

WORKER'S COMPENSATION SUBROGATION

2013 SAFETY AND LOSS CONTROL CONFERENCE

By

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WHAT IS SUBROGATION?

Subrogation is defined by Black's law dictionary as:

Subrogation is the substitution of one person in place of another person with reference to a lawful claim, demand or right so that the one who is substituted succeeds to the rights of the other in relation to a debt or claim, and its rights, remedies or securities. A legal fiction through which a person who, not as a volunteer or in his own wrong, and in the absence of outstanding and superior equities, pays the debt of another, is substituted to all of the rights and remedies of the other, and the debt is treated in equity as still existing for his benefit, and the doctrine is broad enough to include every instance in which one party pays the debt for which another is primarily answerable, and which in equity and good conscience should have been discharged by such other. The principle which lies at the bottom of the doctrine is that the person seeking it must have paid the debt under grave necessity to save himself a loss. The right is never accorded to a volunteer.

The general rule or principle regarding an insurance company's right to subrogation is that the insurer is not entitled to recover its payments until its insured has been made whole. **Westendorf by Westerndorf v. Stasson, 330 N.W.2d 699, 703 (Minn. 1983)**. That is because the insurer's rights generally are derivative of the insured's rights, and accordingly the insurer must stand in its insured's shoes. Subrogation in the workers' compensation context is an exception to this general rule as the employer (or its workers compensation insurer), and the Special Compensation Fund have been statutorily granted their own cause of action. This distinction becomes most important in cases where the recovery, or potential recovery, would be far less than the injured party's actual damages.

**WHAT DOES MINNESOTA'S WORKERS COMPENSATION SUBROGATION
STATUTE SAY?**

Our workers compensation subrogation statute is found *at M.S.A. 176.061*. It basically says that if an injury or death for which workers compensation benefits are payable is caused under circumstances which create a legal liability for damages on the part of some party other than the employer, then legal proceedings may be initiated. These proceedings maybe initiated by the employee, the employee's dependents, the employer, or the Attorney General on behalf of the Special Compensation Fund to recover damages from that legally liable party. It also provides that if the employee or employee's dependents begin pursuing an action but are not doing so diligently the court may grant the employer or Special Compensation Fund the right to intervene in the prosecution of that action. Furthermore, it provides that the employer and Special Compensation Fund have a right to bring a separate action to protect their subrogation rights or continue on in the action which was previously instituted by the employee or the employee's dependents.

Finally, the statute in *subd. 6* provides a statutory formula for dividing up the recovery between the employee or employee's dependents and the workers compensation insurer or Special Compensation Fund paying those benefits.

**DIFFERENCES BETWEEN WORKER'S COMPENSATION CLAIMS
AND THIRD-PARTY CLAIMS**

Worker's Compensation claims are based on statutory strict liability. Generally the only question is whether the employee was injured in the scope and course of their employment. Generally, fault has nothing to do with Worker's Compensation benefits.

Tradeoff for this strict liability Worker's Compensation system is that there is no compensation to the injured employee for their pain and suffering and only limited scheduled payments for their allowable disability or disfigurement.

On the other hand, third-party claims are generally based on the principle of fault. Under Minnesota law if the Plaintiff is found to be more at fault than the Defendant the Plaintiff loses – see *M.S.A § 604.02*. A simple example would be a case involving one Defendant, where the Plaintiff is found to be 50% at fault and the Defendant is also found to be 50% at fault. In that case the Plaintiff would recover 50% of their damages. However, if the Plaintiff were found to be 51% at fault and the Defendant were found to be 49% at fault, the Plaintiff loses. Under State law, the attorneys are allowed to explain to the jury the effect of that fault allocation pursuant to Rule 49 of Minnesota Rules of Civil Procedure.

In Federal Court the parties are prohibited from being able to tell the jury the effect of their fault allocation. It's for that very reason that in most products liability cases the product manufacturer, if allowable, will remove the case from State Court to Federal Court. In a third-party personal injury case, the jury, after making a determination as to the parties respective fault which was a direct cause of the accident, the jury will be asked to answer the following question regarding damages:

What amount of money will fairly and adequately compensate Plaintiff for the following types of damages

- a) Past health care expenses \$ _____
- b) Future health care expenses \$ _____
- c) Past lost wages \$ _____
- d) Loss of future earning capacity \$ _____
- e) Past pain, disability, disfigurement, embarrassment and emotional distress \$ _____
- f) Future pain, disability, disfigurement, embarrassment and emotional distress \$ _____

You should note that in a third-party case the jury won't be asked to answer questions regarding the reasonable value of the injured employee's rehabilitation benefits, such as QRC and job placement vendor costs nor is the jury asked to determine a specific permanency rating or permanency amount. Although those categories are recoverable under the Worker's Compensation subrogation statute, they don't fit neatly into a third-party personal injury case.

There's even more of a disparity between the Worker's Compensation system and third-party system when we talk about wrongful death situations. In the Worker's Compensation claim Statutory dependency benefits may be awarded which may bear little relationship to the value of the wrongful death claim.

Statistically, well over 90% of the personal injury claims which are filed end up being resolved by settlement or Summary Judgment prior to trial. In that regards, almost all civil cases which are filed are subject to having to go through mandatory mediation prior to trial. I would estimate that at least 60% of the cases that go through mediation are resolved by way of settlement at the mediation with most of other cases being resolved after mediation but prior to trial.

