

DRAFT
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UNIFORM APPORTIONMENT OF TORT RESPONSIBILITY ACT

**NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS**

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WITH PREFATORY NOTE AND REPORTER'S NOTES

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM APPORTIONMENT OF TORT RESPONSIBILITY ACT

(~~Fourth~~ Fifth Tentative Draft, ~~April 26~~ October 11, 2001)

Prefatory Note

Apportionment of tort responsibility, the subject that the Drafting Committee has been charged to address, is a familiar one to the National Conference of Commissioners on Uniform State Laws. In fact, the Conference has promulgated three acts dealing with this subject. The first, denominated the Uniform Contribution Among Joint Tortfeasors Act, was completed in 1939. That Act was superseded by a revised version bearing the same name in 1955. A third version--the Uniform Comparative Fault Act--was promulgated in 1977, but, unlike the 1955 version, it did not supersede its predecessor. Because approximately one-third of the states in the 1970s had not adopted comparative fault, it was decided to leave the Uniform Contribution Among Joint Tortfeasors Act (1955) for possible use by those jurisdictions. However, it was recommended that the other jurisdictions embracing comparative fault adopt the newly promulgated Uniform Comparative Fault Act. Given the state of the law today, it is contemplated that the work product of the Committee will replace both the Uniform Contribution Among Joint Tortfeasors Act (1955) and the Uniform Comparative Fault Act (1977).

THE EARLY COMMON LAW AND SUBSEQUENT DEVELOPMENTS

The Conference's work in this area reflects the somewhat disparate approaches that have brought us to this juncture. At early common law, there was no occasion to apportion tort responsibility, for at least two reasons. First, contributory negligence of the plaintiff was a complete bar and apportionment of responsibility between a plaintiff and defendant was not part of the process. The plaintiff either recovered all of his or her damages or recovered nothing. Secondly, at the same time, the rules of procedure would not permit joinder in most tort cases involving multiple tortfeasors unless the defendants had acted in concert. Each tortfeasor had to be sued separately. Moreover, the common law dictated that a claimant prove how much damages each tortfeasor had caused, unless, again, the defendants had acted in concert, the latter situation being the only one giving rise to joint and several liability. The combination of the early rules of procedure and the common law resulted in a situation where a claimant was rarely able to recover against multiple tortfeasors, at least where there were independent acts resulting in indivisible harm. This, of course, has changed in many respects.

Initially, courts broadened the scope of procedural joinder from those situations where multiple defendants had acted in concert to include situations where the defendants were alleged to have a common duty, although, strictly speaking, not acting in concert. As early as the 1920s, and certainly by World War II, some courts had begun to allow joinder of multiple tortfeasors even though they had engaged in independent acts that did not involve a common duty or had not acted in concert. This move was reflected in and encouraged through the newly adopted Federal Rules of Civil Procedure which took place in 1938. Once joinder was more freely permitted, the issue of joint

and several liability was bound to be brought into greater relief.

After World War II, it did not take long for the courts to recognize the injustice of the common law rule that required a claimant to prove which defendant caused what damages in those cases where independent acts resulted in indivisible harm. The result of such recognition was to subject multiple tortfeasors to the rule of joint and several liability, not only in concerted action and common duty cases, but in all cases where the conduct of multiple defendants results in indivisible harm. In addition, once joint and several liability was more generally recognized, it was only a short time before the courts were petitioned to permit contribution among this newly defined group of joint tortfeasors, something that also had not been allowed earlier when joint and several liability was so restricted.¹ It was largely the refusal of the courts to accede to this request that led to the need for legislation to rectify what one torts scholar observed to be an “obvious lack of sense and justice in a rule that permitted the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff’s whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free.”² The legislation, however, that ensued varied in many respects.

THE LEGISLATIVE RESPONSE AND UNIFORM ACTS

As the developments described above unfolded, the Uniform Laws Conference responded by drafting a uniform law dealing with contribution among joint tortfeasors. This act, which as previously stated was promulgated in 1939, did not attempt to determine when multiple tortfeasors would be held jointly and severally liable. Rather, it took the position, once multiple tortfeasors were determined to be jointly and severally liable, that certain rights of contribution existed and addressed how those rights were effected. The Act also attempted to resolve related issues such as the effect of settlements among those tortfeasors who were subjected to joint and several liability. Although this Act was enacted by a number of states, it was so extensively amended in the process that the goal of uniformity was not achieved. Part of the problem was that the 1939 Act contained elaborate provisions addressing procedures for joinder. In addition, it came under criticism with regard to the provisions dealing with the legal effect of a settlement by one joint tortfeasor upon the rights of the plaintiff and the rights of the nonsettling tortfeasors. In the meantime, many states independently passed other legislation that also proved to be problematic. This unsatisfactory situation caused the Conference to take up the subject again in the 1950s.

¹Although the “no right of contribution” rule originated in early English cases involving defendants acting in concert to commit intentional torts, ultimately it was applied more generally in the United States to include all cases of joint and several liability, even where independent, although concurrent, negligence had contributed to a single result. William L. Prosser, *Law of Torts*, 273-74 (3rd ed. 1964).

²*Id.* at 275.

