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Loss Allocation and Reallocation in Minnesota: A Road in Need of Repair [Hosley v. Armstrong Cork Co., 383 N.W.2d 289 (Minn. 1986) and Frederickson v. Alton M. Johnson Co., 390 N.W.2d 787 (Minn. 1986)]

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COMMENTS

LOSS ALLOCATION AND REALLOCATION IN MINNESOTA: A ROAD IN NEED OF REPAIR

[*Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289 (Minn. 1986) and
Frederickson v. Alton M. Johnson Co., 390 N.W.2d 787
(Minn. Ct. App. 1986)]

INTRODUCTION

Allocation of the cost of an injury is a societal concern increasingly in the public consciousness.¹ Throughout the historical development of the law, litigants, the courts, and legislatures have struggled with the problem of how to equitably apportion the cost of injury where that injury has been "caused" by another.² The struggle is particularly acute when the injured person has contributed to the injury along with multiple tortfeasors.³ The evolution of Minnesota law is a graphic example. The Minnesota legislature enacted a statutory scheme in 1978 designed to reallocate uncollectible loss.⁴ An examination of the loss reallocation statute, its recent judicial inter-

1. Across America it assumes various forms and goes by various names. In the state legislatures it is known as tort reform. See Tort Reform Act of 1986, ch. 455, 1986 Minn. Laws 840; compare Wright, *Why Tort Reform is Needed*, 43 BENCH & B. MINN. 20 (March 1986) (the current tort system resembles a lottery rather than a compensation system) with Steenson, *Is Tort Reform in Minnesota Justified?*, 43 BENCH & B. MINN. 21 (March 1986) (the proposed changes will not solve any problems of the perceived crisis). See, e.g., Church, *Sorry Your Policy Is Cancelled*, TIME, Mar. 24, 1986, at 16.

2. See generally James, *Contributory Negligence*, 62 YALE L.J. 691 (1953) (examining the historical underpinnings and policy reasoning behind the rule of contributory negligence as a bar to recovery); Lambert, *The Common Law is Never Finished (Comparative Negligence on the March)*, 32 A.T.L. L.J. 741 (1968) (advocating the replacement of contributory negligence with comparative fault); Leflar, *The Declining Defense of Contributory Negligence*, 1 ARK. L. REV. 1 (1946-47) (examining the evolution of the contributory negligence rule); Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413 (1937) (defining joint and several liability); Steenson, *The Fault with Comparative Fault: The Problem of Individual Comparison in a Modified Comparative Fault Jurisdiction*, 12 WM. MITCHELL L. REV. 1 (1986) (advocating a unit rule for comparison of fault between a plaintiff and several defendants in a modified comparative fault jurisdiction); Note, *Contribution and Indemnity - An Examination of the Upheaval in Minnesota Tort Loss Allocation Concepts*, 5 WM. MITCHELL L. REV. 109 (1979) (examining contribution and indemnity in the context of comparative fault in Minnesota).

3. See generally Steenson, *supra* note 2.

4. Act of April 5, 1978, ch. 738, § 8, 1978 Minn. Laws 836, 840 (codified at MINN. STAT. § 604.02 (1978)).

pretation, and how the two interface with the pre-existing law presents an opportunity for critical examination of the working of the entire loss allocation system.

This Comment begins with an examination of the development of loss allocation principles in Minnesota. A brief overview is given of the evolution of settlement and release within the context of joint and several liability, and of comparative fault. Next comes a summary of the judicial analysis of subdivisions 2 and 3⁵ of Minnesota Statutes section 604.02 in *Hosley v. Armstrong Cork Co.*,⁶ and *Frederickson v. Alton M. Johnson Co.*⁷ These summaries are followed by the author's analysis of the net effects of these statutory provisions, as interpreted by *Hosley* and *Frederickson*, upon current tort law in the personal injury and products liability fields. Finally, the Comment recommends clarifications and changes needed to effectuate the policies and principles intended by the rules.

I. THE HISTORY OF THE CONFLICTING POLICIES

A. Settlement and the Pierringer Release

Out of court settlements are favored in the law.⁸ They compensate the victim, more fairly allocate the cost of injury among the responsible parties, and decrease the cost of dispute resolution.⁹ Minnesota courts have consistently supported and encouraged settlement.¹⁰

Despite the advantages of settlement in the classic scenario of one plaintiff versus one defendant, the common law rendered harsh results where joint or co-tortfeasors were involved.¹¹ Pursuant to old common law principles, the effect of giving a release to a defendant was to surrender an entire cause of action.¹² Hence, the release of one tortfeasor was the release of all.¹³

The Minnesota Bar has created various devices to circumvent the

5. Minnesota Statutes section 604.02 was first codified in 1978. It has not been amended since its initial enactment.

6. 383 N.W.2d 289 (Minn. 1986).

7. 390 N.W.2d 786 (Minn. Ct. App. 1986).

8. *E.g.*, *Schmidt v. Smith*, 299 Minn. 103, 107, 216 N.W.2d 669, 671 (1974); *Employers Mut. Casualty Co. v. Chicago, St. P. M. & O. Ry.*, 235 Minn. 304, 314, 50 N.W.2d 689, 695 (1951).

9. *See generally* Simonett, *Release of Joint Tortfeasors: Use of the Pierringer Release in Minnesota*, 3 WM. MITCHELL L. REV. 1 (1977).

10. *See, e.g.*, *Schmidt*, 299 Minn. at 107, 216 N.W.2d at 671; *Employers Mut. Casualty Co.*, 235 Minn. at 314, 50 N.W.2d at 695.

11. *See* Simonett, *supra* note 9, at 12.

12. For a detailed examination of the development of this rule, see Prosser, *supra* note 2, at 421-25.

13. *Id.*

harshness of this rule. These include the covenant not to sue,¹⁴ high-low agreements,¹⁵ and loan receipts.¹⁶ Minnesota is a joint and several liability jurisdiction,¹⁷ however, and none of these devices afford either party adequate protection. This was particularly true after 1969 and the advent of comparative negligence.¹⁸ Settling defendants desire a complete release in exchange for settlement proceeds. A covenant not to sue leaves the settling defendant vulnerable to a claim for contribution from a non-settling defendant.¹⁹ Yet, the plaintiff cannot release the settling defendant without risking loss of

14. A covenant not to sue is an agreement between a plaintiff and a settling joint tortfeasor. The plaintiff agrees not to commence or continue "prosecution of any action based upon a disputed claim" in return for a specified sum of money. *See, e.g.,* Gronquist v. Olson, 242 Minn. 119, 121, 64 N.W.2d 159, 161-62 (1954); Joyce v. Massachusetts Real Estate Co., 173 Minn. 310, 311-12, 217 N.W. 337, 338 (1928); Musolf v. Duluth Edison Elec. Co., 108 Minn. 369, 377, 122 N.W. 499, 502 (1909). The agreement need not reserve the right to sue other joint tortfeasors for that right to be effective. The reservation of that right is, however, important in determining whether the parties to the covenant intended to preserve those other claims or whether they intended complete settlement of plaintiff's entire claim, thereby releasing the other joint tortfeasors as well. *See Joyce*, 173 Minn. at 312-13, 217 N.W. at 338-39. *Contra Musolf*, 108 Minn. at 375-76, 122 N.W. at 502 ("reservation of the right to sue other joint tort-feasors is obviously necessary to a covenant not to sue"). A covenant not to sue does not protect a settling tortfeasor from the later contribution claims of other joint tortfeasors. *See Employers Mut. Casualty Co.*, 235 Minn. at 314, 50 N.W.2d at 695.