In a settlement, the parties can agree to almost anything they want subject to a Worker's Compensation Judge's approval if the settlement involves a closeout of some of the injured employee's Worker's Compensation benefits or if it involves a future credit.

THE STATUTORY FORMULA

Our legislature has created a statutory formula which it apparently felt would be fair in most cases. That statutory formula is found at *M.S.A. 176.061, subd. 6*. It should be noted that the statutory formula only applies only to the employee's share of the third-party recovery. Accordingly if the employee's spouse has a claim for loss of consortium, that claim would have to be deducted first before applying the statutory formula.

The formula starts out with the premise that the employee's attorney should first be able to recover his or her attorneys' fees and their costs.

From the remaining amount of the recovery, (after deduction for the employee's attorneys' fees and costs) the employee is absolutely entitled to receive one-third of the remaining recovery. Theoretically, that is to compensate the employee for his or her pain, disability and disfigurement, embarrassment and emotional distress.

The remaining amount is then subject to the employer's claim for subrogation. To calculate the amount of that subrogation claim, we first need to determine the amount of workers compensation benefits which have been paid on the employee's behalf as of the date of the settlement. We then need to reduce that amount to take into account the employee's costs of collection (which usually is somewhere around 35%). The employer would then be able to recover 65% of the Worker's Compensation benefits as paid to date—assuming there is enough money to do that. If there is enough money remaining, the employer would recover, in this example, 65% the Worker's Compensation benefits paid to date and the remaining amount would go to the injured employee subject to a future credit.

The employee's future credit only comes in to play if the employee becomes entitled to receive additional Worker's Compensation benefits. In that instance, the employer would pay 35% of future benefits and the employee's future would be responsible for paying the additional 65% himself. For example, if the employee's bill was \$100, the employer would pay \$35 and the employee would pay \$65. The Supreme Court has decided the employer's future credit would then be reduced by \$100. Once the future credit has been "used up" then the employer would again resume paying Worker's Compensation benefits to the employee at the full 100% rate.

NAIG OR REVERSE NAIG TYPE RELEASE SETTLEMENTS

At some point, in almost any subrogation case, you will hear about the potential for either a Naig or a Reverse Naig type settlement. {see – Naig v. Bloomington Sanitation, 258 N.W.2d 891 (Minn. 1977)}. The basic concept with these settlements is that public policy favors settlements. Accordingly, if an entire claim cannot be resolved for some reason or another the courts are supportive of the situation where at least some of, or part of, the claims can be resolved by way of settlement. A Naig type settlement is where the employee agrees to settle out all of his or her claims which have not been, or won't be, compensated through the workers compensation system. In other words, the employee, regardless of the employer's position, can negotiate a settlement with the defendant and keep those settlement proceeds without having to share them with the employer or its workers compensation insurer. However, if the employee is going to do that, the employee must give reasonable notice of his or her intention to do so to their employer. Our courts have determined that a notice which is given thirty days in advance of the settlement is generally determined to have been reasonable notice. {see – Easterling v. State, 330 N.W.2d 704 (Minn. 1983)}. The employee who fails to give the employer reasonable notice of his or her intention to settle their claims on the basis of a Naig Type Release would be subject to a penalty for failing to do so. That penalty could allow the employer to take an offset in the amount of the employee's settlement amount against the employer's obligation to pay additional workers compensation benefits on behalf of the injured employee. Accordingly, the employee who "secretly" settles his or her claims against the tortfeasor on the basis of a Naig Type Release does so at his or her peril.

The opposite of a Naig Type Release is when the employer settles its workers compensation subrogation claims against the defendant without sharing any of those proceeds with the injured employee. The theory behind a Reverse Naig Release is that if the employee can settle pursuant to a Naig Type Release why can't the employer settle its Worker's Compensation subrogation claim pursuant to a Reverse Naig Type Release?

You may also hear the term "Pierringer Type Release". A Pierringer Type Release is used in a situation where the plaintiff would like to settle some of his or her claims but not all of them. The plaintiff in that instance can accept the money which is being offered to him or her by some of the defendants and continue forward with his or her case against the remaining non-settling defendants.

The general rule is that when you have settled with one tortfeasor you have settled with all tortfeasors. A Pierringer Type Release is an exception to that general rule.

Settling cases pursuant to Pierringer Type Releases can be "tricky business" as it destroys what is known as joint and several liability. Joint and several liability is the plaintiff's ability to collect all of his or her damages from any of the defendants. Accordingly, in settling a claim pursuant to a Pierringer Type Release it is important to make sure that in the process, you haven't "given up" the bulk of your claim against the remaining defendant.

In many cases, both the employee and the employer will agree that the defendant's settlement offer is a good offer and should be accepted. However, that's not always the case and in the case of **Jackson vs. Zurich American Insurance Co.** 546 N.W. 2d 621 (Minn. 1996) the employer or insurer thought the employee was settling his or her claims too cheaply and the settlement is going to be pursuant to a General Release rather than a Naig Type Release. The Court held that the employer can object and in that instance the District Court would decide whether or not the employees proposed overall settlement is reasonable given the particular circumstances of the case. In most cases that difference would be resolved with the case being settled on the basis of a Naig or Reverse Naig Type Release. There may however be some situations where the Defendant refuses to do that and insists that there be only one overall settlement if the case is to be settled.

