

DRAFT
FOR DISCUSSION ONLY

**UNIFORM
APPORTIONMENT OF TORT RESPONSIBILITY ACT
(STYLED)**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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With Reporter's Notes

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(Sixth Tentative Draft, Styled, January 22, 2002)

Preface

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 That Act was superseded by a revised version bearing the same name in 1955.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 subject 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

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 1950s.

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 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

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.

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 merely 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 caused 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.

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 the paying judgment debtors to seek reimbursement from the nonpaying 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.

APPORTIONING TORT RESPONSIBILITY IN THE CURRENT DRAFT

The drafters of the 1997 Comparative Fault Act structured the scope of the Act by defining “fault.” In doing so, the definition had to account for the clear cases in which the Act should apply, strict liability as well as negligence, and also for the fact that in some jurisdictions these causes of action may be disguised by other language, such as breach of warranty.

A second problem was presented by intentional torts. In 1977 the conventional wisdom was that intentional torts and torts based on negligence were so different in kind or nature that they should not be compared. Although the Comparative Fault Act defined fault in a manner that, at least arguably, could include intentional torts, the comments noted that such conduct had not been compared theretofore. Since 1977, several courts have held that in some circumstances contributory negligence may be a defense to an intentional tort. However, it also seems clear that in other circumstances an allegation of contributory negligence would not be permitted as a defense to an intentional tort, e.g., provocative dress in a rape case. Yet, where contributory negligence is a defense, the comparative fault principles should apply. In addition, courts have been more receptive to comparing intentional conduct with that of negligent conduct in multiple tortfeasor situations.

A third problem is that in some jurisdictions, contributory negligence is not a defense to strict liability. Nonetheless, there is no reason why comparative fault principles should not apply in order to apportion responsibility between multiple defendants, even if the plaintiff’s fault is not relevant.

To address these problems, one possible alternative would be to draft the current version without attempting to define “fault” generally. This could be done by merely referring to the types of cases that the Act governs, namely (1) those actions seeking damages for personal injury or harm to property that are based on negligence or strict liability or (2) those types of actions to which contributory fault is a legal defense, in whole or part. Although this approach would still require that the Act define “contributory fault,” that is more easily accomplished than trying to accommodate all the variations that exist among the various jurisdictions regarding what is meant by “fault” on the part of defendants. In fact, this is the approach taken in the current draft in that the scope of the Act is built into the operative language of Section 3 along the lines just indicated. It has the advantage of assuring that negligence and strict liability claims are within the Act, while also making the Act applicable to any other *class of cases* in which a claimant’s fault may be relevant (even if in the particular case the claimant is not at fault). Thus, this draft makes it clear that the Act applies to the core of tort law – negligence and strict liability – while attempting to make it applicable to the less common cases where it also should be applicable.

1 **UNIFORM APPORTIONMENT OF TORT RESPONSIBILITY ACT**

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

4 **SECTION 2. DEFINITIONS.** In this [Act]:

5 (1) “Contributory fault” includes contributory negligence, misuse of a product,
6 unreasonable failure to avoid or mitigate harm, and assumption of risk unless the risk is expressly
7 assumed in a legally enforceable release or similar agreement.

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

12 (3) “Released person” means a person that would be liable for damages to a
13 claimant for personal injury or harm to property if the person had not been discharged from
14 liability under Section 9 [or 10].

15 (4) “Responsibility” means the legal consequences of an act or omission that
16 imposes liability for, or creates a defense in whole or part, to a claim for damages for personal
17 injury or harm to property.

1 **Reporter's Notes**

2 The definition of "person" is adopted from the standard language found in the NCCUSL
3 Drafting Manual.

4 The definition of "responsibility" is an attempt to employ one term throughout the Act
5 that is neutral on the issue regarding the type of conduct for which liability may be imposed and
6 which should be compared under the Act.

7 The fault of a person who is not a party to the lawsuit because of a release has to be taken
8 into account in assessing responsibility among those who remain subject to liability, as well as
9 the claimant. There are two types of released persons. Those who receive a release from the
10 claimant under Section 9 and those who are immune from tort liability under the workers'
11 compensation laws but nonetheless have a lien or right of subrogation when an employee has
12 been injured on the job and has a tort action against a third party. In this situation, the employer
13 or workers' compensation insurer is treated under Section 10 just as if a release had been
14 obtained from the employee when compensation benefits are paid to that employee.

