCHELL L. REV. 315 (1978); Steenson, No-Fault in a Fault Context: Tort Actions and Section 65B.51 of the Minnesota No-Fault Automobile Insurance Act, 2 WM. MITCHELL L. REV. 109 (1976); Note, Subrogation and Indemnity Rights Under the Minnesota No-Fault Automobile Insurance Act, 4 WM. MITCHELL L. REV. 119, 120-21 (1978) ("The no-fault system promises prompt payment to every injured party in an automobile accident for out-of-pocket losses, without regard to which party was at fault."). Moreover, refusing to allow a right of contribution will not deter persons from engaging in negligent torts. This is so because few negligent co-tortfeasors realize that there is a contribution remedy. Thus, the rule denying contribution between co-tortfeasors does not affect societal conduct. The District Court in the District of Columbia, recognizing this argument, stated:

To believe that the rule of no contribution will tend to make a careless person careful, or that a motorist who is not deterred from carelessness by fear of personal danger will be affected in his conduct by a legal rule of no contribution between joint wrongdoers, seems to us wholly fanciful.


Moreover, if the rule prohibiting contribution between co-tortfeasors has as its goal deterrence and punishment, it seems totally contradictory to allow some intentional co-tortfeasors to avoid bearing any responsibility for the injured party's loss. See Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 89, 110 A.2d 24, 34 (1954) ("If each intentional wrongdoer knew that his conduct was exposing him to the risk of the certainty of liability in some amount, the desired deterrent effect would be produced more surely than if contribution among the wrongdoers is denied."). See generally Leflar, supra note 2, at 133-34.

For a novel approach to the problem of allocating loss between intentional co-tortfeasors, see Turck, supra note 2, at 3. The author indicates that the Prussian Code of 1794 "forbade contribution among intentional wrongdoers, however, they were not released by the payment of the damages by one of them, but had to pay their respective shares to the public poor fund of the community involved." Id. (footnotes omitted).

A second theory proffered in support of the noncontribution rule is that allowing the remedy favors insured co-tortfeasors at the expense of uninsured co-tortfeasors. This theory is based on the belief that an injured party is most likely to bring a claim against an insured co-tortfeasor. Consequently, the insured co-tortfeasor's insurance company will attempt to allocate the loss to other co-tortfeasors. Prosser finds this rationale partially acceptable:

The only kind words said by any writer over the last century for the rule denying contribution have been addressed to the proposition that contribution will be used chiefly to permit liability insurance companies to shift a part of the loss which they have been paid to bear to the shoulders of uninsured defendants.

W. PROSSER, supra note 1, § 50, at 307 (footnote omitted).

Nevertheless, it seems that any system of loss allocation that bases its determination
the inadequacies of a rule barring contribution in all situations and therefore allow contribution between negligent co-tortfeasors. The Minnesota Supreme Court has always permitted contribution between

to allocate loss solely on the basis of insurance and not on culpability is subject to criticism because such a system would encourage people to go uninsured. This would also lead to fewer persons in the insurance pool, thus creating higher premium rates.

A third rationale offered in support of the noncontribution rule is that it prevents the injured party from being "the lord of his cause of action." See James, Contribution Among Joint Tortfeasors: A Pragmatic Criticism, 54 Harv. L. Rev. 1156, 1160-65 (1941). But see Gregory, supra note 2 (rebutting James' article). This rationale is not very convincing, however, because of the opportunities for collusion between the injured party and a co-tortfeasor and the arbitrariness by which a co-tortfeasor may be singled out for suit. Cf. Pennsylvania Co. v. West Penn. Rys., 110 Ohio 516, 144 N.E. 51 (1924) (a judgment obtained jointly against two railroads was purchased by a company owning 99% of the stock of one of the co-tortfeasors; because of the rule prohibiting contribution, the company purchasing the judgment was allowed to enforce the judgment entirely against the railroad in which it was not a stockholder).

Finally, several commentators have suggested that the rule denying contribution between co-tortfeasors stems from the "unclean hands" that such persons bring into court. See, e.g., Bohlen, supra note 2, at 559-60; Turck, supra note 2, at 10. This rationale also is not convincing because the action for contribution often arises after the injured party's judgment has been satisfied. Thus, any harm initially done should be viewed as repaired. Viewed in this perspective, a right to contribution results from a compensatory act, an action by which the co-tortfeasors cannot be said to have soiled their hands.

negligent co-tortfeasors. In Ankeny v. Moffett, the first case to consider whether contribution between negligent co-tortfeasors should be permitted, Justice Mitchell stated that the rule against contribution applied only when the person seeking the remedy is "guilty of an intentional wrong or, at least, where he must be presumed to have known that he was doing an illegal act." Subsequent decisions have denied the remedy whenever the tort resulted from the violation of a statute. Initially, the Minnesota court broadly defined intentional acts to include a presumption of intent whenever a statute was violated. For example, in Fidelity & Casualty Co. v. Christenson, a truck owner violated a traffic statute by leaving his truck parked on a street at night with an unlit taillight. As a consequence of this act, a passenger in a negligently driven automobile was injured. The court refused to grant the truck owner contribution from the negligent driver because the truck owner had actual knowledge of the unlit taillight. The court concluded that such knowledge on the part of the truck owner constituted an intentional violation of the statute, even though the truck owner may have been unaware of the statute that had been violated. Although Christenson has been criticized,}

50. See Note, Contribution and Indemnity Among Tortfeasors in Minnesota, 37 Minn. L. Rev. 470, 471-72 (1953).
51. 37 Minn. 109, 33 N.W. 320 (1887). In Ankeny, the plaintiff was injured when the walls of a building fell on him. The court allowed contribution from one negligent building owner to the other.
52. Id. at 110, 33 N.W. at 320.
54. See Comment, Joint Tortfeasors: Contribution—No Intentional Wrongdoing Inference from Strict Liability Statute, 53 Minn. L. Rev. 1089, 1091-92 (1969) and cases cited therein.
55. 183 Minn. 182, 236 N.W. 618 (1931).
56. Id. at 183, 236 N.W. at 618.
57. Id. at 183, 187-88, 236 N.W. at 618, 620.
58. Id. at 186-87, 236 N.W. at 620.
59. See id.
60. See id.
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its doctrine of presumed intentional violation of statute has never been expressly overruled.

A 1968 Minnesota case, however, can be interpreted as laying to rest the Christenson doctrine of presumed intentional violation of statute. In Skaja v. Andrews Hotel Co. the court allowed contribution to a violator of the Civil Damages Act who had sold liquor to an obviously inebriated customer. The court based its decision to grant contribution on the absence of any evidence that the co-tortfeasors were conscious of any wrongdoing or statutory violation. The Christenson doctrine, therefore, apparently is limited to situations in which the intentional nature of the statutory violation is proved by showing a conscious statutory violation. Thus, under present Minnesota law co-tortfeasors can obtain contribution when their actions are not intentional and when any statutory violations have not resulted from a conscious disregard of the law.

b. Measure of Contribution

Although most jurisdictions presently permit an action for contribution, the amount recoverable may be measured in two different ways. Early decisions in Minnesota, as elsewhere, awarded contribution among co-tortfeasors based on the maxim "equality is equity." Courts utilizing this approach divided loss equally among the co-tortfeasors.

62. 281 Minn. 417, 161 N.W.2d 657 (1968).
63. Minn. Stat. § 340.95 (Supp. 1977), which provides in part:
   Every husband, wife, child, parent, guardian, employer, or other person who is injured in person or property, or means of support, by any intoxicated person, or by the intoxication of any person, has a right of action, in his own name, against any person who, by illegally selling or bartering intoxicating liquors, caused the intoxication of such person, for all damages, sustained; . . . and all suits for damages under this section shall be by civil action . . .
64. See 281 Minn. at 417, 161 N.W.2d at 657.
65. See id. at 421, 161 N.W.2d at 660.
66. See note 49 supra.
69. For example, if the injured party receives a verdict for $12,000 and there are three co-tortfeasors, each will be liable for his pro rata share of $4,000. Although the 1939 Uniform Contribution Among Tortfeasors Act made available the possibility of computing shares of liability in contribution among co-tortfeasors on the basis of comparative fault because its drafters felt that "a very strong case" could be made for such apportionment, see Uniform Contribution Among Tortfeasors Act § 2, Commissioners' Note (1939 version), the 1955 Revised Act rejects this position in favor of the pro rata rule. The drafters of the 1955 revision returned to the pro rata rule because "the exclusion of intentional, willful and wanton actors from the right to contribution elimi-
Allocating loss equally among co-tortfeasors has come to be known as the pro rata rule. The pro rata rule, however, is subject to the exception that parties who are jointly liable for the breach of a single duty will be viewed as one entity, and thus loss will not be allocated among the co-tortfeasors but will be charged to them as a unit. Suits falling within this exception to the pro rata rule generally are based on vicarious liability, such as a principal liable for the torts of his agent under the doctrine of respondeat superior, a person liable for the negligence of his independent contractor, or an automobile owner obligated by statute for a driver's wrongful actions.

The principal rationale for the pro rata rule is that apportioning fault on any other basis places too great a burden on the courts. Such a rationale, however, is inconsistent with the widespread adoption of comparative negligence laws by both courts and legislatures. Thus, most nates the better arguments for a relative degree of fault rule.”

The Restatement (Second) of Torts § 886A (Tent. Draft No. 16, 1970) rejects the pro rata rule and provides for the equitable apportionment among tortfeasors of shares of common liability. Comment h to this section recognizes that “[n]ormally ‘equality is equity,’” but that apportionment based on degrees of fault is more equitable in a jurisdiction that has adopted the rule of comparative negligence in a plaintiff's action. See Restatement (Second) of Torts § 886A, Comment h (Tent. Draft No. 16, 1970).

70. See generally 1 F. Harper & F. James, supra note 1, § 10.2; W. Prosser, supra note 1, § 50, at 310.


75. Bohlen, supra note 2, at 560; see Turck, supra note 2, at 28.


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modern courts, including Minnesota, no longer award contribution on a pro rata basis. Instead, contribution is awarded by utilizing comparative negligence principles.

2. Requirements for Obtaining Contribution in Minnesota

Although authorities disagree as to the theoretical basis for contribution, most agree that two requirements must be satisfied before contribution is proper. First, the co-tortfeasors must be under a common liability to the injured party. Second, the co-tortfeasor claiming contribution must have paid a disproportionate share of the judgment. Both of these requirements are analyzed below.

a. Common Liability Requirement

To be entitled to contribution, a common liability that is enforceable against each co-tortfeasor must exist. The rationale for requiring a common liability is that contribution is intended to apportion the loss between the beneficiaries of a tort, and the beneficiaries are defined as persons who are injured by the tort and who are joint parties to the action. This requirement is necessary to ensure that the co-tortfeasors are subject to liability to the injured party and that they are not insulated from each other's liability by a statutory or other immunity.

common liability is that contribution is a remedy between co-tortfeasors. If a person is not liable to the injured party, co-tortfeasors do not exist, and contribution is unavailable. Accordingly, contribution is inappropriate when a party has a defense to the injured party's action. Family, charitable, or governmental immunities are examples of defenses that render contribution unavailable.

The common liability requirement has been criticized because a tortfeasor may be forced, as a result of the requirement, to bear the entire financial burden of a judgment that in equity should be paid in part by another. The rationale supporting this criticism is that contribution

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304, 309, 50 N.W.2d 689, 693 (1951) (execution of covenant not to sue does not destroy common liability); Kauth v. Landsverk, 224 Wis. 554, 558-59, 271 N.W. 841, 843 (1937) (assumption of risk negated liability).

84. See Allied Mut. Cas. Co. v. Long, 252 Iowa 829, 838-39, 107 N.W.2d 682, 687 (1961) ("The whole matter may be summed up in the statement that before there can be contribution among tortfeasors, there must be tortfeasors."); Hart v. Cessna Aircraft Co., No. 48329, slip op. at 4 (Minn., filed Feb. 9, 1979) ("only a tortfeasor who is liable for a plaintiff's loss should be required to contribute to the payment for that loss").

85. See cases cited notes 86-88 infra.


The law, however, generally is eliminating immunities. See RESTATEMENT (SECOND) OF TORTS ch. 45A (Tent. Drafts Nos. 18-19, 1972-1973). The editorial committee takes the view that all immunities should be abrogated to the extent there is substantial authority to that effect. See id., Note to Institute, at 59 (Tent. Draft No. 18, 1972).

Charitable immunity was rejected long ago by the Minnesota court. See Miller v. Macalester College, 262 Minn. 418, 429, 115 N.W.2d 666, 673 (1962) (college); Mulliner v. Evangelischer Diakonissenverein, 144 Minn. 392, 395-98, 175 N.W. 699, 700-01 (1920) (hospital). In the past 15 years the Minnesota Supreme Court has abolished sovereign immunity, see Neting v. Blondell, 306 Minn. 122, 132, 235 N.W.2d 597, 603 (1975) (abrogating state immunity after August 1, 1976); Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 292, 118 N.W.2d 795, 803 (1962) (abolishing governmental immunity as to school districts, municipal corporations, and other subdivisions of government), and intra-family immunity, see Beaudette v. Frana, 285 Minn. 366, 371-73, 173 N.W.2d 416, 420 (1969) (abolishing interspousal immunity); Silesky v. Kelman, 281 Minn. 431, 442, 161 N.W.2d 631, 638 (1968) (limiting immunity of parent from suit by unemancipated child); Balts v. Balts, 273 Minn. 419, 433, 142 N.W.2d 66, 75 (1966) (limiting immunity of unemancipated child from suit by parent).

89. See, e.g., F. HARPER & F. JAMES, supra note 1, § 10.2, at 718; Jensvold, supra note
exists to apportion the financial burden caused the injured party as a result of co-tortfeasors' actions. The primary consideration, therefore, should be whether the parties' actions were tortious and whether those actions resulted in the loss suffered by the injured person.

