

ARTICLES

Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform

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I. INTRODUCTION

In 1986, the Washington Legislature adopted a broad reform of the principles governing tort liability law. The Tort Reform Act of 1986¹ was the most far-reaching legislative revision of tort law in Washington state history, and perhaps in the nation.² The legislation established dramatic changes in the rules governing civil actions for tort recovery, ranging from such basic concepts of liability law as the doctrine of joint and

1. Tort Reform Act of 1986, ch. 305, §§ 100-912, 1986 Wash. Laws 1354-67 (codified in scattered sections of WASH. REV. CODE (1991)).

2. See Cornelius J. Peck, *Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability*, 62 WASH. L. REV. 233, 233 (1987) (stating that the forces of tort reform in Washington "probably accomplished more of their program than in any other state") [hereinafter Peck, *Washington's Partial Rejection*].

several liability among tortfeasors³ and the maximum amount of damages recoverable,⁴ to matters concerning the waiver of the physician-patient privilege in personal injury cases⁵ and limited immunity for directors and officers of certain charitable organizations.⁶ In sum, the compendium of modern tort law principles adopted in the 1986 Act "cast a heavy shadow on the common law"⁷ of liability in Washington.

The Tort Reform Act was enacted by overwhelming majorities of both houses of the state legislature,⁸ and the tort reform movement has received strong support from the public.⁹ However, within the legal community, reform of the rules governing civil liability has remained sharply controversial. Following the enactment of the legislation, the field of battle over tort reform has shifted from the political to the legal, from the legislature to the courts. In 1989, the Washington Supreme Court struck down a provision in the Act¹⁰ that placed a ceiling on the amount of non-economic damages that could be awarded.¹¹ A divided court declared the cap on damages to be an improper infringement upon the jury's role of determining an appropriate award of damages. The court therefore invalidated the provision as a violation of the state constitutional right to a jury trial.¹² Many other significant reforms in the legislation have also been the subject of consti-

3. Tort Reform Act of 1986, ch. 305, § 401, 1986 Wash. Laws 1357-58 (codified at WASH. REV. CODE § 4.22.070 (1991)).

4. *Id.* § 301, 1986 Wash. Laws 1357 (codified at WASH. REV. CODE § 4.56.250 (1991)). This provision was invalidated as unconstitutional by the Washington Supreme Court. *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 771 P.2d 711, *modified*, 780 P.2d 260 (1989).

5. Tort Reform Act of 1986, ch. 305, § 101, 1986 Wash. Laws 1355-56 (codified at WASH. REV. CODE § 5.60.060(4) (1991)).

6. *Id.* § 903, 1986 Wash. Laws 1365 (codified at WASH. REV. CODE § 4.24.264 (1991)).

7. See Roger J. Traynor, *Statutes Revolving in Common-law Orbits*, 17 CATH. U. L. REV. 401, 402 (1968) (a statute "may cast a heavy shadow on the common law or a light one").

8. See H. Journal, 49th Reg. Sess. & Spec. Sess. 1068-69 (1986) (adoption of Tort Reform Act by vote of 65-32); S. Journal, 49th Reg. Sess. & 1st Spec. Sess. 498 (1986) (final passage by vote of 31-16).

9. For example, a poll taken in 1987 revealed that 70 percent of the national population supported elimination of joint and several liability among defendants to tort actions. Karyn T. Hicks, *The Case for Reform: An Economic Analysis of Joint and Several Liability After Comparative Negligence*, 17 CAP. U. L. REV. 187, 197 (1988) (citing Harris poll).

10. WASH. REV. CODE § 4.56.250 (1991).

11. *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 771 P.2d 711, *modified*, 780 P.2d 260 (1989).

12. WASH. CONST., art. I, § 21.

tutional dispute, first in the law review literature¹³ and increasingly in the courts.¹⁴

The centerpiece of the Tort Reform Act of 1986, and the provision with the greatest effect upon liability law, is Revised Code of Washington (RCW) 4.22.070.¹⁵ In this single section of the Act, the Washington Legislature established a new foundation for tort liability—one of individual responsibility in direct proportion to individual fault. RCW 4.22.070 significantly modifies the application of joint and several liability against joint tortfeasors, particularly (but not only) in circumstances where the plaintiff is also at fault. Not surprisingly, opponents of the path taken by the Washington State Legislature have focused their greatest energies against this provision. The region's law reviews, as well as other legal periodicals, have published numerous articles discussing the provision, its merits, its weaknesses, and its validity.¹⁶ The various and sundry constitutional objections raised—and the strength of those objections—to the modification of joint and several liability have been addressed elsewhere.¹⁷

Opponents of the legislative changes to joint and several liability have recently opened a new front in the war on tort reform, emphasizing their struggle against the modification of joint and several liability. In addition to the frontal constitu-

13. Bryan P. Harnetiaux, *RCW 4.22.070, Joint and Several Liability, and the Indivisibility of Harm*, 27 GONZ. L. REV. 193 (1991/92); Cornelius J. Peck, *Constitutional Challenges to the Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability Made by the 1986 Washington Tort Reform Act*, 62 WASH. L. REV. 681 (1986/1987) [hereinafter Peck, *Constitutional Challenges*]; Charles K. Wiggins et al., *Washington's 1986 Tort Legislation and the State Constitution: Testing the Limits*, 22 GONZ. L. REV. 193 (1987). *But see* Gregory C. Sisk, *The Constitutional Validity of the Modification of Joint and Several Liability in the Washington Tort Reform Act of 1986*, 13 U. PUGET SOUND L. REV. 433 (1990) (concluding that the statutory modification of joint and several liability passes constitutional muster); Thomas J. McLaughlin & Bradley L. Fisher, *Apportioning the "Indivisible": Comparative Liability*, 27 GONZ. L. REV. 207 (1991/92) (same); John J. McFadden, Comment, *Development in the Law, The 1986 Washington Tort Reform Act: Elimination of Joint and Several Liability (RCW 4.22.070)*, 23 WILLAMETTE L. REV. 211, 235 (1987) (same).

14. As of the date of this writing, the Washington appellate courts have not yet addressed the constitutionality of other provisions in the Tort Reform Act of 1986. I am aware of at least one superior court decision upholding the constitutionality of RCW 4.22.070, the provision modifying joint and several liability. *Werner v. R & H Construction, Inc.*, No. 88-2-06577-8 (Pierce County Super. Ct. June 29, 1990).

15. WASH. REV. CODE § 4.22.070 (1991).

16. *See, e.g.*, Peck, *Washington's Partial Rejection*, *supra* note 2; Wiggins et al., *supra* note 13.

17. *See* authors cited *supra* note 13.

tional challenge to the validity of RCW 4.22.070, the opponents of tort reform in the plaintiff's bar initiated a flanking maneuver to destroy the statute through suggested interpretive models that would drain the provision of its reforming energy.¹⁸ Although commentators from all points of view were originally in general agreement on the meaning of the statute's basic provisions,¹⁹ creative tort law advocates have now begun formulating alternative theories of statutory interpretation designed to dismantle the reforms. From this new deconstructionist perspective, RCW 4.22.070 is portrayed as either a modest and insignificant provision with limited application, or as a hopelessly ambiguous statute that should be narrowly construed to preserve the basic concepts of full joint and several liability in Washington. In addition to the statutory "disinterpretation" strategy, members of the plaintiffs' bar within the state bar association have campaigned for changes in the court rules of civil procedure. Specifically, those changes seek to impose upon defendants an early burden of raising by pleading the issue of fault allocation among all potentially responsible tortfeasors.

This Article is offered in defense of RCW 4.22.070 and in opposition to the deconstruction of legislative tort reform. My premise is that the legislature did indeed intend to accomplish a significant reform of the liability system and to take a long, purposeful stride toward the implementation of comparative fault as applied to all parties in tort litigation. Moreover, I conclude that the legislature adopted language that adequately, if sometimes imperfectly, achieves that purpose.

My thesis is this: Proposed interpretations of the statute

18. See, e.g., David Heller, *Statutory Construction and the "Empty Chair,"* TRIAL NEWS (Washington St. Trial Lawyers Ass'n), Apr. 1991, at 2 (stating that while constitutional invalidation of joint and several liability modification statute would solve all problems, plaintiffs' lawyers can overcome some obstacles through statutory interpretation); Richard B. Kilpatrick, *Joint and Several Liability Under Tort Reform Act of 1986,* TRIAL NEWS (Washington St. Trial Lawyers Ass'n), Dec. 1990, at 13 (urging "vigilance, imagination, and sharing of idea" to challenge RCW 4.22.070 on constitutional, statutory, and procedural grounds). In addition to its longstanding amicus curiae committee, which works to develop constitutional and statutory challenges to legislative provisions limiting tort liability, the Washington State Trial Lawyers Association has created a network for sharing briefs and other materials directed toward attacking the joint and several liability provision on both constitutional and statutory grounds. See, e.g., TRIAL NEWS (Washington St. Trial Lawyers Ass'n), Sept. 1991, at 2, col. 3.

19. Peck, *Washington's Partial Rejection,* supra note 2, at 242-56; Sisk, supra note 13; Wiggins et al., supra note 13, at 236-39.

that serve to undermine the guiding principle of comparative fault in liability are not in accord with either the plain language of the provision or the history of its enactment.²⁰ That is not to say that there are no gaps left to be filled. On occasion, the courts must apply the 1986 modification of joint and several liability in contexts that are also regulated by other legislative enactments. The workers' compensation statutory scheme²¹ and the section of the earlier 1981 product liability act providing relief to retailers from liability for defective products are examples of other statutory provisions²² that must be coordinated with the 1986 adoption of comparative fault. Nevertheless, the essential framework of RCW 4.22.070 can readily be discerned from the language of the statute, and it does not plausibly lend itself to the unusual interpretations offered to preserve the broader liability rules that previously prevailed in Washington common law.

The subject of this Article is statutory interpretation. In particular, I discuss the following: the meaning of "fault" as applicable through RCW 4.22.070;²³ the nature of the entities to whom fault must be allocated;²⁴ the responsibility for raising the culpability of an unjoined entity and the burden of proof on allocation of fault;²⁵ the manner in which damages are to be apportioned among the culpable parties;²⁶ the separate rule for

20. See WASH. REV. CODE § 4.22.070(1) (1991) (commanding trier of fact to "determine the percentage of the total fault which is attributable to *every entity* which caused" the injury or harm, and providing that the "liability of each defendant shall be several only and shall not be joint" unless the case falls within certain narrow limitations and exceptions) (emphasis added); S. Journal, 49th Reg. Sess. & 1st Spec. Sess. 466 (1986) (legislation promotes "good public policy to have those persons who have contributed to the problem pay proportionate to their contribution") (remarks of Sen. Thompson); *id.* at 1486 (changes in joint and several liability were adopted to deal with unfairness of situation in which someone is found "fifty percent negligent in the accident" and yet is left "paying the total cost") (remarks of Sen. Hayner); H. Journal, 49th Reg. Sess. & Spec. Sess. 1067-68 (1986) (explaining that joint and several liability concept needed to be corrected because "it allows one person to be held liable for another person's fault to some extent") (remarks of Rep. Barnes). See also Huber v. Henley, 656 F. Supp. 508, 511 (S.D. Ind. 1987) (the provisions of Indiana's comparative fault statute "signal a legislative policy favoring the principle of fair allocation among all tortfeasors," and "[a]ny interpretation of legislative intent must therefore be made with a cognizance of this policy").

21. See *infra* part IV.B; see also Clark v. Pacificorp, 118 Wash. 2d 167, 822 P.2d 162 (1991).

22. See *infra* part IV.C.

23. See *infra* part III.B.

24. See *infra* part III.C.1.

25. See *infra* part III.C.2.

26. See *infra* part III.D.

parties acting in concert or as agents;²⁷ the limited form of joint and several liability that applies when the plaintiff is without fault;²⁸ the provisions for settlement and contribution under the statute;²⁹ and the three exceptions to the statute.³⁰

In addition, I examine two areas in which RCW 4.22.070 must be read in conjunction with other statutes so as to give the fullest possible effect to both legislative enactments. First, I outline a recent Washington Supreme Court decision concerning the application of comparative responsibility principles to the workers' compensation program.³¹ In *Clark v. Pacificorp*, the court held that the state government's right to reimbursement of industrial insurance benefits from an injured employee who recovers from a third person must be proportionately reduced.³² Such a reduction occurs when fault is allocated under the Tort Reform Act to the employer who is immunized from liability under the workers' compensation system. Second, I look at the application of the comparative fault principles of the 1986 modification of joint and several liability in the context of the 1981 retailer relief provision, which granted broad relief to retailers but left them exposed to liability in certain circumstances, such as when the manufacturer of a product was insolvent.³³ Lastly, I offer some ruminations on the future course of the common law as it develops with respect to joint and several liability in those few areas that fall outside the express mandate of the 1986 statute.³⁴

Other than as it bears on interpretation of the statute, the constitutional validity of RCW 4.22.070 is not addressed in this Article. That subject has been thoroughly examined in previous publications, including one that I authored.³⁵ The legislature has adopted the statute. I believe the supreme court will uphold it. In my view, and for good or for ill, RCW 4.22.070 will remain the law of the State of Washington for the foreseeable future.

27. See *infra* part III.E.

28. See *infra* part III.F.

29. See *infra* part III.G.

30. See *infra* part III.H.

31. *Clark v. Pacificorp*, 118 Wash. 2d 167, 822 P.2d 162 (1992); see *infra* part IV.B.

32. 118 Wash. 2d at 181, 822 P.2d at 169-70.

33. See *infra* part IV.C.

34. See *infra* part V.

35. See authors cited *supra* note 13.

II. RCW 4.22.070: BACKGROUND AND SUMMARY

A. *The Road to Tort Reform: Joint and Several Liability and the Expansion of Tort Liability*

Under the common law doctrine of joint and several liability, a plaintiff asserting a cause of action in tort was entitled to pursue any or all responsible tortfeasors and thereafter collect any part or all of the judgment against any one or more of the defendants found to have contributed to the personal injury or property damage.³⁶ In other words, each individual defendant—however slightly at fault in comparison to other defendants—was liable for the entire amount of the damages awarded to the plaintiff.³⁷ At the same time, a plaintiff who was found also to have been at fault, and thus to have contributed to the event that led to the injury or damage, was barred from any recovery, no matter how slight the plaintiff's contributory negligence.³⁸ Both doctrines—the rule of joint and several liability and the bar of contributory negligence—“grew out of the common law concept of the unity of the cause of action; the jury could not be permitted to apportion the damages, since there was but one wrong.”³⁹

However, two recent developments in tort law combined to provide a sharper edge to the doctrine of joint and several liability. The ever deepening channel dug by these two forces into the tort liability system, and the consequent expansion of liability, led to a rather sudden realization that an unlimited rule of joint and several liability was no longer appropriate.

First, most states, including Washington, rejected the absolute bar of contributory negligence to recovery by negligent plaintiffs. Tort law was modified to permit plaintiffs, even when they bear some culpability for the accident, to nevertheless recover against tortfeasors for a proportionate share of the

36. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 47, at 327-28 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON THE LAW OF TORTS]; 1 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 3.6, at 391-92 (1983); *Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wash. 2d 230, 235, 588 P.2d 1308, 1312 (1978).

37. PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 36, § 47, at 327-28; 2 COMPARATIVE NEGLIGENCE § 13.80[3], at 13-109 (1992); *DaFonte v. UpRight, Inc.*, 828 P.2d 140, 142 (Cal. 1992).

38. PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 36, § 65, at 451-52; 2 COMPARATIVE NEGLIGENCE § 13.80[3], at 13-109 (1992); *DaFonte*, 828 P.2d at 142.

39. *Bartlett v. New Mexico Welding Supply*, 646 P.2d 579, 584 (N.M. Ct. App. 1982).

damages. In 1973, Washington adopted a pure system of comparative negligence under which the trier of fact allocates fault between the plaintiff and the defendant and reduces the amount of recovery by only the plaintiff's share of the total fault for the accident.⁴⁰ The "premise that wrongs were inherently indivisible or that responsibility could not rationally be apportioned among multiple parties fell into disfavor."⁴¹ With the removal of the bar of contributory negligence, the circumstances under which a defendant could be held liable in tort dramatically increased, thereby also extending the reach of joint and several liability.⁴²

Second, during the last twenty to thirty years, the scope of tort liability expanded exponentially.⁴³ New causes of action were invented; new duties of care were created. Strict liability, or liability irrespective of negligence, was expanded to new activities and subjects. The doctrine that a plaintiff could not recover when he or she had assumed the risk by engaging in a dangerous activity was merged into comparative negligence. The immunity of governments and charitable institutions from liability largely collapsed. The requirement of a direct link of proximate causation was weakened. The expansion of substantive liability law, and the removal of the contributory negligence bar, combined so that the doctrine of joint and several liability packed an extra wallop against defendants. As Peter W. Huber puts it so colorfully, "[j]oint and several liability provided the brass knuckle at the end of the law's ever longer swing."⁴⁴

To take a common example, the simple automobile acci-

40. 1973 Wash. Laws, 1st Ex. Sess. 949, ch. 138, § 1 (codified as amended at WASH. REV. CODE § 4.22.005-.015 (1991)).

41. Sisk, *supra* note 13, at 437.

42. Hicks, *supra* note 9, at 192 (adopting comparative negligence (and thereby removing the bar to recovery of contributory negligence) in the 1970's exacerbated the effects of joint and several liability because "an enormous new and distinct class of injured parties was suddenly in the picture").

43. See generally George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1534-36 (1987) (outlining expansion of liability since the 1960's, including limiting effect of contributory negligence and assumption of risk, expanding strict liability, and relaxing rules of causation and statutes of limitations); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 461 (1985) ("Since 1960, our modern civil liability regime has experienced a conceptual revolution that is among the most dramatic ever witnessed in the Anglo-American legal system.").

44. PETER W. HUBER, *LIABILITY—THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 79 (1988).

dent case increasingly included an allegation against the state, county, or city government.⁴⁵ Although the primary cause of the accident may have been the negligent or reckless driving of another driver combined with the contributory negligence of the plaintiff driver himself, economic realities encouraged the creative plaintiff lawyer to look well beyond those primary actors. The defendant driver might not have either sufficient wealth or insurance coverage to pay a full recovery to the plaintiff. The plaintiff's own insurance coverage might not be sufficient to pay all expenses for a serious injury. The government, however, was the quintessential "deep pocket," plainly able to cash out to the plaintiff. Hence, a lawsuit would often be filed against the government for negligent road design or inadequate posting of highway signs, despite the negligent drivers' primary responsibility.

During the common law period, but prior to the last couple of decades, such a lawsuit was unlikely to succeed in most jurisdictions. The court might have found the government exempt from liability under the doctrine of sovereign immunity. Or, alternatively, the court might have concluded that the government owed no specific duty to individual drivers, as opposed to the public in general, upon which a tort cause of action could hang. Or the court might have barred recovery from any defendant upon a finding that the plaintiff driver was contributorily negligent. In any event, the court was likely to find that any errors by the government in developing the roadway or posting signs were too removed from an accident between two automobiles to fall within the realm of proximate causation.⁴⁶

45. See generally Peck, *Washington's Partial Rejection*, *supra* note 2, at 238; 2 COMPARATIVE NEGLIGENCE § 13.80[3], at 13-109 (1992).

46. Even in recent years, Washington courts have continued to cut short the chain of causation to a city's minor fault when the primary actor's behavior in an automobile accident case is sufficiently egregious. For example, in *Klein v. City of Seattle*, 41 Wash. App. 636, 639, 705 P.2d 806, 808 (1985), the court refused to hold that negligent road design was the legal proximate cause of an accident in which a speeding driver had crossed the center line and collided with the plaintiff's car. See also *Braegelmann v. Snohomish County*, 53 Wash. App. 381, 385-86, 766 P.2d 1137, 1140 (1989) (similar facts to *Klein* with addition that at-fault driver was highly intoxicated). However, when a motorist has acted merely with negligent carelessness, the link of causation between government fault in road design or maintenance and a motor vehicle accident will not be severed as a matter of law and public policy. See *Stephens v. City of Seattle*, 62 Wash. App. 140, 144, 813 P.2d 608, 610 (1991) (fact that motorcyclist may have been drinking and was speeding when he hit curb did not justify holding, as a matter of law, that the sole proximate cause of accident was motorcyclist's own

Not so any longer. Before tort reform in 1986, the state, county, or city government stood a high chance of being held fully responsible. Even if the government was found only slightly at fault—perhaps far less culpable than either the defendant or plaintiff drivers—the doctrine of joint and several liability ensured that the government was left on the hook for the entire judgment.⁴⁷ For example, if the plaintiff was found to be 40 percent at fault, the other driver 55 percent at fault, and the government only 5 percent at fault, the government was left holding the bag for 60 percent of the damages (assuming the other driver was insolvent). The impact on taxpayer dollars or liability insurance premiums paid by municipalities was not difficult to imagine. Other similar examples of the ever larger sweep of joint and several liability across the tort law landscape abounded.⁴⁸ Accordingly, “a consensus developed that a crisis existed in the administration of tort law and in the operation of insurance enterprises.”⁴⁹

B. *Washington's Statutory Modification of Joint and Several Liability in the Tort Reform Act of 1986*

In Washington, the legislative response to this state of

negligence, rather than city's design of intersection). See also *infra* part V.C (discussing *Klein, Braegelmann, and Stephens*).

47. See *Zakshersky v. City of New York*, 562 N.Y.S. 2d 371, 373 (1990) (stating that among the flaws of the “old rule” of joint and several liability was that “[t]he defendant with the ‘deep pocket’ need only be held in for a small percentage and yet be liable for the full amount of the judgment”).

48. See, e.g., *HUBER, supra* note 44, at 79 (citing as examples a case in which the City of Los Angeles was held jointly and severally liable for a multimillion dollar judgment based on inadequate trimming of bushes at an intersection, although the accident's primary cause was that one driver ran the stop sign while high on drugs, and another case in which the City of San Diego was held jointly and severally liable for a \$1.6 million judgment based on a theory of faulty road design when a drunk driver crossed the center line and collided with a car in which the plaintiff was a passenger); *Peck, Washington's Partial Rejection, supra* note 2, at 238 & n.18 (noting that “it has become quite common” in automobile accident litigation for plaintiffs to charge the governmental entity responsible for the roadway with fault in the design or maintenance of the roadway) (citing *Vasey v. Snohomish County*, 44 Wash. App. 83, 721 P.2d 524 (1986), in which a county was held jointly and severally liable based upon 20 percent negligence in road design compared with 80 negligence on the part of the plaintiff's spouse who had been the driver of the car)).