Once there is an agreement as to the amount of the overall settlement with the Defendant in the third-party case, the employee is really in the driver's seat. In that regards, the employee can opt to run the entire recovery through the Statutory formula of *M.S.A. § 176.061 subd. 6* or the employee can file a motion with the district court demanding a **Henning v. Wineman**, 306 N.W.2d 550 (Minn. 1981) hearing.

A **Henning v. Wineman** hearing is a short, abbreviated hearing before the judge which typically lasts one to two hours. The hearing is done before a judge and not a jury. The judge listens to the evidence from the sworn witnesses and then is supposed to allocate in some equitable fashion, the recovery between the injured employee and his or her employer. These hearings are actually quite rare. It is clear that the judge cannot allocate all of the recovery to the employee to the exclusion of the employer. However, judges are given wide discretion as to any other distribution. The employee will typically argue that the settlement is insufficient to compensate the employee for his or her injuries and therefore most of the settlement should be allocated to the injured employee. The employer, on the other hand, should argue that the sharing should be done a "pro rata basis." In other words, if the employee is only being compensated 50% for his or her damages, the employer should be compensated for 50% of its workers compensation damages (both past and future).

The danger to the employer in "proving up" its future workers compensation exposure to the injured employee is that the employer's position may be later used against the employer when the employee decides to pursue those additional workers compensation benefits. In other words, if the employer alleges that the employee is permanently and totally disabled in the **Henning v. Wineman** hearing that position could very well be used against the employer when the employee brings a Workers Compensation claim petition for permanent and total disability benefits. Accordingly, the **Henning v. Wineman** hearing can pose some risks for the employer.

CLAIMS FOR LAMBERTSON TYPE CONTRIBUTION - WHAT ARE THEY?

Contribution is an equitable principle. The theory is that a tortfeasor who believes that he is being required to pay more than his fair share of the plaintiff's damages should be entitled to obtain some type of contribution from others who are also liable to the plaintiff for the same injury. In a contribution action, generally the one seeking contribution will allege that although they were at fault (accordingly didn't pay monies as a "volunteer")but that the one from whom they are seeking contribution was also at fault and should be required to pay their "fair share."

Employers who have purchased workers compensation insurance for their injured employees have long been immune from direct claims from those injured employees pursuant to *M.S.A. 176.031*. However, there are many instances where the employer's fault is apparent, if not overwhelming. In these situations there is inherent unfairness in two respects:

1. The statutory formula of *M.S.A § 176.061 subd. 6* doesn't take into account any independent fault on behalf of the employer.
2. There are a number of instances where the employee is able to pursue a cause of action against the defendant - that is that the employee's comparative fault is less than the defendant's comparative fault. In some of those instances the employer also has a significant amount of fault. The defendant in those instances is placed in the unfair position of having to pay all of the plaintiff's damages even though the defendant was only partially at fault. Take for example the case where the employee is found to be 10% at fault, the defendant is found to be 20% at fault, and the employer is found to be 70% at fault. In that instance the employee would collect 90% of his damages from the defendant who is only 20% at fault.

Our courts attempted to remedy that situation in the case of *Lambertson v. Cincinnati Corp.*, 257 N.W.2d 679 (Minn. 1977). In that case, our Supreme Court allowed the defendant to pursue a limited claim for contribution against the negligent employer. The claim was limited in that the employer's liability for contribution was capped by reason of the employer's exposure for workers compensation benefits. The cap is determined by the amount of the workers compensation benefits the employer and insurer have paid to date as well as the present value of the workers compensation insurer's future exposure for workers compensation benefits to the injured employee. This "change in the law" attempted to resolve the inequities of a negligent employer being able to obtain the same percentage of it's subrogation recovery as a non-negligent employer.

Occasionally , there are situations where the employer, on the one hand, is asking the defendant to "repay it" for its workers compensation exposure to the injured employee while at the same time the defendant is asking the negligent employer to contribute to the employee's settlement.

Obviously, this situation can create inconsistent positions for the employer and insurer. On the one hand, the employer and insurer would hope that the employee loses his or her claim against the defendant to avoid the defendant's claim for Lambertson contribution. On the other hand, the employer and insurer would hope that the employee obtains a substantial recovery from the defendants so that the employer and insurer can share in that recovery.

Lambertson contribution claims always involve a double set of calculations. The first set of calculations would be the calculations pursuant to the subrogation formula as are set forth before. The second set of calculations would relate to the defendant's claims for contribution. It is important to do both sets of calculations to determine the employer and insurer's likelihood of recovering anything at all. In that regard, under certain situations it is possible that the employer and insurer will end up paying out more money with respect to the Lambertson contribution claim than they will ever be recovering with respect to their workers compensation subrogation claims. This situation can become even more complicated where there are different insurers involved. Due note that *M.S.A. § 176.061 subd. 11*, now allows an employer to "waive and walk". In other words, the negligent employer may avoid the Lambertson contribution exposure by affirmatively waiving their Worker's Compensation subrogation claim.