15. In a high-low agreement, a plaintiff and defendant set minimum and maximum limits on the ultimate award regardless of the jury verdict or arbitration award. The defendant pays the minimum amount at the time of settlement, the remainder to be paid at the time of the verdict or arbitration award. *See Finz, A Trial Where Both Sides Win*, 59 JUDICATURE 41, 42 (June-July 1975); Robinson, *High-Low Arbitration - A Settlement Technique*, 11 FORUM 476, 476-77 (1976).

16. A loan receipt involves settlement through the use of a noninterest loan. The settling defendant loans an interest free sum of money to the plaintiff. In return, the plaintiff agrees to pursue claims against the non-settling defendants and promises to repay the loan from any judgment obtained against the non-settling defendants. The plaintiff is not obligated to repay the loan from any portion of a judgment exceeding the amount of the loan. *See, e.g.,* Reese v. Chicago, Burlington & Quincy R.R., 5 Ill.2d 356, 358, 303 N.E.2d 382, 383-84 (1973).

17. "Joint and several liability" is a concept that originated in two separate doctrines. "Joint tortfeasors" whose common enterprise or conspiracy caused injury were each liable for the plaintiff's entire loss. Prosser, *supra* note 2, at 414. As procedural rules were liberalized, merely concurrent tortfeasors could be joined causing "joined" and "joint" to become confused. *Id.* at 420-22. The result was joint and several liability as we know it today: where the acts of two or more persons converge to cause harm, each is jointly and severally liable for the entire loss. *Id.*

18. Act of May 23, 1969, ch. 624, § 1, 1969 Minn. Laws 1069 (codified at MINN. STAT. § 604.01 (1986)). For a detailed examination of the development of comparative fault in Minnesota, see generally Note, *The Scope of Comparative Fault in Minnesota*, 9 WM. MITCHELL L. REV. 299 (1984).

19. *See generally* Note, *supra* note 18.

her claims against the remaining defendants.²⁰ It was not until 1978 and the judicial endorsement of the *Pierringer*²¹ release that an equitable balance was struck.²²

The *Pierringer* release, named after the Wisconsin case that endorsed its use, is designed to effectively cut off the liability of a settling joint defendant-tortfeasor.²³ It preserves the remainder of the plaintiff's claim against the remaining defendants²⁴ and guarantees that the non-settling defendant tortfeasor will not pay more than its "fair share" of the damages.²⁵ The release consists of three parts: (1) release of the settling defendant by discharge of that part of the cause of action equal to the settling defendant's causal fault; (2) reservation by the plaintiff of "the balance of the whole cause of action" against the non-settling joint tortfeasors; and (3) an indemnification agreement whereby the plaintiff indemnifies the settling defendant from any claims of contribution made by the non-settling parties.²⁶ The *Pierringer* release modifies the rule of joint and several liability to allow piecemeal settlement of suits.²⁷ In effect, it allows the parties to sever the total cause of action into segments of individual fault, each defendant being assured that it will pay no more than its agreed proportion of the total damage.

The parties entering into a *Pierringer* release accept the risk that their calculation of the fault distribution and the total damage may differ from what is ultimately determined, to the detriment of one party or the other.²⁸ Courts have upheld such agreements,²⁹ noting

20. *Id.*

21. *Pierringer* releases were named after the Wisconsin case in which they were first judicially recognized, *Pierringer v. Hoyer*, 21 Wis. 2d 182, 124 N.W.2d 106 (1963). Its use was endorsed in Minnesota in *Frey v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978).

22. For a thorough discussion of the theoretical basis for and operation of the *Pierringer* release, see generally Simonett, *supra* note 9.

23. *Id.* at 3-4.

24. *Id.*

25. *See id.*

26. *Id.* at 3.

27. *Id.* at 9.

28. The settling parties take the calculated risk that their assessment of the value of the total damages and their assessment of the settling tortfeasor's degree of fault is reasonably accurate. *Frederickson v. Alton M. Johnson Co.*, 390 N.W.2d 786, 789 (Minn. Ct. App. 1986) provides a good example of the import of a miscalculation. The plaintiff settled with defendant Hunt on a *Pierringer* release prior to trial. Frederickson received \$20,000 in return for the release of Hunt. The jury awarded total damages of \$800,000 and assigned Hunt 40 percent of the fault. Thus, Hunt had paid \$20,000 for release of its \$320,000 share. A defendant, of course, faces the same risk in reverse.

29. *See, e.g., Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289, 294 (Minn. 1986); *Lange v. Schweitzer*, 295 N.W.2d 387, 390 (Minn. 1980).

that the risk was contemplated as part of the bargain.³⁰ Joint and several liability between all defendants remains.³¹ An injured plaintiff is not compelled to enter into this modification of the rule. The risk that the plaintiff will miscalculate the fault allocation, and end up less than fully compensated, is one undertaken voluntarily.

B. *Comparative Fault and Loss Reallocation*

At common law, any negligence on the part of an injured person that contributed to an injury served as a complete bar to recovery of damages.³² This was true no matter how disparate the degrees of fault; if an injured plaintiff was found to be five percent at fault in causing injury, even though another party was ninety-five percent at fault, the plaintiff could not maintain a cause of action.

The harsh effects of such a rule are obvious. The Minnesota Legislature responded in 1969 with the enactment of the Comparative Negligence Statute,³³ modeled after Wisconsin law.³⁴ For the first time, negligence of a plaintiff contributing to her own injury was not a total bar to recovery. A plaintiff was allowed to recover damages where her contributory negligence was less than that of a defendant.³⁵

It soon became evident that the statutory enactment was not drafted broadly enough. As the area of products liability developed, courts were faced with new legal theories, such as strict liability for defective products, which did not fit within the current statutory scheme.³⁶ In response, the Minnesota Legislature enacted the Com-

30. *Hosley*, 383 N.W.2d at 294.

31. *Id.* at 292; *cf. Lange*, 295 N.W.2d at 390 (plaintiff who had released defendant on a *Pierringer* release was obligated to satisfy the contribution claims of the non-settling defendants; joint and several liability, a prerequisite for a contribution claim, is impliedly retained).

32. See RESTATEMENT (SECOND) OF TORTS § 467 (1965) (bar against negligent defendant). See generally Leflar, *supra* note 2; Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674 (1934).

33. Act of May 23, 1969, ch. 624, 1969 Minn. Laws 1069 (codified as amended at MINN. STAT. § 604.01 (1986)). Subdivision 1 of the statute reads:

Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering When there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each, provided, however, that each shall remain jointly and severally liable for the whole award.

Id.

34. Compare MINN. STAT. § 604.01 with WIS. STAT. ANN. § 895.045 (West 1983).

35. MINN. STAT. § 604.01.

36. See, e.g., *Busch v. Busch Constr. Inc.*, 262 N.W.2d 377, 393 (Minn. 1977)

parative Fault Act of 1978. The 1978 Act made three changes in Minnesota law. First, it increased the scope of the former statute by providing for a comparison of fault rather than negligence.³⁷ The change significantly expanded the theories of recovery and defenses subject to comparison. Second, the Act adopted a modified form of comparative fault already in use in Wisconsin.³⁸ Rather than bar a claimant from recovery if her fault equaled or exceeded that of the person from whom recovery is sought, the statute now provides that a claimant is not barred from recovery unless her fault is greater than the fault of the person from whom recovery is sought.³⁹ Third, the Act provides for a reallocation scheme in the event that a portion of the judgment is found to be uncollectible.⁴⁰

(concerning the apportionment of fault between a negligent plaintiff and a strictly liable manufacturer); *cf.* Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362, 367-68 (Minn. 1977) (concerning contribution between parties in a chain of distribution).

