October 11, 2001

To: Drafting Committee, Uniform Apportionment of Tort Responsibility Act (Fifth Tentative Draft)

From: Roger Henderson, Reporter

Re: Seattle, Washington Drafting Committee Meeting, November 9-11, 2001

Enclosed please find a copy of a revised version of the Tort Apportionment Act. I have shown (through the use of over strike and highlight) every change I have made to the draft that was presented and discussed at the NCCUSL 2001 Annual Meeting held recently at the Greenbrier. I believe all of these changes are merely style matters or otherwise noncontroversial, but you will want to review them to make sure that is the case. There are other matters that were raised at the Annual Meeting that need to be discussed at our Seattle meeting before I make any changes.

I have gone through my notes and the comments made during the reading of the Act at the Annual Meeting in an attempt to create an agenda for our meeting in Lincoln. In addition, Gene Lebrun and I met with Harvey Perlman in Lincoln, Nebraska on October 6 to review issues that were raised at the Annual Meeting. We felt it important to get Harvey's input since he was not able to be present during the first reading and, moreover, he will not be able to attend our meeting in Seattle.

In this memo, I have noted, and where warranted offered an explanation for, some of the changes that you see in the enclosed draft. Additionally, I have attempted to set out the issues raised on the first reading and in our discussions with Harvey which the Drafting Committee needs to resolve. I am sure you also will have matters that you will want to raise that I have not included and you are encouraged to do so. In any event, we can discuss all of these and any other matters that arise when we get together. My memo is not an exclusive list of the issues we need to address.

Prefatory Note

I deleted the material in the Prefatory Note regarding "current issues" since it was included only for purposes of our earlier Drafting Committee meetings and to alert those in the Committee of the Whole at the Annual Meeting to the main issues confronted by the Drafting

Committee. Those issues, to the extent they still exist, are listed below in connection with the sections in which they arise. Once the Act is finally approved by the Conference I will revise and expand the Prefatory Note. I invite you at any time in the process of completing this project to submit any comments or suggestions that you might have for inclusion in the note.

Section 1. Short Title.

1. As you will recall, Commissioner Hite questioned whether the Act meets the Conference criteria for it to be designated as a Uniform Act rather than a Model Act. You will find the criteria and procedures for designating an Act at pp. 111-14 of the 2000-2001 edition of the NCCUSL Reference Book (aka "Yellow Book"). Although the Act was designated by the Executive Committee as a Uniform Act, this can be changed by a floor vote at the 2002 Annual Meeting in Tucson, Arizona. The issue will no doubt be raised again at that time and the Committee needs to be prepared to respond.

2. Another issue that needs to be raised at the outset involves how the Act is cast to govern those situations involving apportionment of tort responsibility. This issue was raised in our discussions with Harvey Perlman in Lincoln. You will be provided with additional materials prior to the Seattle meeting regarding this matter. In short, to do justice to Harvey's suggestion I have asked him to prepare a short memo explaining what he views as an alternative approach to the present draft and how it would satisfy the charge to the Drafting Committee.

Section 2. Definitions.

(1) Several commissioners questioned the definition of fault, primarily with regard to the inclusion of "strict liability in tort" and "breach of warranty." One questioned how it was possible to compare this type of conduct with negligence, saying it was like apple and oranges, while another apparently was from a jurisdiction that currently does not allow such comparisons. As to the first point, most courts and commentators have concluded that the comparison is possible because, as John Wade explained in the Comments to the 1977 Act:

> Although strict liability is sometimes called absolute liability or liability without fault, it is included [in the definition of "fault"]. Strict liability for both abnormally dangerous activities and for products bears a strong similarity to negligence as a matter of (negligence per se), and the factfinder should have no real difficulty in setting percentages of fault. Putting out a product that is dangerous to the user or the public or engaging in an activity that is dangerous to the user or the public or engaging in an activity that is dangerous to those in the vicinity involves a measure of fault that can be weighed and compared, even though it is not characterized as negligence.
>
> An action for breach of warranty is held to sound sometimes in tort and sometimes in contract. There is no intent to include in the coverage of the Act

> actions that are fully contractual in their gravamen and in which the plaintiff is suing solely because he did not recover what he contracted to receive. The restriction of coverage to physical harms to person or property excludes these claims.

Since that time, most courts and commentators have opined that it is the cause of the harm that is being considered by the trier of fact when strict liability combines with negligence to produce injury. In any event, the trier of fact is required to make such comparisons in a number of jurisdictions today and apparently it is done without any serious problems in the process.