The Uniform Contribution Among Joint Tortfeasors Act was revised, and ultimately adopted by the Conference in 1955, to bring it into line with what was considered to be more just and equitable solutions to the legal problems arising out of a rule of joint and several liability. However, the rule at that time with regard to contributory negligence acting as a complete bar was still in effect in the overwhelming majority of jurisdictions in the United States. Nonetheless, beginning in the 1960s, and clearly by the 1970s, most American jurisdictions abandoned contributory negligence as a complete bar and were proceeding to adopt some type of comparative fault system. At first, the focus was on comparing plaintiff's fault with that of defendant's, but it was only a matter of time before the courts and legislatures began to address the problem of comparing fault among all the parties in situations involving two or more defendants. Since the 1955 Act called for contribution to be based upon a *pro rata* determination, this, among other issues associated with the comparative fault movement, again led the Conference to review the legal situation with regard to contribution among joint tortfeasors. This review culminated in the bifurcated approach contained in the current Conference Acts on the subject.

In 1977 the Conference promulgated the Uniform Comparative Fault Act which gave the states a choice. If all the parties to the litigation were to be evaluated in terms of fault and that fault compared in determining responsibility for damages, the 1977 act provided a complete replacement for the Uniform Contribution Among Joint Tortfeasors Act (1955). On the other hand, it was decided not to amend the Uniform Contribution Act, but to leave that act for possible use by states that did not adopt the principle of comparative fault.

Suffice it say at this point, the Uniform Comparative Fault Act did not alter the basic rule of joint and several liability where joint tortfeasors acted in concert, breached a common duty, or otherwise were legally responsible for indivisible harm. Although fault was to be compared among all the parties responsible for the harm and assessed accordingly on a percentage basis, joint and several liability was retained. Contribution, however, was to be based upon the percentages assessed among the defendants, not on a *pro rata* basis as was the case under the Uniform Contribution Among Joint Tortfeasors Act (1955). Among other features not contained in the 1955 Act, the Comparative Fault Act provided for reallocation of responsibility in cases where one or more joint tortfeasors were unable to satisfy the damage award assessed and attempted to deal with the set off problem in cases involving counter claims under the pure comparative fault system. Although the 1977 drafting effort by the Conference, which was chaired by Professor John Wade, provided a state-of-the-art product at that time much has changed in the interim, particularly with regard to apportionment of tort responsibility. In the main, what are these changes?

DEVELOPMENTS SINCE THE UNIFORM COMPARATIVE FAULT ACT (1977)

In 1977 approximately two-thirds of the states had adopted comparative fault. Today, all but five jurisdictions³ in the United States have adopted some type of comparative fault system. Of the

³The five jurisdictions that have not adopted a comparative responsibility system are the states of Alabama, Maryland, North Carolina, and Virginia and the District of Columbia.

46 states that have adopted some form of comparative responsibility, 10 have been by judicial decision and 36 by legislation. Although seven of the 10 states in which comparative responsibility has been *judicially* adopted have opted for a pure scheme (in which a plaintiff who is far more negligent than the defendant may still recover), only six of the 36 states in which comparative responsibility has been *legislatively* adopted have chosen the pure system. A majority of the states that have adopted a comparative responsibility scheme, i.e., 33 out of 46 have chosen a modified scheme. Two-thirds of these--22 out of 33--have chosen a 51 percent threshold, while the other 11 have adopted a 50 percent threshold. Three states have replaced their original pure schemes with modified schemes, and none has gone the other way. Thus, the clear trend has been toward the modified approach, which is in contrast to the Uniform Comparative Fault Act which employs a pure comparative fault scheme. Moreover, only two states have adopted the Uniform Act, and one of these recently repealed it in favor of a modified system.

If this were the end of the story, perhaps there would be no need for this drafting project, but the story does not end here. Once the great majority of jurisdictions adopted some type of comparative fault system that compared the fault not only of plaintiffs with defendants, but also compared the fault among defendants in a multiple tortfeasor situation, inevitably another question arose. In particular, defendants began to question the justice of joint and several liability when it has been determined that each defendant in a multiple tortfeasor situation is only responsible for causing a certain percentage of the harm to the claimant. The question became even more acute when defendants pointed out that in many of these cases the claimant had also been assigned a certain percentage of responsibility for the harm that had resulted. Thus, it was not long before legislatures, and even courts, were persuaded to revisit the issue of allocating responsibility among joint tortfeasors. In doing so, further changes have occurred since 1977.

Many jurisdictions employing comparative fault today have been persuaded to severely limit joint and several liability. In some ways, one might observe that the law in this area has come full circle, as it were, and has returned in large part to the position of the early common law. As a general rule, where defendants have acted in concert, joint and several liability has been retained. In addition, some jurisdictions have retained joint and several liability where multiple defendants have engaged in conduct which results in environmental harm. Beyond these two situations, however, many jurisdictions today in some manner have abolished joint and several liability and, thereby, any necessity to recognize rights of contributions among joint tortfeasors. How has this trend manifested itself?

