

**UNIFORM APPORTIONMENT OF
TORT RESPONSIBILITY ACT***

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

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APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

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WITH PREFATORY NOTE AND COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM APPORTIONMENT OF TORT RESPONSIBILITY ACT

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UNIFORM APPORTIONMENT OF TORT RESPONSIBILITY

Preface

Apportionment of tort responsibility is a subject with which the National Conference of Commissioners on Uniform State Laws is familiar. 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 That Act was superseded by a revised version bearing the same name in 1955.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 in the 1970s approximately one-third of the states had yet to adopt 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, the Uniform Apportionment of Tort Responsibility Act (2002) is intended to 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, the occasion to apportion tort responsibility arose infrequently, for at least two reasons. First, contributory negligence of a 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. Second, the rules of civil procedure would not permit joinder in most tort cases involving multiple tortfeasors unless the defendants had acted in concert or otherwise had a common duty. Where multiple tortfeasors acted independently, usually each tortfeasor had to be sued separately. Generally, the common law also required that a claimant prove how much damage each tortfeasor had caused, unless the facts involved one of the few situations giving rise to joint and several liability. The combination of the early rules of procedure and the common law resulted in a situation in which a claimant was often unable, in a single action, to recover against multiple tortfeasors, at least where there were independent acts resulting in indivisible harm.

_____ Things were not so equitable from a defendant's perspective either since the early common law did not readily recognize a right of contribution among multiple tortfeasors who were held to be jointly and severally liable. Consequently, one joint tortfeasor could be held to account for the full amount of a claimant's damages, with an equally guilty joint tortfeasor skating completely free.

This state of affairs, in which both claimants and defendants found themselves, of course, has since changed in many respects. Over time, the scope of procedural joinder was broadened to include more situations where multiple defendants were alleged to have a common duty. Eventually, this expansion extended to joinder of multiple tortfeasors whose conduct resulted in indivisible harm, even though they had engaged in independent acts. In any event, once joinder was more freely permitted, other issues regarding joint and several liability were bound to be brought into greater relief.

It did not take long for the courts to recognize the injustice of a common law rule that required a claimant to prove which defendant caused what damages in cases where due to the nature of the injuries, it was not practicable to do so. As a result of this recognition, multiple tortfeasors were subjected to the rule of joint and several liability, not only in concerted action and common duty cases, but in cases where the conduct of multiple defendants resulted in indivisible harm. In addition, as joint and several liability became more generally recognized, the courts were petitioned to permit contribution among this newly defined group of joint tortfeasors, something that had been generally denied earlier when joint and several liability was more 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 However, the legislation that ensued differed in many significant respects.

THE LEGISLATIVE RESPONSE AND UNIFORM ACTS

As the developments generally described above unfolded, in 1939 the Uniform Laws Conference responded by drafting a uniform law dealing with contribution among joint tortfeasors. This act did not attempt to determine when multiple tortfeasors would be held jointly and severally liable. Rather, it took the position that, once multiple tortfeasors were determined to be jointly and severally liable, certain rights of contribution existed, and it addressed how those rights were to be exercised. The 1939 Act also attempted to resolve related issues, such as the effect of a settlement among those tortfeasors who were subject to joint and several liability. Although this Act was adopted 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

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.

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 those of a nonsettling tortfeasor. In the meantime, many states independently passed other legislation on the subject of contribution that also proved to be problematic. This unsatisfactory situation led the Conference to take up the subject again in the 1950s.

Revisions to the Uniform Contribution Among Joint Tortfeasors Act (1939) were 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 a plaintiff's fault with that of a sole defendant, 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 law governing 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 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 1955 Act, but to retain that Act for possible use by states that did not adopt the principle of comparative fault.

The Uniform Comparative Fault Act (1977) did not alter the basic rule of joint and several liability when 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 (1977) provided for reallocation of responsibility in cases when one or more joint tortfeasors are unable to satisfy the damage award assessed. It also attempted to deal with the set off problem in cases involving counterclaims under the pure comparative fault system contained in the Act. 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.

DEVELOPMENTS SINCE THE UNIFORM COMPARATIVE FAULT ACT (1977)

By 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 more negligent than a 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, in contrast to the Uniform Comparative Fault Act (1977) which employs a pure comparative fault scheme. Moreover, only two states adopted the 1977 Act, and one of these subsequently repealed it in favor of a modified system.

If this were the end of the story, perhaps there would be no need for the Conference to reenter this field of law, 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 fault among defendants in a multiple tortfeasor situation, inevitably another question arose. In particular, defendants began to question the justification for joint and several liability when it is 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 apportioning responsibility among joint tortfeasors. Their efforts have led to further changes 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 that 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 contribution among joint tortfeasors. This trend has manifested itself in several ways.

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.

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 it for noneconomic loss. Other jurisdictions do not allow a tortfeasor that is determined to be less than a certain percentage at fault, for example 20 percent, to be held jointly and severally liable with other tortfeasors whose individual responsibility is determined to be in excess of that percentage.

Still another variation is seen in those jurisdictions that, although initially prohibiting joint and several liability, permit a claimant to show that a judgment entered severally against multiple defendants cannot be satisfied on that basis. Upon such a showing, a court may be permitted to reallocate the nonpaying 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 nonpaying 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 nonpaying 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 (1977) 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 torts 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.

⁴Reallocation does not relieve the nonpaying 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 total sum assessed for his or her damages, nor is the nonpaying 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 carelessly 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 THIS ACT

The drafters of the 1977 Comparative Fault Act structured the scope of the Act by defining “fault”. In doing so, the definition took into account those cases in which the Conference thought the Act should apply, i.e., strict liability as well as negligence, and also accounted for the fact that in some jurisdictions some of 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, when contributory negligence is a defense, the comparative fault principles should apply. In addition, courts are now 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 may not be a defense to strict liability. Even where it is a defense, the exact dimensions of the defense may vary from jurisdiction to jurisdiction due to different approaches of the courts and sometimes legislation that has been enacted on the subject.

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 should govern, namely (1) those actions seeking damages for personal injury or harm to property that are based on negligence and (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 this Act 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 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, under the particular facts of the case *sub judice*, the claimant is not at fault). Thus, this draft makes it clear that the Act applies to the core of tort law while attempting to make it applicable to the less common cases that arguably it also should govern because of the nature of the cause of action involved.