Traditionally, the Minnesota Supreme Court has required a showing of common liability between co-tortfeasors before awarding contribution. On several recent occasions, however, the court has allowed contribution in the absence of common liability between co-tortfeasors. Thus, the status of the common liability requirement in Minnesota is uncertain and therefore is discussed subsequently in this Note.

b. Disproportionate Discharge of Liability Requirement

After common liability has been established, the party seeking contribution must prove a discharge of a disproportionate share of the injured party's judgment. Under the pro rata loss allocation scheme, a party

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6. at 745-47; Note, supra note 50, at 472.
90. See Note, supra note 50, at 472.
91. Id.
92. See, e.g., Hart v. Cessna Aircraft Co., No. 48329 (Minn., filed Feb. 9, 1979) (contribution prohibited against party previously found not negligent in the injured party's first suit); Ascheman v. Village of Hancock, Minn. , 254 N.W.2d 382, 384 (1977) (action to recover for loss of support); Lunderberg v. Bierman, 241 Minn. 349, 363, 63 N.W.2d 355, 364 (1954) (personal injury action); American Auto. Ins. Co. v. Molling, 239 Minn. 74, 79, 57 N.W.2d 847, 851 (1953) (same).
94. Much of the uncertainty, however, was clarified by Hart v. Cessna Aircraft Co., No. 48329 (Minn., filed Feb. 9, 1979) in which the court held that co-tortfeasors generally must share a common liability to the injured party before contribution is appropriate. See id., slip op. at 4. Arguably, some uncertainty remains because the Hart court noted that the common liability requirement may not have to be met if such a requirement would produce an unjust result. See notes 209-29.1 and accompanying text for a theoretical framework to determine in which situations the court may award contribution in the absence of a common liability between co-tortfeasors.
95. See notes 209-29.1 infra and accompanying text.
96. See, e.g., Gustafson v. Johnson, 235 Minn. 358, 364, 51 N.W.2d 108, 112 (1952) (as a general rule, "an action for contribution does not mature until one of two or more obligors or tort-feasors has paid more than his share of the debt or obligation"); Pennsylvania Greyhound Lines, Inc. v. Rosenthal, 14 N.J. 372, 386, 102 A.2d 587, 593 (1954) ("[j]oint liability is not enough; payment is of the essence of the right of action, not only under the statute but also at common law in cases where contribution may be had"); Bolkin v. Levy, 17 Misc. 2d 56, 56, 184 N.Y.S.2d 461, 462-63 (Sup. Ct. 1959) (motion for contribution premature when joint judgment had not yet been paid). Although the party seeking contribution must have paid more than his share of the joint liability, this prerequisite does not prevent a court from awarding declaratory relief or a judgment conditional upon the satisfaction of the victim's claim. See, e.g., Smith v. Whitmore, 270 F.2d 741, 746 (3d Cir. 1959) (Pennsylvania) (conditional judgment); Thomas v. Malco Refineries,
would be required to prove a discharge of more than the pro rata percentage of liability before contribution was awarded. Similarly, where comparative negligence is the accepted method of loss allocation in contribution actions, a co-tortfeasor must show a discharge of liability in excess of the percentage of negligence attributable to that co-tortfeasor before contribution is available.

The requirement that liability be discharged does not require that full payment of the judgment be made to the injured party. A settlement, for example, will fulfill the discharge requirement. Some jurisdictions have held that liability may be discharged by a payment on the judgment and that a suit need not be brought against the party paying the judgment. See, e.g., Merrimac Mining Co. v. Gross, 216 Minn. 244, 251-53, 12 N.W.2d 506, 510-11 (1943) (payment must be "compulsory" in sense that party paying is under legal obligation to pay); Manthey v. Schueler, 126 Minn. 87, 89, 147 N.W. 824, 825 (1914) (no recovery for services voluntarily rendered); Western Cas. & Sur. Co. v. Milwaukee Gen. Constr. Co., 213 Wis. 302, 306, 251 N.W. 491, 492 (1933) (fulfillment of a legal obligation does not make one a volunteer).

Id. at 440, 144 A.2d at 168 (emphasis in original). Any other result would prevent the disposal of the entire case in a single proceeding.

97. See cases cited note 96 supra.
99. See, e.g., Dixon v. Northwestern Nat'l Bank, 275 F. Supp. 582, 584 (D. Minn. 1967) (motion by third-party defendants to dismiss action for lack of jurisdiction); Radmacher v. Cardinal, 264 Minn. 72, 74, 117 N.W.2d 738, 740 (1962) (action for personal injuries and property damage); Coble v. Lacey, 257 Minn. 352, 356, 101 N.W.2d 594, 597 (1960) (action for personal injuries); Hoverson v. Hoverson, 216 Minn. 228, 236, 12 N.W.2d 501, 506 (1943) (action for partition or sale); Township of Canosia v. Township of Grand Lake, 80 Minn. 357, 359, 83 N.W. 346, 347 (1900) (more than share paid).
100. See, e.g., Merrimac Mining Co. v. Gross, 216 Minn. 244, 251-53, 12 N.W.2d 506, 510-11 (1943) (payment must be "compulsory" in sense that party paying is under legal obligation to pay); Manthey v. Schueler, 126 Minn. 87, 89, 147 N.W. 824, 825 (1914) (no recovery for services voluntarily rendered); Western Cas. & Sur. Co. v. Milwaukee Gen. Constr. Co., 213 Wis. 302, 306, 251 N.W. 491, 492 (1933) (fulfillment of a legal obligation does not make one a volunteer).


No sound reason compelled plaintiff to refuse to pay the claims until suit was brought and they were reduced to judgment. . . . [I]t was entitled to pay them when . . . its investigation satisfied it the offers of settlement were fair, reasonable and just. And such payment was no less involuntary than payment of a judgment upon the claims. The law favors settlement of controversies without resort to litigation.

dictions, however, limit contribution to co-tortfeasors against whom a judgment has been rendered. This requirement springs from the fear of potential unfairness to co-tortfeasors who are not parties to a settlement. However, co-tortfeasors who are not parties to settlement agreements are protected against unfair settlements by requiring the co-tortfeasor who obtains the settlement to establish the fairness and reasonableness of the settlement. Only then will the nonsettling co-tortfeasor be subject to the settlement.

A co-tortfeasor who obtains a settlement is not, by virtue of the settlement, insulated from a contribution claim by another co-tortfeasor. A co-tortfeasor who obtains a settlement is not, by virtue of the settlement, insulated from a contribution claim by another co-tortfeasor.

Co., 213 Wis. 302, 306, 251 N.W. 491, 492 (1933) (fulfillment of a legal obligation does not make one a volunteer).


Some states, on the other hand, take a middle road and require only that a judgment have been entered against the party seeking contribution. See, e.g., Traveler's Ins. Co. v. United States, 283 F. Supp. 14, 25 (S.D. Tex. 1968) (satisfied by consent judgment); Brown & Root, Inc. v. United States, 92 F. Supp. 257, 264 (S.D. Tex. 1950) (voluntary settlement agreement before trial), aff'd, 198 F.2d 138 (5th Cir. 1952); Young v. Steinberg, 53 N.J. 252, 255-56, 250 A.2d 13, 14 (1969) (consent judgment allowed).


The Pennsylvania court in Swartz emphasized that allowing contribution after settlement will not deprive a co-tortfeasor of his rights: "Nor will the appellee . . . be prejudiced by the fact that judgment has not first been entered in favor of the injured party. They [co-tortfeasors] will still have their day in court with full opportunity to defend against liability and the reasonableness of the amount paid in settlement of the existing claim." 403 Pa. at 225-26, 169 A.2d at 291 (emphasis in original).

If there is evidence of bad faith, all contribution may be denied. In Trampe v. Wisconsin Tel. Co., 214 Wis. 210, 216-17, 252 N.W. 675, 677-78 (1934), the plaintiffs and one tortfeasor entered into a secret agreement designed to cause the other tortfeasor to bear an excessive share of the loss and to give the plaintiff an excessive recovery. Both contribution in favor of the conspiring co-tortfeasor and additional recovery for the injured party were denied.


See, e.g., Samuelson v. Chicago, R.I. & P.R.R., 287 Minn. 264, 268, 178 N.W.2d 620, 624 (1970); Gronquist v. Olson, 242 Minn. 119, 125, 64 N.W.2d 159, 164 (1954). It should be noted that in Gronquist, the court held that contribution was barred only because the tort committed was intentional. See id. at 129, 64 N.W.2d at 166. The rule that a co-tortfeasor committing an intentional tort is not entitled to contribution was.
release\textsuperscript{107} or covenant not to sue\textsuperscript{108} only precludes further action by the

determined early in Minnesota law. See Warren v. Westrup, 44 Minn. 237, 239, 46 N.W. 347, 348 (1890). See generally Simonett, Release of Joint Tortfeasors: Use of the

107. Traditionally, a release of one co-tortfeaser operated as a release of all co-tortfeasors. See, e.g., Sheppard v. Atlantic States Gas Co., 72 F. Supp. 185, 187 (E.D. Pa. 1947) (release of one tortfeaser releases all tortfeasors), rev'd on other grounds, 167 F.2d 841 (3d Cir. 1948); Hawber v. Raley, 92 Cal. App. 701, 703-05, 268 P. 943, 944 (1928) ($380.27 payment by one party released $1,245 claim); Holmgren v. Heisick, 287 Minn. 386, 391, 178 N.W.2d 854, 858 (1970) (settlement effected discharge of all claims); Joyce v. Massachusetts Real Estate Co., 173 Minn. 310, 312, 217 N.W. 337, 338 (1928) (settlement effected discharge of all claims); Hartigan v. Dickson, 81 Minn. 284, 285-86, 83 N.W. 1091, 1092 (1900) (same). This is true regardless of the intentions of the parties. See, e.g., Bryan v. Creaves, 138 F.2d 377, 379 (7th Cir. 1943), cert. denied, 321 U.S. 778 (1944) (attempted reservation of a cause of action against another tortfeaser was of no effect); Morris v. Diers, 134 Colo. 39, 42-43, 298 P.2d 957, 959 (1956) (provision in release stating it would release the "undersigned defendants only" was ineffective); Shortt v. Hudson Supply & Equip. Co., 191 Va. 306, 312-13, 60 S.E.2d 900, 904 (1950) (covention not to sue one tortfeaser released others). For a discussion of the development of the "release of one, releases all" doctrine, see Simonett, supra note 106, at 12-13 n.50. The "release of one, releases all" doctrine, however, has been severely criticized. See, e.g., Note, Release of a Joint Tortfeaser, 28 IOWA L. REV. 515 (1943); Note, Joint Tortfeasers—Release of One Joint Tort-feaser as a Bar to Right of Action Against Others, 22 MINN. L. REV. 692 (1938); Comment, Torts—Joint and Several Liability—Releases, Covenants not to Sue, Covenants not to Levy & Execute—Reduction of Judgment Debts Pro Tanto, 24 S. CAL. L. REV. 466 (1951); 12 VAND. L. REV. 1414 (1959). One writer has noted:

The application of the rule that a release of one releases all has not been altogether happy. Judges and lawyers seized upon the dogmatic statement of the rule and applied it to destroy many meritorious claims where plaintiffs sought or could get only partial satisfaction from one of the tort obligors. . . . Thus, a rule, which had developed out of a fiction of procedure to obtain the salutory result of preventing a plaintiff from obtaining more than that to which he was entitled, was turned into a vicious truism and defeated the very object on which it was founded: the full redress of plaintiff's injuries. Comment supra, at 471 (footnotes omitted). Such criticism has persuaded the Minnesota court that the archaic common law release rule will only operate against the injured party when the release instrument demonstrates an actual intention of the parties to release all co-tortfeasors. See Gronquist v. Olson, 242 Minn. 119, 125, 64 N.W.2d 159, 164 (1954); Simonett, supra note 106, at 13.

108. A covenant not to sue is an agreement entered into by the injured party and a settling co-tortfeaser, in which the injured party agrees not to commence or continue to prosecute any action based upon the claim in dispute in return for a specified sum of money. See, e.g., Gronquist v. Olson, 242 Minn. 119, 121, 64 N.W.2d 159, 161-62 (1954); Joyce v. Massachusetts Real Estate Co., 173 Minn. 310, 311-12, 217 N.W. 337, 338 (1928); Musolf v. Duluth Edison Elec. Co., 108 Minn. 369, 377, 122 N.W. 499, 502 (1909). A covenant need not reserve the right to sue other co-tortfeasors for that right to remain effective. But the reservation of such a right is important in determining whether the parties intended the right to exist or whether they intended to settle the claim entirely and release the other co-tortfeasors from the action. See Joyce v. Massachusetts Real Estate Co., 173 Minn. 310, 313-14, 217 N.W. 337, 338-39 (1928). But see Musolf v. Duluth Edison Elec. Co., 108 Minn. 369, 375-76, 122 N.W. 499, 502 (1909) ("reservation of the right to sue other joint tortfeasers is obviously necessary to a covenant not to sue"). For a
injured party; the "released" co-tortfeasors remain subject to a contribution suit by other co-tortfeasors. The amount paid to the injured party by the settling co-tortfeasor is considered a proportionate discharge of liability to the injured party, however, and therefore is treated as a credit against any contribution claim asserted by a nonsettling co-tortfeasor.

Additionally, Minnesota courts allow contribution claims to be litigated by cross-claims, or third-party proceedings. These liberal joinder rules facilitate the litigation of the injured party's claim with the contribution claim and thereby render the disproportionate discharge discussion of the distinction between a covenant and a release, see Simonett, supra note 106, at 12-18.


110. See id.

111. See Gronquist v. Olson, 242 Minn. 119, 127-28, 64 N.W.2d 159, 165 (1954); Simonett, supra note 106, at 15. This approach allows the injured party full recovery from the other co-tortfeasors and also recognizes fully the duty to contribute. It does so, however, at the expense of depriving the settlement of its necessary finality. Consequently, this approach does not create an atmosphere conducive to settlement. While the injured party has much to gain by such a settlement, the co-tortfeasor is given little incentive to settle because one of the prime motives for settling—avoidance of future costly legal battles—is lacking. The Uniform Contribution Among Tortfeasors Act attempted to solve this problem by adopting the provision that the release discharges the one to whom it is given from all liability for contribution. See Uniform Contribution Among Tortfeasors Act § 4(b). Minnesota, however, has not adopted the Uniform Act or any other statutory protection for a settling co-tortfeasor.

An alternative to the enactment of the Uniform Contribution Among Tortfeasors Act is the use of a device known as a Pierringer release. This device (1) releases the settling co-tortfeasor from the lawsuit and discharges a part of the cause of action equal to that part attributable to the settling co-tortfeasor's causal negligence, (2) reserves the balance of the whole cause of action against the nonsettling co-tortfeasors, and (3) contains an agreement whereby the plaintiff indemnifies the settling co-tortfeasors from any claims of contribution made by the nonsettling co-tortfeasors to the extent the settling co-tortfeasor has been released. For an in-depth analysis of the use of the Pierringer release in Minnesota, see Simonett, supra note 106. The use of the Pierringer release in Minnesota was expressly approved in Frey v. Snelgrove, 269 N.W.2d 918, 921-22 (Minn. 1978).

112. See Minn. R. Civ. P. 13.07. Cross-claims are claims against a co-party and should not be confused with counterclaims which are claims against an opposing party. Cross-claims may be pleaded if the claim is related to the transaction or occurrence of either the original claim or any counterclaim. Cross-claims in Minnesota are not compulsory. See Coble v. Lacey, 257 Minn. 352, 358-60, 101 N.W.2d 594, 599 (1960). However, the rule of Lustik v. Rankila, 269 Minn. 515, 519-20, 131 N.W.2d 741, 744 (1964), providing for one-way res judicata, requires the pleader to assert a cross-claim or run the risk of later having his claim barred.