49. 2 COMPARATIVE NEGLIGENCE § 13.80[1], at 13-99 (1992); see also STATE OF WASHINGTON, A REPORT TO THE LEGISLATURE FROM THE JOINT STUDY COMMITTEE ON INSURANCE AVAILABILITY AND AFFORDABILITY 3 (1985) (concluding that the growth of tort litigation compounded problems caused by insurance industry practices, leading to a crisis in the availability and affordability of liability insurance).

affairs was the Tort Reform Act of 1986.⁵⁰ In that Act,

the legislature largely abandoned the archaic common law doctrine of joint and several liability in cases where the plaintiff is also at fault. Consistent with the adoption of comparative negligence several years before, the legislature mandated that recovery of tort damages generally be limited to that portion of damages for which each individual defendant is found to have been responsible.⁵¹

Under this new approach, codified in RCW 4.22.070,⁵² a defendant's liability is several only, unless: (1) the plaintiff was not at fault; (2) the defendant was acting in concert with another person; (3) the person at fault was acting as an agent of the defendant; or (4) the case falls within one of the three exceptions to the statute.⁵³ RCW 4.22.070 calls for allocation of fault by the trier of fact to every entity, whether a party or not, that played any part in causing the plaintiff's damages. Each defendant is responsible to pay only its own share of the loss, unless one of the limitations or exceptions permitting application of joint and several liability applies, such as a finding that the plaintiff lacks any culpability for his or her own

50. The legislature stated that the purpose of the reforms enacted were "to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance." Tort Reform Act of 1986, ch. 305, § 100, 1986 Wash. Laws 1354. Individual members of the legislature further explained the need for the legislation to correct the unfairness of the joint and several liability doctrine in holding defendants, who may be only partially at fault, liable for the entire amount of damages. *See, e.g.*, S. Journal, 49th Reg. Sess. & 1st Spec. Sess. 466 (1986) (legislation adopts "good public policy to have those persons who have contributed to the problem pay proportionate to their contribution") (remarks of Sen. Thompson); H. Journal, 49th Reg. Sess. & Spec. Sess. 1065 (1986) (describing the economic harm to society of holding a defendant that is only ten percent responsible for an injury liable for the entire amount of the damages simply because another tortfeasor is insolvent) (remarks of Rep. Ballard). *See also supra* note 20 (additional comments by legislators).

51. Sisk, *supra* note 13, at 435. *See also* S. Journal, 49th Reg. Sess. & 1st Spec. Sess. 1486 (1986) (explaining that, since contributory negligence had earlier been eliminated in 1973, the modification of joint and several liability proposed in the 1986 Tort Reform Act "is just bringing it a little back toward where it was—a little bit of equalization") (remarks of Sen. Newhouse); H. Journal, 49th Reg. Sess. & Spec. Sess. 1049 (1986) (saying change in joint and several liability means return to an "equal" situation given the 1973 legislative changes) (remarks of Rep. Ballard).

52. WASH. REV. CODE § 4.22.070 (1991).

53. Thomas V. Harris, *Washington's 1986 Tort Reform Act: Partial Tort Settlements After the Demise of Joint and Several Liability*, 22 GONZ. L. REV. 67, 73-74 (1986/87) [hereinafter Harris, *Partial Tort Settlements*]; *see generally*, Sisk, *supra* note 13, at 439-41.

injury.⁵⁴ By the terms of the statute, it is effective as to "all actions" filed after August 1, 1986.⁵⁵

Because this is an Article about statutory interpretation, our touchstone should be the actual words of the statute. Thus, it is appropriate to set out the full text of RCW 4.22.070:

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages, including the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities immune from liability to the claimant and entities with any other individual defense against the claimant. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is

54. WASH. REV. CODE § 4.22.070(1)(b) (1991); see generally Sisk, *supra* note 13, at 469-71 (1991).

55. Tort Reform Act of 1986, ch. 305, § 910, 1986 Wash. Laws 1367. Accordingly, the statutory adoption of comparative fault applies to all suits commenced after August 1, 1986, including a plaintiff's addition of a new defendant by amendment of a complaint, or an action for contribution by one tortfeasor against another tortfeasor who was not a party to the original action by the plaintiff. *Erickson v. Wright Welding Supply, Inc.*, 485 N.W.2d 82, 84-85 (Iowa 1992) (new defendant who was added to lawsuit by amended complaint after effective date of tort reform statute was entitled to benefit of new statute; addition of new defendant did not relate back to date of filing of original action before effective date of statute); *Bisaillon v. Casares*, 798 P.2d 1368 (Ariz. Ct. App. 1990) (absent a mistake as to the identity of the parties permitting an amendment of the complaint to relate back to the date of the original complaint, the plaintiff's amendment of the complaint to add a new defendant constituted the commencement of a new suit after the effective date of the Arizona statute abolishing joint and several liability); *Fraser v. Beutel*, 56 Wash. App. 725, 739, 785 P.2d 470, 478 (1990) (although the plaintiff brought action against the defendant before August 1, 1986, when the defendant filed a third party action for contribution against another tortfeasor after the effective date of the statute, the contribution suit was a new cause of action subject to the provisions of the Tort Reform Act of 1986).

entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [sic] damages.

(2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.

(3) (a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.

(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.

(c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.⁵⁶

III. INTERPRETATION OF RCW 4.22.070

A. *The Rules of the Game*

1. Sustaining the Plain Meaning of the Statute

When I was first prompted to explore the subject of the interpretation of RCW 4.22.070, my impression was that this would be a rather barren area for legal analysis. In its basic operation, I did not (and do not) think the statute is truly in much need of interpretation. Its purpose is clear. Its language is direct. There are no apparent ambiguities in the provisions as written. The ordinary reader, even one educated in the skills of lawyerly disputation, would likely conclude that however controversial the adoption of the statute, its application would raise few significant issues of statutory interpretation.

This impression is further confirmed by the fact that, until quite recently, virtually every commentator who has looked at the statute—including those who are critical or advocate constitutional invalidation of it—have reached the same, simple conclusions about its basic operation. For example, three respected members of the state plaintiff's bar⁵⁷ and I⁵⁸ have

56. WASH. REV. CODE § 4.22.070 (1991).

57. Wiggins et al., *supra* note 13 (Charles K. Wiggins, Bryan P. Harnetiaux and Robert H. Whaley).

58. Sisk, *supra* note 13.

authored articles that, while focusing on constitutional challenges to the statute, have also provided an overview of the structure and meaning of the statute. There were no real disagreements on these basic underlying points. Professor Cornelius J. Peck of the University of Washington School of Law has also studied the statute and, while criticizing the drafting of the statute and suggesting a few interesting issues of interpretation, had little difficulty perceiving the fundamental format and effect of the statute.⁵⁹ Finally, the Washington Supreme Court Committee on Jury Instructions, which includes noted plaintiffs' attorneys among its membership, has published pattern instructions implementing the 1986 reforms. Again, this committee of lawyers reached the same conclusions about the fundamental purpose and effect of RCW 4.22.070.⁶⁰

Notwithstanding, members of the Washington plaintiffs' bar have recently suggested very different understandings of RCW 4.22.070 and have further urged the aggressive advocacy of such variant interpretations before the courts.⁶¹ These interpretations depart significantly from the common understanding of the statute that has prevailed heretofore; moreover, the transparent intent of these advocates, and the obvious effect of the proposed interpretations, are to nullify or undermine the statutory retreat from broad rules of joint and several liability. Accordingly, the receptivity of the courts to these deconstructionist interpretations will determine whether the 1986 Act has truly given birth to a new era of tort liability founded upon the principle of comparative fault, or whether tort reform instead will die aborning in the courts.

Fortunately, despite the superficial appeal and creativity of some of the proffered arguments, the language of the statute and the legislative history, together with a healthy dose of common sense, provide the rejoinder to these proposals. I think it may safely be predicted that the Washington appellate courts will not accept such interpretations of RCW 4.22.070 for the simple reason that these arguments fail to adhere to the

59. Peck, *Washington's Partial Rejection*, *supra* note 2; Peck, *Constitutional Challenge*, *supra* note 13.

60. Washington Pattern Jury Instruction—Civil, §§ 41.00-50.24, 6 WASHINGTON PRACTICE (1989 & Supp. 1990).

61. See, e.g., Heller, *supra* note 18; Kilpatrick, *supra* note 18; Charles K. Wiggins, *Living Without Joint and Several Liability*, in 1ST ANNUAL TORT LAW UPDATE: WHAT YOU DON'T KNOW CAN HURT YOU AND YOUR CLIENT 204, 208-10 (sponsored by Washington St. Trial Lawyers Ass'n Oct. 5, 1990).

plain language and obvious import of the statute. Several of these newly-minted interpretations of RCW 4.22.070 invite the courts to excise certain phrases and commands from the statute. For example, these tort law advocates would reduce the requirement that the trier of fact determine the percentage of fault to be assigned to each entity to a useless formality by construing the statute to allow the trier of fact to ignore that fault allocation when apportioning the damages to be assessed against each defendant.⁶² In yet another imaginative approach, and notwithstanding the statute's direct command that fault be allocated to "every entity," a canon of statutory interpretation would be misapplied to severely restrict the field of responsible entities that would be considered by the trier of fact in allocating fault.⁶³

In sum, the alternative interpretations addressed below are not true alternative understandings of the statute at all. Rather, they employ a deconstructionist approach manifestly designed to destroy the law, rather than faithfully seeking to divine the statute's true meaning. As further discussed below, and as is apparent from even a cursory reading of the statute, RCW 4.22.070 has two underlying themes. First, where the plaintiff is also at fault for the ensuing harm, no defendant should be held liable for more than its own share of the damages as determined by its proportionate fault. Second, when a potential defendant has not been added to the lawsuit because of a legal immunity or impediment, or simply by reason of the plaintiff's voluntary choice or neglect, no other defendant may be forced to assume that share of the liability. Any interpretation of RCW 4.22.070 that ignores these basic premises is not true to the letter, spirit, or intent of the legislative act.

2. Giving Full Effect to the Intent and Spirit of the Statute

In applying RCW 4.22.070 through interpretation, the flame of tort reform must not be smothered beneath the blanket of that "legal cliché"⁶⁴ which states that statutes in derogation of the common law should be given a narrow

62. See *infra* part III.D.2.b (discussing proposed alternative interpretation of statute whereby trier of fact could assess damages on an equitable share basis rather than awarding judgment proportionately based upon the percentage share of fault).

63. See *infra* part III.C.1.f (discussing allocation of fault to all entities, including nonparties).

64. *Sheppard v. Michigan Nat'l Bank*, 83 N.W.2d 614, 618 (Mich. 1957).

construction.⁶⁵ Even assuming that the movement toward comparative fault fails to advance the precepts of the common law, this nevertheless provides no basis for evading or muting the legislative command.

The antagonistic rule calling for narrow construction of statutes reforming the common law reflected an unseemly hostility by the judiciary toward legislative incursions upon what the judiciary regarded as its sacred province. In an earlier day, the judiciary revered the common law as a perfect construct of law formed from abstract and disinterested reason, above and unstained by the flawed compromises distilled through the legislative process. Accordingly, the courts adopted a doctrine of strict construction of statutes in furtherance of its "zealous guardianship against legislative encroachment" upon the venerated common law.⁶⁶ In the age of statutes, it is time to discard this "pious canon[]" of an early age."⁶⁷

Dean Roscoe Pound powerfully challenged the legitimacy of a rigid approach to legislation:

The proposition that statutes in derogation of the common law are to be construed strictly has no analytical or philosophical justification. It assumes that legislation is something to be deprecated. As no statute of any consequence dealing with any relation of private law, unless declaratory, can be anything but in derogation of the common law, under this doctrine the social worker and legal reformer must always face the situation that the legislative act which represents the fruits of their labors will find no sympathy in those who apply it, will be construed narrowly, and will be made to achieve as little as possible.⁶⁸

Beginning in 1899,⁶⁹ Washington courts frequently,⁷⁰ but

65. *Id.*; see generally Jefferson B. Fordham & J. Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438 (1950) (criticizing presumption that statutes derogating from common law should be strictly construed); Barbara Page, *Statutes in Derogation of the Common Law: The Canon as an Analytical Tool*, 1956 WIS. L. REV. 78 (criticizing doctrine as applied in Wisconsin).

66. Fordham & Leach, *supra* note 65, at 440-41.

67. John M. Landis, *Statutes and the Sources of Law*, HARVARD LEGAL ESSAYS 213, 213 (1934); see also *id.* at 217, 235 n.11 (discussing the origin of the doctrine of strict construction of statutes in derogation of common law as "a product of late eighteenth century thought").

68. 3 ROSCOE POUND, JURISPRUDENCE, § 111, at 664 (1959).

69. *State v. Binnard*, 21 Wash. 349, 58 P. 210 (1899).

70. See, e.g., *Burns v. Miller*, 107 Wash. 2d 778, 733 P.2d 522 (1987); *Coburn v. Seda*, 101 Wash. 2d 270, 276, 677 P.2d 173, 77 (1984); *McNeal v. Allen*, 95 Wash. 2d 265, 269, 621 P.2d 1285, 1288 (1980).

uncritically, applied the "time-honored rule"⁷¹ of strict construction to rigidly confine legislative innovations upon common law subjects to the express terms of the statute. To its credit, however, the Washington Supreme Court, in a very recent decision, has joined a handful of other jurisdictions⁷² in questioning whether the courts should "cling to the concept that a statute in derogation of the common law must be interpreted strictly."⁷³ In *Wichert v. Cardwell*,⁷⁴ a defendant argued that the statute permitting constructive or substituted service of process⁷⁵ should be strictly construed as in derogation of a purported common law rule requiring personal service of process. In upholding the validity of service upon the defendant's adult child who was an overnight resident in the defendant's house, the court acknowledged that "the purpose and rationale" underlying this rule of strict construction had not been "explored" in prior decisions applying the doctrine.⁷⁶ The court further recognized that the principle has been heavily criticized and was denounced by Dean Pound as without "analytical or philosophical justification."⁷⁷ The court even suggested⁷⁸ that the doctrine may be irreconcilable with RCW 1.12.010, which provides that "[t]he provisions of this code shall be liberally construed, and shall not be limited by any rule of strict construction."⁷⁹

Despite these strong expressions of dissatisfaction with the doctrine, the *Wichert* court somewhat surprisingly declared that it would await more thorough briefing and analysis in a future case before "craft[ing] a proper and meaningful principle of construction when a statute purports to change an identified common law rule."⁸⁰ However, while the court may have thus delayed the official pronouncement of death and might wish to conduct a more thorough autopsy in a future opinion, the *Wichert* opinion dealt a mortal blow to the doctrine. In the end, the court was willing to assume that the substituted service of process statute indeed *was* in conflict with the com-

71. *Theis v. Spokane Falls Gas Light Co.*, 34 Wash. 23, 31, 74 P. 1004, 1007 (1904).

72. *See, e.g., McCluskey v. Bechtel Power Corp.*, 363 So. 2d 256, 261-64 (Miss. 1978).

73. *Id.* at 261.

74. 117 Wash. 2d 148, 812 P.2d 858 (1991).

75. WASH. REV. CODE § 4.28.080(14) (1991).

76. *Wichert*, 117 Wash. 2d at 153, 812 P.2d at 860.

77. *Id.* at 155, 812 P.2d at 861 (quoting 3 POUND, *supra* note 68, at 664).

78. *Id.* at 154, 812 P.2d at 861.

79. WASH. REV. CODE § 1.12.010 (1991).

80. *Wichert*, 117 Wash. 2d at 155-56, 812 P.2d at 862.

mon law rule, but nevertheless refused to apply a strict construction in interpreting the statute.⁸¹ Instead, the court manifested a modern appreciation of the legislature as a full partner in the development of the law. The court announced that it would interpret a legislative enactment presumptively modifying the common law in a manner giving full effect to the spirit and intent of the statute—over and above the literal letter of the law—so as to “best advance the perceived legislative purpose.”⁸²

This is the spirit that should animate any judicial interpretation of RCW 4.22.070.

B. The Meaning of “Fault” in RCW 4.22.070

1. The Definition of “Fault” in RCW 4.22.015

Although RCW 4.22.070 requires determination of the percentage of “fault” attributable to every entity, the section itself does not define “fault.” However, RCW 4.22.070 was added to RCW Chapter 4.22, which includes a specific definition of fault in RCW 4.22.015.⁸³ Based upon the legislature’s purposeful location of RCW 4.22.070 in the same chapter of the code, RCW 4.22.015 quite apparently was intended to supply the definition of fault for the modification of joint and several liability.⁸⁴ There is no reason to believe that the legislature adopted one definition of “fault” for comparative negligence and contribution purposes, while creating yet another concept of “fault” for the allocation of responsibility under the modified joint and several liability provision.

RCW 4.22.015 provides in pertinent part:

“Fault” includes acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability or liability on a product liability claim. The term also includes breach of warranty, unreasonable assumption of risk, and unreasonable

81. *Id.* at 156, 812 P.2d at 862.

82. *Id.* at 151, 812 P.2d at 859.

83. WASH. REV. CODE § 4.22.015 (1991).

84. RCW 4.22.015 governs the “comparison of fault for any purpose under RCW 4.22.005 through 4.22.060.” However, because RCW 4.22.070 was added to the chapter after the enactment of RCW 4.22.015, the failure to include RCW 4.22.070 within this particular phrase cannot be interpreted as an intentional omission of this particular section from the definition of “fault” contained in RCW 4.22.015.

failure to mitigate damages.⁸⁵

The incorporation of RCW 4.22.015's definition of fault has important consequences for the application of RCW 4.22.070. Because RCW 4.22.015 includes "strict tort liability" within the meaning of "fault," RCW 4.22.070 applies to cases of strict liability just as it governs cases of simple negligence. Likewise, because RCW 4.22.015 includes "liability on a product liability claim" within the meaning of "fault," RCW 4.22.070 also applies with full force to claims based upon defective products. In sum, the statutory modification of joint and several liability applies to *all* actions based upon the broad definition of fault, whatever the theory of liability.⁸⁶

2. The Problem of the Intentional Tortfeasor

a. *The Definition of Fault and Intentional Torts*

Although the definition of fault in RCW 4.22.015 is broad, it is not open ended. Intentional wrongdoing is *not* included within the definition of "fault." Accordingly, as the Washington Supreme Court stated in *Schmidt v. Cornerstone Investment, Inc.*,⁸⁷ RCW 4.22.015 has been understood to prevent intentional wrongdoers from seeking to reduce liability through the allocation of fault to another culpable party.⁸⁸ With the incorporation of that definition of fault into the statutory modification of joint and several liability, a party found guilty of intentional wrongdoing could not claim the benefits of RCW 4.22.070 to limit the extent of its liability. In other words, an intentional tortfeasor remains liable for the full measure of the plaintiff's damages.

This, of course, presupposes the validity of the traditional assumption that intentional wrongdoing falls outside of the concept of comparative responsibility in Washington. The Washington comparative negligence statute is derived from the

85. WASH. REV. CODE § 4.22.015 (1991).

86. See *Lundberg v. All Pure Chemical Co.*, 55 Wash. App. 181, 186, 777 P.2d 15, 19 (1989) (stating that, whatever the theory of liability, "the comparative fault doctrine shall apply to all actions based on 'fault'").

87. 115 Wash. 2d 148, 795 P.2d 1143 (1990).

88. *Id.* at 161-62, 795 P.2d at 1149-50; Peck, *Constitutional Challenges*, *supra* note 13, at 697 n.72 (definition of fault found in RCW 4.22.015, and applicable to RCW 4.22.070, does not include intentional torts); Scott I. Anderson, Comment, *Contribution Among Tortfeasors in Washington: The 1981 Tort Reform Act*, 57 WASH. L. REV. 479, 483 (1982) (stating that intentional tortfeasors are excluded from the purview of the comparative negligence and contribution statutes).

Uniform Comparative Fault Act. The comments to the Uniform Act state that, while intentional torts are not generally included within the Act's definition of fault, the courts of each state could nevertheless appropriately decide to extend the comparative fault principle to intentional torts as a matter of common law.⁸⁹

At least one court has accepted that invitation. In the very recent decision of *Blazovic v. Andrich*,⁹⁰ the New Jersey Supreme Court considered the case of a restaurant patron who was assaulted after leaving the establishment. The plaintiff patron brought suit both against his assailants for intentional assault and battery *and* against the restaurant for negligence in failing to provide adequate security and lighting outside the building and for negligently serving alcoholic beverages to the assailants.⁹¹ The question before the court was whether, under the state's comparative responsibility statute that displaces joint and several liability, the trier of fact must allocate fault among a contributorily negligent plaintiff (who provoked the fight), several defendants guilty of intentional misconduct (the assailants), and a negligent defendant (the restaurant).⁹²

Although the New Jersey court recognized that most courts have refused to extend comparative fault principles to intentional misconduct, the court nevertheless found the exclusion of intentional torts from the comparative fault calculation to be "difficult to justify."⁹³ The court reasoned that intentional misconduct is different only in degree, not in kind, from negligent conduct.⁹⁴ The court observed that "the plaintiff's injury was caused by the combination of the intentional tortfeasors' assaultive conduct, plaintiff's negligence in apparently provoking the assault, and [the restaurant's] failure to have provided adequate lighting and security in the parking light."⁹⁵ Under these circumstances, the court chose to "adhere to the general principle that liability should be imposed in proportion to fault."⁹⁶

The exclusion of intentional torts from the ambit of the

89. Uniform Comparative Fault Act § 1, Comment, 12 U.L.A. 44 (1979).

90. 590 A.2d 222 (N.J. 1991).

91. *Id.* at 224.

92. *Id.* at 223.

93. *Id.* at 227-28, 231.

94. *Id.* at 231-32.

95. *Blazovic*, 590 A.2d 233.

96. *Id.*

comparative fault system has also come under criticism in the legal literature. A number of commentators have challenged the traditional dogma that negligent and intentional wrongdoing are different in *kind*, rather than merely "different points on a continuum of fault."⁹⁷ These commentators argue that intentional torts and other torts based upon fault "reflect a continuum of conduct in violation of a singular social norm" established for protecting the safety of citizens.⁹⁸ Messrs. Dear and Zipperstein suggest that the only true difference between intentional and negligent misconduct is the degree of the actor's knowledge of possible harmful consequences, ranging "from a low level of objective knowledge (negligence) to a very high level of subjective knowledge (intent)."⁹⁹ As Dean William L. Prosser expressed it: "As the probability of injury to another, apparent from the facts within his knowledge, becomes greater, his conduct takes on more of the attributes of intent, until it reaches that substantial certainty of harm which juries, and sometimes courts, may find inseparable from intent itself."¹⁰⁰ Accordingly, these commentators submit that there is no logical reason why intentional wrongdoing cannot be compared with negligent conduct as part of the allocation of fault under a comparative fault approach to tort liability.¹⁰¹

Moreover, in some instances, conduct, although deliberate, may not be significantly more culpable or morally reprehensible than conduct that is careless and therefore negligent.¹⁰² Professor William J. McNichols of the University of Oklahoma

97. Teresa Tracy, Comment, *Comparative Fault and Intentional Torts*, 12 LOY. L.A. L. REV. 179, 186 (1978).

98. Jake Dear & Steven Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations*, 24 SANTA CLARA L. REV. 1, 2 (1984).

99. *Id.* at 15.

100. WILLIAM L. PROSSER, LAW OF TORTS § 31, at 145-46 (4th ed. 1971) (footnote omitted).

101. Dear & Zipperstein, *supra* note 98, at 2 (urging "open and express application of comparative fault principles" to "some intentional tort situations," other than self-help measures such as a battery, which involve taking the law into one's own hands); William J. McNichols, *Should Comparative Responsibility Ever Apply to Intentional Torts?*, 37 OKLA. L. REV. 641 (1984) (in light of extension of comparative negligence to strict liability cases, comparative responsibility should be applied to some carefully tailored intentional tort cases); Tracy, *supra* note 97 (endorsing extension of comparative fault principles to actions involving intentional tortfeasors). *But see* William E. Westerbeke, *Survey of Kansas Law: Torts*, 33 U. KAN. L. REV. 1, 31-32 (1984-1985) (tortfeasor who intends to cause the harm or knows with substantial certainty that the harm will occur "has no compelling equitable claim" for a proportionate reduction in liability).

102. McNichols, *supra* note 101, at 645.

Law Center posits the following hypothetical: "Suppose that a plaintiff negligently conceals his hemophiliac condition from the defendant and then carelessly sets up a situation in which defendant intentionally strikes him in a way that defendant reasonably thinks is offensive but not harmful."¹⁰³ Is the defendant's conduct truly different in kind from other types of culpable behavior? Under such circumstances, is not a comparative fault analysis appropriate as a matter of fairness and public policy?

