Baylor Law Review
Spring 2003

Articles

***617** APPORTIONING RESPONSIBILITY IN CASES INVOLVING CLAIMS OF VICARIOUS, DERIVATIVE, OR STATUTORY LIABILITY FOR HARM DIRECTLY CAUSED BY THE CONDUCT OF ANOTHER

William D. Underwood [FNa1]
Michael D. Morrison [FNaa1]

Table of Contents

***618** I. Introduction

Should a defendant whose conduct is negligent precisely because it creates a foreseeable risk of criminal conduct by another be able to largely escape liability when the very event that made the defendant's conduct negligent in the first place occurs, simply by blaming the criminal for what happened? Our instincts tell us that the answer must be no. Otherwise, what is the point of creating the legal duty? Nonetheless, the answer to this question has been unclear since the legislature revised the apportionment of liability provisions in Chapter 33 of the Texas Civil Practice and Remedies Code as part of the 1995 tort reform legislation. [FN1] Indeed, there is tremendous uncertainty today regarding whether and to what extent liability should be apportioned in any circumstance where one person is being held legally responsible for harm directly caused by the conduct of another.

Texas law recognizes a number of circumstances where one person is held legally responsible for harm, caused at least in part, by the conduct of another. This responsibility may be vicarious, derivative, or the result of shared culpable conduct such as that of joint tortfeasors acting in concert or responsible for the plaintiff's indivisible injuries. The most straightforward of these categories is that involving claims of pure vicarious liability. The person who is being held responsible for the conduct of the tortfeasor has engaged in no wrongful conduct personally, but is liable because of his or her relationship with the actor who engaged in the wrongful conduct. [FN2] An employer, for example, is vicariously liable for tortious conduct of its employees when that conduct occurs in the ***619** course and scope of employment. [FN3] A partner in a Texas general partnership is vicariously liable for debts and obligations of the partnership. [FN4] And, a parent may be vicariously liable for the willful or malicious conduct of a child. [FN5]

Unlike cases involving pure vicarious liability, cases of derivative liability, such as the wrongful hiring of an incompetent employee, involve wrongful conduct both by the person who is derivatively liable and the actor whose wrongful conduct was the direct cause of injury to another. [FN6] The liability is derivative because it depends upon a subsequent wrongful act or omission. As one court explained in a negligent entrustment setting:
Obviously, an owner who is negligent in entrusting his vehicle is not liable for such negligence until some wrong is committed by the one to whom it is entrusted. Even if the owner's negligence in permitting the driving were gross, it would not be actionable if the driver was guilty of no negligence. The driver's wrong, in the form of legal ***620** liability to the plaintiff, first must be established, then by negligent entrustment liability for such wrong is passed on to the owner. [FN7]

Derivative liability is thus predicated on the tortious conduct of the defendant personally. [FN8] However, like vicarious liability, there is no liability without the subsequent tortious conduct of another.

Several well-established categories of liability meet this definition of derivative liability. One category includes those cases where the defendant's negligence affirmatively enabled a third person's foreseeable and culpable conduct to cause the plaintiff's injuries. This category would include, for example, a case where a trucking company negligently hired, retained or supervised a habitually intoxicated truck driver who injured the plaintiff as a result of driving while intoxicated. [FN9] It would also include claims that a defendant had negligently entrusted a vehicle or some other dangerous instrumentality to another, [FN10] such as a pawn shop that negligently sold a Saturday Night Special to a violent and underage youth, who

then used the handgun to gun down a police officer. [FN11] Another category of cases meeting this definition of derivative liability includes cases where the defendant negligently interfered with the plaintiff's safety ***621** measures and thereby created an unreasonable risk of harm resulting from the foreseeable criminal, intentional or negligent intervention of a third person. [FN12] Yet a third category would include cases where a defendant unreasonably fails to take necessary steps to warn of, or reduce the risk of, foreseeable criminal intervention, such as a property owner whose unlawful failure to secure its property permits a foreseeable crime of violence to occur on the premises. [FN13]

Finally, in addition to principles of pure vicarious liability as well as those of derivative liability which sometimes create liability for harm directly caused by another, certain statutes in Texas create a hybrid form of vicarious-derivative liability for harm caused by another. The Texas Dram Shop Act, for example, provides that a business which continues to provide alcoholic beverages to an obviously intoxicated patron is liable to a third person who is injured by the intoxicated patron. [FN14] The liability of the person providing the alcohol is derivative (rather than vicarious) in one sense, because to be liable under the Dram Shop Act the provider must have engaged in wrongful conduct-providing alcoholic beverages in circumstances where it is "apparent" to the defendant "at the time" the alcohol is provided, sold or served that the person consuming the alcohol is "obviously intoxicated to the extent that he present[s] a clear danger to himself and others." [FN15] The liability of the provider is vicarious, however, in the sense that the causal connection between the conduct of the intoxicated patron and the injuries suffered by the third party is imputed to the provider. While "the intoxication of the recipient" must be "a proximate cause of the damages suffered," [FN16] the Dram Shop Act does not require any causal connection between the conduct of the alcohol provider and the damages suffered by the plaintiff. [FN17] In this sense, the liability of the person providing the alcoholic beverages is vicarious. Another example of a statute that creates a hybrid form of vicarious-derivative liability is the provision in the Texas Family Code that makes a parent derivatively liable for property damage proximately caused by the ***622** negligent conduct of a minor child. [FN18] Once again, the liability of the parent is derivative in the sense that the parent must have engaged in wrongful conduct to be liable-the negligent failure to control the child. The parent's liability is vicarious, however, in that like liability of an alcohol provider under the Dram Shop Act, the causal connection between the conduct of the child and the harm suffered by the plaintiff is imputed to the parent. [FN19]

Prior to 1995, a plaintiff seeking to recover damages from one person for harm directly caused by the tortious conduct of another could avoid a jury question regarding whether liability should be apportioned between the directly responsible actor and the person whose liability was vicarious or derivative simply by not suing the person who was directly liable. If the plaintiff sued only the person whose liability was vicarious or derivative, the express terms of the apportionment of liability sections of Chapter 33 of the Texas Civil Practice and Remedies Code would not permit the jury to apportion responsibility between the defendant and the person whose conduct directly caused the harm. [FN20] Moreover, even if the plaintiff elected also to sue the person whose conduct directly caused the harm, Texas courts held that responsibility should not be apportioned between the person directly liable and the person who was vicariously or derivatively liable. [FN21]

The 1995 revisions to the apportionment of responsibility provisions of Chapter 33 eliminated the plaintiff's ability to avoid altogether the question of whether liability should be apportioned between two tortfeasors by simply electing not to sue one of the two. Section 33.004 for the first time permits defendants to join "responsible third parties" whose responsibility the jury shall considered in apportioning responsibility. [FN22] Other than a case where the defendant has a strong argument that the plaintiff's own ***623** negligence is principally responsible for the plaintiff's damages, [FN23] the revisions to Chapter 33 have encouraged defendants to join as many responsible third parties as possible, in the hope of avoiding joint and several liability and reducing the portion of the plaintiff's damages for which the defendant may be responsible.

In cases involving multiple tortfeasors with direct (as opposed to derivative or vicarious) liability, Chapter 33 now unquestionably permits one tortfeasor to join others as responsible third parties and submit for consideration in both the liability and the apportionment of responsibility questions the names of all directly liable tortfeasors who have been joined by either the plaintiff or the defendant. Prior to the 1995 revisions, an automaker whose product contained a minor defect which combined with a driver's intoxication to cause injury to the plaintiff probably would have been sued alone. [FN24] Had the manufacturing defect been compared to the conduct of the drunk driver, the jury might well have allocated a very small percentage of the responsibility for the accident to the manufacturing defect. But by suing only the automaker, the plaintiff avoided the allocation issue altogether and 100 percent of the responsibility for damages would rest with the automaker. [FN25] Under the 1995 revisions to Chapter 33, however, the automaker can now join the drunken driver as a responsible third party and have the jury allocate responsibility between the drunk driver and the automaker, thereby reducing the

automaker's percentage of responsibility and liability. [FN26]

The Texas legislature clearly intended to permit defendants to join as "responsible third parties" those persons whose liability is direct. [FN27] However, defendants have increasingly attempted to use the concept of responsible third party to apportion responsibility between those defendants whose liability is direct and those whose liability is either vicarious or derivative. Two Texas courts have recently refused to permit ***624** the jury to apportion responsibility between a party which was directly liable and another whose liability was only derivative, at least with respect to apportioning responsibility for the injury causing event that was the basis of the plaintiff's claim. [FN28] This was true in both cases, even though the defendants had joined the primary wrongdoer as a responsible third party under Section 33.004. [FN29]