In those jurisdictions that have not completely abolished joint and several liability outside of the two areas mentioned above (acting in concert and environmental harm), a number of different approaches have been taken to limit joint and several liability. For example, some jurisdictions still permit joint and several liability for economic loss, but do not permit such for non-economic loss. Other jurisdictions do not allow a tortfeasor that is determined to be less than a certain percentage at fault, say 20 percentage, to be held jointly and severally liable with other tortfeasors whose individual responsibility is determined to be in excess of that figure. Still another variation is seen in those jurisdictions that, although initially prohibiting joint and several liability, permit claimants

to show that a judgment entered severally against multiple defendants is not capable of being satisfied on that basis. Upon such as showing, a court may be permitted to reallocate the non-paying judgment debtor's obligation to others adjudged responsible for a portion of the harm suffered.⁴

The reallocation process may take one of several forms. For example, it may just reallocate the non-paying judgment debtor's portion among the remaining judgment debtors. Or, it may take into account any contributory fault on the part of the plaintiff so that the allocation of responsibility itself is revised to take into account the relatively greater responsibility of the claimant once the responsibility of a non-paying judgment debtor is eliminated from the equation.

In addition to the above, other issues have become more acute. For example, the issue of comparing intentional conduct with lesser forms of culpability has received much more attention since the Uniform Comparative Fault Act was promulgated. This includes the possibility of comparing any negligence on the part of a claimant with intentionally cause harm by a defendant as well as comparing the intentional conduct of one joint tortfeasor with the negligent conduct of other joint tortfeasors. The occasion for these issues to be raised has increased as the courts have expanded tort liability in areas involving an actor's obligation to protect a tort victim from the intentional tortious acts of a third party.⁵ Present legislation dealing with apportionment of tort responsibility does not always address these issues and, where that is the case, court decisions have been anything but unanimous in resolving the problems. In any event, the apportionment area is much more problematic than it was 25 years ago when the Conference last addressed the subject.

~~CURRENT ISSUES TO BE ADDRESSED~~

~~————— The preceding historical summary and outline of the legal developments since 1977, when the Conference last addressed the subjects of joint and several liability, contribution among joint tortfeasors, and comparative fault, provides an agenda of some of the issues confronting the Drafting Committee. These and some of the related issues may be listed as follows:~~

- ~~————— 1. The Uniform Comparative Fault Act (UCFA) embraces a pure system of comparative fault. Most states have adopted some form of modified comparative~~

⁴This does not relieve the non-paying judgment debtor from liability to the claimant for the amount not paid, nor does it alter any rights of contribution that the paying judgment debtors might have against the non-paying debtor. However, the claimant may not collect more than the sum assessed for the damages awarded, nor is the non-paying judgment debtor ultimately liable for more than the amount originally assessed as his or her share.

⁵For example, it has become common for owners and occupiers of commercial office buildings, shopping centers, transportation sites, hotels, motels and similar facilities, be they private or public in nature, to be subjected to liability for failing to protect invitees and others on their premises from reasonably foreseeable intentional torts committed by third parties frequenting the areas.

~~fault. Which system should the Committee adopt?~~

- ~~2. The UCFA retains joint and several liability despite the fact that responsibility is apportioned among the responsible parties on a percentage basis. Should the Committee retain joint and several liability and, if so, to what extent?~~
- ~~3. What should be done about non-parties at fault? Should the fault of a person who is not subject to the jurisdiction of the court or otherwise not made a party to the litigation be taken into account?~~
- ~~4. Assuming that joint and several liability is limited in some manner, to what extent should reallocation be allowed where one among several joint tortfeasors is unable to satisfy all or part of an assessed award of damages?~~
- ~~5. Assuming that joint and several liability is retained to some extent, what rights of contribution and/or indemnity should be recognized?~~
- ~~6. To what type of actions should the statute apply? All tort actions? All personal injury actions? Only actions seeking compensation for bodily injury, including death, and physical harm to property?~~
- ~~7. In comparing fault, how should "fault" be defined? Should it include intentional wrongdoing and, if so, in what situations?~~
- ~~8. Depending on the answers to one or more of the above questions, what should be the legal effect of a settlement by one or more joint tortfeasors on the rights of the parties or other affected persons?~~

~~Although this list of issues is certainly not exhaustive, it does provide the point from which the Committee began its work. The fourth tentative draft, set out below, represents the Committee's current thinking on these issues.~~

1 **UNIFORM APPORTIONMENT OF TORT RESPONSIBILITY ACT**

2 **SECTION 1. SHORT TITLE.** This [Act] may be cited as the Uniform Apportionment of
3 Tort Responsibility Act.

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(a) In this [Act]:

[Alternative A]

(1) "Fault" includes:

(A) an act or omission that:

(i) is in any degree negligent or reckless toward a person or property, including the person or property of the actor; or

(ii) subjects a person to strict liability in tort;

(B) breach of warranty;

(C) unreasonable assumption of risk, unless the actor has expressly agreed to assume the risk;

(D) misuse of a product; and

(E) unreasonable failure to avoid injury or to mitigate damages.

[Alternative B]

(1) "Fault" includes an act or omission that creates an unreasonable risk of harm to a person or property, including the person or property of the actor, and conduct which subjects a person to strict liability in tort or for breach of warranty. The term does not include express assumption of risk, such as a legally enforceable release or similar agreement.