Finally, there is one other very important issue that had to be resolved. Should the fault of a person that is not a party to the lawsuit be taken into account in attributing responsibility for

the claimant's injury or harm? At one point, the draft took into account the conduct of a "nonparty at fault" but ultimately abandoned it because of the problems inherent in doing so.

First, who is it that should qualify as a "nonparty at fault"? Anyone over whom the court lacks jurisdiction? Or, does it matter that jurisdiction is lacking because the person is, for example, a foreign diplomat or an immune governmental or other entity, as compared to someone upon whom service cannot be perfected because the person is out of the country or whose location is unknown? Second, to qualify as a "nonparty at fault", does the person have to be identifiable and, if so, in what manner or particulars? Third, it was also thought that the absence, and nonparticipation, of such a person tended to skew the trial process unfairly. Finally, it was noted that a defendant always has the right to seek contribution from any legally responsible person whose fault also contributed to the claimant's injury or harm and that this right, in most cases, will permit a defendant to join someone who was not already a defendant. If joinder is not possible, a defendant who is held responsible may subsequently pursue an absent tortfeasor in a separate action.

Although the Act expressly authorizes a defendant to bring a third-party action against any person who may be responsible for all or part of the personal injury or harm to property claimed by a plaintiff, it has to be recognized that this may not always be possible because the third person may not be subject to the jurisdiction of the court. On balance, however, it seemed preferable to have a defendant shoulder the responsibility of pursuing the third person in another jurisdiction, presumably where the parties will have an opportunity to fully litigate their rights, rather than risking that the trial process will be skewed in the original action, which may result in an irreversible injustice. Nonetheless, if a particular jurisdiction is persuaded that the fault of a nonparty should be taken into account, an alternative approach is explained in the last paragraph of this note.

As explained above, ultimately it was decided to compare fault only among those that are actual parties to the litigation, with one exception. That exception encompasses someone that would have been a party to the litigation had the claimant not released the person from liability for the injury or harm the person caused to the claimant. Thus, when the Act speaks of a party, it is referring to a person that has been sued and is an actual party to the litigation. It is not referring to someone who merely was involved in the accident that led to the lawsuit. A person that has settled with a claimant is referred to as a "released person", whether or not the person was ever made a party to the lawsuit. In short, parties and any released person are the only persons whose fault is taken into account in comparing and attributing fault in a case that is governed by the Act.

Although the decision not to take into account the fault of a nonparty, except for that of a released person, finds support in what has actually taken place in practice,⁶ it would be possible

⁶According to the Restatement Third of Torts dealing with apportionment of tort liability, of the seven jurisdictions that have adopted a reallocation system in connection with what is

to do so by modifying the Act without substantially redrafting it. For example, a definition of a “nonparty at fault” or similar term would need to be added to Section 2, the definition section. See the last paragraph of the comments to that section for suggested language. Other changes also would need to be made in Sections 3, 4, and 5 and suggested language is provided at the end of the comments to these sections. Therefore, if a jurisdiction decides that the fault of a nonparty should be taken into account, it may amend the existing language in accordance with the suggestions found at the end of the comments for the various sections that are affected. The Act is otherwise unaffected.

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

SECTION 2. DEFINITIONS. In this [act]:

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

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

(3) “Released person” means a person that would be liable for damages to a claimant for personal injury or harm to property if the person had not been discharged from liability under Section 8 [or 9].

(4) “Responsibility”, with respect to a claim for damages for personal injury or harm to property, means the legal consequences of an act or omission that is the basis for liability or a defense in whole or in part.

essentially a several-liability-only scheme, only two of the jurisdictions take into account the fault of a nonparty. See Restatement (Third) of Torts § 17, at 156 (2000).

Legislative Note: If Section 9 of this Act is adopted as part of this Act, the brackets in the definition of “released person” in paragraph (3) should be deleted. If it is not adopted as part of this Act but is adopted as an amendment to the workers’ compensation statutes, the brackets and words within should be deleted and replaced with a cross reference to the amended section of the workers’ compensation statute. If Section 9 is not adopted at all, both the brackets and words within should be deleted.

Comments

As indicated in the prefatory note, no attempt is made in the Act to define “fault”, other than in the term “contributory fault”. This recognizes that the chance of achieving any degree of uniformity on this topic is very problematic, given the different approaches that exist today among the jurisdictions adopting comparative fault. This avoids arguments over whether strict liability in products cases is a type of “fault”, especially when some jurisdictions still base liability in this area, either exclusively or alternatively, on contract law rather than tort law. It also avoids the issue of deciding for all those who consider adopting the Act whether intentional conduct should be compared with other forms of fault and, if so, in what situations. The existing approaches taken in this area are anything but uniform. Thus, an adopting state remains free to resolve these issues in any manner that it wishes.

On the other hand, it is desirable to achieve as much uniformity as possible on the issue of the type of fault that should be attributed to a claimant. This is facilitated by the fact that a claimant is never barred from recovering on a theory of strict liability, at least in tort. In fact, there is much more consensus in the United States on what is meant by “fault” when it comes to a claimant’s conduct. That is reflected in the definition of “contributory fault” in that a claimant will be barred, either partially or wholly, only when the claimant could have reasonably avoided injury or harm by altering his or her conduct. This is true whether avoidance could reasonably have been achieved prior to the initial injury or harm or thereafter. Yet, the definition of “contributory fault” is not exclusive and a jurisdiction is free to decide, among other issues, whether a claimant should be barred in any manner when engaged in intentional wrongdoing.

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

In addition to the fault of a claimant, the fault of a person who is not a party to the lawsuit because of a release has to be taken into account in assessing responsibility among those who remain subject to liability to the claimant. Under the Act, there are two possible types of released persons: those who receive a release from the claimant under Section 8 and, if the adopting jurisdiction chooses to do so, those who are immune from tort liability under workers’ compensation laws but nonetheless have a lien or right of subrogation when an employee has been injured on the job and has a tort action against a third party. In the latter situation, the employer or workers’ compensation insurer is treated under Section 9 just as if a release had been obtained from the employee when compensation benefits are paid to that employee.