The Texas Supreme Court has now granted a petition for review in one of the two cases, indicating that the Court has an interest in examining whether the liability of a person whose liability is derived from the wrongful conduct of another should be apportioned with that of the person who directly caused the injury. [FN30] Few issues of tort responsibility could be more important. If a person whose conduct creates a foreseeable risk of misconduct by another (in other words, a person whose liability is derivative) can largely escape responsibility simply because the very event which made his own conduct wrongful in the first place actually occurs, then the incentive to take precautions against the risk is substantially reduced. This concern is especially great when the foreseeable event is a crime of violence given the likelihood that a jury, when asked to apportion responsibility between a person who commits a crime of violence and a person whose conduct simply involved facilitating that crime through negligence, might be expected to apportion most of the responsibility to the person who actually committed the crime. [FN31] Allocating responsibility in ***625** cases of vicarious or derivative liability would not only be bad policy, but has not traditionally been how Texas courts have interpreted and applied the allocation of responsibility provisions in Chapter 33. [FN32] Moreover, nothing in the language or the legislative history of the 1995 tort reform revisions to the allocation of responsibility provisions of Chapter 33 either requires or justifies departure from the traditional rule that juries are not asked to allocate responsibility between persons who are directly liable and persons whose liability is either derivative or vicarious. [FN33]

II. Comparative Responsibility Under Texas Law Prior to the 1995 Amendments to Chapter 33 of the Texas Civil Practice and Remedies Code

Prior to the 1995 tort reform legislation that amended Chapter 33 of the Texas Civil Practice and Remedies Code, the relevant sections of Chapter 33 placed important restrictions on the allocation of responsibility among parties to a lawsuit. One significant restriction strictly limited whose responsibility the trier of fact "shall" consider, [FN34] while another limited those whose responsibility the jury could consider to those persons whose wrongful conduct caused or contributed to cause the harm. [FN35] Both of these restrictions supported the traditional approach taken by courts in Texas of refusing to apportion responsibility between a person whose liability is derived or imputed from the wrongful conduct of another with that of the person whose wrongful conduct directly caused the injury.

A. Limiting Apportionment of Responsibility to Claimants, Defendants, and Settling Persons

The version of 33.003 amended in 1995 was adopted in 1987. The legislative history reveals that in 1987 the legislature considered but rejected the following language:
***626** Sec. 33.003. DETERMINATION OF COMPARATIVE RESPONSIBILITY.
The trier of fact shall determine the percentage of responsibility of:
(1) each claimant;
(2) each defendant; and
(3) each other person alleged to have been a factor in causing the personal injury, property damage, or death, whether or not such other person is a party to the action, has settled with or been released by any person, is immune from liability, or has any other individual defense against the claimant. [FN36] The bill analysis explained that the reason for including the language in proposed subsection 33.003(3) was to broadly require "the trier of fact to determine the percentage of responsibility of: (1) each claimant; (2) each defendant; and (3) all other persons who are a factor in causing the injury or damage." [FN37]

The version of section 33.003 actually adopted, however, deleted the broadly inclusive language that had been proposed for subsection three and instead included language that far more restrictively limited the persons whose responsibility the jury

could consider in apportioning responsibility. Rather than allowing the jury to consider the responsibility of each "other person alleged to have been a factor in causing" the injury, the jury could consider only claimaints, defendants, and "settling person[s]." [FN38]

Since section 33.003 as adopted in 1987 expressly limited apportionment of responsibility to claimants, defendants, and settling persons, if the plaintiff elected not to sue a person whose misconduct contributed to the plaintiff's injuries, the trier of fact would not consider that person in apportioning responsibility. This was true even if the defendant asserted a third-party claim against that person. This is because the definition of defendant did not include third-party defendants, at least ***627** not when the claim against that third-party defendant was a claim for contribution. [FN39] Section 33.011(2) defined "defendant" as "any party from whom a claimant seeks recovery of damages pursuant to the provisions of Section 33.001 at the time of the submission of the case to the trier of fact." [FN40]

One might have argued that a defendant asserting a third-party claim for contribution or indemnity from a contribution defendant was a "claimant" seeking "recovery of damages" within the meaning of section 33.011(2), except that section 33.016(c) made clear that a contribution defendant's responsibility could not be considered in allocating responsibility under section 33.003:
The trier of fact shall determine as a separate issue or finding of fact the percentage of responsibility with respect to each contribution defendant and these findings shall be solely for purposes of this section and Section 33.015 and not as a part of the percentages of responsibility determined under Section 33.003. Only the percentage of responsibility of each defendant and contribution defendant shall be included in this determination. [FN41]

One consequence of this comparative responsibility scheme as it existed prior to 1995 was to place the burden of judgment-proof tortfeasors on other tortfeasors rather than on plaintiffs. A plaintiff who was seriously injured in an automobile accident with a drunk driver when the restraint system in the plaintiff's vehicle failed could elect to sue only the company that manufsactured the plaintiff's vehicle. The automaker could name the drunk driver as a third-party defendant, but if the jury found the automaker liable, the jury would not be asked to apportion responsibility between the automaker and the drunk driver with respect to the plaintiff's claim. The automaker would be liable to the plaintiff for 100 percent of the plaintiff's recoverable damages. The automaker would be entitled to contribution from the drunk driver, and the jury would be asked to apportion responsibility between the automaker and the drunk driver. However, this apportionment was material only to determining the amount of contribution the automaker would be entitled to receive from the drunk driver. Of course, if the drunk driver was judgment- proof, the judgment for contribution would do the automaker little good. Thus, Chapter 33 ***628** placed the risk of judgment-proof tortfeasors on joint tortfeasors rather than plaintiffs-at least if the plaintiff chose not to sue the judgment-proof tortfeasor.

B. Limiting Apportionment of Responsibility to Persons Whose Conduct Caused or Contributed to Cause the Harm

In addition to limiting the apportionment question to claimants, defendants, and settling persons, Chapter 33 recognized a second important restriction on allocation of responsibility among parties to a lawsuit. Section 33.011 made clear that in comparing responsibility among claimants, defendants, and settling persons, the jury was being asked to compare the responsibility of only those persons who had engaged in conduct that caused or contributed to cause the plaintiff's injuries. More specifically, section 33.011(4) defined "percentage of responsibility" as follows:
Percentage of responsibility means that percentage attributed by the trier of fact to each claimant, each defendant, or each settling person with respect to causing or contributing to cause in any way, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity violative of the applicable legal standard, or by any combination of the foregoing, the personal injury, property damage, death, or other harm for which recovery of damages is sought. [FN42]

This restriction was especially significant in cases involving claims against persons whose liability was vicarious. A person whose liability was purely vicarious had not personally engaged in "conduct or activity" that had "caused or contributed to cause" the harm. Liability was based instead entirely on the relationship between the person whose tortious conduct proximately caused the harm and the person who was vicariously responsible. [FN43] Thus, rather than allocating responsibility among persons directly liable and persons vicariously liable, whatever responsibility ***629** existed for persons directly liable was simply passed on to persons vicariously liable. The vicariously liable defendant essentially stepped into

the shoes of the tortfeasor who was directly responsible and assumed that person's responsibility to the claimant.

By analogy, Texas courts reached precisely the same conclusion with respect to claims against persons whose liability was derivative rather than vicarious. [FN44] In Loom Craft Carpet Mills, Inc. v. Gorrell, the Texarkana Court of Appeals rejected the argument that the trial court erred by refusing to require the jury to apportion responsibility between a directly responsible actor and a person derivatively liable as a negligent entrustor. [FN45] Focusing on the derivative nature of liability for negligent entrustment, the court reasoned that since the responsibility of the derivatively liable entrustor is ultimately based on the foreseeable negligence of the directly responsible entrustee, the responsibility of the entrustee was "passed on" to the entrustor:
While entrusting is a separate act of negligence, and in that sense not imputed, it is still derivative in that one may be extremely negligent in entrusting and yet have no liability until the driver causes an injury. If the owner is negligent, his liability for the acts of the driver is established, and the degree of negligence of the owner would be of no consequence. When the driver's wrong is established, then by negligent entrustment, liability for such wrong is passed on to the owner. We believe the better rule is to apportion fault only among those directly involved in the accident, and to hold the entrustor liable for the percentage of fault apportioned to the driver. [FN46]

More recently, the Corpus Christi Court of Appeals in Wyndham Hotel Co. v. Self likewise concluded that the jury should not apportion liability between the directly responsible actor and the derivatively liable defendant because the liability of the directly liable party "is passed on" to the derivatively liable defendant as a matter of law. [FN47] Thus, prior to the 1995 revisions to Chapter 33, the law in Texas was clear that courts would not ***630** apportion responsibility between persons whose liability was derived or imputed from the wrongful conduct of another with that of the person whose wrongful conduct directly caused the injury.

III. The 1995 Amendments to the Apportionment of Responsibility Provisions in Chapter 33 of the Texas Civil Practice and Remedies Code

In 1995, the 74th Texas legislature enacted a variety of tort reform measures to address matters such as punitive damages, proportionate responsibility, venue, medical liability, frivolous lawsuits, liability of commercial property owners, and deceptive trade practices. [FN48] Among the most significant changes were those involving apportionment of responsibility among joint tortfeasors under Chapter 33 of the Texas Civil Practice and Remedies Code. The legislature enacted section 33.004 to permit defendants to join "responsible third parties." [FN49] Section 33.011 as amended generally defines "responsible third party" as follows:
(6)(A) "Responsible third party means" any person to whom all of the following apply:
(i) the court in which the action was filed could exercise jurisdiction over the person;
(ii) the person could have been, but was not, sued by the claimant; and
(iii) the person is or may be liable to the plaintiff for all or a part of the damages claimed against the named defendant or defendants. [FN50]

By properly joining and adducing probative evidence of the liability of a responsible third party, the defendant is entitled to have that third party's responsibility considered by the jury when it apportions responsibility. [FN51] Section 33.003, as amended in 1995, provides that:
***631** The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility, stated in whole numbers, for the following persons with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these:
(1) each claimant;
(2) each defendant;
(3) each settling person; and
(4) each responsible third party who has been joined under Section 33.004. [FN52]

By adding the fourth subpart to section 33.003, the Texas legislature clearly intended to change existing law regarding the apportionment of responsibility among torfeasors with direct liability. But there is absolutely no indication in either the legislative history or the text of the amended apportionment of responsibility provisions of Chapter 33 that the legislature

intended to now permit apportionment of responsibility among directly liable tortfeasors and those whose liability was only derivative or vicarious.