(2) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(3) “Nonparty at fault” means an identifiable person that is allegedly responsible for

1 all or part of any injury to a claimant or harm to a claimant's property and, as to that injury or harm,
2 has been released from liability or is immune from liability.¹

3 **Reporter's Notes**

4 The definition of "fault" in Alternative A is taken from the Uniform Comparative Fault Act
5 (1977). It has been conformed to current NCCUSL style conventions. No substantive changes have
6 been made, as one can see by examining the text of the 1977 version:

7
8 "Fault" includes acts or omissions that are in any measure negligent or reckless toward the
9 person or property of the actor or others, or that subject a person to strict tort liability. The
10 terms also includes breach of warranty, unreasonable assumption of risk not constituting an
11 enforceable express consent, misuse of a product for which the defendant otherwise would
12 be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal
13 requirements of causal relation apply both to fault as the basis for liability and to contributory
14 fault.

15 Notice that the 1977 definition does not allude to intentional acts, but the definition is not exclusive
16 so that one could argue that intentional acts should be compared. In fact, some jurisdictions that
17 have addressed the issue under similar language have decided that intentional tortious conduct
18 should be compared with others forms of fault. Regarding the last sentence of the 1977 Act, this is
19 an operative provision that under current NCCUSL drafting conventions should not be contained in
20 the definitions. It could be moved to another Section in the Act, but currently the Drafting
21 Committee does not believe it is necessary to include it at all because it merely restates a basic
22 principle of tort law that would be applied in any event.

23 Alternative B is a much more succinct definition of fault and arguably is no less
24 comprehensive than Alternative A. It includes negligent acts or omissions, regardless of how slight
25 or exacerbated, and does not exclude more aggravated forms of culpable conduct such as conscious
26 indifference and intentionally inflicted harm. Some feel that there is no longer any need to make
27 specific reference to unreasonable assumption of risk or the doctrine of avoidable consequences,
28 since each is subsumed under the concept of unreasonable risk enunciated in the first sentence of
29 Alternative B. Thus, the Drafting Committee is seriously considering using the more succinct
30 definition of fault, but have included both for purpose of obtaining comments at the annual meeting.

31 The definition of "person" ~~employees~~ is adopted from the standard language found in the
32 NCCUSL Drafting Manual.

¹The definition of the term was in Section 4, but it was pointed out to me that the term is used in more than one section of the Act. Therefore, it needs to be included in the definition section.

1 A “nonparty at fault” is limited to two types of persons, i.e., a person who has obtained a
2 release from liability to the claimant and a person who under other law is immune from liability to
3 the claimant. These are the only two types of persons who are not party to the litigation and whose
4 fault may still be considered by the trier of fact in assessing responsibility under Section 4 of the Act.
5 Currently the definition speaks of an “identifiable person,” which would require evidence that there
6 was an actual person who is allegedly responsible, not just a theory that someone else might be
7 responsible.

8 **SECTION 3. EFFECT OF CONTRIBUTORY FAULT.**

9 **[Alternative A]**

10 (a) In an action based on fault seeking damages for personal injury or harm to property, any
11 contributory fault chargeable to the claimant diminishes the amount that may be awarded as
12 compensatory damages for the injury or harm in proportion to the percentage of fault assigned to the
13 claimant pursuant to Section 4.

14 **[Alternative B]**

15 (a) Subject to subsection (b), in an action based on fault seeking damages for personal injury
16 or harm to property, any contributory fault chargeable to the claimant diminishes the amount that
17 may be awarded as compensatory damages for the injury or harm in proportion to the percentage of
18 fault assigned to the claimant pursuant to Section 4.

19 (b) If the claimant’s fault is [equal to or] greater than the combined fault of all other persons
20 whose fault is determined to have caused the injury or harm, the claimant is precluded from
21 recovering any damages.

22 [(b)[c)] In a jury trial, the court shall instruct the jury regarding the effects of its findings of
23 fact under this Section on the claimant’s right to recover damages.

24 **Reporter’s Notes**

1 Two basic issues are raised by the alternative provisions. Should the Act adopt a pure
2 comparative fault system, as did the 1977 Act, or a modified system, such as most jurisdictions have
3 done since the 1977 Act was promulgated? If it is to be a modified system, what should the
4 threshold be--50 percent or 51 percent or some other figure? Alternative A perpetuates the pure type
5 of system, whereas Alternative B adopts the so-called modified system. If a jurisdiction were to
6 choose an "equal to" threshold, i.e., where a claimant who is 50 percent or more at fault is precluded
7 from recovering any damages, the brackets in subsection (b) should be deleted. However, if the
8 jurisdiction were to choose a "greater than" threshold, i.e., where a claimant would not be precluded
9 from recovering unless the claimant's fault exceeded that of the others causing the injury or harm,
10 then both the brackets and words within should be deleted.

11 Under Alternative B, a claimant's fault is compared to the combined fault of all others whose
12 fault is determined also to have caused the injury or harm rather than comparing it to the fault of each
13 person who also caused the injury or harm. Thus, where there is more than one defendant at fault,
14 a claimant may recover part of the damages suffered even though the claimant's fault may equal or
15 exceed that of a particular defendant as long as the claimant's fault does not equal or exceed the
16 combined fault of all defendants.