15 **SECTION 3. APPLICABILITY; EFFECT OF CONTRIBUTORY FAULT.**

16 (a) Except as otherwise provided in subsection (b), in an action seeking damages
17 for personal injury or harm to property based on negligence or strict liability, or on a claim for
18 which the claimant may be subject to a defense, in whole or part, based on contributory fault, any
19 contributory fault chargeable to the claimant diminishes the amount that the claimant otherwise
20 would be entitled to recover as compensatory damages for the injury or harm by the percentage
21 of responsibility assigned to the claimant pursuant to Section 4.

22 **[Alternative A]**

23 [(b) If the claimant's contributory fault is [equal to or] greater than the combined
24 responsibility of all other persons whose responsibility is determined to have caused personal
25 injury or harm to property, the claimant may not recover any damages.]

1 **[Alternative B]**

2 [(b) If the claimant’s contributory fault is [equal to or] greater than 50 percent of
3 the total responsibility of all other persons whose responsibility is determined to have caused
4 personal injury or harm to property, the claimant may not recover any damages.]

5 (c) In a jury trial, the court shall instruct the jury regarding the legal effect of its
6 findings pursuant to Section 4 on the claimant’s right to recover damages under subsection (b).

7 **Reporter’s Notes**

8 The Uniform Comparative Fault Act (1977) employed a pure comparative fault system.
9 Under that system, an at-fault claimant would be permitted to recover from any other party whose
10 fault also caused injury to the claimant, no matter that the claimant might be overwhelmingly at
11 fault. For example, if a claimant were found to be 95 percent at fault and the defendant only 5
12 percent at fault, the claimant would be entitled to recover 5 percent of his or her damages from
13 the defendant. Although it might have appeared that most jurisdictions would eventually adopt
14 such a system in 1977, that did not prove to be the case. In fact, of those adopting some type of
15 comparative fault, approximately two-thirds have chosen what is referred to as a modified
16 comparative fault system.

17 Under a modified comparative fault system, depending on how one defines the threshold,
18 at some point a claimant would be completely barred from recovering any damages, just as under
19 the earlier contributory negligence rule that developed at common law. However, if the
20 claimant’s fault fell short of the threshold, the claimant would be entitled to recover damages, but
21 those damages would be reduced by the percentage of fault assessed against the claimant. At the
22 Annual Meeting of NCCUSL in the summer of 2001, a sense of the house motion was made to
23 indicate that the Conference preferred a modified rather than a pure comparative fault system.
24 The vote, reflecting what had already transpired in the various jurisdictions, passed by a margin
25 of 62 to 28. Consequently, the Drafting Committee has chosen to adopt a modified comparative
26 fault system.

27 The current draft contains alternative locutions for the modified comparative approach set
28 out in subsection (b). Alternative B merely uses the figure of 50 percent in an attempt to make it
29 clear that the trier of fact is to assume that the combined fault of all the parties should total 100
30 percent. The Drafting Committee needs to choose which alternative it prefers for the final draft.

31 If a jurisdiction, however, prefers a pure comparative fault system, such a system would
32 be compatible with the remainder of this Act. The jurisdiction can adopt a pure plan by deleting
33 subsection (b) and the introductory clause in the first line of subsection (a) of Section 3 (that

1 refers to subsection (b)), so that subsection (a) would read:

2 (a) In an action seeking damages for personal injury or harm to property based on
3 negligence or strict liability or on a cause of action in which a claimant may be subject to
4 a defense, in whole or part, based on contributory fault, any contributory fault chargeable
5 to the claimant diminishes the amount that may be awarded as compensatory damages for
6 the injury or harm in proportion to the percentage of fault assigned to the claimant
7 pursuant to Section 4.

8 Having chosen a pure system, those in the jurisdiction may refer to the comments to Section 3 of
9 the Uniform Comparative Fault Act (1977) for examples that explain how the set off provision in
10 Section 7 of the present Act operates under a pure comparative fault plan.

