A Modern Approach to Loss Allocation among Tortfeasors in Products Liability Cases

Jon D. Jensvold
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By Jon D. Jensvold*

I. INTRODUCTION

The acceptance in Minnesota of the doctrine of strict liability in tort has given rise to several important and intricate questions concerning the rights of defendants to common law indemnity and contribution. Since the proponents of strict liability were primarily interested in protecting injured plaintiffs, it is not surprising that they should have paid scant attention to the rights of jointly and severally liable defendants. However, their inattentiveness has resulted in an unfortunate extension of common law rules governing loss allocation based on fault to situations where, at least in its legal definition, "fault" does not necessarily exist.

Part of the problem stems from the fact that in Minnesota, as elsewhere, the law of indemnity had attained a high degree of development prior to the acceptance of strict liability. Although the Minnesota Supreme Court purportedly rejected the so-called "disparity in degree of fault" test in Hendrickson v. Minnesota Power & Light Co. and instead enumerated five exclusive situations in which indemnity would be allowed, it has strayed from the restrictive Hendrickson guidelines in several

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1. The doctrine of strict liability in tort as set out in RESTATEMENT (SECOND) OF TORTS § 402A (1965) was first discussed and approved in McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967). However, actual application of the doctrine had to wait for subsequent cases. See, e.g., Waite v. American Creosote Works, Inc., 295 Minn. 288, 204 N.W.2d 410 (1973); Farr v. Armstrong Rubber Co., 288 Minn. 83, 179 N.W.2d 64 (1970).
2. 258 Minn. 368, 104 N.W.2d 843 (1960).
3. The court in Hendrickson held that indemnity was possible in situations where there was (a) derivative or vicarious liability; (b) action at the direction of or for another; (c) breach of a duty to the party seeking indemnity; (d) failure to discover the misconduct of another; or (e) an express contract for indemnity.
subsequent decisions. It now appears that general equitable principles often determine rights to indemnity, with primary attention being directed to the conduct of the parties and the relative culpability of their actions.\(^4\) In short, the concepts of "fault" and "duty"—renounced by the doctrine of strict liability—are often determinative of the rights of defendants \textit{inter se}.

The reason that manufacturers and distributors are held strictly liable for the harm caused by their products is that liability based on negligence does not adequately protect consumers from risks of bodily harm inevitably created by a mass production and marketing system.\(^5\) Yet in the same action in which multiple defendants are held to be strictly liable to an injured plaintiff, strict application of the principles of indemnity requires that the claims of the defendants against each other be determined by traditional notions of fault, according to characterization of their participation as "active" or "passive." This anomalous situation clearly contravenes the social policies embodied in the doctrine of strict liability.\(^6\)

The problems caused by the use of the common law rules governing contribution are somewhat different. The catchphrase "equality is equity" illustrates the common law requirement that all jointly liable defendants contribute equal amounts toward the plaintiff's total award.\(^7\) This traditional approach does successfully avoid the anomaly of using relative degrees of fault as a method for allocating losses among non-negligent defendants. However, in so doing it ignores the fact that although all the defendants in a strict liability case may be equally faultless, the activities of some may have been more directly the cause of the plaintiff's injuries than the activities of others.

These problems are of substantial practical importance in modern tort litigation. The abolition of "privity" requirements

\(^4\) See, e.g., White v. Johnson, 272 Minn. 363, 137 N.W.2d 674 (1965); Daly v. Bergstedt, 267 Minn. 244, 126 N.W.2d 242 (1964). But see Haney v. International Harvester Co., 294 Minn. 375, 201 N.W.2d 140 (1972).


\(^6\) For example, one of two defendants guilty of nearly identical negligence may get off scot free. See, e.g., Tromza v. Tecumseh Prods. Co., 378 F.2d 601 (3d Cir. 1967).

\(^7\) See Larsen v. Minneapolis Gas Co., 282 Minn. 135, 163 N.W.2d 755 (1968).
for most tort actions together with today's liberal rules for joinder have greatly increased the number of multi-party actions with their frequent claims for indemnity and contribution. The purpose of this Article is to suggest that, as ironic as it may seem, the rationale of the Minnesota comparative negligence statute offers a possible alternative to the use of common law principles of indemnity and contribution in actions where strict liability in tort is alleged. Admittedly, it does seem self-contradictory to suggest that the problems caused by the use of relative degrees of fault as a means of allocating losses among non-negligent defendants can be solved by resort to a comparative negligence statute. However, the Minnesota statute contains a rule which can be generalized to apply in all situations—that contribution among jointly liable defendants shall be in proportion to the percentage of negligence attributable to each. Since a plaintiff's contributory negligence is at least a partial defense to an action founded solely upon strict liability, the issue of the plaintiff's negligence may be submitted to the jury under the statute with the further instruction that it be compared to the strict liability of the defendants. So applied, the comparative negligence statute becomes more than a comparative negligence or even a comparative fault statute; it becomes a comparative cause statute under which all independent and concurrent causes of an accident may be apportioned on a percentage basis. Such an application of the statute permits an apportionment of economic loss among all defendants in a manner fully consistent with the principles underlying the doctrine of strict liability.

8. McCormack v. Hanksraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967) (warranty and strict liability cases); Beck v. Spindler, 256 Minn. 543, 99 N.W.2d 670 (1959) (implied warranty cases); Schubert v. J. R. Clark Co., 49 Minn. 331, 51 N.W. 1103 (1892) (negligence cases). And in Froysland v. Leef Bros., 293 Minn. 201, 197 N.W.2d 656 (1972), the plaintiff was held to be a third party beneficiary to an express warranty made to his employer.


10. MINN. STAT. § 604.01 (1971). The statute applies to all actions tried after July 1, 1969.

11. The last sentence of MINN. STAT. § 604.01(1) (1971) reads: "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.


II. APPLICATION OF THE TRADITIONAL PRINCIPLES OF INDEMNITY AND CONTRIBUTION TO STRICT LIABILITY SITUATIONS

A. DEFINITIONS AND HISTORICAL BASES OF INDEMNITY AND CONTRIBUTION IN MINNESOTA

Indemnity is the right of one party held liable to another to shift the entire burden of liability to a third party also liable for the same harm; contribution is the right to shift part of that liability. Contribution has its origins in equity, where a defendant was required to contribute to a fellow defendant who relieved him of his obligation to pay the plaintiff's damages. Accordingly, it invariably has been held that "common liability" is the very essence of the action for contribution. If the one from whom contribution is sought is not liable to the person harmed, there is no basis for contribution.

The right to indemnity is not based upon the discharge of a common obligation, but rather results from the violation of a duty owed to the indemnitee by the one sought to be charged. Indemnity shifts the entire liability to the party whose wrongful conduct resulted in the imposition of legal liability upon another who is "morally innocent." While there was some confusion as late as 1965, it now appears firmly settled that common liability is not a prerequisite to the recovery of indemnity.

