

D R A F T  
FOR DISCUSSION ONLY

## **UNIFORM APPORTIONMENT OF TORT RESPONSIBILITY ACT**

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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MEETING IN ITS ONE-HUNDRED-AND-TENTH YEAR  
WHITE SULPHUR SPRINGS, WEST VIRGINIA  
AUGUST 10–17, 2001

## **UNIFORM APPORTIONMENT OF TORT RESPONSIBILITY ACT**

*WITH PREFATORY NOTE AND REPORTER'S NOTES*

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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**UNIFORM APPORTIONMENT OF  
TORT RESPONSIBILITY ACT**

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1                                   **UNIFORM APPORTIONMENT OF**  
2                                   **TORT RESPONSIBILITY ACT**

3                                   **PREFATORY NOTE**

4                   Apportionment of tort responsibility, the subject that the Drafting  
5                   Committee has been charged to address, is a familiar one to the National Conference  
6                   of Commissioners on Uniform State Laws. In fact, the Conference has promulgated  
7                   three acts dealing with this subject. The first, denominated the Uniform  
8                   Contribution Among Joint Tortfeasors Act, was completed in 1939. That Act was  
9                   superseded by a revised version bearing the same name in 1955. A third version –  
10                  the Uniform Comparative Fault Act – was promulgated in 1977, but, unlike the  
11                  1955 version, it did not supersede its predecessor. Because approximately one-third  
12                  of the States in the 1970s had not adopted comparative fault, it was decided to leave  
13                  the Uniform Contribution Among Joint Tortfeasors Act (1955) for possible use by  
14                  those jurisdictions. However, it was recommended that the other jurisdictions  
15                  embracing comparative fault adopt the newly promulgated Uniform Comparative  
16                  Fault Act. Given the state of the law today, it is contemplated that the work  
17                  product of the Committee will replace both the Uniform Contribution Among Joint  
18                  Tortfeasors Act (1955) and the Uniform Comparative Fault Act (1977).

19                               **The Early Common Law and Subsequent Developments**

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

35                  Initially, courts broadened the scope of procedural joinder from those  
36                  situations where multiple defendants had acted in concert to include situations where  
37                  the defendants were alleged to have a common duty, although, strictly speaking, not

1 acting in concert. As early as the 1920s, and certainly by World War II, some  
2 courts had begun to allow joinder of multiple tortfeasors even though they had  
3 engaged in independent acts that did not involve a common duty or had not acted in  
4 concert. This move was reflected in and encouraged through the newly adopted  
5 Federal Rules of Civil Procedure which took place in 1938. Once joinder was more  
6 freely permitted, the issue of joint and several liability was bound to be brought into  
7 greater relief.

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

## 25 The Legislative Response and Uniform Acts

26 As the developments described above unfolded, the Uniform Laws  
27 Conference responded by drafting a uniform law dealing with contribution among  
28 joint tortfeasors. This act, which as previously stated was promulgated in 1939, did  
29 not attempt to determine when multiple tortfeasors would be held jointly and  
30 severally liable. Rather, it took the position, once multiple tortfeasors were  
31 determined to be jointly and severally liable, that certain rights of contribution

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

1 <sup>2</sup> *Id.* at 275.

1 existed and addressed how those rights were effected. The Act also attempted to  
2 resolve related issues such as the effect of settlements among those tortfeasors who  
3 were subjected to joint and several liability. Although this Act was enacted by a  
4 number of States, it was so extensively amended in the process that the goal of  
5 uniformity was not achieved. Part of the problem was that the 1939 Act contained  
6 elaborate provisions addressing procedures for joinder. In addition, it came under  
7 criticism with regard to the provisions dealing with the legal effect of a settlement by  
8 one joint tortfeasor upon the rights of the plaintiff and the rights of the nonsettling  
9 tortfeasors. In the meantime, many States independently passed other legislation  
10 that also proved to be problematic. This unsatisfactory situation caused the  
11 Conference to take up the subject again in the 1950s.