**SUBROGATION CLAIMS AGAINST UNINSURED MOTORIST OR
UNDERINSURED MOTORIST CLAIMS**

There are no workers compensation subrogation rights against the employee's UM or UIM recoveries. Although the injured party may bring a claim arising out of an automobile accident for either uninsured motorist benefits or underinsured motorist benefits neither the employer, its workers compensation insurer, nor the Special Compensation Fund can exercise any workers compensation subrogation rights as to those benefits. The theory is that those claims are contractual claims as opposed to claims which are based on tort law.

See Jansen v. Land O'Lakes, Inc., 278 N.W.2d 67 (Minn. 1979) and Cooper v. Younkin, 339 N.W.2d 552 (Minn. 1993).

SPLITTING THE CAUSE OF ACTION

Minnesota doesn't allow splitting a cause of action. Accordingly if the State of Minnesota commences a Worker's Compensation subrogation lawsuit against a party the State of Minnesota would be required to include all claims against the same party arising out of the same instance. This is important in instances involving damage to State vehicles.

In that regards, if the State employee is injured as a result of an automobile accident, often times that State employee is operating or riding in a vehicle owned by the State of Minnesota. Accordingly, if a lawsuit is commenced against the negligent party the lawsuit should not only include a Worker's Compensation subrogation claim but also a property damage claim if that claim hasn't already been resolved.

PROPERTY DAMAGE CLAIMS

The State of Minnesota's contacts regarding those property damage claims maybe as follows:

DOT claims:

Matt Gaetz
395 John Ireland Blvd, RM 215
St. Paul, MN 55155
651-366-4856

State Patrol claims:

Department of Public Safety
Lisa Yaeger
444 Cedar Street, Suite 130
St. Paul, MN 55155
651-201-7123

Fleet Services claims:

Risk Management
Lea Shedlock
310 Centennial Office Bldg
658 Cedar Street
St. Paul, MN 55155
651-201-2589

TORT CLAIMS LIABILITY

Minnesota is self-insured for its tort claims liability. There may be instances the State has fault and liability. Although the State has many defenses including sovereign immunity and official immunity, in some cases, particularly those cases involving automobile accidents there may be a question as to whether the State of Minnesota will be recovering money or paying out money. It's also possible, for the fault to be split on a 50 / 50 basis so that the State of Minnesota would recover 50% of its damages from the Defendant and the Defendant would also be entitled to receive 50% of his, her or its damages from the State of Minnesota.

THE STATE'S LIABILITY FOR UNINSURED AND UNDERINSURED MOTORISTS BENEFITS

The State of Minnesota is self-insured for purposes of providing that mandatory insurance coverage. The State carries the minimum self-insured limits of \$25,000 per claim.

Uninsured and underinsured motorist coverage may come into play when the State employee is operating or riding in a State vehicle. If that's the case the injured employee would look first to the coverage on the State vehicle and then to coverage under their own policy of insurance. An example of this may be a State Trooper who is seriously injured in a motor vehicle accident. Assume that the tortfeasor has policy limits of only \$30,000. Those \$30,000 limits would probably be tendered by the Defendant / tortfeasor's insurance company. The Trooper would then have a claim for \$25,000 worth of underinsured motorist benefits against the State of Minnesota and then a claim for excess underinsured motorist against their own policy of insurance.

Due note that if the Trooper was injured while outside the State vehicle – such as a pedestrian, the Trooper would first make claim against the Defendant / tortfeasor and then a claim against only his own underinsured motorist carrier since the State's coverage only applies if the individual is in a State vehicle at the time of the accident.

HOW TO SPOT A VIABLE SUBROGATION CLAIM

A viable subrogation claim should be defined as a subrogation claim that's worth pursuing. Subrogation claims that are worth pursuing must meet the following requirements:

1. A legal basis for pursuing that claim;
2. A practical basis for pursuing the claim;
3. A practical basis for being able to obtain a benefit or recovery.

Although subrogation should be considered in almost every case, viable subrogation claims will arise, statistically, in only a fraction of those cases. There are, however, a number of circumstances where subrogation rights are likely to arise such as:

1. Injuries arising out of motor vehicle accidents
2. Injuries which were caused by slipping on slippery substances such as ice, snow or something that's been spilled on a floor
3. Injuries arising out of fights or assaults
4. Serious injuries caused by operating defective machinery.

The types of accidents which have led to the successful subrogation recoveries in the past have included the following:

1. Motor vehicle accidents;
2. Accidents involving product defects;
3. Slip and fall cases;
4. Pushing, shoving and/or assault cases;
5. Dram shop cases (*see M.S.A. 340A.801*);
6. Medical malpractice cases (*see M.S.A. 145.682*);

Whether or not there will be a viable subrogation claim arising out of any of these types of actions will depend on the facts and circumstances surrounding the particular injury. Usually, some type of inquiry or investigation will be necessary to uncover those facts. In that regard, oftentimes the best source of that information will come from the injured employee.

For instance, if the injured employee tells you that he was involved in a one car automobile accident which was caused when he drove off the roadway while attempting to pick up his notebook which had just slid from his passenger's seat to the passenger floorboard area you can quickly "rule out" any type of viable workers compensation subrogation claim. On the other hand, if the employee tells you that he was stopped at a stop sign when he was rear ended by another car it is likely that this injury will result in a viable workers compensation subrogation claim.