Because of the difference in their historical bases, it has been steadfastly maintained that indemnity and contribution are fundamentally different doctrines, and therefore "full contribution" and "partial indemnity" are contradictions in terms. This
unswerving belief is based on historical anachronisms and semantic quibbling and has given birth to a number of anomalies and absurdities which become apparent in the context of strict liability.

B. STRICT LIABILITY: ITS DEFINITION AND SIGNIFICANCE

The doctrine of strict liability in tort, as set out in section 402A of the RESTATEMENT (SECOND) OF TORTS, was first embraced by the Minnesota Supreme Court in McCormack v. Hankscraft Co.\(^\text{22}\) That section provides:

\[\text{402A. Special Liability of Seller of Product for Physical Harm to User or Consumer.}\]

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.\(^\text{23}\)

As Dean Prosser has properly cautioned,\(^\text{24}\) it is important not to overestimate the changes actually brought about by the acceptance of strict liability in tort. The liability imposed by section 402A is similar to the liability which was traditionally incurred by a seller of a product who breached an implied warranty of merchantability.\(^\text{25}\) The real significance of strict liability lies in its recognition that the seller's liability is tortious, not contractual; such purely "contractual" defenses as the seller's lack of notice of a defect in his product or the lack of privity of contract between the seller of a defective product and

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


its ultimate user are unavailing. The elimination of these defenses means that sellers and manufacturers of defective products may be sued directly by an injured user or consumer regardless of how the product reached the consumer's hands. Thus, the practical effect of strict liability has been to increase substantially the number of non-negligent defendants subject to direct suit. In the context of indemnity and contribution, strict liability actions are unique because, for the first time, otherwise faultless defendants may be held jointly and severally liable to a single injured plaintiff.

C. RIGHTS TO INDEMNITY IN SPECIFIC STRICT LIABILITY SITUATIONS

Thus far, the Minnesota Supreme Court has dealt with indemnity in only one case in which the plaintiff's right to recovery was predicated solely upon strict liability. In Farr v. Armstrong Rubber Co., both the manufacturer and retailer of a defective truck tire were held strictly liable in tort to the injured plaintiffs. The trial court granted the retailer indemnity from the manufacturer and the supreme court affirmed on appeal. Relying upon the guidelines set out in Hendrickson, the court observed that one of the circumstances under which a tortfeasor was traditionally allowed indemnity was where he had only a derivative or vicarious liability for damages caused by the other. The court held that since the retailer's liability resulted "solely from its passive role as the retailer of a defective

26. Dean Prosser has described the change from contractual liability to tortious liability in the following terms:
It is warranty only that has gone overboard, and with it all idea that the plaintiff's recovery is founded on a contract, as well as the statutory provisions. In particular it is the contract defenses, such as lack of notice to the seller and disclaimers, which are out of the window. The cases of warranty, whether on a direct sale between the parties or to the consumer without privity, are still important precedents in determining what the seller has undertaken to deliver.


28. Thus, Torpey v. Red Owl Stores, Inc., 129 F. Supp. 404 (D. Minn.), aff'd, 228 F.2d 117 (8th Cir. 1955), which denied recovery to a friend of the purchaser of a glass jar which shattered, is no longer good law in Minnesota. Of course, for a distributor to be held liable, it is necessary to show that he at some time sold to someone the actual product which caused the complained of injury.

29. 288 Minn. 83, 179 N.W.2d 64 (1970).
product furnished to it by the manufacturer;" indemnity was proper.

While ostensibly the issues raised in *Farr* were resolved by a simple and correct application of the principles expressed in *Hendrickson*, the *Farr* case is worthy of note for at least two reasons. First, the "faultless" retailer was allowed indemnity from one who was, at least legally, equally faultless. Second, the retailer's liability to the injured plaintiffs was not vicarious, but rather was based upon the retailer's independent and volitional act of selling a defective product. Since the doctrine of strict liability makes it as tortious to sell a defective product as to manufacture one, the retailer's liability resulted from his own tortious conduct. Thus, it differed from truly vicarious liability, which is imposed solely by reason of one's relationship to the actor causing harm.\(^{31}\)

*Farr* provides an excellent example of the conceptual problems which arise when traditional principles of indemnity are applied to strict liability situations. Nevertheless, the result reached by the court was sound. The ultimate economic loss was shifted entirely to one whose "active" conduct (the manufacture of a defective tire) caused the plaintiff's injury under circumstances where no significant independent conduct of another concurred in bringing about the injury.

Although it is admittedly difficult to generalize from a single case, *Farr* does shed some light on how claims for indemnity will be treated in several additional strict liability situations:

1. **Where the Liability of All the Defendants Is Premised Solely on Their Strict Liability to the Plaintiff**

   *Farr* clearly stands for the proposition that where the liability of all the defendants is premised solely on strict liability, the loss caused by a defective product should ultimately rest

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30. Id. at 97, 179 N.W.2d at 72.

31. The classic example of truly vicarious liability is reflected in the rule of *respondeat superior* ("look to the man higher up"), under which liability is imposed upon the master for certain torts of his servants. W. Prosser, *Law of Torts* §§ 62-63 (3d ed. 1964). The liability in *Farr* was more akin to the liability imposed for negligently employing a particular servant, Dean v. St. Paul Union Depot Co., 41 Minn. 360, 43 N.W. 54 (1889), or negligently entrusting a firearm to a child, Clarine v. Addison, 182 Minn. 310, 234 N.W. 295 (1931). In these situations, it is the act of employing or entrusting, not the relationship between the defendant and actual wrongdoer, which results in liability. Cf. W. Prosser, *Law of Torts* § 104 (4th ed. 1971).
with the party at the beginning of the distributive chain.\textsuperscript{32} Since each defendant is liable only if the product was in a defective condition at the time it left his possession,\textsuperscript{33} the ultimate responsibility should rest upon the one who first placed the defective product into the stream of commerce. Thus, it follows that if a product is defective only because one of its component parts is defective, the ultimate responsibility for injuries caused by the product is imposed upon the manufacturer of the component part.\textsuperscript{34} This surely should not be the case, however, where a component part is put to an unintended use with the result that the product as a whole is rendered defective.\textsuperscript{35} Here, the manufacturer of the component part should not be liable because the part was not defective at the time it left his possession.

The doctrinal underpinnings which allow the party at the beginning of the distribution chain to be held liable for the entire harm suffered by the plaintiff are not unique to strict liability cases. One who furnishes a defective product to another breaches an implied warranty of merchantability\textsuperscript{36} for which an action for indemnity will lie.\textsuperscript{37} Since the terms “defective condition” and “unmerchantable” are for all practical purposes synonymous,\textsuperscript{38} and since in the typical case there is no dispute as to how the defective product got into the plaintiff’s hands, the findings of fact which give rise to strict liability are identical to those necessary to determine rights to indemnity for breach of an implied warranty of merchantability.\textsuperscript{39}

\textsuperscript{32} This is analogous to the principles behind liability on a negotiable instrument. Although an endorser of an instrument is liable to all subsequent holders in due course, he is allowed to recover from the maker. The result is that the loss is ultimately placed upon the party who first negotiated the worthless instrument.