113. See Minn. R. Civ. P. 14.01. The third-party complaint must allege that the third-party defendant is liable, in whole or in part, to the third-party plaintiff for the third-party plaintiff's liability to the original plaintiff. Thus, the third-party action may not be attempted by the defendant to offer the plaintiff a co-tortfeasor whom the defendant believes to be solely responsible to the plaintiff. See, e.g., Altendorfer v. Jandric, Inc., 294 Minn. 475, 478, 199 N.W.2d 812, 814-15 (1972) (action for property damage).
requirement easily attainable.\textsuperscript{114} Thus, because of Minnesota's liberal procedural rules the disproportionate discharge of liability requirement rarely will present difficulties to the co-tortfeasor seeking contribution.

B. Indemnity

1. Scope of the Indemnity Remedy

The scope of the indemnity remedy can be analyzed most effectively by examining to whom the remedy is extended. The measure of recovery is not a consideration because the full amount of the judgment is recoverable.\textsuperscript{115}

Just as \textit{Merryweather v. Nixan}\textsuperscript{116} was interpreted to limit contribution between intentional co-tortfeasors, that case also was interpreted to deny indemnity when co-tortfeasors' actions were intentional.\textsuperscript{117} \textit{Merryweather} apparently was not construed, however, to prohibit indemnity between negligent co-tortfeasors.\textsuperscript{118}

A right to indemnity may arise under a number of different situations.\textsuperscript{119} The most frequent examples of indemnity are those that arise

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\textsuperscript{115} See, e.g., Hendrickson v. Minnesota Power & Light Co., 258 Minn. 368, 371, 104 N.W.2d 843, 847 (1960) ("indemnity requires one party to reimburse the other entirely"), \textit{overruled in part on other grounds}, Tolbert v. Gerber Indus., Inc., \textit{Minn.}, \textit{255 N.W.2d 362, 367-68, 368 n.11 (1977) (abrogating Rule 4).}
\textsuperscript{118} See \textit{id}. In the following cases the courts granted indemnity without reference to the prohibitions placed on the remedy by \textit{Merryweather}. See \textit{Lee Way Motor Freight, Inc. v. Yellow Transit Freight Lines, Inc.}, 251 F.2d 97, 99 (10th Cir. 1957) (self-insured employer brought action against negligent third party to recover amount of death benefits); Samuelson v. Chicago, R.I. & P.R.R., 287 Minn. 264, 267, 178 N.W.2d 620, 623 (1970) (wrongful death action); American Mut. Liab. Ins. Co. v. Reed Cleaners, 265 Minn. 503, 509, 122 N.W.2d 178, 182 (1963) (action to recover compensation paid injured employer); Lunderberg v. Bierman, 241 Minn. 349, 352-54, 63 N.W.2d 355, 358-59 (1954) (action for personal injuries).
\textsuperscript{119} Minnesota has three alternative procedural methods by which a co-tortfeasor may obtain indemnity. First, when the injured party has joined both the indemnitor and the indemnitee in the same lawsuit a right to indemnity may simply be asserted by bringing a cross-claim pursuant to \textit{Minn. R. Civ. P. 13.07}. See, e.g., Soerenson v. Safety File, Inc., 298 Minn. 353, 216 N.W.2d 859 (1974) (distributor upon being held liable for injury to customer's employee granted indemnity from manufacturer). Second, when the indemnitor was not included by the injured party in the original complaint, but could have been, a right to indemnity may be asserted by the indemnitee bringing a third-party complaint pursuant to \textit{Minn. R. Civ. P. 14.01}. See, e.g., Lunderberg v. Bierman, 241 Minn. 349, 63 N.W.2d 355 (1954) (automobile owner granted indemnity from garage owner). Under either of these methods any confusion or difficulty caused by the presentation of the complaint and cross-claim may be obviated by a separate trial of the indemnity issues by bringing a motion for severance pursuant to \textit{Minn. R. Civ. P. 42.02}. Finally, when the indemnitee has satisfied a judgment or settled a claim with the injured person, the indem-
from insurance agreements. Indemnity also may be awarded in the absence of an express contract. Thus, indemnity may be proper when liability has been imposed vicariously on the indemnitee, such as the liability imposed on a principal for the torts of his agent or on an automobile owner for a driver’s negligence. Additionally, some courts have allowed indemnity when a co-tortfeasor's negligence resulted from a failure to inspect and correct a danger created by another co-tortfeasor.

The precise scope of the indemnity remedy is uncertain, however, because of the confusing tangle of tests and rules used by courts in awarding indemnity. As several commentators have concluded, listing the cases in which indemnity has been granted is easier than extrapolating from these cases precise rules for the implementation of indemnity. The resulting confusion stems partially from courts having
granted indemnity when contribution between co-tortfeasors was prohibited. The confusion has been exacerbated because many courts have awarded indemnity only after placing labels on the co-tortfeasor's conduct. Some of these labels include such intangible terms as "active and passive," "primary and secondary," and "constructive and actual negligence." These labels have been criticized as artificial and devoid of the objective criteria desirable for achieving predictability in

127. See, e.g., Hillman v. Ellingson, 298 Minn. 346, 350-52, 215 N.W.2d 810, 813-14 (1974) (bus driver found 76% negligent granted indemnity against two passengers each 12% negligent; contribution not appropriate because bus driver's negligence was "passive"), overruled on other grounds, Tolbert v. Gerber Indus., Inc., ___ Minn. ___, ___ 255 N.W.2d 362, 367-68, 368 n.11 (1977) (abrogating Rule 4); Keefer v. Al Johnson Constr. Co., 292 Minn. 91, 101, 193 N.W.2d 305, 311 (1971) (general contractor found 28% negligent held entitled to indemnity from employer subcontractor found 55% negligent; contribution not appropriate because no common liability between employer and third-party plaintiff). See generally Bohlen, supra note 2, at 568; Polelle, supra note 2, at 279; Comment, Toward a Workable Rule of Contribution in the Federal Courts, 65 COLUM. L. REV. 123, 126 (1965).

128. See Comment, supra note 125, at 738.


130. This formulation attempts to distinguish between parties on the basis of the different "duties" owed to the victim. See Comment, supra note 125, at 738-39. The Minnesota court, however, uses the terms interchangeably with the active-passive dichotomy. Tolbert v. Gerber Indus., Inc., ___ Minn. ___, 255 N.W.2d 362, 367 n.7 (1977).


One noted commentator has concluded that the word games courts play when awarding indemnity is very similar to the "Humpty Dumpty Rule." See Davis, supra note 126, at 541 n.147. The "Humpty Dumpty Rule" stems from the following conversation:

"When I use a word," Humpty Dumpty said in rather scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you can make words mean different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

L. Carroll, Through the Looking-Glass 112 (Heritage Press ed. 1941) (cited in Davis, supra) (emphasis in original).
the law. Because of the confusion generated by these labels the practitioner faces uncertainty as to which doctrine will operate, and the legal scholar confronts confusing rationales as to why a court has decided to shift a particular loss to a particular party. An analysis of the requirements for obtaining indemnity in Minnesota may help to clarify this uncertainty.

2. Requirements for Obtaining Indemnity in Minnesota

Seeking to clarify the guidelines for implementing indemnity, the Minnesota Supreme Court established five rules for the application of indemnity in Hendrickson v. Minnesota Power & Light Co. Satisfying one of the Hendrickson rules may be the sole requirement a co-tortfeasor must meet to successfully bring an indemnity action. The Minnesota court, however, previously has required proof that the indemnitee's conduct did not constitute independent and concurrent negligence and that if the indemnitee was negligent this negligence was not characterized as "active." These additional requirements have not been a standard prerequisite for indemnity but recur with sufficient frequency to warrant examination. Accordingly, each Hendrickson rule, as well as the independent and concurrent negligence and the active-passive negligence tests, must be analyzed separately to understand the scope of Minnesota indemnity law.

a. The Hendrickson Rules

In Hendrickson the court held that before a co-tortfeasor may be granted indemnity his conduct must fall within one of the following five rules:

Rule 1.

A co-tortfeasor may be granted indemnity when the one seeking indemnity has only derivative or vicarious liability for damage caused by the one sought to be charged.  


133. 258 Minn. 368, 104 N.W.2d 843 (1960), overruled in part, Tolbert v. Gerber Indus., Inc., Minn., 255 N.W.2d 362, 367-68, 368 n.11 (1977) (abrogating Rule 4). In Hendrickson the plaintiff's husband was electrocuted while moving a house in the course of his employment. The plaintiff brought a wrongful death action against the defendant power company. The defendant impleaded the employer on the theory that a contract existed between it and the employer to indemnify it for any damages resulting from the contract's breach. The Minnesota Supreme Court affirmed the trial court's order dismissing the third-party action.

134. See Jensvold, supra note 6, at 723 n.3 (indemnity "possible" when a Hendrickson rule satisfied).

135. See notes 185-87 infra and accompanying text.

136. See notes 190-202 infra and accompanying text.

137. 258 Minn. at 372, 104 N.W.2d at 848.
Rule 1 applies to situations in which a co-tortfeasor’s liability is vicarious or derivative.\footnote{138} This type of liability is imposed by law as a result of the actions of another.\footnote{139} A common situation falling within this category is the liability imposed on a motor vehicle owner for the negligent acts of another.\footnote{140} For example, when an automobile is entrusted by the owner to a garage for repairs and a mechanic has an accident while road testing the vehicle, the owner may be held statutorily liable to the injured party.\footnote{141} Because the imposition of liability in such cases does not depend on the automobile owner’s fault, Rule 1 shifts the burden of loss from the innocent co-tortfeasor to the co-tortfeasor whose culpable conduct caused the injured party’s loss.\footnote{142} The rationale for allowing indemnity in Rule 1 cases is that the party causing an injury should be solely responsible for the injured party’s loss.\footnote{143}

Most likely Rule 1 was formulated to minimize the sometimes harsh results created by the vicarious liability doctrine.\footnote{144} Implicit in Rule 1 is the public policy recognition that a co-tortfeasor held absolutely liable for the wrongful actions of another has been injured just as much by the other co-tortfeasor’s wrongful actions as the injured party.\footnote{145} To obtain indemnity under Rule 1 the indemnitee must be free of all fault.\footnote{146} If the indemnitee is even partially at fault, only contribution is proper.\footnote{147}

\textbf{Rule 2.}

A co-tortfeasor may be granted indemnity when the one seeking indemnity has incurred liability by action at the direction of, in the interest of, and in reliance upon the one sought to be charged.\footnote{148}

Rule 2 permits indemnity when the indemnitee has been held liable for actions performed at the indemnitor's direction. A common Rule 2

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\item \footnote{138} See Tolbert v. Gerber Indus., Inc., ___ Minn. ___, 255 N.W.2d 362, 366 (1977).
\item \footnote{139} See generally Douglas, Vicarious Liability and Administration of Risk I, 38 YALE L.J. 584 (1929); James, Vicarious Liability, 28 TULANE L. REV. 161 (1954); Laski, The Basis of Vicarious Liability, 26 YALE L.J. 105 (1916).
\item \footnote{140} See Reese v. Henke, 286 Minn. 145, 149-50, 174 N.W.2d 690, 693 (1970) (owner and driver treated as one for contribution purposes in measuring pro rata share).
\item \footnote{141} See Lunderberg v. Bierman, 241 Minn. 349, 63 N.W.2d 355 (1954).
\item \footnote{142} See id. at 354, 63 N.W.2d at 359-60.
\item \footnote{143} See Tolbert v. Gerber Indus., Inc., ___ Minn. ___, 255 N.W.2d 362, 366 (1977).
\item \footnote{144} See Leflar, supra note 2, at 148-50.
\item \footnote{145} Cf. Lunderberg v. Bierman, 241 Minn. 349, 355, 63 N.W.2d 355, 360 (1954) ("Now that such liability is imposed upon the bailor by our Financial Responsibility Act, we should accept the fact that the liability so imposed is as much a damage to her resulting from the bailee's negligent conduct as damage to the bailor's property would be.").
\item \footnote{146} See Tolbert v. Gerber Indus., Inc., ___ Minn. ___, 255 N.W.2d 362, 366-67 (1977).
\item \footnote{147} See id. at ___, 255 N.W.2d at 366-68.
\item \footnote{148} 258 Minn. at 373, 104 N.W.2d at 848.
\end{itemize}
situation occurs when an agent seeks indemnity from a principal. For example, a sheriff held liable for foreclosing the wrong mortgage has been granted indemnity from the attorney who selected the property to be foreclosed. Indemnity is appropriate because liability should be imposed upon a principal for damages caused by an agent’s good faith execution of tasks that are not manifestly wrong. The agent is acting on matters known by the principal alone, and, therefore, the agent is not at fault for the injuries caused by the agent’s actions. Moreover, an agent is entitled, in the absence of a very good reason to the contrary, to assume that the principal’s authority was properly delegated. Apparently, Rule 2 is based on the public policy that unless such an assumption could be made persons would be hesitant to become agents, thereby causing commerce to suffer. Rule 2 also requires an indemnitee to be free from personal fault; if not, contribution is the appropriate action.

Rule 3.

A co-tortfeasor may be granted indemnity when the one seeking indemnity has incurred liability because of a breach of duty owed to him by the one sought to be charged.

Rule 3 applies when an indemnitee is liable to an injured party because the indemnitor breached a duty owed to the indemnitee. Exactly what is meant by the term “breach of a duty owed” is uncertain, although an analysis of the cases cited by the Hendrickson court in support of Rule 3 indicates that the term refers to nondelegable duties owed to an indemnitee by an indemnitor. For example, a bridge owner held


151. See, id. at 413, 132 N.W. at 716; Leflar, supra note 2, at 151-52.


154. Cf. Leflar, supra note 2, at 148-51 (principals are usually in better position to distribute loss to consumers).


156. See id.

157. 258 Minn. at 373, 104 N.W.2d at 848.

158. In formulating Rule 3, the Hendrickson court cited Kahler v. Liberty Mut. Ins. Co., 204 F.2d 804 (8th Cir. 1953) (co-tortfeasor who conducts marksmanship show has nondelegable duty to keep gun zone free of spectators), Hanson v. Bailey, 249 Minn. 495,
liable for injuries resulting from improper bridge maintenance may seek indemnity from the party that promised to repair the bridge. Moreover, a lessor is entitled to indemnity from a lessee when a person suffers injury on property that contains a hidden defective condition, which arose during the term of the lease. In these situations, and others cited by the Hendrickson court, the common thread running through the cases is that the indemnitor has assumed and then breached a duty that the law, as a matter of public policy, views as nondelegable.

