SAME AS IT EVER WAS: LAMBERTSON *CONTRIBUTION IN A POST-*FISH V. RAMLER *WORLD*

By Rachel Beauchamp and Peter Lindberg; Cousineau, Van Bergen, McNee & Malone, P.A.

INTRODUCTION

And you may find yourself as a third-party tortfeasor in a workplace injury case.

And you may find yourself with a large subrogation interest asserted against you.

And you may say to yourself "THIS IS NOT MY FAULT."

And you may ask yourself, well, "what are my *Lambertson* contribution rights?"

Questions of equity and legal strategy arise when both an employer and a third-party are at fault for an incident that injured an employee. Is it "fair" to allow the workers compensation carrier to recover in subrogation when its own fault played a substantial role in bringing about the injury? And, is it "fair" that a third-party must pay damages to the injured party for which an employer is at fault? Certainly, civil defense attorneys, and our alleged third-party tortfeasor clients, would answer "no" to both of these questions.

However, for many years, third-party tortfeasors were simply out of luck. There was little a third-party tortfeasor could do in cases where the employer bore a large percentage of fault. The injured employee was entitled to bring a tort action against the non-employer tortfeasor, and the employer was entitled to assert its workers' compensation subrogation interest as part of that action. And, there was no statute or precedent that would allow a third-party tortfeasor to assert a claim for contribution against the employer.

That all changed when *Lambertson v. Cincinnati Welding Corp.* was decided. 257 N.W.2d 679 (Minn. 1977) In *Lambertson*, the Minnesota Supreme Court determined that although there could be no common liability between an employer and a third-party tortfeasor due to the operation of the Workers' Compensation Act, a third-party tortfeasor did have a right to contribution against an at-fault employer. That contribution claim was capped at the amount of workers' compensation paid or payable, which was later codified at Minnesota Statutes Section 176.061 subd. 11.

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Rachel Beauchamp is a shareholder at Cousineau, Van Bergen, McNee & Malone, specializing in the areas of insurance defense, commercial trucking, and coverage. She is a member of the Trucking Industry Defense Association ("TIDA"), a former co-head of the MDLA Insurance Law Committee.

Peter Lindberg is an associate at Cousineau, Van Bergen, McNee & Malone, P.A. focused on motor vehicle accident litigation, as well as premises liability, commercial trucking, dramshop, and aviation litigation. Prior to joining the firm, Peter practiced law at a small insurance defense law firm in the Minneapolis-St. Paul metropolitan area.

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The Minnesota Supreme Court's recent decision in *Fish v. Ramler Trucking, Inc.* settled open questions about the application of Section 604.02 and the application of joint and several liability between employers and third-party tortfeasors in the context of *Lambertson* contribution actions. 935 N.W.2d 738 (Minn. 2019). *Fish* reaffirmed that there is no joint and several liability between employers and third-party tortfeasors, and confirmed that the third-party tortfeasor must pay the full amount of the award to the employee and later seek contribution against the employer to the extent possible. In light of the court's recent ruling in *Fish,* it is a good time to review the mechanics of *Lambertson* contribution actions and its litigation impact on employers and third-party tortfeasors.

EMPLOYERS OWE WORKERS' COMPENSATION BENEFITS REGARDLESS OF FAULT

Implementation of the workers' compensation system involved a grand compromise; in exchange for being forced to compensate workers for injuries regardless of fault, employers are generally immunized from tort liability for a workplace incident that injures an employee (there are narrow exceptions to this exclusivity). Minn. Stat. § 176.001. An employer "is liable to pay compensation in every case of personal injury or death of an employee arising out of and in the course of employment without regard to the question of negligence". Minn. Stat. § 176.021. In exchange, the employer's liability to pay compensation is governed by the Act and "is exclusive and in the place of any other liability". Minn. Stat. § 176.031.

This system makes sense when a workplace injury involves only an employer and an employee. But it becomes complicated when an injured employee also has a claim against an at-fault tortfeasor.

EMPLOYEE HAS A RIGHT TO RECOVER DAMAGES AGAINST AN AT-FAULT TORTFEASOR

An employee's recovery of workers' compensation benefits is not a complete recovery of damages from an injury; workers' compensation pays only partial lost wages and does not compensate an employee for general damages (i.e. pain and suffering). Minn. Stat. §176.061. As a result, the employee retains the right to bring a tort claim against a non-employer at-fault party. *Id.* at subd. 5.