The definition of “responsibility” is an attempt to employ one term throughout the Act that is neutral on the issue regarding the type of conduct for which liability may be imposed and which should be compared under the Act. As indicated above, an adopting jurisdiction is still free to determine, through judicial decisions or other legislation, which types of conduct should be compared, be it negligent, intentional, or the type of conduct on which strict liability is based.

If a jurisdiction decides that the fault of a nonparty is to be considered in apportioning tort responsibility, a definition identifying such a person should be added to this section. A possible term and definition to consider would read: “ ‘Responsible nonparty’ means a person that has been sufficiently identified to permit service of process on or discovery from the person and that would be responsible for all or part of a claimant’s personal injury or harm to property had the person been made a party to an action for personal injury or harm to property.” This definition, however, does not include a person that is immune from liability. If a jurisdiction chooses to do so, the definition would need to be modified, which could be done by adding the following sentence: “The term is deemed to include an immune person other than an employer under [insert cross reference to workers’ compensation statute providing immunity to employers as to tort actions by employees for work place injuries].” See Section 9 for treatment of employers under the Act.

SECTION 3. EFFECT OF CONTRIBUTORY FAULT.

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

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

(c) In a jury trial, the court shall instruct the jury regarding the legal effect of its answers to interrogatories, made pursuant to Section 4, on a claimant's right to recover damages under subsection (b).

Legislative Note: The significance of the brackets in subsection (b) is explained in the comments. Basically, the legislature is given a choice. It may choose one of three types of comparative fault plans. The comments explain how each choice may be implemented.

Comments

This section implements a system of comparative fault. Subsection (a) makes it clear that the Act applies to all negligence actions and to any other type of action for personal injury or harm to property where contributory fault may be asserted as a defense. Contributory fault is defined in Section 1. As explained below, subsection (a) leaves the issue of whether the Act applies to an action asserting strict liability to existing law in the adopting jurisdiction.

At one time there was considerable debate concerning whether contributory negligence should be a defense to a claim based on strict liability. Prior to the advent of strict product liability, most courts resolved the matter by holding that a claimant asserting that a defendant should be liable without regard to fault, for example in a case involving explosives or poisons, may be barred if the claimant was aware of the danger posed, but, nevertheless, proceeded to unreasonably encounter it. Although this defense bore a great deal of similarity to that of assumption of risk, which could also apply, it differed in that the claimant could be barred where there was no actual or implied agreement to bear the risk since it worked to defeat a claim when the claimant acted carelessly in confronting a known danger. On the other hand, a claimant's negligent failure to discover the danger was not a defense to a strict liability claim.

Once strict liability was extended to defective products, the courts were again faced with the same issue, but this development came at a time when the common law was also embracing comparative fault in lieu of a complete bar for contributory negligence. Consequently, the answer was not nearly as uniform as to whether a claimant's fault should bar all or part of a claim based on strict liability, with the court decisions falling into three basic categories. Some courts held that contributory fault was not a defense at all, whereas others held that all forms of fault should be compared, albeit the claim was based on strict liability. Others carried forward the rule described under the earlier common law dealing with explosives, poisons, and other bases for strict liability. Still, in other jurisdictions, the applicability of comparative fault in strict liability situations and otherwise is dealt with in statutes.

The American Law Institute, in drafting the Restatement Third of Torts dealing with product liability, found that most jurisdictions in some manner compare the fault of a claimant in a strict liability case and concluded that all forms of fault should fall within this rule, rather than limiting the comparison to those situations involving an unreasonable encounter of a known

danger. The Conference also adopted the ALI position when it initially approved the Act at its annual meeting in 2002. Subsequently, concerns were raised by representatives of the American Bar Association about attempting to make the law uniform in this area. Some jurisdictions in considering whether to adopt the Act may prefer not to deal with the matter here for a variety of reasons. The courts may have already resolved the matter in a manner that the legislature prefers not to disturb. Or, if not yet resolved, the legislature may want to leave the issue for the courts. Alternatively, there may already be existing legislation on the subject, for example in a statute dealing with product liability, in the jurisdiction. Consequently, NCCUSL amended the Act at its annual meeting in 2003 to leave the issue of what types of defenses are available in a strict liability case to the courts or legislature in the adopting jurisdiction.

In other words, the law as it exists in the adopting jurisdiction on the subject of defenses to a strict liability claim for personal injury or harm to property will not be affected by this Act. If one of the types of fault described in the definition of “contributory fault” applies to a strict liability claim before this Act is adopted, it will still apply after it is adopted. The converse is also true. The Act, as amended, simply does not address the issue.

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

Under a modified comparative fault system, depending on how one defines the threshold, at some point a claimant would be completely barred from recovering any damages, just as under the earlier contributory negligence rule that developed at common law. However, if a claimant’s fault falls short of the threshold, although the claimant would be entitled to recover damages, those damages would be reduced by the percentage of fault assessed against the claimant. At the annual meeting of NCCUSL in the summer of 2001, a sense of the house motion was made to indicate that the Conference preferred a modified rather than a pure comparative fault system. The vote, reflecting what had already transpired in the various jurisdictions, passed by a margin of 62 to 28. Consequently, the Conference ultimately adopted a modified comparative fault system. However, in doing so, adopting jurisdictions are given a choice as to the type of modified plan, as indicated by the brackets in subsection (b).

With regard to modified plans, there are two basic types of thresholds. One bars a claimant from recovering any damages if the claimant’s share of fault equals that of the defendant(s); the other bars a claimant only if the claimant’s share is greater than that of the defendant(s). The current draft provides a choice for jurisdictions that adopt the modified plan

presented in this section. If a jurisdiction chooses an “equal to” threshold, i.e., where a claimant who is 50 percent or more at fault is precluded from recovering any damages, the brackets in subsection (b) should be deleted. However, if the jurisdiction chooses a “greater than” threshold, i.e., where a claimant would only be precluded from recovering anything if the claimant’s fault exceeded that of the others causing the injury or harm, then both the brackets and words within should be deleted.