A number of employees are injured every year in accidents where they have slipped and fallen on snow or ice. Although those cases may give rise to a viable workers compensation subrogation claim, you should be aware that the plaintiff loses about eighty percent of those cases which are actually taken to trial. In addition, in those cases where the plaintiff does win, the plaintiff's damages are typically reduced about 50% for the plaintiff's own comparative fault.

Cases involving intentional acts or assaults typically aren't covered by insurance and may or may not be worth pursuing.

Cases involving Dram Shop claims can be good claims but are tricky. Due note there is a Notice requirement requiring you to provide the bar with written Notice of a potential claim within 240 days of entering into an Attorney / Client relationship and a 2 year Statute of Limitations.

Medical malpractice cases are subject to a 4 year statute of limitations and in general are expensive to pursue with the out of pocket costs of bringing such a case to litigation generally running in the neighborhood of \$30,000 or more.

Construction accidents may also be a source for recovery. They however, may be subject to the 2 year Statute of Limitations applicable to improvements to real property and are usually subject to a fair amount of comparative fault by the injured employee himself.

HOW ARE SUBROGATION CLAIMS PURSUED IN DISTRICT COURT?

In Minnesota there are two separate court systems which handle almost all tort claims. One system is the Federal court system and the other is the State court system. Both systems usually involve jury trials. The state court system handles the majority of the tort claims which are brought in the state of Minnesota but not all of them. Claims you are likely to see in the federal court system would be primarily claims involving out of state defendants and oftentimes products liability actions where the manufacturer of the allegedly defective product is an out of state corporation.

Actions commenced in either state or federal court begin with a summons and complaint. That summons and complaint is then served on the defendant who is given a short period of time (usually twenty days) to serve an answer. The defendant's answer almost always denies everything which has been alleged in the plaintiff's complaint.

The case usually spends about the next six months in what is called the "discovery stage." In that regard, the parties have an opportunity to interview each other (which is usually done by way of depositions) as well as to obtain copies of any records which may be pertinent to either side's case. Questions which are asked of the opposing party in writing are typically referred to as interrogatories. Discovery requests may include requests for production of medical records, request for production of employment records, and request for production of almost anything else one can think of which may be relevant to the lawsuit.

At the conclusion of the discovery period the defendant will oftentimes file a motion with the court asking the court to "throw out" as a matter of law, all or part of the plaintiff's claims against the defendant. The judge will then make a ruling as to whether or not the plaintiff's case is strong enough to go forward.

Judges have found that when the parties get together, and when those parties include the individuals with full settlement authority, that most cases (about 90% of all cases prior to trial) are resolved by way of settlement. Accordingly, most cases are now subject to something called ADR (alternative dispute resolution). Although ADR can take on numerous forms such as mediation, arbitration, summary jury trials, etc., most parties elect mediation as their desired form of ADR.

Mediation consists of both parties hiring an independent attorney (who acts as a mediator) and who attempts to assist the parties in reaching a negotiated settlement of their respective positions. Mediators typically charge between \$150.00 to \$300.00 per hour which fees are generally split between the parties.

If the case is not resolved by way of settlement through ADR the case will typically proceed to a pre-trial / settlement conference with the judge who will be hearing the case. Again, the primary focus of that session will be the judge's attempt to resolve the case by way of settlement. If that doesn't work the case will typically be set down for trial. Currently, it takes about one year from the time the case is filed with the court until the case is called for trial.

Actually preparing a personal injury case for trial can be time consuming and expensive. Typically, doctors are too busy to testify in person at the time of trial and prefer to have their depositions taken instead. Then at the time of trial their deposition is either read or in most cases a videotape of the deposition is played to the jury. Doctors will typically charge \$1,000.00 to \$2,000.00 for giving a deposition. In addition, there will be fees from the court reporter - approximately \$250.00 per deposition as well as fees from the videotape operator of approximately \$500.00 to \$700.00 (for taking and playing back the videotape). If the case involves several doctors the case can be much more expensive as the above rates are quoted for a single doctor's deposition. In addition, products liability cases usually involve a number of other experts. The fees for those experts is typically greater than the fees for the doctors since those experts usually base their opinions on their own investigation, research and tests which they charge for in addition to the time for simply giving their opinions.

In many of the cases which do not settle and are ultimately called for trial, the trial judge will schedule about twenty cases to be "on call" for trial at the same time. The judge will then proceed through the cases trying as many cases as he or she can while on the Judge's "civil trial block." Cases which are not called for trial during that period of time, are subsequently held over to the judge's next "civil trial block." Very few cases are given a "day certain" trial setting.

Accordingly, there is usually a fair amount of uncertainty as to when a case will actually be called for trial. It is generally for that reason that doctors, and sometimes other witnesses and experts, must be deposed prior to trial to make sure that their testimony is available when the case is actually called for trial.

Trial is not always the end of the case. In that regard, a trial and verdict often result in one party being displeased with the results. That party then has a right to go back to the trial judge to ask for some relief or to seek relief by way of an appeal from the Court of Appeals.