EMPLOYER HAS A RIGHT TO SUBROGATION AGAINST AT-FAULT TORTFEASOR

If the employee's injury was caused by the fault of a third-party tortfeasor, the employer has a right to recover workers' compensation benefits paid. Minn. Stat. §176.061. If the action to recover damages is prosecuted by the employee, the employer receives subrogation according to a distribution formula. *Id.* However, if the employer directly pursues the at-fault tortfeasor (either because the employee chose not to pursue the claim or because the employee settled the case on a *Naig* basis), then the employer's right of subrogation is for the entire amount of workers' compensation benefits without regard for the statutory formula. *Id.*

AN ALLEGED TORTFEASOR HAS A RIGHT TO... WHAT, EXACTLY?

Per the above scheme, everyone has their pound of flesh from the at-fault tortfeasor; the injured party gets compensated for general and special damages and the employer gets to recover the amounts paid for an employee's injury that was caused by someone else's fault.

But what if the tortfeasor believes that the employer has some, or the majority, of-fault for the injury-causing incident? In this scenario, an alleged tortfeasor must decide whether to allege a claim for contribution against the employer. And this is when the complicated mechanics of *Lambertson* liability come into play.

LAMBERTSON LIABILITY

Although an employee cannot sue their employer for civil damages, an alleged non-employer tortfeasor has the right to bring a contribution claim against an employer that they believe is at fault for the injury-causing incident. *Lambertson v. Cincinnati Welding Corp.*, 257 N.W.2d 679 (Minn. 1977) and Minn. Stat. § 176.061 subd. 11. But, because the employer has no direct liability to the employee, regardless of the percentage of fault attributable to the employer, there is never "common liability" between the employer and the non-employer tortfeasor. As a result, the courts reached a second great compromise, which is often referred to as "*Lambertson* liability". *Id.*

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Before *Lambertson*, employers were not liable in contribution at all and were recovering the amounts paid in workers' compensation in their subrogation claims, even in cases where their own fault was a cause of the employee's injury. *See Hendrickson v. Minnesota Power & Light Co.*, 258 Minn. 368, 104 N.W.2d 843 (Minn. 1960). However, after *Lambertson*, non-employee tortfeasors could now bring a contribution action against the employer, but their recovery against the employer could never exceed the employer's workers' compensation subrogation interest, regardless of the percentage of fault allocated to the employer.

Lambertson therefore removed one inequity; at-fault employers would no longer be able to recover their full subrogation claim if they bore fault for the injury-causing incident. However, it left a second inequity; under *Lambertson*, a tortfeasor that was 5% at fault would still owe the entire award to the claimant, while the 95% at-fault employer would only owe the third-party tortfeasor the amount of its subrogation interest. Under this allocation, a minimally at-fault third-party tortfeasor was clearly paying well in excess of any damages actually caused by the tortfeasor's percentage of fault.

Lambertson was decided in 1976; in 2003, Minnesota Statutes Section 604.02 was amended to ensure that joint and severally liable individuals paid tort awards only according to their own percentage of fault. Minn. Stat. § 604.02, subd. 1. After this amendment, attorneys questioned whether Section 604.02 now governed tort claims with both employers and third-party tortfeasors such that the tortfeasor could only be required to pay according to their own percentage of fault.

In *Kempa v. E.W. Coons, Co.*, the Minnesota Supreme Court held that the enactment of Section 604.02 had not changed the analysis for employer contribution set forth in *Lambertson*. 370 N.W.2d 414, 420 (1985). But, in *Gaudreault v. Elite Line Services*, the U.S. District Court for the District of Minnesota held that Minnesota Statutes Section 604.02 applied in the context of *Lambertson* actions. 22 F. Supp. 3d 966 (D. Minn. 2014). In *Gaudreault*, the court found that unless the prerequisites for joint and several liability were satisfied, a third-party tortfeasor was only responsible for paying its fair share in proportion to the percentage of fault allocated to it (i.e. it was not responsible for paying the share of fault chargeable to the employer).