A. Application of Section 33.003 to Apportion Responsibility Among Tortfeasors with Direct Liability

By authorizing defendants to join other tortfeasors as responsible third- parties and to have their responsibility apportioned among the tortfeasors sued by the plaintiff, the 1995 tort reform legislation provided a powerful new defensive tool to defendants. Rather than place the cost of judgment-proof tortfeasors on other tortfeasors, as was the case under prior law, section 33.003 now places that cost on plaintiffs. Take the earlier example of the plaintiff who was seriously injured in an automobile accident with a judgment- proof drunk driver when the restraint system in the plaintiff's vehicle failed. Regardless of whether the plaintiff elects to sue only the automaker, the automaker can now name the drunk driver as a ***632** responsible third-party under section 33.004. [FN53] If the jury finds that the automaker and drunk driver have both violated the applicable legal standards, then the jury will apportion responsibility between the two tortfeasors. If the jury places the lion's share of the responsibility on the drunk driver (a likely scenario), the automaker would be responsible for only that portion of damages reflecting the percentage of responsibility allocated to the automaker. This is because the automaker would not be jointly and severally liable unless the jury allocated more than fifty percent of the responsibility to the automaker. [FN54] To the extent the drunk driver is judgment-proof, the loss will fall on the plaintiff rather than the automaker.

This loss rests with the plaintiff, regardless of the plaintiff's lack of culpability, even though the defendant has necessarily been found guilty of wrongful conduct. Moreover, it places the loss on the party who, in most cases, is least able to bear the loss since it is certainly reasonable to assume that most plaintiffs in cases governed by Chapter 33 are individuals. As individuals, they are probably less equipped to bear the loss than the business enterprises that will be the defendants in most instances. For these reasons, reasonable minds could disagree as to whether the revision to section 33.003 was good public policy. However, there is no question that this is what the Texas legislature intended. Indeed, this precise scenario was presented in testimony before the Senate Economic Development Committee in opposition to the amendments to Chapter 33:

But, if you'll recall, when Professor Powers was talking, and the hypothetical situation that he used, he used the circumstance in which two cars were approaching an intersection at right angles to one another, and each failed ***633** to stop at the stop sign; each failed to keep a proper look-out; each was driving at an excessive rate of speed; they collide in the intersection; a wheel comes off the car and injures a pedestrian.

Now, you've got a pedestrian versus the two drivers. One of the drivers in the hypothet is uninsured, financially incapable of responding in damages. Now, a jury would find both of those drivers 50 percent at fault for the accident. You recall that? That he was talking about they would assign 50 percent fault for the accident. But his explanation was something that was not dealt with by the people from TLR today in addressing this committee, because it's an explanation with which they're uncomfortable. The explanation lies in the fact that, but for the negligence of both parties, the accident would not have occurred. Had either party stopped at the stop sign, the other car would have gone through the stop sign. No collision would have occurred. The pedestrian would not have been injured. In that circumstance, though each party is 50 percent at fault for the accident, they're 100 percent at fault for the injury, because it was the combined conduct that was a "but for" cause of the accident. If either party had obeyed the law, the injury would not have occurred.

Now, in our Diogynesian search for truth, the question becomes who's going to bear the insolvency of the driver who had no coverage, nor financial resources with which to respond. Should the innocent victim who was standing on the corner bear that responsibility? Or should the drunk who ran the stop sign bear that responsibility, or only pay 50 percent of the damages because the other driver's insolvent? I suggest to you that the better social policy would require that the party who was a "but for" cause of the accident should pay 100 percent of the damages. [FN55]

Despite being confronted with the effect of placing the cost of one joint tortfeasor's insolvency on the innocent injured party rather than the other culpable tortfeasor, the Senate approved the amendments to Chapter 33. Senator Sibley explained that the rationale for this result was simply to ***634** deny to the plaintiff control over the determination of which parties would be considered by the jury in apportioning responsibility:

It's a departure from current jurisprudence. Right now the plaintiff controls the list of the people who are submitted to the jury for apportionment of fault. We're changing that, and we're going to give the defendant something to say about that. So what we're allowing is the submission of third parties by the defendant. Now this allows a defendant, upon proper notice, and it has to be a person who'd be properly joined in the court, to name somebody whom they wish to be submitted to the jury for apportionment of fault.

In the past what we've had is people joined in court who had the deep pockets. And it may be somebody else just as much as [sic] fault, and we're going to allow the defendant to bring them in. . . . [FN56]

B. Application of Section 33.003 to Claims Based on Vicarious Liability

Nothing in either the language or the legislative history of the 1995 amendments to the apportionment of responsibility provisions of Chapter 33 suggests, however, that the legislature intended to change the traditional rule that responsibility is not allocated among persons who are directly liable on the one hand and those who are either vicariously or derivatively liable on the other. With respect to claims against persons who are vicariously liable for the tortious conduct of another, the plain language of section 33.003 continues to preclude the trier of fact from allocating responsibility among persons who are directly liable and persons who are vicariously liable. Section 33.003 provides that the jury is to allocate responsibility only among those persons who engaged in "conduct or activity" that "caused or contributed to cause" the "harm for which recovery of damages is sought." [FN57] Since vicarious liability is based on the existence of a particular relationship, such as an employer-employee relationship, rather than any particular "conduct or activity" by the ***635** vicariously liable party, [FN58] section 33.003 does not permit the jury to consider the vicariously liable party in apportioning responsibility.

Moreover, in cases of pure vicarious liability, the vicariously liable party is not a "cause" of the harm suffered by the plaintiff. Nor does the jury make any inquiry into whether the vicariously liable party was a cause of the plaintiff's injury. In a simple negligence case, for example, where the employer of a truck driver who is involved in an accident is sued on a theory of pure vicarious liability, the only liability questions submitted to the jury would be as follows:
Did the negligence, if any, of [the truck driver] proximately cause the [occurrence] in question? [FN59]
On the occasion in question was [the truck driver] acting in the scope of his employment? [FN60]

The court never asks the jury to consider whether any conduct by the employer was a cause of the occurrence in question, because that question is not material. Given that the claim against the employer is based solely on vicarious liability, all that matters is whether the requisite relationship exists between the truck driver and the employer. Since the court never asks the jury to consider whether any conduct of the employer was a cause of the harm, the employer should not be considered under Section 33.003 when the jury apportions responsibility among other parties. This is entirely consistent with the approach of the Restatement (Third) of Torts dealing with apportionment of responsibility, which recognizes that the party vicariously liable should be liable for the entire share of harm assigned to the tortious actor. [FN61] Section 13 of the Restatement provides, "A person whose liability is imputed based on the tortious acts of another is liable for the entire share of comparative responsibility assigned to the other, regardless of whether joint and several liability or several liability is the governing rule for independent tortfeasors who cause an individual injury." [FN62]

***636** Apportionment of responsibility is simply ill-suited for cases where a party's liability for negligence is solely vicarious. As one commentator has explained:
The liability of a master for the acts of a servant . . . within the scope of the employment . . . stands upon grounds that do not support apportionment. Under the doctrine of respondeat superior, the master becomes responsible for the same act for which the servant is liable, and for the same consequences. Ordinarily there is a sound basis for indemnity, but not for any apportionment of damages between the two. [FN63]

For this reason, those courts to consider the issue have consistently held that juries should not be asked to apportion responsibility between a directly liable party and a party whose liability is purely vicarious. [FN64] However, if the court does request the jury to apportion responsibility between the person whose liability is purely vicarious and the person whose wrongful conduct provides the basis for the vicarious liability, the court must apportion whatever percentage of responsibility the jury assigns to the person directly liable to the person vicariously liable. [FN65]

C. Application of Section 33.003 to Claims Under The Dram Shop Act

The question of whether liability should be allocated between the directly liable party and one whose liability is based on the Texas Dram Shop Act presents an issue similar to that presented when liability is purely ***637** vicarious. Of course, liability for a provider of alcoholic beverages under the Dram Shop Act is not purely vicarious. To be liable under the Act the provider must have engaged in wrongful conduct. The provider must have provided an alcoholic beverage in circumstances

where it is "apparent" to the defendant at the time the alcohol is provided, sold or served that the person consuming the alcohol is "obviously intoxicated to the extent he present[s] a clear danger to himself and others." [FN66] Indeed, the level of provider culpability required for liability to exist under the Dram Shop Act more closely resembles recklessness than mere negligence. [FN67]