\textsuperscript{33} \textit{See} Kerr v. Corning Glass Works, 284 Minn. 115, 169 N.W.2d 587 (1969).


\textsuperscript{35} \textit{Cf.} Borg Warner Corp. v. White Motor Co., 344 F.2d 412 (5th Cir. 1965).

\textsuperscript{36} The “implied” warranty of merchantability is now statutorily mandated by the Uniform Commercial Code. \textit{See} M\textsc{inn. Stat.} § 336.2-314(2) (1971), which provides in part that “[g]oods to be merchantable must be at least such as . . . (c) are fit for the ordinary purposes for which such goods are used . . . .”


\textsuperscript{39} But arguably a retailer may not recover indemnity from a manufacturer on an implied warranty theory where the retailer purchased the offending product from an intervening distributor, since the
2. Where One or More Defendants Have Breached an Implied Warranty

In view of the foregoing discussion, one held liable for the breach of an implied warranty of merchantability seems to have the same recourse against those nearer to the beginning of the chain of distribution as does one held strictly liable in tort. Indeed, this inference can properly be drawn from Farr itself. However, it is questionable whether all breaches of implied warranties will be treated alike. For example, the breach of an implied warranty of fitness for a particular purpose might well bar a seller from the recovery of indemnity. The seller's liability in this case is founded upon his failure to exercise skill and judgment in selecting goods to fulfill the requirements made known to him by the buyer. The exercise of such skill and judgment could well be considered an independent undertaking, which would make indemnity inappropriate.

3. Where One or More Defendants Are Also Negligent

Although Farr does not discuss the availability of indemnity where one or more of the defendants in a strict liability action are found negligent, its acceptance of the traditional approach to indemnity suggests that the negligence of the indemnitee will bar his claim. This is the result of the general rule that one who is causally negligent may not recover indemnity, except where his negligence is imputed or consists entirely of his failure to discover or prevent the negligence of another. Put another way, one whose negligence is "independent and concurrent" is in pari delicto with other defendants and therefore must

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40. In granting the retailer indemnity, the court recognized that it "was found liable [to the plaintiffs] either on the grounds of breach of implied warranty or of strict liability in tort." Farr v. Armstrong Rubber Co., 288 Minn. 83, 98, 179 N.W.2d 64, 72 (1970).

41. The implied warranty of fitness for a particular purpose is codified in Minn. Stat. § 336.2-315 (1971), which provides:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.


43. See, e.g., Hanson v. Bailey, 249 Minn. 495, 83 N.W.2d 252 (1957); Lunderberg v. Bierman, 241 Minn. 349, 63 N.W.2d 355 (1954).
be denied indemnity. Some decisions have used this principle to allow indemnity only to those whose negligence was "passive" rather than "active," or "secondary" rather than "primary."

In determining whether negligence is "active," "primary" or "independent and concurrent," the test is qualitative, not quantitative. Therefore, the doctrine of comparative negligence is not applicable. A defendant whose negligence is found, for example, to have contributed only 30 percent to an accident is still not entitled to indemnity unless he can show that his negligence is "passive" in nature. Since almost all negligence other than a failure to discover or prevent the negligence of another is considered "active," even the negligent failure to adequately warn of a known (or perhaps even an unknown but discoverable) hazard will bar indemnity.

4. Where One or More Defendants Have Breached an Express Warranty

Even assuming there is no reason to hold that the breach of an "express warranty" which merely expresses warranties already implied by law is "independent and concurrent" misconduct so as to bar indemnity, the considerations are quite dif-

44. See Kenyon v. F.M.C. Corp., 286 Minn. 283, 176 N.W.2d 69 (1970).
47. [T]he difference between primary and secondary liability, as used in determining the right of indemnity, is based not on a difference in degrees of negligence or on any doctrine of comparative negligence, but on the difference in the character or kind of wrongs which caused the injury and in the nature of the legal obligation owed by each wrongdoer to the injured person.
50. For example, the court in Farr noted that there was no evidence of any express warranty given by the retailer where the only statement made by it was that the tires would be adequate. This statement, said the court, was nothing more than a reaffirmation of what was already required under an implied warranty of merchantability and hence could not be considered an "active wrong." 288 Minn. 83, 96,
different where the express warranty goes beyond the scope of an implied warranty of merchantability. When a manufacturer, retailer or distributor warrants more than is required by law, he has in essence gone off on an independent undertaking and should not be allowed to shift the entire burden of the plaintiff's injuries to the shoulders of other parties in the distribution chain. Although the only direct authority for this position is found in a federal case applying New York law, it was indirectly suggested by the court in Farr. Noting that recovery of attorneys' fees and costs were generally not allowed in situations where the indemnitee had also defended accusations which encompassed his separate wrongful acts, the Minnesota court affirmed the trial court's order denying the retailer attorneys' fees and costs as part of its indemnification. It reasoned that the plaintiff's claims that the retailer had breached express warranties placed the retailer in the position of defending its own wrongful conduct. Therefore, its attorneys' fees and costs were spent in its own behalf.

D. Rights to Contribution in Strict Liability Situations

Although contribution may be available in strict liability cases where common liability exists among the defendants and the defendant seeking contribution has been guilty of no "intentional wrongdoing," it is not clear how contribution will allocate losses among non-negligent parties. Prior to the enactment of the Minnesota comparative negligence statute, all tortfeasors were liable for contribution in equal amounts. The total amount of the plaintiff's award was simply divided equally among all the parties legally responsible for it. The comparative negligence statute, however, provides for contribution "in

51. See Sylvestri v. Warner & Swasey Co., 398 F.2d 598 (2d Cir. 1968). In Sylvestri, the jury found that a backhoe was neither unmerchantable nor unfit for its intended use, but that the manufacturer had made and breached an express warranty that the machine could be safely used as the plaintiff was using it at the time of the accident. The manufacturer's breach of his express warranty was held to be an "active" wrong so as to preclude him from recovering indemnity from a retailer who was found negligent for failing to warn the plaintiff that the machine could not safely be used for such purposes.
52. 288 Minn. at 97, 179 N.W.2d at 73.
proportion to the percentage of negligence attributable to each [defendant]. If the statute is interpreted literally so as to allow only a comparison of negligence, excluding comparison of causal relationships between defendants' acts and plaintiff's injury, contribution among strictly liable defendants still will be by equal shares.