FISH V. RAMLER TRUCKING, INC., 935 N.W.2D 738 (MINN. 2019).

Fish v. Ramler Trucking, Inc. has now confirmed that there is no joint and several liability in the context of *Lambertson* contribution actions despite the enactment of Section 604.02. 935 N.W.2d 738 (Minn. 2019). Fish was injured in a work-place accident. He brought a personal injury claim against a non-employer tortfeasor (Ramler) and the non-employer tortfeasor brought a claim for contribution against his employer. The employer settled out of both cases. After trial, a jury found Fish 5% negligent, his employer 75% negligent, and the third-party tortfeasor 20% negligent. *Fish v. Ramler Trucking, Inc.*, 923 N.W.2d 337 (Minn. Ct. App. 2019). The tortfeasor made a post-trial motion to reduce the judgment so that the tortfeasor would owe only 20% of the final award—the amount attributable to its own negligence. *Id.* The district court agreed that Section 604.02 governed the claim and that the tortfeasor would only owe the award in accordance with its own percentage of fault. *Id.*

The order was appealed, and first the Minnesota Court of Appeals and then the Minnesota Supreme Court held that Section 604.02 does not govern the ultimate liability for jury awards involving claims for contribution against an employer. *Fish v. Ramler*, 935 N.W.2d 738 (Minn. 2019). Both courts explained that because workers' compensation is the sole remedy against an employer, an employer and a third-party tortfeasor can never be "severally liable" (because the employer can never be "liable" to the employee). Instead, *Fish* affirmed the principles of *Johnson v. Raske Building Solutions*, 276 N.W.2d 79 (Minn. 1979) finding that the third-party tortfeasor was required to pay the full amount of any award to the employee. *Fish* also went on to affirm that the third-party's only recourse against the negligent employer was to recover contribution under Minn. Stat. § 176.061 subd. 11 and *Lambertson*, the amount of which is capped at the amount of the employer's workers' compensation subrogation interest as calculated under the formula set out in Minn. Stat. § 176.061 subd. 6. As noted elsewhere, this limited right of contribution can create inequities for the third-party tortfeasor.

WAIVE AND WALK

Fish also noted that the Minnesota legislature had approved the *Lambertson* compromise because the 2000 amendments to the Workers' Compensation Act ratified and codified the procedure created by *Lambertson*. 935 N.W.2d at 744.

Section 176.061, subd. 11, provides: "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 . . .". This mirrors and codifies the *Lambertson* decision.

In addition, Subdivision 11 provides: "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

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compensation benefits from the damages payable by any third party". The amount of workers' compensation paid and payable is then treated as a collateral source offset following a jury trial (for any damages duplicated). *Id.* In other words, an employer may "waive and walk" to opt out of the civil litigation procedure entirely if it appears its percentage of fault would negate any workers' compensation subrogation recovery.

HOW IS THE AWARD PAID AFTER A JURY TRIAL?

Fish also confirmed that following trial, payments are to be made as described in *Johnson v. Raske Building Systems*, 276 N.W.2d 79 (Minn. 1979):

1.) the non-employer tortfeasor is required to pay the full amount of the award (minus any amount for the plaintiff's own negligence and after all offsets, etc.) to the employee/plaintiff; then,

2.) the employer then pays the third-party tortfeasor an amount that represents the lesser of its percentage of negligence or its workers' compensation subrogation interest (as calculated using the "net formula recovery"); then,

3.) the plaintiff-employee reimburses the employer for workers' compensation paid to date pursuant to the formula set out in Minn. Stat. § 176.061 subd. 6.

This seems like a messy and circular way to address an award. And, as a practical matter, the parties may calculate numbers and simply treat it as an offset. However, where two separate insurers are involved on the employer side, the circular nature of the contribution award may lead to some interesting conflicts.

WHO IS PAYING THE CONTRIBUTION AWARD?

The question of who is paying what money in the case of a jury award can lead to unique conflicts and/or strategic decisions in a *Lambertson* contribution case. The non-employer tortfeasor's liability coverage covers tort damages within the limits of insurance liability assessed against the non-employer tortfeasor, with any excess award owed by the individual tortfeasor. But for the employer, the applicable coverage arises under the workers' compensation insurance policy procured by the employer.