If the plaintiff wins, the plaintiff will typically ask the court to add on the plaintiff's costs (excluding attorneys' fees) to the award against the defendant. These motions are typically granted and at least a portion of the plaintiff's costs of bringing the case to trial are added on to the amount the defendant owes the plaintiff. However, the converse is also true. That is, if the defendant wins, the defendant can ask the court to enter a judgment against the plaintiff or plaintiff in intervention for the defendant's out-of-pocket costs (again excluding attorneys' fees). Oftentimes the defendant's judgment against the injured plaintiff is uncollectible as the plaintiff simply can't afford to pay it. However, where the plaintiff is a solvent entity, such as the State, it may be required to pay the defendant's taxable costs if we lose.

STATUTE OF LIMITATIONS

There are various statute of limitations that you should be aware of. The statute of limitations usually means the last day you have to commence a lawsuit against the defendant. The statute of limitations can sometimes be extended where the injured employee has timely commenced his or her lawsuit. Generally the following statute of limitations apply:

1. Injuries arising out of defective and unsafe conditions of an improvement to real property - two years - see *M.S.A. § 541.051*.
2. Medical malpractice cases - four years - see *M.S.A § 541.07 / 145.682*
3. Libel, slander, assault, battery, false imprisonment or other intention torts resulting in personal injury - two years - see *M.S.A § 541.07*
4. Dram shop claims - two years - see *M.S.A § 340A.802*
5. Claims based on breach of contract - six years - see *M.S.A § 541.05*
6. Claims based on negligence (for example automobile accident cases) - six years - see *M.S.A § 541.05*
7. Claims based on fraud - six years – see *M.S.A § 541.05*
8. Wrongful death claims - three years – see *M.S.A §. 573.02*
9. Products liability claims based on strict liability – four years - see *M.S.A § 541.05 subd. 2*
10. Breach of warranties – 4 years but may vary - see the language in the written warranty – see *M.S.A § 336.2-725*

APPENDIX

M.S.A. § 176.061..... Exhibit 1

M.S.A. § 604. 01 - Comparative Fault - Effect Exhibit 2

M.S.A. § 604.02 - Apportionment of Damages. Exhibit 3

EXHIBIT 1**176.061 THIRD-PARTY LIABILITY.**

Subdivision 1. **Election of remedies.** If an injury or death for which benefits are payable occurs under circumstances which create a legal liability for damages on the part of a party other than the employer and at the time of the injury or death that party was insured or self-insured in accordance with this chapter, the employee, in case of injury, or the employee's dependents, in case of death, may proceed either at law against that party to recover damages or against the employer for benefits, but not against both.

Subd. 2. **Action for recovery of damages.** If the employee, in case of injury, or the employee's dependents, in case of death, brings an action for the recovery of damages, the amount of the damages, the manner in which they are paid, and the persons to whom they are payable, are as provided in this chapter. In no case shall the party be liable to any person other than the employee or the employee's dependents for any damages resulting from the injury or death.

Subd. 3. **Election to receive benefits from employer; subrogation.** If the employee or the employee's dependents elect to receive benefits from the employer, or the special compensation fund, the employer or the special compensation fund has a right of indemnity or is subrogated to the right of the employee or the employee's dependents to recover damages against the other party. The employer, or the attorney general on behalf of the special compensation fund, may bring legal proceedings against the party and recover the aggregate amount of benefits payable to or on behalf of the employee or the employee's dependents, regardless of whether such benefits are recoverable by the employee or the employee's dependents at common law or by statute together with costs, disbursements, and reasonable attorney fees of the action.

If an action as provided in this chapter is prosecuted by the employee, the employer, or the attorney general on behalf of the special compensation fund, against the third person, and results in judgment against the third person, or settlement by the third person, the employer has no liability to reimburse or hold the third person harmless on the judgment or settlement in absence of a written agreement to do so executed prior to the injury.

Subd. 4. **Application of subdivisions 1, 2, and 3.** The provisions of subdivisions 1, 2, and 3 apply only if the employer liable for benefits and the other party legally liable for damages are insured or self-insured and engaged, in the due course of business in, (1) furtherance of a common enterprise, or (2) in the accomplishment of the same or related purposes in operations on the premises where the injury was received at the time of the injury.

Subd. 5. **Cumulative remedies.** (a) If an injury or death for which benefits are payable is caused under circumstances which created a legal liability for damages on the part of a party other than the employer, that party being then insured or self-insured in accordance with this chapter, and the provisions of subdivisions 1, 2, 3, and 4 do not apply, or the party other than the employer is not then insured or self-insured as provided by this chapter, legal proceedings may be taken by the employee or the employee's dependents in accordance with paragraph (b), or by the employer, or by the attorney general on behalf of the special compensation fund, in accordance with paragraph (c), against the other party to recover damages, notwithstanding the payment of benefits by the employer or the special compensation fund or their liability to pay benefits.