11 With regard to modified plans, there are two basic types of thresholds. One bars a
12 claimant from recovering any damages if the claimant's share of fault equals that of the
13 defendant(s); the other bars a claimant only if the claimant's share is greater than that of the
14 defendant(s). The current draft provides a choice for those that adopt the modified plan
15 presented in this Section. If a jurisdiction were to choose an "equal to" threshold, i.e., where a
16 claimant who is 50 percent or more at fault is precluded from recovering any damages, the
17 brackets in subsection (b) should be deleted. However, if the jurisdiction were to choose a
18 "greater than" threshold, i.e., where a claimant would not be precluded from recovering unless
19 the claimant's fault exceeded that of the others causing the injury or harm, then both the brackets
20 and words within should be deleted.

21 Under subsection (b), a claimant's fault is compared to the combined fault of all others
22 whose fault is determined also to have caused the injury or harm rather than comparing it to the
23 fault of each person who also caused the injury or harm. Thus, where there is more than one
24 defendant at fault, a claimant may recover part of the damages suffered even though the
25 claimant's fault may equal or exceed that of a particular defendant as long as the claimant's fault
26 does not equal or exceed the combined fault of all defendants. However, if the adopting
27 jurisdiction prefers to bar a claimant from recovering against any person whose fault is less than
28 or equal to that of the claimant, the following language should be substituted in subsection (b):

29 (b) If the claimant's fault is [equal to or] greater than the responsibility of any
30 other person whose responsibility is determined to have caused the injury or harm, the
31 claimant is precluded from recovering any damages from that person.

32 It should also be noted that the language of this Section, or for that matter any other
33 Section, does not speak to the types of tort cases that should be governed by the Act. Presumably
34 the courts would construe the Act to apply to the typical bodily injury, wrongful death, and
35 property damage cases and probably to cases involving negligent infliction of emotional distress.
36 Beyond that, each jurisdiction would be free to decide if the Act should apply to defamation,
37 negligent misrepresentation, nuisance, and other types of torts, including those that require proof

1 of intentional harm. In the same vein, the courts will have to decide when, if at all, it would be
2 appropriate to compare intentionally harmful or consciously indifferent conduct with that
3 involving less egregious forms of culpability, such as negligence and strict liability.

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

9 **SECTION 4. APPORTIONMENT OF DAMAGES.**

10 (a) In an action to recover damages for personal injury or harm to property
11 involving the responsibility of more than one person, the court shall instruct the jury to answer
12 special interrogatories, or if there is no jury make findings, stating:

13 (1) the amount of damages that a claimant would be entitled to recover if
14 any contributory fault were disregarded; and

15 (2) as to each claim, the percentage of the total responsibility of all the
16 parties, including any released person, allocated to each claimant, defendant, and released person
17 that caused the injury or harm.

18 (b) In determining percentages of responsibility, the trier of fact shall consider
19 both the nature of the conduct of each party and released person responsible and the extent of the
20 causal relation between the conduct and the damages claimed.

21 (c) In submitting interrogatories to the jury or making findings under subsection
22 (a), the court shall determine whether two or more persons are to be treated as a single person, as
23 in cases involving issues of vicarious or similar responsibility.

24 (d) The court shall submit special interrogatories to the jury or, if there is no jury,

1 make findings regarding whether any of the parties acted in concert or with an intent to cause
2 personal injury or harm to property and any other issues of fact fairly raised by the evidence and
3 which must be determined to enter judgment under Section 5.

4 **Reporter's Notes**

5 The basic structure of this Section is taken from the 1977 Act. The only persons whose
6 fault is considered are those parties to the action and any persons who have secured a release
7 from the claimant under Section 9 or are deemed to have received such a release under Section
8 10.

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

13
14 Because degrees of fault, whether it be based on negligence or strict liability, and
15 proximity of causation are inextricably mixed, in determining the relative responsibility of the
16 parties, the fact-finder will also give consideration to the relative closeness of the causal
17 relationship of the liability producing conduct of those responsible and the harm that was caused.
18 Thus, subsection (b) states an axiom of basic tort law that would be applied even were the Act
19 silent on the subject.

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

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

30 **SECTION 5. DETERMINING DAMAGES; ENTERING JUDGMENT.** After the
31 trier of fact has made findings pursuant to Section 4, the court shall determine the award of

1 damages to a claimant in accordance with the percentage of responsibility found and enter
2 judgment for that amount severally against each party adjudged liable, except in the following
3 situations:

4 (1) If two or more parties adjudged liable acted in concert or with an intent to
5 cause personal injury or harm to property, the court shall enter judgment jointly and severally
6 against the parties.