17 It should also be noted that the language of this Section, or for that matter any other Section,
18 does not speak to the types of tort cases that should be governed by the Act. Presumably the courts
19 would construe the Act to apply to the typical bodily injury, wrongful death, and property damage
20 cases and probably to cases involving negligent infliction of emotional distress. Beyond that each
21 jurisdiction would be free to decide if the Act should apply to defamation, negligent
22 misrepresentation, nuisance, and other types of torts, including those that require proof of intentional
23 harm. In the same vein, the courts will have to decide when, if at all, it would be appropriate to
24 compare intentionally harmful or consciously indifferent conduct with that involving less egregious
25 forms of culpability, such as negligence and strict liability.

26 **SECTION 4. APPORTIONMENT OF DAMAGES.**

27 (a) ~~In this section, "nonparty at fault" means an identifiable person that is allegedly~~
28 ~~responsible for all or part of any injury to a claimant or harm to a claimant's property and, as to that~~
29 ~~injury or harm, has been released from liability or is immune from liability.~~² For purposes of this
30 section, a person who is not subject to liability in tort under [cite specific provision of workers'
31 compensation statute] is not immune from liability but is deemed to have had its liability discharged

²See footnote 1.

1 under Section 9 as if it had received a release, covenant not to sue, or covenant not to execute a
2 judgment from, or entered a similar agreement with, the claimant.

3 (b) In an action to recover damages for personal injury or harm to property involving the
4 fault of more than one person, unless otherwise agreed by all the parties, the court shall instruct the
5 jury to answer special interrogatories or, if there is no jury, make findings stating:

6 (1) the amount of damages that each claimant would be entitled to recover if any
7 contributory fault were disregarded; and

8 (2) as to each claim, the percentage of the total fault of all the parties and nonparties
9 at fault allocated to each claimant, defendant, and nonparty at fault.

10 (c) In submitting interrogatories to the jury or making findings under subsection (b), ~~in cases~~
11 ~~involving issues of vicarious or similar responsibility~~ the court may determine that two or more
12 persons are to be treated as a single person, as in cases involving issues of vicarious or similar
13 responsibility.

14 (d) Upon motion of a party, the court shall submit special interrogatories or, if there is no
15 jury, make findings regarding whether any of the parties acted intentionally or in concert to injure
16 a claimant or harm property or any other issues of fact fairly raised by the evidence and which are
17 needed to enter judgment under Section 5.

18 ~~(e) In a jury trial, the court shall instruct the jury regarding the effects of its findings of fact~~
19 ~~on the claimant's right to recover damages.~~

20 **Reporter's Notes**

21 The basic structure of this Section is taken from the 1977 Act, but it goes beyond that Act.
22 Except for the situation where a joint tortfeasor settles with a claimant, the 1977 Act did not attempt
23 to take into account the conduct of persons who were at fault in causing a claimant's injuries but who

could not be made a party to the claimant's law suit. This draft adds one more category to the nonparty at fault situation. In addition to any fault of a settling tortfeasor, the trier of fact is required in the appropriate situation to consider the fault of any person who is legally immune from liability. Depending on the jurisdiction, this category could include such persons as governmental and charitable entities and any other potential defendants that have received immunity from tort liability under the common law or through legislation. This category, however, does not include an employer or any other person that is immune from tort liability because of workers' compensation legislation. The situation regarding an employer's or workers' compensation insurer's lien and subrogation rights is addressed in Section 10.

Subsection (b)(2), when speaking of the total fault of all the parties, contemplates that the total fault should always equal 100 percent. So, the trier of fact should allocate fault in such a manner that, when so allocated, the sum of the percentages will total 100 percent.

Subsection (c) permits the court to treat an employer and employee as one party where the employer is subject to liability only because of the doctrine of *respondeat superior*. Other situations that may deserve the same treatment involve vicarious liability under partnership and other business arrangements, such as a joint enterprise, as well as other principal and agent relationships. The court may also find it appropriate to treat an owner and permissive operator of a motor vehicle under "owner consent" statutes as one party. A manufacturer and retailer of a product would also be possible candidates for such unitary treatment.

Subsection (d) may be necessary to determine whether a joint and several judgment should be entered under Section 5 or whether the judgment may only be entered on a several liability basis.

Finally, subsection (e) is included so that a jury will not mistakenly conclude that it is awarding some damages to a claimant when, in fact, the particular jury findings would preclude any award at all. This type of mistake is most likely to occur in a jurisdiction that adopts a modified system employing an "equal to" threshold, but it could also occur in a "greater than" jurisdiction.

SECTION 5. DETERMINING DAMAGES; REALLOCATING IMMUNE NONPARTY'S FAULT; ENTERING JUDGMENT.

(a) After the trier of fact has made findings pursuant to Section 4, subject to subsection (b) the court shall determine the award of damages to each claimant in accordance with the percentage of fault found and enter judgment for that amount against each party adjudged liable on the basis of several liability, except in the following situations:

1 (1) If two or more parties adjudged liable acted intentionally or in concert to injure
2 a claimant or harm property, the court shall enter judgment against the parties on the basis of joint
3 and several liability.

4 (2) If a party is adjudged liable for failing to prevent a third party from intentionally
5 injuring or harming a claimant, the court shall enter judgment against the party so failing and the
6 third party on the basis of joint and several liability.

7 (3) If the law of this State, other than this [Act], so requires, the court shall enter
8 judgment on a joint and several basis or conform the judgment to the other law.