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(b) If an action against the other party is brought by the injured employee or the employee's dependents and a judgment is obtained and paid or settlement is made with the other party, the employer or the special compensation fund may deduct from the benefits payable the amount actually received by the employee or dependents or paid on their behalf in accordance with subdivision 6. If the action is not diligently prosecuted or if the court deems it advisable in order to protect the interests of the employer or the special compensation fund, upon application the court may grant the employer or the special compensation fund the right to intervene in the action for the prosecution of the action. If the injured employee or the employee's dependents or any party on their behalf receives benefits from the employer or the special compensation fund or institutes proceedings to recover benefits or accepts from the employer or the special compensation fund any payment on account of the benefits, the employer or the special compensation fund is subrogated to the rights of the employee or the employee's dependents or has a right of indemnity against a third party regardless of whether such benefits are recoverable by the employee or the employee's dependents at common law or by statute. The employer or the attorney general on behalf of the special compensation fund may maintain a separate action or continue an action already instituted. This action may be maintained in the name of the employee or the names of the employee's dependents, or in the name of the employer, or in the name of the attorney general on behalf of the special compensation fund, against the other party for the recovery of damages. If the action is not diligently prosecuted by the employer or the attorney general on behalf of the special compensation fund, or if the court deems it advisable in order to protect the interest of the employee, the court, upon application, may grant to the employee or the employee's dependents the right to intervene in the action for the prosecution of the action. The proceeds of the action or settlement of the action shall be paid in accordance with subdivision 6.

(c) If an employer, being then insured, sustains damages due to a change in workers' compensation insurance premiums, whether by a failure to achieve a decrease or by a retroactive or prospective increase, as a result of the injury or death of an employee which was caused under circumstances which created a legal liability for damages on the part of a party other than the employer, the employer, notwithstanding other remedies provided, may maintain an action against the other party for recovery of the premiums. This cause of action may be brought either by joining in an action described in paragraph (b) or by a separate action. Damages recovered under this clause are for the benefit of the employer and the provisions of subdivision 6 are not applicable to the damages.

(d) The third party is not liable to any person other than the employee or the employee's dependents, or the employer, or the special compensation fund, for any damages resulting from the injury or death.

(e) A coemployee working for the same employer is not liable for a personal injury incurred by another employee unless the injury resulted from the gross negligence of the coemployee or was intentionally inflicted by the coemployee.

Subd. 6. Costs, attorney fees, expenses. (a) The proceeds of all actions for damages or of a settlement of an action under this section, except for damages received under subdivision 5, paragraph (c), received by the injured employee or the employee's dependents or by the employer or the special compensation fund, as provided by subdivision 5, shall be divided as follows:

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(1) after deducting the reasonable cost of collection, including but not limited to attorney fees and burial expense in excess of the statutory liability, then

(2) one-third of the remainder shall in any event be paid to the injured employee or the employee's dependents, without being subject to any right of subrogation.

(b) Out of the balance remaining, the employer or the special compensation fund shall be reimbursed in an amount equal to all benefits paid under this chapter to or on behalf of the employee or the employee's dependents by the employer or special compensation fund, less the product of the costs deducted under paragraph (a), clause (1), divided by the total proceeds received by the employee or dependents from the other party multiplied by all benefits paid by the employer or the special compensation fund to the employee or the employee's dependents.

(c) Any balance remaining shall be paid to the employee or the employee's dependents, and shall be a credit to the employer or the special compensation fund for any benefits which the employer or the special compensation fund is obligated to pay, but has not paid, and for any benefits that the employer or the special compensation fund is obligated to make in the future.

(d) There shall be no reimbursement or credit to the employer or to the special compensation fund for interest or penalties.

Subd. 7. **Medical treatment.** The liability of an employer or the special compensation fund for medical treatment or payment of any other compensation under this chapter is not affected by the fact that the employee was injured through the fault or negligence of a third party, against whom the employee may have a cause of action which may be sued under this chapter, but the employer, or the attorney general on behalf of the special compensation fund, has a separate additional cause of action against the third party to recover any amounts paid for medical treatment or for other compensation payable under this section resulting from the negligence of the third party regardless of whether such other compensation is recoverable by the employee or the employee's dependents at common law or by statute. This separate cause of action of the employer or the attorney general on behalf of the special compensation fund may be asserted in a separate action brought by the employer or the attorney general on behalf of the special compensation fund against the third party, or in the action commenced by the employee or the employer or the attorney general on behalf of the special compensation fund under this chapter, but in the latter case the cause of action shall be separately stated, the amount awarded in the action shall be separately set out in the verdict, and the amount recovered by suit or otherwise as reimbursement for medical expenses or other compensation shall be for the benefit of the employer or the special compensation fund to the extent that the employer or the special compensation fund has paid or will be required to pay compensation or pay for medical treatment of the injured employee and does not affect the amount of periodic compensation to be paid.

Subd. 8. [Repealed, 1983 c 290 s 35]

Subd. 8a. **Notice to employer.** In every case arising under subdivision 5, a settlement between the third party and the employee is not valid unless prior notice of the intention to settle is given to the employer within a reasonable time. If the employer or

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insurer pays compensation to the employee under the provisions of this chapter and becomes subrogated to the right of the employee or the employee's dependents or has a right of indemnity, any settlement between the employee or the employee's dependents and the third party is void as against the employer's right of subrogation or indemnity. When an action at law is instituted by an employee or the employee's dependents against a third party for recovery of damages, a copy of the complaint and notice of trial or note of issue in the action shall be served on the employer or insurer. Any judgment rendered in the action is subject to a lien of the employer for the amount to which it is entitled to be subrogated or indemnified under the provisions of subdivision 5.

Subd. 9. **Service of notice on attorney general.** In every case in which the state is liable to pay compensation or is subrogated to the rights of the employee or the employee's dependents or has a right of indemnity, all notices required to be given the state shall be served on the attorney general and the commissioner.