Perhaps. In my view, however, the Washington State Legislature has not made that policy choice. Whatever the merits of the proposal to include intentional wrongdoing within the system of comparative fault, the definition of "fault" in RCW 4.22.015 quite clearly excepts intentional misconduct. The courts, even in the exercise of common law powers, should not intrude where the legislature appears to have made deliberate choices in selecting the objects of the statute. The judiciary should give great weight to the list of included culpable forms of conduct in the statute and the obvious omission of intentional torts when interpreting and applying the comparative fault principle.

In its report upon the proposal that became RCW 4.22.015, the Senate Select Committee on Tort and Product Liability Reform stated: "The definition is intended to encompass all degrees of fault short of intentionally caused harm."¹⁰⁴ The Washington Supreme Court correctly concluded in *Schmidt v. Cornerstone Investment, Inc.*,¹⁰⁵ that "the Legislature's intent to exclude intentional conduct from the definition of fault is clear."¹⁰⁶ That legislative choice has occupied this field of tort law and should not be subject to judicial modification.

Moreover, both the New Jersey court in *Blazovic*¹⁰⁷ and the commentators advocating extension of comparative fault to intentional torts¹⁰⁸ have justified their new approach in part by observing that the policy goal of punishing wanton acts can better be achieved through assessment of punitive damages against intentional tortfeasors. Punitive damages, however, are

103. *Id.* at 652.

104. S. Journal, 47th Legis. Sess. 635 (1981).

105. 115 Wash. 2d 148, 795 P.2d 1143 (1990).

106. *Id.* at 162, 795 P.2d at 1149.

107. *Blazovic v. Andrich*, 590 A.2d 222, 231-32 (N.J. 1991).

108. Dear & Zipperstein, *supra* note 98, at 36; Tracy, *supra* note 97, at 187.

not available in Washington.¹⁰⁹ Thus, for cases involving deliberate tortious injury, strict insistence that intentional tortfeasors be held fully responsible for damages remains the best and perhaps only means (other than criminal prosecution) for punishment in Washington.

Finally, the expansion of the comparative responsibility concept to intentional wrongdoing raises significant policy concerns that are best resolved in the democratic branch of state government. Beyond the threshold issue of whether comparative fault should include intentional torts at all, there are questions of what situations are best suited for such an application, and whether a strict joint and several liability approach should be retained for certain outrageous forms of intentional conduct.¹¹⁰

b. Combined Acts of Negligent and Intentional Tortfeasors

Assuming that intentional acts are indeed outside of the scope of "fault" under the Washington comparative fault statute, what should be done in the case where the independent acts of a negligent tortfeasor and an intentional wrongdoer combine to cause injury to a plaintiff? One noted member of the plaintiff's bar, Charles K. Wiggins, contends that the introduction of an element of intentional wrongdoing into a tort case, even if only one of several defendants engages in such conduct, removes the entire case from the purview of RCW 4.22.070.¹¹¹ This result is contrary to common sense and minimal standards of fairness. Through such an arbitrary application of the statute, merely negligent tortfeasors are deprived of the statute's benefits. Such an application thus raises constitutional concerns.

Because RCW 4.22.015 fails to include intentional conduct within the definition of fault, the intentional actor should not escape full responsibility by assigning partial responsibility to other actors who also contributed to the injury. In other

109. *Fisher Prop., Inc. v. Arden-Mayfair, Inc.*, 106 Wash. 2d 826, 854, 726 P.2d 8, 24 (1986); *Barr v. Interbay Citizens Bank*, 96 Wash. 2d 692, 699, 635 P.2d 441, 443, *as amended*, 649 P.2d 827 (1981). In considering the legislation that became the Tort Reform Act of 1986, the Washington State Legislature expressly rejected a proposal to permit recovery of punitive damages in Washington. S. Journal, 49th Reg. Sess. & 1st Spec. Sess. 456-58 (1986).

110. McNichols, *supra* note 101, at 678-98 (outlining the policy issues involved in considering how to extend comparative fault to intentional torts).

111. Wiggins, *supra* note 61, at 208-09.

words, someone who commits an intentional tort should remain jointly and severally liable for the full amount of the plaintiff's damages.

But why should the defendant who unintentionally, albeit negligently, contributes only in part to an accident suddenly lose the protections of the modification of joint and several liability through the mere happenstance that some *other* defendant acting independently may have committed an intentional wrong? Although neither RCW 4.22.015 nor RCW 4.22.070 appear to contemplate this situation, there is no rational basis for concluding that a negligent defendant is not entitled to a determination by the trier of fact of its own separate share of the total fault simply because some other independent defendant has lost the right to allocation of fault under the statute. As Professors William E. Westerbeke and Reginald L. Robinson of the University of Kansas School of Law have said, to deny comparative allocation of fault to such negligent tortfeasors would "create[] the anomalous rule that negligent actors are subject . . . to joint and several liability, depending not on the nature or culpability of their own acts, but on the nature or culpability of some third party's unrelated acts."¹¹²

For example, take a situation where the actions of three automobile drivers combine to cause an injury to one of the three (the plaintiff). The plaintiff and one of the two defendants were driving negligently, while the other culpable defendant was either acting with such disregard for safety as to constitute intentional indifference or perhaps was even acting with the deliberate purpose of creating mayhem on the highway. The driver who is guilty of intentional misconduct should remain directly and fully liable to the plaintiff driver, notwithstanding the plaintiff driver's own contributory negligence or the fact that the other defendant's negligent driving also contributed to the accident. However, there is no more reason to hold the negligent defendant jointly and severally liable with the intentional wrongdoer than there would be if both drivers had acted negligently. From the perspective of the negligent defendant, it makes no difference that the other culpable

112. William E. Westerbeke & Reginald L. Robinson, *Survey of Kansas Tort Law*, 37 U. KAN. L. REV. 1005, 1049 (1989). See also *Medina v. Graham's Cowboys, Inc.*, 827 P.2d 859, 863 (N.M. Ct. App. 1992) ("[i]t would seem inconsistent with [the comparative responsibility] approach to hold a negligent tortfeasor responsible for the entirety of the damage if the concurrent tortfeasor happened to have committed an intentional tort rather than a negligent tort") (citing Westerbeke & Robinson, at 1049).

driver was harboring an intent to do wrong rather than having simply acted without reasonable care for the safety of others.

It must be remembered that tort defendants, as well as tort plaintiffs, are entitled to the protections of the state and federal constitution. It may be a denial of equal protection¹¹³ to arbitrarily apply¹¹⁴ the modification of joint and several liability to all negligent tortfeasors *except* those, who through no action of their own, happen to be found at fault together with another defendant who independently engaged in intentional misconduct. Arguably, the defendant who intends to inflict harm may be placed in a different category from the negligent defendant, because the traditional view is that wrongful "conduct differs from negligence not only in degree but in kind, and in the social condemnation that attached to it."¹¹⁵ But the quality of a defendant's negligent conduct will not ordinarily vary depending upon the nature of some other party's independent contributing actions. In sum, it is difficult to posit a rational justification for separating out one set of negligent defendants for less favorable treatment under RCW 4.22.070 based upon the independent conduct of another culpable party over whom the negligent defendants had no control.¹¹⁶

To resolve this anomaly, Professors Westerbeke and Robinson propose

a hybrid system in which the intentional tortfeasor is jointly and severally liable for all damage, but the negligent tortfeasor is limited to a proportionate fault share of the total damages. This approach would retain the policy of denying the benefits of the comparative negligence statute to

113. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); WASH. CONST. art. I, § 12 ("No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations").

114. A statute may be held unconstitutional only "as applied to a specific factual situation," and thus remains capable "of valid application in other circumstances." *Foundation for the Handicapped v. Department of Social and Health Services*, 97 Wash. 2d 691, 695, 648 P.2d 884, 887 (1982), *cert. denied*, 459 U.S. 1146 (1983).

115. PROSSER, *supra* note 100, § 66, at 426 (explaining why the plaintiff's contributory negligence is not a defense in the case of intentional torts). *But see* *Blazovic v. Andrich*, 590 A.2d 222, 231-32 (N.J. 1991) (ruling that intentional misconduct is only different in degree, rather than in kind, from negligent conduct).

116. *See* *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (stating "rational relation" test of constitutional equal protection); *American Network, Inc. v. Washington Utilities and Transp. Comm'n*, 113 Wash. 2d 59, 77-82, 776 P.2d 950, 960-62 (1989) (equal protection standards under both federal and state constitutions require a rational relationship between a classification and a valid statutory purpose).

intentional tortfeasors, and still honor the intent of the statute to require negligent tortfeasors to pay only in proportion to fault.¹¹⁷

The Kansas Supreme Court recently considered the Westerbeke-Robinson "hybrid" approach in *Kansas State Bank & Trust Co. v. Specialized Transportation Services, Inc.*¹¹⁸ In that case, a child had been molested by her school bus driver. Suit was brought against the driver for intentional battery and against the school district and the bus service on theories of negligent retention and supervision of the employee driver. The trial court apportioned fault between the school district and the bus service pursuant to the state's adoption of comparative fault and abolition of joint and several liability. However, the school district and bus service were held jointly and severally liable with the bus driver as the intentional tortfeasor.¹¹⁹ The school district and the bus service appealed to the Kansas Supreme Court asking for the adoption of the "hybrid" approach proposed by Professors Westerbeke and Robinson.¹²⁰

The Kansas court acknowledged the contradiction involved in holding a negligent tortfeasor jointly and severally liable when his or her actions combine with those of an intentional tortfeasor, while negligent tortfeasors in other contexts are held liable only for a proportionate fault share of the damages.¹²¹ Nevertheless, the court "elect[ed] to follow the precedential path" marked by earlier decisions that had declined to compare negligent conduct with intentional conduct.¹²²

The *Kansas State Bank* decision is disappointing. The court offered no analysis or reasoning for its result other than to observe that no other court had adopted the hybrid approach.¹²³ But given the rather recent genesis of the modifi-

117. Westerbeke & Robinson, *supra* note 112, at 1049 (footnote omitted); *see also* Westerbeke, *supra* note 101, at 33 (footnote omitted).

118. 819 P.2d 587 (Kan. 1991).

119. *Id.* at 605.

120. *Id.*

121. *Id.* at 606.

122. *Id.*

123. The New Mexico Court of Appeals very recently adopted the "hybrid" approach proposed by Professors Westerbeke and Robinson. The case involved a suit against a restaurant owner for negligently hiring a violence-prone employee who committed an assault against the plaintiff in the restaurant parking lot. *Medina v. Graham's Cowboys, Inc.*, 827 P.2d 859 (N.M. Ct. App. 1992). However, the court nevertheless held the employer fully liable for the intentional tort of the employee on a vicarious liability theory. *Id.* at 863-64.

cation or abolition of joint and several liability in most states, it is hardly surprising that few courts have yet had the occasion to consider this problem. The unremarkable absence of authority does not excuse a court from facing and resolving the problem created when negligence combines with intentional wrongdoing to result in a single harm. The Kansas court abdicated its responsibility to provide a reasoned response to what it confessed was a "contradiction" in the law.¹²⁴ Nor did the court consider whether minimal but fundamental principles of equity incorporated within the constitutional guarantee of equal protection permit such an arbitrary denial of comparative fault benefits to one set of negligent tortfeasors for reasons unrelated to their own actions. Because the *Kansas State Bank* case involved a special affirmative duty of protection from other tortfeasors, there was indeed a rational, legitimate basis for the outcome in that particular case.¹²⁵ However, the Kansas court did not offer that analysis nor limit its ruling to the unique setting of a special duty to take protective action. In sum, the *Kansas State Bank* decision cannot be regarded as persuasive authority and should not be followed in Washington. The equal protection argument remains unanswered.

Therefore, for purposes of applying RCW 4.22.070, the courts in Washington must distinguish between the situation of the intentional wrongdoer and the negligent tortfeasor, even when both may coexist in the same case. The trial court must instruct the jury to make separate determinations as to those defendants accused of intentional torts and those accused of fault-based errors. For those defendants accused of or found to be liable only based upon negligence or other fault within the meaning of RCW 4.22.015, the jury would be required to determine the respective percentage of culpability of those defendants in comparison with all other responsible parties, including any defendant found to have committed an intentional tort. For purposes of this determination, the jury could be instructed to treat the intentional wrongdoer as if it had acted with negligent culpability.

c. *Cases Involving a Duty to Protect Based Upon a "Special Relationship"*

Not all cases involving the combination of negligence and

124. *Kansas State Bank*, 819 P.2d at 606.

125. See *infra* part III.B.2.c.

intentional misconduct are alike. There may be exceptional circumstances where, by reason of the unique nature of the duty allegedly breached, it would be inappropriate to allocate fault between a party who negligently exposed another to injury from intentional harm and the intentional wrongdoer. One example would be the liability of an apartment owner for negligently failing to protect tenants from criminal trespassers, such as neglecting to provide sufficient lighting around the building or keeping entrances locked or guarded to discourage burglars or rapists.¹²⁶ In that instance, the distinctive nature of the duty of care—to prevent precisely such intentional wrongdoing—is such that the negligent actor should not escape responsibility to the plaintiff by shifting the major share of the blame to the intentional wrongdoer.¹²⁷

Both the New Jersey case of *Blazovic v. Andrich*¹²⁸ and the Kansas case of *Kansas State Bank & Trust Co. v. Specialized Transportation Services, Inc.*,¹²⁹ which were discussed above,¹³⁰ fall within this narrow category of cases involving an affirmative duty to protect another from being harmed by a third person. Unfortunately, neither court adequately addressed this unique feature in those cases.

In the *Kansas State Bank* case, the Kansas Supreme Court refused to allow the negligent tortfeasors to allocate fault to the intentional wrongdoer, but it made that decision without considering whether the exceptional nature of the duty involved justified such a result. In that case, the school district and the bus service had a special duty of care to supervise the bus driver and ensure that children riding on the bus were pro-

126. *E.g.*, *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970) (tenant permitted to recover from landlord for injuries sustained in criminal assault in apartment building when landlord had notice of repeated criminal assaults and yet reduced protective measures in the building). *See also* *Hutchins v. 1001 Fourth Ave. Assoc.*, 116 Wash. 2d 217, 224, 802 P.2d 1360, 1364 (1991) (noting that some courts have found a duty to take affirmative protective measures in the relationship of a landlord and tenant). *See generally* Gary Spivey, Annotation, *Landlord's Obligation to Protect Tenant Against Criminal Activities of Third Persons*, 43 A.L.R.3d 331 (1972).

127. It may be that the negligent party would be entitled to reimbursement for the entire loss by the intentional wrongdoer through an action for contribution or indemnity. The question here, however, is whether a party with a special duty to protect someone against intentional wrongdoing may avoid responsibility to the injured victim by pointing out that the intentional wrongdoer obviously is the primary culprit.

128. 590 A.2d 222 (N.J. 1991).

129. 819 P.2d 587 (Kan. 1991).

130. *See supra* part III.B.2.b.

tected from intentional harm by that driver. As stated above,¹³¹ the court utterly failed to justify its adoption of a general rule precluding application of comparative fault principles when the careless acts of a negligent defendant combine with the independent, intentional wrongdoing of another defendant. Although the court failed to articulate this justification, the fact that the duty breached by the negligent tortfeasors was an affirmative duty to protect the child from intentional wrongdoing changes the nature of the case.

In *Blazovic*, the New Jersey Supreme Court held that the principle of comparative responsibility should be applied to apportion fault among the intentional tortfeasors who assaulted the plaintiff outside a restaurant, the plaintiff who negligently provoked the fight, and the restaurant that negligently failed to provide adequate security and lighting outside the establishment.¹³² Indeed, the court adopted a general rule providing for allocation of fault among all tortfeasors, even for the benefit of the intentional wrongdoer, by treating intentional misconduct as a species of fault.¹³³ Unfortunately, the court failed to adequately consider the effect of this particular application of comparative fault upon the affirmative duty of care to provide protection from intentional wrongdoing.

In the *Blazovic* case, the dissenting judge at the intermediate appellate court level expressed the view that where the negligent defendant had breached a duty to maintain safe premises, the plaintiff should be able to recover for the full consequences of the defendant's negligence in providing adequate security.¹³⁴ If comparative fault were to be applied under such circumstances, this judge stated, "the assailants' paramount, and probably exclusive, responsibility for the victim's beating will be reflected in the jury's percentage allocation of fault."¹³⁵ Consequently, little or no comparative fault will be assigned to the negligent proprietor, thereby leaving the injured plaintiff to a "dubious remedy" against the assailants.¹³⁶ In addition, of course, such a result provides little incentive to the restaurant owner to ensure safe premises for customers.

131. *Id.*

132. *Blazovic*, 590 A.2d at 233.

133. *Id.* at 231-34.

134. *Id.* at 225 (describing the dissenting opinion below).

135. *Id.* at 225 (quoting Landau, J., dissenting opinion below).

136. *Id.*

The New Jersey Supreme Court acknowledged the force of this concern that permitting apportionment under such circumstances “would dilute [the restaurant’s] duty to prevent violent confrontations in its parking lot.”¹³⁷ Nevertheless, the court dismissed the dissenting judge’s view, stating that the dissenter’s approach “ignore[d] the principle that the parties causing an injury should be liable in proportion to their relative fault.”¹³⁸ In so ruling, the court failed to fully consider whether that principle appropriately applies in the unique context of an affirmative duty of protection.

In my view, the dissenting appellate court judge in *Blazovic* raises a point that requires further examination. The principle of comparative responsibility is, and should be, the general rule. Moreover, as argued above,¹³⁹ there ordinarily is no rational basis for arbitrarily holding a negligent defendant liable for more than a proportionate share of the fault simply because his or her actions combine with the independent actions of an intentional wrongdoer. However, a rational and legitimate basis does arise for an exception to the general principle of comparative fault when the duty of care that has been breached by a negligent tortfeasor is the affirmative duty to protect the injured plaintiff from intentional wrongdoing by a third person. The very essence of the duty of care in such a circumstance is one of protection. That duty would effectively be nullified if we were to allow a negligent guardian to escape responsibility by shifting the lion’s share of fault to an intentional wrongdoer who was not deterred because the guardian afforded inadequate protection. In other words, an individual with a fiduciary or other special relationship giving rise to a duty to prevent harm by third-parties cannot evade responsibility by pointing the finger at the third person who caused the harm. To do so would render this affirmative duty of protection meaningless.

I have argued earlier that the constitutional standard of equal protection mandates extension of RCW 4.22.070 to situations where a negligent tortfeasor’s conduct has combined with the independent intentional conduct of another party. How then can I justify a contrary result in the particular context

137. *Blazovic*, 590 A.2d at 233.

138. *Id.*

139. See *supra* part III.B.2.b.

above? As I have acknowledged,¹⁴⁰ the definition of fault in RCW 4.22.015 does not include intentional torts, and the language of RCW 4.22.070 does not appear to contemplate the situation of the combined negligent tortfeasor and intentional tortfeasor. A deviation from the plain language of the statute—to extend the application of RCW 4.22.070 to the combined acts situation—is therefore justified only to the limited extent necessary to bring the operation of the statute within the minimal requirements of the constitutional guarantee of equity. Thus, if a rational and legitimate basis can be stated for holding a merely negligent tortfeasor jointly and severally liable with an independent intentional tortfeasor, the statutory exclusion of intentional conduct from the system of comparative fault in Washington must be honored.

Where then is the dividing line? When does the exclusion of a negligent tortfeasor from the application of RCW 4.22.070 cease to be an arbitrary denial of the statute's provision of comparative responsibility? I suggest that the answer lies in the nature of the duty of care involved in the particular case; that is, when the actor's responsibility extends beyond the ordinary requirement that one refrain from taking actions that involve an unreasonable risk of harm to another and instead involves a special duty to take affirmative actions to protect another from a risk of harm from a third person. When the direct consequences of a negligent act, combined together with the consequences of an independent intentional act, cause harm to another, the happenstance that one tortfeasor was acting with intent provides no rational basis for denying the benefits of comparative fault to the negligent tortfeasor. However, when the claim against the negligent actor is based upon a failure to aid or protect another person or to control the conduct of a third person, the negligent actor cannot avoid all responsibility by assigning primary fault to the third person who caused harm because of the very failure of the required protection.

In this latter instance, we are talking about a linkage between the legal duty of protection and a particular type of relationship between the parties.¹⁴¹ A guardian has a special

140. See *supra* part III.B.2.a.

141. See *Keller v. State*, 475 N.W.2d 174, 179 (Iowa 1991) (discussing requirement of linkage of duty of care to a particular relationship between parties when the claim is based on an alleged failure of an actor to aid or protect another person or to control the conduct of a third party).

relationship with a person under his or her care that entitles that person to positive aid from the guardian; a custodian has a special relationship with a person under his or her control that obligates the custodian to protect others from the dangers posed by that person.¹⁴²

A comment to the Restatement (Second) of Torts explains the origin and nature of the key distinction between these types of legal duties:

The origin of the rule lay in the early common law distinction between action and inaction, or "misfeasance" and "non-feasance." In the early law one who injured another by a positive affirmative act was held liable without any great regard even for [the relationship between the parties]. But the courts were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing, even though another might suffer serious harm because of his omission to act. Hence liability for nonfeasance was slow to receive any recognition in the law. It appeared first in, *and is still largely confined to*, situations in which there was some special relation between the parties, on the basis of which the defendant was found to have a duty to take action for the aid or protection of the plaintiff.¹⁴³

Accordingly, the existence of such a special relationship, which gives rise to a duty to take affirmative action for the protection of another, provides a rational basis for removing the case from the comparative fault system and strictly adhering to the statutory exclusion of intentional wrongdoing from the comparative fault calculation.

However, there remains one more quirk in the problem. This "special relationship" duty of protection that we have been discussing includes a duty to protect against both intentional and negligent wrongdoing of third parties. Yet the principle of comparative fault would provide for allocation when protection fails against negligence of third parties, but not when intentional wrongdoing overcomes inadequate protec-

142. See *Hutchins v. 1001 Fourth Ave. Assoc.*, 116 Wash. 2d 217, 227, 802 P.2d 1360, 1365-66 (1991) (stating "the general rule that there is usually no duty to prevent a third party from causing physical injury to another, unless 'a special relationship exists between the defendant and either the third party or the foreseeable victim of the third-party's conduct'" (quoting *Petersen v. State*, 100 Wash. 2d 421, 426, 671 P.2d 230, 236 (1983))). See also RESTATEMENT (SECOND) OF TORTS § 315 (1965).

143. RESTATEMENT (SECOND) OF TORTS § 314 cmt. c (1965) (emphasis added). See generally PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 36, § 56, at 373-74.

tion. Doesn't this still leave us with an anomaly when applying comparative fault to different sets of defendants? Professors Westerbeke and Robinson offer the following hypothetical:

[A] restaurant owes a duty of reasonable care to protect its guests from unreasonable risks of harm while they are on the premises. Assume that a visibly intoxicated third person in the restaurant negligently stumbles into and knocks down one guest, then intentionally pushes down another guest. In each case the restaurant breached its duty in the same manner—by failing to remove the intoxicated person from the premises before he harmed a guest. The results, however, vary. The restaurant is liable for only a proportionate fault share of the damages suffered by the first guest, but is jointly and severally liable for all damages suffered by the second guest.¹⁴⁴

This hypothetical, while troubling, is not unanswerable. When the question is one of comparison of negligence, an allocation of fault by the trier of fact is likely to include a substantial assignment of responsibility to the party with the duty of protection as well as to the third-party whose negligence was not warded off. Thus, in the above hypothetical, a jury would likely allocate a significant share of the fault to the restaurant for failing to prevent the intoxicated person from stumbling into the customer, even if the majority of the fault was assigned to the intoxicated stumbler. Therefore, a sufficient share of fault and attendant liability would fall upon the restaurant to give teeth to the duty of protection.