37. The new Comparative Fault Act contained the following definition of "fault":

"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 term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent, misuse of a product 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.

Act of April 5, 1978, ch. 738, § 7, 1978 Minn. Laws 836, 840 (codified as amended at MINN. STAT. § 604.01, subd. 1a (1986)).

38. Compare MINN. STAT. § 604.01, subd. 1 (1978) with WIS. STAT. ANN. § 895.045 (West 1983).

39. Act of April 5, 1978, ch. 738, § 6, 1978 Minn. Laws 836, 839-40 (codified as amended at MINN. STAT. § 604.01, subd. 1 (1986)). The 1978 amendment eliminated the clause "as great as" and inserted the clause "greater than" into the first sentence of the subdivision. 1978 Minn. Laws at 839. This portion of the amendment seems to have been legislative acknowledgement of the commonplace reality that juries often apportion liability equally between plaintiff and defendant, a result which often precluded the plaintiff from any recovery.

40. Act of April 5, 1978, ch. 738, § 8, 1978 Minn. Laws 836, 840 (codified as amended at MINN. STAT. § 604.02, subs. 2, 3 (1986)). The general reallocation provision found in subdivision 2 comes directly from the Uniform Comparative Fault Act section 2(d), 2 U.L.A. 37, 41 (Supp. 1985):

Upon motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

MINN. STAT. § 604.02, subd. 2 (1986). Subdivision 3 is unique to Minnesota. It appears to be specifically designed to contain uncollectible loss that occurs within the chain of manufacture and distribution within that chain. It reads as follows:

In the case of a claim arising from the manufacture, sale, use or consumption of a product, an amount uncollectible from any person in the chain of manufacture and distribution shall be reallocated among all other persons in the chain of manufacture and distribution but not among the claimant or

The predecessor to Minnesota's reallocation provisions was contribution.⁴¹ Pursuant to the early common law rule, no contribution existed among joint tortfeasors.⁴² An injured plaintiff could elect to bring suit against any of several potentially liable tortfeasors.⁴³ That tortfeasor was obligated to pay the entire judgment, yet was not entitled to any reimbursement from another wrongdoer who might be equally or more responsible for causing the plaintiff's loss.⁴⁴ Equity focused upon the rights of the injured party. The thrust of the law was to fully compensate the victim of the wrong. Thus, the injured party's rights were not affected by the inability of a joint tortfeasor to secure contribution from other wrongdoers.⁴⁵

Contribution developed in Minnesota as an equitable remedy to the basic unfairness of the former common law rule.⁴⁶ Like indemnity,⁴⁷ contribution is a remedy that distributes fault among multiple tortfeasors. It shifts a portion of the injured party's loss from the tortfeasor who has paid an excessive proportion of a judgment to another joint tortfeasor. It was developed to more fairly allocate the cost of an injury among those responsible for its cause. It was not, however, intended to affect the rights of the injured party.⁴⁸

others at fault who are not in the chain of manufacture or distribution of the product. Provided, however, that a person whose fault is less than that of a claimant is liable to the claimant only for that portion of the judgment which represents the percentage of fault attributable to him.

Id. § 604.02, subd. 3 (1986).

41. Contribution is an equitable remedy used to distribute fault among joint tortfeasors. It shifts a portion of the injured party's loss from one co-tortfeasor to another co-tortfeasor. For an in-depth discussion of the development of the doctrine, see generally Note, *supra* note 2, at 109.

42. Note, *Contribution and Indemnity Among Tortfeasors in Minnesota*, 37 MINN. L. REV. 470, 470-71 (1953).

43. See, e.g., *Nees v. Minneapolis St. P. Ry.*, 218 Minn. 532, 541, 16 N.W.2d 758, 763 (1944). ("[T]he injured person may . . . sue the actors jointly or severally and recover against one or all.')

44. *Id.* at 541, 16 N.W.2d at 763-64.

45. *Id.* at 541, 16 N.W.2d at 764. ("[T]he question of liability as between the two tortfeasors is immaterial in determining the liability of either to the injured person.')

46. E.g., *Duluth, M. & N. Ry. v. McCarthy*, 183 Minn. 414, 417, 236 N.W. 766, 767 (1931). Minnesota was one of only six jurisdictions to permit contribution among unintentional tortfeasors. Note, *supra* note 42, at 471 n.10.

47. Indemnity shifts the injured party's entire loss from one co-tortfeasor to another. See, e.g., *Samuelson v. Chicago, R.I. & P. R.R.*, 287 Minn. 264, 267, 178 N.W.2d 620, 623 (1970) ("[I]ndemnity is the . . . action for restitution of the whole amount paid by one party in satisfaction of an obligation of the other party'); *American Mut. Liberty Ins. Co. v. Reed Cleaners*, 265 Minn. 503, 508-09, 122 N.W.2d 178, 182 (1963). For a general discussion of the doctrine of indemnity, see Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 CORNELL L.Q. 552 (1936).

48. *Nees*, 218 Minn. at 541, 16 N.W.2d at 764.

II. THE JUDICIAL ANALYSIS OF LOSS REALLOCATION

In *Hosley v. Armstrong Cork Co.*⁴⁹ and *Frederickson v. Alton M. Johnson Co.*⁵⁰ the Minnesota appellate courts grappled for the first time with the general reallocation provision found in Minnesota Statutes section 604.02, subdivision 2,⁵¹ and the special loss reallocation provision for products liability cases found in Minnesota Statutes section 604.02, subdivision 3.⁵² As the first judicial review of significant statutory law, these interpretations have significance in and of themselves. When viewed from a broader perspective, however, *Hosley* and *Frederickson* become more than a reading and individual application of statutory law. The cases necessarily address the principles of joint and several liability,⁵³ comparative fault,⁵⁴ settlement,⁵⁵ products liability,⁵⁶ contribution,⁵⁷ indemnity,⁵⁸ and reallocation of uncollectible loss.⁵⁹ In each case, virtually all of the equitable remedies of modern tort law converge in a single set of facts. It is the author's contention that the result is needlessly complex and less than equitable.

A. Subdivision 2: Hosley

Patrick Hosley was employed for thirty years as an insulator.⁶⁰ After contracting asbestosis, he commenced suit against thirteen asbestos manufacturers.⁶¹ He alleged that exposure to asbestos products while on the job caused his illness.⁶² After he filed suit, two of the defendants, Johns-Manville Corp. (Johns-Manville) and Unarco Industries filed for bankruptcy.⁶³ The trial court severed all of the claims against these two defendants and allowed Hosley to proceed

49. 383 N.W.2d 289 (Minn. 1986).

50. 390 N.W.2d 786 (Minn. Ct. App. 1986).

51. *Supra* note 40.

52. *Id.*

53. *Supra* note 17.

54. *See generally supra* notes 32-39 and accompanying text.

55. *See generally supra* notes 8-31 and accompanying text.