Unfortunately, Rule 3 does not give guidelines for determining which duties are nondelegable. Adding to this uncertainty are Justice Kelly's recent comments, voiced in a concurring opinion in Frey v. Montgomery Ward & Co. In that case Justice Kelly characterized Rule 3 as contemplating a duty owed not to breach an implied warranty of merchantability. Because none of the previous Rule 3 cases involved a breach of warranty and because Justice Kelly's comments were enunciated in a concurring opinion, the ambit of Hendrickson's third rule is uncertain.

Rule 4.

A co-tortfeasor may be granted indemnity when the one seeking indemnity has incurred liability merely because of the failure, even though negligent, to discover or prevent the misconduct of the one sought to be charged.

Rule 4 allowed an indemnitee to shift the loss arising from a failure to discover an indemnitor's negligence. For example, a bus driver

83 N.W.2d 252 (1957) (when the negligence of both co-tortfeasors was the proximate cause of the accident, only contribution is possible), Dehn v. S. Brand Coal & Oil Co., 241 Minn. 237, 63 N.W.2d 6 (1954) (breach of duty to return premises in as good a condition as when received entitled lessee to indemnity when a child is subsequently injured on property), Fidelity & Cas. Co. v. Northwestern Tel. Exch. Co., 140 Minn. 229, 167 N.W. 800 (1918) (breach of duty to fasten wire on pole securely is a proper situation for indemnity), overruled on other grounds, Tolbert v. Gerber Indus., Inc., __ Minn. __, __, 255 N.W.2d 362, 367-68, 368 n.11 (1977), and Minneapolis Mill Co. v. Wheeler, 31 Minn. 121, 16 N.W. 698 (1883) (breach of duty to exercise reasonable diligence in repairing a bridge requires the party responsible for bridge maintenance to indemnify the bridge owner). See Hendrickson v. Minnesota Power & Light Co., 258 Minn. 368, 373, 104 N.W.2d 843, 848 (1960), overruled in part on other grounds, Tolbert v. Gerber Indus., Inc., __ Minn. __, __, 255 N.W.2d 362, 367-68, 368 n.11 (1977) (abrogating Rule 4).

159. See Minneapolis Mill Co. v. Wheeler, 31 Minn. 121, 16 N.W. 698 (1883).
160. See Dehn v. S. Brand Coal & Oil Co., 241 Minn. 237, 63 N.W.2d 6 (1954).
161. See cases cited note 158 supra.
162. 258 N.W.2d 782 (Minn. 1977).
163. See id. at 789 (Kelly, J., concurring specially).
164. For an examination of the future validity of Hendrickson's third rule, see notes 282-96 infra and accompanying text.
165. 258 Minn. at 373, 104 N.W.2d at 848.
found liable to an injured party for failing to prevent the horseplay of two passengers that resulted in a third passenger suffering injury was entitled to indemnity from the negligent passengers.167 Rule 4 also applied to product liability cases in which a defective product passed undetected through a sales chain of distribution to an injured party.168

The justification for Rule 4 was that the indemnitee's fault was due only to "passive" or "secondary" negligence.169 Recognizing the inadequacies of this rationale, the Minnesota Supreme Court specifically abrogated this rule in Tolbert v. Gerber Industries, Inc.,170 in which the court reasoned that a party whose fault caused the injured party's loss should share the cost of making the injured party whole.171 Under Tolbert, loss in Rule 4 cases is allocated among all co-tortfeasors according to their relative fault.172 Thus, when all co-tortfeasors are responsible

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171. See id. at ___, 255 N.W.2d at 367-68.

172. See id. The question of what factors indicate "fault" is a difficult one. Indeed, Justice Rogosheske dissented in Tolbert because he did not think allocation of loss could be based on relative fault concepts:

The majority opinion, I assume, applies only where liability of the manufacturer and the retailer or installer is based on negligence, since the jury's findings as to strict liability and breach of warranty are utterly ignored. If my assumption is incorrect and apportionment of fault is to be extended to defective product cases where liability is based on breach of warranty or strict liability, apportionment of fault would require a wholly different comparison of the fault-producing relationship between the parties. Factors such as size and technical expertise surely would be important considerations in assessing relative culpability between, for example, a large manufacturer and a small neighborhood variety store or one-man installer. I doubt that an intelligible rule or jury instruction could be fashioned which would permit a jury to apply equitable principles necessarily required to justly apportion liability.

Id. at ___, 255 N.W.2d at 372 (Rogosheske, J., dissenting).

Apparently the only commentator who has attempted to fashion a rule for determining which factors make up "fault" is Jensvold. See Jensvold, supra note 6, at 741-45. Jensvold advocates that in making its determination of what constitutes relative fault the jury should be instructed to weigh the following factors:

(a) the extent to which conduct of a defendant induced the plaintiff to purchase
for causing an injured party's loss, contribution, rather than indemnity, is the appropriate method for allocating loss.\textsuperscript{173}

\textbf{Rule 5.}

A co-tortfeasor may be granted indemnity when there is an express contract between the parties containing an explicit undertaking to reimburse for liability of the character involved.\textsuperscript{174}

Rule 5 permits contractual indemnity. Contracts that indemnify a party against liability resulting from that party's own negligent acts are valid unless the agreement violates public policy.\textsuperscript{175} For example, a contract indemnifying a retailer for liability resulting from selling glue to minors is void when the sale violates a state statute.\textsuperscript{176} In general, however, many indemnity contracts will be upheld.\textsuperscript{177} Guidelines for determining which indemnity contracts will be upheld are offered by Professor Williston\textsuperscript{178} and the \textit{Restatement of Contracts}.\textsuperscript{179} Both authorities

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  \item the product which caused his injury;
  \item (b) the extent to which the conduct of the defendant was motivated by a justifiable reliance upon the proper conduct of others;
  \item (c) the economic gain derived by each defendant as a result of his conduct in comparison to such gains derived by other defendants; and
  \item (d) the likelihood of the accident not happening at all in the absence of defendant's conduct.
\end{itemize}

\textit{Id.} at 742.

\textsuperscript{173} See ___ Minn. at ___, 255 N.W.2d at 367-68.

\textsuperscript{174} 258 Minn. at 373, 104 N.W.2d at 848.

\textsuperscript{175} See, e.g., Indemnity Ins. Co. of N. America \textit{v.} Koontz-Wagner Elec. Co., 233 F.2d 380, 383 (7th Cir. 1956) (agreement indemnifying contractor for liability arising from work under contract is valid); Zerby \textit{v.} Warren, 297 Minn. 134, 144, 210 N.W.2d 58, 64 (1973) (agreement indemnifying retailer held invalid as against public policy because of statute prohibiting sale of glue to minors); Speltz Grain & Coal Co. \textit{v.} Rush, 236 Minn. 1, 7-8, 51 N.W.2d 641, 644-45 (1952) (railroad company's insertion of clause in lease which placed all burden of loss on lessee of land is valid); Pettit Grain & Potatoe Co. \textit{v.} Northern Pac. Ry., 227 Minn. 225, 235, 35 N.W.2d 127, 133 (1948) (lease provision indemnifying railroad against loss from fire, even when caused by railroad, is valid); Northern Pac. Ry. \textit{v.} Thornton Bros. Co., 206 Minn. 193, 195-97, 288 N.W.2d 226, 227-28 (1939) (sewer contractor's indemnity bond construed to cover property damage to third parties caused by railroad companies' negligence is valid); \textit{cf.} Comment, \textit{Torts: Contribution and Indemnity in Cases of Absolute Statutory Liability—In Search of the Minnesota Rule}, 1 WM. MITCHELL L. REV. 185, 202 (1974) (court's exclusive dependence on public policy in Zerby \textit{v.} Warren, 297 Minn. 134, 143, 210 N.W.2d 58, 64 (1973)).

\textsuperscript{176} Zerby \textit{v.} Warren, 297 Minn. 134, 210 N.W.2d 58 (1973).

\textsuperscript{177} \textit{See} cases cited note 175 \textit{supra}.

\textsuperscript{178} With respect to contractual indemnity, Professor Williston states:

There is no reason for denying a contract operation according to its terms, unless its tendency is to provide immunity for future conduct that is tortious or opposed to public policy.

And if future tortious conduct does not involve serious moral obliquity and there is no reason to suppose that the contract will induce such conduct, a contract for freedom from liability for it is not invalid.

\textbf{15 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS} § 1750 (3d ed. W. Jaeger 1972)
agree that the appropriate inquiry in determining whether the indemnity contract violates public policy is whether the contract will induce the tortious act. Accordingly, if part of the consideration of the contract is the commission of a tort, the contract violates public policy and is unenforceable. On the other hand, the indemnity contract is enforceable if the tort is only an undesired possibility after entering into the contract. Although the public policy doctrine may create some confusion, the doctrine provides courts with a useful tool for refusing to enforce socially undesirable contracts.

In summary, all of the Hendrickson rules, with the exception of Rule 4, are viable; at least one of the rules must be satisfied as a threshold for obtaining indemnity. Whether satisfying a Hendrickson rule is the sole requirement for obtaining indemnity is uncertain, however, because of the court's use of the independent and concurrent negligence and the active-passive negligence tests. These tests are discussed below.

b. Independent and Concurrent Negligence

On several occasions the Minnesota court has refused to grant indemnity when the indemnitee's negligence was independent from and concurrent with the negligence of the proposed indemnitor. Although

(footnotes omitted). He continues: "An attempted exemption from liability for a future intentional tort or for a future willful act or one of gross negligence is void . . . ." Id. at § 1750A.

The general rule has also been summarized as follows:

[I]t is now the prevailing rule that a contract may validly provide for the indemnification of one against, or relieve him from liability for, his own future acts of negligence . . . . Some courts have reached this result on the basis of an analogy between such contracts and insurance policies, while others reach the same result independently, as by simply stating that such contracts do not violate public policy. However, such contracts are invalid if it can be shown that they tend to promote a breach of duty to the public.

41 AM. JUR. 2d Indemnity § 9 (1968) (footnotes omitted).

179. RESTATEMENT OF CONTRACTS § 572 (1932), reads:

A bargain to indemnify another against the consequences of committing a tortious act is illegal unless the performance of the tortious act is only an undesired possibility in the performance of the bargain, and the bargain does not tend to induce the act.

180. See notes 178-79 supra.

181. See Comment, supra note 175, at 202.

182. Id. at 202-03.


184. Id. at ----, 255 N.W.2d at 366.

185. See, e.g., Kenyon v. F.M.C. Corp., Minn. 283, 287, 176 N.W.2d 69, 71-72 (1970) (retailer whose negligence was failure to lubricate the idler arm of a lawn mower held not entitled to indemnity from the lawn mower's manufacturer); Thill v. Modern Erecting Co., Minn. 217, 227-28, 136 N.W.2d 677, 684-85 (1965) (general contractor held not entitled to indemnity from subcontractor where negligence of both parties concurred to cause injury to plaintiff).
difficult to define, "independent and concurrent negligence" has been interpreted to mean negligence that occurs at the same time as another co-tortfeasor's negligence but in a different manner. Thus, when a co-tortfeasor failed to exercise reasonable care in the supervision of its subcontractor and a third party breached a duty to supply reasonably safe equipment, indemnity was inappropriate because both acts contributed to the injured party's loss.

The continued validity of the independent and concurrent negligence test is questionable, however, because the test arose only in Rule 4 situations, which now are treated as contribution actions. This Note proposes, however, that the independent and concurrent negligence test should be utilized in conjunction with the other Hendrickson rules to determine whether indemnity is proper. For example, under Hendrickson's first rule, when an automobile owner loans an automobile to another who subsequently has an accident, the owner may be indemnified after being found liable under the Financial Responsibility Act. If the owner is also independently at fault for negligently entrusting the vehicle to the driver, however, indemnity should be unavailable because the indemnitee's negligence is independent from and concurrent with the indemnitor's negligence. Using the independent and concurrent negligence test in this manner would assist courts and practitioners in determining with an added degree of certainty when indemnity is appropriate.

c. The Active-Passive Dichotomy

In addition to the Hendrickson rules and the independent and concurrent negligence test, the Minnesota court on occasion has applied an active-passive test to determine whether indemnity was appropriate.

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187. See id.
189. MINN. STAT. § 170.54 (1976) (the driver of an automobile is deemed the owner's agent for purposes of assessing tort liability). For a situation in which indemnity was granted after a co-tortfeasor was held liable under this statute, see Lunderberg v. Bierman, 241 Minn. 349, 63 N.W.2d 355 (1954).
190. See Sorenson v. Safety Flate, Inc., 298 Minn. 353, 361, 216 N.W.2d 869, 864 (1974) (distributor entitled to indemnity from manufacturer for injuries to plaintiff caused by malfunctioning safety device on tire changing machine), overruled on other grounds, Tolbert v. Gerber Indus., Inc., ___ Minn. ___, ___ 255 N.W.2d 362, 367-68, 368 n.11 (1977); Hillman v. Ellington, 298 Minn. 346, 351-52, 215 N.W.2d 810, 813-14 (1974) (bus driver entitled to indemnity when his negligence consisted of failing to supervise properly and where student-passenger defendants were actively negligent), overruled on other grounds, Tolbert v. Gerber Indus., Inc., ___ Minn. ___, ___ 255 N.W.2d 362, 367-68, 368 n.11 (1977); Keefer v. Al Johnson Constr. Co., 292 Minn. 91, 100, 193 N.W.2d 305, 310-11 (1971) (contractor entitled to indemnity where contractor’s liability was vicarious);
The active-passive test requires that when the negligence of co-tortfeasors is characterized as "active" their negligence must be compared under the comparative negligence statute. Such a comparison renders indemnity inappropriate. Conversely, if a co-tortfeasor's negligence is passive and the negligence of other co-tortfeasors is active, the passively negligent co-tortfeasor is afforded indemnity.  

When attempting to ascertain whether a party's negligence is active or passive, the Minnesota court apparently views the quality of the indemnitee's negligence as the crucial element. This was most clearly set forth in *Hillman v. Ellingson*, a personal injury suit arising out of horseplay on a school bus. Under the *Hillman* decision, the right of indemnity rests upon a difference between the primary and secondary liability of two persons, each of whom is legally responsible to an injured party. The court explained that the difference between active and passive negligence has nothing to do with percentages of negligence. Rather, the distinction hinges upon the character or kind of wrong that causes an injury and the nature of the legal obligation owed to a victim by each co-tortfeasor. Unfortunately, defining the active-passive test...