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

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

36           Suffice it say at this point, the Uniform Comparative Fault Act did not alter  
37 the basic rule of joint and several liability where joint tortfeasors acted in concert,  
38 breached a common duty, or otherwise were legally responsible for indivisible harm.  
39 Although fault was to be compared among all the parties responsible for the harm  
40 and assessed accordingly on a percentage basis, joint and several liability was

1 retained. Contribution, however, was to be based upon the percentages assessed  
2 among the defendants, not on a *pro rata* basis as was the case under the Uniform  
3 Contribution Among Joint Tortfeasors Act (1955). Among other features not  
4 contained in the 1955 Act, the Comparative Fault Act provided for reallocation of  
5 responsibility in cases where one or more joint tortfeasors were unable to satisfy the  
6 damage award assessed and attempted to deal with the set off problem in cases  
7 involving counter claims under the pure comparative fault system. Although the  
8 1977 drafting effort by the Conference, which was chaired by Professor John Wade,  
9 provided a state-of-the-art product at that time much has changed in the interim,  
10 particularly with regard to apportionment of tort responsibility. In the main, what  
11 are these changes?

### 12 **Developments Since the Uniform Comparative Fault Act (1977)**

13 In 1977 approximately two-thirds of the States had adopted comparative  
14 fault. Today, all but five jurisdictions<sup>3</sup> in the United States have adopted some type  
15 of comparative fault system. Of the 46 States that have adopted some form of  
16 comparative responsibility, 10 have been by judicial decision and 36 by legislation.  
17 Although seven of the 10 States in which comparative responsibility has been  
18 *judicially* adopted have opted for a pure scheme (in which a plaintiff who is far  
19 more negligent than the defendant may still recover), only six of the 36 States in  
20 which comparative responsibility has been *legislatively* adopted have chosen the  
21 pure system. A majority of the States that have adopted a comparative  
22 responsibility scheme, i.e., 33 out of 46 have chosen a modified scheme. Two-thirds  
23 of these – 22 out of 33 – have chosen a 51 percent threshold, while the other 11  
24 have adopted a 50 percent threshold. Three States have replaced their original pure  
25 schemes with modified schemes, and none has gone the other way. Thus, the clear  
26 trend has been toward the modified approach, which is in contrast to the Uniform  
27 Comparative Fault Act which employs a pure comparative fault scheme. Moreover,  
28 only two States have adopted the Uniform Act, and one of these recently repealed it  
29 in favor of a modified system.

30 If this were the end of the story, perhaps there would be no need for this  
31 drafting project, but the story does not end here. Once the great majority of  
32 jurisdictions adopted some type of comparative fault system that compared the fault  
33 not only of plaintiffs with defendants, but also compared the fault among defendants  
34 in a multiple tortfeasor situation, inevitably another question arose. In particular,  
35 defendants began to question the justice of joint and several liability when it has

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1 <sup>3</sup> The five jurisdictions that have not adopted a comparative responsibility  
2 system are the States of Alabama, Maryland, North Carolina, and Virginia and the  
3 District of Columbia.

1 been determined that each defendant in a multiple tortfeasor situation is only  
2 responsible for causing a certain percentage of the harm to the claimant. The  
3 question became even more acute when defendants pointed out that in many of  
4 these cases the claimant had also been assigned a certain percentage of responsibility  
5 for the harm that had resulted. Thus, it was not long before legislatures, and even  
6 courts, were persuaded to revisit the issue of allocating responsibility among joint  
7 tortfeasors. In doing so, further changes have occurred since 1977.

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

18 In those jurisdictions that have not completely abolished joint and several  
19 liability outside of the two areas mentioned above (acting in concert and  
20 environmental harm), a number of different approaches have been taken to limit joint  
21 and several liability. For example, some jurisdictions still permit joint and several  
22 liability for economic loss, but do not permit such for non-economic loss. Other  
23 jurisdictions do not allow a tortfeasor that is determined to be less than a certain  
24 percentage at fault, say 20 percentage, to be held jointly and severally liable with  
25 other tortfeasors whose individual responsibility is determined to be in excess of that  
26 figure. Still another variation is seen in those jurisdictions that, although initially  
27 prohibiting joint and several liability, permit claimants to show that a judgment  
28 entered severally against multiple defendants is not capable of being satisfied on that  
29 basis. Upon such as showing, a court may be permitted to reallocate the non-paying  
30 judgment debtor's obligation to others adjudged responsible for a portion of the  
31 harm suffered.<sup>4</sup>

32 The reallocation process may take one of several forms. For example, it may  
33 just reallocate the non-paying judgment debtor's portion among the remaining

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



1 judgment debtors. Or, it may take into account any contributory fault on the part of  
2 the plaintiff so that the allocation of responsibility itself is revised to take into  
3 account the relatively greater responsibility of the claimant once the responsibility of  
4 a non-paying judgment debtor is eliminated from the equation.