7 (2) If a party is adjudged liable for failing to prevent a third party from
8 intentionally causing personal injury or harm to property, the court shall enter judgment jointly
9 and severally against that party and the third party for their combined percentages of
10 responsibility.

11 (3) If a statute of this State, other than this [Act], so requires, the court shall enter
12 judgment jointly and severally or otherwise conform the judgment to the statute.

13 ~~[(4)]~~ If two or more parties are adjudged liable to a claimant and the claimant is
14 not found responsible for any of the damages, the court shall enter judgment jointly and severally
15 for their combined percentages of responsibility.]

16 ~~[(5)]~~ If each of two or more parties is adjudged liable to a claimant in a
17 percentage of responsibility that is [equal to or] greater than that of the claimant, the court shall
18 enter judgment jointly and severally against those parties.]

19 ~~[(6)]~~ If two or more parties are adjudged liable to a claimant, the court shall enter
20 judgment jointly and severally against the parties for their combined percentages of responsibility
21 with regard to the damages for economic loss caused by the parties.]

22 ~~[(7)]~~ If two or more parties are adjudged liable to a claimant, the court shall enter

1 judgment jointly and severally for their combined percentages of responsibility with regard to the
2 parties whose percentage of responsibility [equals or] exceeds [20] percent.]

3 **Reporter's Notes**

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

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

13 In addition, the Drafting Committee felt that joint and several liability should be retained
14 where a defendant breaches a duty to protect another person from an intentional tort of a third
15 party. An ever growing body of case law recognizes such a duty in a number of situations today,
16 primarily with regard to the duties of commercial and similar occupiers of land. Owners and
17 operators of hotels, office buildings, shopping centers, and transit facilities, to name but a few,
18 have been held liable for failing to take reasonable precautions to protect invitees and others on
19 their premises from foreseeable intentionally inflicted injuries by others. The Committee felt that
20 the incentives imposed by such rules would be significantly undercut were liability to be
21 apportioned on a several only basis. Nonetheless, several liability would still be the rule where
22 the third party's conduct did not rise to the level of intentionally inflicted harm or such
23 intentional conduct was not reasonably foreseeable.

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

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

34 A system of reallocation, however, presents a number of new issues. For example, how
35 long should a judgment creditor have to seek reallocation and how many times may it be sought?

1 What does it mean to say that a judgment is “not collectible” and should there be some test
2 regarding a judgment creditor’s efforts to collect the portion due? If the judgment is collectible
3 in part—say 30, 50, or 80 percent—should reallocation still be available? Should a insurer who has
4 paid benefits to its insured under health insurance or uninsured motorist coverage, and who has a
5 right of subrogation to its insured’s tort claim against a third party, be able to trigger reallocation
6 in order to satisfy its subrogation claim against third party tortfeasors who are severally liable to
7 the insured tort claimant?

8 Although Section 6 attempts to answer most of these questions, they still produce
9 litigation points and create the potential for greater transactions costs than are involved in a
10 system of joint and several liability. Consequently, the Drafting Committee is considering
11 whether it would be best to merely expand the categories in which joint and several liability is
12 retained, so that the need for reallocation might be obviated. Thus, Section 5 presently contains a
13 number of alternative situations, placed in brackets, which will provide the basis for discussion
14 and resolution of the issue at the next Drafting Committee meeting.

15 **SECTION 6. SATISFACTION OF JUDGMENT; REALLOCATION OF**
16 **UNCOLLECTIBLE SHARE.**

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

20 (b) Not later than [one year] after a judgment is final and subject to execution, a
21 claimant may move the court in the original action to determine whether all or part of the amount
22 for which one or more judgment debtors are severally liability is not reasonably collectible. If the
23 court determines based on a preponderance of the evidence that all or part of a judgment debtor’s
24 share is not reasonably collectible, the court shall amend the judgment to reallocate the
25 uncollectible share severally to the other parties to the judgment, including a claimant and
26 released person at fault, and authorize the claimant to satisfy the judgment from the judgment
27 debtors to which the uncollectible share has been reallocated to the extent of the amount

1 reallocated to them. Reallocation shall be made among the parties to the judgment in the
2 proportion that each party's respective percentage of responsibility bears to the total of the
3 percentages of responsibility assigned to the parties, including the claimant and any released
4 person but not including the percentage being reallocated.