Subd. 10. MS 1974 [Repealed, 1976 c 2 s 70; 1976 c 154 s 3]

Subd. 10. **Indemnity.** Notwithstanding the provisions of chapter 65B or any other law to the contrary, an employer has a right of indemnity for any compensation paid or payable pursuant to this chapter, regardless of whether such compensation is recoverable by the employee or the employee's dependents at common law or by statute, including temporary total compensation, temporary partial compensation, permanent partial compensation, medical compensation, rehabilitation, death, and permanent total compensation.

Subd. 11. **Right of contribution.** To the extent the employer has fault, separate from the fault of the injured employee to whom workers' compensation benefits are payable, any nonemployer third party who is liable has a right of contribution against the employer in an amount proportional to the employer's percentage of fault but not to exceed the net amount the employer recovered pursuant to subdivision 6, paragraphs (b) and (c). The employer may avoid contribution exposure by affirmatively waiving, before selection of the jury, the right to recover workers' compensation benefits paid and payable, thus removing compensation benefits from the damages payable by any third party.

Procedurally, if the employer waives or settles the right to recover workers' compensation benefits paid and payable, the employee or the employee's dependents have the option to present all common law or wrongful death damages whether they are recoverable under the Workers' Compensation Act or not. Following the verdict, the trial court will deduct any awarded damages that are duplicative of workers' compensation benefits paid or payable.

History: 1953 c 755 s 6; Ex1967 c 1 s 6; Ex1967 c 40 s 4; 1969 c 199 s 1,2; 1969 c 936 s 3,4; 1973 c 388 s 15; 1976 c 154 s 1,2; 1979 c 81 s 1,2; Ex1979 c 3 s 31; 1981 c 346 s 61-66; 1983 c 290 s 35; 1986 c 444; 1995 c 231 art 1 s 16; 2000 c 447 s 4-8

EXHIBIT 2**604.01 COMPARATIVE FAULT; EFFECT.**

Subdivision 1. **Scope of application.** Contributory fault does not bar recovery in an action by any person or the person's legal representative to recover damages for fault resulting in death, in injury to person or property, or in economic loss, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed must be diminished in proportion to the amount of fault attributable to the person recovering. The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each party and the court shall then reduce the amount of damages in proportion to the amount of fault attributable to the person recovering.

Subd. 1a. **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 or primary assumption of risk, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages, and the defense of complicity under section 340A.801. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault. The doctrine of last clear chance is abolished.

Evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages may be considered only in determining the damages to which the claimant is entitled. It may not be considered in determining the cause of an accident.

Subd. 2. **Personal injury or death; settlement or payment.** Settlement with or any payment made to an injured person or to others on behalf of such injured person with the permission of such injured person or to anyone entitled to recover damages on account of injury or death of such person shall not constitute an admission of liability by the person making the payment or on whose behalf payment was made.

Subd. 3. **Property damage or economic loss; settlement or payment.** Settlement with or any payment made to a person or on the person's behalf to others for damage to or destruction of property or for economic loss does not constitute an admission of liability by the person making the payment or on whose behalf the payment was made.

Subd. 4. **Settlement or payment; admissibility of evidence.** Except in an action in which settlement and release has been pleaded as a defense, any settlement or payment referred to in subdivisions 2 and 3 shall be inadmissible in evidence on the trial of any legal action.

Subd. 5. **Credit for settlements and payments; refund.** All settlements and payments made under subdivisions 2 and 3 shall be credited against any final settlement or judgment; provided however that in the event that judgment is entered against the person seeking recovery or if a verdict is rendered for an amount less than the total of any such advance payments in favor of the recipient thereof, such person shall not be required to refund any portion of such advance payments voluntarily made. Upon motion to the court in the absence of a jury and upon proper proof thereof, prior to entry of judgment on a verdict, the court shall first apply the provisions of subdivision 1 and then shall reduce the amount of the damages so determined by the amount of the payments previously made to or on behalf of the person entitled to such damages.

History: 1969 c 624 s 1; 1978 c 738 s 6,7; 1986 c 444; 1990 c 555 s 19-21

EXHIBIT 3**604.02 APPORTIONMENT OF DAMAGES.**

Subdivision 1. **Joint liability.** When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award:

- (1) a person whose fault is greater than 50 percent;
- (2) two or more persons who act in a common scheme or plan that results in injury;
- (3) a person who commits an intentional tort; or
- (4) a person whose liability arises under chapters 18B - pesticide control, 115 - water pollution control, 115A - waste management, 115B - environmental response and liability, 115C - leaking underground storage tanks, and 299J - pipeline safety, public nuisance law for damage to the environment or the public health, any other environmental or public health law, or any environmental or public health ordinance or program of a municipality as defined in section 466.01.

This section applies to claims arising from events that occur on or after August 1, 2003.

Subd. 2. **Reallocation of uncollectible amounts generally.** 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.

Subd. 3. **Product liability; reallocation of uncollectible amounts.** 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 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 the person whose fault is less.

History: 1978 c 738 s 8; 1986 c 444; 1986 c 455 s 85; 1988 c 503 s 3; 1989 c 209 art 1 s 44; 2003 c 71 s 1