III. AN ANALYSIS OF THE PROBLEMS

A. THE OBJECTIVES OF INDEMNITY, CONTRIBUTION AND STRICT LIABILITY

Despite the differences in their application and historical bases, both indemnity and contribution have the same ultimate objective. They seek to avoid injustice by requiring an equitable allocation of liability among joint tortfeasors. Both doctrines are "used when required by judicial ideas of fairness to secure restitution." As Dean Prosser has observed with respect to the rationale underlying the doctrine of contribution:

There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be Shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free.

However, the assertion that contribution is appropriate where justice requires a sharing of liability while indemnity is proper where justice requires one of the parties to assume the entire burden is a statement of results, not a statement of principles. The single principle which the courts try to implement in both indemnity and contribution cases is simply the principle that each tortfeasor should be required to pay his just share of the bill, whether that share be all, part or none. The equitable loss sharing among all those whose conduct has caused harm has long been a goal of tort law.

Similarly, the object of strict liability is also to achieve an

58. See, e.g., Hanson v. Bailey, 249 Minn. 495, 505, 83 N.W.2d 252, 260 (1957).
equitable distribution of losses. However, like all substantive rules of tort law, the doctrine of strict liability reflects an implicit value judgment as to who should ultimately bear a loss. It is in part premised upon the notion that economic losses caused by unsafe products should be borne by manufacturers and distributors of the products who are better able to insure against or otherwise spread losses among the industry than are individual consumers.\textsuperscript{60}

It is important to realize that both the manufacturer and the distributor of a defective product are held strictly liable. As the Minnesota Supreme Court has observed:

Strict liability in tort applies not only to manufacturers but also to retailers and distributors. The same policy considerations apply, since both retailers and manufacturers are engaged in the business of distributing goods to the public. Thus, both are an integral part of the overall producing and marketing complex that should bear the cost of injuries resulting from defective products.\textsuperscript{61}

This recognition of the importance of marketing in product-caused injuries leads to the conclusion that the remedial goals of strict liability cannot be fully achieved simply by shifting the economic loss from the injured consumer to the “producing and marketing complex” as a whole. Full implementation of these goals requires the losses to be further allocated among all members of the “complex.” The problem, of course, is that in the absence of fault there is no readily available way in which to further spread the loss.

At least a partial answer is suggested by another, albeit subsidiary, goal of strict liability. Despite strict liability’s lack of concern with “fault” in the traditional sense, deterrence does remain a viable objective of modern tort law. “[T]he manufacturer who is made liable to the consumer for defects in his product will do what he can to see that there are no such defects.”\textsuperscript{62}


\textsuperscript{61} Farr v. Armstrong Rubber Co., 288 Minn. 83, 96, 179 N.W.2d 64, 72 n.1 (1970).

\textsuperscript{62} W. Prosser, Law of Torts § 4 (3d ed. 1964). Cf. Skaja v. Andrews Hotel Co., 281 Minn. 417, 161 N.W.2d 657 (1968), where the court allowed contribution between unintentional violators of the Civil Damage Act, Minn. Stat. § 340.95 (1971), stating: Allowing contribution may not demonstrably advance the compensatory objectives of the act in favor of the injured party, but it will not hinder that objective and it will spread the burden of economic loss more equitably upon the liquor industry.

Secondly, the act by the imposition of the sanction of strict
The same might be said for retailers, distributors and others in the chain of distribution even though their conduct is not connected with the creation of a defective product. The view that losses caused by defective products should fall on all parties who in any way substantially influenced or aided the plaintiff in obtaining the product is reflected in recent decisions indicating that organizations which grant "seals of approval" and other certifications of quality, such as the Good Housekeeping Consumer Guaranty Seal or the Underwriters' Laboratories Seal of Approval may be liable to plaintiffs injured by defective products. These decisions, based on the theory that such certifications act as a meaningful inducement to purchasers, provide judicial recognition of the importance of modern merchandising methods.

B. SOME CRITICISMS OF THE PRESENT LAW

The most notable feature of the present law of indemnity and contribution is that much of it makes little sense even outside the context of strict liability. Part of the problem stems from the fact that courts are often forced to resort to indemnity in order to achieve some semblance of justice in a particular case where contribution would be more appropriate but for liability provides an extremely effective incentive for liquor vendors to do everything in their power to avoid making illegal sales. . . . The allowance of contribution between unintentional violators would serve to increase this incentive, for it will make more certain that every vendor who makes an illegal sale will be unable to escape liability for his share of the damages resulting because of "the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the wrongdoer" as is possible if the right to seek contribution were denied.

Making the right of contribution available between unintentional violators will, therefore, distribute the burden of liability among those commonly liable equally, increase the incentive of all licensed vendors to guard against illegal sales, and spread more equitably the economic loss resulting from violations upon the liquor industry.

65. See, e.g., Keefer v. Al Johnson Constr. Co., 292 Minn. 91, 193 N.W.2d 305 (1971) (general contractor found 28 percent negligent, held entitled to indemnity from employer-subcontractor found 55 percent negligent). See also Hillman v. Wallin, 215 N.W.2d 810 (Minn. 1974) (bus driver found 76 percent negligent granted full indemnity against two passengers, each of whom were found 12 percent negligent); Tromza v. Tecumseh Prods. Co., 378 F.2d 601 (3d Cir. 1967); Bjorklund v. Hantz, 208 N.W.2d 722 (Minn. 1973).
some reason is not available.\footnote{66} Faced with the unenviable choice of placing the entire liability upon a defendant who is only slightly culpable or shifting the entire liability to a defendant who is largely but not solely at fault, courts simply choose the lesser of two evils and grant indemnity.\footnote{67} Even in those cases in which contribution is available, it is sometimes more equitable to shift the entire burden rather than to divide it equally—for example, where one tortfeasor’s negligence contributed only 10 percent to the occurrence of the accident while another's accounted for 90 percent.\footnote{68}

These problems of allocating liability are particularly well illustrated in \textit{Haney v. International Harvester Co.}\footnote{69} where, because contribution was not available, indemnity was allowed even though the indemnitee was personally as opposed to vicariously guilty. The plaintiff in \textit{Haney} brought suit against the manufacturer of a truck claiming that a defect existing in the truck at the time of its manufacture caused the accident in which he was injured. The manufacturer in turn brought an action against the plaintiff's employer, who had been forced to pay workmen's compensation to the plaintiff as a result of the accident, alleging that any defect in the truck was attributable to his conduct. The trial court dismissed the manufacturer's action. On appeal, the Minnesota Supreme Court noted that contribution was not available to the manufacturer because the employer's liability under the Workmen's Compensation Act was exclusive, and therefore he and the manufacturer were not commonly liable.\footnote{70} The court also pointed out that indemnity would not ordinarily be available because the case did not fall within any of the five categories set forth in \textit{Hendrickson}.\footnote{71}

\footnote{66} For examples of situations in which contribution is not available see section IV-C infra.