However, the Dram Shop Act does not require that the plaintiff's injuries be caused by the provision, sale or service of alcoholic beverages to the obviously intoxicated person. The causation question submitted to the jury in an action under the Dram Shop Act is not: "Do you find the conduct of [the provider of alcoholic beverages] to be a proximate cause of the occurrence in question?" [FN68] Instead, the Act requires the plaintiff to demonstrate that "the intoxication of the recipient . . . was a proximate cause of the damages suffered." [FN69] If the recipient's intoxication is a proximate cause of the plaintiff's damages, it makes no difference whether the provider's conduct contributed in any way. Other jurisdictions with similar statutes have held that the provider, may be liable, for example, even if the evidence demonstrates that the recipient did not even consume the alcohol served by the provider, [FN70] or that whatever alcohol was consumed was not a cause in fact because the recipient was already exceedingly intoxicated. [FN71]

Whatever causation is attributed to the intoxication is thus imputed to the provider as a matter of law. As one court observed in interpreting the similar Florida Dram Shop Act, "the culpable vendor becomes vicariously ***638** liable for the damages caused by the intoxicated tortfeasor." [FN72] Indeed, the Texas Dram Shop Act expressly makes providers of alcoholic beverages responsible "for the actions of their customers." [FN73] That the Act does not require the plaintiff to prove that the provider's conduct caused the plaintiff's injury is important. It is important because under section 33.003, the jury apportions responsibility among only those persons whose conduct caused or contributed to cause the plaintiff's injury. [FN74]

Before the provider could be included in the apportionment of liability issue in the charge, the trial court would be required to submit an issue otherwise immaterial under the Dram Shop Act inquiring whether the provider's conduct caused or contributed to cause the plaintiff's injuries. If the jury's answer was no, then under the express language of section 33.003, the jury could not consider the provider in apportioning responsibility. Since no responsibility could be apportioned to the provider, one possible result would be that the provider would not be liable for any of the plaintiff's damages. This result would have the effect of rewriting the Dram Shop Act to read into the Act a causation requirement that simply is not there. The provider would always escape all responsibility unless the jury found a causal connection between the provider's conduct and the plaintiff's injury. [FN75] That result obviously would be wrong.

The other possible outcome would be that since the injuries caused by the intoxication are imputed by law to the provider, whatever responsibility the jury assigned to the intoxicated person would be imputed to the provider. This would be the correct result. Furthermore, since the intoxicated person's causation is imputed to the provider as a matter of law, no purpose would be served by inquiring into whether the provider's conduct caused or contributed to cause the plaintiff's injuries. Suppose, for example, that the jury's answer was yes when asked whether the provider's conduct caused or contributed to cause the plaintiff's injury. Presumably, under the express language of section 33.003, the jury would then be authorized to proceed to answer a question apportioning responsibility between the intoxicated patron and the provider. But to what ***639** effect? If we only required the provider to pay whatever percentage of the plaintiff's damages was apportioned to the provider, a provider whose conduct combined with that of the intoxicated patron to cause or contribute to cause the plaintiff's injuries would actually incur less liability than the provider whose conduct did not.

This bizarre result would be avoided by recognizing that the provider is responsible both for the percentage the jury apportioned to the provider, and the percentage the jury apportioned to the intoxicated patron, because this latter percentage would be imputed to the provider as a matter of law. Since this would be the necessary outcome, absolutely no purpose would be served by (1) requiring the jury to needlessly answer an immaterial causation question relating to the conduct of the provider, and (2) then needlessly make an immaterial apportionment of responsibility between the patron and the provider. Because the injuries caused by the intoxication are imputed by law to the provider (who had engaged in wrongful conduct), and whatever responsibility the jury assigns to the intoxicated person is imputed to the provider, the jury should not be asked to apportion responsibility between the intoxicated patron and the provider. [FN76]

This was the conclusion of the Corpus Christi Court of Appeals in F.F.P. Operating Partners, L.P. v. Duenez. [FN77] The court in Duenez rejected ***640** the convenience store's argument that the trial court had erred in refusing to require the jury to

apportion responsibility between the intoxicated driver and the provider, thereby depriving the provider of the opportunity to shift the lion's share of its liability to the intoxicated driver. [FN78] Relying on the Texas Supreme Court's decision in Borneman v. Steak & Ale of Texas, Inc., [FN79] the court concluded that under the terms of the Dram Shop Act, [FN80] the owner of the convenience store was vicariously liable for the conduct of the intoxicated driver. [FN81]

The court reasoned that the Dram Shop Act imposed liability on the owner of the convenience store without requiring the plaintiffs to demonstrate that the owner's conduct actually caused the injuries suffered by the plaintiffs. [FN82] Because the Dram Shop Act creates a form of vicarious liability, the court held that the vicariously responsible party (the owner of the convenience store) was not entitled to a reduction of liability based on the conduct of the principally responsible party (the intoxicated driver). As the court explained:

[I]n third-party actions under the Dram Shop Act in which there are no allegations of negligence on the part of the plaintiffs, a provider is vicariously liable for the damages caused by an intoxicated person, and such a provider is not entitled to offset its liability by that of the intoxicated person. . . . When a provider sells, serves, or provides an alcoholic beverage to an intoxicated person, that provider becomes liable for any harm caused by the intoxicated person, as a result of his intoxication, just as an employer is liable for the damages caused by an employee in the course and scope of the employment. [FN83]

This conclusion seems correct under a straightforward application of the language in the allocation of responsibility sections of Chapter 33 to an action based on the Dram Shop Act. Moreover, the conclusion seems to support the policy underlying the Dram Shop Act, which "is intended to deter providers of alcoholic beverages from serving alcoholic beverages to obviously intoxicated individuals who may potentially inflict serious injury ***641** on themselves and on innocent members of the general public." [FN84] The Iowa Supreme Court has explained that if liability were to be apportioned between the intoxicated patron and the provider, much of the deterrent effect would be lost:

The tavern's strategy [as a defendant in a dram shop case], of course, is to avoid as much fault as possible. So in its answer, it alleges comparative fault as a defense to plaintiff's dram shop allegations and joins the intoxicated tortfeasor as a third-party defendant.

At trial the plaintiff, of course, is limited as to what fault the plaintiff may establish against the tavern. The tavern, on the other hand, is not handicapped in this way. The facts show that the collision was due, in large part, to the intoxicated tortfeasor's negligence resulting from that person's impaired condition. The plaintiff's own negligence was also a cause. Consequently, the tavern easily convinces the jury to assign seventy percent of the fault to the intoxicated tortfeasor and ten percent to the plaintiff. The plaintiff is only able to convince the jury to assign the remaining twenty percent to the tavern.

The practical result is that the plaintiff is forced to financially assume eighty percent of the damages: ten percent due to the plaintiff's own fault and seventy percent due to the intoxicated tortfeasor's fault. In contrast, the tavern, which violated the provisions of section 123.92 [of the Dram Shop Act], pays only twenty percent of the damages and is insulated against the other eighty percent. . . .

The scenario we have just described is not an unlikely one. In a dram shop case, an intoxicated tortfeasor is usually involved in an underlying tort of some kind that is easily provable. Often, such a tortfeasor is insolvent. The jury might find it difficult to overcome the temptation to apportion most of the fault to the intoxicated tortfeasor, as the dram shop defendant would be urging. [FN85] ***642** Apportioning responsibility between the provider and the intoxicated person would thus undermine the policy behind creating liability under the Dram Shop Act in the first place. Moreover, given that causation is imputed to the provider in an action under the Act, section 33.003 neither contemplates or permits the apportionment of responsibility between the intoxicated patron and the provider in an action brought by an injured third party. [FN86]

D. Application of Section 33.003 to Claims Based on Derivative Liability

The more difficult question is whether liability should be apportioned under section 33.003 between the directly liable party and a person whose liability is derivative. Recall that derivative liability, as used here, refers to a person's liability for tortious conduct when that conduct is tortious precisely because it creates a foreseeable risk of tortious or criminal conduct by another. Negligent hiring, supervision, retention, security and entrustment are all examples of theories of derivative liability. Although the liability is not vicarious (because the derivatively liable person has engaged in tortious conduct), the liability is derivative because it depends upon a subsequent wrongful act or omission by another. [FN87] The question of whether responsibility should be apportioned between the directly liable party and the derivatively liable party is more difficult than cases involving vicarious liability because the result Texas courts have traditionally reached-that liability should not be apportioned-while certainly justified as a question of policy, is more difficult to reconcile with the express language of the

apportionment of responsibility provisions of Chapter 33. Moreover, the strength of the policy supporting the traditional approach in Texas is impacted by whether derivative liability is based on a foreseeable intentional tort, or instead on negligence.