As explained at the end of the prefatory note, actual parties to the lawsuit and any released person are the only persons whose fault is taken into account in comparing and attributing fault in a case that is governed by the Act. Consequently, under subsection (b), a claimant’s fault is compared to the combined fault of all the other parties and any released person whose fault is determined also to have caused the injury or harm rather than comparing it to the fault of each person who also caused the injury or harm. Thus, where there is more than one defendant at fault, a claimant may recover part of the damages suffered even though the claimant’s fault may equal or exceed that of a particular defendant as long as the claimant’s fault does not equal or exceed the combined fault of all defendants and released persons. However, if the adopting jurisdiction prefers to bar a claimant from recovering against any person whose fault is less than or equal to that of the claimant, the following language should be substituted in subsection (b):

(b) If the claimant’s contributory fault is [equal to or] greater than the responsibility of any other person whose responsibility is determined to have caused personal injury to or harm to property of the claimant, the claimant may not recover any damages from that person.

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

(a) In an action seeking damages for personal injury or harm to property based on negligence or on any other claim for which the claimant may be subject to a defense in whole or part based on contributory fault, any contributory fault chargeable to the claimant diminishes the amount that the claimant otherwise would be entitled to recover as compensatory damages for the injury or harm by the percentage of responsibility assigned to the claimant pursuant to Section 4.

Having deleted the introductory clause in subsection (a), subsection (b) should also be deleted. The jurisdiction would then have adopted a pure comparative fault system, one that is entirely compatible with the other provisions in the Act.

It should also be noted that the language of this section, or for that matter any other section, does not speak to the types of tort cases that should be governed by the Act. Presumably

the courts would construe the Act to apply to the typical bodily injury, wrongful death, and property damage cases and probably to cases involving negligent infliction of emotional distress. Beyond that, each jurisdiction is free to decide if the Act should apply to defamation, negligent misrepresentation, nuisance, and other types of torts, including those that require proof of intentional harm. In the same vein, the courts will have to decide when, if at all, it would be appropriate to compare intentionally harmful or consciously indifferent conduct with that involving less egregious forms of culpability, such as negligence and strict liability.

Subsection (c) 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.

If a jurisdiction decides to take into account the fault of a nonparty in apportioning tort responsibility, subsection (b) should be modified as follows: “(b) If the claimant’s contributory fault is [equal to or] greater than the combined responsibility of all other parties, ~~and~~ released persons, and responsible nonparties whose responsibility is determined to have caused personal injury to or harm to property of the claimant, the claimant may not recover any damages.” In addition, the jurisdiction would still need to make a decision regarding the language in brackets, i.e., either to just delete the brackets or to delete both the brackets and the words within. The significance of the choice is explained earlier in the comment to this section.

SECTION 4. FINDING DAMAGES; ATTRIBUTION OF RESPONSIBILITY.

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

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

(2) stating, as to each claim, the percentage of the total responsibility of all the parties and released persons attributed to each claimant, defendant, and released person that caused the injury or harm;

(3) regarding whether any of the parties or released persons acted in concert or with an intent to cause personal injury or harm to property; and

(4) regarding any other issue of fact fairly raised by the evidence which is necessary to make a determination under Section 5 or enter judgment under Section 6.

(b) In determining percentages of responsibility, the trier of fact shall consider:

(1) the nature of the conduct of each party and released person determined to be responsible; and

(2) the extent of the causal relation between the conduct and the damages claimed.

(c) The court shall determine the extent to which the responsibility of one party, which is based on the act or omission of another party, warrants that the parties be treated as a single party for the purpose of submitting interrogatories to the jury or making findings under subsection (a).

Comments

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

In keeping with the custom of the Conference, the Act does not adopt any rules of procedure that affect local court rules or practices. Each jurisdiction should follow its own rules of procedure and court practices in fashioning and submitting the special interrogatories that are contemplated under this section. In addition, such practices as bifurcating trials between matters of liability and damages are left to local rules and practices.

Subsection (a)(2), when speaking of the total responsibility of all those causing injury or harm, contemplates that the total responsibility should always equal 100 percent. Consequently, the trier of fact must allocate fault in such a manner that, when so allocated, the sum of the percentages will total 100 percent.

Fact findings under subsection (a)(3) may be necessary to determine whether a joint and several judgment should be entered under Section 6 or whether the judgment may be entered only on a several liability basis.

Because degrees of fault, whether based on negligence or strict liability, and proximity of causation are inextricably mixed, in determining the relative responsibility of the parties, the fact-finder also will give consideration to the relative closeness of the causal relationship of the liability producing conduct of those responsible and the harm that was caused. Thus, subsection (b) states an axiom of basic tort law that is applicable even were the Act silent on the subject. The fact that the Act explicitly states this rule, however, does not mean that the trier of fact is to make subfindings as to the relationship. Rather, one finding is to be made with regard to the fault of each party and released person and that finding is to be expressed as a percentage under subsection (a)(2). As indicated above, the total of the percentages found must equal 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 also may find it appropriate to treat an owner and permissive operator of a motor vehicle under an “owner consent” statute as one party. In addition, a manufacturer and retailer of a product may be possible candidates for such unitary treatment.

If a jurisdiction decides that the fault of a nonparty is to be considered in apportioning tort responsibility, subsections (a) and (b) need to be modified to include either “responsible nonparty” or “responsible nonparties” in the appropriate places where reference is being made to those among whom the responsibility may be assigned.

SECTION 5. DETERMINING DAMAGE AWARD; REALLOCATION OF UNCOLLECTIBLE SHARE.

(a) After the trier of fact has answered interrogatories or made findings pursuant to Section 4, the court shall determine, in accordance with the percentages of responsibility found, the monetary amount of any award of damages to a claimant, the amount of the several share for which each party found liable is responsible, and any amount attributable to a released person.

(b) After the court has made its determinations pursuant to subsection (a), a claimant, no later than [the time permitted for filing a motion for new trial] [90 days after the entry of judgment for the plaintiff], may move the court to determine whether all or part of the

amount of the several share for which a party is liable will not be reasonably collectible and request reallocation. If the court based on a preponderance of the evidence determines that the party's share will not be reasonably collectible, the court shall make findings reallocating the uncollectible share severally to the other parties, including the claimant, and any released person. Reallocation must be made in the proportion that each party's and released person's respective percentage of responsibility bears to the total of the percentages of responsibility attributed to the parties, including the claimant, and any released person but not including the percentage being reallocated.