5 (c) A judgment debtor whose liability is reallocated remains liable to a claimant
6 for any additional share of responsibility allocated to the claimant. A judgment debtor to which
7 an additional share of responsibility has been allocated and that discharges that share has a right
8 of reimbursement from the judgment debtor from which the share was reallocated. Upon motion,
9 the court shall declare such rights and obligations in the amended judgment. [Reallocation does
10 not make a released person liable for any reallocated share of responsibility unless the release or
11 other agreement so provides.]

12 (d) A claimant may not seek reallocation more than once.

13 (e) If a motion for reallocation is filed, any party may conduct discovery regarding
14 any issue relevant to the motion.

15 [(f) A claimant's right to seek reallocation may not be exercised, directly or
16 indirectly, by a person who is subrogated to the claimant's cause of action for personal injury or
17 harm to property.]

18 **Reporter's Notes**

19 This Section begins by restating the general rule under the Act that liability is to be
20 adjudged on a several basis unless one of the exceptions under Section 5 is satisfied. More
21 importantly, subsection (b) creates a right of reallocation where a party adjudged severally liable
22 is unable to satisfy that liability. The Act contemplates that inability to satisfy a judgment
23 obligation is determined by reference to the financial situation of the party, rather than the fact
24 that the party is as a matter of law is not required or cannot be compelled to discharge the
25 obligation. At this point, the Drafting Committee has not decided whether it needs to further

1 define in any manner what is meant by “not reasonably collectible,” but the Section clearly places
2 the burden of proof on the claimant. In that regard, subsection (e) makes it clear that discovery is
3 available under the general rules of civil procedure in the adopting state to aid the claimant in
4 discharging this burden.

5 It is also worth noting that subsection (b) makes it clear that any reallocated shares among
6 two or more tortfeasors must be assigned on a several basis, i.e., tortfeasors assessed additional
7 shares are not liable for these shares on a joint and several basis any more than they were jointly
8 and severally liable for their original shares. Their liability remains several.

9 Although it is possible that there could be more litigation under a reallocation provision,
10 such as contained in this Section, in comparison with a system that employs joint and several
11 liability, the Drafting Committee is not convinced at this point that there would be a significant
12 difference. For example, presently it is common for a claimant in an uninsured motorist case to
13 obtain an affidavit showing the financial condition of the uninsured motorist. Such affidavits
14 also are obtained in other situations where the financial condition of a tortfeasor is relevant. The
15 Drafting Committee believes that in the large majority of cases that this type of proof, or at most
16 a deposition, will suffice to show when it is that a party is insolvent and unable to satisfy the
17 party’s several responsibility under this Act.

18 There are two major differences, however, between a system of joint and several liability
19 and reallocation under this Section. Under joint and several liability, the claimant and any
20 released person do not share any additional burden when a joint tortfeasor is called upon to pay
21 more than the tortfeasor’s fair share. This Section, as explained below, makes the claimant and
22 any settling person, share part of the burden of an insolvent tortfeasor. In addition, joint and
23 several liability permits a claimant to decide whether a particular joint tortfeasor has to pay more
24 than the tortfeasor’s assigned share and thereby shifts the burden to a joint tortfeasor who pays
25 more than the tortfeasor’s assigned share of responsibility to seek contribution. The reallocation
26 system in this Section places the burden on the claimant to satisfy a court that one among several
27 joint tortfeasors should have to pay more than originally assessed, thereby restricting the
28 claimant’s right to choose how the judgment may be satisfied. In deciding which system is best,
29 one should keep in mind these differences.

30 Reallocation, where granted by the court under this Section, must be among all the
31 parties, including the claimant, if at fault, and any released person. Where the claimant is at fault
32 too, this method produces a different result than that under the rule of joint and several liability.
33 For example, if the fault findings in the original litigation showed that the claimant was 20
34 percent at fault and that two defendants were each 40 percent at fault, by reallocating one of the
35 defendant’s percentage share of liability, the claimant would only be able to recover 66.7 percent
36 of his or her damages from the lone solvent defendant rather than 80 percent (which would be the
37 case if the defendants were originally adjudged jointly and severally liable).