1. Apportioning Responsibility When Derivative Liability is Based on the Intentional Tort of Another

Under the approach advocated by the Restatement (Third) of Torts, responsibility would not be apportioned between two tortfeasors in cases where one's derivative liability is based on a reasonably foreseeable intentional tort by the other. Section 14 provides that:

***643** A person who is liable to another based on a failure to protect the other from the specific risk of an intentional tort is jointly and severally liable for the share of comparative responsibility assigned to the intentional tortfeasor in addition to the share of comparative responsibility assigned to the person. [FN88]

The comments to Section 14 explain that when a person negligently fails to protect a person from the risk of an intentional tort, the greater culpability of the intentional tortfeasor may well lead the jury to assign the bulk of the responsibility for the harm to the intentional tortfeasor, who often will be insolvent. [FN89] Take, for example, the case of a pawnshop that negligently sells a Saturday Night Special to a violent youth, who then uses the Saturday Night Special to gun down a police officer in the line of duty. If the jury is asked to apportion responsibility between the pawnshop (which was negligent) and the youth (who was guilty of an intentional tort and a crime), the jury is likely to apportion the lion's share of the responsibility to the person who pulled the trigger. This would leave the pawnshop with little liability, thereby undermining the duty imposed on the pawnshop to exercise reasonable care in selling handguns. As the comment to Section 14 explains, "Yet when the risk of an intentional tort is the specific risk that required the negligent tortfeasor to protect the injured person, that result significantly diminishes the purpose for requiring a person to take precautions against this risk." [FN90] This would leave the injured police officer with little compensation for his injuries, especially given the fact that there would be no joint and several liability unless the pawnshop was found more than 50 percent responsible. Additionally, the fact that the triggerman is probably insolvent diminishes the likelihood of adequate compensation for the officer.

For these reasons, Dean Prosser once observed that "[o]bviously, the defendant cannot be relieved from liability by the fact that the risk . . . to which the defendant has subjected the plaintiff has indeed come to pass." [FN91] The apparent majority, and certainly the better rule, is in accord with that articulated by Dean Prosser and section 14 of the Restatement. In Medina v. Graham's Cowboys, Inc., for example, a bar patron sued the bar and a ***644** doorman employed by the bar for assault. [FN92] The court found the doorman liable for assault. [FN93] The court also found the bar derivatively liable for having negligently hired the doorman, but not vicariously liable under traditional respondeat superior principles because the doorman was not acting within the course and scope of employment. [FN94] Even though New Mexico had abolished joint and several liability, the court held the bar liable for the doorman's share of comparative responsibility:

In other words, if the special nature of the employer-employee relationship requires that a faultless employer pay for all damages caused by a negligent employee acting within the scope of employment, then it should also require an employer who has negligently hired an employee to pay for all damages arising from an intentional tort of the employee when the tort was a reasonably foreseeable result of the negligent hiring. [FN95] A number of other courts have likewise concluded that "[n]egligent tortfeasors should not be allowed to reduce their fault by the intentional fault of another that they had a duty to prevent." [FN96]

2. Apportioning Responsibility When Derivative Liability is Based on the Negligence of Another

A related question is whether derivatively liable tortfeasors should be permitted to reduce their responsibility based on the foreseeable negligence (as opposed to intentional wrongdoing) of the directly liable tortfeasor. Many Texas lawyers apparently assume that responsibility would be apportioned between, for example, the trucking company that negligently hires a trucker and the negligent trucker who runs over the plaintiff's vehicle. The committee that drafted the Texas Pattern Jury Charge on apportionment of responsibility assumed, though without citation to any ***645** authority, that the responsibility of a derivatively liable negligent entrustor would be apportioned with that of the directly liable negligent entrustee. [FN97]

The fact is, however, that those Texas courts which have considered the issue have found it inappropriate to apportion responsibility between the defendant whose liability is derivative and the directly liable negligent tortfeasor. [FN98] The El Paso Court of Appeals, for example, has held in a negligent entrustment derivative liability setting that if "the owner is negligent, his liability for the acts of the driver is established, and the degree of negligence of the owner would be of no consequence." [FN99] The court added that "the proximate cause of the accident or occurrence is the negligence of the driver and not that of the owner." [FN100] Another Texas court held that it was "not necessary to submit a special issue concerning the owner's negligence as being a proximate cause of the accident since the causal connection is shown between the negligence of the owner in lending the automobile and the injury to the third person [plaintiff]." [FN101] That court reasoned that negligent entrustment liability is derivative in nature. Since the responsibility of the entrustor is ultimately based on the foreseeable negligence of the entrustee, the responsibility of the entrustee is passed onto the derivatively liable entrustor. There is simply no need to include the entrustor in the apportionment question. At least that was the conclusion of those courts to consider the issue prior to the 1995 revisions to the apportionment of responsibility provisions of Chapter 33. [FN102]

This conclusion was far from unusual. One leading commentator observed that "for the great majority of cases, both the negligent original defendant and the negligent intervening actor are liable for the harm they have together inflicted under the rules for joint and several liability or comparative fault." [FN103] And while the Restatement (Third) of Torts ***646** declined to categorically extend the rule on non-apportionment that applies when the foreseeable wrongdoing is intentional to circumstances when that wrongdoing is only negligent, the Restatement notes that "the rule provided in this Section might logically apply even when a person negligently fails to protect another from risks created by a negligent tortfeasor." [FN104] The logic behind refusing to apportion responsibility between directly and derivatively liable persons is compelling. When the risk of tortious or criminal conduct is the very risk that made the derivatively liable party's conduct negligent in the first place, allowing the occurrence of that foreseeable conduct to reduce the responsibility of the derivatively liable party undermines the incentive for that party to take precautions against this risk.

More often than not, the real question is whether the plaintiff should bear the burden of a judgment-proof tortfeasor, or whether other tortfeasors should bear that burden. When the directly liable person has assets to satisfy a judgment, it makes little difference whether liability is apportioned between the directly liable person and the person whose liability is derivative. If liability is apportioned, the plaintiff can recover the appropriate percentage of the plaintiff's judgment from each. If liability is not apportioned with respect to the plaintiff's claim, the derivatively liable defendant could still recover in contribution from the directly liable defendant. [FN105] Thus, only when the directly liable person is unable to satisfy a judgment does the issue become important, because if responsibility is apportioned with respect to the plaintiff's claim, the plaintiff will bear the burden of whatever percentage of responsibility the jury assigns to the judgment-proof tortfeasor. [FN106] Placing this burden on the plaintiff, regardless of the plaintiff's lack of culpability, rather than a tortfeasor whose misconduct was a proximate cause of the plaintiff's ***647** injuries may be questionable policy in any case. However, placing the burden of the judgment proof tortfeasor on an innocent plaintiff is clearly bad policy when the conduct of the judgment-proof tortfeasor is the very risk that made the derivatively liable tortfeasor negligent in the first place. When a trucking company hires a drunk to drive its trucks, and the drunk proceeds to drive while intoxicated and kill the breadwinner of a family, it is simply unjust to require the surviving family members to bear to burden of the truck driver being judgment- proof, rather than the trucking company that negligently put him behind the wheel.

3. Impact of the 1995 Revisions on Apportionment in Cases of Derivative Liability

Whether the 1995 revisions to the apportionment of responsibility provisions of Chapter 33 changed the law in Texas to now require that responsibility be apportioned between directly and derivatively liable parties is unclear. The easy answer is yes. Nothing in the definition of responsible third party found in section 33.011(6) would exclude persons whose liability is derivative. [FN107] Additionally, because the derivatively liable party engaged in conduct that caused or contributed to cause the plaintiff's injuries, section 33.003 appears to authorize apportioning responsibility between the directly and derivatively liable parties. [FN108] Moreover, at least at a superficial level, the legislative history would appear to support apportioning responsibility, regardless of whether doing so unjustly places the burden of judgment-proof tortfeasors on the innocent plaintiff. As Senator Sibley expressed during hearings before the Senate Economic Development Committee: "In the past what we've had is people joined in court who had the deep pockets. And it may be somebody else just as much as [sic] fault,

and we're going to allow the defendant to bring them in. . . ." [FN109]

However, the easy answer is not always the right answer. It is absolutely clear that the legislature did not consider the precise question of whether liability should be apportioned between derivatively and directly liable parties when the 1995 revisions were enacted. During testimony regarding proposed revisions to the apportionment of responsibility provisions of Chapter 33, no one discussed apportionment in cases of ***648** derivative liability. [FN110] Also, nothing in the language of the revised apportionment of responsibility provisions expressly addresses whether liability will now be apportioned in cases of derivative liability. [FN111] Before construing the revised provisions in Chapter 33 to overturn established law-law that is supported by compelling policy justifications-it would not be unreasonable to insist on more direct indications that this is what the legislature intended to accomplish.