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192. 298 Minn. at 351, 215 N.W.2d at 813.  
193. See Jensvold, *supra* note 6, at 732.  
195. 298 Minn. at 350-51, 215 N.W.2d at 812-13. In awarding indemnity the court stated:  

In the case before us, the jury found that the bus driver was negligent in failing to properly supervise the children on the bus. Although he is legally responsible for injuries caused by student passengers which he could have prevented by using ordinary care, he is only secondarily liable for their negligent acts. We might also characterize the negligence of the driver as "passive" and the wrongdoing of Ellingson and Kleven as "active."  

Thus, given the facts of the case, if we look to one of the guidelines of *Hendrickson*, or describe the duty and hence the liability of the bus driver as "secondary" and that of the two students as "primary," or characterize the negligence of the bus driver as passive and that of the two students as active, we conclude that indemnity should be awarded.  

*Id.* (footnotes omitted).  

It is interesting to note that the court could have framed the bus driver's actions as passive or active. For example, the bus driver may have passively failed to look to the back of the bus, or he might have actively concentrated on traffic, thereby not being able to view the horseplay that resulted in the plaintiff's injuries.  
196. See *id.* at 351-52, 215 N.W.2d at 813-14.  
197. See *id.*
in this manner does not clarify the method in which the test is applied. Commentators\textsuperscript{198} and jurists\textsuperscript{199} often have criticized the active-passive dichotomy because the test presupposes the ideal of an indemnitee who was not at fault, which is often a misconception in loss allocation systems sophisticated enough to utilize comparative negligence principles. This criticism is worth noting because the sharing of liability through contribution, rather than the shifting of liability through indemnity, is the only way Minnesota’s system of loss allocation can remain consistent with the recent legislative mandate that loss be allocated based on relative fault.\textsuperscript{200}

Determining the exact scope of the active-passive test may be a moot question, however, because, once again, the test was used almost exclusively in Rule 4 situations.\textsuperscript{201} In the few instances in which the active-passive test was used in other than Rule 4 situations, the court’s refer-

198. See Keeton, Contribution and Indemnity Among Tortfeasors, 27 INS. COUNSEL J. 630, 632 (1960); Leflar, supra note 2, at 156; Sherk, supra note 3, at 64-66; Comment, Indemnity Among Joint Tortfeasors in New York: Active and Passive Negligence and Impleader, 28 FORDHAM L. REV. 782, 787 (1959-1960); Comment, Products Liability—Non-Contractual Indemnity—The Effect of the Active-Passive Negligence Theory in Missouri, 41 Mo. L. REV. 382, 391 (1976).

199. One New York trial judge, rebelling against the active-passive dichotomy, stated: I desire to go beyond the matter of fictions and semantics, even though the words and the symbols may cloak principles of moral and natural justice striving for justifiable recognition. The unanalyzed terminology of “active” and “passive” conduct and of “actual” and “constructive” notice results, I fear, in beclouding the crucial issue. The phrasing shows what confusion will arise if we attempt to fit specific cases into the bare cubicles of easy nomenclature. Confusion made worse confounded is apparent from the fact that the principal authorities are relied upon with equal vigor by each antagonist. Falk v. Crystal Hall, Inc., 200 Misc. 979, 984, 105 N.Y.S.2d 66, 70-71 (Sup. Ct. 1951), aff’d mem., 279 A.D. 1071, 113 N.Y.S.2d 277 (1952). An Illinois appellate judge viewed the distinction between active and passive negligence on the presence or absence of motion, as follows: We have already discussed the confusion arising in large part from the fact that the vocabulary of negligence law is wholly inadequate to meet its current complexities. Certainly the courts in the cases we have cited did not intend any such limited meaning for the phrase “passive or technical negligence.” In Pennsylvania Co. v. Roberts & Schaefer Co., 250 Ill. App. 330, the railroad was considered passively negligent although the railroad employee actively pulled a rope that brought down the weight on his fellow-employee. In United States v. Chicago, Rock Island & Pacific Ry. Co., 10 Cir., 171 F.2d 377, a pile of material was the obstruction and the engine was moving, still the railroad was held to be only passively negligent. It is clear that mere motion does not define the distinction between active and passive negligence. Gulf, M. & O.R.R. v. Arthur Dixon Transfer Co., 343 Ill. App. 148, 157, 98 N.E.2d 783, 788 (1951).


ence to the theory was in dictum and was used only to illustrate the indemnitee's imputed negligence. Therefore, the demise of Rule 4 indemnity also may signal the death knell of the active-passive test.

d. Summary

The Minnesota Supreme Court has applied three criteria in determining whether indemnity should be granted. First, the co-tortfeasor must satisfy a Hendrickson requirement. Second, the court occasionally requires proof that the indemnitee's conduct did not constitute independent and concurrent negligence. Finally, the court may require proof that the indemnitee's negligence is not "active." The active-passive test, however, actually may be another form of the independent and concurrent negligence test, as the court appears in both tests to be searching for some basis upon which to grant indemnity to a co-tortfeasor. After Tolbert, however, meeting a Hendrickson requirement may be the sole threshold for obtaining indemnity because the latter two requirements mainly arose in the now overruled Rule 4 situations.

Although the active-passive dichotomy should be viewed as archaic, the independent and concurrent negligence test should be used in conjunction with the remaining Hendrickson rules to determine whether indemnity is appropriate. Thus, indemnity should be awarded only when the indemnitee's actions fall within one of Hendrickson's remaining rules and the indemnitee's negligence is not independent from and concurrent with the negligence of the proposed indemnitor.

III. The Upheaval: Recent Judicial Revamping of Minnesota Contribution and Indemnity Law

In an attempt to resolve the uncertainty as to which doctrine was applicable, the Minnesota Supreme Court established guidelines for the implementation of contribution and indemnity. These guidelines have

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202. The active-passive distinction was made in Keefer v. Al Johnson Constr. Co., 292 Minn. 91, 193 N.W.2d 305 (1971) and Lunderberg v. Bierman, 241 Minn. 349, 63 N.W.2d 355 (1954). In both cases, the party seeking indemnity was liable only because the negligence of another was imputed as a matter of law.


204. See notes 185-87 supra and accompanying text.

205. See notes 190-202 supra and accompanying text.

206. See Tolbert v. Gerber Indus., Inc., --- Minn. ---, ---, 255 N.W.2d 362, 366-67 (1977) (explaining the requirements that must be met to obtain indemnity in Minnesota without requiring the active-passive or independent-concurrent tests to be met).

been altered significantly, however, and in some respects completely overruled, by several recent Minnesota decisions. To help explain the current status of Minnesota contribution and indemnity law, the cases causing the upheaval in tort loss allocation concepts will be discussed.

A. Contribution: Apparent Abolition of the Common Liability Requirement

1. The Lambertson Question

The requirement that a common liability must exist between co-tortfeasors before contribution is proper may have been abrogated by the Minnesota Supreme Court's decision in Lambertson v. Cincinnati Corp. In that case the injured party's arm was caught in a machine press. After receiving workers' compensation benefits, the injured party sued Cincinnati Corporation, the manufacturer of the press, alleging strict liability, negligence, and breach of warranty. Cincinnati Corporation impleaded the injured party's employer arguing that the employer negligently failed to install safety devices.

The jury found all parties to be causally negligent, apportioning fifteen percent to the injured party, twenty-five percent to Cincinnati Corporation, and sixty percent to the employer. Because the employer's liability to the employee under the workers' compensation act is exclusive, a common liability did not exist between Cincinnati Corporation and the employer. Therefore, the trial court refused to grant Cincinnati Corporation's request for contribution. On appeal, however, the supreme court rejected the argument that contribution was inappropriate, stating: "Contribution is a flexible, equitable remedy

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208. See notes 209-70 infra and accompanying text.
210. ___ Minn. at ___, 257 N.W.2d at 682.
211. See id.
212. Id. at ___, 257 N.W.2d at 683.
213. See MINN. STAT. § 176.031 (1976). Under this statute, the employer's liability for injuries suffered by his employee, while within the scope of his employment, is exclusively under the Workers' Compensation Act. Thus, the employer has no liability in tort to an injured employee. See, e.g., Hendrickson v. Minnesota Power & Light Co., 258 Minn. 368, 374-75, 104 N.W.2d 843, 849 (1960) ("Since workmen's compensation statutes provide that the obligations thereunder are the only liability of the employer to the employee, . . . there is no common liability involving the employer and third party in such situations; and, therefore, there is no ground for allowing contribution."); overruled in part on other grounds, Tolbert v. Gerber Indus., Inc., ___ Minn. ___, ___ 255 N.W.2d 362, 367-68, 368 n.11 (1977) (abrogating Rule 4).
214. See ___. Minn. at ___, 257 N.W.2d at 688. The court did note, however, that the employer is liable to the employee through the fixed no-fault workers' compensation system and that the third party is liable to the employee through recovery in a common law tort suit. See id.
215. See id. at ___, 257 N.W.2d at 683.
designed to accomplish a fair allocation of loss among parties. Such a remedy should be utilized to achieve fairness on particular facts, unfettered by outworn technical concepts like common liability.\textsuperscript{216}

Although \textit{Lambertson} may be limited to contribution cases in which workers' compensation is paid, the court's attack on the common liability requirement is broad enough to extend to all contribution situations. Such an extension would be consistent with the court's previous decisions permitting contribution when a co-tortfeasor has secured a covenant not to sue,\textsuperscript{217} when the statute of limitations has run against a co-tortfeasor,\textsuperscript{218} or when a municipality has a defense based upon the injured party's failure to give timely notice of a claim.\textsuperscript{219}

An additional reason for giving \textit{Lambertson} a broad interpretation is the court's willingness in recent years to limit defenses in tort actions. For example, sovereign immunity\textsuperscript{220} and intra-family immunity\textsuperscript{221} have been partially abrogated. By limiting these immunities the court has shown a willingness to increase the number of situations in which contribution is appropriate.

After \textit{Lambertson} the question remains whether common liability is completely obviated or whether it will be abrogated on a case-by-case analysis. In the event the latter procedure is chosen by the court, the following section of this Note discusses a proposed approach for a case-by-case analysis.

2. \textit{A Proposed Answer to the Lambertson Question}

Any comparison of fault between co-tortfeasors who do not share a common liability to an injured party must start with the premise that, except for some legal principle, common liability does not exist between co-tortfeasors without a common liability to an injured party. This premise clarifies any theoretical difficulties resulting from the principle that a tortfeasor cannot shift liability to a person from whom an injured

\textsuperscript{216.} Id. at \_, 257 N.W.2d at 688.

In general, tort immunities are on the decline. \textit{See note 88 supra.}
party could not obtain recovery.\textsuperscript{222} A second premise is that contribution should be awarded based on the participation of co-tortfeasors in acts or omissions that are tortious.\textsuperscript{223} To accommodate an amalgamation of these two premises, courts must examine each defense that prevents common liability from existing between co-tortfeasors. If the purposes underlying the defense would not be defeated by contribution, the remedy should be allowed.\textsuperscript{224}

Denying contribution only when the policies supporting a defense preventing common liability from existing between co-tortfeasors are more important than the need for equitable loss allocation is consistent with the court's reasoning in \textit{Lambertson}. Before granting contribution, the \textit{Lambertson} court analyzed and balanced the conflicting interests involved. Thus, the court balanced the employer's interest in paying only its workers' compensation liability against the manufacturer's interest in paying only that portion of the judgment attributable to its fault.\textsuperscript{225} In other situations the policy of allocating loss in accordance with relative fault should be balanced against any liability avoidance policy inherent in the defense asserted. This balancing approach also is consistent with prior Minnesota cases that have allowed contribution notwithstanding defenses such as covenants not to sue\textsuperscript{226} and failure to

\begin{itemize}
\item \textsuperscript{222} See, e.g., Allied Mut. Cas. Co. v. Long, 252 Iowa 829, 839, 107 N.W.2d 682, 687 (1961) ("The whole matter may be summed up in the statement that before there can be contribution among tortfeasors, there must be tortfeasors."); American Auto. Ins. Co. v. Molling, 239 Minn. 74, 79, 57 N.W.2d 847, 851 (1953) (contribution improper in the absence of common liability between co-tortfeasors).
\item \textsuperscript{223} See, e.g., 1 F. Harper & F. James, supra note 1, § 10.2, at 718; Note, supra note 50, at 472.
\item \textsuperscript{224} For example, the rationale behind intra-family tort immunities is the belief that it protects societal interests by preventing discord and strife within the family unit. See W. Prosser, supra note 1, § 122, at 86. Several courts which have retained intra-family tort immunities have nevertheless allowed contribution against a co-tortfeasor raising a family immunity as a defense to a tort action. See Perchell v. District of Columbia, 444 F.2d 997 (D.C. Cir. 1971); Smith v. Southern Farm Bureau Cas. Ins. Co., 247 La. 695, 174 So. 2d 122 (1965); Bedell v. Reagan, 159 Me. 292, 192 A.2d 24 (1963); Fisher v. Diehl, 156 Pa. Super. 476, 40 A.2d 912 (1945); Zarrella v. Miller, 100 R.I. 545, 217 A.2d 673 (1966). In so holding, these courts balanced the conflicting equities—the interest in preserving family harmony against the interest of the co-tortfeasor to only pay that portion of the judgment attributable to its fault. The \textit{Fisher} court, in balancing the conflicting interests, succinctly stated:
\begin{quote}
The legal unity of husband and wife and the preservation of domestic peace and felicity between them are desirable things to maintain . . . where they do not inflict injustice upon outsiders and deprive them of their legal rights.
\end{quote}
\end{itemize}

\ldots To hold otherwise would permit a husband to profit by his own wrongful or negligent act at the sole expense of the third party.


give statutory notice to a dramshop or a municipal defendant. In each case the court determined that the immunity existed only because of a procedural rule and that justice required that contribution be allowed.

In summary, although Lamberton apparently abrogated the common liability prerequisite, common liability still may be required in specific instances. Determining when common liability is a proper prerequisite to a contribution claim requires a balancing of the policies supporting the defense against the need for equitable loss allocation.

227. See Hammerschmidt v. Moore, 274 N.W.2d 79 (Minn. 1978). In Hammerschmidt the court held that the notice-of-claim provision requiring that notice be given to the licensee of any licensed liquor establishment within 120 days after an injury, see Minn. Stat. § 340.951 (1976 & Supp. 1977), is not a condition precedent to a third-party civil damage action for contribution. See 274 N.W.2d at 82. Although the Hammerschmidt court appears to have indicated that common liability is a requirement which must be met before contribution is appropriate in Minnesota, the court allowed contribution against a defendant who could not be held liable to the injured party because of the plaintiff's failure to notify that defendant within the 120 days required by the statute. See id. Thus, whether common liability is necessary before contribution can be applied remains uncertain. But see Hart v. Cessna Aircraft Co., No. 48329 (Minn., filed Feb. 9, 1979). For a discussion of the Hart case, see note 229.1 infra. In holding that contribution was allowable, the Hammerschmidt court appears to have balanced the need for prompt investigation of claims by an alleged dram shop violation and the need for enforcement of the policy that all wrongdoers must share in the burden of their wrong. See 274 N.W.2d at 81-83.