(c) A party whose liability is reallocated remains liable to a claimant for any additional share of responsibility allocated to the claimant. A party that discharges an additional share of responsibility allocated to it pursuant to subsection (b) has a right of reimbursement from the party from which the share was reallocated. Upon motion, the court in the judgment entered under Section 6 shall declare the rights and obligations resulting from the reallocation, including any rights and obligations with regard to subrogation or a secured position. If any party to whom reallocation has been made holds a secured position with regard to the share reallocated, each party to whom reallocation has been made has a proportionate share in the secured position. Any amount recovered under this subsection from a party whose liability has been reallocated must be distributed to each of the parties to whom the reallocation was made in the same proportion as the original reallocation.

(d) Reallocation does not make a released person liable for any reallocated share of responsibility unless the release or other agreement so provides.

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

Comments

This section begins by requiring the court to calculate the amount of damages, if any, a claimant is entitled to recover and the several amount for which each defendant found liable is responsible. The court is given this responsibility regardless of the fact that the percentage findings under Section 4 may be made by a jury. Normally, the calculations will be done for the court by the prevailing party and presented to the court for approval under the local rules of procedure as part of the judgment to be entered under Section 6.

In a case involving a released person, whether under Section 8 or 9, the court also is required under subsection (a) to calculate the amount of money the released person would have been liable to pay the claimant had there not been a release. The relevance of this latter calculation is explained in the comment to Section 9. In the event that Section 9 is not adopted, either as a part of this Act or as an amendment to the workers' compensation statute, there would be no need to have the court calculate the amount for which a released person would have been responsible, but there is no harm in having the court do so. In fact, it may help the parties understand exactly how much money the claimant would have been entitled to collect from the released person, had there been no release, in comparison with the amount that the released person actually paid the claimant.

Subsection (b) adopts a reallocation provision, as did the 1977 Uniform Act. In the event that a defendant, who is only severally liable, is financially unable to discharge his or her share of responsibility, the claimant may seek to have that share reallocated. However, it was felt that any attempt to invoke the reallocation process should be limited to a relatively short period of time. Therefore, the subsection suggests that one of two time periods be considered for adoption, so that all rights and obligations may be fixed and understood at the earliest practicable time. The first suggested time period, which should be practicable in many jurisdictions, requires that any motion for reallocation be filed before the time for filing a motion for new trial expires. In those jurisdictions that follow the Federal Rules of Civil Procedure, this will be 10 days from the entry of judgment. However, since this may not be practicable in some jurisdictions, the second suggestion would require that the motion be filed within 90 days from entry of judgment. If neither of these time periods are practicable in the adopting jurisdiction, some other period should be inserted or it also would be possible for the statute to reference local rules of civil procedure. Others adopting the Act may want to delete any reference to a time for filing the motion and leave it to the appropriate court in the jurisdiction to fashion a suitable rule. In fact, the latter solution may be required in those jurisdictions where the courts have exclusive authority to adopt judicial rules of procedure. In any event, the time period for filing a motion for reallocation should not be unduly protracted.

_____ In adopting a reallocation plan, no attempt was made to define when a several share “will not be reasonably collectible”. Rather, because of the indefinite variety of circumstances that could arise, it was decided that the issue should be left to the courts in the adopting jurisdiction. For example, a court may decide that, although a judgment might be collectible, it would not be reasonable to do so if the cost would equal or exceed the proceeds. In addition, the Act does not resolve whether the issue of collectibility should be limited to the situation where the responsible party is not able to pay because of financial inability or should also include a situation where a responsible party is partially immune or cannot be legally compelled to discharge the obligation. An example of the former might include an entity, such as a charity, whose liability is limited to a certain maximum amount. The latter might include an entity that is liable only to the extent it carries or is required to carry liability insurance. In any event, the section clearly places the burden of proof on the claimant. In that regard, subsection (e) makes it clear that discovery is available under the general rules of civil procedure in the adopting state to aid the claimant in discharging this burden. Any party that is subject to reallocation also may have an interest in conducting discovery on the issue.

It also is worth mentioning that the Act does not prevent a party from bringing a declaratory judgment action to determine, for example, whether a liability insurance carrier is legally obliged to pay all or part of any judgment that may be entered. How and in what manner such an action should proceed is governed by existing rules and other law in the adopting jurisdiction.

Subsection (b) makes it clear that any reallocated shares among two or more tortfeasors initially must be assigned on a several basis. Whether or not tortfeasors assessed additional shares under any reallocation ultimately are liable for these shares on a joint and several basis depends on Section 6.

Although it is possible that there could be more litigation, and therefore greater transaction costs, under a reallocation provision like that contained in this section in comparison with a system that employs joint and several liability, it was felt that there would not be a significant difference. For example, presently it is common for a claimant in an uninsured motorist case to obtain an affidavit showing the financial condition of the uninsured motorist. Such affidavits also are obtained in other situations where the financial condition of a tortfeasor is relevant. In the large majority of cases, this type of proof, or at most a deposition, will suffice to show when a party is insolvent and unable to satisfy the party’s several responsibility under this Act. Nonetheless, even if the transaction costs are greater, there is an overriding reason why a reallocation system as contained in this Act is preferable to a system of joint and several liability.

There are two major differences between a system of joint and several liability and that of reallocation under this section. Under joint and several liability, the claimant and any released person do not share any additional burden when a joint tortfeasor is called upon to pay more than the tortfeasor’s fair share. This section, as explained below, makes the claimant and any settling

person share part of the burden of an insolvent tortfeasor. In addition, joint and several liability permits a claimant to decide whether a particular joint tortfeasor has to pay more than the tortfeasor's assigned share and thereby shift the burden to a joint tortfeasor who pays more than the tortfeasor's assigned share of responsibility to seek contribution. The reallocation system in this section places the burden on the claimant to satisfy a court that one among several joint tortfeasors should have to pay more than originally assessed, thereby restricting the claimant's right to choose how the judgment may be satisfied. In deciding which system is best, one should keep in mind these differences.