The one reported decision addressing this issue since the 1995 amendments reached precisely this conclusion.Rosell v. Central West Motor Stages, Inc. was a case involving derivative liability of an employer who negligently entrusted a truck to an employee. [FN112] The Dallas Court of Appeals in Rosell considered how to submit jury questions on liability and apportionment of fault in a case against a bus driver and his employer where the plaintiffs alleged that the bus company was negligent in hiring, supervising, and entrusting the bus to an incompetent driver, whose subsequent negligence caused the death of plaintiffs' decedent. [FN113]

The trial court refused to include the bus company in the broad form negligence question that encompassed the other allegedly negligent parties, as well as the apportionment of fault question. [FN114] Instead, it used one series of questions to establish the liability of those who contributed to cause the injury-causing event and then to apportion causation among them. The court then used a separate broad form negligence question to determine whether the bus company could in fact be held liable for the negligence of ***649** its driver based on the plaintiffs' theories of negligent hiring, negligent retention, and negligent entrustment. [FN115] The jury found the bus company derivatively liable for the driver's negligence under theories of negligent hiring and negligent entrustment. [FN116] This finding would render the employer liable for one hundred percent of the damages for which the employee was found responsible. The jury, however, apportioned seventy percent of the fault to the decedent for the events leading to his death which barred him from recovering under the fifty-one percent bar rule of Chapter 33. As a result, even though the jury found $809,312.96 in actual damages and $1,250,000.00 in punitive damages, the trial court signed a take-nothing judgment. [FN117]

On appeal, the Dallas Court of Appeals rejected the plaintiff's argument that the trial court should have included the bus company in the apportionment of responsibility question. According to the plaintiffs, the charge as submitted prevented any percentage of fault for the event itself from being apportioned to the bus company for its negligent conduct, and thus deprived the jury of the opportunity to off load fault from the plaintiffs and other parties which might have prevented the plaintiffs' fault from exceeding fifty percent. [FN118] In rejecting this argument, the Dallas Court of Appeals reasoned that:
Although negligent entrustment and negligent hiring are considered independent acts of negligence, these causes are not actionable unless a third party commits a tort. In that respect, these causes are similar to the respondeat superior theory of recovery where, unless the employee commits a tort in the scope of employment, the employer has no responsibility. In reviewing the application of section 33.003 to responsibility, we observe that, while the statute on its face requires all defendants to be included in the apportionment question, it would not be proper for an employer to be included along with the driver if its only responsibility was that of respondeat superior. Section 33.003 has not been used to require both a driver and ***650** employer to be submitted in the apportionment question in that situation. [FN119]

Thus, given the absence of a clearer indication of legislative intent to change established law to require apportionment in cases of derivative liability, the court concluded that the traditional rule of non-apportionment continues to be the law in Texas. [FN120] Texas courts have consistently read the language of Chapter 33 requiring the apportionment of responsibility with respect to "causing or contributing to cause in any way harm for which recovery of damages is sought" to refer to those whose conduct or product was a legal cause of the injury or injury-causing event of which plaintiff complains, and not to a defendant whose liability is purely vicarious or derivative. [FN121] A reading which would require submission of the vicariously or derivatively liable defendant is not only not compelled by the language of the statute, but also finds no support in the legislative history behind the language, nor in the policies sought to be advanced thereby.

IV. Conclusion

Texas has firmly established authority providing for the submission of a derivatively or vicariously liable defendant separately from those parties directly involved in the occurrence which resulted in plaintiff's injury. This is a principle which should not change when the defendant's liability is derivative as opposed to vicarious, nor is it any less applicable where the conduct of the third person directly responsible for the injury is negligent rather than intentional. The logic of the argument belongs neither to the plaintiff's nor the defense bar. While it was urged by the plaintiffs in Duenez, [FN122] it was the defendant that asserted it in Rosell. [FN123] The existing practice should not be changed without an unmistakable signal from the legislature. To paraphrase Dean Prosser, it simply cannot be the law that a defendant can be relieved of the consequences of his wrongful conduct by the occurrence of the very risk which made his conduct negligent in the first instance.

[FNa1]. The Leon Jaworski Professor of Practice and Procedure, Baylor University School of Law. The authors would like to acknowledge the valuable research assistance they received from Amy Pattillo, who is presently completing her third year at Baylor University School of Law.

[FNaa1]. 1974 Graduate of the University of Oklahoma Law School, a member of Order of the Coif, a Fellow of the Texas and American Bar Foundations and holds the William J. Boswell Chair of Law at Baylor University School of Law where he has taught since 1977.

[FN1]. See Tex. Civ. Prac. & Rem. Code Ann. §§ 33.003, 33.004, 33.011 (Vernon 1997).

[FN2]. St. Anthony's Hosp. v. Whitfield, 946 S.W.2d 174, 177 (Tex. App.-- Amarillo 1997, writ denied) ("Vicarious liability is liability placed upon one for the conduct of another, based solely upon the relationship between the two." (citing Black's Law Dictionary 1566 (6th ed. 1990))).

[FN3]. GTE Southwest, Inc. v. Bruce, 998 S.W.2d 605, 617 (Tex. 1999) ("Generally, a master is vicariously liable for the torts of its servants committed in the course and scope of their employment.") (citing Medina v. Herrera, 927 S.W.2d 597, 601 (Tex. 1996); Restatement (Second) of Agency § 219(1) (1958)); Southwest Dairy Prods. Co. v. De Frates, 132 Tex. 556, 125 S.W.2d 282, 283 (1939) (
It is the firmly settled rule that when a servant completely departs from his work to accomplish some purpose of his own not connected with his employment, the relation of master and servant is thereby temporarily suspended and the master is not liable for his acts during the period of such suspension.
)).

[FN4]. Tex. Rev. Civ. Stat. Ann. art. 6132b-3.04 (Vernon 2001).

[FN5]. See Tex. Fam. Code Ann. § 41.001(2) (Vernon Supp. 2002) ("A parent or other person who has the duty of control and reasonable discipline of a child is liable for any property damage proximately caused by...the willful [sic] and malicious conduct of a child who is at least 10 years of age but under 18 years of age."). This section "imposes liability without fault and without the necessity for a parent-child relationship." Carl David Adams, Note, Has the Family Code Made Any Changes in the Liability of a Parent for His Child's Conduct?, 26 Baylor L. Rev. 687, 691 (1974). It requires only "that the person to be held liable have a duty of control and reasonable discipline over the child." Id.

[FN6]. Read v. Scott Fetzer Co., 990 S.W.2d 732, 735 (Tex. 1998) (stating that a negligent hiring claim "is not based on a notion of vicarious liability, but upon the premise that [employer] is responsible for its own actions."); Wrenn v. G.A.T.X. Logistics, Inc., 73 S.W.3d 489, 496 (Tex. App.--Fort Worth 2002, pet. filed) ("The cause of action [for negligent hiring, supervision, or retention] is based on an employer's direct negligence instead of the employer's vicarious liability for the torts of its employees.").

[FN7]. Rodgers v. McFarland, 402 S.W.2d 208, 210 (Tex. Civ. App.--El Paso 1966, writ ref'd n.r.e.); see also Loom Craft Carpet Mills, Inc. v. Gorrell, 823 S.W.2d 431, 432 (Tex. App.--Texarkana 1992, no writ) ("Negligent entrustment liability is derivative in nature."); Estate of Arrington v. Fields, 578 S.W.2d 173, 178 (Tex. Civ. App.--Tyler 1979, writ ref'd n.r.e.) ("[T]he doctrine of negligent hiring is merely a means of imputing liability for the acts of the servant to the master.").

[FN8]. Texas courts sometimes use the terms "vicarious" and "derivative" liability interchangeably. Compare Marange v.

Marshall, 402 S.W.2d 236, 239 (Tex. Civ. App.--Corpus Christi 1966, writ ref'd n.r.e.) (referring to pure vicarious liability as derivative liability), with Loom Craft Carpet Mills, Inc., 823 S.W.2d at 432 (referring to liability based on negligently creating a risk of harm caused by another as derivative liability). While the labels attached to the concepts matters little, for conceptual clarity we will use the term "vicarious" liability to refer to the situation where one is being held responsible for the wrongful acts of another based on the relationship between the two.

[FN9]. See Rosell v. Cent. W. Motor Stages, Inc., 89 S.W.3d 643, 655 (Tex. App.--Dallas 2002, pet. filed).

[FN10]. Loom Craft Carpet Mills, Inc., 823 S.W.2d at 432.

[FN11]. Of course, depending on the particular circumstances of the case, the criminal activity of the youth in shooting the police officer could be viewed as an unforeseeable and thus superseding cause which entirely breaks the chain of causation. See Holder v. Bowman, No. 07-00-0126-CV (Tex. App.-- Amarillo Jan. 25, 2001, pet. denied) (not designated for publication), 2001 Tex. App. LEXIS 540, *9;Chapman v. Oshman's Sporting Goods, Inc., 792 S.W.2d 785, 787 (Tex. App.--Houston [14th Dist.] 1990, writ denied).

[FN12]. McCane-Sondock Prot. Sys., Inc. v. Emmittee, 540 S.W.2d 764, 765 (Tex. Civ. App.--Eastland 1976, no writ) (finding that negligence in installing an alarm system was a proximate cause of damages resulting from robbery).

[FN13]. See Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 549 (Tex. 1985).

[FN14]. Tex. Alco. Bev. Code Ann. §§ 2.01-2.03 (Vernon 1995);see also Borneman v. Steak & Ale of Tex., Inc., 22 S.W.3d 411, 412 (Tex. 2000).

[FN15]. Tex. Alco. Bev. Code Ann. § 2.02(b)(1) (Vernon 1995).

[FN16]. Id. § 2.02(b)(2).

[FN17]. See Borneman, 22 S.W.3d at 412-13.

[FN18]. Tex. Fam. Code Ann. § 41.001(1) (Vernon Supp. 2002); see also David F. Johnson, Paying for the Sins of Another-Parental Liability in Texas for the Torts of Children, 8 Tex. Wesleyan L. Rev. 359, 360 (2002).

[FN19]. This imputation of proximate cause occurs as long as "the negligent conduct of the child" is reasonably attributable to the negligent failure of the parent to control the child. Id.

[FN20]. Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, §§ 2.06, 2.07, 1987 Tex. Gen. Laws 41 (amended 1995) (current version at Tex. Civ. Prac. & Rem. Code Ann. §§ 33.003, 33.011 (Vernon 1997)).