229.1. After this Note originally had gone to press, the Minnesota Supreme Court decided Hart v. Cessna Aircraft Co., No. 48329 (Minn., filed Feb. 9, 1979), in which the court clarified the common liability issue. In Hart, a wrongful death action, the court held that co-tortfeasors generally must share a common liability to the injured party before contribution will be appropriate. See id., slip op. at 3. The plaintiff, whose husband died in an airplane crash, first brought a wrongful death action against the pilot of the airplane. The supreme court affirmed a finding that the pilot was not negligent. See Hart v. Vogt, 306 Minn. 476, 238 N.W.2d 590 (1976). The plaintiff then sued the manufacturer of the airplane, alleging negligence in the design and manufacture of the airplane. A third-party action claiming a right to contribution was made against the pilot. Because the verdict in the first action established that the pilot was not liable to the plaintiff, the Minnesota Supreme Court affirmed the trial court's dismissal of the third-party complaint, reasoning that "only a tortfeasor who is liable for a plaintiff's loss should be required to contribute to the payment for that loss." Hart v. Cessna Aircraft Co., slip op. at 4. The court indicated, however, that when necessary to achieve an equitable result, the common liability requirement may not have to be satisfied. See id. Thus, the need still exists for a test to determine the situations in which the absence of common liability will not bar contribution.

The Hart court also held, however, that the manufacturer could only be held liable for the portion of damages attributable to its own negligence. See id., slip op. at 6. Thus, if the jury is the second suit found the pilot to be party at fault, the manufacturer apparently would receive the same benefits it could obtain in a contribution claim.
B. Indemnity: Recent Judicial Modifications of Loss Allocation Principles

As stated above, the Minnesota Supreme Court has rendered several decisions in the past few years that have dramatically altered tort loss allocation concepts. Indemnity has undergone a particularly drastic change. The upheaval in Minnesota indemnity law results from the holdings and dicta in *Tolbert v. Gerber Industries, Inc.*, 230 *Frey v. Montgomery Ward & Co.*, 231 and *Busch v. Busch Construction, Inc.* 232 Although these cases have little in common factually, an underlying issue in each case was the appropriateness of contribution or indemnity when a co-tortfeasor in a sales chain of distribution was at fault in causing the injured party's loss.

In *Tolbert* the court refused to grant indemnity to an installer of a defective product from a manufacturer whose liability was based on negligence, strict liability, and breach of implied warranty. 233 Subsequently, in *Frey* the supreme court remanded a case involving the sale of a defective product with orders to the trial court to determine whether the facts fell within *Hendrickson's* third or fourth rules. 234 Although the majority opinion was silent as to the effects of a potential breach of implied warranty, Justice Kelly, in a concurring opinion, stated that indemnity is proper anytime a nonmanufacturing entity proves that a manufacturer breached an implied warranty, reasoning that a breach of an implied warranty falls within *Hendrickson's* third rule. 235 More recently, however, in *Busch* a strictly liable manufacturer was held to be entitled to contribution from a negligent co-tortfeasor. 236 Logically, then, a negligent co-tortfeasor should be allowed contribution from a strictly liable manufacturer. Thus, because strict liability and breach of implied warranty claims have been viewed as being virtually identical in the proof needed to sustain recovery, 237 Justice Kelly’s concurring opinion in *Frey*, in which he would allow indemnity to a negligent co-tortfeasor from a manufacturer who breaches an implied warranty, appears to be

230. See id. at 789-91 (Kelly, J., concurring specially).
231. 258 N.W.2d 782 (Minn. 1977).
232. 262 N.W.2d 377 (Minn. 1977).
233. See id. at 789-91 (Kelly, J., concurring specially).
234. See 258 N.W.2d at 788-89.
235. See 262 N.W.2d at 393-94.
236. See 262 N.W.2d at 393-94.
237. See Goblirsch v. Western Land Roller Co., 310 Minn. 471, 475, 246 N.W.2d 687, 690 (1976) (trial judge's refusal "to instruct on . . . warranty theories because . . . the instructions would have been mere surplusage, redundant in view of the instructions on strict liability" affirmed); Worden v. Gangelhoff, 308 Minn. 252, 254, 241 N.W.2d 650, 651 (1976) (burden of proof for strict liability, breach of warranty, and negligence is the same); Farr v. Armstrong Rubber Co., 288 Minn. 83, 89-94, 179 N.W.2d 64, 69-71 (1970) (legal theories of strict liability and breach of implied warranty of merchantability are closely related, involving similar proof).
inconsistent with the court's holdings in *Tolbert* and *Busch*. In light of the uncertainty created by this trilogy of recent indemnity cases, each case will be examined individually, and a synthesis of their holdings will be offered.238

In *Tolbert* the Minnesota Supreme Court significantly narrowed the scope of the indemnity remedy. In that case the injured party, while standing on a boxcar, was knocked to the ground when an overhead tube feeding grain into the boxcar fell.239 The overhead tube was installed by Voldco, Inc. but was manufactured by Gerber Industries, Inc.240 The jury returned a verdict for the injured party, attributing one hundred percent of the negligence to the manufacturer and the installer.241 The jury also found that both co-tortfeasors had breached implied warranties and were strictly liable.242 The trial court therefore awarded indemnity to the installer, reasoning that the facts satisfied *Hendrickson's* fourth rule.243 On appeal, however, the Minnesota Supreme Court overruled *Hendrickson's* fourth rule, holding that allocation of loss should be based on relative fault, and remanded the case for a new trial on the limited issue of apportionment of damages.244 In so holding, the court emphasized that the remaining *Hendrickson* rules were still valid.245 Thus, after *Tolbert*, if both co-tortfeasors are found negligent the appropriate remedy should be contribution, not indemnity. Unfortunately, the clarity that *Tolbert* brought to Minnesota indemnity law was short-lived because of apparent inconsistent language used in the subsequent case of *Frey v. Montgomery Ward & Co.*246

In *Frey*, the injured party brought an action to recover damages caused when a space heater malfunctioned in a trailer in which he raised chinchillas.247 Montgomery Ward, the retailer, impleaded McGraw-Edison, the manufacturer of the space heater, alleging a right to contribution or indemnity from McGraw-Edison if Montgomery Ward should be found liable to the injured party.248 The trial court, however, granted a directed verdict in favor of the manufacturer, thereby foreclosing any contribution or indemnity claim.249 On appeal, the Minnesota Supreme Court reversed the trial court's order granting a directed verdict, reason-

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238. See notes 239-70 infra and accompanying text.
239. See id. Minn. at ____., 255 N.W.2d at 365.
240. See *id.* at ____, 255 N.W.2d at 364.
241. Id.
242. *Id.* at ____., 255 N.W.2d at 368 (Kelly, J., dissenting).
243. See *id.* at ____, 255 N.W.2d at 364 (trial court relied on recent Minnesota Rule 4 cases in awarding indemnity).
244. See *id.* at ____, 255 N.W.2d at 367-68.
245. See *id.* at ____., 255 N.W.2d at 366-67.
246. 258 N.W.2d 782 (Minn. 1977).
247. See *id.* at 785.
248. See *id.* at 784.
249. See *id.*
ing that the manufacturer may have breached a duty when it failed to place a warning in the owner's manual. The court determined that by failing to include this warning McGraw-Edison may have breached a foreseeable duty owed to Montgomery Ward and therefore may have placed the case within Hendrickson's third rule.

In remanding Frey for a new trial the supreme court instructed the trial court to determine whether the case fell within Hendrickson's third or fourth rule. Although the majority opinion did not give the trial court any guidance in making the determination, guidance was offered in Justice Kelly's concurring opinion. Specifically, Justice Kelly explained that the duty to which Rule 3 refers is similar to the duty owed not to breach an implied warranty. Thus, Montgomery Ward, though negligent, should be entitled to indemnity from the manufacturer if the trial court finds the manufacturer breached an implied warranty. So formulated, Justice Kelly's interpretation of Hendrickson's third rule appears to be that a breach of an implied warranty permits a retailer to be indemnified as a matter of law regardless of the retailer's negligence.

Although Justice Kelly interpreted Hendrickson's third rule in a concurring opinion, his views might be the law of the case because the majority opinion appears to refer to his opinion with approval. If so, the rule of loss allocation based on relative fault enunciated in Tolbert appears to have been severely limited, if not abrogated. Consequently, in product liability cases, breach of an implied warranty may automatically place the case in Rule 3.

Three months after the decision in Frey, in which the notion that loss allocation should be based on relative fault apparently was rejected, the Minnesota Supreme Court appears to have returned to the concept of loss allocation based on relative fault in Bush v. Busch Construction, Inc. Bush involved six consolidated personal injury actions arising out of a single vehicle accident. The accident occurred when the steering column on a car driven by Lando Busch locked, causing the car to go out of control. The jury found Busch fifteen percent at fault and General Motors Corporation, the manufacturer of the automobile, eighty-five percent at fault.

The primary issue in Bush was whether the contributory negligence

250. See id. at 787-89.
251. See id. at 788.
252. Id. at 788-89.
253. See id. at 789-91 (Kelly, J., concurring specially).
254. See id. at 789-90.
255. See id. at 790-91.
256. See id. at 788.
257. 262 N.W.2d 377 (Minn. 1977).
258. See id. at 383.
259. See id.
260. Id.
of an injured party could be compared with the strict liability of a co-tortfeasor under the comparative negligence statute.\textsuperscript{261} Answering the question in the affirmative, the court held that a co-tortfeasor who is strictly liable is entitled to contribution from a negligent co-tortfeasor whose liability arises from negligence other than failure to discover or guard against product defects.\textsuperscript{262}

A synthesis of Tolbert, Frey, and Busch yields the following conclusions.\textsuperscript{263} First, Hendrickson's fourth rule clearly is abrogated.\textsuperscript{264} Second, in future cases, when co-tortfeasors have been negligent their negligence will be apportioned under the comparative negligence or comparative fault statutes, each co-tortfeasor found negligent bearing a share of the loss in proportion to that co-tortfeasor's degree of fault.\textsuperscript{265} The court thus appears to be merging the remedies of contribution and indemnity into a single remedy of comparative fault.\textsuperscript{266} Third, under Busch the fault of

\begin{tabular}{|l|l|l|}
\hline
\textbf{PARTY SEEKING INDEMNITY} & \textbf{Tolbert} & \textbf{Frey} & \textbf{Busch} \\
\hline
\textbf{PARTY AGAINST WHOM INDEMNITY SOUGHT} & Installer & Retailer & Consumer \\
\hline
\textbf{TYPE OF GOODS CAUSING PLAINTIFF'S INJURY} & Manufacturer & Manufacturer & Manufacturer \\
\hline
\textbf{LIABILITY OF PROPOSED INDEMNITOR PREDICATED UPON} & Negligence, strict liability, breach of implied warranty & Negligence, strict liability, breach of implied warranty & Negligence, strict liability, breach of implied warranty \\
\hline
\textbf{LIABILITY OF PROPOSED INDEMNITEE PREDICATED UPON} & Negligence & Negligence & Negligence \\
\hline
\end{tabular}

\textsuperscript{261} See id. at 393-94.
\textsuperscript{262} See id. at 394.
\textsuperscript{263} Drawing any conclusions from Tolbert, Frey, and Busch is difficult because the degree of interrelation between these cases is uncertain. The following chart illustrates the similarities and differences between these cases:

\textsuperscript{265} See id. at ---, 255 N.W.2d at 367-68.
\textsuperscript{266} See Jensvold, supra note 6, at 739-40 (suggesting that "comparative responsibility" or "partial indemnity" be adopted as a method of allocating loss); notes 299-313 infra and accompanying text.
the co-tortfeasors is compared regardless of the theory upon which liability is predicated. 267 Loss apportionment is then calculated according to the comparative negligence or comparative fault statutes. 268 Under Frey, however, a breach of duty by the indemnitor may still entitle the indemnitee to indemnity based on Hendrickson's third rule. 269 Finally, Frey renders uncertain the ambit of Hendrickson's third rule, leaving to future litigation the issue of whether the co-tortfeasor claiming indemnity under Hendrickson's third rule must remain free of fault with respect to the injured party's loss. 270

IV. THE FUTURE OF CONTRIBUTION AND INDEMNITY IN MINNESOTA

Recent years have witnessed both case law and statutory changes affecting contribution and indemnity in Minnesota. In the area of contribution law, whether common liability between co-tortfeasors will be required in all situations before contribution may be permitted is uncertain. 271 As discussed previously, the court appears to apply a balancing test when confronted with this question. 272 In the area of indemnity law, the validity of Hendrickson's rules may be questioned because of apparent inconsistencies in recent Minnesota decisions. 273 In addition to the questions raised by recent case law, the Minnesota Legislature recently enacted a comparative fault statute 274 that will have a significant impact on the remedies of contribution and indemnity. 275

A. Hendrickson's First, Second and Fifth Rules

Hendrickson's first and second rules should be maintained, as they permit indemnity to a party not personally at fault in causing the injured party's loss. 276 In Rule 1 cases, liability is imposed on the party seeking indemnity because of the conduct of another. 277 Under Rule 2, liability is imposed on the party seeking indemnity as a result of the indemnitee's justifiable reliance upon the representations made by an-

267. See 262 N.W.2d at 394.
268. See id. at 393-94.
269. See 258 N.W.2d at 788-89.
270. For a discussion of Frey and the scope of Hendrickson's third rule in light of the amendments to the comparative negligence statute, see notes 309-13 infra and accompanying text.
271. See notes 209-29.1 supra and accompanying text.
272. See notes 222-29.1 supra and accompanying text.
273. For a discussion of the apparent inconsistencies in recent Minnesota decisions, see notes 230-70 supra and accompanying text.
274. See Act of Apr. 5, 1978, ch. 738, §§ 6-8, 1978 Minn. Laws 839 (to be codified as MINN. STAT. §§ 604.01-.02).
275. See notes 299-314 infra and accompanying text.
277. Id.
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other.118 Under both rules, the fundamental principle that a party guilty of injurious misconduct must indemnify those without fault supports the continued granting of indemnity.276 Additionally, Hendrickson's fifth rule should be maintained because indemnity contracts play an important role in allocating risks equitably among societal members.280 For example, few companies will manufacture products unless insurance for product liability suits remains available.281