9 (b) If a percentage of fault has been assessed against an immune nonparty at fault under
10 Section 4, before making the calculations required under subsection (a) of this section the court shall
11 reallocate this percentage of fault among all the other parties, including the claimant and any released
12 nonparty at fault. Reallocation shall be made among these parties in the proportion that each party's
13 respective percentage of fault bears to the total of the percentages of fault assigned to the parties,
14 other than the nonparty.

15 **Reporter's Notes**

16 Most jurisdictions require that the trier of fact determine the percentages of fault and the
17 amount of damages separately. However, it is the responsibility of the court to make the necessary
18 calculations to enter judgment.

19 The 1977 Uniform Act provided for a pure comparative fault system and retained joint and
20 several liability. Regardless of whether a jurisdiction were to choose a pure comparative fault system
21 or a modified system, this Section, save only a few situations, provides for several liability as the
22 general rule. Where parties act intentionally or in concert to harm another, joint and several liability
23 is retained. These were the exceptions to several liability first recognized under the common law.
24

25 In addition, the Drafting Committee felt that joint and several liability should be retained
26 where a defendant breaches a duty to protect another person from ~~the~~ an intentional torts of a third
27 party. An ever growing body of case law recognizes such a duty in a number of situations today,

1 primarily with regard to the duties of commercial and similar occupiers of land. Owners and
2 operators of hotels, office buildings, shopping centers, and transit facilities, to name but a few, have
3 been held liable for failing to take reasonable precautions to protect invitees and others on their
4 premises from foreseeable intentionally inflicted injuries by others. The Committee felt that the
5 incentives imposed by such rules would be significantly undercut were liability to be apportioned
6 on a several only basis. Nonetheless, several liability would still be the rule where the third party's
7 conduct did not rise to the level of intentionally inflicted harm or such intentional conduct was not
8 reasonably foreseeable.

9 The third exception to several liability recognizes that a number of states have passed
10 legislation that imposes joint and several liability in the area of environmental harm. Thus, if the
11 environmental protection legislation requires joint and several liability, there should be no conflict
12 with this Act.
13

14 In adopting several liability as the general rule, the Drafting Committee is mindful that this
15 approach may produce some inequitable situations if one or more joint tortfeasors are not able to
16 satisfy the amount of the judgment entered against them. This is particularly true where a claimant
17 is free from any fault, but it is also true even if the claimant is to some degree at fault in causing his
18 or her own injury or harm. This inequity is address through a system of reallocation which is
19 established in Section 6.

20 SECTION 6. SATISFACTION OF JUDGMENT; REALLOCATION OF 21 UNCOLLECTIBLE SHARE.

22 (a) Except as otherwise provided in subsection (b) or unless judgment is entered awarding
23 damages under the rules of joint and several liability in Section 5, a judgment creditor may ~~proceed~~
24 ~~to~~ satisfy the judgment against each judgment debtor only on the basis of several liability.

25 (b) Upon motion made not later than [one year] after judgment is entered, a claimant may
26 petition the court to determine whether all or part of a party's percentage share of several liability is
27 not uncollectible from that party. If the court determines based on a preponderance of the evidence
28 that the claimant has made a reasonable effort to collect the judgment and the party's share is not
29 collectible, the court shall reallocate the uncollectible amount to the other parties, including a
30 claimant at fault and any nonparty at fault, and authorize the claimant to satisfy the judgment from

1 the other parties to the extent of the reallocation. Reallocation shall be made among these parties
2 in the proportion that each party's respective percentage of fault bears to the total of the percentages
3 of fault assigned to the parties. A claimant may not seek reallocation more than once.

4 (c) Upon filing a petition for reallocation, a claimant or any other party may seek to discover
5 evidence regarding the financial condition of the party that is allegedly unable to satisfy the several
6 share for which the party has been adjudged liable.

7 (c) Any relief granted under this section does not relieve the party whose liability is
8 reallocated of any continuing liability to the claimant on the judgment or of any obligation of
9 contribution to the other parties.

10 **Reporter's Notes**

11 This Section begins by restating the general rule under the Act that liability is to be adjudged
12 on a several basis unless one of the exceptions under Section 5 is satisfied. More importantly,
13 subsection (b) creates a right of reallocation where a party adjudged severally liable is unable to
14 satisfy that liability. The Act contemplates that inability to satisfy a judgment obligation is
15 determined by reference to the financial situation of the party, rather than the fact that the party is
16 as a matter of law is not required or cannot be compelled to discharge the obligation. At this point,
17 the Drafting Committee has not decided whether it needs to further define in any manner what is
18 meant by uncollectible, but the Section clearly places the burden of proof on the claimant. In that
19 regard, subsection (c) makes it clear that discovery is available under the general rules of civil
20 procedure in the adopting state to aid the claimant in discharging this burden.

21 Reallocation, where granted by the court, must be among all the parties, including the
22 claimant, if at fault, and any nonparty at fault. Where the claimant is at fault too, this method
23 produces a different result than that under the rule of joint and several liability. For example, if the
24 fault findings in the original litigation showed that the claimant was 20 percent at fault and that two
25 defendants were each 40 percent at fault, by reallocating one of the defendant's percentage share of
26 liability, the claimant would only be able to recover 66.7 percent of his or her damages from the lone
27 solvent defendant rather than 80 percent (which would be the case if the defendants were originally
28 adjudged jointly and severally liable).