38 In other words, under a reallocation system that takes a claimant’s fault into account, the

1 claimant ends up with a larger share of fault to shoulder than would be the case under the rule of
2 joint and several liability. However, if the claimant is not adjudged at fault, the reallocation is
3 limited to the defendants. For example, assume a claimant is found to have suffered \$200,00 in
4 damages caused by three defendants, A, B, and C, and each defendant is found to be 20, 40, and
5 40 percent at fault, respectively. Since the claimant is free from fault, any insolvent defendant's
6 share would be distributed solely among the remaining solvent defendants. So, if defendant B is
7 insolvent, defendant A would be responsible for one-third of B's share (\$26,640) and defendant
8 C would be responsible for two-thirds (\$53,360). Thus, A would be liable for a total of \$66, 640
9 and C would be liable for a total of \$133,360.

10 If there is reallocation, the claimant, as well as any other party to whom an insolvent
11 party's share of responsibility is shifted, always has the right to go back against the insolvent
12 party, if the opportunity presents itself, to collect any reallocated share. This right of contribution
13 is specifically recognized in Section 8 of the Act and is not precluded by the last sentence of
14 subsection (b), which limits a claimant to one opportunity to reallocate an insolvent defendant's
15 share. In other words, the insolvent party still remains liable for the share originally assessed
16 and, if called upon at some in time in the future when financially able to do so, will have to
17 reimburse those who have been assessed any additional amount through the reallocation process.
18 So, in the last hypothetical above, defendant A has the right to seek indemnity from B in the
19 amount of \$26,640 and defendant C has the right to seek indemnity from B in the amount of
20 \$53,360.

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

34 Taking into account the fault of a released person for purposes of allocating or
35 reallocating responsibility to the actual parties does not in fact make the released party legally
36 liable for the additional share assigned to such a party. In other words, a released party is not
37 made liable for anything by virtue of reallocation. Once released, always released. The current
38 version of subsection (c), which contains suggestions by the Committee on Style, attempts to
39 make this clear and the sentence in brackets may now be unnecessary.

1 Subsection (f) is new and addresses an issue that was raised by some Commissioners at
2 the last annual meeting, but which was not resolved by the Drafting Committee at its meeting in
3 Seattle. It needs to be addressed at the February 2002 Drafting Committee meeting in Chicago.

4 **SECTION 7. SET OFF.** A claim or counterclaim under this [Act] may not be set off
5 against the other except by agreement of the parties. However, on motion, if the court finds that
6 ~~the obligation of either~~ a judgment against a party is likely to be uncollectible, in whole or part,
7 the court may order ~~that both~~ the parties to make payment into the court for distribution. The
8 court shall distribute the money received and declare obligations discharged as if the payment
9 into ~~the~~ court by ~~either~~ one party ~~had been~~ were a payment to ~~the~~ another party and any return of
10 ~~those funds~~ money to the party making payment ~~had been~~ were a payment to that party by the
11 other party.

12 **Reporter's Notes**

13 This language is taken from the 1977 Uniform Comparative Fault Act. The Drafting
14 Committee has yet to decide if any change needs to be made in it or whether it is really needed.
15 The “strike-and-score” format shows changes suggested by the Committee on Style.

16
17 The 1977 Act adopted a pure comparative fault system, under which the set off problems
18 are most acute because every party injured has a claim against all others at fault. Although the
19 number of successful claimants are substantially reduced under a modified comparative fault
20 plan, there still will be cases where set off issues may arise. For example, any state that adopts a
21 “greater than” plan will find that each driver in a two car collision may be able to collect one-half
22 of their respective damages from the other if the trier of fact determines that each was 50 percent
23 negligent in causing the collision. The main question is whether there needs to be any set off
24 provision in the Act, particularly if the courts would readily come to the same result in the
25 absence of such a provision.

26 If the Drafting Committee decides to retain the Section, a number of hypotheticals will be
27 employed in the comments to illustrate how the Section works. For the time being, one can
28 consult the comments under Section 3 of the Uniform Comparative Fault Act (1977) for
29 examples that illustrate how the Section works in a pure comparative fault system. To see how it
30 works in a “greater than” modified system, change the facts in the examples so that the claimant

1 other persons jointly and severally liable for the same injury or harm for which the released
2 person would have been liable must be reduced by the percentage of responsibility assigned to
3 the released person pursuant to Section 4.

4 [(c) Any claim of contribution that a released person would have had against
5 another person who would have been jointly and severally liable with the released party is
6 extinguished by the release.]