56. *See generally* Steenson, *The Anatomy of Products Liability in Minnesota: Principles of Loss Allocation*, 6 WM. MITCHELL L. REV. 243 (1980).

57. *See generally supra* notes 41-48 and accompanying text.

58. *Supra* note 47.

59. *Supra* note 40.

60. *Hosley v. Armstrong Cork Co.*, 364 N.W.2d 813, 815 (Minn. Ct. App. 1985), *aff'd in part, rev'd in part*, 383 N.W.2d 289 (Minn. 1986).

61. *Id.*

62. *Id.*

63. *Id.* The two corporations filed for reorganization under Chapter 11 of the Bankruptcy Reform Act of 1978 (codified at 11 U.S.C. §§ 101-151326 (1982 & Supp. 1985)). The proceedings were stayed pursuant to the automatic stay provision, 11 U.S.C. § 362(a) (1982). *Hosley*, 383 N.W.2d at 290.

against the rest.⁶⁴ By the end of trial, all the defendants except Pittsburgh Corning Corporation (Pittsburgh Corning) settled by means of a *Pierringer* release.⁶⁵

The jury considered the fault of all the parties, and awarded Hosley \$350,000 damages.⁶⁶ Eight of the original defendants and the plaintiff were found to be at fault.⁶⁷ Among those at fault were Pittsburgh Corning and Johns-Manville. In allocating the damages, the trial court first reduced the total award by the proportionate shares of Hosley and the settling defendants.⁶⁸ It then determined that Pittsburgh Corning and Johns-Manville were jointly and severally liable for the remainder.⁶⁹ Without making a determination on the question of uncollectibility, the trial court calculated the reallocation distribution in the event that Johns-Manville's share was later determined to be uncollectible.⁷⁰ It then stayed Hosley's share of this reallocation.⁷¹

On appeal, the Minnesota Court of Appeals addressed two issues:

64. *Hosley*, 364 N.W.2d at 815.

65. *Id.* For the contents of the release see *infra* note 103.

66. *Hosley*, 364 N.W.2d at 815.

67. *Id.* The jury found the plaintiff and eight of the thirteen named defendants to be at fault. They allocated fault as follows:

| | |
|-------------------------------------|-------------|
| Patrick Hosley | 7% |
| Celotex Corporation | 5% |
| Eagle-Picher Industries, Inc. | 9% |
| Fibreboard Corporation | 15% |
| Forty-Eight Insulation, Inc. | 5% |
| Johns-Manville Sales Corporation | 25% |
| MacArthur Corporation | 9% |
| Owens-Corning Fiberglas Corporation | 15% |
| Pittsburgh Corning Corporation | 10% |
| | <u>100%</u> |

Id.

68. *Id.* This was a reduction of \$227,500 for the combined 58 percent fault of the released defendants and seven percent fault of Hosley himself.

69. *Id.*

70. Minnesota Statutes section 604.02, subdivision 2 clearly states that a determination of uncollectibility must be made by the court upon the motion of a party within one year from the entry of judgment. No such motion was made in this case, nor was a definitive determination of uncollectibility. As noted by Judge Crippen in his dissenting opinion, the trial court's decision to stay collection of Hosley's portion of Johns-Manville's 25 percent was premature. *Hosley*, 364 N.W.2d at 819 n.2 (Crippen J., dissenting).

The court of appeals recently confirmed Judge Crippen's position. On remand, *Hosley* went before the district court for a reallocation of damages consistent with the supreme court's 1986 decision. Judge Crippen wrote the appellate court opinion affirming the trial court's finding that where a party to the transaction is not a party to the lawsuit, a determination of uncollectibility as to that party is premature. *Hosley v. Pittsburgh Corning Corp.*, No. C-3-86-1429, slip op. at ___ (Minn. Ct. App. Feb. 24, 1987) The trial court cannot determine whether or not the claim against that party is collectible until a judgment has been entered against that party. *Id.*

71. *Hosley*, 364 N.W.2d at 815.

1) the effect of *Pierringer* releases on joint and several liability, and 2) the applicability of the statutory loss reallocation provisions to persons no longer parties to a lawsuit.⁷² The court of appeals affirmed the trial court on the first issue and held that execution of a *Pierringer* release did not destroy joint and several liability.⁷³ The court stated that a contrary decision would unfairly penalize plaintiffs and discourage settlement.⁷⁴

The court of appeals reversed the trial court on the second issue and held that the principal reallocation provision does not apply to a person severed from the lawsuit.⁷⁵ The court noted the distinct change in wording between the three subdivisions of Minnesota Statutes section 604.02. In subdivisions 1 and 3, the legislature used the word "person."⁷⁶ In subdivision 2, the general reallocation provision, the legislature used the word "party."⁷⁷ Following traditional rules of statutory construction, the court reasoned that this distinction in language demanded a distinction in meaning.⁷⁸ The court, therefore, held that the reallocation provision did not apply to Johns-Manville, the severed bankrupt tortfeasor no longer a party to the lawsuit.⁷⁹

Having determined that the loss reallocation statute did not apply, the court of appeals went on to consider reallocation of this potentially "uncollectible" portion of the judgment under common law principles. Restating that Pittsburgh Corning and Johns-Manville were jointly and severally liable for the whole of plaintiff's damages, the court determined that Pittsburgh Corning should receive "equitable contribution" from those defendants more at fault than the plaintiff.⁸⁰

The parties raised the same issues on appeal to the Minnesota Supreme Court.⁸¹ The supreme court affirmed both the trial court and the court of appeals on the first issue.⁸² It reversed the court of appeals on the second.⁸³

The *Hosley* decision marks an emphatic re-affirmation of the continuing viability of joint and several liability in Minnesota.⁸⁴ The

72. *See id.*

73. *Id.* at 816.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *See id.*

79. *Id.*

80. *Id.* at 817.

81. *Hosley*, 383 N.W.2d at 292.

82. *Id.*

83. *Id.* at 293.

84. *Id.* at 292.

Comparative Fault Act expressly preserves it.⁸⁵ According to the supreme court, a *Pierringer* release cannot destroy it.⁸⁶

The supreme court next addressed the applicability of the reallocation statute provisions to severed tortfeasors.⁸⁷ The court first acknowledged the use of the word "parties" in subdivision 2, the general reallocation provision, as opposed to the word "persons" used in subdivisions 1 and 3, discussing joint and several liability and the products liability reallocation provisions respectively.⁸⁸ The court recognized the general rule of statutory construction used by the court of appeals in declaring the provision inapplicable; such distinctions in language are presumed intentional.⁸⁹ The court further noted that the comment to the Uniform Comparative Fault Act (Uniform Act), on which the Minnesota statute was based, expressly states that the reallocation provision was meant to apply only to parties joined in a lawsuit.⁹⁰ Yet, the *Hosley* court held that the reallocation provision does apply to tortfeasors no longer parties to the lawsuit, as long as they are "parties to the transaction."⁹¹ The supreme court relied on *Lines v. Ryan*,⁹² a case decided under the comparative negligence statute, which held that the negligence of "parties to the transaction" should be submitted to the jury for fault allocation.⁹³ The language in the comment to the Uniform Act relied upon by the court of appeals was succinctly dismissed.⁹⁴

The court pointed out that the formulators of the Uniform Act were concerned about determining the liability of a person not

85. *See id.*

86. *Id.*

87. *Id.*

88. *Id.* at 292-93.