As to the second point, it is true that not all jurisdictions define fault to include strict liability and/or breach of warranty. As currently drafted, the Act, if adopted in those jurisdictions, would change the law. Thus, the question is whether uniformity is essential on this issue. If so, then the current draft adopts one approach (requiring comparison). Alternatively, the Act could preclude such comparisons. Still another alternative would be to delete any reference to strict liability or breach of warranty in the definition, thereby allowing each jurisdiction to choose for itself. The definition as drafted is not exclusive, so the failure to mention some type of conduct leaves it open for each jurisdiction to resolve as it sees fit. Finally, the language regarding strict liability and/or breach of warranty could be bracketed, with an appropriate comment alerting those considering the Act to the issue so that they could decide either to include or omit the language.

(2) As to the choice between Alternatives A and B, some people seemed to stumble over the fact that B does not use the term negligence or contributory negligence. One of the questions that the floor was asked to consider is whether there is any substantive difference between the two versions, as none was intended. As you will recall, A is taken *verbatim* from the 1977 Act, whereas B is an attempt to condense it without changing the substance. I am unconvinced that there is any substantive difference, but it is something we will want to review again in Seattle. It may be we should use the more familiar locutions, but we can still use the condensed version.

(3) With reference to assumption of the risk, it has been suggested that we delete the word "unreasonable" say: "Fault includes: ...implied assumption of risk, unless ..." Which is best?

(4) I moved the definition of "nonparty at fault" from Section 4 to the definition section because the term is used in several sections of the Act. If we continue to permit evidence of a nonparty at fault, we need to discuss exactly what we mean by "immune" and "identifiable." As to the former, do we mean literally that only those who would otherwise be liable except for some type of immunity (such as governmental or charitable immunity) qualify as an immune person? Or, would it also include a person who enjoys some type of diplomatic immunity or who otherwise is not subject to the jurisdiction of the court?

With regard to "identifiable" do we mean that the person has to be so identified that

service of process would be possible if found in the jurisdiction? Or would it suffice that there is evidence from which the trier of fact could find that someone, although his or her identity is not ascertainable, was at fault in causing harm to the claimant.

Section 3. Effect of Contributory Fault.

(1) As you know, a "sense of the house" motion was passed that favored the adoption of Alternative B of Section 3. Alternative A would continue the pure comparative fault system adopted in the 1977 Uniform Comparative Fault Act, whereas Alternative B adopts a modified type of comparative fault. Given the motion, I would propose to move Alternative A to the comments, explaining that a jurisdiction could choose to adopt a pure comparative fault plan and, if that were the choice, the remainder of the Act would still function as intended without any further revisions.

On the other hand, we could simply delete any reference to a pure system, but I think we would engender more opposition on the floor to the Act than we would if we explained in the comments that a pure system would be compatible with the remainder of the Act and provided the language in the comments to implement that choice.

(2) As to the type of modified system, if the Act is to be a Uniform Act the Drafting Committee needs to decide at the Seattle meeting whether they want a "greater than" or "equal to" threshold. We asked the Committee of the Whole to defer any decision on this issue, indicating that the Drafting Committee would address the issue. The time has come.

(3) Another issue is whether we need (or want) to define what we mean by "personal injury or harm to property"? Or, just leave it to the courts, as it is presently drafted? The 1977 Act used the language "damages for injury or death or harm to property".

(4) It was suggested that we add in Alternative B the phrase "shall not bar recovery but" after the word "claimant" and before the word "diminishes" in the second line of subsection (a).

(5) Regardless of whether Alternative A or B is included in the Act, the jurors should be told the effect of their answers. Thus, the new subsection, which will be either subsection (b) or (c) depending on which alternative is adopted, is necessary. In the Annual Meeting draft it was included as subsection (e) of Section 4. It was suggested that it would be best that it appear in Section 3, so I moved it. There is no substantive change, but we need to discuss just what it is that jurors should be told and what they should not be told. It may be that a comment will suffice to refine exactly what jurors should be told, but the statutory language may need refining too. I added the phrase "under this Section" after the word "fact" and before the word "on" in an attempt to do so.

(6) We need to consider how the Act should deal with those jurisdictions that do not permit jury trials for certain parties, commonly governmental entities, when joined with parties

that are entitled to a jury trial. Probably the best, and perhaps the only, solution is to authorize the court to empanel a jury in any case where a party is so entitled and requests and, as to any other party that is not subject to a jury trial, to use the jury in an advisory capacity. The question is do we draft a bracketed section or subsection addressing the problem in the text of the Act or merely put the draft language in a comment for those jurisdictions that face this situation.