Reallocation, if granted by the court under this section, must be among all the parties found to have been at fault, including the claimant and any released person. Where the claimant is also at fault, this method produces a different result than the one produced under the rule of joint and several liability. For example, if the fault findings in the original litigation show that the claimant was 20 percent at fault and that two defendants were each 40 percent at fault, by reallocating one of the defendant's percentage share of liability, the claimant would only be able to recover 66.7 percent of his or her damages from the lone solvent defendant rather than 80 percent, which would be the case if the defendants were originally adjudged jointly and severally liable.

In other words, under a reallocation system that takes a claimant's fault into account, the claimant ends up with a larger share of fault to shoulder than would be the case under the rule of joint and several liability. Consider the following hypothetical: Assume that P, a claimant, sustains \$100,000 in damages and is found to be 40 percent at fault and defendants A and B are found to be 20 and 40 percent at fault, respectively. If reallocation is sought because defendant A is insolvent, A's 20 percent share of \$20,000 would be divided among the claimant P and defendant B equally since each was 40 percent at fault with the following result. P's right to recover, which was originally \$60,000, would be reduced to \$50,000 ($\$60,000 - (\frac{1}{2} \times \$20,000 = \$10,000)$) and B's responsibility would be increased to \$50,000 ($\$40,000 + (\frac{1}{2} \times \$20,000 = \$10,000)$). Thus, P's share of responsibility will have been increased from 40 percent to 50 percent while defendant B's share will have been increased from 40 percent to 50 percent.

If, as a result of reallocation, a claimant's percentage share of responsibility is increased to the point that the claimant would be barred from recovering at all, had that been the original percentage of responsibility assigned to the claimant, the claimant still is not barred. Rather, the claimant's right to recover is merely reduced, not totally eliminated. In other words, reallocation does not operate to bar a claimant from recovering because the claimant's percentage of responsibility, as a result of reallocation, meets or exceeds the threshold that would completely bar a claimant from recovering under Section 3(b).

If there is reallocation, the claimant, as well as any other party to whom an insolvent party's share of responsibility is shifted, always has the right, if the opportunity presents itself, to seek to collect back any reallocated share from the insolvent party. This right is specifically recognized in subsection (c) of this section and assures that the insolvent party remains liable for

the share originally assessed and, if called upon at some in time in the future when financially able, will have to compensate those who have been assessed and paid any additional amount through the reallocation process. So, in the last hypothetical above, if it turns out that some time in the future defendant A is financially able to discharge his obligation, P is entitled to recover \$10,000 from A. Defendant B also has the same right.

On the other hand, if the claimant is not adjudged at fault, reallocation is limited to the defendants. For example, assume P is found to have suffered \$200,000 in damages caused by defendants A, B, and C, who are found to be 20, 40, and 40 percent at fault, respectively. If defendant B is insolvent and reallocation occurs, defendant A would be responsible for one-third of B's share (\$26,640) and defendant C would be responsible for two-thirds (\$53,360). Thus, after reallocation, A would be liable for a total of \$66,640 and C would be liable for a total of \$133,360, permitting P to collect the full award of \$200,000. As between A, B, and C, A has the right to seek reimbursement from B in the amount of \$26,640 and C has the right to seek reimbursement from B in the amount of \$53,360.

Taking into account the fault of a released person for purposes of allocating or reallocating responsibility to the actual parties does not in fact make the released person legally liable to pay any damages. In other words, a released person is not made liable for anything by virtue of being initially assigned a percentage of fault or an additional percentage upon reallocation. Once released, always released, unless the release provides otherwise. Subsection (d) makes this clear.

To understand the effect of a release under the reallocation system, in the last hypothetical above assume that A, instead of being a party defendant, had been released by P. If that were the case, although A was found to be 20 percent at fault, P would not be able to collect the \$40,000 (.20 x \$200,000) that otherwise would have been owed by A to P. Moreover, when reallocation takes place because B is insolvent and A's share is increased to \$66,640, P still will not be able to collect anything from A. However, if it later develops that B is solvent, P will be able to seek from B the amount reallocated (\$26,640) from B to A. Thus, a released person also participates in any reallocation for purposes of determining how much P can collect from the nonreleased solvent defendants, but that does not make the released person liable for the reallocated amount unless the release provides otherwise.

Subsection (c) addresses several concerns to ensure that all parties to whom reallocation may be made are treated equitably. First, it makes it clear that reallocation in no way alters the responsibility of an insolvent defendant to the claimant. Likewise, any defendant that, because of reallocation, pays more than its original assessed share has a right to seek reimbursement from the insolvent defendant whose share was reallocated. This is in addition to any right of subrogation that exists because a solvent defendant pays a co-defendant's debt to the claimant. For example, under traditional debtor-creditor law, the paying defendant, who would be in the position of a surety or guarantor, may be subrogated to the claimant's right, as a creditor, to recover from the insolvent debtor defendant. In addition, if a claimant occupies a preferred or

secured position, for example because a lien was created in favor of the claimant when the judgment was entered, this also redounds to the benefit of any defendant who may have been assessed an additional share under reallocation. Another example of a secured position may exist because the claimant may have a direct right to recover from a otherwise insolvent defendant's liability insurer and to the extent that right exists, a defendant to whom a reallocated share has been made will enjoy that preferred position proportionately. In summary, all the rights and obligations of the parties to any reallocation should be declared in the judgment, including any rights and obligations concerning subrogation or a secured position.

_____ Finally, under subsection (c), if any party to whom an additional share has been reallocated recovers any amount from a defendant from whom reallocation was made, the recovering party must share the recovery on a proportionate basis with all others to whom reallocation was made. This should not only ensure that all are treated equitably, but it also should encourage cooperation among all the parties to whom reallocated shares have been assessed.

If a jurisdiction decides that the fault of a nonparty is to be considered in apportioning tort responsibility, subsection (a) needs to be modified by adding "or responsible nonparty" at the end of the sentence. In addition, the last two sentences of subsection (b) would need to be modified as follows: "If the court based on a preponderance of the evidence determines that the party's share will not be reasonably collectible, the court shall make findings reallocating the uncollectible share severally to the other parties, including the claimant, and any released person and responsible nonparty. Reallocation must be made in the proportion that each party's, and released person's, and responsible nonparty's respective percentage of responsibility bears to the total of the percentages of responsibility attributed to the parties, including the claimant, and any released person and responsible nonparty but not including the percentage being reallocated."