89. *Id.*

90. The comment to the reallocation section of the Uniform Act states:

The limitation to parties to the action means ignoring other persons who may have been at fault with regard to the particular injury but who have not been joined as parties. *This is a deliberate decision.* It cannot be told with certainty whether that person was actually at fault or what amount of fault should be attributed to him or whether the statute of limitations will run on him, etc. An attempt to settle these matters in a suit to which he is not a party would not be binding on him. Both plaintiff and defendants will have significant incentive for joining available defendants who may be liable. The more parties joined whose fault contributed to the injury, the smaller the percentage of fault allocated to each of the other parties, whether plaintiff or defendant

UNIFORM COMPARATIVE FAULT ACT § 2, comment, 12 U.L.A. 37, 41 (Supp. 1986) (emphasis added).

91. *Hosley*, 383 N.W.2d at 293.

92. 272 N.W.2d 896 (Minn. 1978).

93. *Id.* at 902-03.

94. "[T]he concerns expressed in the comment to the Uniform Act have no applicability here." *Hosley*, 383 N.W.2d at 293.

before the court.⁹⁵ Citing *Lines*, the supreme court noted that pursuant to Minnesota law the determination of fault made by a jury for an absent defendant is not an establishment of liability.⁹⁶ Rather, it makes the assigned percentage the maximum fault of the absent party in a future suit.⁹⁷ The purpose of the language distinction as set forth by the commentators to the Uniform Act is not needed under Minnesota law.⁹⁸ The court thus refused to use the "restrictive definition" of the word "parties" and "thwart the legislature's creation of a fair method of distributing the risk of uncollectible obligations under the comparative fault scheme."⁹⁹ The general reallocation provision contained in subdivision 2 of Minnesota Statutes, section 604.02, was found applicable to all "parties to the transaction," including those which, for one reason or another, are not parties to the lawsuit.¹⁰⁰ Based on this analysis, the supreme court did not need to address the issue of equitable contribution.¹⁰¹

Having held that the principal loss reallocation provision was applicable to the uncollectible share of a severed party, the *Hosley* court calculated the reallocation. The statute provides that the uncollectible amount is to be reallocated among all remaining parties according to their respective fault, including the plaintiff.¹⁰² *Hosley*'s recovery was therefore reduced by his proportionate share of Johns-Manville's uncollectible amount.¹⁰³ This was precisely what had been done by the trial court.

The supreme court, however, went on to examine the final piece in the loss allocation puzzle: what effect does a *Pierringer* release have on the reallocation process? The releases used in *Hosley* contained standard indemnification language plus a specific agreement to indemnify the settling defendants for any loss reallocation.¹⁰⁴ All parties were cognizant of Johns-Manville's bankruptcy petition at the

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 295.

102. MINN. STAT. § 604.02, subd. 2 (1984).

103. *Hosley*, 383 N.W.2d at 294 n.3. *Hosley*'s share of Johns-Manville's 25 percent was 7/75 of \$87,500, or \$8,166.67. *Id.*

104. The releases provided in part:

Releasors agree to satisfy any future judgment which may be rendered in favor of Releasors, in such fraction, portion or percentage of the judgment as the causal fault of [defendant] is adjudged to be of all causal fault of all persons adjudged responsible for Releasor's damages. *It is also agreed and understood that this Release and Indemnification Agreement encompasses any and all claims based on the amount of any subsequent judgment determined to be uncollectible in accordance with Minn. Stat. 604.02 (1980), and reallocated to [defendant].*

Id. at 294 (emphasis in original).

time the releases were negotiated.¹⁰⁵ The court had little difficulty, therefore, enforcing the explicit agreement of the parties.¹⁰⁶ Johns-Manville's twenty-five percent of the verdict was distributed among all parties in proportion to their respective degree of fault.¹⁰⁷ Since Hosley was indemnified through the release of all defendants other than Pittsburgh Corning, he absorbed all but ten percent of the uncollectible portion of the judgment.¹⁰⁸

B. Subdivision 3: Frederickson

Gary Frederickson was severely burned in an electrical fire.¹⁰⁹ The fire resulted from an electrical explosion which occurred when he attempted to install a fuse in an electrical cabinet.¹¹⁰ Frederickson sued Michaud, Cooley, Hallberg, Erickson & Associates, Inc. (MCHE), the electrical engineering firm that designed the electrical system involved, Alton M. Johnson Co. (Johnson), the electrical cabinet manufacturer, and Hunt Electric Co. (Hunt), the installer of the cabinet.¹¹¹ Prior to trial, Frederickson settled with Hunt on a *Pierringer* release.¹¹²

The fault of all parties was submitted to the jury.¹¹³ The jury rendered a verdict awarding the plaintiff \$800,000 damages and appor-

105. All parties were involved in the suit at the time Johns-Manville declared Chapter 11 bankruptcy. Their awareness is further substantiated by the express reference to reallocation in the releases. *Id.*

106. *See id.*

107. *Id.*

108. Hosley absorbed his own seven percent share of fault (\$24,500) plus the 58 percent allocated to the settling defendants (\$203,000). *Id.* at 290. He also absorbed his allocated share of Johns-Manville's 25 percent of fault (\$8,166.67) plus the settling defendants' allocated share (\$67,666.66). *Id.* at 294 n.3. In total, Hosley absorbed \$303,333.33, due, in most part, to the *Pierringer* releases.

Pittsburgh Corning Corp. was liable for its 10 percent of fault (\$35,000). *Id.* at 290. In addition, it was liable for its allocated share of Johns-Manville's 25 percent of fault (\$11,666.67). *Id.* at 294 n.3. In total, the judgment against Pittsburgh Corning Corp. amounted to \$46,666.67.

Hosley received a total of \$72,500 in consideration for the *Pierringer* releases. *See* Brief for Appellant at A5-8, *Hosley*, 364 N.W.2d 813 (Minn. Ct. App. 1985). He has recovered \$119,166.67 (\$46,666.67 plus \$72,500) out of a \$350,000 damage award. Had all defendants been solvent, and had he not settled on *Pierringer* releases, judgment would have been entered for \$325,500 (total award of \$350,000 minus \$24,500 for his own share of fault). *See Hosley*, 383 N.W.2d at 290. Between the settlements and the application of the loss reallocation provision in subdivision 2 of Minnesota Statutes, section 604.02, Hosley lacks full compensation by \$325,500 minus \$119,166.67, or \$206,333.33.

109. 390 N.W.2d 786, 789 (Minn. Ct. App. 1986).

110. *Id.*

111. *Id.*

112. *Id.*

113. *See id.*

tioned fault among all parties, including the plaintiff.¹¹⁴

The trial court reduced the award by forty-eight percent, which was the combined fault of Frederickson and the indemnified Hunt, and ordered judgment against Johnson and MCHE, jointly and severally, for fifty-two percent of the verdict.¹¹⁵ The trial court ultimately decided that Johnson's forty percent share was uncollectible and not reallocable to MCHE.¹¹⁶

On appeal, one of the issues addressed was whether Johnson's uncollectible forty percent share was reallocable to MCHE.¹¹⁷ The court of appeals turned to the special reallocation provision for products liability claims found in subdivision 3 of Minnesota Statutes, section 604.02, which provides that an uncollectible amount from a person in the chain of manufacture and distribution "shall be reallocated among all other persons in the chain of manufacture and distribution *but not among the claimant or others at fault who are not in the chain of manufacture or distribution of the product.*"¹¹⁸ The court noted first that Frederickson's claim against Johnson was a products liability claim, arising out of the manufacture and sale of a defective electrical cabinet.¹¹⁹ Frederickson's claim against MCHE, however, was a claim for defective services.¹²⁰ MCHE was, therefore, not in the chain of manufacture or distribution.¹²¹ Johnson's uncollectible

114. The jury allocated fault as follows:

| | |
|--------------|-----|
| Frederickson | 8% |
| Hunt | 40% |
| Johnson | 40% |
| MCHE | 12% |

Id. at 789.