However, when the third person has acted with the purpose of causing harm, the focus of the trier of fact is likely to shift rather dramatically to the intentional wrongdoer. As the dissenting appellate judge suggested in *Blazovic v. Andrich*, the intentional tortfeasor's "'paramount, and probably exclusive, responsibility for the victim's [injury] will be reflected in the jury's percentage allocation of fault.'"¹⁴⁵ In the restaurant hypothetical above, a finder of fact would likely assign a predominant share of fault to the intentional wrongdoer and by doing so, the restaurant would effectively be relieved of its

144. Westerbeke & Robinson, *supra* note 112, at 1049.

145. *Blazovic v. Andrich*, 590 A.2d 222, 225 (1991) (quoting Landau, J., dissenting opinion below). See also Robert N. Strassfeld, *Causal Comparison*, 60 *FORDHAM L. REVIEW* 913, 929 (1992) (where intentional wrongdoing is occasioned by another's negligence, "we would certainly select [intentional tortfeasors] as more important causes of the harm").

responsibility to provide protection against the very harm represented by the intentional tortfeasor. I recognize that this is not a wholly satisfactory answer to this problem and still leaves negligent tortfeasors in a similar situation facing different results based upon the nature of a third-party's independent conduct. But I believe this partial response will have to hold us until the legislature addresses this difficult area. If, and when it does, the legislature will have to decide whether and how to apportion responsibility while preserving the meaningfulness of the special duty to protect others from the wrongdoing of third-parties in this context.

In *Hutchins v. 1001 Fourth Avenue Associates*,¹⁴⁶ the Washington Supreme Court recently reaffirmed "the general rule that there is usually no duty to prevent a third party from causing physical injury to another, unless a 'special relationship exists between the defendant and either the third party or the foreseeable victim of the third-party's conduct.'"¹⁴⁷ In general, a duty to protect another from harm has been confined to special relationships in which "the plaintiff is typically in some respect particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over the plaintiff's welfare."¹⁴⁸ In such cases, the plaintiff's expectation of protection often arises because the relationship provides some economic advantage to the defendant.¹⁴⁹ Other exceptional relationships giving rise to a duty to protect are "custodial by nature, requiring the defendant to control his charge and to guard other persons against his dangerous propensities."¹⁵⁰ Both situations involve narrow exceptions to "the general rule . . . that a private person does not have a duty to protect others from the criminal [or intentional] acts of

146. 116 Wash. 2d 217, 802 P.2d 1360 (1991) (holding that a building owner has no generalized duty to provide security measures on the premises to protect passers-by from the risk of criminal assault).

147. *Id.* at 227, 802 P.2d at 1365-66 (quoting *Petersen v. State*, 100 Wash. 2d 421, 426, 671 P.2d 230, 236 (1983)). The *Hutchins* court also suggested that a duty to protect someone from the intentional misconduct of a third-party might also arise under exceptional circumstances, such as where a person creates "a special or peculiar temptation or opportunity" for intentional harm that involves "a high degree of risk of harm." *Id.* at 232, 802 P.2d at 1368 (emphasis in original).

148. PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 36, § 56, at 374 (footnote omitted); see also *Hutchins*, 116 Wash. 2d at 227-28, 802 P.2d at 1366.

149. PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 36, § 56, at 374.

150. *Id.* § 56, at 383 (footnote omitted). See also *Hutchins*, 116 Wash. 2d at 228-29, 802 P.2d at 1366-67.

third parties."¹⁵¹ Accordingly, the limited instances in which such an affirmative duty arises to protect one person from another ensure that this type of case will remain an isolated exception and seldom provoke a problem in the application of RCW 4.22.070.

d. Conclusion

Although the question of whether to hold a negligent tortfeasor jointly and severally liable with an intentional wrongdoer poses an interesting and complicated legal problem for the operation of RCW 4.22.070, it is unlikely to be of practical concern in any but the most unusual of cases. The general rule remains that an individual has no obligation to protect others from persons intending to cause harm. Under most circumstances, intentional wrongdoing will be regarded—either by the court as a matter of law or by the jury in practical fact finding—as a superseding cause breaking any link between the negligent tortfeasor's carelessness and the ultimate injury to the plaintiff.¹⁵² In sum, in most cases involving allegations that more than one defendant contributed to a single injury, the court or jury is likely to conclude that any defendant who is guilty of intentional wrongdoing is the one solely responsible for the harm to the plaintiff.

3. The Problem of the Indivisible Fault Case

Opponents of the movement toward comparative fault as a substitute for joint and several liability often illustrate their arguments by reference to troublesome and unusual cases in which it is logically impossible or very difficult to divide fault among multiple tortfeasors:

151. *Hutchins*, 116 Wash. 2d at 223, 802 P.2d at 1364.

152. *See, e.g.*, *Henry v. Merck & Co.*, 877 F.2d 1489, 1494-96 (10th Cir. 1989) (intentional or criminal conduct likely to be considered an independent and supervening cause of harm); *Muniz v. Flohern, Inc.*, 553 N.Y.S.2d 313, 315 (1990) ("the intervening criminal act of a third person will generally be deemed a superseding cause which severs the liability of the original tortfeasor"), *rev'd*, 568 N.Y.S.2d 725 (1991); *Pratt v. Thomas*, 80 Wash. 2d 117, 491 P.2d 1285 (1971) (owner of car, which was not locked and was later stolen, is not liable to those injured in collision with the car being driven by the thief). *See generally* RESTATEMENT (SECOND) OF TORTS § 448 (1965) (the act of a third person in committing an intentional tort is a superseding cause of harm, although the actor's negligent conduct created an opportunity for the intentional tortfeasor, unless the actor realized or should have realized at the time that such a situation would be created and a third person would avail him or herself of the opportunity to commit the tort).

The trier of fact may be able to roughly allocate fault (including cause) in those case[s] in which the negligence of two or more actors combined to cause a single indivisible result which neither alone would have caused. There are cases, however, in which two or more actors concurrently cause a single result which either actor alone would have caused.¹⁵³

Dean Prosser offered several examples of this type of situation. In one case, two defendants pass the plaintiff at the same time on motorcycles, frightening the plaintiff's horse; the horse then runs away and injures the plaintiff. In another case, separate fires set by two defendants merge and burn over the plaintiff's property, when either fire alone would have caused the damage.¹⁵⁴ In these cases, although there are two defendants, the actions of either acting alone would have achieved the same harmful result.

The problem of the indivisible fault case, while providing grist for interesting academic debate, is not frequently replicated in the real world. In most cases involving more than one culpable party, it is quite possible to make a meaningful comparison of the different degrees of responsibility of the different tortfeasors in terms of the offensiveness of the behavior and the proximity of the conduct to the harm caused. Under RCW 4.22.015, the comparison of fault "shall involve a consideration of both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages."¹⁵⁵ Cases "where the separate defendants are truly indistinguishable in their degree of culpability" are genuinely rare.¹⁵⁶ Such unusual cases certainly cannot serve as a foundation for a tort liability system.

What then shall we do on those unusual occasions when a case of true indivisible fault does arise? When two or more defendants, each acting independently,¹⁵⁷ commit negligent

153. Wiggins et al., *supra* note 13, at 238-39 (footnote omitted).

154. William L. Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413, 433 (1937).

155. WASH. REV. CODE § 4.22.015 (1991). See also Strassfeld, *supra* note 145, at 914-15 & n.9 (identifying Washington as a state that has adopted comparative causation as part of the comparative fault inquiry).

156. HUBER, *supra* note 44, at 217. See also Vecchione v. Carlin, 168 Cal. Rptr. 571, 576 (Sup. Ct. 1980) (referring to those "few situations" where there are concurring independent causes for a tortious injury, such that either cause operating alone would have been sufficient to cause the result).

157. If the tortfeasors are acting in concert then the case would fall within the

acts that by themselves would cause the entire harm to the plaintiff, the plaintiff almost invariably is an innocent party. In a situation where two defendants act independently and their actions do not concur or combine to cause the harm, but rather are independent and sufficient causes of the harm, it necessarily means that the defendants have been acting in isolation from each other and, likely, in isolation from the plaintiff as well. Thus, the case of indivisible fault among multiple tortfeasors should almost always involve an innocent plaintiff as a passive victim. Indeed, in each of the examples given by Dean Prosser, the plaintiff was without contributory negligence.¹⁵⁸ When the plaintiff is without fault, Paragraph (1)(b) preserves joint and several liability among all defendants against whom judgment is entered.¹⁵⁹ Unless one of the defendants is immune from liability or otherwise not joined to the action by the plaintiff, the plaintiff will be able to obtain full recovery from either defendant.

In the still rarer situation where there is indivisible fault among two or more tortfeasors, and where one of the tortfeasors cannot be joined to the action or the plaintiff somehow is also culpable, it is true that RCW 4.22.070 applied literally would nevertheless require apportionment of fault. If the plaintiff could establish that this was genuinely one of those exceptional cases where the tortfeasors are truly indistinguishable in fault (both in terms of conduct and causation), and no legitimate reason could be given for separating the responsibility in damages of those entities, perhaps one could argue that application of RCW 4.22.070 in that circumstance violates principles of due process or equal protection.¹⁶⁰

The rarity of such a case, however, makes it impossible to give this remote possibility much weight in the development of modern tort liability policy or in the interpretation and validity of RCW 4.22.070. Should the indivisible fault scenario arise more frequently or prove more problematic than I predict, the legislature might take that occasion to consider a narrow

express limitation in Paragraph (1)(a), which preserves full joint and several liability between parties acting in concert. WASH. REV. CODE § 4.22.070(1)(a) (1991). See also *infra* part III.E.1 (discussing vicarious liability for those acting in concert).

158. See *supra* text accompanying note 154.

159. WASH. REV. CODE § 4.22.070(1)(b) (1991).

160. See *Foundation for the Handicapped v. Department of Social and Health Services*, 97 Wash. 2d 691, 695, 648 P.2d 884, 887 (1982), cert. denied, 459 U.S. 1146 (1983) (a statute may be held unconstitutional only "as applied to a specific factual situation," and thus remains capable "of valid application in other circumstances").

exception. Any such exception should be carefully crafted to apply only in the instance of indivisible fault. The language should be drafted so as to foreclose any interpretation of the added exception as reintroducing joint and several liability into ordinary cases involving merely indivisible *harm*, rather than indivisible *fault*.

We must recognize and maintain the distinction between the rare case of truly indivisible responsibility and the common case in which it is merely alleged that the harm is indivisible. Through the adoption of comparative fault, the Washington State Legislature rejected the "tortured analysis" that "harm which is indivisible leaves no logical basis for apportionment."¹⁶¹ The unitary nature of the harm and the assignment of responsibility are two separate matters. When multiple proximate causes have been determined for a single injury, the trier of fact still must determine and apportion the responsibility based upon the varying degrees of culpability and causation among the actors. As commentators have explained: "It does not follow that simply because the *harm* is indivisible that there is no basis for apportionment. It is the *responsibility* for causing the harm which should be the focus of the inquiry."¹⁶² Initially through the adoption of comparative negligence between plaintiffs and defendants that have concurrently caused the harm, and subsequently through the enactment of RCW 4.22.070 to govern the accountability among multiple tortfeasors contributing to a single injury, Washington has adopted comparative fault as the touchstone for apportionment of responsibility in damages.¹⁶³

161. See Larry Pressler & Kevin V. Schieffer, *Joint and Several Liability: A Case for Reform*, 64 DEN. U.L. REV. 651, 677 (1988); see also *Stratton v. Parker*, 793 S.W.2d 817, 818 (Ky. 1990) (in contrast with the common law theory that "it was impossible to divide a single indivisible injury into parts and determine which part each of the joint tortfeasors was responsible for," several states have now adopted approaches that, "while recognizing that a single injury is indivisible . . . allocate among tortfeasors the degree of percentage of legal causation of an injury" and thereby make liability "depend upon the degree of fault of each").

162. Pressler & Schieffer, *supra* note 161, at 677 (footnote omitted).

163. See generally McLaughlin & Fisher, *supra* note 13 (Washington's adoption of comparative fault as a basis for apportionment of liability is a constitutionally valid legislative choice). Commentators have offered several approaches for weighing multiple causal factors as a means for apportioning liability. See generally Strassfeld, *supra* note 145 (concluding that comparative causation is a feasible means of apportioning legal responsibility for harm, through the combined use of two approaches: (1) judgments of counterfactual similarities (that is, using imaginative alternatives to the actual course of events to determine whether something similar to the event would have occurred in the absence of a particular cause); and (2) the

C. *The Nature of "Every Entity" to Which Fault Must Be Attributed Under the Statute*

RCW 4.22.070(1) establishes a general rule of "several only"¹⁶⁴ liability on the part of defendant tortfeasors; in other words, "a person should not be liable for more than his own proportionate share of the claimant's total damages."¹⁶⁵ That

comparative responsibility normative evaluation of causes based upon value judgments concerning the actors, their conduct, their states of mind, their respective capacities, the purposes sought by the activities, the interests affected, the foreseeability and magnitude of the risk, and other policy factors); Aaron D. Twerski, *The Many Faces of Misuse: An Inquiry Into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403, 413-14 (1978) (arguing that, in addition to comparative proximate causation, we should adopt a comparative cause-in-fact approach rather than "torture ourselves with an all or nothing rule in causation"; under this comparative cause-in-fact approach, we factor "the uncertainty of the causal connection into a fault apportionment" by allowing the jury "to consider the likelihood on a percentage basis that a party's activities caused harm") (emphasis in original)).

164. WASH. REV. CODE § 4.22.070(1) (1991).

165. Sisk, *supra* note 13, at 440. The statute refers to the liability of defendants as "several," which some commentators suggest is a misuse of the term. Harnetiaux, *supra* note 13, at 198 n.19; Brian P. Harnetiaux, *RCW 4.22.070, Joint and Several Liability and the Indivisibility of Harm*, 26 TRIAL NEWS (Washington St. Trial Lawyers Ass'n), Feb. 1991, p. 1, 16; Peck, *Washington's Partial Rejection*, *supra* note 2, at 339 n.20. These commentators state that the classical use of the term "several" indicated a tortfeasor's responsibility for the entire harm. *Id.* Whatever may have been the meaning of the term at common law, these commentators do acknowledge that the legislature applied the term "several" in the statute to limit a defendant's liability to its proportionate share of the damages. *Id.* However, a few plaintiffs' counsel in court papers have seized upon the supposed misuse of this term to argue that the legislature actually failed to modify joint and several liability at all in enacting RCW 4.22.070. The gist of the argument is that the term "several liability" at common law meant that a tortfeasor could be sued separately and held responsible for the entire amount of damages even if others might also be liable but had not been joined to the action. Thus, these plaintiffs' counsel argue that legislators, by selecting the term "several" liability in RCW 4.22.070(1), inadvertently retained the very type of full liability that they thought they were changing. This argument, of course, is frivolous. Whatever may have been the technical meaning assigned to the term "several" liability at common law, the meaning of the term in a statute must be drawn from its context in that statute. Subsection (1) provides for "several only" liability as part of a provision stating that judgment shall be entered against each defendant "in an amount which represents that party's proportionate share of the claimant's total damages." WASH. REV. CODE § 4.22.070(1) (1991). The context makes unmistakably clear that the term "several only" liability refers to liability that is limited to a defendant's proportionate share of the damages based on percentage of individual fault. As Mr. Harnetiaux recognizes, the legislature intended the term "several" in the statute to be "the equivalent of proportionate fault." Harnetiaux, *supra* note 13, at 198 n.19. See also Peck, *Washington's Partial Rejection*, *supra* note 2, at 339 n.20 (word "several" is used differently in the statute than at common law and refers to a tortfeasor's "proportionate share of the plaintiff's total damages"). Even if the context left any doubt, this legislative intent settles the matter. It is also significant that Washington is not alone in adopting the term "several" liability to achieve this purpose. For example, the California Fair Responsibility Act of 1986 also provides that, in

proportionate share is determined by the trier of fact's allocation of fault to "every entity" that contributed to the plaintiff's injury or damage. This is the rule that applies whenever the plaintiff is also at fault for the incident that led to the injury or damage.

Under Paragraph (1)(b),¹⁶⁶ if the plaintiff is determined to be without fault, the defendants found at fault by judgment remain jointly and severally liable for "the sum of their proportionate shares of the claimant[']s total damages."¹⁶⁷ Each defendant, thus, is fully responsible for its own share of the damages *and* for the proportionate shares of every other entity which has been joined as a defendant to the action and against whom a legitimate judgment of fault is entered.¹⁶⁸ The defendants are not, however, liable for that part of the damages attributable to the fault of an "entity" that has not been made a party defendant to the action or that was joined as a defendant but was released before judgment.¹⁶⁹

Accordingly, the nature of those "entities" to whom fault must be allocated under the statute, has direct consequence for the plaintiff's ability to obtain the full measure of damages. This follows from the fundamental premises of the statutory movement to a system of liability based upon comparative fault:

The cornerstone principle of a comparative fault system is that each person who contributes to cause an injury must

comparative fault cases, "the liability of each defendant for noneconomic damages shall be several only and shall not be joint." CAL. CIV. CODE 1431.2(a) (Supp. 1992). The California courts have had no difficulty recognizing that "several" liability indicates liability limited to a proportional share. *See, e.g.,* DaFonte v. Up Right, Inc., 828 P.2d 140, 144 (Cal. 1992); Evangelatos v. Superior Court, 753 P.2d 585 (Cal. 1988). *See also* ARIZ. REV. STAT. ANN. § 12-2506(A) (Supp. 1991) (providing that in tort actions, "the liability of each defendant for damages is several only and is not joint") *and* Bisailon v. Casares, 798 P.2d 1368 (Ariz. Ct. App. 1990) (applying Arizona statute as limiting defendant's liability to that percentage of the damages reflecting the defendant's percentage of fault); OR. REV. STAT. § 18.485(2) (1991) (liability of defendants for noneconomic damages "shall be several only and shall not be joint"). The "clincher" to any argument that "several only" in RCW 4.22.070 means something other than proportionate liability lies in the recent Washington Supreme Court decision in *Clark v. Pacificorp*, 118 Wash. 2d 167, 822 P.2d 162 (1991). In *Clark*, the court applied RCW 4.22.070 as requiring a tortfeasor to "pay its proportionate share of damages." *Id.* at 181, 822 P.2d at 169.

166. WASH. REV. CODE § 4.22.070(1)(b) (1991).

167. *Id.*

168. *See infra* part III.F (discussing Paragraph (1)(b)).

169. *See also infra* part III.C.1.c (discussing allocation of fault to entities released by the claimant) and part III.C.1.f (discussing allocation of fault to nonparties).

bear the burden of reparation for that injury in exact proportion to his share of the total fault which contributed to cause the injury. . . . [I]n order to achieve a fair distribution of the financial burden in a true comparative fault system, it is imperative that the fault of all culpable actors, whether or not they are parties to the legal action, be measured and assigned. To the extent that a given legal system ignores the fault of any tortfeasor, and shifts the financial burden from one culpable party to another, the fundamental principle of comparative fault is compromised.¹⁷⁰

1. The Meaning of "Entity"

RCW 4.22.070(1) provides in pertinent part:

In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to *every entity* which caused the claimant's damages, including the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities immune from liability to the claimant and entities with any other individual defense against the claimant.¹⁷¹

What is the meaning of this "entity" to which fault must be attributed by the finder of fact under Subsection (1)? I submit that the meaning of "entity" is simple and straightforward. It means "entity," nothing more, nothing less. The term needs no interpretation. By a dictionary definition, "entity" means anything with real and separate existence.¹⁷² In other words, the term "entity" "denotes anything that exists."¹⁷³

"Entity" is the broadest¹⁷⁴ possible word of inclusion for conveying the statutory mandate that every person, organiza-

170. Leonard E. Eilbacher, *Comparative Fault and the Nonparty Tortfeasor*, 17 IND. L. REV. 903, 903 (1984).

171. WASH. REV. CODE § 4.22.070(1) (1991) (emphasis added).

172. See, e.g., WEBSTER'S NEW COLLEGIATE DICTIONARY 377 (1981) ("entity" defined as including "something that has separate and distinct existence and objective or conceptual reality"); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 437 (1969) ("entity" defined as "[t]he fact of existence; being" and "[s]omething that exists independently, not relative to other things").

173. See *United States v. Angelilli*, 660 F.2d 23, 31 (2d Cir. 1981), cert. denied, 455 U.S. 945 (1982) (interpreting the term "entity" in the Racketeer Influenced and Corrupt Organizations Act).

174. See *Palestine Information Office v. Shultz*, 853 F.2d 932, 937 (D.C. Cir. 1988) (in interpreting the word "entity" in the Foreign Missions Act to include the Palestine Information Office, the court stated that "[t]he meaning of the word 'entity' in general usage is quite broad").

tion, corporation, unincorporated business, government or agency, or other being that contributed to the plaintiff's injury or damage must be part of the fault allocation equation. Indeed, as Professor Peck suggests, the broad term "entity" appears to encompass all but inanimate objects or forces of nature;¹⁷⁵ things as to which the concept of "fault" cannot have meaningful application.

Subsection (1) includes a number of examples of "entities" to which fault must be allocated by the trier of fact:

a. The Claimant or Person Suffering Injury or Damage

RCW 4.22.070(1) first lists "the claimant or person suffering personal injury or incurring property damage."¹⁷⁶ Thus, the trier of fact must determine the percentage of total fault that is attributable to the plaintiff, the person on whose behalf the plaintiff is suing (such as in a guardianship action), or the person whose injury forms the basis for the lawsuit (such as in a wrongful death, survival, or loss of consortium action). In this respect, Subsection (1) simply restates the principle of comparative fault that had earlier been enacted in the comparative negligence statute.¹⁷⁷

175. Peck, *Washington's Partial Rejection*, *supra* note 2, at 243 (suggesting that "'entity' must be a juridical being capable of fault, and does not include inanimate objects or forces of nature"); Cornelius J. Peck, *Reading Tea Leaves: The Future of Negotiations for Tort Claimants Free From Fault*, 15 U. PUGET SOUND L. REV. 335, 343 (1992) (same) [hereinafter Peck, *Reading Tea Leaves*].

176. WASH. REV. CODE § 4.22.070(1) (1991).

177. The comparative negligence statute, RCW 4.22.005, previously provided a proportionate diminution of the plaintiff's recovery based upon the plaintiff's contributory fault. WASH. REV. CODE § 4.22.005 (1991). Similarly, if the plaintiff's action was derivative in nature from another person's harm—such as in a survival action brought on a decedent's behalf by the estate or a wrongful death action brought by the surviving beneficiaries—the recovery would be reduced to allow for the comparative negligence of the person whose injury or death formed the basis of the action. *Ginochio v. Hesston Corp.*, 46 Wash. App. 843, 733 P.2d 551 (1987) (imputing negligence of decedent to reduce recovery in survival action by estate and wrongful death action by decedent's wife); *Griffin v. Gehret*, 17 Wash. App. 546, 564 P.2d 332 (1977) (parent's recovery for wrongful death must be reduced to allow for minor decedent's comparative negligence). See also *Brown v. Spokane County Fire Protective Dist. No. 1*, 21 Wash. App. 886, 586 P.2d 1207 (1978) (recovery of wrongful death beneficiary must be reduced by contributory negligence of beneficiary in contributing to cause of decedent's death). Under RCW 4.22.020, "[i]n an action brought for wrongful death or loss of consortium, the contributory fault of the decedent or injured person shall be imputed to the claimant in that action." WASH. REV. CODE § 4.22.020 (1991).

b. *Defendants and Third-party Defendants*

Subsection (1) requires allocation of fault to other parties joined in the action, including defendants and third-party defendants.¹⁷⁸ Anyone joined to a lawsuit, whether named as a defendant by the plaintiff or impleaded as a third-party defendant by the defendant (or, for that matter, added as a fourth-party defendant by the third-party defendant), shall be added to the calculation of the total percentage of fault.