\footnote{67} \textit{Cf.} cases cited in note 65 supra.

\footnote{68} \textit{See} \textit{Furnish, Distributing Tort Liability: Contribution and Indemnity in Iowa}, 52 IOWA L. REV. 31, 50 (1966). \textit{Cf. Lawrence v. Great Northern Ry.}, 109 F. Supp. 552, 555 (D. Minn. 1942), \textit{aff’d} sub nom., \textit{Waylander-Peterson Co. v. Great Northern Ry.}, 201 F.2d 408, 416 (8th Cir. 1953).

\footnote{69} 294 Minn. 375, 201 N.W.2d 140 (1972).

\footnote{70} The relevant section of the Workmen’s Compensation Act is \textit{Minn. Stat.} § 176.031 (1971). The section provides that if an employer fails to insure or self-insure his liability for workmen's compensation, the employee may maintain an action at law in which the employer is deprived of the defenses of contributory negligence (unless willful), assumption of risk or injury by fellow servant. \textit{See} \textit{Fox v. Swartz}, 228 Minn. 233, 36 N.W.2d 708 (1949).

\footnote{71} The court may be wrong in assuming that the five \textit{Hendrickson} categories are exclusive. \textit{See} cases cited in note 4 supra and text ac-
However, obviously troubled by the injustice of denying both contribution and indemnity to a party who was only 10 percent negligent while at the same time allowing the 90 percent negligent employer to recoup all the workmen's compensation benefits which it had paid, the court held that it would reconsider granting indemnification where there was "great disparity in the degree of fault of the parties." The trial court's order was reversed and the case remanded for trial, with instructions to determine the percentages of negligence attributable to the manufacturer and the employer.

Unfortunately, indemnity is also frequently used, with results that border on the preposterous, in cases where contribution would clearly be more appropriate. For example, in Bjorklund v. Hantz a retailer found by the jury to have been 30 percent negligent was awarded indemnity from a manufacturer found 45 percent negligent. In that case, the court held that the retailer's negligence was not "active," because it consisted solely of not discovering and correcting the defective condition of the product. Stating that the doctrine of comparative negligence applied only in contribution cases and ignoring the availability of contribution, the court rejected the manufacturer's contention that liability should have been apportioned in relation to the adjudicated percentages of negligence. This truly is a triumph of historical accident over common sense.

As applied to strict liability, present day principles of indemnity seem even more outmoded and illogical. Because they look to the relative culpability of the defendants, the traditional rules governing indemnity disregard the importance of non-negligent or otherwise faultless conduct in bringing about product-caused injuries. Unless their conduct in some way amounts to "active fault," retailers and distributors are free to promote goods of any quality, secure in the knowledge that any liability companying notes 3-4 supra; Larson v. Minneapolis, 262 Minn. 142, 114 N.W.2d 68 (1962). But see Olson v. Village of Babbitt, 291 Minn. 105, 189 N.W.2d 701 (1971).

73. 208 N.W.2d 722 (Minn. 1973).
74. The operator of the defective snowmobile which injured plaintiff was found 25 percent negligent. Id. at 723.
75. "The right of indemnity inures to a person who, without active fault on his part, has been compelled by reason of a legal obligation to pay damages occasioned by the initial negligence of another and for which he himself is only secondarily liable." Keefer v. Al Johnson Constr. Co., 292 Minn. 91, 100, 193 N.W.2d 305, 310 (1971).
which results from selling defective products can usually be shifted to the one who created the defective condition. The ability of retailers and distributors to shift the entire liability resulting from their own activities to others destroys the deterrent effect of strict liability by making it impossible to allocate losses among all those who, in the regular course of their businesses, derive economic gain from the sale of defective products.

What courts have overlooked is that the conduct involved in wholly "faultless" marketing methods may constitute a greater cause of harm to the public than the conduct which created the defective product in the first place. The manufacturer of a defective product may be a small, inexperienced concern, with little capital and little or no ability to market its own product. Moreover, the manufacturer's gross profit derived from creating the product may be small when compared to that of the large, nationwide concern which packages, promotes and distributes it. If losses should be allocated in relation to benefits derived from the activity which caused the loss, traditional notions of fault are as irrelevant in deciding whether Sears, Roebuck & Co. is allowed indemnity from the manufacturer who operates out of his garage as they are in determining the injured plaintiff's right of recovery in the first instance. Furthermore, when ultimate liability is shifted upward along the distribution ladder, the entire loss may come to rest upon a defendant whose conduct was entirely unrelated to the creation of the defective product simply because the party who actually created the defective condition is not subject to service of process, is uninsured or is just plain broke. In these cases, the ultimate imposition of liability is fortuitous and is entirely unrelated to any policy objective.

Of course, the simplest solution to the problems caused by common law indemnity and contribution is the abolition of both doctrines and the creation of an entirely new rule stripped of historical anachronisms and semantic absurdities, which would allocate responsibility among all persons whose conduct was in some significant manner responsible for the plaintiff's loss. The doctrine could even be christened with an appealing new name such as "comparative responsibility." Under the guise of "partial indemnification," the New York Court of Appeals has come close to doing just this, at least in negligence cases. In Dole

76. This disposes of the contention of some that every defective condition is properly attributable only to someone at "fault". See text following note 96 infra.
v. Dow Chemical Co., the court renounced the "active-passive" negligence test for indemnity and instead held "that where a third party is found to have been responsible for a part, but not all, of the negligence for which a defendant is cast in damages . . . there must necessarily be an apportionment of responsibility in negligence between those parties."

This decision, imposing liability in proportion to responsibility, is remarkable not only because New York is not a comparative negligence jurisdiction, but also because a New York statute provides for contribution only by equal shares.

It has been suggested, apparently in all seriousness, that sellers and manufacturers of defective products be limited to contribution in proportion to relative volumes of business. At least one writer has even questioned whether indemnity should ever be allowed among those engaged in the manufacture and sale of defective goods. He reasoned that as "partners" in an "enterprise" manufacturers and distributors should always share the cost of injuries to the consuming public. However, in view of the court's adherence to traditional doctrine in Haney and Bjorklund it is likely that inertia will prevail over common sense, and that in Minnesota contribution and indemnity will remain separate and distinct concepts. Nevertheless, it is possible that some of the problems caused by common law indemnity and contribution can be alleviated, if not solved, without a revolutionary change in tort law. Contribution is currently available in most products liability cases, since the element of common liability is usually present. If the provision of the

78. Id. at 148-49, 282 N.E.2d at 292, 331 N.Y.S.2d at 387.
83. See text accompanying notes 69-72 supra.
84. The court held that, since the retailer was entitled to indemnity under Hendrickson, there was no need to apportion liability in accordance with the adjudicated percentages of negligence. It stated:

This is not the rule, however, with respect to indemnity, which is an equitable doctrine of longstanding [sic]. Its application is reserved for those rare cases in which the parties seeking indemnity have been guilty of no active negligence. We are not disposed to lightly overrule these well-established principles. In any event, the facts of this case do not make it a proper vehicle for so doing.