7 **Reporter's Notes**

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

14 The released person is not only no longer subject to liability to the claimant but, by virtue
15 of the release, is no longer subject to a claim of contribution by a person who is not released. By
16 the same token, any claim of contribution that a released person would have had against another
17 person who would have been jointly and severally liable with the released party is extinguished
18 by the release. Whether or not this result needs to be explicitly stated in the statute was debated
19 at the Seattle meeting and a majority of the Drafting Committee thought not. It is put in brackets
20 in the current draft as a possible addition in a subsection (c) for any further discussion that might
21 be warranted.

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

24 (a) If an employer or workers' compensation insurer asserts a lien or right of
25 subrogation under [insert citation to workers' compensation statute that provides for an
26 employer's or workers' compensation insurer's lien or right of subrogation for compensation
27 benefits paid or payable to an employee when the employee has a tort action for personal injury

1 against a third party], the employer or insurer is deemed to have had its obligation to the
2 employee for the compensation benefits paid or payable discharged under Section 9 as if the
3 employer or insurer had received a release, covenant not to sue, or covenant not to execute a
4 judgment from, or entered a similar agreement with, the employee. In such case, any percentage
5 of responsibility that the employer would have had for the employee's injury, were the employer
6 not immune under the workers' compensation law, must be determined as that of a released
7 person pursuant to Section 4 and the lien or subrogation right is reduced by the monetary amount
8 of the employer's percentage of responsibility, if any, in the employee's action against the third
9 party.

10 (b) A party asserting that an employer's or workers' compensation insurer's lien
11 or subrogation right should be reduced under subsection (a) because of the employer's fault shall
12 give notice to the employer or workers' compensation insurer, in which case the employer or
13 insurer may intervene in the employee's action for personal injury.]

14 **Reporter's Note**

15 This Section implements a decision of the Drafting Committee to treat an employer's
16 fault, when the employer is exercising a workers' compensation lien or subrogation right, as if
17 the employer had obtained a release from the employee for the dollar amount of the percentage of
18 fault of the employer that contributed to the employee's injury or harm.

19 For example, assume that an employee is injured by X, another motorist, while the
20 employee is driving a truck for her employer. The employee collects \$30,000 in workers'
21 compensation benefits from her employer and then files a tort action for her personal injuries
22 against X. In the trial of the tort action it is determined that X was 80 percent at fault for failing
23 to keep a proper lookout and the employer was 20 percent at fault in failing to properly maintain
24 the brakes on the truck. In addition, the employee's total damages are assessed at \$100,000 in
25 the tort action. Since the employer was 20 percent at fault, its share of responsibility is \$20,000.
26 Thus, under the Act the lien or subrogation right arising from the payment of the compensation
27 benefits is reduced by \$20,000, leaving only \$10,000 that may be recouped by the employer or its
28 workers' compensation carrier from the \$80,000 to be paid by X to the employee. On the other

1 hand, if the employer had not been at fault at all and the employee had been 20 percent at fault,
2 the employer or its compensation carrier would be entitled to recoup the full \$30,000 in
3 compensation benefits from the \$80,000 owed by X the employee.

4 Changing the facts in the above hypothetical yet again, assume that the employer is 20
5 percent, the employee is 10 percent, and X is 70 percent at fault. If the employee has received
6 \$30,000 in compensation benefits and the tort damages are found to be \$100,000, the employer
7 or its compensation carrier is entitled to recoup \$10,000 from the \$70,000 tort award against X,
8 leaving the employee with a total of \$90,000 (\$30,000 in compensation benefits plus \$60,000
9 from the tort award), which is \$10,000 less than her full tort damages. In short, all those at fault
10 bear some responsibility for the harm.

11 The reason the Section is placed in brackets is because it would not be legally possible in
12 some states to amend the workers' compensation statute in this manner. Rather, the amendment
13 would have to be to the workers' compensation statute itself and not through collateral legislation
14 such as this Act. Even if it were legally possible, a number of state legislative drafting offices
15 have similar rules that prohibit such indirect methods of amending statutes. If either situation
16 exists in an adopting state, Section 10 will need to be deleted in this Act and incorporated into an
17 amendment to the workers' compensation statute. Subsequent Sections of this Act would then
18 need to be renumbered accordingly.

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

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

26 **SECTION 13. APPLICABILITY.** This [Act] applies to actions [filed on or] accruing

1 after its effective date.

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

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

4 (1)

5 (2)

6 (3)