115. Fifty-two percent of the verdict amounted to \$416,000. *Id.*

116. *Id.* at 790. The word "uncollectible" is not defined anywhere in Minnesota Statutes, section 604.02. See Steenson, *Comparative Fault and Loss Allocation*, 6 MINN. TRIAL LAW. 8 (1981). Both the *Hosley* court and the *Frederickson* court declined to define it. It seems clear that "uncollectible" would include a defendant who is (1) immune, (2) bankrupt, (3) not liable to the plaintiff, i.e., less at fault than the plaintiff, see *Jack Frost, Inc. v. Engineered Bldg. Components*, 304 N.W.2d 346, 352 & n.5 (Minn. 1981) (one defendant liable for entire amount of plaintiff's damages, where defendant's liability greater than plaintiff's), or (4) possibly a defendant employer who has paid partial damages through workers' compensation, see *Lambertson v. Cincinnati Corp.*, 312 Minn. 114, 119-30, 257 N.W.2d 679, 684-89 (1977) (contribution awarded against employer to extent of employer's workers' compensation liability). In *Frederickson*, the trial court made the determination of Johnson's uncollectibility on the basis of a financial statement from the company, submitted in the form of an affidavit. Telephone interview with Howard P. Helgen, counsel for Gary Frederickson (Oct. 1, 1986)[hereinafter Helgen interview].

117. *Frederickson*, 390 N.W.2d at 790.

118. *Id.* at 792 (citing MINN. STAT. § 604.02, subd. 3).

119. *Id.*

120. *Id.*

121. *Id.*

share could not be reallocated to them.¹²²

In a footnote, the court of appeals expressly declined to offer an opinion "as to whether Johnson's uncollectible share can be reallocated to Hunt or whether Frederickson, through his *Pierringer* release, agreed to pay Hunt's share of any uncollectible obligation reallocated to Hunt."¹²³ Which of the remaining parties will ultimately absorb the \$320,000 unallocated loss has yet to be determined.

III. THE NET RESULT

While the *Hosley* and *Frederickson* cases clarify some of the confusion surrounding the reallocation statute, they raise many questions. These interpreted provisions affect the law in three major areas.

The first area of impact is most readily described by example. Two plaintiffs, A and B, both partially at fault and both injured by a defective or inherently dangerous product, face the distinct possibility of very different treatment under the law if one of the tortfeasors is insolvent. Plaintiff A, injured over a period of time by exposure to some type of toxic chemical or drug, falls under the general loss reallocation provision found in subdivision 2 of the statute.¹²⁴ This occurs because under such circumstances the defendants are most likely to be independent manufacturers of the toxic substance¹²⁵ rather than a chain of manufacturers, distributors, and middlepersons. In the event that one of the tortfeasors becomes insolvent and a determination of uncollectibility is made, plaintiff A absorbs part of the risk of that insolvency.¹²⁶ This is true even though the plaintiff is not fully compensated for her damages.¹²⁷

Plaintiff B, injured by a defective or inherently dangerous product in a single accident rather than through long term exposure, falls under the special loss reallocation provision found in subdivision 3 of the statute.¹²⁸ In the event that one of the tortfeasors in the chain becomes insolvent and a determination of uncollectibility is made, plaintiff B does not absorb any of the risk.¹²⁹

Both scenarios are products liability cases. In each, the plaintiff was partially at fault. In each, the plaintiff was injured by a defective

122. *Id.*

123. *Id.* at 792 n.2.

124. MINN. STAT. § 604.02, subd. 2.

125. The multiple asbestos manufacturers in *Hosley* are typical of this type of litigation. The thousands of suits surrounding DES exposure, in which the defendants are usually a long list of DES manufacturers, is another cogent example.

126. See *Hosley*, 383 N.W.2d at 293.

127. *Id.*

128. MINN. STAT. § 604.02, subd. 2.

129. See *Frederickson*, 390 N.W.2d at 792.

or inherently dangerous product. There seems to be no justification for treating them differently. It would seem that the sole difference is the lack of a chain of manufacture in plaintiff A's situation.

The Minnesota Supreme Court in *Hosley* read the word "parties" right out of the reallocation statute,¹³⁰ and replaced it with a phrase synonymous with "persons."¹³¹ The *Hosley* court reasoned that the intent of the legislature to create "a fair method of distributing the risk of uncollectible obligations under the comparative fault scheme"¹³² was more important than a literal reading of the statutory language. Where the literal words of the statute prevented the implementation of the equitable result it was designed to shape, the court followed the equitable intent.¹³³ It read the words broadly enough to facilitate the intended result.¹³⁴ The Minnesota courts should also read subdivision 3 broadly enough to ensure that plaintiffs A and B receive the same treatment.

The exact origin of subdivision 3 of the reallocation statute is unknown.¹³⁵ The provision is, however, consistent with existing product liability doctrine.¹³⁶ Business enterprises are expected to bear the burden of the cost of consumer injuries as a part of the cost of doing business.¹³⁷ The protection of the injured consumer is the first priority.¹³⁸ The fact that subdivision 3 contains the words "chain of manufacture and distribution"¹³⁹ should not render a result contrary to the thrust of the entire provision. Subdivision 3 should be read broadly enough to facilitate equal treatment of all products liability cases. Any other interpretation results in arbitrary distinctions of potentially major impact,¹⁴⁰ which the legislature

130. MINN. STAT. § 604.02, subd. 2.

131. See *Hosley*, 383 N.W.2d at 293.

132. *Id.*

133. See *id.*

134. *Id.*

135. The comparative fault bill presented to the senate contained the basis of what became subdivision 3. While on the senate floor, the bill was amended following discussion by Senators Sieloff and Davies about the impact of the loss reallocation provisions on low volume sellers within the manufacture-distribution chain. Thus, there exists some guidance for interpretation of the amended form of subdivision 3. See Debate on H.F. No. 338 Before the Minnesota Senate, 70th Minn. Leg., 1978 Sess., Mar. 16, 1978 (audio tape) (available at Legislative Library, Minnesota State Capitol). For a more expanded presentation of the background of the bill, see Steenson, *supra* note 56, at 9-12.

136. See generally, Steenson, *supra* note 56, at 326-50.

137. W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON TORTS § 96, at 682 (5th ed. 1985).

138. *Id.* at 135; MINN. STAT. § 604.02, subd. 3.

139. MINN. STAT. § 604.02, subd. 3.

140. An example will illuminate the impact. Assume the following facts. Plaintiff (P) brings a claim against defendants D1, D2 and D3, all asbestos manufacturers. (P) is found to be 20 percent at fault, D1 30 percent, D2 25 percent and D3 25 percent.

could not have intended.