29 In other words, under a reallocation system that takes a claimant's fault into account, the
30 claimant ends up with a larger share of fault to shoulder than would be the case under the rule of
31 joint and several liability. However, if the claimant is not adjudged at fault, the reallocation is

1 limited to the defendants. For example, assume a claimant is found to have suffered \$200,00 in
2 damages caused by three defendants, A, B, and C, and each defendant is found to be 20, 40, and 40
3 percent at fault, respectively. Since the claimant is free from fault, any insolvent defendant's share
4 would be distributed solely among the remaining solvent defendants. So, if defendant B is insolvent,
5 defendant A would be responsible for one-third of B's share (\$26,640) and defendant C would be
6 responsible for two-thirds (\$53,360). Thus, A would be liable for a total of \$66, 640 and C would
7 be liable for a total of \$133,360.

8 If there is reallocation, the claimant, as well as any other party to whom an insolvent party's
9 share of responsibility is shifted, always has the right to go back against the insolvent party, if the
10 opportunity presents itself, to collect any reallocated share. This right of contribution is specifically
11 recognized in Section 8 of the Act and is not precluded by the last sentence of subsection (b), which
12 limits a claimant to one opportunity to reallocate an insolvent defendant's share. In other words, the
13 insolvent party still remains liable for the share originally assessed and, if called upon at some in
14 time in the future when financially able to do so, will have to reimburse those who have been
15 assessed any additional amount through the reallocation process. So, in the last hypothetical above,
16 defendant A has the right to seek contribution from B in the amount of \$26,640 and defendant C has
17 the right to seek contribution from B in the amount of \$53,360.

18 In a case where a claimant is at fault, the claimant would also share in the reallocation and
19 would have the same right to seek reimbursement from any insolvent defendant whose share has
20 been reallocated to the claimant. For, example, assume that a claimant sustains \$100,000 in damages
21 and is found to be 40 percent at fault and defendants A and B are each found to be 20 and 40 percent
22 at fault, respectively. If reallocation is sought because defendant A is insolvent, A's 20 percent share
23 of \$20,000 would be divided among the claimant and defendant B equally since each was 40 percent
24 at fault with the following result: Claimant's right to recover, which was originally \$60,000, would
25 be reduced to \$50,000 (\$60,000 - ($\frac{1}{2}$ x \$20,000 = \$10,000)) and B's responsibility would be
26 increased to \$50,000 (\$40,000 + ($\frac{1}{2}$ x \$20,000 = \$10,000)). Thus, the claimant's share of
27 responsibility will have been increased from 40 percent to 50 percent while defendant B's share will
28 have been increased from 40 percent to 50 percent. If it turns out that some time in the future
29 defendant A is financially able to discharge his obligation, the claimant is entitled to recover \$10,000
30 from A. Defendant B also has the same right. See Section 8.

31 Taking into account the fault of a released person or other nonparty for purposes of allocating
32 or reallocating responsibility to the actual parties does not make the released party or nonparty
33 legally liable for the additional share assigned to the nonparty such a party. In other words, a
34 released party is not made liable for anything by virtue of reallocation. Once released, always
35 released. The same, for example, would be true for a immune nonparty at fault; reallocation does
36 not create actual liability for an immune nonparty.

37 **SECTION 7. SETOFF.** A claim or counterclaim may not be set off against the other except

1 by agreement of the parties. However, on motion, if the court finds that the obligation of either party
2 is likely to be uncollectible, the court may order that both parties make payment into the court for
3 distribution. The court shall distribute the money received and declare obligations discharged as if
4 the payment into the court by either party had been a payment to the other party and any return of
5 those funds to the party making payment had been a payment to that party by the other party.

6 **Reporter's Notes**

7 This language is taken from the 1977 Uniform Comparative Fault Act. The Drafting
8 Committee has yet to decide if any changes need to be made in it. It is commendable for its
9 simplicity.

10 **SECTION 8. RIGHT OF CONTRIBUTION.** A party that is subject to liability under
11 Section 6(b) for more than the party's share of liability assessed under Section 5 or jointly and
12 severally liable with one or more other parties upon the same indivisible claim for the same injury
13 may seek contribution from the other parties for any amount the party has paid in excess of the
14 several amount for which the party is responsible. The claim may be asserted in the original action
15 or in a separate action.

16 **Reporter's Notes**

17 This basic language is taken from the 1977 Uniform Comparative Fault Act and would be
18 applicable to situations under the Apportionment of Tort Responsibility Act where joint and several
19 liability is preserved. See Section 5(a).

20
21 If the reallocation approach under subsection (b) of Section 6 is adopted (which requires a
22 party upon reallocation to pay more than the original share assessed against the party), it is advisable
23 to have an explicit reference in Section 8 to ensure that the right of contribution extends to that
24 situation. Thus, the language in the first sentence referring to such liability recognizes and assures
25 that right of contribution. For examples of how the right works in a reallocation situation, see the
26 comments to Section 6.