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

#### 19 **Current Issues to be Addressed**

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

- 25 1. The Uniform Comparative Fault Act (UCFA) embraces a pure system of  
26 comparative fault. Most States have adopted some form of modified  
27 comparative fault. Which system should the Committee adopt?
- 28 2. The UCFA retains joint and several liability despite the fact that responsibility  
29 is apportioned among the responsible parties on a percentage basis. Should the  
30 Committee retain joint and several liability and, if so, to what extent?

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

- 1           3. What should be done about non-parties at fault? Should the fault of a person  
2           who is not subject to the jurisdiction of the court or otherwise not made a party  
3           to the litigation be taken into account?
- 4           4. Assuming that joint and several liability is limited in some manner, to what  
5           extent should reallocation be allowed where one among several joint tortfeasors  
6           is unable to satisfy all or part of an assessed award of damages?
- 7           5. Assuming that joint and several liability is retained to some extent, what  
8           rights of contribution and/or indemnity should be recognized?
- 9           6. To what type of actions should the statute apply? All tort actions? All  
10          personal injury actions? Only actions seeking compensation for bodily injury,  
11          including death, and physical harm to property?
- 12          7. In comparing fault, how should “fault” be defined? Should it include  
13          intentional wrongdoing and, if so, in what situations?
- 14          8. Depending on the answers to one or more of the above questions, what  
15          should be the legal effect of a settlement by one or more joint tortfeasors on the  
16          rights of the parties or other affected persons?
- 17                Although this list of issues is certainly not exhaustive, it does provide the  
18                point from which the Committee began its work. The fourth tentative draft, set out  
19                below, represents the Committee’s current thinking on these issues.

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**UNIFORM APPORTIONMENT OF  
TORT RESPONSIBILITY ACT**

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

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

**[Alternative A]**

- (1) “Fault” includes:
- (A) an act or omission that:
    - (i) is in any degree negligent or reckless toward a person or property,  
including the person or property of the actor; or
    - (ii) subjects a person to strict liability in tort;
  - (B) breach of warranty;
  - (C) unreasonable assumption of risk, unless the actor has expressly  
agreed to assume the risk;
  - (D) misuse of a product; and
  - (E) unreasonable failure to avoid injury or to mitigate damages.

**[Alternative B]**

(1) “Fault” includes an act or omission that creates an unreasonable risk of  
harm to a person or property, including the person or property of the actor, and  
conduct which subjects a person to strict liability in tort or for breach of warranty.

The term does not include express assumption of risk, such as a legally enforceable release or similar agreement.

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

## Reporter's Notes

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

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

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

Alternative B is a much more succinct definition of fault and arguably is no less comprehensive than Alternative A. It includes negligent acts or omissions, regardless of how slight or exacerbated, and does not exclude more aggravated forms of culpable conduct such as conscious indifference and intentionally inflicted harm. Some feel that there is no longer any need to make specific reference to unreasonable assumption of risk or the doctrine of avoidable consequences, since each is subsumed under the concept of unreasonable risk enunciated in the first

1 sentence of Alternative B. Thus, the Drafting Committee is seriously considering  
2 using the more succinct definition of fault, but have included both for purpose of  
3 obtaining comments at the Annual Meeting.

4 The definition of “person” employees the standard language found in the  
5 NCCUSL Drafting Manual.

### 6 **SECTION 3. EFFECT OF CONTRIBUTORY FAULT.**

#### 7 **[Alternative A]**

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

#### 12 **[Alternative B]**

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

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

#### 21 **Reporter’s Notes**

22 Two basic issues are raised by the alternative provisions. Should the Act  
23 adopt a pure comparative fault system, as did the 1977 Act, or a modified system,  
24 such as most jurisdictions have done since the 1977 Act was promulgated? If it is to  
25 be a modified system, what should the threshold be – 50 percent or 51 percent or  
26 some other figure? Alternative A perpetuates the pure type of system, whereas

1 Alternative B adopts the so-called modified system. If a jurisdiction were to choose  
2 an “equal to” threshold, i.e., where a claimant who is 50 percent or more at fault is  
3 precluded from recovering any damages, the brackets in subsection (b) should be  
4 deleted. However, if the jurisdiction were to choose a “greater than” threshold, i.e.,  
5 where a claimant would not be precluded from recovering unless the claimant’s fault  
6 exceeded that of the others causing the injury or harm, then both the brackets and  
7 words within should be deleted.