Section 4. Apportionment of Damages.

(1) The definition of "nonparty at fault," as explained earlier, has been moved to the definition section.

(2) Another issue that was raised concerns treating an immune party as a nonparty at fault. We will want to discuss this in Seattle. One problem concerns what is meant by "immune". Sometimes governmental entities and officials are said to be immune when there would be no liability if the same action had been taken by a private entity or person. For example, a decision to build a school next to a heavily traveled street would not subject either a public or private school to liability for doing so if a child was later run over by a car, assuming the school did not engage in any negligent activity after the school was built. Other times, a governmental entity or official would be liable under tort law but for the immunity. A city police officer who stops but fails to arrest a drunk driver, who then goes on his way and negligently injures another, may subject the city to liability under tort law but for the immunity. I don't think we intended to permit the school district to be joined as a nonparty at fault, but we probably would want the city to be joined. A diplomat with immunity would be subject joinder if otherwise liable under tort law. This could be clarified in the comments.

(3) There is a more fundamental question that needs to be discussed. In listening to the floor debate and in our discussions with Harvey Perlman, I have about concluded that it is a mistake to include immune parties in the definition of a nonparty defendant. I tend to agree that where immunity exists, by virtue of the common law or legislation, it was not intended that those at fault should bear the immune party's responsibility through a reallocation process. In a case where a person is injured solely by an immune person, the victim cannot recover at all. Arguably, the principle should be the same when there are multiple defendants, one of whom is immune. In the latter case, although the victim cannot recover against the immune party, the victim can recover against the others and that recovery should not be affected by the fault of a person who is immune. This was the position taken in the 1977 Act and it appears to me to be correct. Moreover, as a practical matter, if you allow joinder of immune parties and then reallocate their share to the other parties at fault, as the current draft does, in most situations you will achieve the same result were you to ignore an immune party's fault altogether.

Were we to dispense with immune parties, the definition of nonparty at fault might be dispensed with also because the only nonparty whose fault would be considered would be a released party. We could merely refer to a "released party," as was done in the 1977 Act. Of course, the basic issue of who should be a nonparty defendant for purposes of assessing

responsibility is a matter for the Committee to decide, but it needs to be reviewed. In addition, the language regarding the treatment of an employer who is involved in the assertion of a worker's compensation lien or right of subrogation presently in subsection (a) would need to be moved to Section 10. In fact, it may be best to move it regardless because Section 10 may not be enacted in all or very many states and, if that occurs, the relevant language in Section 4(a) would need to be deleted. Rather than run the risk that Section 4 may get botched in the process, it probably would be best to include all the provisions dealing with workers' compensation in one place in the Act.

(4) In subsection (b), the language in the second line "unless otherwise agreed by all the parties" may be superfluous in that the parties can always waive this type of thing. In addition, as one Commissioner questioned, when would the parties ever not want to use special interrogatories?

(5) Subsection (c) has been recast because it could have been read to mean only in cases of vicarious or similar responsibility could the court treat two persons as one. There may be other situations where that would be appropriate.

(6) Also, in subsection (d), the introductory clause "Upon motion of a party," may be superfluous. If the evidence fairly raises the issue, would not the claimant always want to have the possibility of a joint and several judgment.

(7) Former subsection (e) dealing with informing jurors of the effect of their answers has been moved to Section 3.

(8) To the extent we retain the concept of assessing fault against a nonparty (be it a released person or an immune person), do we need to insert a specific provision requiring notice to all parties and a particular time in which such notice must be given. Normally, the Conference discourages building rules of civil procedure into Acts, leaving the matter to be addressed by existing rules in the adopting jurisdiction. Nonetheless, we need to review the matter.

Section 5. Determining Damages; Reallocating Immune Nonparty's Fault; Entering Judgment.

If we dispense with treating an immune person as a nonparty at fault as discussed earlier, subsection (b) will be deleted, along with the reference in the section title and cross reference in subsection (a) to subsection (b). We would still need to retain the language in what is now subsection (a) because it obligates the court to assess the damages based on the percentages of fault found by the trier of fact and determines when a judgment is to be entered on a several basis only or a joint and several basis.

Section 6. Satisfaction of Judgment; Reallocation of Uncollectible Share.

(1) Regarding subsection (b), from what point should the [one year] period run? Entry of judgment? When the judgment becomes final? When all post trial relief has been exhausted?