Coverage A versus Coverage B

Benefits payable to the injured employee pursuant to the Workers' Compensation Act are payable under Coverage A. However, the employer's *Lambertson* liability to the non-employee tortfeasor is covered by Coverage B to the workers' compensation insurance policy (i.e. ***not*** under the liability/GCL policy held by the employer). These are two separate pools of coverage within workers' compensation insurance policies (similar to separate coverages for PIP, liability, UM/UIM in auto accident cases).

Ordinarily Coverage A and Coverage B exist under the same policy. However, differences between the two coverages can cause complications. There is no dollar limit to liability under Coverage A, while the Coverage B will have a firm dollar limit. There are cases in which the *Lambertson* exposure is greater than the available limits under Coverage B, which can cause employers to give up a valuable subrogation interest. There could be cases in which the subrogation interest is larger than the *Lambertson* contribution exposure (which would ordinarily mitigate against waiving and walking), but the employer may waive and walk anyway because the Coverage B limits are low and failure to settle would expose the employer to new-money exposure to the non-employee tortfeasor (e.g. WC subro = $400,000, *Lambertson* exposure $300,000, Coverage B limits = $100,000).

Conflicts between Coverage A and Coverage B Insurers

It is also possible for an employer to contract with two separate workers compensation insurers, one to provide Coverage A and one to provide Coverage B. This can lead to a conflict, wherein a Coverage A insurer may not want to waive and walk and give up its possible subrogation interest despite the risk of a large contribution award, because any liability to the employer will be covered by a separate insurer who has issued Coverage B.

Situations involving loaned workers/temp workers can also cause these conflicts. Contractual arrangements between the temp agency and the location placed may specify that one may carry Coverage A and the other may carry Coverage B. For example, a contract between a temp agency and a factory where workers are placed may specify that temp agency will carry Coverage A and be responsible for paying workers' comp benefits owed to the employee. However, that same contract may explicitly (or implicitly) state that the temp agency will not be responsible for any *Lambertson* liability incurred as the result of workplace injuries. This is logical, because it would be the factory's (not the temp agency's) negligence that would have caused the accident. But in a *Lambertson* liability case, there may again be the conflict between the right of the Coverage A insurer to pursue subrogation, and the concerns of the Coverage B insurer as to the risk of a large *Lambertson* award.

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EXAMPLES OF *LAMBERTSON* ALLOCATIONS

Lambertson liability, and its impact on your case, is best understood in its practical application.

HYPOTHETICAL I

Factual Scenario

Gross Verdict:	$100,000
Workers' Comp Paid:	$40,000
Costs of Collection:	$33,000

Fault Allocation:
A. Employee = 10%
B. Non-Employer Tortfeasor = 80%
C. Employer = 10%

Step 1
Non-employer tortfeasor pays $90,000 to plaintiff.

Step 2
Employer pays to non-employer tortfeasor per its percentage of fault, but its liability is capped at amount of its workers' comp subrogation interest as calculated by Minn. Stat. § 176.061 subd. 6.

$90,000 net recovery to employee minus $33,000 costs of collection = $57,000

$57,000 minus 1/3 (Plaintiff's guaranteed share) = $38,000 available for workers' comp subrogation

WC formula: [$40,000 WC paid – (($33,000 cost of collection ÷ $90,000 plaintiff's net recovery) x $40,000) = $25,333 workers' comp subrogation interest]

$38,000 minus $25,333 = $12,667 to plaintiff-employee, but counts as future credit to workers' compensation insurer.

Employer's *Lambertson* contribution liability would be capped at $38,000

Because the employer's fault is 10%, employer will pay $10,000 to non-employer tortfeasor, (cap is not reached, no reason to "waive and walk" because the employer's fault is minimal).

Step 3
Employee must reimburse employer under Minn. Stat. § 176.061 subd. 6(c). Apply WC formula (as above) = employee reimburses employer $25,333.

HYPOTHETICAL II

Factual Scenario

Gross Verdict:	$100,000
Workers' Comp Paid:	$40,000
Costs of Collection:	$33,000

Fault Allocation:
A. Employee = 10%
B. Non-Employer Tortfeasor = 10%
C. Employer = 80%

Step 1
Non-employer tortfeasor pays $90,000 to plaintiff (even though it is only 10% at fault).