Of course, should the court determine by adjudication on the merits that a defendant or third-party defendant must prevail in the action either before or at trial, then there is no fault to be allocated to that particular "entity." For example, in the Indiana case of *Bowles v. Tatom*,¹⁷⁹ which involved application of a similar comparative fault statute, several defendants originally joined in the action were dismissed at trial at the close of the plaintiff's case.¹⁸⁰ The remaining defendant in the case contended that the dismissal of those parties did not preclude the assessment of fault against them because the statute provided for allocation of fault to nonparties.¹⁸¹ The Indiana Supreme Court rejected this defendant's argument that the dismissed defendants reverted to nonparty status. The court's ruling depended, in part, upon provisions in the Indiana statute concerning the definition of "nonparty" and placing the burden of proof upon a defendant to assert that a nonparty is at fault,¹⁸² provisions that are not paralleled in the Washington statute. However, the result also follows from the fact that the dismissal of the defendants constituted an adjudication on the merits. When the evidence is insufficient to allow the case for the liability of certain defendants to go to the trier of fact, the resulting dismissal is a final determination that the dismissed defendants are not at fault in any respect or to any degree. Simply put, a defendant prevailing on the merits is removed from the picture.

An adjudication in favor of one defendant has rather direct consequences for the other defendants. As the Indiana court advised in *Bowles*:

In cases where motions at the conclusion of the plaintiff's

178. WASH. REV. CODE § 4.22.070(1) (1991).

179. 546 N.E.2d 1188 (Ind. 1989).

180. *Id.* at 1189.

181. *Id.*

182. *Id.* at 1189-90.

evidence threaten to remove a party that a remaining defendant claims should remain a party or nonparty for purposes of allocation of fault, such remaining defendant may and should oppose the motion or request that any ruling be delayed until the remaining defendant has an opportunity to present his evidence. In such event, the nature and purpose of the [comparative fault statute], together with the efficient administration of justice, would normally result in a trial court's refusal to prematurely dismiss and discharge such parties.¹⁸³

In sum, each defendant to a lawsuit now has an emphatic interest in the resolution of the merits of accusations of culpability against other parties to the action. If one defendant seeks to be released from the action (on the merits of the case rather than because of an immunity or individual defense)—whether on motion to dismiss, summary judgment, or by motion for directed verdict or judgment notwithstanding the verdict at trial—every other defendant may be directly affected. The removal of any defendant from the fault allocation equation leaves the remaining defendants potentially at risk for greater ultimate responsibility in damages.

For that reason, each defendant must regard every other defendant as a potential adversary.¹⁸⁴ For tactical reasons, a plaintiff may choose not to present evidence against a particular defendant or elect not to oppose a defendant's motion for dismissal.¹⁸⁵ Or a plaintiff may simply fail to competently and

183. *Id.* at 1190.

184. *See Sewell v. Wilson*, 684 P.2d 1151, 1157-58 (N.M. Ct. App. 1984) (separate peremptory challenges to jurors were properly granted to each defendant where the interests of the defendant were antagonistic to that of other defendants under a comparative fault approach, since multiple defendants will seek to establish the fault of other defendants).

185. There are many reasons why a plaintiff might not press a case against a particular defendant, even if that defendant is indeed partially responsible for the plaintiff's harm. A plaintiff may find that a particular defendant is without sufficient resources to pay any judgment (i.e., is "judgment-proof"). A plaintiff may wish to avoid the necessity of accusing a sympathetic defendant of wrongdoing. A plaintiff may have a relationship with a particular culpable person, such as a spouse or parent, and thus prefer not to charge that person with wrongdoing. A plaintiff may wish to avoid the effort of proving partial fault by each of a number of actors, instead hoping that the list of defendants can be narrowed so that the entire recovery can be obtained from remaining defendants. A plaintiff may believe that proving responsibility by a particular defendant may be more difficult than proving the fault of another defendant, even if actually less responsible. A plaintiff may be concerned that a particular defendant, if pursued, would present a more vigorous or skilled defense than other defendants. For any of these reasons, a plaintiff might prefer that a particular defendant be dropped from the case—provided there is a judgment

adequately press the claim against a particular defendant. In such events, the remaining defendants must be given the opportunity to be heard and to fill the gap in the evidence left by the plaintiff. Thus, when a single defendant files a motion to dismiss for failure to state a claim or for summary judgment or for dismissal at trial, the other defendants as well as the plaintiff are entitled to respond. The trial court should not prematurely grant any single defendant's motion on the merits of a case without considering the interests of both the plaintiff and the other defendants.

c. Entities Released by the Claimant

Subsection (1) provides for an allocation of fault to "entities released by the claimant."¹⁸⁶ Under Paragraph (1)(b),¹⁸⁷ when a plaintiff is found to be without fault, joint and several liability is preserved, but only among those defendants to the action against whom judgment is entered. Because released entities, as well as other nonparties, are not retained in the action for the entry of judgment, that share of the fault is not part of the joint and several liability award. Thus, even if the plaintiff is innocent of contributory fault, the remaining defendants to the action will not be held jointly and severally liable for the percentage share of fault attributable to the released entity. If the plaintiff voluntarily chooses to release a responsible entity from liability, either as an act of charity or friendship or in the course of a settlement, "that plaintiff is hardly in a position to demand that the share of damages attributable to the released entities be imposed on others. The plaintiff remains free to refuse a release and, instead, retain that entity as a party."¹⁸⁸

To evade this operation of the statute, plaintiffs' attorneys have recently suggested that a settlement with a single defendant in a multiple defendant case could be structured to retain the defendant in the case until entry of the judgment, but with a covenant not to execute that judgment against the particular defendant.¹⁸⁹ In this way, the defendant, although actually released from liability by agreement with the plaintiff, would

(uncontested by the plaintiff) that the defendant is not at fault—so that the entire fault will be allocated only among the remaining defendants.

186. WASH. REV. CODE § 4.22.070(1) (1991).

187. *Id.* § 4.22.070(1)(b).

188. Sisk, *supra* note 13, at 470.

189. Heller, *supra* note 18, at 13; Kilpatrick, *supra* note 18. See also Peck, *Reading*

supposedly remain one of those "defendants against whom judgment is entered."¹⁹⁰ Thus, assuming the plaintiff is without contributory fault, the other nonsettling defendants would purportedly remain jointly and severally liable for the share of the settling defendant. Through this mechanism, the plaintiff would hope to avoid the risk of a poor settlement with the single defendant, in that the amount of the settlement might not correspond to the percentage of fault ultimately attributed to that settling defendant by the finder of fact.

While certainly a clever procedural suggestion, I do not think this evasion of the statute can succeed. To begin with, as a practical matter, few settling defendants are likely to agree to have judgment entered against them after reaching a settlement agreement. Even if an agreement not to execute the judgment is entered with the plaintiff, the defendant would still have a judgment recorded against it as a public record. A covenant not to execute "does not amount to a release or satisfaction of the debt" and "does not extinguish the cause of action or the judgment."¹⁹¹ The effect upon one's ability to obtain credit, transact business, or transfer real property is obvious.¹⁹²

Most importantly, RCW 4.22.070 must be interpreted in a manner consistent with its manifest object as expressed in the language of the statute.¹⁹³ Subsection (1) expressly provides for allocation of fault to "released entities"¹⁹⁴ and then deliberately states that the limited form of joint and several liability, which is available under Paragraph (1)(b) when a plaintiff is without fault, applies only among defendants against whom judgment is entered.¹⁹⁵ The statute, read in full context, plainly contemplates that "released entities" will *not* be among

Tea Leaves, *supra* note 175, at 343-44 (characterizing this "scheme" as "imaginative" but concluding it will "fail to obtain its objective").

190. WASH. REV. CODE § 4.22.070(1)(b).

191. *Ivy v. Pacific Auto. Ins. Co.*, 320 P.2d 140, 147 (Cal. Ct. App. 1958).

192. In *Ivy*, the court held that an attorney had committed malpractice by stipulating to a judgment without the client's consent, notwithstanding that the judgment was obtained with a covenant not to execute the judgment against the client and to collect the balance from an insurance company. 320 P.2d at 145-48. The client had suffered harm by the mere entry of the judgment because he had thereafter been unable to transact business and because his credit had been impaired. *Id.*

193. See Philip A. Talmadge, *Product Liability Act of 1981: Ten Years Later*, 27 GONZ. L. REV. 153, 165 (1991/92) (arguing that contingent settlement agreements that undermine the purpose of statutory tort reform are void as against public policy).

194. WASH. REV. CODE § 4.22.070(1) (1991).

195. *Id.* § 4.22.070(1)(b).

those as to whom judgment is entered. It is therefore illogical to hold a nonsettling defendant liable for the share of loss attributable to a settling entity simply because the plaintiff and the settling defendant structure their arrangement in a particular manner.

Indeed, Professor Peck concludes that this scheme will fail because it mistakenly "assumes that a contract not to execute is not a release within the meaning of RCW 4.22.070(1)."¹⁹⁶ He notes that RCW 4.22.060, which governs settlement agreements, treats "a release" and a "covenant not to enforce judgment"¹⁹⁷ as "being interchangeable for the purpose of determining the effect of a settlement agreement."¹⁹⁸ Moreover, as Professor Peck observes, Washington courts have refused to blindly accept recitals of a document in determining whether it was properly characterized as a release or a covenant not to sue.¹⁹⁹ Accordingly, he predicts "that a court will treat a contract not to execute as a release or settlement under RCW 4.22.070, in spite of recitals stating that an agreement is only a contract not to enforce a judgment."²⁰⁰

In addition, the term "judgment" in Paragraph (1)(b) must also be understood in the context of the statute. This provision of the statute preserves a limited form of joint and several liability when the plaintiff is without contributory fault. But the provision also limits that joint and several liability to those defendants who are truly subject to liability to the plaintiff, *i.e.*, those defendants "against whom judgment is entered."²⁰¹ The thrust of the provision is that, if a plaintiff is innocent of any culpability, joint and several liability remains among those who are still party to the case when it concludes with an adverse judicial disposition.

The term "judgment" in this context plainly denotes an *adverse* ruling with concrete, detrimental consequences for the judgment-debtor. A defendant who had previously obtained a settlement with a covenant preventing execution of the judgment cannot truly be said to have had an adverse judgment entered against it. The word "judgment" in Paragraph (1)(b)

196. Peck, *Reading Tea Leaves*, *supra* note 175, at 343-44.

197. WASH. REV. CODE § 4.22.060 (1991).

198. Peck, *Reading Tea Leaves*, *supra* note 175, at 344.

199. *Id.* (citing *Haney v. Cheatham*, 8 Wash. 2d 310, 318, 111 P.2d 1003, 1006 (1941); *Rust v. Schlaitzer*, 175 Wash. 331, 336, 27 P.2d 571, 573 (1933)).

200. *Id.*

201. WASH. REV. CODE § 4.22.070(1)(b) (1991).

thus is similar in meaning to the term "final decision" in 28 U.S.C. 1291,²⁰² which provides for appellate jurisdiction in the federal appellate courts over "final decisions" in the district courts. The federal courts have declared that a final decision is appealable only if it is adverse to the party seeking the appeal.²⁰³ A party who has stipulated to a judgment or is the beneficiary of an agreement not to enforce the judgment would not have a sufficient adverse interest to prosecute an appeal. Nor would that person be the subject of "an involuntary adverse judgment"²⁰⁴ with concrete, detrimental consequences such that the share of fault attributable to that person would be part of the joint and several liability responsibility of other nonsettling defendants. In sum, only those defendants truly subject to "an involuntary adverse judgment" remain in the boat together when the lawsuit comes to shore for entry of judgment.

In any event, the trial court should decline to permit such circumvention of the statute. The court should insist that any such covenant not to execute a judgment be revealed prior to entry of final judgment,²⁰⁵ and then it should refuse to enter judgment against a party that is not truly subject to its consequences. The court retains the power of judgment and may refuse to exercise that power when the parties seeking such a judgment are attempting to manipulate the judicial process to an improper end.

d. Entities Immune From Liability

Among the most significant of its reforms, the Tort Reform Act of 1986 relieves a partially responsible defendant from liability for the actions of another tortfeasor that possesses an immunity from liability to the plaintiff. Under Subsection (1), fault must be allocated by the trier of fact to "entities immune from liability to the claimant."²⁰⁶ Under Paragraph (1)(b), even when the plaintiff is without contribu-

202. 28 U.S.C.A. § 1291 (West Supp. 1992).

203. See *Seidman v. City of Beverly Hills*, 785 F.2d 1447, 1448 (9th Cir. 1986) (parties cannot appeal unless there has been "an involuntary adverse judgment against" them).

204. See *id.*

205. Under RCW 4.22.060(1), parties entering into a settlement are obliged to give five days written notice of that intent to all other parties and the court. WASH. REV. CODE § 4.22.060(1) (1991).

206. WASH. REV. CODE § 4.22.070(1) (1991).

tory fault, the defendants are jointly and severally liable only for the sum of their own proportionate shares of the total damages.²⁰⁷ Consequently, defendants to a joint and several liability judgment are never liable for the share of fault attributable to nonparties, including those entities that are immune from liability.²⁰⁸ The policy justification for this change in the law has been stated in my earlier article on the statute:

With respect to entities that are immune from liability, a social judgment has been made that a particular type of entity should not be subject to suit. There is no compelling basis for requiring a defendant to bear the cost of this social policy judgment and pay that portion of damages attributable to the fault of the immune entity. If the plaintiff has been aggrieved in such circumstances, the complaint goes to the policy decision to afford immunity to that entity. The plaintiff cannot legitimately demand that the difference in award be made up by imposing additional liability upon a party defendant who was not immune from suit.²⁰⁹

The most common example of the operation of this statutory change occurs in the situation where an employee is injured and culpability lies with both the employer, immune from liability under the Industrial Insurance Act,²¹⁰ and a third-party that is not immune, such as the manufacturer of a machine or equipment with which the employee was working.²¹¹ Under prior law, the third-party could be held liable for the entire loss, notwithstanding that the employer had contributed to the accident and that the employee was able to collect workers' compensation benefits as reparations for the employer's share of the fault. Today, the employer remains immune from liability, and the employer's share of the fault continues to be compensated through the industrial insurance system. However, with the enactment of RCW 4.22.070, the third-party tortfeasor may allocate fault to the employer and thereby reduce its own percentage share of the damage liability to the plaintiff.

207. *Id.* § 4.22.070(1)(b).

208. *See also infra* part III.F (discussing the limited form of joint and several liability among defendant as to whom judgment is entered in favor of an innocent plaintiff).

209. *Sisk, supra* note 13, at 451 (footnotes omitted).

210. WASH. REV. CODE § 51.04.010 (1991).

211. *See also infra* part IV.B (discussing conjunction of worker's compensation statute and the Washington comparative fault statute).

In *Clark v. Pacificorp*,²¹² the Washington Supreme Court recognized the application of RCW 4.22.070 in the context of a suit by an injured employee against a third person when the immune employer's fault is also at issue. Quoting Professor Peck, the court stated that "the primary purpose of the provision permitting allocation of fault to an entity with immunity was to provide relief for defendants in workers' compensation third party tort actions."²¹³ The court ruled that subjecting every entity—including the employee beneficiary under the workers' compensation system, the immune employer, and the third-party being sued—is fair in light of the interests at stake.²¹⁴ Courts in other jurisdictions, which have adopted comparative fault statutes providing for allocation of fault to nonparties, have rather uniformly concurred in the conclusion that a third-party tortfeasor sued by an employee should be able to allocate fault to a nonparty, immune employer.²¹⁵

Beyond its application to employers immune under the workers' compensation system, the provision for allocation of fault to immune entities sweeps still more broadly. For example, parents are generally immune from liability to their children for injuries resulting from negligent supervision.²¹⁶ However, if a third-party were sued for injuries to the child, and the parents were responsible in part for that injury, the third-party would be entitled to allocate a share of the fault to the parents.²¹⁷ In the Kansas case of *Lester v. Magic Chef, Inc.*,²¹⁸ a child injured on a stove brought suit against the manufacturer of the stove. The contributory culpability of the child's parents was unmistakable. The child had been left

212. 118 Wash. 2d 167, 822 P.2d 162 (1991).

213. *Id.* at 180, 822 P.2d at 169 (quoting Peck, *Washington's Partial Rejection*, *supra* note 2, at 245).

214. *Id.* at 180-81, 822 P.2d at 169.

215. *See, e.g.*, *Dietz v. General Electric Co.*, 821 P.2d 166 (Ariz. 1991); *DaFonte v. UpRight, Inc.*, 828 P.2d 140 (Cal. 1992); *Williams v. White Mountain Constr. Co.*, 749 P.2d 423, 429 (Colo. 1988); *Pape v. Kansas Power & Light Co.*, 647 P.2d 320 (Kan. 1982); *Taylor v. Delgarno Transp. Inc.*, 667 P.2d 445 (N.M. 1983); *Bode v. Clark Equip. Co.*, 719 P.2d 824 (Okla. 1986); *Mills v. MMM Carpets, Inc.*, 1 Cal. Rptr. 2d 813 (Cal. Ct. App. 1991). *But see Hill v. Metropolitan Trucking, Inc.*, 659 F. Supp. 430, 434 (N.D. Ind. 1987) (Indiana comparative fault statute expressly excludes "the employer of the claimant" as a nonparty to whom fault may be allocated).

216. *Baughn v. Honda Motor Co.*, 105 Wash. 2d 118, 712 P.2d 293 (1986); *Jenkins v. Snohomish County Pub. Util. Dist. 1*, 105 Wash. 2d 99, 103-06, 713 P.2d 79 (1986).

217. *Brown v. Keil*, 580 P.2d 867 (Kan. 1978) (under comparative fault statute, intra-family immunity rules do not preclude consideration of the immune family member's negligence in apportionment of fault).

218. 641 P.2d 353 (Kan. 1985).

unsupervised. She climbed up on the stove to get a cookie, which her parents stored above the stove. The girl accidentally turned on a burner on the stove that set her clothing on fire. The stove was old and apparently had not been properly maintained. The parents knew the burner could be turned on accidentally by brushing against it, and yet they stored cookies up above the stove where the child knew they were.²¹⁹ Under a comparative fault statute similar to the Washington enactment, the Kansas Supreme Court held that the third-party manufacturer could properly allocate fault to the parents for their negligent supervision of the child.²²⁰

This kind of result has been criticized as effectively imputing the negligence of the parents to the child.²²¹ This is not the case. No negligence is imputed to the child, nor is the child limited in his or her ability to recover from a third-party to the full extent of that third-party's fault. The third-party simply will not be held liable for the share of the harm caused by another party. As I have said previously, "it is not apparent why another party should be held responsible for the parent's proportionate responsibility simply because of the fortuitous circumstance that one of the culpable parties was the parent of the injured plaintiff."²²²

In cases where the child is without fault, Professor Peck suggests that the parents could waive their immunity and be joined to the lawsuit in order to allow the child to take advantage of the limited joint and several liability provision.²²³ If the parents agree not to plead immunity, Professor Peck argues that the other defendants should not be able to have the parents dismissed on jurisdictional grounds.²²⁴ He fears, however, that the defendants may be able to achieve a dismissal before entry of judgment on the grounds that joinder of the parents interferes with the defendants' substantive right under the statute to name other entities for the purpose of limiting liability.²²⁵

If the joinder of the parents as defendants to a lawsuit by a child against a third-party is a mere procedural ploy with no

219. *Id.* at 354.

220. *Id.* at 355.

221. Peck, *Washington's Partial Rejection*, *supra* note 2, at 246.

222. Sisk, *supra* note 13, at 452 n. 86.

223. Peck, *Washington's Partial Rejection*, *supra* note 2, at 245.

224. *Id.*

225. *Id.*

true consequences, then the parents cannot properly be made part of the joint and several liability equation. Paragraph (1)(b) provides for joint and several liability among those defendants joined to that action against whom judgment is entered.²²⁶ As stated earlier, the term "judgment" in Paragraph (1)(b) denotes an adverse disposition with concrete detrimental consequences for the defendant.²²⁷ The statute does not permit, and the court should not sanction, the manipulation of the judicial process to hold a defendant jointly and severally liable with another entity who is not truly subject to the adverse consequences of the judgment.

However, I believe that would not be the case if parents of an injured child truly waived their immunity to be joined as defendants to an action against a third-party tortfeasor. But the waiver of immunity would have real consequences. First, the parents would actually be subject to an enforceable judgment in favor of their own child. The judgment would be of public record, with attendant consequences for credit and property transactions. The child, at least upon emancipation, would be entitled to execute it. Second, the parents' choice to waive their immunity could not be conditional or partial; a party cannot pick and choose which aspects of the statute they wish to take advantage of and which they wish to avoid. A waiver of parental immunity for the purpose of being held liable to a judgment under Paragraph (1)(b) means that the immunity from liability has been surrendered for all purposes related to the action. Thus, the traditional immunity of parents from liability for contribution to third-party tortfeasors²²⁸ would be waived as well. If judgment was entered against the parents and the third-party defendants, and the child executed the entire judgment against the jointly and severally liable third-party defendant, that defendant could fairly insist upon contribution from the parents. The parents' contribution would reflect the parents' adjudicated share of the fault.²²⁹

226. WASH. REV. CODE § 4.22.070(1)(b) (1991).

227. See *supra* part III.C.1.c (discussing allocation of fault to entities released by the claimant).

228. *Baughn v. Honda Motor Co.*, 105 Wash. 2d 118, 119, 712 P.2d 293, 294 (1986).

229. RCW 4.22.070 itself mandates this result. In Subsection (2), the statute provides that if any defendant is held jointly and severally liable under Paragraph (1)(b) (where the plaintiff is not at fault and the defendant is one of those against whom judgment is entered), then that defendant shall have a right to contribution against another jointly and severally liable defendant pursuant to RCW 4.22.060-070. WASH. REV. CODE § 4.22.070(2) (1991). In sum, any defendant who is among those

In sum, the parents' decision to waive immunity could carry consequences that would not make this choice worth the perceived benefits to be obtained by taking advantage of the limited joint and several liability approach in Paragraph (1)(b). As with other schemes to avoid the comparative responsibility thrust of the statute, attempts at evasion of the statutory purpose are not likely to prove successful. If a plaintiff's goal is to structure the disposition of the case so as to leave a defendant liable for the responsible share of another entity who is not truly subject to the power of the court to form an effective judgment, the statute by its terms and intent forecloses the scheme.