(2) It was suggested that we consider taking into account any collateral sources of compensation available to a claimant in the reallocation process. Also, a question was raised about how uninsured and underinsured motorist claims fit into the reallocation scheme. I will give this more thought before we meet, but it is very likely that any collateral source or uninsured/underinsured motorist insurer will have a right of subrogation. If that is the case, there may not be any problem since the subrogated party will merely stand in the shoes of the claimant. Thus, my current thinking is that we do not need to worry about collateral sources unless one wants to limit the amount reallocated to a claimant's net loss after taking into account all sources of compensation, including recoveries by the claimant from first-party insurers.

There also is a related problem regarding uninsured/underinsured motorist coverage. Assume P, a tort victim, obtains a judgment holding A and B liable on a several basis and P is only able to satisfy that portion of her judgment against A, B being insolvent. P then files a claim against her UM insurer and is paid the full amount that B owes her. Should the UM carrier, through a right of subrogation, be able to seek reallocation so that it can recoup what it paid P from A? I think not. We may need to put something in this section to prevent an UM/UIM carrier from invoking reallocation, and leave the loss on the insurer rather than have it shifted to the solvent judgment debtor. Think about it.

(3) In subsection (b), should we try to define when it is that a judgment debtor's share is "not collectible"?

(4) Do we want to consider limiting reallocation to the situation where a judgment debtor is at least a certain percentage at fault. For example, assume that the claimant is 20 percent at fault and Defendants A and B are 70 and 10 percent at fault, respectively. Assume further that A is insolvent. Do you want to reallocate in that situation? Commissioner Hite was suggesting that he may be more disposed to voting for a reallocation system if there were some threshold below which there would be no reallocation to a defendant whose is only minimally at fault.

(5) Commissioner Concannon suggested that he foresaw problems in a state, such as Kansas, that has abolished the collateral source rule and wanted to know how the Act would work in that situation. This is something that I have not had time to think through, but will do so before we meet. I have attached Concannon's comments, which I have copied from the transcript of the floor debate, as an appendix to this memo. Whether or not we can deal with the problem he raises, if it is a problem, will have to be decided in Seattle.

(6) It was suggested that the judgment creditor demonstrate that reasonable efforts had been made to collect the judgment as a condition of obtaining a reallocation order. This is the reason for the additional language of subsection (b).

(7) In subsection (c), at the suggestion from the floor, I added the language "or any other party" because it clear that a solvent judgment debtor will also be interested in trying to prove that the alleged insolvent judgment debtor is in fact able to pay its share of the original judgment. So, any interested party should have the benefit of discovery.

(8) I added comments to make it clear that a released party is not made liable for anything by virtue of reallocation. Once released, always released. The same would be true for a nonparty at fault, if we keep immune parties in the process. Reallocation does not make an immune party liable. Also, if there is reallocation, the claimant, as well as any other party to whom an insolvent party's share is shifted, always has the right to go back against the insolvent party, if the opportunity presents itself, to collect any reallocated share.

Section 7. Setoff.

There were no remarks regarding this section at the Annual Meeting, but look it over anyway. The 1977 Uniform Comparative Fault Act contained a rather lengthy comment explaining how this section works, but I am holding off drafting the comment for our Act until we decide whether we are going to adopt a pure or modified system and, if the latter, what type of modified system. In the meantime, you can look at the comment to Section 3 of the 1977 Act to see how it works under a pure system.

Even if we adopt a modified system, the setoff problem will still exist. Under a modified system, it will occur more frequently if the claimant's fault is compared to the aggregate fault of all defendants because it would be possible for an injured defendant to recover on a claim against the other parties, including the original claimant. For example, assume A sues B and C for her injuries and C files a counter claim against A and a cross claim against B for his injuries. At trial A, B, and C are found to 30, 50, and 20 percent at fault, respectively, in causing A's and C's injuries. It is also found that A has suffered $100,000 in damages and C has suffered $200,000 in damages. Since A's and C's fault is less than that assessed against those they are suing, each could recover. A could recover $50,000 from B and $20,000 from C. C could recover $60,000 from A and $100,000 from B. Thus, there is the potential for a setoff problem between A and C, since each has a right to recover from the other. On the other hand, if you compare fault on a one-on-one basis, in the hypothetical A could only recover against B, since A's fault is less than B's but greater than C's. C, however, could recover against A and B, since C's fault is less than that of either A or B. There would be no setoff problem though because the two injured parties, A and C, are not permitted to recover against each other.

To complete the picture, in the above hypothetical assume that B is also injured and then work out who can recover from whom, assuming first a "greater than" threshold and, in turn, the two different methods of comparing fault. Then assume an "equal to" threshold and, again, employ the different methods of comparing fault. You will see it not only makes a difference as to who can recover depending on how fault is compared (one-on-one or one compared to the aggregate of all others), it also impacts the setoff situation. Of course, the setoff problem is most

acute under a pure system of comparative fault.