[FN21]. Wyndham Hotel Co. v. Self, 893 S.W.2d 630, 640 (Tex. App.--Corpus Christi 1994, writ denied); Loom Craft Carpet Mills, Inc. v. Gorrell, 823 S.W.2d 431, 432 (Tex. App.--Texarkana 1992, no writ).

[FN22]. Tex. Civ. Prac. & Rem. Code Ann. § 33.004 (Vernon 1997).

[FN23]. When a plaintiff's own contributorily culpable conduct is expected to be high, a defendant might choose not to join responsible third parties because of the possibility that any responsibility attributed to the responsible third party might not only reduce the defendant's percentage, but might also reduce the plaintiff's responsibility below the 51 percent bar. See id.

[FN24]. The automaker's liability is not derivative of that of the drunk driver because liability for defectively manufacturing a product is not dependent upon the subsequent wrongful conduct of another.

[FN25]. Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.06, 1987 Tex. Gen. Laws (amended 1995).

[FN26]. Tex. Civ. Prac. & Rem. Code Ann. §§ 33.003, 33.004, 33.011 (Vernon 1997).

[FN27]. See infra text accompanying notes 36-37.

[FN28]. Rosell v. Cent. W. Motor Stages, Inc., 89 S.W.3d 643, 656-57 (Tex. App.--Dallas 2002, pet. filed);F.F.P. Operating Partners, L.P. v. Duenez, 69 S.W.3d 800, 809 (Tex. App.--Corpus Christi 2002, pet. granted).

[FN29]. Rosell, 89 S.W.3d at 656-57;F.F.P. Operating Partners, L.P., 69 S.W.3d at 809;see also Tex Civ. Prac. & Rem. Code Ann. § 33.004 (Vernon 1997).

[FN30]. See F.F.P. Operating Partners, L.P., 69 S.W.3d at 809.

[FN31]. Of course, this would not always be the result, especially if the jury realizes that the result of allocating most of the responsibility to the person who committed the criminal act would be to leave the injured person uncompensated. See Hutcherson v. City of Phoenix, 961 P.2d 449, 455 (Ariz. 1998) (affirming judgment in which jury assigned twenty-five percent responsibility to murderer and seventy-five percent responsibility to City of Phoenix for negligence of 911 operator in handling emergency call prior to murders); Scott v. County of Los Angeles, 32 Cal. Rptr. 2d 643, 649 (Cal. Ct. App. 1994) (stating that jury assigned one percent comparative responsibility to grandmother who held seven-year old's legs in a tub of scalding water that resulted in burns so severe that child's bones were injured, seventy-five percent to County of Los Angeles, and twenty-four percent responsibility to social worker who failed to protect child despite earlier warnings that grandmother was abusive); Pamela B. v. Hayden, 31 Cal. Rptr. 2d 147, 159-60 (Cal. Ct. App. 1994) (recognizing jury assigned ninety-five percent comparative responsibility to apartment owner and manager for inadequate security and four percent responsibility to defendants who raped and violently assaulted plaintiff; court overturned jury allocation based on lack of substantial evidence).

[FN32]. See F.F.P. Operating Partners, L.P., 69 S.W.3d at 809; Rosell v. Cent. W. Motor Stages, Inc., 89 S.W.3d 643, 656 (Tex. App.--Dallas 2002, pet. filed); Wyndham Hotel Co. v. Self, 893 S.W.2d 630, 640 (Tex. App.-- Corpus Christi 1994, writ denied); Loom Craft Carpet Mills, Inc. v. Gorrell, 823 S.W.2d 431, 432 (Tex. App.--Texarkana 1992, no writ).

[FN33]. See infra text accompanying notes 36-37.

[FN34]. Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.06, 1987 Tex. Gen. Laws 41 (amended 1995).

[FN35]. Id. § 2.07.

[FN36]. Tex. S.B. 287, 70th Leg., R.S. (1987), page 12, lines 25-27 and page 13, lines 1-7 (introduced version).

[FN37]. Sen. Comm. on Econ. Dev., Bill Analysis, Tex. S.B. 287, 70th Leg., R.S. (1987), §2.05 (emphasis added).

[FN38]. Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.06, 1987 Tex. Gen. Laws 38, 41 (amended 1995).

[FN39]. Id. § 2.07

[FN40]. Id.

[FN41]. Id. § 2.11A, 44.

[FN42]. Act of June 3, 70th Leg., 1st C.S., ch. 2, § 2.07, 1987 Tex. Gen. Laws 37, 41 (amended 1995) (emphasis added).

[FN43]. St. Anthony's Hosp. v. Whitfield, 946 S.W.2d 174, 177 (Tex. App.--Amarillo 1997, writ denied) ("Vicarious liability is liability placed upon one for the conduct of another, based solely upon the relationship between the two." (citing Black's Law Dictionary 1566 (6th ed. 1990))).

[FN44]. See Wyndham Hotel Co. v. Self, 893 S.W.2d 630, 640 (Tex. App.-- Corpus Christi 1994, writ denied); Loom Craft Carpet Mills, Inc. v. Gorrell, 823 S.W.2d 431, 432 (Tex. App.--Texarkana 1992, no writ).

[FN45]. Loom Craft Carpet Mills, Inc., 823 S.W.2d at 432.

[FN46]. Id. (citation omitted).

[FN47]. 893 S.W.2d 630, 640 (Tex. App.--Corpus Christi 1994, writ denied).

[FN48]. Teel Bivins et al., The 1995 Revisions to the DTPA: Altering the Landscape, 27 Tex. Tech L. Rev. 1441, 1442 (1996).

[FN49]. Tex. Civ. Prac. & Rem. Code Ann. § 33.004 (Vernon 1997).

[FN50]. Id. § 33.011(6)(A). Section 33.011(6)(B) excluded from this definition (1) a claimant's employer if the employer maintained workers' compensation insurance, and (2) debtors in bankruptcy proceedings. Id.

[FN51]. Tex. R. Civ. P. 278.

[FN52]. Tex. Civ. Prac. & Rem. Code Ann. § 33.003 (Vernon 1997).

[FN53]. The prudent defendant will want to name other tortfeasors as responsible third parties under Section 33.004, regardless of whether the plaintiff has named them as defendants.This is especially true in a case where one or more of the other potential tortfeasors is judgment-proof. If the defendant fails to do so, the defendant risks the plaintiff electing to nonsuit the judgment-proof tortfeasor prior to the plaintiff resting at trial.If the plaintiff were to do so, and the defendant had not named the nonsuited tortfeasor as a responsible third party, that tortfeasor would no longer qualify as a defendant under section 33.003.This is because section 33.011 defines defendant as: "any party from whom a claimant seeks recovery of damages pursuant to the provisions of Section 33.001 at the time of submission of the case to the trier of fact." Id. § 33.011(2) (emphasis added). It would also be too late in most cases for the defendant to amend its pleading to join the non-suited tortfeasor as a responsible third party.Section 33.004 provides a relatively brief window of opportunity for defendants to join responsible third parties in cases where the statute of limitations has run with respect to the plaintiff's claim against the person proposed to be joined. Id. § 33.004(d).

[FN54]. Id. § 33.013.

[FN55]. 3 Scott A. Sherman, Texas Tort Reform: The Legislative History- Joint & Several Liability II-37 (1995).

[FN56]. Id. at II-55.

[FN57]. Tex. Civ. Prac. & Rem. Code Ann. § 33.003 (Vernon 1997).

[FN58]. St. Anthony's Hosp. v. Whitfield, 946 S.W.2d 174, 177 (Tex. App.--Amarillo 1997, writ denied). Vicarious liability is liability placed upon one for the conduct of another, based solely upon the relationship between the two.Id.(citing Black's Law Dictionary 1566 (6th ed. 1990)).

[FN59]. Comm. on Pattern Jury Charges, State Bar of Tex., Texas Pattern Jury Charges PJC 4.1 (2000).

[FN60]. Id. 7.6.

[FN61]. Restatement (Third) of Torts: Apportionment of Liability § 13 (1999).

[FN62]. Id.

[FN63]. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 52, at 346 (5th ed. 1984).

[FN64]. See, e.g., Caterpillar Inc. v. Great Am. Ins. Co., 864 F. Supp. 849, 857 (C.D. Ill. 1994); Nodaway Valley Bank v. Cont'l Cas. Co., 715 F. Supp. 1458, 1466 (W.D. Mo. 1989) ("It seems clear that merely derivative corporate liability should

not cause an apportionment between the primary wrongdoer and a vicarious wrongdoer, where both are joined in litigation."); Am. Nat'l Bank & Trust Co. v. Columbus-Cuneo-Cabrini Med. Ctr., 609 N.E.2d 285, 289 (Ill. 1992); Sieben v. Sieben, 646 P.2d 1036, 1041 (Kan. 1982) (no separate apportionment of damages in case between tortfeasor and vicariously liable party); Glidewell by Nabors v. S.C. Mgmt., Inc., 923 S.W.2d 940, 946 (Mo. App. 1996) ("Contrary to Hospital's contentions, when a claim is based upon vicarious liability, there is no basis for apportionment of fault between the principal and agent.").