Professor Peck points out that a similar situation arises when the actions of one spouse combine with those of a third-party tortfeasor to cause an injury to the other spouse.²³⁰ Because there is no longer a general interspousal immunity from liability,²³¹ the problem is not one involving allocation of fault by the third-party tortfeasor to an immune nonparty. However, Professor Peck argues that allocation of fault to the culpable spouse, like allocation of fault to the negligent parents of an injured child, amounts to imputation of the negligence of one spouse to the other.²³² RCW 4.22.020 expressly provides that "[t]he contributory fault of one spouse shall not be imputed to the other spouse . . . to diminish recovery in an action by the other spouse."²³³ Professor Peck accordingly suggests the Tort Reform Act of 1986 creates a direct statutory conflict.²³⁴ I disagree.²³⁵

The allocation of fault to all responsible entities mandated by RCW 4.22.070 and the imputation of one individual's negligence to another are distinctly different matters. For example,

against whom a joint and several liability judgment is entered under Paragraph (1)(b) constitutes "another jointly and severally liable defendant" who is a proper subject of a claim for contribution pursuant to Subsection (2). See also *infra* part III.G (discussing Subsection (2)).

230. Peck, *Washington's Partial Rejection*, *supra* note 2, at 246-49.

231. *Freehe v. Freehe*, 81 Wash. 2d 183, 500 P.2d 771 (1972); *Vasey v. Snohomish County*, 44 Wash. App. 83, 721 P.2d 524 (1986).

232. Peck, *Washington's Partial Rejection*, *supra* note 2, at 246-47.

233. WASH. REV. CODE § 4.22.020 (1991).

234. Peck, *Washington's Partial Rejection*, *supra* note 2, at 247.

235. To the extent that there is any conflict, and I submit that there is none, the later enacted reforms established in the 1986 Act must prevail over the earlier and inconsistent provisions of RCW 4.22.020. RCW 4.22.070 is explicit and mandatory in its command that fault be allocated to "every entity," *Clark v. Pacificorp*, 118 Wash. 2d 167, 181, 822 P.2d 162, 170 (1991), and therefore must take precedence.

Professor Peck poses a hypothetical in which "the injured spouse was a passenger in an automobile which collided with another through the combined negligence of the other driver and the driver-spouse."²³⁶ Under Subsection (1), "the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages."²³⁷ Thus, the trier of fact must compare the fault of the injured passenger-spouse, the driver-spouse, and the third-party driver. In the event that the injured spouse somehow had contributed to the fault, such as by distracting the driver-spouse or bumping the wheel of the car,²³⁸ the liability of the third-party driver will be several only and limited to that driver's own individual share of the responsibility.

This result does not amount to any imputation of the driver-spouse's fault to the injured spouse; it simply reflects the equitable principle that the third-party driver will be held responsible only for the percentage of the fault which he or she caused. The fact that a married couple forms a common economic unit and any reduction in recovery will affect both members of that unit is a collateral matter to the question of fault for the accident. There is no apparent reason why a third-party driver who is only partially at fault for an accident should be held liable for the responsible share of another driver simply because that other driver is the spouse of the injured plaintiff.²³⁹

If the injured spouse in the automobile accident is innocent of contributory fault, as is ordinarily the case when a passenger is injured, the liability of the defendants against whom judgment is entered remains joint and several. Thus, the innocent spouse is fully entitled to take advantage of the form of

236. Peck, *Washington's Partial Rejection*, *supra* note 2, at 248.

237. WASH. REV. CODE § 4.22.070(1) (1991).

238. *E.g.*, *Geschwind v. Flanagan*, 65 Wash. App. 207, 828 P.2d 603 (1992) (passenger who watched driver consume numerous alcoholic drinks and bump cars in front and behind as they left the last location was contributorily negligent in riding with the obviously intoxicated driver); *Griffin v. Gehret*, 17 Wash. App. 546, 564 P.2d 332 (1977) (passenger was 50 percent negligent in automobile accident for grappling and fighting over wheel with driver).

239. In *Messmer v. Teacher's Ins. Co.*, 588 So. 2d 610 (Fla. Dist. Ct. App. 1991), the Florida Court of Appeals ruled that the Florida comparative fault statute mandated assigning fault to the plaintiff's husband who was the driver of the automobile in which the plaintiff was a passenger, notwithstanding Florida's continued adherence to interspousal immunity. The court stated, in words fully applicable to the Washington context, that the comparative fault statute must be interpreted in light of the legislative intent "to implement a system of equating fault with liability." *Id.* at 612.

joint and several liability that is expressly preserved for the plaintiff who is without fault. In other words, absolutely no fault is imputed to the passenger-spouse. If the negligence of the driver-spouse were actually imputed to the passenger-spouse, the injured spouse would not be treated as an innocent plaintiff entitled to the benefits of Paragraph (1)(b). Instead, the statute extends its benefits to the innocent plaintiff spouse, as much as to any nonculpable claimant. In sum, by its very terms and operation, RCW 4.22.070 does not provide for any imputation of negligence from one spouse to another, or, for that matter, from a parent to a child.

In the unique context where one spouse is partially at fault for an injury to the other spouse, the economic realities of the marital relationship do indeed raise some interesting problems. None of these problems, however, are caused by the third-party tortfeasor or raise any basis for holding that third-party responsible for a greater share of the fault than RCW 4.22.070 would command in any other context. Moreover, spouses may make choices to legitimately take advantage of the provisions of RCW 4.22.070, provided they are also willing to accept the consequences for those elections.

Continuing with the automobile accident hypothetical, Professor Peck outlines those choices and consequences in words that I cannot improve upon:

If a plaintiff is free from fault, liability of the defendants is joint and several for the sum of their proportionate shares of a plaintiff's total damages. It may, therefore, be advantageous for the injured spouse to file suit against the negligent spouse as well as the other driver for the purpose of including the share of the damages of the negligent spouse in the total for which there is joint and several liability. Indeed, to do so would make an even stronger case that the injured spouse was entitled to recover damages for one-half of the lost earning capacity as separate property because that would be the relief to which the injured spouse was entitled in the action against the spouse at fault. Joining the spouse at fault would also preclude reducing the damages recoverable as separate property for pain and suffering or loss of consortium which would result from allocating a share of those damages to the spouse at fault if that spouse were not a party to the suit. The injured spouse need not seek satisfaction of the judgment from his or her spouse but may

instead proceed to obtain that satisfaction from some other defendant.

Of course, if the injured spouse does obtain satisfaction from a defendant other than the spouse at fault, the couple must consider the possibility that the satisfying defendant will seek contribution from the spouse at fault, as the satisfying defendant is entitled to do under the 1986 statute. If the couple has substantial community assets the amount lost in paying contribution may equal the gain from avoiding the diminution of an allocation of fault to the spouse as a non-joined entity. But if the couple does not have substantial community assets, and if the recovery by the injured spouse is characterized as separate property in accordance with the court of appeals' recent decision, the couple will have much to gain from a suit which includes the spouse at fault as a defendant. The other defendant will not be able to recover contribution from that part of the recovery obtained by the injured spouse as separate property, and the negligent spouse may free future earnings by obtaining a discharge in bankruptcy.²⁴⁰

In conclusion, when a culpable entity is immune from liability, the fault attributable to that entity will nevertheless be allocated to it and will not be shifted to the other defendants who are amenable to suit. That share of the loss will remain where it falls—on the plaintiff—because of the societal judgment that a particular entity is to be protected from liability. If, however, an immune entity decides to truly waive its exemption and accepts the full consequences of being adjudicated a responsible tortfeasor, then an innocent plaintiff would be entitled to a judgment of joint and several liability among all of the defendants, including the share of fault attributable to the entity that has surrendered its immunity.

e. Entities With an Individual Defense

Subsection (1) also provides for allocation of fault to "entities with any other individual defense against the claimant."²⁴¹ As with released and immune entities, entities that are dismissed from an action because of an individual defense will not be part of the equation for limited joint and several liability under Paragraph (1)(b) of the statute. By "*individual defense*," the statute means a defense, other than one on the

240. Peck, *Washington's Partial Rejection*, *supra* note 2, at 248-49.

241. WASH. REV. CODE § 4.22.070(1) (1991).

merits, which is unique to that individual entity. Included would be such threshold defenses as the statute of limitations, inadequate service of process, or absence of personal jurisdiction over that entity.

In my earlier article, I stated the policy justification for this provision:

[I]f an entity escapes liability to the plaintiff because of an individual defense, there is no basis for shifting the burden of that share of liability to another defendant. Ordinarily, the availability of an individual defense is attributable to an error or omission by the plaintiff. To use a common individual defense as an example, if the plaintiff is unable to sue a potential defendant because the statute of limitations has run, it is entirely equitable to require the plaintiff to bear any losses that result from the failure to file a timely action. Indeed, it would be unjust to require other defendants to bear the burden of the plaintiff's negligence in failing to preserve the right to recover against that individual defendant.²⁴²

The same reasoning applies to other individual defenses. If, for example, a plaintiff has failed to properly serve a particular defendant, the fault for the problem lies at the plaintiff's own doorstep.

With respect to the possibility that personal jurisdiction could not be obtained over a responsible entity residing outside of the state, the problem is likely an "illusory one."²⁴³ Professor Peck correctly notes that, "considering the broad interpretation which the Washington Court has given to the Washington long-arm statute, [it is] unlikely that an entity outside the state could not be made subject to the personal jurisdiction of a Washington court."²⁴⁴ And in the rare case where personal jurisdiction could not be obtained over an individual defendant in Washington, the plaintiff ordinarily will have an available forum elsewhere. No defendant should be held liable for the fault of another entity merely because the plaintiff has chosen a forum that is not suited for all possible

242. Sisk, *supra* note 13, at 451. See also Eilbacher, *supra* note 170, at 912 ("a defendant should not be penalized for a plaintiff's lack of diligence in identifying and suing each tortfeasor").

243. Sisk, *supra* note 13, at 469 n.172.

244. Peck, *Constitutional Challenges*, *supra* note 13, at 696 (citing Philip A. Trautman, *Long-Arm and Quasi In Rem Jurisdiction in Washington*, 51 WASH. L. REV. 1 (1975)).

defendants.²⁴⁵ In an unusual situation, a plaintiff may have to bring successive suits against separate defendants in more than one forum, although that possibility certainly existed prior to the modification of joint and several liability.

f. Nonparty Entities

Upon the 1986 enactment of RCW 4.22.070, every commentator agreed that the statute's plain language mandated the trier of fact to allocate fault to *all* responsible entities, *including* those culpable "entities" not named as parties to the lawsuit. Professor Peck found it apparent that the term "entity" meant more than defendants to the action and also included potential defendants, immune entities, and unidentified persons, bodies, and associations.²⁴⁶ Messrs. Wiggins, Harnetiaux, and Whaley, three lawyers active in the plaintiffs' bar, concurred that the statute required determination of responsibility by those entities "who are not present in the courtroom" and that, even under the limited joint and several liability provision of Paragraph (1)(b), damages could not be collected for fault allocated to "absent tortfeasors or immune entities."²⁴⁷ The Washington Supreme Court Committee on Jury Instructions, which has always included noted members of the plaintiffs' bar, adopted pattern jury instructions to implement the statute by requiring the jury to determine the fault of all entities, including "entities not party" to the action.²⁴⁸

In my previous article, I likewise agreed that the plain meaning of the statute directs the allocation of fault to nonparties, including those whom the plaintiff elects not to name as defendants: "If a plaintiff, for whatever reason, voluntarily chooses not to name some responsible entity as a defendant to a case, there is no basis to complain if that entity's share of the

245. Similarly, a plaintiff may choose to file suit in federal court based upon diversity of citizenship jurisdiction. As a consequence of that forum choice, the plaintiff may be unable to join all possible defendants because some tortfeasors are nondiverse and their joinder would destroy federal subject matter jurisdiction. Under such circumstances, the plaintiff can hardly complain that his or her voluntary choice of forum has limited the ability to name all tortfeasors, although the fault of those unjoined parties will be considered in determining the defendants' proportional share of liability. *Greenwood v. McDonough Power Equip. Co.*, 437 F. Supp. 707, 711 (D. Kan. 1977) (applying Kansas comparative fault statute in diversity of citizenship case).

246. Peck, *Washington's Partial Rejection*, *supra* note 2, at 243.

247. Wiggins et al., *supra* note 13, at 236.

248. Washington Pattern Jury Instructions—Civil, § 41.04, 6 WASHINGTON PRACTICE 337 (1989). For a list of the members of the committee, see *id.* at III-IV and the 1990 Supplement at III-IV.

damages is not awarded."²⁴⁹

In other jurisdictions that have adopted similar modifications of joint and several liability that allow for allocation of fault beyond the parties joined to the action, courts have also held that "the comparative fault of all persons and entities contributing to the occurrence, whether named as parties or not, is to be considered in determining the liability of the parties to the action."²⁵⁰ Therefore, "any damages sustained by the plaintiff will be diminished, not only in proportion to his own fault, but also in proportion to the fault attributed to any nonparties."²⁵¹

In 1990, however, Mr. Wiggins departed from his earlier commentary on the operation of the statute and offered a revisionist interpretation designed to prevent allocation of fault to those entities that the plaintiff elects not to name as defendants. Mr. Wiggins now contends that the term "entity" under RCW 4.22.070(1) should be narrowly read to denote only those who are actually parties to the action or who could not be made parties because of an immunity or other obstacle to joinder.²⁵² He obtains this result²⁵³ by applying the interpretive doctrine of *eiusdem generis*, which holds that a general reference in a statute should be interpreted in light of the nature of related specific references in the statute.²⁵⁴ He argues that the

249. Sisk, *supra* note 13, at 469.

250. *Lester v. Magic Chef, Inc.*, 641 P.2d 353, 355 (Kan. 1982) (interpreting Kansas comparative fault statute). *See also* *Huber v. Henley*, 656 F. Supp. 508, 509 (S.D. Ind. 1987) ("[w]ith the advent of Indiana's Comparative Fault Act . . . , the fault of one who is not a party to the action is to be apportioned by the jury along with the relative fault of the named defendants"); *Dietz v. General Electric Co.*, 821 P.2d 166 (Ariz. 1991) (Arizona comparative fault statute requires allocation to all persons who contributed to the injury regardless of whether made a party to the lawsuit); *Mills v. MMM Carpets, Inc.*, 1 Cal. Rptr. 2d 813, 817 (Cal. App. 1991) (under the California comparative fault statute, apportionment of fault must take into account all tortfeasors, regardless of whether they are named as defendants, immune from liability, or capable of responding in damages); *Messmer v. Teacher's Ins. Co.*, 588 So. 2d 610 (Fla. Dist. Ct. App. 1991) (under Florida comparative fault statute, fault is to be assigned to all participants in the accident), *Rosiello v. Ladden*, No. 90699, 1990 WL 283830, *3 (Conn. Super. Ct. Aug. 7, 1990) (under Connecticut comparative fault statute, "the trier of fact must allocate a percentage of responsibility for the damages among all persons involved in the incident, including persons who are not party to the action").

251. *Huber*, 656 F. Supp. at 509 (interpreting Indiana comparative fault statute).

252. *Wiggins*, *supra* note 61, at 210.

253. *Id.* at 211.

254. The doctrine of *eiusdem generis* "requires that general terms appearing in a statute in connection with specific terms be given meaning and effect only to the extent that the general terms suggest items similar to those designated by the specific

listing of certain specific entities in Subsection (1) limits the meaning of the word "entity" to those illustrations.²⁵⁵ Mr. Wiggins reasons that, because none of the specific entities listed includes a nonparty that the plaintiff neglects to name to the lawsuit, such nonparties should be understood as falling outside the statute's general reference to "entity."²⁵⁶

The conspicuous flaw in this argument is that it contravenes the plain language of the statute—the mandate that a "percentage of the total fault" be attributed to "every entity."²⁵⁷ *Ejusdem generis* is merely a canon of statutory construction. "[L]ike other canons of statutory construction, [it is] only an aid to the ascertainment of the true meaning of the statute."²⁵⁸ It cannot be relied upon to vary clear statutory language.²⁵⁹

The United States Supreme Court's decision in *Harrison v. PPG Industries, Inc.*²⁶⁰ is particularly instructive. In *Harrison*, the Court considered a statute governing judicial review of certain administrative decisions made by the Administrator of the Environmental Protection Agency. The statute provided for

terms." *State v. Sigman*, 60 Wash. App. 1, 4, 802 P.2d 142, 144 (1990), *rev'd on other grounds*, 118 Wash. 2d 442, 826 P.2d 144 (1992). See also 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.17, at 188 (Sands 5th ed. 1992) (where "specific words follow[] general ones," the doctrine of *ejusdem generis* applies to "restrict[] application of the general term to things that are similar to those enumerated") (note omitted)).

255. Wiggins, *supra* note 61, at 210-12. See also Heller, *supra* note 18, at 2, 13.

256. Wiggins, *supra* note 61, at 210-12.

257. WASH. REV. CODE § 4.22.070(1) (1991).

258. *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 89 (1934).

259. *State ex rel. Health & Social Services Dept. v. Natural Father*, 598 P.2d 1182, 1186 (N.M. Ct. App. 1979) (in refusing to apply doctrine of *ejusdem generis*, court held that "when the statutory words are unambiguous, there is no basis for utilizing a rule of construction to determine legislative intent; rather intent is determined from the statutory language"); 2A SINGER, *supra* note 254, § 47.22, at 210 ("general words are not restricted in meaning to objects of the same kind (*ejusdem generis*) if there is a clear manifestation of a contrary intent") (note omitted)).

Judge Mann, in a dissent that was later adopted by the Florida Supreme Court, offered the following apt commentary on the use of canons of construction:

In the search for meaning there are no shortcuts, and Latin is no substitute for thought. Of course *expressio unius est exclusio alterius* if the *alterius* is excluded from the *unius* by context or common sense. . . . But neither *expressio* nor *ejusdem* determines the correct interpretation of a statute. These Latin labels are affixed *after* interpretation by us judges. When they are taken seriously, . . . as factors in the process of decision, the result often distorts the legislative intent.

Akey v. Murphy, 229 So. 2d 276, 279 (Fla. Dist. Ct. App. 1969) (Mann, J., dissenting) (emphasis in original), *rev'd*, 238 So. 2d 94 (Fla. 1970).

260. 446 U.S. 578 (1980).

direct review in a federal court of appeals over certain specifically listed types of decisions and of "any other final action" by the Administrator.²⁶¹ The petitioners in the case argued that the phrase "any other final action" should be narrowly construed under the doctrine of *ejusdem generis* "not to reach all final actions of the Administrator, but only those similar to the actions under the specifically enumerated provisions that precede that catchall phrase in the statute."²⁶²

The Court began its response with the reminder that the rule of *ejusdem generis* "is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty."²⁶³ The Court discerned no uncertainty in the subject phrase and held that it "must be construed to mean exactly what is says, namely, *any other final action*."²⁶⁴

This same analysis applies with full force to the Washington comparative fault statute. RCW 4.22.070(1) states that fault is to be allocated to "*every entity*."²⁶⁵ There are no words of exception—*every* entity is to be included within the fault equation. It doesn't matter whether the entity is a plaintiff, a defendant, a third-party defendant, or not a party at all. It doesn't matter whether the entity is not a party because it could not be made a party or because the plaintiff simply neglected to do so. In *Clarke v. Equinox Holdings, Ltd.*,²⁶⁶ the Washington Court of Appeals echoed the *Harrison* opinion: "A statute will be held to mean exactly what it says, and rules of construction will not be applied, where the language of the statute is free of ambiguity."²⁶⁷ RCW 4.22.070(1) states simply and unequivocally that *every entity* must be considered in determining the percentage of fault to be allocated to defendants in the action. A canon of interpretation cannot be relied upon to delete a phrase from a statute or to give it an unnatural, restrictive meaning.²⁶⁸ The phrase "every entity" means

261. *Id.* at 579-80.

262. *Id.* at 587 (note omitted).

263. *Id.* at 588 (quoting *United States v. Powell*, 423 U.S. 87, 91 (1975)).

264. *Id.* at 589 (emphasis in original) (note omitted).

265. WASH. REV. CODE § 4.22.070(1) (1991) (emphasis added).

266. 56 Wash. App. 125, 783 P.2d 82 (1989).

267. *Id.* at 130, 783 P.2d at 85.

268. As noted earlier, the term "entity" is the broadest possible word of inclusion for conveying the statutory mandate that every person, organization, corporation, unincorporated business, government or agency, or other being that contributed to the plaintiff's injury or damage must be part of the fault allocation equation. See *supra* part III.C.1.

exactly what it says.

In addition, Subsection (1) requires the trier of fact to determine "the *percentage* of the total fault" that is attributable to every entity.²⁶⁹ In *Mills v. MMM Carpets, Inc.*,²⁷⁰ the California Court of Appeal relied upon the use of the term "percentage" in the California comparative fault statute to conclude that apportionment of fault must take into account all tortfeasors, regardless of whether they are named as defendants, immune from liability, or capable of responding in damages.²⁷¹ The court observed that "percentage" means "'a part of a whole expressed in hundreds.'"²⁷² The court then noted that the "defendant's percentage of fault would not constitute 'a part of a whole' if it were quantified in comparison with the fault of fewer than all culpable parties."²⁷³ Accordingly, the court ruled, the language of the comparative statute "most readily suggests comparison with the fault of the entire field of tortfeasors."²⁷⁴

The Florida Court of Appeals reached the identical conclusion in *Messmer v. Teacher's Insurance Company*.²⁷⁵ The court held that "the plain meaning of the word percentage" in the Florida comparative fault statute was "a proportionate share of the whole."²⁷⁶ For that reason, the court held, "a party's percentage of the total fault of all participants in the accident is the operative percentage to be considered."²⁷⁷ Accordingly, the Florida court held that fault must be assigned under the statute to the plaintiff's husband who had been the driver of the car in which the plaintiff was a passenger, even though Florida law held spouses immune from tort liability to one another.²⁷⁸

Even if it could be reconciled with the plain language of the statute, Mr. Wiggins's ejusdem generis argument is less than compelling. The six specific listed entities in Subsection (1)—which the statute says are merely *included* within the larger term "every entity"—*do* include entities that are not

269. WASH. REV. CODE § 4.22.070(1) (1991) (emphasis added).

270. 1 Cal. Rptr. 2d 813 (Cal. Ct. App. 1991).

271. *Id.* at 814.

272. *Id.* at 817 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1675 (1981)).

273. *Id.*

274. *Id.*

275. 588 So. 2d 610 (Fla. Dist. Ct. App. 1991).

276. *Id.* at 612.

277. *Id.* at 611.

278. *Id.* at 612.

parties to a legal action. Among the listed entities are "entities released by the claimant," "entities immune from liability to the claimant," and "entities with any other individual defense against the claimant."²⁷⁹ Like the potential defendant not joined at a plaintiff's election, these entities also are not parties to the lawsuit. It is undisputed that fault must be attributed to each of them.

Mr. Wiggins nevertheless argues that these three entities are not parties because they cannot be made parties.²⁸⁰ By reason of the release, immunity, or individual defense, these entities cannot be joined or retained in a lawsuit. Therefore, Mr. Wiggins contends, "[p]ersons who could have been named as defendants but were not, either intentionally or through oversight, are not of the same kind and quality" as those entities listed in the statute.²⁸¹ In other words, Mr. Wiggins acknowledges that nonparties must be included within the fault allocation equation but wishes to limit the responsible nonparties to those entities that cannot be joined to the lawsuit because of a release, an immunity, or an individual defense.

If Mr. Wiggins's peculiarly rigid application of the *eiusdem generis* canon were to prevail, the meaning of the phrase "every entity" would effectively be limited to the very specific natures of the six listed entities—the plaintiffs, defendants, third-party defendants, released entities, immune entities, and entities with an individual defense. We would then be left with a statute that provides for allocation of fault *only* to those referenced entities, notwithstanding that they are listed only as examples. Thus, once again, to reach such a narrow construction, it would be necessary to delete from the statute the words, "every entity."