SECTION 6. ENTERING AND MODIFYING JUDGMENT.

_____ (a) After determining an award of damages to a claimant and the amount of the several share, including any reallocated share, for which each party found liable is responsible, the court shall enter judgment severally against each party adjudged liable, except in the following situations:

(1) If two or more parties adjudged liable acted in concert or with an intent to cause personal injury to, or harm to property of, the claimant, the court shall enter judgment jointly and severally against the parties for their joint share.

(2) If a party is adjudged liable for failing to prevent another party from intentionally causing personal injury to, or harm to property of, the claimant, the court shall enter judgment jointly and severally against the parties for their combined shares of responsibility.

(3) If a party is adjudged liable for the act or omission of another party under Section 4(c), the court shall enter judgment jointly and severally against the parties for their joint share.

(4) If a statute of this state, other than this [act], so requires, the court shall enter judgment jointly and severally or otherwise conform the judgment to the statute.

(b) If a court grants a motion for reallocation pursuant to Section 5 after judgment is entered, the court shall modify the judgment to declare the rights and obligations resulting from the reallocation, including any rights and obligations with regard to subrogation or a secured position.

Comments

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

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

same is true if the occupier or other person upon whom the duty is imposed is not at fault in failing to protect the person to whom the duty is owed.

As recognized in subsection (c) of Section 4, there are several situations involving vicarious and similar responsibility where a court may decide to treat two or more persons as one entity. In such cases, paragraph (3) of this section dictates that judgment is to be entered jointly and severally against these persons for their joint share.

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

In adopting several liability as the general rule, the Conference is mindful that this approach may produce some inequitable situations if one or more joint tortfeasors are not able to satisfy the amount of the judgment entered against them. This is particularly true where a claimant is free from any fault, but it is also true even if the claimant is to some degree at fault in causing his or her own injury or harm. This inequity is addressed through a system of reallocation which is established in Section 5. If a court determines that reallocation is appropriate prior to entry of judgment, subsection (a) of this section contemplates that the reallocation shall be effected as part of the judgment when entered. If judgment is entered and subsequently it is determined that reallocation is appropriate, subsection (b) provides that the court shall modify the judgment accordingly. The fact that the Act may authorize reallocation after judgment is entered does not otherwise expand the authority of the trial court regarding finality of judgments and when it is that a trial court may no longer have jurisdiction to modify a judgment. The latter depends on the law of the particular jurisdiction.

It is not contemplated that the Act will impact the lien laws regarding judgment creditors in an adopting jurisdiction. Nonetheless, an adopting jurisdiction may want to examine such laws to determine if any amendments are necessary, particularly with regard to rights of judgment creditors created under the reallocation system established in Section 5. The same type of review also may be warranted with regard to the laws dealing with postjudgment interest.

SECTION 7. RIGHT OF CONTRIBUTION AND INDEMNITY; THIRD-PARTY ACTION.

(a) Except as otherwise provided in subsection (b), a party that is jointly and severally liable with one or more other parties under this [act] has a right of contribution from another party jointly liable for any amount the party pays in excess of the several amount for

which the party is responsible. A party against which contribution is sought is not liable for more than the monetary amount of the party's several share of responsibility determined pursuant to Section 5.

(b) A party that is adjudged liable for the act or omission of another party under Section 6(3) has a right of indemnification from the other party.

(c) A party that is subject to liability for injury to, or harm to property of, a claimant under this [act] has a right:

(1) to join a person that is also subject to liability to the claimant for all or part of the same injury or harm if the claimant has not sued the person; and

(2) to seek contribution or indemnity, whichever is appropriate, from another person whose liability is not determined in the proceeding in which the party is adjudged liable if the other person is responsible for all or part of the claimant's injury or harm.

(d) A claim for contribution or indemnity may be asserted in the original action or in a separate action.

Comments

The basic language in subsection (a) is taken from the 1977 Uniform Comparative Fault Act and would be applicable to situations under the Apportionment of Tort Responsibility Act where joint and several liability is preserved. See Section 6(1).

Subsection (b) recognizes the right of an employer, or any other person held liable purely on the basis of vicarious or similar responsibility, to seek indemnity from the person whose act or omission constituted the basis for imposing such responsibility.

Subsection (c) is designed to deal explicitly with the rights of a defendant in two situations that a court should recognize, even if the Act did not speak to the matter. Rather than leave the matter to be divined by the courts, it is best to state these rights explicitly, if for no other reason than to preclude any argument that they have been preempted by virtue of the fact that the Act does not, were it to do so, expressly recognize that they should exist. First, since the

Act only recognizes joint and several liability in a very limited number of situations when there are multiple persons who are responsible for injury to, or harm to property of, a claimant, only several liability will be imposed in the great majority of these types of cases. Second, the Act does not take account of fault on the part of anyone except those who are actual parties to the litigation and any released person. Third, it may happen that a claimant chooses not to sue all of the potential defendants in a particular case. In this event, a defendant may want to file a third-party complaint against a person that has been omitted by the claimant, thereby making the person a party to the proceedings. The defendant (third-party plaintiff) would want to do so in any case where it would be possible to reduce the defendant's (third-party plaintiff's) exposure to liability to the claimant because the trier of fact may attribute some, or possibly all, of the responsibility for the claimant's injury or harm to the third-party defendant. Yet, since the defendants may only be adjudged severally liable, it could be argued, under the Federal Rules of Civil Procedure (see Rule 14) and any similar state rule, that the third-party defendant is not really *liable to* the defendant (third-party plaintiff) for part or all of the claimant's injury or harm. Rather, the third-party defendant is only *liable to* the claimant. Therefore, according to the argument, there would be no basis for the third-party action.

If this argument were to prevail, a claimant could pick and choose among potential defendants and, since the fault of a nonparty would not be considered by the trier of fact under this Act, the defendant or defendants actually sued by the claimant could be held liable for more of the injury or harm than the defendant or defendants actually caused. The most graphic illustration of this dilemma would occur when a claimant is free from fault and chooses to sue only one defendant, although there are other persons who also are responsible for the claimant's injury or harm. In that situation, the lone defendant would end up bearing 100 percent of the responsibility.