Section 8. Right of Contribution.

It was suggested that we consider whether we need a limitation period for asserting a right of contribution. I assume that in the absence of anything in the statute that the applicable statute of limitations in the adopting jurisdiction would govern, but there may be some question as to which statute. The Uniform Comparative Fault Act (1977) does not have such a provision.

Section 9. Effect of Release.

I broke the section into two subsections to highlight a problem that exists with the current draft. Subsection (a) basically says the released party is no longer liable to anyone; not to the claimant nor to the nonsettling tortfeasor. It also reverses the common law rule that a release of one tortfeasor releases all tortfeasors, i.e., the rule under the Act is that a release only releases those specified.

Subsection (b) deals with the effect of the release on the amount that the claimant can collect from the nonsettling tortfeasors. My thought is that the latter problem only exists where joint and several liability is retained, which is in very limited situations as the Act is now drafted. If there is several liability only, the nonsettling defendants are only liable for their respective shares, whether as originally assessed or reassessed under a reallocation. Therefore, the liability of a nonsettling tortfeasor who is only severally liable is not directly affected by a settlement between a claimant and some other tortfeasor. If I am correct about this, then the sentence in (b) needs to be amended to reflect this idea. In the alternative it could read something like this:

> (b) If one of two or more tortfeasors, all of whom are determined to be jointly and severally liable, enters into an agreement discharging a claimant under subsection (a), the claimant's right to recover from the nonsettling tortfeasors is reduced by the percentage of fault assessed against the settling tortfeasor under Section 4.

The present language was taken in part from the 1977 Act which retained joint and several liability in all cases. It says:

> A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of Section 2 [which is the equivalent of our Section 4].

We need to discuss this in Seattle. At the very best, the last sentence of the section, as it exists in the Annual Meeting draft, is opaque and, at worst, may not achieve the result we intend.

So, review the amended language in the Act and compare it to the alternative language set out above.

Section 10. Reduction of Workers' Compensation Lien and Subrogation Right; Notice and Intervention.

I added a new subsection to Section 10, as suggested by one Commissioner, because it is clear that the subrogation or lien rights of an employer or workers' compensation insurer are being affected in any case where there is an attempt to assign a share of fault to the employer or insurer. I am sure a court would permit any interested person to intervene, but it does not hurt to make this right explicit and to require notice to such a person. We can refine the provision if the Committee agrees it should be included.

APPENDIX

COMMISSIONER JAMES M. CONCANNON (Kansas): My comment goes to both Section 6 and to Section 5. There are some states that have abolished the collateral source rule, in whole or in part, and it seems to me there needs to be a comment at least, and perhaps some suggested language, for states to deal with the problems that arise from the intersection of the abolition of the collateral source rule and this act.

It existed to a degree when the defendants were jointly and severally liable, but it's even more severe in this proportionate liability scheme and when you're dealing with reallocation. The states that abolish the collateral source rule are doing so with the idea that we should avoid a double recovery or recovery by plaintiff in excess of the total damages. But this proportionate liability system will mean that in many instances there won't be a double recovery, even though the plaintiff has received some collateral source payments.

If I can just give an example. Assume the plaintiff has total damages of $100,000 and has received $40,000 in Blue Cross Blue Shield payments where there is no subrogation right, the jury finds the plaintiff 20 percent at fault, one defendant 60 percent at all, an immune defendant ten percent at fault, and then insolvent defendant ten percent at fault. In that instance, the liability of the main defendant would be for $60,000, and the plaintiff 40,000, and Blue Cross payments, in essence, could be treated as first party coverage for the damages attributable to the plaintiff's fault and to the fault of the immune defendant and the insolvent defendant. You could make an argument that in

that instance, to carry out the collateral source policy, you should not reallocate the fault of the immune defendant or the insolvent defendant.

It gets really complicated with other numbers. If you assume $30,000 worth of Blue Cross Blue Shield, you could make an argument that the plaintiff ought to be able to attribute that to the $20,000 damages attributed to the plaintiff's fault and the 10,000 attributable to the immune defendant, and then you reallocate the insolvent defendant. If it's $35,000 of Blue Cross, then you reallocate half of the fault attributable to the insolvent defendant.

I guess it's a problem of intersection here that I think needs to be addressed, because it sure gets confusing, I think, in legislature. At least we had that experience in Kansas, where you had these two things coming together.