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

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

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

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

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

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

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

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

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

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

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

## Reporter's Notes

The basic structure of this section is taken from the 1977 Act, but it goes beyond that Act. Except for the situation where a joint tortfeasor settles with a

1 claimant, the 1977 Act did not attempt to take into account the conduct of persons  
2 who were at fault in causing a claimant's injuries but who could not be made a party  
3 to the claimant's law suit. This draft adds one more category to the nonparty at  
4 fault situation. In addition to any fault of a settling tortfeasor, the trier of fact is  
5 required in the appropriate situation to consider the fault of any person who is  
6 legally immune from liability. Depending on the jurisdiction, this category could  
7 include such persons as governmental and charitable entities and any other potential  
8 defendants that have received immunity from tort liability under the common law or  
9 through legislation. This category, however, does not include an employer or any  
10 other person that is immune from tort liability because of workers' compensation  
11 legislation. The situation regarding an employer's or workers' compensation  
12 insurer's lien and subrogation rights is addressed in Section 10.

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

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

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

## 29 **SECTION 5. DETERMINING DAMAGES; REALLOCATING**

### 30 **IMMUNE NONPARTY'S FAULT; ENTERING JUDGMENT.**

31 (a) After the trier of fact has made findings pursuant to Section 4, subject to  
32 subsection (b) the court shall determine the award of damages to each claimant in  
33 accordance with the percentage of fault found and enter judgment for that amount



1 against each party adjudged liable on the basis of several liability, except in the  
2 following situations:

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

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

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

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

19 **Reporter's Notes**

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

23 The 1977 Uniform Act provided for a pure comparative fault system and  
24 retained joint and several liability. Regardless of whether a jurisdiction were to

1 choose a pure comparative fault system or a modified system, this section, save only  
2 a few situations, provides for several liability as the general rule. Where parties act  
3 intentionally or in concert to harm another, joint and several liability is retained.  
4 These were the exceptions to several liability first recognized under the common  
5 law.

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

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

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

29 **SECTION 6. SATISFACTION OF JUDGMENT; REALLOCATION OF**  
30 **UNCOLLECTIBLE SHARE.**

31 (a) Except as otherwise provided in subsection (b) or unless judgment is  
32 entered awarding damages under the rules of joint and several liability in Section 5,

1 a judgment creditor may proceed to satisfy the judgment against each judgment  
2 debtor only on the basis of several liability.

3 (b) Upon motion made not later than [one year] after judgment is entered, a  
4 claimant may petition the court to determine whether all or part of a party's  
5 percentage share of several liability is uncollectible from that party. If the court  
6 determines based on a preponderance of the evidence that the party's share is not  
7 collectible, the court shall reallocate the uncollectible amount to the other parties,  
8 including a claimant at fault and any nonparty at fault, and authorize the claimant to  
9 satisfy the judgment from the other parties to the extent of the reallocation.

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

13 (c) Upon filing a petition for reallocation, a claimant may seek to discover  
14 evidence regarding the financial condition of the party that is allegedly unable to  
15 satisfy the several share for which the party has been adjudged liable.

16 (d) Any relief granted under this section does not relieve the party whose  
17 liability is reallocated of any continuing liability to the claimant on the judgment or  
18 of any obligation of contribution to the other parties.

### 19 **Reporter's Notes**

20 This section begins by restating the general rule under the Act that liability is  
21 to be adjudged on a several basis unless one of the exceptions under Section 5 is  
22 satisfied. More importantly, subsection (b) creates a right of reallocation where a  
23 party adjudged severally liable is unable to satisfy that liability. At this point, the  
24 Drafting Committee has not decided whether it needs to define in any manner what  
25 is meant by uncollectible, but the section clearly places the burden of proof on the

1 claimant. In that regard, subsection (c) makes it clear that discovery is available  
2 under the general rules of civil procedure in the adopting State to aid the claimant in  
3 discharging this burden.