To avoid the unfairness of this result, it was felt that the Act should expressly recognize the right of a defendant to bring a third-party action against any person who also is potentially responsible for all or part of the injury or harm that is the subject of the lawsuit brought by the claimant against one or more but less than all of those who caused the harm. This is what subsection (c)(1) does.

Subsection (c)(2) addresses a related problem and that is the situation where neither the claimant, nor a defendant who seeks to file a third-party complaint, can obtain jurisdiction over someone who is responsible for all or part of the harm for which the claimant has sued the defendant. In this situation, presumably the trial would proceed against those who are amenable to process and their responsibility would be adjudicated. However, it is possible again, as explained above, for a defendant or defendants to be adjudged liable for more than the defendant or defendants caused. This is so because the fault of a nonparty is not considered in a case governed by this Act. Therefore, any defendant in that situation should have a right to seek contribution or indemnity against any other person whose responsibility for the injury or harm was not determined in the proceeding against the defendant. Of course, the defendant would have the burden to establish that the person from whom contribution or indemnity is sought also

is responsible for the original claimant's injury or harm that was attributed to the defendant and how much is owed to the defendant.

It would also be possible in the last situation mentioned for the original claimant to pursue any person who was not a party to the first trial. This Act does not prevent such a suit, but neither does it attempt to resolve any of the legal issues that might arise in that situation.

The present section does not govern the situation under Section 5(b) where reallocation may occur. The rights of the parties eventually to recover from an insolvent party, whose share of responsibility has been reallocated, are explicitly preserved in Section 5(c).

SECTION 8. EFFECT OF RELEASE.

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

(b) The amount of the claim of the releasing person under subsection (a) against other persons jointly and severally liable for the same injury or harm for which the released person would have been liable is reduced by the percentage of responsibility attributed to the released person pursuant to Section 4.

(c) A release, covenant not to sue, covenant not to execute a judgment, or similar agreement extinguishes any claim for contribution or indemnity that the released person would have had against another person that would have been jointly and severally liable with the released person.

Comments

This provision was contained in the Uniform Comparative Fault Act (1977) and, although rewritten here, no substantive change was made. Section 4 specifically contemplates that any released person's fault will be an issue in the continuing litigation between the claimant and parties that are not released. The effect of the release is determined by whatever share of responsibility is ultimately assessed against the released person. Parties that are not released are not responsible for the share of a released person. The claimant, by entering into a release for whatever consideration that the released person paid to the claimant, is barred from collecting any share of responsibility that is ultimately attributed to the released person in the ongoing litigation.

The released person is not only no longer subject to liability to the claimant but, by virtue of the release, is no longer subject to a claim of contribution by a person who is not released. By the same token, any claim that a released person would have had against another person who would have been jointly and severally liable with the released person is extinguished by the release.

[SECTION 9. REDUCTION OF WORKERS' COMPENSATION LIEN AND SUBROGATION RIGHT; NOTICE AND INTERVENTION.

(a) If an employer or workers' compensation insurer asserts a lien or right of subrogation under [insert citation to workers' compensation statute that provides for an employer's or workers' compensation insurer's lien or right of subrogation for compensation benefits paid or payable to an employee when the employee has a tort action for personal injury against a third party], the employer or insurer is deemed to have had its obligation to the employee for the compensation benefits paid or payable discharged under Section 8 as if the employer or insurer had received a release, covenant not to sue, or covenant not to execute a judgment from, or entered a similar agreement with, the employee. In such a case, any percentage of responsibility that the employer would have had for the employee's injury, were the employer not immune under the workers' compensation law, must be determined as that of a released person pursuant to Section 4 and the lien or right of subrogation is reduced by the

monetary amount of the employer's percentage of responsibility, if any, in the employee's action against the third party.

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

Legislative Note: If this section is not enacted as part of this Act but is enacted as an amendment to the workers' compensation statutes, the cross references to Section 8 and to Section 4 in subsection (a) need to be reworded to accurately refer to the respective sections of this Act.

Comments

This section implements a decision to treat an employer's fault, when the employer or its insurer is exercising a workers' compensation lien or subrogation right, as if the employer had obtained a release from the employee for the dollar amount of the percentage of fault of the employer that contributed to the employee's injury or harm.

For example, assume that an employee is injured by X, another motorist, while the employee is driving a truck for her employer. The employee collects \$30,000 in workers' compensation benefits from her employer and then files a tort action for her personal injuries against X. In the trial of the tort action it is determined that X was 80 percent at fault for failing to keep a proper lookout and the employer was 20 percent at fault in failing to properly maintain the brakes on the truck. In addition, the employee's total damages are assessed at \$100,000 in the tort action. Since the employer was 20 percent at fault, its share of responsibility is \$20,000. Thus, under the Act the lien or subrogation right arising from the payment of the compensation benefits is reduced by \$20,000, leaving only \$10,000 that may be recouped by the employer or its workers' compensation carrier from the \$80,000 to be paid by X to the employee. On the other hand, if the employer had not been at fault at all and the employee had been 20 percent at fault, the employer or its compensation carrier would be entitled to recoup the full \$30,000 in compensation benefits from the \$80,000 owed by X to the employee.

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

The reason the section is placed in brackets is because it would not be legally possible in some states to amend the workers' compensation statute in this manner. Rather, the amendment would have to be to the workers' compensation statute itself and not through collateral legislation such as this Act. Even if it were legally possible, a number of state legislative drafting offices have similar rules that prohibit such indirect methods of amending statutes. If either situation exists in an adopting state, Section 9 will need to be deleted in this Act and incorporated into an amendment to the workers' compensation statute. Subsequent sections of this Act would then need to be renumbered accordingly.

SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

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

SECTION 12. APPLICABILITY. This [act] applies to actions originally filed on or after its effective date.

SECTION 13. EFFECTIVE DATE. This [act] takes effect on

SECTION 14. REPEALS. The following acts and parts of acts are repealed:

(1)

(2)

(3)