Step 2
Employer pays to non-employer tortfeasor per its percentage of fault, but its liability is capped at amount of its workers' comp subrogation interest as calculated by Minn. Stat. § 176.061 subd. 6.

$90,000 net recovery to employee minus $33,000 costs of collection = $57,000

$57,000 minus 1/3 (plaintiff's guaranteed share) = $38,000 available for work comp subrogation

WC formula: [$40,000 WC paid – (($33,000 cost of collection ÷ $90,000 plaintiff's net recovery) x $40,000) = $25,333 workers' comp subrogation interest]

$38,000 minus $25,333 = $12,667 to plaintiff-employee, but counts as future credit to workers' compensation insurer.

Because the employer is 80% at fault, if it was paying a proportional share, it would pay $80,000 of the award. However, employer's *Lambertson* contribution liability is capped at $38,000.

Employer pays $38,000 to non-employer tortfeasor.

Step 3
Employee must reimburse employer under Minn. Stat. § 176.061 subd. 6(c). Apply WC formula (as above) = employee reimburses employer $25,333.

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Because the employer's *Lambertson* exposure is higher than its subrogation interest, if the case were accurately evaluated early on, there would be good incentive to waive and walk in this scenario. In that circumstance, the non-employer tortfeasor is entitled to a collateral source offset of $40,000. This still results in an inequitable outcome for the third-party tortfeasor, who now must make a net payment to the plaintiff of $50,000 (even though their percentage of fault would dictate a $10,000 payment).

NOW WHAT?

Now that you understand every aspect of *Lambertson* liability, you can properly evaluate and strategize for your case.

If you are representing an employer defending a *Lambertson* claim, it is essential to give clients an honest breakdown of the likely range of fault to be attributed to your employer client, their *Lambertson* exposure, possibility of any recovery on the workers' compensation subrogation side, and the effect of their coverage limits on their possible individual liability in a worst-case scenario. Because the recovery right often belongs to the insurance company, and the same insurance company is also often paying defense costs, a "waive and walk" under Minn. Stat. § 176.061 subd. 11 may make sense even in cases where there is a decent chance of at least some subrogation recovery.

When representing third-party non-employer tortfeasors, you first need to be able to examine and give information as to the likely allocation of fault to an employer, if any. Then, you need to be able to explain both the procedure for adding the employer and the range of outcomes. What is the employer's subrogation interest worth? What are the *Lambertson* contribution rights worth? Is the employer going to "waive and walk" leaving you with a collateral source offset for workers' compensation paid? Are there strategic considerations that would mitigate for or against settling with the employee on a *Naig* release prior to trial? Are there strategic considerations that would mitigate for or against settling the workers' compensation subrogation interest on a reverse-*Naig* prior to trial?

Obviously, the hardest conversations about *Lambertson* liability are the cases with severe injuries, large employer liability, and only a small amount attributable to your client (and virtually none to the injured employee). It is our experience that tortfeasors and insurers are often unfamiliar with the mechanics of how these *Lambertson* contribution actions actually work, and can be surprised (and quite unhappy) to learn that they may be responsible for paying a large award despite the fact that the employer may bear the majority of the fault. Both the client and insurer should be advised of the mechanics of how these actions work and explicitly informed of the inherent limitations of *Lambertson* contribution actions as early as possible to avoid "sticker shock" or confusion later in the case.

CONCLUSION

The workers' compensation system's grand compromise was trading away the litigation rights of individual injured employees to obtain general damages from employers in exchange for a guaranteed safety net for all injured employees regardless of any employer fault. The policy goals and considerations of the grand compromise are mirrored in the smaller compromise in *Lambertson, Johnson,* and Section 176.06, subd. 11, and now confirmed again in *Fish*. The courts will prevent employers from receiving a subrogation windfall when their own misconduct causes injury and will offset the workers compensation benefits against the tortfeasor's fault. But they will not require employers to participate as parties with full civil liability in contribution in a tort action and, as part of these bargains, they will require an at-fault tortfeasor to bear an inequitable share of damages in certain actions in support of the public policy goal of complete compensation for injured employees.