[FN65]. See North Am. Van Lines, Inc. v. Emmons, 50 S.W.3d 103, 122 (Tex. App.--Beaumont 2001, pet. denied) (employer vicariously liable for employee's share of responsibility as found by the jury).

[FN66]. Tex. Alco. Bev. Code Ann. § 2.02(b)(1) (Vernon 1995).

[FN67]. Smith v. Merritt, 940 S.W.2d 602, 607 (Tex. 1997)(recognizing that culpability required in an action under the Dram Shop Act is greater than that required to establish common law negligence).

[FN68]. See Borneman v. Steak & Ale of Texas, Inc., 22 S.W.3d 411, 413 (Tex. 2000);see also Southland Corp. v. Lewis, 940 S.W.2d 83, 85 (Tex. 1997).

[FN69]. Tex. Alco. Bev. Code Ann. § 2.02(b)(2) (Vernon 1995).

[FN70]. Id. § 2.02.Liability can be based entirely on the sale of an alcoholic beverage to an obviously intoxicated person, regardless of whether the patron actually consumes the beverage purchased.

[FN71]. See Kavorkian v. Tommy's Elbow Room, Inc., 711 P.2d 521, 523-24 (Alaska 1985) (citing Nolan v. Morelli, 226 A.2d 383, 386 (Conn. 1967)).

[FN72]. Publix Supermarkets, Inc. v. Austin, 658 So. 2d 1064, 1068 (Fla. App. 1995). The Florida Dram Shop Act is like the Texas Act in one material respect. Like the Texas Act, causation in an action under the Florida Act is based on "the intoxication" rather than the provision of an alcoholic beverage. Id. at 1065 n.1.

[FN73]. Tex. Alco. Bev. Code Ann. § 2.03 (Vernon 1995).

[FN74]. Tex. Civ. Prac. & Rem. Code Ann. § 33.003 (Vernon 1997) (emphasis added).

[FN75]. See Tex. Alco. Bev. Code Ann. § 2.02 (Vernon 1995).

[FN76]. There would be one possible exception to this conclusion.That would be in the unusual case where the plaintiff's injuries were allegedly caused by both (1) the intoxication of the patron, and (2) some other negligent act or omission by the patron.In such a case, if both contributed to cause the plaintiff's injuries, theoretically the jury should be asked to apportion responsibility between these two causes since only the responsibility attributed to the intoxication of the patron would be imputed to the provider.
Perhaps this is what the Texas Supreme Court had in mind in Smith v. Sewell.858 S.W.2d 350 (Tex. 1993). In Sewell, the court held that in a circumstance where the intoxicated patron is the plaintiff and patron's own misconduct is a proximate cause of the plaintiff's injuries, the court should require the jury to apportion responsibility between the plaintiff and the provider. Id. at 356. That conclusion is not correct for two reasons. First, there would be no basis for asking the jury to apportion between the plaintiff and the provider because there would be no finding that the provider's conduct was a cause of the plaintiff's injuries. Second, if the only negligence of the patron related to the intoxication, then whatever injury was caused by the intoxication would be imputed to the provider. The court was writing in dicta, and never worked through the implications of that dicta. See id. Only if the provider alleged that the plaintiff (intoxicated patron) was negligent in some other respect, then perhaps the jury could be asked to apportion responsibility between the two causes. Of course, this also creates a problem, because section 33.003 contemplates apportionment between persons, not between causes. Tex. Civ. Prac & Rem. Code Ann. § 33.003 (Vernon 1997).

[FN77]. 69 S.W.3d 800, 805 (Tex. App.--Corpus Christi 2002, pet. granted).

[FN78]. Id. at 804-06.

[FN79]. 22 S.W.3d 411 (Tex. 2000).

[FN80]. Tex. Alco. Bev. Code Ann. § 2.03 (Vernon 1995).

[FN81]. F.F.P. Operating Partners, L.P., 69 S.W.3d at 805.

[FN82]. Id. at 806.

[FN83]. Id. at 805-06.

[FN84]. Smith v. Sewell, 858 S.W.2d 350, 356 (Tex. 1993).

[FN85]. Slager v. HWA Corp., 435 N.W.2d 349, 357 (Iowa 1989).

[FN86]. Tex. Civ. Prac. & Rem. Code Ann. § 33.003 (Vernon 1997).

[FN87]. See supra text accompanying notes 53-56.

[FN88]. Restatement (Third) of Torts: Apportionment of Liabilty § 14 (2000).

[FN89]. Id. at cmt. b.

[FN90]. Id.

[FN91]. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 44, at 303 (5th ed. 1984).

[FN92]. 827 P.2d 859, 860 (N.M. Ct. App. 1992).

[FN93]. Id. at 860-61.

[FN94]. Id. at 860.

[FN95]. Id. at 864.

[FN96]. Kansas State Bank & Trust Co. v. Specialized Transp. Servs., Inc., 819 P.2d 587, 590, 606 (Kan. 1991); see also Wal-Mart Stores, Inc. v. McDonald, 676 So. 2d 12, 21 (Fla. Dist. Ct. App. 1996); Veazey v. Elmwood Plantation Assocs., Ltd., 650 So. 2d 712, 719 (La. 1994); McLean v. Kirby Co., 490 N.W.2d 229, 244 (N.D. 1992).But see Reichert v. Atler, 875 P.2d 384, 391 (N.M. Ct. App. 1992).Additional cases are collected in the Reporter's Notes to Section 14 of the Restatement (Third) of Torts.Restatement (Third) of Torts: Apportionment of Liability § 14 reporter's notes (2000).

[FN97]. Comm. on Pattern Jury Charges, State Bar of Tex., Texas Pattern Jury Charges PJC 4.3 cmt., at 44 (2000).

[FN98]. See Rosell v. Cent. W. Motor Stages, Inc., 89 S.W.3d 643, 656-57 (Tex. App.--Dallas 2002, pet. filed); Wyndham Hotel Co. v. Self, 893 S.W.2d 630, 640 (Tex. App.--Corpus Christi 1994, writ denied); Loom Craft Carpet Mills, Inc. v. Gorrell, 823 S.W.2d 431, 432 (Tex. App.--Texarkana 1992, no writ).

[FN99]. Rodgers v. McFarland, 402 S.W.2d 208, 210 (Tex. Civ. App.--El Paso 1966, writ ref'd n.r.e.).

[FN100]. Id.

[FN101]. Broesche v. Bullock, 427 S.W.2d 89, 94 (Tex. Civ. App.--Houston [14th Dist.] 1968, writ ref'd n.r.e.).

[FN102]. Wyndham Hotel Co., 893 S.W.2d at 640; Loom Craft Carpet Mills, Inc., 823 S.W.2d at 432.

[FN103]. Dan B. Dobbs, The Law of Torts § 192, at 476 (2000).

[FN104]. Restatement (Third) of Torts: Apportionment of Liability § 14 cmt. b (2000). The comment cautions, however, the breadth of circumstances in which a person might be found negligent for failing to act based on the risk created by the foreseeable negligence of a third person is so great that a categorical extension of the rule stated in this Section could undermine the policies embodied in a jurisdiction's decision to abrogate joint and several liability.Id.In Texas, it would seem, however, that a failure to extend the principle to foreseeable negligent conduct would upset established authority.

[FN105]. Even if responsibility is not apportioned with respect to the plaintiff's claim, section 33.016 of the Texas Civil Practice and Remedies Code authorizes a defendant to have the jury apportion responsibility as between the defendant and a contribution defendant for purposes of the contribution claim. Tex. Civ. Prac. & Rem. Code Ann. § 33.016 (Vernon 1997).

[FN106]. The only exception would be if the jury assigned more than 50 percent responsibility to the derivatively responsible party, who thereby became jointly and severally liable. See id. § 33.013.

[FN107]. Id. § 33.011(6).

[FN108]. Id. § 33.003.

[FN109]. 3 Scott A. Sherman, Texas Tort Reform: The Legislative History- Joint & Several Liability, at II-55 (1995).

[FN110]. See id.

[FN111]. In 1995, Section 33.003 was amended by adding language requiring the inclusion of any responsible third parties in the plaintiff's jury apportionment question as well as the following language:
[S]tated in whole numbers, for the following persons with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these ....
Tex. Civ. Prac. & Rem. Code Ann. § 33.003 (Vernon 1997).
While the new language might seem at first blush to evidence a legislative intent to expand the scope of the conduct to be included in the apportionment question, a closer look reveals that it is simply an incorporation of some preexisting language from section 33.011 with the addition of a single new requirement-that percentages be set in whole numbers.

[FN112]. 89 S.W.3d 643, 649 (Tex. App.--Dallas 2002, pet. filed).

[FN113]. Id.

[FN114]. Id. at 652-54.

[FN115]. Id. at 655-56.

[FN116]. Id. at 649.

[FN117]. Id.

[FN118]. Id. at 656-57.

[FN119]. Id. (citation omitted).

[FN120]. Id.

[FN121]. Tex. Civ. Prac. & Rem. Code Ann. § 33.003 (Vernon 1997).

[FN122]. F.F.P. Operating Partners, L.P. v. Duenez, 69 S.W.3d 800, 805 (Tex. App.--Corpus Christi 2002, pet. granted).

[FN123]. Rosell, 89 S.W.3d at 656.

END OF DOCUMENT