1 **SECTION 9. EFFECT OF RELEASE.**

2 (a) A release, covenant not to sue, covenant not to execute a judgment, or similar agreement
3 by a claimant and person subject to liability discharges the person from liability to the claimant to
4 the extent provided in the agreement and from liability for contribution to any other person subject
5 to liability to the claimant for the same injury. The agreement does not discharge any other person
6 subject to liability upon the same claim unless the agreement so provides.

7 (b) The amount of the claim of the releasing person under subsection (a) against other
8 persons jointly and severally liable for the same injury for which the released person would have
9 been liable must be reduced by the ~~amount~~ percentage of fault assessed against the released person's
10 ~~several share of the obligation, determined~~ pursuant to Section 4.

11 **Reporter's Notes**

12 This provision was contained in the Uniform Comparative Fault Act and, although rewritten
13 here, no substantive change was made. Section 4 specifically contemplates that any releasing party's
14 fault will be an issue in the continuing litigation between the claimant and nonreleasing parties. The
15 effect of the release is determined by whatever share of responsibility is ultimately assessed against
16 the releasing party and the nonreleasing parties are not responsible for that share.

17 **[SECTION 10. REDUCTION OF WORKERS' COMPENSATION LIEN AND**
18 **SUBROGATION RIGHT; NOTICE AND INTERVENTION.**

19 (a) To the extent that an employer or workers' compensation insurer has a lien or right of
20 subrogation under [refer to appropriate provision in workers' compensation statute] for benefits
21 provided to an injured employee who also has a claim for injury or harm against a third party who
22 is subject to this [Act], the lien or right of subrogation is reduced by the monetary amount of the
23 employer's share of responsibility determined pursuant to Section 4 in the employee's action against

1 the third party.

2 (b) A party asserting that an employer's or workers' compensation insurer's lien or
3 subrogation right should be reduced because of the employer's fault shall allege such in the third-
4 party litigation and give notice to the employer or workers' compensation insurer, in which case the
5 employer or insurer has a right to intervene in the third-party litigation.]

6 **Reporter's Note**

7 This Section ~~attempts to~~ implements a decision of the Drafting Committee to treat an
8 employer's fault, when the employer is exercising a workers' compensation lien or subrogation right,
9 as if the employer had given obtained a release to from the employee for the dollar amount of the
10 percentage of fault of the employer that contributed to the employee's injury or harm.

11 For example, assume that an employee is injured by a third-party motorist while the
12 employee is driving a truck for hiser employer. The employee collects \$30,000 in workers'
13 compensation benefits from her employer and then files a third-party tort action against the driver
14 of the other car. In the trial of the tort action it is determined that the third-party motorist was 80
15 percent at fault and the nonparty employer was 20 percent at fault in failing to properly maintain the
16 truck. In addition, the employee's total damages are assessed at \$100,000 in the tort action. Since
17 the employer was 20 percent at fault, its share of responsibility is \$20,000. Thus, under the Act the
18 lien or subrogation right arising from the payment of the compensation benefits is reduced by
19 \$20,000, leaving only \$10,000 that may be recouped by the employer or its workers' compensation
20 carrier from the \$80,000 to be paid by the motorist to the employee. On the other hand, if the
21 employer had not been at fault at all and the employee had been 20 percent at fault, the employer or
22 its compensation carrier would be entitled to recoup the full \$30,000 in compensation benefits from
23 the \$80,000 owed by the third part to the employee.

24 Changing the facts in the above hypothetical yet again, assume that the employer is 20
25 percent at fault, but that the employee is 10 percent at fault and the third party is 70 percent at fault.
26 If the employee has received \$30,000 in compensation benefits and the tort damages are found to be
27 \$100,000, the employer or its compensation carrier is entitled to recoup \$10,000 from the \$70,000
28 tort award, leaving the employee with a total of \$90,000 (\$30,000 in compensation benefits plus
29 \$60,000 from the tort award), which is \$10,000 less than her full tort damages. In short, all those
30 at fault bear some responsibility for the harm.

31 The reason the Section is placed in brackets is because it would not be legally possible in
32 some states to amend the workers' compensation in this manner. Rather, the amendment would have
33 to be to the workers' compensation statute itself and not through collateral legislation such as this
34 Act. Even if it were legally possible, a number of state legislative drafting offices have similar rules

1 that prohibit such indirect methods of amending statutes. If either situation exists in an adopting
2 state, Section 10 will need to be deleted in this Act and incorporated into an amendment to the
3 workers' compensation statute. Subsequent Sections of this Act would then need to be renumbered
4 accordingly.

5 **SECTION [11]. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
6 applying and construing this Uniform Act, consideration must be given to the need to promote
7 uniformity of the law with respect to its subject matter among States that enact it.

8 **SECTION [12]. SEVERABILITY CLAUSE.** If any provision of this [Act] or its
9 application to any person or circumstance is held invalid, the invalidity does not affect other
10 provisions or applications of this [Act] which can be given effect without the invalid provision or
11 application, and to this end the provisions of this [Act] are severable.

12 **SECTION [13]. APPLICABILITY.** This [Act] applies to actions [filed on or][accruing]
13 after its effective date.

14 **SECTION [14]. EFFECTIVE DATE.** This [Act] takes effect on

15 **SECTION [15]. REPEALS.** The following acts and parts of acts are repealed:

16 (1)

17 (2)

18 (3)