85. See section IV-C(1) infra.
Minnesota Comparative Negligence Statute providing for contribution based on the percentage of negligence is expanded so as to operate on all theories of tort liability, the resulting “comparative cause” statute will provide a means of equitable loss allocation among all defendants whether negligent or strictly liable. Thus, a simple curtailment of the use of indemnity coupled with a liberal utilization of the comparative negligence statute could lead to an equitable system of loss allocation.

IV. A PROPOSED GENERAL RULE

A. THE RULE

It is submitted that the following general rule is both equitable and logically consistent with contemporary objectives of the law of torts:

One held liable for personal injury resulting from a defective product manufactured or sold by him in the ordinary course of business may not recover indemnity from anyone if:

(a) he was negligent with respect to the product, breached an express warranty or misrepresented, intentionally or innocently, the product and such conduct was a direct cause of the injury; or,

(b) his independent conduct with respect to the product, apart from any conduct directly related to the defect itself, was a direct cause of the injury.

A party so denied indemnity may recover contribution from all other persons legally responsible for the injury, contributions to awards being in proportion to the percentage of causal conduct attributable to each such person responsible.

So formulated, the rule concerns itself not so much with traditional notions of “fault” or degrees of fault, but rather with independent, causal conduct. While the proposed rule recognizes that complete indemnification may be appropriate in some cases, it also recognizes that under modern commercial conditions many forms of wholly “faultless” conduct are so causally related to product-caused injuries that indemnity is inequitable and inconsistent with the social policies and remedial goals of contemporary tort law.

B. THE RULE’S BASIC APPLICATION

Application of the proposed rule to traditional “fault” situations is relatively simple: (a) a defendant found to have been causally negligent is denied indemnity, and there is no need to determine the kind, character or degree of his negligence; (b) a defendant found to have breached an express warranty going
beyond the scope of an implied warranty of merchantability, or found to have intentionally or negligently misrepresented the product, is also denied indemnity if his conduct was a direct cause of the plaintiff's loss.

Application of the rule to situations involving "faultless" defendants is somewhat more complex. The jury must assess the total marketing activities and other non-defect-causing conduct of each defendant to determine whether that conduct, apart from the defect itself, was so causally related to the accident as to constitute an independent and concurrent cause of the plaintiff's injury. In making such a determination, the jury could use the following criteria: (a) the extent to which conduct of a defendant induced the plaintiff to purchase the product which caused his injury; (b) the extent to which the conduct of the defendant was motivated by a justifiable reliance upon the proper conduct of others; (c) the economic gain derived by each defendant as a result of his conduct in comparison to such gains derived by other defendants; and (d) the likelihood of the accident not happening at all in the absence of the defendant's conduct.

Applying these criteria, the jury in many cases may conclude that a retailer's independent conduct—the mere act of selling—although subjecting him to liability to the plaintiff, is so insignificant in relation to the conduct of others that it does not constitute an independent and concurrent cause of the plaintiff's injuries. For example, if a consumer enters a hardware store and asks for a "Stanley" claw hammer of a particular style and weight, a jury might conclude that the store's conduct in complying with the consumer's specific demand was insignificant in relation to the conduct of the manufacturer who produced the defective hammer since: (a) the store did little to induce the sale of the particular kind of hammer which caused the plaintiff's injuries; (b) the store's decision to sell "Stanley" hammers to the public was made in reliance upon the manufacturer's long-standing and excellent reputation in the hand tool industry; (c) the annual profit derived by the store from the sale

86. It is questionable whether statements which merely express the warranties already implied by law can be considered express warranties. See generally Sorenson v. Safety Flate, Inc., Nos. 43938, 43962 (Minn., filed Feb. 22, 1974); Olson v. Village of Babbitt, 291 Minn. 105, 189 N.W.2d 701 (1971).

of “Stanley” hammers is negligible when compared to the profits derived by their manufacturer; and (d) if the store had not supplied the consumer with the particular hammer he requested, he would simply have purchased it elsewhere.

However, there are situations where a jury could well reach the opposite result. For example, assume that a large shipment of claw hammers manufactured in a foreign country lies unclaimed on the docks of New York. Finally the entire shipment is purchased by an importer at a price equal to the outstanding shipping and storage charges. A local chain of hardware stores, learning of the importer’s purchase, buys the entire shipment from him, paying a price which yields the importer a profit of 25 percent. In its advertising, the hardware chain offers the hammers for sale to the public at a price of $1.99 each. This price is about one-half the retail price of any other hammer sold by the chain, but because the hammers were obtained so cheaply, it represents a 100 percent profit on each hammer sold. Plaintiff responds to the chain’s television and newspaper advertising and buys one of the hammers. Unfortunately, every hammer in the shipment, including the one purchased by the plaintiff, is defective but the defect is such that it cannot be discovered with reasonable inspection. While properly using the hammer, plaintiff sustains serious injury when its head shatters. In the resulting action by plaintiff against the hardware chain and importer, both are found free from negligence but are held strictly liable in tort for breaching implied warranties of merchantability.

Since both the retailer and importer are free from “fault,” under present Minnesota law the retailer would be entitled to indemnity from the importer.88 However, a jury could easily conclude that the retailer’s “faultless” conduct with respect to the offending hammer was an independent and concurrent cause of the plaintiff’s injury since: (a) the sale of the hammer to plaintiff was induced by the retailer’s advertising; (b) there was little, if any, justifiable reliance by the retailer upon the due care of the unknown manufacturer or upon the selection expertise of the importer; (c) keeping in mind that both retailer and importer were acting pro hac vice with respect to this particular shipment of hammers, the profit of the retailer was four times that of the importer; and (d) it is highly unlikely that plain-

tiff would or could have purchased the hammer in the absence of the retailer's purchasing and marketing activities.

One of the more revolutionary aspects of the rule is that it leaves questions as to the availability of indemnity to the jury. Traditionally, even "factual" questions have generally been determined by the court insofar as rights to indemnity were concerned.90 Yet there is no rule of law which requires issues of indemnity to be decided by the court. Rather, the court often determines the availability of indemnity simply because it has not been asked to submit the question to the jury.90 It is freely conceded that the availability of indemnity will no longer be "predictable" if the issue is left to the jury under relatively general instructions. However, it is not clear that predictability was ever a true goal of traditional indemnity law. Even the Minnesota Supreme Court recently observed that "indemnity is an equitable doctrine which does not lend itself to hard-and-fast rules, and . . . its application depends upon the particular facts of each case."91 Moreover, the Minnesota case law suggests that in fact very little "predictability" results from the use of

89. See, e.g., Keefer v. Al Johnson Constr. Co., 292 Minn. 91, 193 N.W.2d 305 (1971); Thill v. Modern Erecting Co., 272 Minn. 217, 136 N.W.2d 677 (1965); Daly v. Bergstedt, 267 Minn. 244, 126 N.W.2d 242 (1964).
90. In this context, MINN. R. CIV. P. 49.01, dealing with special verdicts, provides:
   If . . . the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand, the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

The inattention of trial counsel to the indemnity issue is well illustrated in Kenyon v. F.M.C. Corp., 286 Minn. 263, 176 N.W.2d 69 (1970), where the court observed:
   It may be noted that where cross-claims for indemnity between multiple tortfeasors are consolidated and tried with plaintiff's claims against such tortfeasors, an appellate court would experience far less difficulty in deciding the type of issue raised on this appeal if the party seeking indemnity had at trial requested the court to include in the special verdict specific questions concerning each claim of negligence.