Furthermore, the doctrine of *eiusdem generis* can be applied just as easily to reach the opposite of Mr. Wiggins's preferred result. As stated, the rule defines the application of a general term followed by specific terms to matters similar in kind or classification to those specified. Thus, it is significant that an omitted defendant is not really any different in nature from a defendant dropped from a lawsuit because he or she is released from liability by the plaintiff. In both cases, the entity is exempted from the continuing litigation because of a volun-

279. WASH. REV. CODE § 4.22.070(1) (1991).

280. Wiggins, *supra* note 61, at 211.

281. *Id.* at 212.

tary action (or inaction) taken by the plaintiff. In either instance, it is a matter of the plaintiff's choice.

Finally, there is no rational basis for excluding unnamed parties from the fault equation. Mr. Wiggins suggests that "no social purpose is served by allocating fault to an absent party who could have been named to a lawsuit but was not."²⁸² The opposite seems more accurate. No social purpose is served by allowing a plaintiff to skew the fault equation and limit the entities to whom fault will be allocated by picking and choosing among the culpable entities to be sued. The "voluntary . . . decision not to sue certain individuals should [not] be available to plaintiff as a strategic weapon to eliminate or avoid" the comparative fault provisions of a statute modifying joint and several liability.²⁸³ The Tort Reform Act of 1986 now abolishes the practice by plaintiffs of targeting particular defendants to bear the burden of the damages.

In the final analysis, the Washington Supreme Court in its recent *Clark v. Pacificorp* decision,²⁸⁴ has laid to rest any argument that the RCW 4.22.070 is equivocal on this point or that the trier of fact's duty of fault allocation can be construed narrowly:

The language of RCW 4.22.070(1) is clear and unambiguous: "the trier of fact *shall* determine the percentage of the total fault which is attributable to *every* entity which caused the claimant's damages." (Italics ours.) "Shall" is presumed mandatory. Reserving the question to a trier of fact prevents manipulation by any one of the parties. We hold that RCW 51.24.060(1) and RCW 4.22.070 require a trier of fact to determine the percentage of total fault attributable to every entity which caused plaintiff's damages.²⁸⁵

Accordingly, the mandatory language of Subsection (1) plainly commands the allocation of fault to all responsible entities, embracing all nonparties, and including those potential defend-

282. Wiggins, *supra* note 61, at 212.

283. *Greenwood v. McDonough Power Equip. Inc.*, 437 F. Supp. 707, 713 (D. Kan. 1977). See also Eilbacher, *supra* note 170, at 912-13 (it is unfair to place the burden of liability on the remaining tortfeasor where the plaintiff makes a selective decision not to sue a culpable entity); Lawrence P. Wilkins, *The Indiana Comparative Fault Act at First (Lingering) Glance*, 17 IND. L. REV. 687, 736, 738 (1984) (although commentator has doubts about the "empty chair" defense in several contexts, he agrees that apportionment of fault to a nonparty is particularly appropriate when the plaintiff simply chooses not to name that person).

284. 118 Wash. 2d 167, 822 P.2d 162 (1991).

285. *Id.* at 181, 822 P.2d at 170 (emphasis in original) (citation omitted).

ants inadvertently or intentionally omitted from the lawsuit by the plaintiff.²⁸⁶

g. Unidentified Entities

New Mexico was one of the first states to abolish the doctrine of joint and several liability at the advent of the new era of comparative responsibility. The New Mexico Court of Appeals took this bold step in the context of an automobile accident case involving an unidentified tortfeasor. In *Bartlett v. New Mexico Welding Supply, Inc.*,²⁸⁷ the driver of the leading car on the highway made a sudden and unexpected change in speed and direction, causing the plaintiff driver to slam on her brakes. The defendant driver was behind the plaintiff when she braked and his truck skidded into the rear of her car. The identity of the lead driver was unknown.²⁸⁸ The jury found the defendant truck driver's negligence to have contributed 30 percent to the accident and the negligence of the unknown driver to have contributed to the extent of 70 percent.²⁸⁹ The New Mexico Court of Appeals ordered judgment to be entered on the jury verdict with an award to the plaintiff against the defendant for the defendant's responsible thirty percent share of the damages.²⁹⁰

The fact that one of the entities responsible for an incident is unknown—what is sometimes referred to as a “phantom tortfeasor”—provides no basis under RCW 4.22.070 for omitting that culpable entity from the fault allocation equation. As the New Mexico court recognized in the *Bartlett* case, an unidentified entity is simply one of the many types of nonparties to whom fault is appropriately allocated under a comparative fault system of liability. The preceding discussion²⁹¹ on the meaning of “every entity” under Subsection (1) and the allocation of fault to nonparties applies with full force to the context of the unidentified nonparty. The Washington Supreme Court's unequivocal holding in *Clark v.*

286. See *Huber v. Henley*, 656 F. Supp. 508, 511 (S.D. Ind. 1987) (Indiana comparative fault statute providing for allocation of responsibility to nonparties includes “inadvertently omitted tortfeasors” and “intentionally omitted tortfeasors”).

287. 646 P.2d 579 (N.M. Ct. App. 1982).

288. *Id.* at 580.

289. *Id.*

290. *Id.* at 586.

291. See *supra* part III.C.1.f.

Pacificorp,²⁹²—ruling that the mandatory language of RCW 4.22.070(1) requires “a trier of fact to determine the percentage of total fault attributable to *every* entity which caused claimant’s damages”²⁹³—certainly suggests the allocation of fault to entities that cannot now be identified.

Professor Peck recognizes that the broad concept of “entity” in RCW 4.22.070 encompasses “unidentified persons.”²⁹⁴ However, he suggests that the due process requirements of notice and an opportunity to be heard may be violated by the assignment of fault to an unknown entity.²⁹⁵ Mr. Wiggins also argues that “fault should not be allocated to an unknown entity because it is difficult to apply a calculus of fault to someone about whom you know nothing.”²⁹⁶ These arguments are unpersuasive.

As I have written previously:

The fact that an entity cannot be identified does not necessarily mean there is any lack of evidence concerning the entity’s existence or the extent to which the entity contributed to the tort. Witnesses to the incident—presumably including the plaintiff—may be able to testify to another entity’s conduct and involvement in the incident. The fact that the entity is not available to appear in court does not bar the presentation and consideration of evidence on the entity’s comparative fault.²⁹⁷

Because a defendant in any action is always entitled to avoid liability altogether by establishing that an unknown entity was the sole cause of the plaintiff’s harm, there is “no logical reason why a defendant might not also attempt to reduce exposure to full liability by attributing a portion of the fault to an unidentified entity whose existence and culpable conduct can be proven through competent corroborating evidence.”²⁹⁸

Mr. Wiggins objects that my argument “confuses allocation of fault with causation of damages.”²⁹⁹ However, the Washing-

292. 118 Wash. 2d 167, 822 P.2d 162 (1991).

293. *Id.* at 181, 822 P.2d at 170 (emphasis in original) (citation omitted).

294. Peck, *Washington’s Partial Rejection*, *supra* note 2, at 243. See also Wiggins et al., *supra* note 13, at 236 (trier of fact must determine the fault of entities not in the courtroom including those entities that are “simply unidentified (such as the driver of a phantom car in an automobile case)”).

295. Peck, *Constitutional Challenges*, *supra* note 13, at 697.

296. Wiggins, *supra* note 61, at 214.

297. Sisk, *supra* note 13, at 456-57.

298. *Id.* at 457.

299. Wiggins, *supra* note 61, at 214.

ton comparative fault statute expressly considers the questions of fault and causation as intertwined when determining respective shares of responsibility for an injury or damage. Under RCW 4.22.015, which defines "fault" for the entire statutory chapter,³⁰⁰ the comparison of fault must include "consideration of both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages."³⁰¹

Moreover, merely because one of the responsible entities is unavailable for examination, the trier of fact is hardly precluded from reaching conclusions about degree of causation and nature of the conduct. Certainly a defendant would not be exonerated from negligence liability, for example, simply because he or she refused to take the stand or testified that he or she acted with reasonable care. Nor would the intervening death of a defendant be grounds for dismissing the lawsuit against his estate. The presence of a defendant on the stand to testify is not a prerequisite to holding a defendant liable based upon fault. In most cases, the circumstances surrounding the incident will provide sufficient evidentiary background to allow the trier of fact to make a complete analysis of the respective fault of all entities, including any absent or deceased defendant, or any culpable, unidentified, entity.³⁰² Even when all responsible persons are identified and are before the court, there may be significant gaps in the evidence caused by failure of memories, witnesses who were unable to see every aspect of the event, lost physical evidence, or a multitude of other reasons. Nevertheless, the case must be presented to the trier of fact to make the best of the situation under the circumstances. A perfect case is rarely, if ever, made to the trier of fact, and yet our system of justice perseveres and largely succeeds.

300. See *supra* part III.B.1 (discussing definition of "fault").

301. WASH. REV. CODE § 4.22.015 (1991). See also *supra* note 163 (discussing theories of comparative causation).

302. In *Wilson v. Gillis*, 731 P.2d 955 (N.M. Ct. App. 1986), the New Mexico Court of Appeals rejected the argument that the jury will be confused if fault is allocated to a nonparty:

[This] argument fails to recognize and credit the significant abilities and talents of jurors to carefully sift through conflicting positions and ascertain the true facts. . . . [The parties] will have every opportunity to explain to the jury the circumstances surrounding the accident, and the jury can reasonably be asked to make an assessment as to the percentages of negligence. An entity does not actually have to be present in the courtroom for the jury to comprehend that it must consider and apportion that entity's fault.

Id. at 958.

The question of the "phantom tortfeasor" is nevertheless a unique one that justifies certain precautions by the court in presiding over the trial. Not every time that a defendant asserts the fault of an unidentified party should the court permit the issue to go to the jury for decision. In *Ripka v. Mehrs*,³⁰³ the Minnesota Court of Appeals considered the case of an automobile accident at an intersection. The defendant driver claimed that she had been waved through by a road construction worker. The plaintiff driver, who had the right of way, collided with the defendant's car when it pulled into the intersection.³⁰⁴ The trial court refused to submit to the jury for apportionment the alleged negligence of the unidentified workman who had supposedly waved the defendant through the intersection.³⁰⁵ The court of appeals affirmed the ruling, stating that "a mere allegation by the defendant that a phantom tortfeasor contributed to the accident is insufficient evidence to justify submitting the alleged negligence of the phantom tortfeasor to the jury for apportionment."³⁰⁶ The court, mentioning fears that defendants might fraudulently assert the negligence of unidentified parties,³⁰⁷ apparently was adopting a rule that a defendant seeking to allocate fault to an unknown party must provide corroborating evidence beyond the defendant's own testimony.

A court must, of course, be very careful not to remove genuine questions of fact from the jury,³⁰⁸ particularly when a witness is prepared to testify to those facts under oath. However, given the somewhat unusual concerns of protecting due process and providing an opportunity to respond raised by this situation, it may be appropriate to require that a defendant at least be able to provide some additional evidence of the existence of an unidentified entity. If the only evidence is self-serving testimony from the defendant's own mouth, the plaintiff may be unable to fully respond. The difficulty of proving a negative might lead to an inequitable result.

303. 390 N.W.2d 878 (Minn. Ct. App. 1986).

304. *Id.* at 879.

305. *Id.*

306. *Id.* at 881.

307. *Id.* at 882.

308. See *Industrial Indemn. Co. v. Kallevig*, 114 Wash. 2d 907, 915-16, 792 P.2d 520, 525 (1990) (a case may be taken from the jury only "if, when viewing the material evidence most favorable to the nonmoving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party").

There is precedent in Washington for such a corroboration requirement when one party, who stands to gain, insists that the fault for an injury or damage lies with an unidentified actor. Under RCW 48.22.030(8),³⁰⁹ an automobile insurer may condition uninsured motorist benefit coverage by requiring independent corroboration when the insured alleges that a "phantom vehicle" caused an automobile accident.³¹⁰ The purpose of the "phantom vehicle" statute is to prevent fraudulent claims, based upon accidents actually resulting from the insured's sole fault, by ensuring proof of the "phantom vehicle" by someone who does not stand to benefit from the outcome of the claim for benefits.³¹¹

Those same concerns would exist when a defendant seeks to avoid or reduce liability to a plaintiff by indicting an unidentified actor as the one truly responsible for the harm. The trial court, therefore, could appropriately remove the issue of an unidentified entity's culpability from the jury's fault allocation consideration in those cases where the defendant cannot provide independent corroboration. Independent corroboration might be presented through the testimony of another witness to the incident, physical evidence such as tracks or paint, or other circumstantial proof supporting the existence of the responsible entity whose identity cannot now be established.

2. Responsibility for Raising Fault of Unjoined Entities and Burden of Proof on Allocation of Fault

a. *Raising the Issue: Pleading or Other Notice*

The Committee on Court Rules and Procedure of the Washington State Bar Association, with the approval of the Board of Governors, has proposed amendments to the Washington Rules of Civil Procedure that would designate the issue of a nonparty's fault as an affirmative defense to be raised by the defendant in its answer.³¹² Plaintiffs' attorney Charles K.

309. WASH. REV. CODE § 48.22.030(8) (1991).

310. *Gobin v. Allstate Ins. Co.*, 54 Wash. App. 269, 271, 773 P.2d 131, 132 (1989); *Power v. Viking Ins. Co.*, 44 Wash. App. 495, 498-502, 722 P.2d 1343, 1345-48 (1986).

311. *Gobin*, 54 Wash. App. at 273, 773 P.2d at 133.

312. Washington Proposed Rules Notice, *published in*, 118 Wash. 2d CXXXI, 818 P.2d LXXIV, XCIV-XCVI (1992) (advance sheet). Under the committee's proposal, Civil Rule 8(c) would be amended to add "fault of a nonparty" to the list of affirmative defenses. *Id.* at XCV. Civil Rule 12 would be amended by the addition of a new subsection, (i), to read:

Whenever a defendant or a third party defendant intends to claim for

Wiggins, who was the chair of the committee proposing the rule changes, had previously encouraged plaintiffs' counsel to argue that "attribution of fault to a nonparty is an affirmative defense which must be pled in the answer, subject to waiver."³¹³ Professor Peck has likewise written that "[a] sensible rule would be that the identification [of a nonparty issue] be made in an answer or amended answer filed well before trial."³¹⁴

The state bar committee, in an accompanying commentary, justified its proposed rule change by observing that, "under the common law," allegations by a defendant that another party is at fault "would amount to an affirmative defense, as contravening the plaintiff's claim and tendering a new issue."³¹⁵ Given that RCW 4.22.070 rather dramatically effected a monumental change in the common law, it is strange that a committee seeking to implement the statute procedurally would return to the common law for direction. Even as a matter of common law analysis, the committee's conclusion may be questioned. Prior to the enactment of the Tort Reform Act of 1986, it was certainly permissible for a defendant to assert at trial that it was wholly without liability because the harm was caused solely by another entity. There was never any suggestion that such an allegation was an "affirmative defense" that the defendant was required to plead, as opposed to simply being included within the defendant's general denial of liability.

More importantly, the state bar committee asked the wrong question. The issue is not whether nonparty fault would have been an affirmative defense "under the common law." The question is what the statute says, that is, what direction is provided by the language of RCW 4.22.070. In other

purposes of RCW 4.22.070(1) that a nonparty is at fault, such claim is an affirmative defense which shall be affirmatively pled by the party making the claim. The identity of any nonparty claimed to be at fault, if known to the party making the claim, shall also be affirmatively pled.

Id. at XCVI.

After this Article had been sent to the printer, the Washington Supreme Court entered an order adopting the amendments to Civil Rule 8 and Civil Rule 12. Washington Supreme Court Order No. 25700-A-510, Sept. 10, 1992, *published in*, 834 P.2d CXXIV (1992) (advance sheet). See *infra* note 348 (discussing the court's order).

313. Wiggins, *supra* note 61, at 215.

314. Peck, *Constitutional Challenges*, *supra* note 13, at 693.

315. Washington Proposed Rules Notice, *published in*, 118 Wash. 2d CXXXI, 818 P.2d LXXIV, XCVI (1991) (advance sheet).

words, the real inquiry is whether the state bar committee's approach—requiring the defendant to raise the issue of nonparty fault at the early pleading stage—can be reconciled with the mandate of the statute. I submit it cannot.

In *State v. Smith*,³¹⁶ the Washington Supreme Court declared that it has the exclusive authority to adopt procedural rules designed to guide "the essentially mechanical operations of the courts."³¹⁷ By contrast, matters of "substantive law, rights and remedies" are within the province of the legislature.³¹⁸ The modification of joint and several liability certainly is "a substantive, not a procedural, change in tort law, rights, and remedies," within the authority of the legislative branch to enact.³¹⁹ The judicial branch may adopt a procedural court rule as a "means to effectuate substantive rights,"³²⁰ but not in a manner inconsistent with the source of that substantive law. Accordingly, in evaluating the bar committee's proposed rule amendments, we must consider whether the purported procedural change actually conflicts with the substantive provisions of the statute modifying joint and several liability.³²¹

Several other states that have adopted legislation modifying the doctrine of joint and several liability have chosen to assign to defendants the duty to raise the question of allocating fault to nonparties. For example, the Indiana comparative fault statute denominates the issue of a nonparty's fault as a "nonparty defense"³²² that the defendant "must affirmatively plead."³²³ If the defendant is aware of the nonparty defense, it must be pleaded as part of the first answer.³²⁴ If the defendant discovers the nonparty defense after the filing of an answer,

316. 84 Wash. 2d 498, 527 P.2d 674 (1974).

317. *Id.* at 501, 527 P.2d at 677.

318. *Id.*

319. Sisk, *supra* note 13, at 486.

320. *State v. Johnson*, 21 Wash. App. 919, 921, 587 P.2d 189, 190 (1978). See also Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 5 (1959) ("all are agreed that procedure exists only for the purpose of putting the substantive law effectively to work").

321. The committee's report acknowledges that there was considerable debate within the committee about whether the proposed rule changes were "substantive" or "procedural." Washington Proposed Rules Notice, *published in*, 118 Wash. 2d CXXXI, 818 P.2d LXXIV, XCV (1991) (advance sheet).

322. IND. CODE ANN. § 34-4-33-10(a) (Burns 1986).

323. *Id.* § 34-4-33-10(b). See generally *Huber v. Henley*, 656 F. Supp. 508, 510 (S.D. Ind. 1987) (describing statutory nonparty defense and burden of pleading and proof as placed on defendant).

324. IND. CODE ANN. § 34-4-33-10(c) (Burns 1986).

the defendant is obliged to plead the defense "with reasonable promptness."³²⁵ If the plaintiff served the complaint more than one hundred and fifty days before the statute of limitations would expire against a nonparty, the defendant is ordinarily required to plead any nonparty defense at least forty-five days before the limitations period expires. This allows the plaintiff an opportunity to join that entity as a party to the action.³²⁶ However, the statute instructs the trial court that the time period for raising the nonparty defense may be altered in order to give the defendant "a reasonable opportunity to discover the existence of a nonparty defense," while balancing the plaintiff's interest in having "a reasonable opportunity" to add the nonparty as an additional defendant before the statute of limitations has expired.³²⁷

As another example, the Colorado comparative fault statute provides that the fault of a nonparty may be considered if "the defending party gives notice that a nonparty was wholly or partially at fault within ninety days following commencement of the action unless the court determines that a longer period is necessary."³²⁸ The defendant provides notice by filing a pleading that either names the nonparty or gives "the best identification of such nonparty which is possible under the circumstances."³²⁹ The defendant's notice must also provide a brief explanation of the basis for asserting that fault should be allocated to the nonparty.³³⁰ The Arizona comparative fault statute provides more generally that the negligence or fault of a nonparty may be considered "if the defending party gives notice before trial, in accordance with requirements established by court rule, that a nonparty was wholly or partially at fault."³³¹

The Washington State Legislature, however, did not choose to adopt language making the trier of fact's duty, to

325. *Id.*

326. *Id.*

327. *Id.* § 34-4-33-10(c)(1), (2).

328. COLO. REV. STAT. § 13-21-111.5(3)(b) (Supp. 1991).

329. *Id.*

330. *Id.*

331. ARIZ. REV. STAT. § 12-2506(B) (Supp. 1991). See also *LyphoMed, Inc. v. Superior Court*, No. 1 CA-SA 91225, 1992 WL 49922, *1 (Ariz. Ct. App. Mar. 19, 1992) ("each defendant who claims that other persons or entities who have not been joined in the action are responsible for the plaintiff's injury must file a notice of nonparty at fault" pursuant to a court rule allowing as much as 150 days after filing the answer to file the notice).

determine the fault attributable to nonparties, contingent upon whether the defendant pleads the issue in an answer or provides other notice. RCW 4.22.070(1) instead states in unequivocal language that in "all actions involving the fault of more than one entity, the trier of fact *shall* determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages" ³³² In *Clark v. Pacificorp*, ³³³ the Washington Supreme Court held that the term "shall" in this provision is "mandatory" language that clearly and unambiguously commands the trier of fact to allocate fault to every culpable entity. ³³⁴

The import of the unqualified language in the Washington Tort Reform Act is plain. The intent of the legislature is unmistakable. If more than one entity contributes to a tortious incident, then every responsible entity is to be considered in the allocation of fault. Given this strong statement of legislative purpose, a procedural court rule may not establish obstacles that significantly restrict the ability of the trier of fact to obey the statutory command to consider the responsibility of every entity. In devising any procedure for implementation of the statute, the primary emphasis must be upon assuring that fault is indeed attributed to all responsible entities. A procedural exception to this general principle may be justified only by the compelling interest of judicial order in the trial of lawsuits, and only to the extent of such necessity.

Some procedure, of course, must be adopted so that the issue of a nonparty's responsibility may be presented to the trier of fact in a manner consistent with the principles of due process. Every litigant is certainly entitled to both notice and an adequate opportunity to be heard. Professor Peck has observed that the literal language of RCW 4.22.070 would not preclude the identification of an entity for allocation of fault as late as the closing oral argument or even in a judge's preparation of findings of fact and conclusions of law. ³³⁵ However, Professor Peck correctly objects to such a result. If a defendant is permitted to delay until the waning moments of the trial before introducing a new culprit, the plaintiff could be ambushed and left without any meaningful opportunity to

332. WASH. REV. CODE § 4.22.070(1) (1991) (emphasis added).

333. 118 Wash. 2d 167, 822 P.2d 162 (1991).

334. *Id.* at 181, 822 P.2d at 167.

335. Peck, *Constitutional Challenges*, *supra* note 13, at 692-93.

respond. In our modern system of civil justice, the trial is to be "less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."³³⁶

The problem is one of balance. On one side is the legislature's strong direction that fault is to be allocated to all responsible entities, including nonparties. This is the general rule that may be qualified only by the most compelling of countervailing interests. On the other side is the judiciary's truly compelling interest in the timely presentation of legal issues and theories, and the orderly production of evidence in the courtroom. The judiciary's concern is to uphold the principle of fair notice and an opportunity to be heard. In weighing these opposing concerns, the Washington Supreme Court should develop a procedural approach that guarantees fair notice to plaintiffs in advance of the trial *and* that also allows defendants a reasonable opportunity, after being informed of a lawsuit, to fully explore the possibility that other entities may also be responsible for the plaintiff's injury or damage.