4 Reallocation, where granted by the court, must be among all the parties,  
5 including the claimant, if at fault, and any nonparty at fault. Where the claimant is at  
6 fault too, this method produces a different result than that under the rule of joint and  
7 several liability. For example, if the fault findings in the original litigation showed  
8 that the claimant was 20 percent at fault and that two defendants were each 40  
9 percent at fault, by reallocating one of the defendant's percentage share of liability,  
10 the claimant would only be able to recover 66.7 percent of his or her damages from  
11 the lone solvent defendant rather than 80 percent (which would be the case if the  
12 defendants were originally adjudged jointly and severally liable). In other words,  
13 under a reallocation system that takes a claimant's fault into account, the claimant  
14 ends up with a larger share of fault to shoulder than would be the case under the  
15 rule of joint and several liability.

16 **SECTION 7. SETOFF.** A claim or counterclaim may not be set off against  
17 the other except by agreement of the parties. However, on motion, if the court finds  
18 that the obligation of either party is likely to be uncollectible, the court may order  
19 that both parties make payment into the court for distribution. The court shall  
20 distribute the money received and declare obligations discharged as if the payment  
21 into the court by either party had been a payment to the other party and any return  
22 of those funds to the party making payment had been a payment to that party by the  
23 other party.

24 **Reporter's Notes**

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

28 **SECTION 8. RIGHT OF CONTRIBUTION.** A party that is subject to  
29 liability under Section 6(b) for more than the party's share of liability assessed under

1 Section 5 or jointly and severally liable with one or more other parties upon the  
2 same indivisible claim for the same injury may seek contribution from the other  
3 parties for any amount the party has paid in excess of the several amount for which  
4 the party is responsible. The claim may be asserted in the original action or in a  
5 separate action.

6 **Reporter's Notes**

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

10 If the reallocation approach under subsection (b) of Section 6 is adopted  
11 (which requires a party upon reallocation to pay more than the original share  
12 assessed against the party), it is advisable to have an explicit reference in Section 8  
13 to ensure that the right of contribution extends to that situation. Thus, the language  
14 in the first sentence referring to such liability recognizes and assures that right of  
15 contribution.

16 **SECTION 9. EFFECT OF RELEASE.** A release, covenant not to sue,  
17 covenant not to execute a judgment, or similar agreement by a claimant and person  
18 subject to liability discharges the person from liability to the claimant to the extent  
19 provided in the agreement and from liability for contribution to any other person  
20 subject to liability to the claimant for the same injury. The agreement does not  
21 discharge any other person subject to liability upon the same claim unless the  
22 agreement so provides. The claim of the releasing person against other persons  
23 liable for the same injury for which the released person would have been liable must  
24 be reduced by the amount of the released person's several share of the obligation,  
25 determined pursuant to Section 4.

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**Reporter’s Notes**

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

**[SECTION 10. WORKERS’ COMPENSATION LIEN AND**

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

**Reporter’s Note**

This section attempts to implement a decision of the Drafting Committee to treat an employer’s fault, when the employer is exercising a workers’ compensation lien or subrogation right, as if the employer had given a release to 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 a third-party motorist while the employee is driving a truck for his employer. The employee collects \$30,000 in workers’ compensation benefits from her employer and then files a third-party tort action against the driver of the other car. In the trial of the tort action it is determined that the third-party motorist was 80 percent at fault and the nonparty employer was 20 percent at fault in failing to properly maintain the truck. In addition, the employee’s total damages are assessed at \$100,000. 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 from the \$80,000 to be paid by the motorist to the employee.

1           The reason the section is placed in brackets is because it would not be legally  
2 possible in some States to amend the workers' compensation in this manner.  
3 Rather, the amendment would have to be to the workers' compensation statute itself  
4 and not through collateral legislation such as this Act. Even if it were legally  
5 possible, a number of state legislative drafting offices have similar rules that prohibit  
6 such indirect methods of amending statutes. If either situation exists in an adopting  
7 State, Section 10 will need to be deleted in this Act and incorporated into an  
8 amendment to the workers' compensation statute. Subsequent sections of this Act  
9 would then need to be renumbered accordingly.

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

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

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

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

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

2                   (1)

3                   (2)

4                   (3)