Id. at 267, 176 N.W.2d at 72.
91. Farr v. Armstrong Rubber Co., 288 Minn. 83, 96, 179 N.W.2d 64, 72 (1970). See Hillman v. Wallin, 215 N.W.2d 810, 813 (Minn. 1974) ("[W]e will have to permit indemnity on a case by case basis where our sense of fundamental fairness seems to require it.").
92. An example of such a word formula is the "active-passive" negligence test approved by the court in Daly v. Bergstedt, 267 Minn. 244, 253, 126 N.W.2d 242, 248 (1964).
word formulas or liability classifications applied by trial courts.

Another possible criticism of the rule is that the criteria proposed as guides for the jury are so general as to allow the jury almost unlimited discretion in determining if indemnity should be allowed. However, the criteria are no more vague than the standards which Minnesota juries have long used to determine negligence (i.e., "doing . . . something which a reasonable person would not do, or the failure to do something which a reasonable person would do, under like circumstances") and proximate cause (i.e., "a cause which had a substantial part in bringing about the [accident]"). Indeed, since the jury is in theory a cross-section of the community, composed of persons of diverse backgrounds and experience, it would seem far more qualified than a trial court judge to assess the relative impact of marketing activities in bringing about a product-caused injury.

Finally, even if the premise can be accepted that indemnity for losses stemming from defective conditions should be allowed only when the indemnitor is at fault, the right to indemnity from the party at fault is valueless unless he is available and able to pay a judgment. The proposed rule would be justified if it did nothing more than eliminate the injustice that occurs when a "faultless" seller is required to indemnify all subsequent parties in the chain of distribution because of inability to obtain redress in turn from the party who actually produced the defective good.

C. Two Impediments to Full Implementation of the Rule

1. Common Liability as a Prerequisite to Contribution

Obviously, full implementation of the rule will be thwarted in those cases where indemnity is inappropriate but contribution is unavailable because the defendants are not commonly liable. This, however, may not be as large a problem as it seems. Com-

96. Id., Instruction 140 G-S.
Common liability is lacking only where one tortfeasor has a "personal defense" existing at the very instant the tort is committed. Defenses which arise after the tortious act are of no moment. Thus, the common liability necessary for contribution is not destroyed if one tortfeasor secures a covenant not to sue from the plaintiff, nor is it destroyed if the statute of limitations runs against one tortfeasor, nor if a municipality has a defense based upon the plaintiff's failure to give timely notice of a claim. In addition, personal defenses or "immunities" are on the wane in Minnesota. Sovereign immunity is now strictly circumscribed, and the Supreme Court of Minnesota has recently abrogated interspousal immunity, a child's immunity for a tort against its parent, and a parent's immunity for a tort against his child. In the absence of immunities of these kinds, common liability will almost always be present in products liability cases.

The easiest solution to the problems caused by lack of common liability in cases where contribution is sought is to follow the lead of courts which have recently allowed contribution from a person immune from suit by the plaintiff on the ground that the immunity does not apply to liability. Although this view has been rejected by the Minnesota Supreme Court, it is pos-

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100. See Hillman v. Wallin, 215 N.W.2d 810 (Minn. 1974), where a school bus driver was held liable to the injured plaintiff because of his negligent failure to supervise two passengers whose "active" negligence injured the plaintiff. Because the bus driver was only "secondarily liable," the court concluded that the element of common liability was lacking, even though it acknowledged that the bus driver was "100 percent responsible for his negligence." Id. at 814. It is difficult to explain how common liability can be lacking where all three defendants are jointly and severally liable to the plaintiff. See also discussion of Bjorklund v. Hantz in text accompanying note 73 supra.
105. See American Auto. Ins. Co. v. Molling, 239 Minn. 74, 57 N.W. 2d 847 (1953). Although the court has not indicated that it is prepared
sible that the requirement of common liability for contribution can be abrogated through the use of the same legal fiction which allows indemnity in the absence of common liability: a party should be liable for contribution as well as for indemnity where he has breached a duty to another by conducting himself in such a way as to subject such other party to legal liability.

2. Employer's Immunity Under Workmen's Compensation Statutes

One immunity that will impede full utilization of a sensible loss allocation system is that belonging to an employer when his employee is injured in the course of his employment. In such cases the Workmen's Compensation Act provides the exclusive means by which the injured employee can recover from his employer.106 Although the employer may be liable to a third party tortfeasor for indemnity,107 he is never liable for contribution because of the absence of common liability.108 This anomalous situation can be corrected only by abolishing the requirement of common liability—perhaps by substituting a test of "common tortious conduct"109—or accomplishing the same result through an allowance of "partial indemnity."110

The situation has been further complicated by the recent enactment of MINNESOTA STATUTES § 176.061 (10), which purports to abolish an employer's liability for indemnity.111 However,

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106. See note 70 supra and accompanying text.
109. This test was expressly rejected in American Auto. Ins. Co. v. Molling, 239 Minn. 74, 57 N.W.2d 847 (1953), but it finds some support in White v. Johnson, 272 Minn. 363, 137 N.W.2d 674 (1965). See note 105 supra.
110. But see text accompanying note 21 supra.
111. MINN. STAT. § 176.061 (10) (1971) provides:
If an action as expressly rejected in American Auto. Ins. Co. v. Molling, 239 Minn. 74, 57 N.W.2d 847 (1953), but it finds some support in White v. Johnson, 272 Minn. 363, 137 N.W.2d 674 (1965). See note 105 supra.
this statutory provision was held unconstitutional in the recent case of Carlson v. Smogard, where the Minnesota Supreme Court held that a statutory abrogation of common law rights to indemnity violates due process. The court did not make the same observation with respect to a common law denial of rights to contribution.