B. Hendrickson's Third Rule

Justice Kelly's concurring opinion in Frey indicated that the duty to which Hendrickson's third rule referred is similar to the duty owed not to breach an implied warranty.282 Under this formulation of the rule, nonmanufacturing entities are entitled to indemnity from any entity higher in the sales chain of distribution when such nonmanufacturing entities reasonably rely on an implied warranty that the manufacturer breaches.283 Indemnity then may be granted even though the retailer, wholesaler, or other nonmanufacturing entity is negligent or strictly liable.284 The reasons for allowing indemnity based on this theory are

278. Id.
279. See id.
280. See Northern Pac. Ry. v. Thornton Bros. Co., 206 Minn. 193, 197, 288 N.W. 226, 228 (1939) (indemnity contracts are “legitimate as insurance”); Comment, supra note 175, at 205 (indemnity contracts help to spread loss among societal members).
281. See WALL ST. J., June 3, 1976, at 1, col. 6, which describes the dissolution of Havir Manufacturing Company of St. Paul, Minnesota because “replacement insurance” would have been too expensive. The company's product liability insurance annual premiums had climbed from $2,000 in 1970 to a projected cost of $200,000, or 10% of its annual sales, in 1976. Id. Havir's resulting liquidation idled most of its 80 employees. Id.
283. See id. at 790-91.
284. This would be the result if Justice Kelly's concurring opinion was the law of the case. See notes 253-55 supra and accompanying text. Justice Kelly's reasoning is theoretically consistent with the cases in which indemnity is granted to a retailer or other nonmanufacturing entity from a manufacturer held negligent or strictly liable based on an invocation of the active-passive test. See, e.g., Guarnieri v. Kewanee-Ross Corp., 270 F.2d 575, 579 (2d Cir. 1959) (breach of nondelegable duty to inspect not passive negligence); Lopez v. Brackett Stripping Mach. Co., 303 F. Supp. 669, 670-71 (N.D. Ill. 1969) (manufacturer's strict liability for defective product not “passive, secondary or merely technical negligence”); Roberts v. Richland Mfg. Co., 260 F. Supp. 274, 276 (W.D. Mich. 1966) (manufacturer charged with negligent design and assembly and breach of warranty “active joint tort feasor”); Farr v. Armstrong Rubber Co., 288 Minn. 83, 96-97, 179 N.W.2d 64, 72 (1970) (sale of defective tires is passive negligence entitling retailer to indemnity from strictly liable manufacturer); cf. Stanfield v. Medalist Indus., Inc., 17 Ill. App. 3d 996, 1000, 309 N.E.2d 104, 107-08 (1974) (liability for defective product “is qualitatively active” but strictly liable manufacturer is outside active-passive test in indemnity action against user for policy reasons) (emphasis in original).

One commentator has noted "a general reluctance . . . to allow a manufacturer to obtain indemnity from his buyer even though it may seem that the manufacturer is less
threefold. First, retailers are at the mercy of manufacturers with respect to the knowledge of dangers that inhere in the products they sell. Second, manufacturers are in a centralized point in the distributive chain and therefore are the most efficient entity to take preventive measures. Finally, manufacturers can best bear the cost of product-related injuries through insurance or by including the cost of injuries in the cost of their products.

Although the preceding theories may support attributing a greater share of the loss to manufacturers, several reasons exist for not allowing indemnity merely because an implied warranty has been breached. First, fitting a breach of implied warranty into Hendrickson’s third rule is inconsistent with Tolbert, in which contribution was considered to be the appropriate remedy despite a breach of an implied warranty by the manufacturer. Second, the Busch court held that liability should be apportioned in strict liability cases, which essentially are similar in at fault.” Note, supra note 129, at 620. The author concludes:

There is a tendency for the courts to say that if the manufacturer is negligent at all, he is actively negligent. The manufacturer assembles the parts and sends the finished product into the flow of commerce. He is not a mere conduit, and he therefore has the original duty to inspect. The courts apparently feel that if a party is later injured by a defect caused by someone’s negligence, the manufacturer should not be able to deny that he had a substantial part in causing the injury.

Id. For an example of this approach, see McClish v. Niagara Mach. & Tool Works, 266 F. Supp. 987, 990-91 (S.D. Ind. 1967) (manufacturer’s “concurrent negligence” prevents indemnity in absence of active-passive test).

See Dobias v. Western Farmers Ass’n, 6 Wash. App. 194, 200-01, 491 P.2d 1346, 1350 (1971) (retailer indemnified for reliance on manufacturer’s representations).

See Comment, Obviousness of Product Dangers as a Bar to Recovery: Minnesota Apparently Adopts the Latent-Patent Doctrine, 3 Wm. Mitchell L. Rev. 241, 242 (1977). The responsibility of the manufacturer to provide feasible safety precautions is illustrated by recent decisions in which manufacturers were held liable for failure to provide safety devices that prevent industrial machine operators from suffering injury because of momentary inadvertence. See, e.g., Bexiga v. Havir Mfg. Co., 60 N.J. 402, 290 A.2d 281 (1972), noted in 86 Harv. L. Rev. 923 (1973).

See, e.g., McCormack v. Hankscraft Co., 278 Minn. 322, 338, 154 N.W.2d 488, 500 (1967). In discussing the rationale for strict liability under the Restatement (Second) of Torts § 402A (1965), the McCormack court stated:

[S]ubjecting a manufacturer to liability without proof of negligence or privity of contract, as the rule intends, imposes the cost of injury resulting from a defective product upon the maker, who can both most effectively reduce or eliminate the hazard to life and health, and absorb and pass on such costs, instead of upon the consumer, who possesses neither the skill nor the means necessary to protect himself adequately from either the risk of injury or its disastrous consequences.

278 Minn. at 338, 154 N.W.2d at 500.

See notes 239-44 supra and accompanying text.

See 262 N.W.2d at 393-94. The court, however, excluded from its holding a consumer’s negligent failure to inspect a product and failure to guard against defects. Id.
CONTRIBUTION AND INDEMNITY

their proof requirements to implied warranty cases.\(^{290}\) Third, allowing indemnity for breach of an implied warranty dangerously insulates retailers and wholesalers from liability.\(^{291}\) Those entities having the greatest contact with consumers thus could promote products regardless of their dangerous condition.\(^{292}\) Fourth, accepting Frey's indemnity theory permits retailers and wholesalers to avoid contribution in what would have been a Hendrickson Rule 4 situation merely by asserting a breach of a duty owed.\(^{293}\) Finally, if Frey stands for the proposition that a showing of implied warranty justifies indemnity, the court's opinion in Tolbert is rendered meaningless, because Tolbert necessitates ignoring implied warranty and strict liability findings when co-tortfeasors are found negligent.\(^{294}\)

Thus, persuasive reasons exist for overruling Frey if that decision is interpreted to mean that indemnity is proper as a matter of law anytime a co-tortfeasor proves that another co-tortfeasor has breached an implied warranty. If Frey's interpretation of Hendrickson's third rule is rejected, the question remains whether Rule 3 should be retained and, if so, what situations the rule encompasses. Previous Rule 3 cases involved situations in which the court granted indemnity based on an indemnitor's breach of a nondelegable duty.\(^{295}\)

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290. See Goblirsch v. Western Land Roller Co., 310 Minn. 471, 475, 246 N.W.2d 687, 690 (1976) (trial judge's refusal "to instruct on . . . warranty theories because . . . the instructions would have been mere surplusage, redundant in view of the instructions on strict liability" affirmed); Worden v. Gangelhoff, 308 Minn. 252, 254, 241 N.W.2d 650, 651, (1976) (burden of proof for strict liability, breach of warranty, and negligence is the same); Farr v. Armstrong Rubber Co., 288 Minn. 83, 89-94, 179 N.W.2d 64, 69-71 (1970) (legal theories of strict liability and breach of implied warranty of merchantability are closely related, involving similar proof).

291. See, e.g., Jensvold, supra note 6, at 738-39; Note, supra note 30, at 85. Justice Kelly's concurring opinion in Frey, apparently suggesting that "reasonable reliance" on the manufacturer's warranty is necessary before indemnity is appropriate, see 258 N.W.2d at 790-91, may alleviate this problem.

292. See Note, supra note 30, at 85. Also note that Justice Kelly's interpretation of Hendrickson's third rule does not find support in prior Minnesota case law, because none of the five cases cited by the court, see 258 Minn. at 373 n.18, 104 N.W.2d at 848 n.18, dealt with a breach of implied warranty. See Kahler v. Liberty Mut. Ins. Co., 204 F.2d 804 (8th Cir. 1953) (indemnity awarded against defendant who conducted marksmanship show and contracted to keep gun zone free of spectators); Hanson v. Bailey, 249 Minn. 495, 83 N.W.2d 252 (1957) (indemnity denied between road construction contractor and motorist); Dehn v. S. Brand Coal & Oil Co., 241 Minn. 237, 63 N.W.2d 6 (1954) (indemnity awarded against lessee based on breach of implied covenant to return premises in as good condition as when received); Fidelity & Cas. Co. v. Northwestern Tel. Exch. Co., 140 Minn. 229, 167 N.W. 800 (1918) (indemnity awarded against defendant for failure to securely fasten wire on pole in joint control of indemnitor and indemnitee), overruled, Tolbert v. Gerber Indus., Inc., ___ Minn. ___ , ___ , 255 N.W.2d 362, 367-68, 368 n.11 (1977); Minneapolis Mill Co. v. Wheeler, 31 Minn. 121, 16 N.W. 698 (1883) (indemnity awarded for failure to exercise reasonable diligence in repairing bridge).


294. See id. at 67.

295. See Kahler v. Liberty Mut. Ins. Co., 204 F.2d 804 (8th Cir. 1953) (indemnity
in these cases apparently was also at fault, Rule 3 probably should be abrogated by the Minnesota court. The basis for this suggestion is two-fold. First, because the court has never enunciated a standard for determining which Rule 3 duties are nondelegable, the type of case that properly falls within Hendrickson's third rule cannot be determined in advance. Second, awarding indemnity to a party at fault in causing the injured party's loss is inconsistent with the recent legislative mandate that indemnity is proper only when the indemnitee is without fault. 296

C. Statutory Loss Allocation in Minnesota

In recent years the Minnesota Legislature also has addressed the problem of allocating loss in tort claims. In 1969 a comparative negligence statute was enacted, which substantially changed Minnesota's prior loss allocation system by permitting some injured parties who were negligent to recover part of their loss. 297 More recently, on April 5, 1978,

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296. See notes 303-12 infra and accompanying text.


Prior to the enactment of the Minnesota comparative negligence statute, contributory negligence was an affirmative defense. See, e.g., Rosin v. International Harvester Co., 262 Minn. 445, 454, 115 N.W.2d 50, 56 (1962) (burden of proving plaintiff's contributory negligence in not maintaining vehicle brakes rests with defendant); Lyon v. Dr. Scholl's Foot Comfort Shops, Inc., 251 Minn. 285, 296, 87 N.W.2d 651, 659 (1958) (when the record failed to disclose negligent conduct by plaintiff, trial court properly refused to submit issue of plaintiff's contributory negligence to jury). See generally W. PROSSER, supra note 1, § 65, at 416. The application of the defense utilizes the reasonable person standard. See generally RESTATEMENT (SECOND) OF TORTS §§ 463-464 (1965).

If successfully established, contributory negligence will bar an injured party from recovering damages. See, e.g., Zuber v. Northern Pac. Ry., 246 Minn. 157, 171-72, 74 N.W.2d 641, 682 (1956) (plaintiff injured when baggage fell from shelf); Peterson v. Doll, 184 Minn. 213, 215, 238 N.W. 324, 325 (1931) (defendant caused collision when he stopped car suddenly without giving a signal). If the injured party was negligent and such negligence was the proximate cause of his injury and this was the only conclusion to be drawn from the evidence, a directed verdict against the injured party was proper. See, e.g., Mortenson v. Hindahl, 247 Minn. 356, 361, 77 N.W.2d 185, 188 (1956) (negligence of child riding pony that stepped in front of oncoming car not clear as a matter of law); Standafer v. First Nat'l Bank, 243 Minn. 442, 448-49, 68 N.W.2d 362, 366-67 (1955) (negligence of mover who fell from top of elevator not clear as a matter of law).
the Legislature amended the comparative negligence statute, substantially changing its loss allocation provisions. Due to the relative youth of this statute, its provisions have not yet been construed. The following section of this Note will explain the portions of the statute affecting contribution and indemnity claims and will propose possible solutions to loss allocation problems that the statute may generate.

1. Statutory Changes Affecting Contribution Claims

Under the comparative negligence statute, as at common law, the insolvency of a co-tortfeasor is irrelevant in computing the injured party's recovery because the right to contribution does not affect the injured party's substantive right to relief. Thus, for cases arising be-

Because of the harshness inherent in a doctrine that denied compensation to a negligent injured party, courts devised a number of exceptions to the contributory negligence rule. See generally W. PROSSER, supra note 1, § 65, at 18. Although some of these exceptions allowed an injured party to recover notwithstanding his failure to exercise due care, id. § 67, they too often created harsh results of full or no recovery. Id. Apparently, the Minnesota Legislature enacted a comparative negligence law in response to the severity of the doctrine of contributory negligence and the failure of doctrines such as last clear chance to consistently provide equitable results.

For a general discussion of the comparative negligence doctrine, see C. HEFT & C. HEFT, COMPARATIVE NEGLIGENCE (1971) (primarily Wisconsin law); V. SCHWARTZ, COMPARATIVE NEGLIGENCE (1974) (texts of the various statutes and a good bibliography).

298. See Act of Apr. 5, 1978, ch. 738, § 8, 1978 Minn. Laws 840 (to be codified as MINN. STAT. § 604.02). Interestingly, the purpose of the amendments to the comparative negligence statute is to combat the mounting costs of products liability insurance. See Tape of Debate on H.F. 388 Before the Minnesota Senate (March 16, 1978).

The concern over the cost and availability of products liability insurance is not limited to the Minnesota Legislature. At this writing two proposals aimed at the "products liability crisis" have been introduced into Congress. See S. 527, 95th Cong., 1st Sess., 123 CONG. REC. S 1735 (daily ed. Jan. 31, 1977) (sponsored by Senators John C. Culver (Iowa) and Gaylord Nelson (Wisconsin), calling for the creation of a temporary reinsurance pool for small businesses); S. 403, 95th Cong., 1st Sess., 123 CONG. REC. S 1185 (daily ed. Jan. 24, 1977) (sponsored by Senator James B. Pearson (Kansas), providing for reinsurance to products liability insurers and qualifying insurance companies). In addition, at least nine states have established commissions to study all aspects of the products liability crisis. See Epstein, Products Liability: The Search for the Middle Ground, 56 N.C. L. REV. 643, 644 n.3 (1978).