The second area of impact comes into the analysis of party alignment on the outcome of a case. Where there are multiple claims against multiple defendants, which include strict products liability and ordinary negligence,¹⁴¹ application of subdivision 3 leads to anomalous results addressed by either the legislature or the appellate courts. In the event that an uncollectible loss occurs within the chain of manufacture, subdivision 3 mandates that reallocation of that loss be made solely within the chain.¹⁴² This severs joint and several liability on the part of any defendants liable to the plaintiff who are outside the chain. *Frederickson* is illustrative. Frederickson's claim against MCHE was a negligence claim.¹⁴³ His claims against Johnson and Hunt were products liability claims based upon the manufacture, sale, and installation of a defective electrical cabinet.¹⁴⁴ Johnson's share was determined to be uncollectible.¹⁴⁵ Johnson was the manufacturer of the cabinet.¹⁴⁶ Pursuant to subdivision 3, Hunt as the installer was the only defendant to which the loss could be reallocated.¹⁴⁷ In *Frederickson*, the question of how Johnson's loss will be reallocated has not yet been determined.¹⁴⁸ The only thing that has been definitively determined is that reallocation cannot be made to MCHE.¹⁴⁹

Only two parties remain to apportion the damage award. If the *Pierringer* release is interpreted to mean that the plaintiff has agreed to indemnify the settling tortfeasor for reallocation as well as contribution, the plaintiff absorbs the uncollectible loss.¹⁵⁰ Such a result is

The damages verdict is \$400,000. Within one year, D2's 25 percent is found to be uncollectible. If D2's 25 percent is reallocated pursuant to subdivision 2, P absorbs 20/75 or \$42,666.66. If, however, D1 and D2 were the manufacturers and distributors of the same asbestos product, D2's uncollectible 25 percent would be reallocated pursuant to subdivision 3. P absorbs nothing, and is fully compensated for her injury. Both scenarios involve the same plaintiff, the same injury, and the same causative agent.

141. This is precisely the alignment in *Frederickson*, 390 N.W.2d at 792. Frederickson's claims against Johnson and Hunt arose from the manufacture, sale, and installation of a defective electrical cabinet. His claim against defendant MCHE was based upon negligent services. *Id.*

142. MINN. STAT. § 604.02, subd. 3.

143. *Frederickson*, 390 N.W.2d at 792.

144. *Id.*

145. *Id.*

146. *Id.*

147. *See id.*

148. *Id.* at 792 n.2.

149. *Id.* at 792.

150. In *Frederickson*, if the *Pierringer* release given to Hunt is interpreted to include an indemnification agreement for reallocation as well as contribution, the plaintiff will absorb an additional \$320,000. Hunt paid the plaintiff \$20,000 for the release. *Id.* at 789-90.

directly contrary to the intent of the legislature in drafting the provision. Initially, the plaintiff was not to absorb the loss. Furthermore, despite the holding by the trial court that the defendants were jointly and severally liable,¹⁵¹ under such a scheme the joint liability of the negligent MCHE has in reality been severed from the liability of the other defendants, to the detriment of the injured party.¹⁵²

The Minnesota Court of Appeals characterizes subdivision 2 of the statute as a modification of the rule of joint and several liability.¹⁵³ It calls subdivision 3 a further modification of the rule.¹⁵⁴ In a lawsuit with multiple defendants and multiple claims, some products liability and some not, this "further modification" is in reality a burial.

There is an additional related issue important to the working of the reallocation statute as a whole that was not raised in either *Hosley* or *Frederickson*. In the event that an uncollectible loss in a chain of manufacture cannot be reallocated to another person in the chain, where does the loss fall? The statute is silent on this issue. The only interpretation that comports with the supreme court's broad reading of the entire statutory scheme is to infer that, absent another tortfeasor in the chain, a court is to turn to subdivision 2 to reallocate the loss.

The third area of impact is settlement. The *Pierringer* release has been effective and widely used because it allows parties to settle claims in a piecemeal fashion.¹⁵⁵ While there is risk involved for both parties to the agreement, that risk has proved to be calculable enough that parties have been able to effectively incorporate the risk into the "price" of the release without that price becoming prohibitive. One of the major unanswered questions left from *Hosley* and *Frederickson* is, what effect does the release have upon the ultimate disposition of the uncollectible loss? The *Hosley* decision does not answer the question. In *Hosley*, the releases specifically stated that the indemnification agreement included indemnification for any reallocated loss.¹⁵⁶ Since the plaintiff explicitly agreed to take on this risk, the court rightly enforced the agreement.¹⁵⁷

The *Frederickson* decision poses the question without an answer. The *Pierringer* release used in *Frederickson* was of a general variety, commonly used in personal injury litigation. There, the plaintiffs agreed to indemnify Hunt for any claims for contribution.¹⁵⁸ The

151. See *id.* at 789.

152. See *supra* note 150.

153. *Frederickson*, 390 N.W.2d at 792.

154. *Id.*

155. See *supra* notes 22-30 and accompanying text.

156. See *supra* note 103.

157. *Hosley*, 383 N.W.2d at 294.

158. It contained the three necessary parts: (1) release of Hunt for its percentage

release was totally silent on the question of reallocation.¹⁵⁹

Hunt has not participated in the litigation since its inception, having settled on the *Pierringer* release prior to the commencement of the suit.¹⁶⁰ If it is determined that the release does not indemnify Hunt for reallocation, pursuant to subdivision 3 of the statute, Hunt is now liable for the entire forty percent of Johnson's uncollectible loss.¹⁶¹

The impact of such a decision on the future use of *Pierringer* releases is greater than may be apparent at first glance. It will be felt in two distinct ways. First, if it is determined that a plaintiff has agreed to indemnify a settling defendant against the uncollectible loss of a non-settling defendant, the price of the release will increase dramatically. This is particularly true in cases with potentially large damages, where the risk associated with an uncollectible loss is high.¹⁶² Thus, in the very case in which an injured plaintiff has the most need of its availability, the price of a settlement and release may be more than a settling defendant is willing or able to pay. Second, if it is determined that a plaintiff has not agreed to indemnify a settling defendant against the uncollectible loss of a non-settling defendant, the settling defendant has not really been released from the litigation at all.¹⁶³ The probability of an early settlement on such a basis is dramatically decreased.

No matter how the question is decided, the reallocation provisions have a negative effect upon the incentive of parties to settle. The most fair decision, the one that gives the parties the most room to structure their bargain, is to find that there is no indemnification for reallocated loss absent an express provision in the release.¹⁶⁴ This

of fault, (2) reservation of the claims against Johnson and MCHE, and (3) indemnification of Hunt for any contribution claims. Helgen interview, *supra* note 116; *see also Frederickson*, 390 N.W.2d at 791 (plaintiff agreed to satisfy Hunt's share of judgment).

159. Helgen interview, *supra* note 116.

160. *Id.*

161. The uncollectible loss amounts to \$320,000.

162. *Frederickson* is the quintessential example. It is precisely because the plaintiff had suffered such catastrophic injuries (\$800,000 damages) that the impact of Johnson's uncollectible 40 percent is so great. *Frederickson*, 390 N.W.2d at 789.

163. In *Frederickson*, defendant Hunt settled on a *Pierringer* for \$20,000. *Id.* In reliance upon this "release" of its obligation, Hunt has not participated in the litigation proceedings. The Minnesota Supreme Court granted review of the case on September 26, 1986. If the court finds that the release does not include indemnification for reallocation, Hunt is theoretically responsible to *Frederickson* for \$320,000 without ever having been present in court. While, arguably, Hunt's liability is not *res judicata* and the claim between *Frederickson* and Hunt can be re-tried. *See Hosley*, 383 N.W.2d at 293; *Lines*, 272 N.W.2d at 902-03. Under these circumstances, Hunt cannot be said to have been released from the litigation.