V. PROCEDURAL IMPLICATIONS OF THE RULE

A. COMPARISON OF CAUSAL CONDUCT AS THE BASIS FOR LOSS ALLOCATION AMONG TORTFEASORS

The enactment of the Minnesota comparative negligence statute has removed previously existing procedural barriers to an equitable loss allocation system. Indeed, application of the rule proposed by this Article hinges upon the rationale underlying that statute. While, of course, a comparative negligence statute speaks only of negligence, the rationale of the Minnesota statute may be extended so as to require the comparison of all legal causes of the plaintiff’s injuries, whether they were caused by negligent or faultless conduct on the part of the defendants. The Wisconsin Supreme Court has achieved precisely this result based on an almost identical statute. In Dippel v. Sciano the court held that strict liability in tort, as expressed in section 402A of the RESTATEMENT (SECOND) OF TORTS, could be considered “negligence per se” for the purpose of applying Wisconsin’s comparative negligence statute. Therefore, the court reasoned that the strict liability of a defendant could be compared to any contributory negligence of the plaintiff.

or settlements in absence of a written agreement to do so executed prior to the injury.

The statute became effective on September 1, 1969, and has not been applied retroactively. Cooper v. Watson, 290 Minn. 362, 187 N.W.2d 689 (1971).

112. 215 N.W.2d 615 (Minn. 1974).

113. MINN. STAT. § 604.01 (1971).

114. The first sentence of the Minnesota statute is actually a verbatim copy of Wis. STAT. § 895.045 (1973). See Olson v. Hartwig, 288 Minn. 375, 180 N.W.2d 870 (1970).

115. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).


117. But in his concurring opinion, Justice Hallows expressed the view that the court was really not adopting strict liability, but rather was holding that a seller who meets the requirements of section 402A of the RESTATEMENT (SECOND) OF TORTS is guilty of negligence as a matter of law. Strict liability, said Justice Hallows, is inconsistent with the doctrine of comparative negligence. 37 Wis. 2d at 404, 155 N.W.2d
The result achieved by this creative legal fiction is highly commendable in light of the accepted principle that "strict liability [is] not absolute liability." Moreover, this construction of the statute permits a just and sensible method of loss allocation. Since the "faultless" conduct of the defendant can be compared with the plaintiff's negligence, there is no reason why a similar comparison of causal conduct cannot be made among all defendants as well.

B. USE OF THE SPECIAL VERDICT

Special verdicts are widely used in Minnesota, primarily because of the comparative negligence statute. Like the doctrine of comparative negligence, the rule proposed in this Article would be impracticable if only general verdicts were used. However the specific findings of fact contemplated by the special verdict procedure render the proposed rule feasible since its application to a typical products liability case would entail simply the addition of one question per defendant to the customary special verdict form. For example, in the hypothetical case of the imported claw hammers, the following form of special verdict might be used:

1. Was plaintiff negligent in his use of the hammer? Ans. No
2. If so, was such negligence a direct cause of his injury? Ans.
3. At the time the hammer left the possession of importer, was it in a defective condition making it unreasonably dangerous to plaintiff? Ans. Yes
4. If so, was such defect a direct cause of plaintiff's injury? Ans. Yes
5. At the time the hammer left the possession of retailer, was it in a defective condition making it unreasonably dangerous to plaintiff? Ans. Yes
6. If so, was such defect a direct cause of plaintiff's injury? Ans. Yes
7. Was importer negligent with respect to the hammer? Ans. Yes
8. Was retailer negligent with respect to the hammer? Ans. No
9. Was retailer negligent with respect to the hammer? Ans. Yes

at 65. The latter statement was grounded upon the erroneous equation of strict liability with absolute liability.
119. Special verdicts are authorized by Minn. R. Civ. P. 49.
120. See section IV-B supra.
121. The special verdict form set out in the text assumes that there is no dispute as to whether the importer and retailer are in the business of selling hand tools or as to whether the hammer reached plaintiff without any substantial change from the condition in which it was sold by both importer and retailer. The last question is the additional finding required by the proposed rule.
10. If so, was such negligence a direct cause of plaintiff's injury?  

11. Did retailer breach an express warranty in connection with its sale of the hammer to plaintiff?  

12. If so, was such breach of express warranty a direct cause of plaintiff's injury? 

13. Was the independent conduct of the importer with respect to the hammer, aside from any conduct directly related to any defect therein, a direct cause of plaintiff's injury?  

14. Was the independent conduct of retailer with respect to the hammer, aside from any conduct directly related to any defect therein, a direct cause of plaintiff's injury?  

15. Taking all of the causes which contributed to the accident (as determined by your answers to questions 2, 4, 6, 8, 10, 12, 13 and 14), what percentage or proportion thereof do you attribute to: 

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<th>Percentage</th>
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<tbody>
<tr>
<td>Plaintiff</td>
<td>0%</td>
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<tr>
<td>Importer</td>
<td>60%</td>
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<tr>
<td>Retailer</td>
<td>40%</td>
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<tr>
<td>Total</td>
<td>100%</td>
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There is no need to ask whether either the retailer or the importer breached an implied warranty of merchantability, unless notice or privity is a problem, since this matter is fully determined by the answers relating to the product's condition. While it is highly desirable under existing law to set forth each type of negligence raised by the evidence in separate questions, this practice is unnecessary under the proposed rule because any kind of negligence will preclude the recovery of indemnity.

Assuming the jury assesses plaintiff's damages at $100,000, the trial court under the proposed rule will order judgment in that amount against both defendants. It will also deny indemnity to both defendants, even though the importer was negligent and the retailer was not, and will award contribution to each defendant in proportion to the percentage of causal conduct attributable to each. Thus, the retailer will ultimately pay $40,000 of the plaintiff's judgment and the importer will pay $60,000.

VI. CONCLUSION

Particularly as applied to strict liability situations, the present system of loss allocation among tortfeasors is both illogical

122. It should be noted that notice or privity may well pose problems in the determination of the rights of defendants inter se. See note 39 supra.

and unjust. First, the availability of indemnity, with its focus on the quality of the defendant's negligence, results in reference to the relative fault of the parties in situations where, at least in its legal sense, “fault” does not necessarily exist. Second, the ability of a distributor to shift liability to prior links in the distribution chain is inconsistent with the substantial role that modern merchandising and marketing activities have in bringing about product-caused injuries.

While the most sensible solution to these problems entails the abolition of indemnity and contribution as separate concepts, substantial improvement can be effected through relatively minor changes in substantive tort law coupled with full utilization of special verdicts and the doctrine of comparative negligence. If the provision of the Minnesota comparative negligence statute providing for contribution based on percentage of negligence is expanded so as to operate on all theories of tort liability, the resulting “comparative cause” statute will provide a means of equitable loss allocation among all defendants whether negligent or strictly liable.

Indemnity and contribution, in the words of Mr. Justice Kelly, are “equitable remedies which by their very nature are constantly being changed to right otherwise unrightable wrongs.” It is hoped that the approach set forth in this Article is not an impossible dream but rather a practical alternative to the quixotic system of loss allocation now employed by the courts.