A comprehensive analysis of the "products liability crisis" was recently completed by the Interagency Task Force on Product Liability under the aegis of the United States Department of Commerce. See U.S. DEP’T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY (1977). The preliminary conclusions of the Task Force were that there is no crisis in product liability insurance, that no large sector of manufacturers is unable to obtain insurance, and the increased cost of insurance accounts for less than one percent of sales. See id., Briefing Report, at ii. Because the Task Force found little evidence of a crisis in insurance rates, legislatures should be wary of effecting major changes in the strict liability doctrine in the name of the "products liability insurance crisis."

299. See MINN. STAT. § 604.01 (1976) (amended 1978), which states in part: "When there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each, provided, however, that
In the effective date of the comparative fault statute, the burden of a co-tortfeasor's insolvency is placed entirely on the solvent co-tortfeasors. Courts have justified this result based on the policy of permitting as much recovery as possible to the injured party. This justification, however, loses force when the injured party is not free from fault because the injured party's equities are no greater than the co-tortfeasor's.

Under the comparative fault statute, therefore, loss that would have been allocated to an insolvent co-tortfeasor is redistributed to the injured party and the remaining co-tortfeasors according to their relative degrees of fault. By dividing the insolvent tortfeasors' liability proportionately between the injured party and the remaining co-tortfeasors according to their relative degrees of fault, the injured party is not left totally uncompensated for the insolvent co-tortfeasor's share, and the remaining co-tortfeasors are not required to shoulder the entire damage attributable to the fault of the insolvent co-tortfeasor. This compro-

each shall remain jointly and severally liable for the whole award." This language was stricken from section 604.01, subdivision 1 in 1978. See Act of Apr. 5, 1978, ch. 738, § 6, 1978 Minn. Laws 839. Similar language was added to section 604.02: "When two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award." Act of Apr. 5, 1978, ch. 738, § 8(1), 1978 Minn. Laws 840 (to be codified as Minn. Stat. § 604.02(1)).


301. See Nees v. Minneapolis St. Ry., 218 Minn. 532, 540-41, 16 N.W.2d 758, 763-64 (1944); Comment, Comparative Negligence in California: Multiple Party Litigation, 7 Pac. L.J. 770, 776 (1976).


303. See Act of Apr. 5, 1978, ch. 738, § 8(2), 1978 Minn. Laws 840 (to be codified as Minn. Stat. § 604.02(2)).

304. An example will help clarify how the insolvent co-tortfeasor's loss is allocated under the comparative fault and the comparative negligence statutes. Assume the following hypothetical:

<table>
<thead>
<tr>
<th></th>
<th>P: 10% negligent</th>
<th>D,: 30% negligent</th>
<th>D,: 60% negligent</th>
</tr>
</thead>
<tbody>
<tr>
<td>P's damages</td>
<td>$2,000 (10% of $20,000)</td>
<td>$6,000 (30% of $20,000)</td>
<td>$12,000 (60% of $20,000)</td>
</tr>
</tbody>
</table>

Assume further that D, is insolvent. Under the comparative negligence statute, P may recover $18,000 from D, because the burden of D,'s insolvency under that statute is placed entirely on D,. See Minn. Stat. § 604.01 (1976) (amended 1978).

Under the comparative fault statute, however, D,'s share (60% of $20,000) must be borne by P and D,, according to their respective percentages of fault. See Act of Apr. 5, 1978, ch. 738, § 8, 1978 Minn. Laws 840 (to be codified as Minn. Stat. § 604.02(1)). Thus,
mise formulation fosters the underlying policy in a comparative fault system of allocating loss in proportion to an individual's share of fault that contributed to the injury.305

Product liability suits are the only exception to allocating an insolvent tortfeasor's share of liability under the comparative fault statute.306 In product liability suits the new statute retains the prior rule that the insolvent tortfeasor's liability will be apportioned only among co-tortfeasors.307 This exception is justified because the policies supporting

P would bear one-fourth of D1's share and D1 would bear three-fourths of D1's share. The numerator in each fraction is the party's degree of fault and the denominator represents the combined fault of P and D1. See Note, Reconciling Comparative Negligence, Contribution, and Joint and Several Liability, 34 WASH. & LEE L. REV. 1158, 1165 (1977).

305. Note, supra note 304, at 1170-71.

306. See Act of Apr. 5, 1978, ch. 738, § 8(3), 1978 Minn. Laws 840 (to be codified as MINN. STAT. § 604.02(3)).

307. See id.

Indicative of the Legislature's desire to give special treatment to injured parties who bring product liability claims is the apparent legislative intent to allow aggregation of damages in such claims. The resolution of the aggregation issue is extremely significant because it may determine whether an injured party will be entitled to any compensation. Under Minnesota's comparative fault law, if the plaintiff's percentage of fault is greater than that of any co-tortfeasor, the plaintiff cannot collect from those co-tortfeasors but only from the co-tortfeasor whose fault was equal to or greater than the plaintiff's. Generally, when each co-tortfeasor's fault is less than the plaintiff's, the plaintiff will recover nothing for the injury, even though the total fault of the co-tortfeasors, when their individual percentages are combined, is greater than the plaintiff's percentage of fault. See Marier v. Memorial Rescue Serv., Inc., 296 Minn. 242, 207 N.W.2d 706 (1973). The Marier court prohibited aggregation based on the Wisconsin Supreme Court's construction of that state's comparative negligence statute, from which Minnesota's comparative negligence statute was adopted. See id. at 244-46, 207 N.W.2d at 708-09. The Wisconsin court, however, has since indicated a willingness to change its interpretation of the comparative negligence statute, stating that comparing the negligence of the individual plaintiff to that of each defendant rather than permitting aggregation leads to harsh and unfair results. See May v. Skelley Oil Co., 83 Wis. 2d 30, 38-39, 264 N.W.2d 574, 578 (1978). If the co-tortfeasors' fault can be aggregated, the injured party will be entitled to the percentage of damage equal to the aggregate percentage of the co-tortfeasors' fault. See Krengel v. Midwest Automatic Photo, Inc., 295 Minn. 200, 210, 203 N.W.2d 841, 847 (1973).

An examination of the legislative history of the aggregation-related portions of the comparative fault statute indicates that the Legislature intended to prohibit aggregation only in those situations in which aggregation previously was prohibited under the comparative negligence statute. See Tape of Debate on H.F. 388 Before the Minnesota Senate (March 16, 1978). Because legislative discussion regarding aggregation under Minnesota's comparative fault statute did not include examples involving co-tortfeasors in a product liability chain of distribution, an argument can be made that the Legislature intended that aggregation should be permitted in product liability cases. See id.

In addition to the legislative history indicating an intent to allow aggregation in product liability cases, several compelling reasons require the allowance of aggregation in such cases.

First, a product chain of distribution is remarkably similar to a joint venture or a joint duty theory that has been used by the Minnesota court to permit aggregation of percentages of negligence. See Krengel v. Midwest Automatic Photo, Inc., 295 Minn. 200, 203
product liability suits require that injured consumers be given as much

N.W.2d 841 (1973). Although each member of the chain may work independently, the end result is that the consumer is presented with one product and not the separate products of three or four co-tortfeasors. The members of the product chain of distribution all contribute money and effort to a common undertaking. Common contractual control over products usually exists, and, in most instances, every member of the chain shares in any profits. Moreover, the economic reality of a single association, acting as a sales chain of distribution, should not be obscured by a lawsuit that involves co-tortfeasors with different corporate names. See Comment, Torts: Joint Venturers’ Negligence Must Be Combined Under the Minnesota Comparative Negligence Statute, 58 MINN. L. REV. 978, 982-83 (1974).

Second, if aggregation is not allowed, the policies behind imposing strict liability on sellers of defective products will be severely frustrated. For a list of policy reasons supporting strict liability, see note 308 infra.

Finally, the nature of comparative fault in a product liability suit requires the jury to compare the injured party’s causal fault to the defective condition of the product. See City of Franklin v. Badger Ford Truck Sales, Inc., 58 Wis. 2d 641, 651 nn.9-10, 207 N.W.2d 866, 870-71 nn.9-10 (1973) (special jury verdict indicates that an injured party’s fault is to be compared to the defective condition of the product). Thus, in those situations involving “a claim arising from the manufacture, sale, use or consumption of a product” aggregation should be allowed. Such a result permits the sophisticated comparative fault statute to exist in harmony with the policies supporting the strict liability doctrine. Permitting aggregation also would appear to reconcile the conflicting policies of barring an injured party from recovering against a co-tortfeasor whose fault is less than the injured party’s and that of spreading the costs of injuries caused by defective products.

Whether aggregation should be permitted among co-tortfeasors in a product liability chain of distribution apparently never has been addressed directly by the courts for three basic reasons. First, comparative negligence concepts originated relatively recently. See generally V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 1.4 (1974) (indicating that prior to 1969 only seven states had comprehensive comparative negligence laws). Second, prior to Busch v. Busch Constr. Co., 262 N.W.2d 377 (Minn. 1977), comparative negligence concepts generally were not applied in product liability cases. Only the Wisconsin Supreme Court, in Dippel v. Scianca, 37 Wis. 2d 443, 461-62, 155 N.W.2d 55, 64-65 (1967), had applied its state’s comparative negligence law in products liability cases. Third, until Tolbert v. Gerber Indus., Inc., — Minn. —, 255 N.W.2d 362 (1977), parties lower in the chain of distribution than manufacturers, such as retailers and wholesalers, could obtain indemnification from manufacturers of defective parts. See Sorenson v. Safety Flate, Inc., 298 Minn. 353, 361-62, 216 N.W.2d 859, 864 (1974). But see Frey v. Montgomery Ward & Co., 258 N.W.2d 782 (Minn. 1977) (Kelly, J., concurring specially).

Assuming that aggregation is proper under the comparative fault statute, the following example indicates how contribution claims should be allocated. Consider a situation in which the plaintiff, a bystander, is injured by an automobile that has defective brakes. The automobile’s owner knew or should have known that the brakes were defective. The injured party sues the automobile owner, the automobile manufacturer, and the brake manufacturer. The jury returns a special verdict with the following findings:

- Plaintiff—30% at fault
- Automobile owner—20% at fault
- Automobile manufacturer—25% at fault
- Brake manufacturer—25% at fault

The plaintiff should be able to recover 50% of his damages, and the automobile and brake manufacturers should each contribute 25% of the total damages suffered. The
contribution as possible.\textsuperscript{308}

2. Statutory Changes Affecting Indemnity Claims

The new comparative fault statute broadly defines "fault" as:

acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages.\textsuperscript{309}

With the exception of minor changes, this definition is taken from section 1(b) of the Proposed Uniform Comparative Fault Act.\textsuperscript{310} This broad definition codifies Tolbert's and Busch's underlying rationales: allocation of loss must be based upon the co-tortfeasors' relative fault.\textsuperscript{311} Therefore, in a multi-party lawsuit, if one co-tortfeasor's liability is based on a theory of negligence and another co-tortfeasor's liability is based on strict liability or breach of an implied warranty, loss allocation

\begin{itemize}
  \item \textsuperscript{308} The policies supporting product liability suits include protecting consumer reliance that results from modern merchandising methods, see Hawkeye Sec. Ins. Co. v. Ford Motor Co., 199 N.W.2d 373, 382 (Iowa 1972); McCormack v. Hankscraft Co., 278 Minn. 322, 338, 154 N.W.2d 488, 500 (1967); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 248-49, 147 N.E.2d 612, 615 (1958), allocating loss to the superior risk and cost bearing abilities of sellers, see Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 65, 207 A.2d 305, 312 (1965) ("The purpose of such liability is to insure that the cost of injuries or damage ... is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves."), and encouraging production of safe products, see McCormack v. Hankscraft Co., 278 Minn. 322, 338, 154 N.W.2d 488, 500 (1967).
  \item \textsuperscript{309} Act of Apr. 5, 1978, ch. 738, § 7, 1978 Minn. Laws 840 (to be codified as MNN. STAT. § 604.01(1a)).
  \item \textsuperscript{310} The Uniform Comparative Fault Act § 1 states:
    
    In an action for injury to person or property, based on negligence [of any kind], recklessness, [wanton misconduct,] strict liability or breach of warranty, or a tort action based on a statute unless otherwise indicated by the statute, any contributory fault on the part of, or attributed to, the claimant, or of any other person whose fault might otherwise have affected the claimant's recovery, does not bar the recovery but diminishes the award of compensatory damages proportionately, according to the measure of fault attributed to the claimant. This Section applies whether the contributory fault previously constituted a defense or not, and replaces previous common law and statutory rules concerning the effect of contributory fault, including last clear chance and unreasonable assumption of risk.
    
    The Uniform Act was passed to avoid the "all-or-nothing" approach previously utilized under the common law method of contributory negligence. Even common law exceptions such as last clear chance did not negate the overall unfairness to particular parties. See Wade, supra note 302, at 223.
  \item \textsuperscript{311} See notes 264-67 supra and accompanying text.
\end{itemize}
should be based in proportion to the jury's findings of causal fault regardless of the specific type of fault alleged. Accordingly, to the extent that Frey stands for the proposition that a co-tortfeasor is automatically entitled to indemnity when another co-tortfeasor breaches an implied warranty, that decision is inconsistent with the new comparative fault statute.312 Hendrickson's third rule, therefore, should not be interpreted as allowing a co-tortfeasor indemnity merely because another co-tortfeasor has breached an implied warranty. Hendrickson's first and second rules, however, remain viable under the new statute as those rules allow indemnity only when the indemnitee is free of fault.313 Hendrickson's fifth rule also remains viable because the new statute does not cover contractual indemnity.314

V. CONCLUSION

Under our present system of tort liability an equitable method of loss allocation is necessary to handle problems created by multi-party lawsuits. Unfortunately, the use of contribution and indemnity to allocate loss has been characterized as being in a clouded and confused state.315 The changes in loss allocation concepts brought about by the recent upheaval indicates, however, that much of the confusion surrounding the historical anachronisms, semantic absurdities, and mechanical rules appears to have ended because allocation of loss based on relative fault is now the rule in Minnesota. The Minnesota Supreme Court's holdings in Lambertson, Tolbert, and Busch are a strong indication that regardless of the legal theories involved loss will be allocated on relative fault principles. The court's decision in Frey, however, injects uncertainty into this loss allocation concept. Accordingly, the decision in Frey should be reexamined to determine whether it is consistent with the trend in recent decisions that loss should be allocated between co-tortfeasors in proportion to their relative fault. Once this apparent inconsistency is clarified, Minnesota's loss allocation system will be on the threshold of being equitable as well as practical. Hopefully, the suggestions proposed by this Note will help guide the court past this threshold and into the forefront of a more enlightened loss allocation system.

312. For an examination of Frey and its effect on Rule 3, see notes 282-96 supra and accompanying text.
315. See Jensvold, supra note 6, at 736, 738.