164. The *Pierringer* release used in *Hosley*, when all parties were aware of the likelihood that Johns-Manville's share would be uncollectible, expressly provided for real-

result, however, may make settlements using a *Pierringer* release so expensive that such a release would no longer be of practical use.

CONCLUSION

The reallocation statute creates as many problems as it cures. Judicial interpretation has clarified some areas and muddled others. The problems of language and application noted in this Comment should be addressed by both the legislature and the courts.

Subdivision 1 maintains joint and several liability, which is the plaintiff's guarantee that she will be fully compensated for her injury. Despite the fact that our legislature and courts consistently affirm its continued viability, joint and several liability has been eroded by both legislative¹⁶⁵ and judicial¹⁶⁶ exceptions to a point where little remains of the original rule. The exceptions leave a plaintiff vulnerable to less than full recovery.¹⁶⁷ At the same time, the retention of the remnants of the rule make settlement with a single joint tortfeasor increasingly risky.¹⁶⁸ A decision should be made to either do away with joint and several liability and move to pure fault-based allocation, or do away with those exceptions that emasculate its effectiveness.

The general loss reallocation provision found in subdivision 2 of the statute was designed for a pure comparative fault jurisdiction.¹⁶⁹ It has been adopted verbatim in Minnesota, a modified comparative fault jurisdiction.¹⁷⁰ Judicial interpretation has attempted to remedy the discrepancy.¹⁷¹ The special loss reallocation provision for products liability cases, however, is poorly drafted to achieve its aim.¹⁷² It should either be redrafted to explicitly apply to multiple manufacturers of a single product, or be interpreted to achieve the same result.

Loss reallocation is Minnesota's most recent effort to allocate the cost of a given loss in an equitable manner. It enters an area already replete with common law rules, statutory modification, and judicial interpretation. The goal behind each principle and statute is justice; the spirit behind each is equity. Yet time has passed since each was developed and social concerns have shifted. What was equitable and

location. The risk of reallocation was a known basis of the bargain between the parties. See *supra* note 103.

165. See MINN. STAT. §§ 604.01-.02.

166. *Supra* notes 22-30 and accompanying text.

167. *Frederickson*, 390 N.W.2d at 792.

168. See *supra* notes 28, 161.

169. Compare UNIFORM COMPARATIVE FAULT ACT § 1, 12 U.L.A. 37, 37-38 (Supp. 1986) with MINN. STAT. § 604.01.

170. Compare UNIFORM COMPARATIVE FAULT ACT § 2(d), 12 U.L.A. 37, 41 (Supp. 1986) with MINN. STAT. § 604.01, subd. 2.

171. *Hosley*, 383 N.W.2d at 292-93; see *supra* notes 87-98 and accompanying text.

172. See *supra* notes 124-37 and accompanying text.

simple standing alone has become complex and inconsistent in combination.

The suggestions made above will temporarily repair a few of the most obvious gaps and overlaps. The tort recovery system is currently such a complex and patchy affair, however, that each additional piecemeal attempt to correct perceived inequities affects multiple areas. This creates new inequities and increases the complexity of the whole. A systematic review of the entire tort recovery system with an eye toward an equitable and efficient allocation of loss compensation is urgently needed.

Sharon L. Van Dyck

ADDENDUM

On March 20, 1987 the Minnesota Supreme Court issued its opinion in the *Frederickson* case.¹⁷³ Its holding mischaracterizes the court of appeals decision and further confuses the correct use of the reallocation statute. The supreme court held that "Johnson's uncollectible portion of the judgment should be reallocated to Michaud-Cooley, Hunt, and Frederickson pursuant to Minn. Stat. § 604.02, subd. 2 (1984)."¹⁷⁴ In arriving at this conclusion, the court's focus was upon upholding joint and several liability.¹⁷⁵ The court of appeals' reliance upon subdivision 3 was summarily reversed.¹⁷⁶ No explanation was given for the selection of subdivision 2 over subdivision 3 other than "joint and several liability applies."¹⁷⁷ The court of appeals correctly applied subdivision 3 analysis to this case. In resolving the issues under subdivision 2, the supreme court ignored the plain language of subdivision 3, and hence ignored the legislative mandate.

Subdivision 3 was meant to apply to the *Frederickson* scenario. It specifically states that reallocation should not occur "among the claimant or others at fault who are not in the chain of manufacture or distribution of the product."¹⁷⁸ Subdivision 3 thus explicitly contemplates mixed-claim actions in which some at-fault parties are outside the manufacture/distribution chain. *Frederickson's* claims were of this mixed variety.¹⁷⁹

One of the basic rules of statutory construction is "[e]very law

173. *Frederickson v. Alton M. Johnson Co.*, Nos. C185-2102 and C3-85-2117 (Minn. Mar. 20, 1987).

174. *Id.* at 6.

175. *Id.* at 7.

176. *Id.*

177. *Id.*

178. MINN. STAT. § 604.02, subd. 3 (1986) (emphasis added).

179. *Supra* note 141.

shall be construed, if possible, to give effect to all its provisions."¹⁸⁰ The supreme court's resolution of *Frederickson* via the application of subdivision 2 renders meaningless an important section of subdivision 3. This is in conflict with unambiguous legislative intent. The resultant impact upon litigants is well illustrated by examination of the *Frederickson* facts absent *Pierringer* releases. Under subdivision 3, manufacturer Johnson's uncollectible 40% is absorbed entirely by installer Hunt. Hunt is thus responsible for 80% of the judgment, MCHE for its 12%. Frederickson collects \$736,000 of his \$800,000 damage award. This result is in keeping with the general policy choices behind products liability law.¹⁸¹

The result under subdivision 2 is substantially different. Johnson's 40% fault is divided between all parties, including MCHE and Frederickson. MCHE is responsible for 20% rather than 12%, Frederickson for 13% rather than 8%. MCHE pays more than it should, and Frederickson absorbs more than he should. The presence of the *Pierringer* release merely increases the complexity of the issue and enhances the plaintiff's loss. The price of the *Pierringer*, as noted above, has become prohibitively high.¹⁸²

Pursuant to *Hosley*, multiple manufacturer cases are to be reallocated pursuant to subdivision 2.¹⁸³ Pursuant to *Frederickson*, mixed chain of manufacture/distribution products liability cases are also to be reallocated pursuant to subdivision 2.¹⁸⁴ The only possible remaining use for subdivision 3 is the "pure" chain of manufacture products liability case. This arbitrarily disparate treatment of products liability cases is grossly unfair and cannot have been intended by the legislature.¹⁸⁵

The faulty analysis and erroneous result in the recent *Frederickson* decision is yet another example of the inequities flowing from Minnesota's cumbersome loss allocation system. The need for systematic review as suggested in the body of this Comment is increasingly evident.*

180. MINN. STAT. § 645.16 (1986).

181. *Supra* notes 135-40 and accompanying text.

182. *Supra* notes 162-62 and accompanying text.

183. *Hosley*, 383 N.W.2d at 293.

184. *Frederickson*, slip op. at 6.

185. *See supra* note 140 and accompanying text.

* *Editor's note:* As of the date of this printing, two of the parties in the *Frederickson* case have applied to the supreme court for rehearing. No decision has been made by the court on these applications.