As noted, the state bar committee recommends altering the pleading rules to impose a duty upon the defendant to raise the nonparty issue as an affirmative defense in the answer, under penalty of otherwise having the issue of a nonparty's fault removed from consideration by the trier of fact. Unfortunately, this approach does not reflect a considered balancing of the statute's substantive command with the court's procedural needs. A defendant is generally obliged to serve an answer within twenty days after service of the plaintiff's complaint.³³⁷ At that point, a defendant obviously should be aware of its own conduct vis-à-vis the plaintiff and presumably also of the plaintiff's actions, at least as they relate to the defendant's purported role in the tortious incident. Thus, even at the early pleading stage, we may legitimately expect a defendant to plead affirmative defenses arising from its own activities and perhaps to raise allegations of the plaintiff's contributory fault. However, at the outset of the litigation, it is unrealistic to expect the average defendant to be familiar with all the characters in the story, especially those other actors who may have come on the stage before or after the defendant's scene.

336. *Taylor v. Cessna Aircraft Co.*, 39 Wash. App. 828, 835, 696 P.2d 28, 32 (1985) (discussing the purposes of the rules of discovery).

337. WASH. R. CIV. P. 12(a)(1) (West 1991).

At the early pleading stage of a lawsuit, the tort plaintiff is often in a superior position. A plaintiff and his or her attorney frequently will have spent considerable time in investigation and preparation before the action is ever filed. By contrast, the defendant, suddenly subjected to suit, may not be in a position to immediately identify all possible contributing tortfeasors so as to allege their participation within only twenty days after service of the complaint. It is therefore both inequitable and contrary to the statutory mandate to impose the duty of raising the issue of the nonparty's fault at this premature point in the judicial proceedings.

Even those states that have adopted statutes assigning to defendants the duty to plead the fault of nonparties recognize the defendant's need for adequate time to discover the existence and conduct of nonparties. The Indiana comparative fault statute directs that a defendant be given "a reasonable opportunity to discover the existence of a nonparty defense."³³⁸ The Colorado statute, rather than demanding immediate pleading in the answer, provides that the defendant should give notice of a nonparty's responsibility within ninety days after the lawsuit is filed and served, unless the court determines that a longer period is necessary.³³⁹ Yet the Washington state bar committee proposes changing the civil rules to mandate immediate pleading of this issue by the defendant in the original answer. The committee in its apparent eagerness to shift the entire burden of pleading to the defendant has failed to make any allowance for the legitimate needs of defendants.

It is true that leave to amend a pleading is to be liberally granted in Washington.³⁴⁰ Thus, even under the state bar committee's approach, a defendant who later learned of the responsibility of a nonparty, in the exercise of due diligence in discovery and investigation, would ordinarily be permitted to amend the answer to include that allegation. However, while the standard for amendment is indeed a liberal one, there is no right to amend. Unless the defendant became aware of the issue within the short period for the filing of the answer to the complaint or within the additional short period provided by the rules for amendment of a pleading once as a matter of

338. IND. CODE ANN. § 34-4-33-10(c)(1) (Burns 1986).

339. COLO. REV. STAT. § 13-21-111.5 (Supp. 1991).

340. WASH. R. CIV. P. 15(a) (West 1991); *Herron v. Tribune Pub. Co.*, 108 Wash. 2d 162, 165, 736 P.2d 249, 253 (1987).

course,³⁴¹ the defendant would have to seek court *permission* to raise the affirmative defense of nonparty fault. Moreover, the trial court's decision whether to grant leave to amend is a discretionary one and will be reversed on appeal only for an abuse of discretion.³⁴² In any event, it is an inefficient procedure to adopt a pleading rule concerning a matter that quite frequently will not have been adduced as an issue at an early stage in the lawsuit. It makes little sense to require a matter to be pled when we expect that amendment to the pleading will be necessary in a large number of cases. The circumstances thus suggest that this is a matter which does not lend itself to regulation by pleading.

Fortunately, there are many procedural alternatives better in keeping with the statutory mandate that fault be allocated to every entity in all cases. First, the matter could appropriately be left to clarification in discovery. There is nothing to preclude the plaintiff from exploring the question in routine discovery of the defendant. The plaintiff may ask directly by interrogatory whether the defendant will assert that culpable nonparties contributed to the incident. Or the plaintiff may serve a request for admission asking the defendant to acknowledge that no one other than the parties to the litigation have any responsibility. The defendant is obliged to respond to such discovery, or face the consequences. When a party fails to properly disclose a matter in discovery, the trial court should exclude any evidence on that issue at trial.³⁴³ It is not apparent why this is an unsatisfactory approach to the problem. After all, even before the adoption of RCW 4.22.070, a defend-

341. Under Civil Rule 15(a), a party has the right to amend a pleading once as a matter of course (1) at any time before a responsive pleading is served, or (2) if the pleading is one to which no responsive pleading is permitted and the action has not yet been placed upon the trial calendar, within 20 days after the pleading is served. WASH. R. CIV. P. 15(a) (West 1991). Even the brief period for amendment as a matter of right is in danger of extinction in Washington. The Washington Court of Appeals has interpreted Rule 15(a) as extending a right to amend a pleading as a matter of course only until the action is placed on the trial calendar. *Wolfe v. Legg*, 60 Wash. App. 245, 251, 803 P.2d 804, 808 (1991). Some county superior courts, including King County, now place a case on the trial calendar immediately upon the filing of the complaint. KING CTY. LOC. R. 4 (West 1991). Because the court of appeals viewed Rule 15(a) as withdrawing the right to amend when the case is set for trial, the traditional entitlement to one early amendment of a pleading appears to have been nullified in King County Superior Court.

342. *Walla v. Johnson*, 50 Wash. App. 879, 882, 751 P.2d 334, 337 (1988); Phillip A. Trautman, *Pleading Principles and Problems in Washington*, 56 WASH. L. REV. 687, 712 (1981).

343. *Taylor v. Cessna Aircraft Co.*, 39 Wash. App. 828, 835, 696 P.2d 28, 32 (1985).

ant was entitled to assert that another entity was wholly and solely responsible for the plaintiff's damages. Nevertheless, the rules did not require the defendant to plead the other entity's responsibility in the answer. The issue was left for development through the ordinary process of discovery.

Second, the Washington Supreme Court might develop a rule requiring the defendant to file a specific notice that the defendant intends to assert that a nonparty is wholly or partially responsible for the plaintiff's injury or damage. The deadline for such a notice would have to fall sufficiently in advance of the trial as to give adequate notice to the plaintiff (absent extraordinary circumstances where the fault of a nonparty is discovered at a later date notwithstanding due diligence of the defendant). However, to avoid the defects of the state bar committee's proposal, the time period for filing such a notice would also allocate substantial time after the commencement of the lawsuit, allowing the defendant ample opportunity to investigate the possibility of culpable conduct by other unjoined entities.

Finally, Washington Rule of Civil Procedure 16 may provide the most opportune method for clarifying the issues, including the question of nonparty fault, at the most appropriate point. Under Rule 16, the court on its own initiative or on motion of the parties may hold a pretrial conference to consider such matters as the simplification of the issues.³⁴⁴ At an appropriate time, presumably after the close of discovery, the plaintiff could request a pretrial hearing for the very purpose of exploring the defendant's intent to assert the responsibility of a nonparty.³⁴⁵ At the conference, the defendant would be obliged either to reveal her intent or to explain why she is not yet ready to make that determination and when she likely will be able to do so. Upon completion of a pretrial conference, Rule 16 directs the court to enter an order which recites the action taken at the conference, including any limitation of

344. WASH. R. CIV. P. 16 (West 1991).

345. Under Rule 16(a), the superior court is granted discretion in determining whether to hold a pretrial conference. WASH. R. CIV. P. 16(a) (West 1991). If the supreme court deems the provision of specific notice of a nonparty fault issue as important enough to merit modification of existing court rules, Rule 16 perhaps could be amended to require the trial court to hold a pretrial conference whenever a party files a motion, stating that discovery is completed and that a conference is necessary to clarify whether any party to the lawsuit will contend that a nonparty is at fault in a comparative fault action.

issues for trial.³⁴⁶

The Rule 16 pretrial conference procedure was crafted to address situations such as this, where the parties desire guidance and clarification of the issues to be tried. Under the rule, a trial court can determine whether the defendant has fully responded to discovery on the nonparty issue and whether the defendant has been given a reasonable opportunity to investigate the matter. The court is able to determine the appropriate point in the lawsuit for defining the nature of the issues to be tried, including the nonparty fault question. Taking into account the particular circumstances of the case, the trial court is then able to fashion a pretrial order. That order can either establish further deadlines for revealing the issues to be tried or, based upon the parties' representations at the conference, can limit the matters to be tried to those truly at issue. The pretrial order then "control[s] the subsequent course of the action, unless modified at the trial to prevent manifest injustice."³⁴⁷

In view of these superior procedural alternatives, I hope that the Washington Supreme Court will turn back the state bar committee's one-sided, rigid proposal to require the defendant to raise the nonparty issue as an affirmative defense in the answer.³⁴⁸ In the event that the state bar committee's rule amendments are adopted, defendants would be advised to take the safe approach by fully complying with the rule and pleading the nonparty issue as an affirmative defense. A case may arise, however, where a defendant neglects to plead the nonparty issue at such an early stage, or where a defendant only learns of a nonparty's responsibility after serving the answer but is nevertheless denied leave by the trial court to amend the answer to add the allegation. In that event, the defendant

346. WASH. R. CIV. P. 16(b) (West 1991).

347. *Id.* See also *Esmieu v. Schrag*, 92 Wash. 2d 535, 537-38, 598 P.2d 1366, 1368 (1979); *Stempel v. Department of Water Resources*, 82 Wash. 2d 109, 115, 508 P.2d 166, 170 (1973).

348. Subsequent to the writing of this Article, the Washington Supreme Court entered an order adopting new rules to be effective on September 1, 1992. Washington Supreme Court Order No. 25700-A-501, June 4, 1992, *published in*, 829 P.2d CLXVIII (1992) (advance sheet). The order conspicuously did not include amendments to Civil Rule 8 or Civil Rule 12, perhaps indicating that the court was hesitant to adopt the proposals. However, after this Article had been sent to the printer, the Washington Supreme Court entered a later order adopting the amendments to Civil Rule 8 and Civil Rule 12. Washington Supreme Court Order No. 25700-A-510, Sept. 10, 1992, *published in*, 834 P.2d CXXIV (1992) (advance sheet).

deprived of the statutory right to demand allocation of fault to every responsible entity may still have recourse through a challenge to the very validity of such a pleading rule.

A substantive law embodied in a statute prevails over any conflicting court rule.³⁴⁹ When a court adopts a procedural rule for the management of litigation, it is acting in its administrative rulemaking role, not in its judicial capacity. The administrative adoption of a court rule does not constitute a judicial decision on the validity of the rule. If and when a rule is challenged in the concrete context of an actual case or controversy, the court must don its judicial robes and adjudicate the validity of the rule, including its consistency with substantive constitutional or statutory limitations.³⁵⁰ Judged on that standard, a pleading rule that reduces the issue of nonparty fault to an affirmative defense cannot be sustained.

b. Assigning the Burden of Proof—Or Not

The burden of proof on an issue ordinarily follows the burden of pleading.³⁵¹ However, this is not invariably the case.³⁵² Deciding who must provide notice that a controversy exists through the pleadings or otherwise, and determining who has the burden of persuasion on that matter, are two separate inquiries. We have concluded above that the issue of allocation of fault to another entity should not be viewed as an affirmative defense to be raised in the defendant's original answer.³⁵³ But we have not thereby resolved the assignment of the burden of proof with respect to such an allocation of fault among the tortfeasors. In other words, to conclude that the matter is or is not an affirmative defense to be pled by the defendant

349. *State v. Frampton*, 95 Wash. 2d 469, 510, 627 P.2d 922, 943 (1981) (Rossellini, J., dissenting).

350. *See, e.g., Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) (considering challenge to Federal Rule of Civil Procedure 35(a), which had earlier been adopted by the Supreme Court, as invalidly affecting matters of substance); *Hanna v. Plumer*, 380 U.S. 460 (1965) (same with respect to Federal Rule of Civil Procedure 4(d)(1)).

351. MCCORMICK ON EVIDENCE § 337, at 948 (E. Cleary 3d ed. 1984). *See, e.g., Haslund v. City of Seattle*, 86 Wash. 2d 607, 620-21, 547 P.2d 1221, 1230 (1976) (because the statute of limitations is an affirmative defense, the burden of proof is on the defendant to prove those facts establishing the defense); *Fulle v. Borlevard Excavating, Inc.*, 20 Wash. App. 741, 744, 582 P.2d 566, 568 (1978) (because doctrines of estoppel, waiver, and laches are affirmative defenses, defendant has the burden of proof).

352. MCCORMICK ON EVIDENCE, *supra* note 351, § 337, at 949.

353. *See supra* part III.C.2.a.

does not by itself answer the question of where the burden of proof should fall.

As with the question of responsibility for raising the issue of the fault of nonparties, the location of the burden of proof requires us to look to the statute and the legislative intent. When a cause of action or an element of an action finds its source in a statute, the imposition of the burden of proof is a question of statutory interpretation.³⁵⁴ Comparative fault statutes enacted in some other states have implicitly or explicitly assigned to the defendant the burden of proof on allocation of fault to a nonparty, while reserving to the plaintiff the ultimate burden of establishing the liability of defendants.³⁵⁵ The Washington State Legislature did not choose to address the issue of burden of proof directly in the statute. However, as with the issue of appropriate procedures for raising a nonparty fault issue, RCW 4.22.070 provides a benchmark for any resolution of the issue by stating that the trier of fact is to allocate fault to all responsible entities.³⁵⁶ Our task is to allocate the burdens of proof among the parties in the manner that "best advances the legislative purpose"³⁵⁷ of ensuring comparative fault among all responsible entities.

At the outset, the burden of proof on two matters would not seem to be in any serious dispute. First, as with any cause of action, the plaintiff bears the primary and ultimate burden of persuasion. "Since the plaintiff is the party seeking to disturb the existing situation by inducing the court to take some measure in his favor, it seems reasonable to require him to demonstrate his right to relief."³⁵⁸ Thus, the plaintiff must persuade the trier of fact, by a preponderance of the evidence, that any named defendant actually engaged in negligent or other culpable behavior and that such conduct was a proximate cause of the plaintiff's injury or damage.

Second, the defendant has traditionally had the burden of

354. *Rozner v. City of Bellevue*, 116 Wash. 2d 342, 804 P.2d 24 (1991) (assigning burden of proof to claimant in forfeiture hearing to show that forfeited vehicle was not used to facilitate the sale of an illegal controlled substance or was used without consent or knowledge of the owner).

355. IND. CODE ANN. § 34-4-33-10(b) (Burns 1986) (placing the burden of proof of a nonparty defense upon the defendant); N.M. STAT. ANN. 41-3A-1(B) (1989) (implicitly placing burden of proof upon defendant by referring to defendant as "establish[ing] that the fault of another is a proximate cause of a plaintiff's injury").

356. WASH. REV. CODE § 4.22.070(1) (1991).

357. *Rozner v. City of Bellevue*, 116 Wash. 2d 342, 347, 804 P.2d 24, 27 (1991).

358. Cleary, *supra* note 320, at 7.

proof of establishing any contributory or comparative fault on the part of the plaintiff.³⁵⁹ If the defendant wishes to avoid liability by directly taking the case to the plaintiff and accusing the plaintiff of proximately causing his or her own injury or damage, the burden of both raising and proving that allegation is properly left with the defendant. The plaintiff has no affirmative obligation to prove his or her own nonculpability. Given the strong historical tradition in Washington of treating contributory or comparative fault by the plaintiff as an affirmative defense to be established by the defendant, we would expect a more explicit statement by the legislature before assuming that RCW 4.22.070 reversed that understanding.

The more difficult question concerns assigning the burden of proof on the allocation of fault among the tortfeasors. If the plaintiff has named more than one defendant, does the plaintiff have the burden of proving only liability without also establishing the degree of each defendant's liability? Or does the burden then shift to the defendants to persuade the trier of fact on the amount of fault to be allocated to each? And if the plaintiff has failed to join or cannot join a responsible entity, who has the burden of proving the fault and degree thereof of that nonparty? Because the plaintiff bears the responsibility of establishing liability on the part of the defendant, doesn't that duty include the burden of proving the degree of that liability in comparison to other tortfeasors? Or perhaps the whole inquiry is misguided and there is no need to assign the burden of proof on allocation of fault to any party? Let us consider the arguments on all sides.

If we were to set aside the legislative intent expressed in the statute and attempt to determine how the burden on respective degree of fault would be assigned under the common law, our analysis would likely favor the plaintiff.³⁶⁰ The plaintiff of course would have the burden of proving that each named defendant was liable, but the burden of showing the extent of individual responsibility would probably be left to the defendants. Two cases support this conclusion.

359. *Godfrey v. State*, 84 Wash. 2d 959, 965, 530 P.2d 630, 633 (1975).

360. Even under a common law analysis, it is not a foregone conclusion that the burden of proof on allocation of fault would be assigned to the defendant. See 9 WIGMORE, EVIDENCE § 2486, at 291 (Chadbourn rev. 1981) (in tort cases, the plaintiff "is put to prove merely the nature of his harm and the defendant's *share* in causing it") (emphasis added).

In *Godfrey v. State*,³⁶¹ the Washington Supreme Court ruled that the plaintiff's contributory or comparative fault was appropriately left for the defendant to prove because the issue only comes into play after the plaintiff has first established the defendant's negligence and liability.³⁶² Thus, the court stated, contributory negligence was "a coordinate or counterpart of a defendant's negligence."³⁶³ The same reasoning used in *Godfrey* could be applied to the question of allocation of degree of fault among the tortfeasors. The issue of respective fault arises only after it has first been established that a defendant is liable. If the defendant is exonerated from fault, the defendant has no interest in the allocation of fault among the remaining entities. In this sense, the issue of respective fault is "a coordinate or counterpart of a defendant's negligence"³⁶⁴ that would properly be left to the defendant to prove as a matter of defense.

The decision in *Phennah v. Whalen*³⁶⁵ provides further support for this conclusion. In *Phennah*, the Washington Court of Appeals considered the burden of persuasion in the context of successive tortfeasors. In that case, the plaintiff had been injured in two unrelated automobile accidents, but the harm suffered was not easily segregated between the separate tortious incidents.³⁶⁶ The court initially recognized that, in the case of successive tortfeasors, "the injuries are inflicted by separate, discrete impacts and it therefore would seem that the plaintiff ought to be able to ascribe to each wrongdoer responsibility only for the damage he caused."³⁶⁷ However, the court stated, when segregation of the injuries separately inflicted is not capable of proof, a requirement that the plaintiff show the exact proportion of harm caused by each defendant would effectively deprive the plaintiff of the right to redress for the injury.³⁶⁸ Accordingly, the *Phennah* court adopted the approach of Section 433B(2) of the Restatement (Second) of Torts, which provides that when a defendant "seeks to limit

361. 84 Wash. 2d 959, 530 P.2d 630 (1975).

362. *Id.* at 964, 530 P.2d at 632.

363. *Id.* at 964, 530 P.2d at 632-33.

364. *Id.*

365. 28 Wash. App. 19, 621 P.2d 1304 (1980).

366. *Id.* at 21-22, 621 P.2d at 1306.

367. *Id.* at 24, 621 P.2d at 1307.

368. *Id.* at 24-25, 621 P.2d at 1307-08 (citing 1 FOWLER V. HARPER & FLEMING JAMES JR., THE LAW OF TORTS § 10.1, at 707-08 (1956); *Summers v. Tice*, 199 P.2d 1, 5 (1948)).

his [joint and several] liability on the ground that the harm is capable of apportionment among [the tortfeasors], the burden of proof as to the apportionment is upon each [defendant].'³⁶⁹ The *Phennah* rule thus requires successive tortfeasors to accept the burden of allocating the harm caused to the plaintiff between the separate incidents or to assume joint and several responsibility in damages. The same rationale applied to our current problem would indicate that the defendant should have the burden of proof when it seeks to limit liability by apportioning part of the responsibility to another tortfeasor.

However, our task is not one of imagining the likely assignment of burdens at common law. Rather it is to uphold the intent of the Washington comparative fault statute. The *Godfrey* and *Phennah* decisions, imposing on defendants the burden of proof on contributory fault and segregation of harm, reflected the traditional "policy of handicapping a disfavored contention" by assignment of the burden of persuasion.³⁷⁰ RCW 4.22.070 establishes a new principle of comparative fault and implements that principle of proportionate responsibility through an unequivocal command that the trier of fact determine the degree of fault of every responsible entity. This legislative policy may not be undermined by treating the rule of comparative responsibility as a "disfavored contention" to be discouraged by imposing the burden of proof upon the party raising the issue. Instead, we must determine what approach "best advances the legislative purpose";³⁷¹ that is, the purpose of correlating extent of liability with degree of fault.

With the transition of liability law to a system of comparative responsibility among tortfeasors, the *Godfrey* and *Phennah* decisions have lost their force and cannot be applied to our situation. As noted above, the question of a plaintiff's contributory fault (the subject of *Godfrey*) is appropriately left to the defendant's proof because it involves, not a denial of the defendant's liability, but a direct counterattack upon the plaintiff. By contrast, under a system of comparative responsibility, the degree of a defendant's fault leads inexorably to the extent of liability. The existence of liability and the extent of liability

369. *Id.* at 28, 621 P.2d at 1310 (quoting RESTATEMENT (SECOND) OF TORTS § 433B(2) (1965)).

370. MCCORMICK ON EVIDENCE, *supra* note 351, § 337, at 950 (footnote omitted).

371. *Rozner v. City of Bellevue*, 116 Wash. 2d 342, 347, 804 P.2d 24, 27 (1991).

are thus logically intertwined, and the plaintiff has the full burden of proof on liability.

With respect to apportionment of harm between successive tortfeasors (the subject of *Phennah*), the court feared that placing the burden of proof upon the plaintiff might deprive the plaintiff of any remedy. If the plaintiff were obliged to segregate the harm between separate incidents, but was unable to make a sufficient evidentiary showing, the plaintiff would be prevented from obtaining a recovery from either tortfeasor. The court thus ensured a remedy to the plaintiff by holding successive tortfeasors jointly and severally liable, unless a successive tortfeasor could prove the divisibility of the harm. The *Phennah* approach has been superseded, and a remedy to the plaintiff has been guaranteed by different means. No longer is the matter of division of responsibility measured by apportionment of the *harm*, but rather by apportionment of the *fault*, a determination that is eminently possible in all but the most unusual of cases.³⁷² RCW 4.22.070 has overturned *Phennah* by providing for apportionment of liability based upon fault in nearly all contexts formerly governed by the joint and several liability doctrine, including the situation of successive tortfeasors. Once the plaintiff has met the burden of proof of showing a defendant's culpable conduct and proximate causation of the harm, the plaintiff is ensured of some recovery, whatever may be the ultimate allocation of respective fault among all responsible entities.

Under the new system of comparative fault, as established by RCW 4.22.070, I think on balance that the burden falls upon the plaintiff to prove both the existence and the extent of liability. The plaintiff's acknowledged burden of showing that a particular defendant is at fault necessarily includes a showing of that defendant's degree of fault. If the plaintiff desires to hold one defendant fully responsible to the exclusion of all other parties and entities, the plaintiff appropriately has the obligation to establish by a preponderance of the evidence that this defendant, and this defendant alone, is at fault. When contributory fault by the plaintiff is alleged, the defendant is seeking to defeat or diminish liability by reversing it back upon the plaintiff. In contrast, when the plaintiff contends that the defendant is solely and fully liable for all damages, the plain-

372. See *supra* part III.B.3 (discussing division of fault as contrasted with division of harm).

tiff's burden includes the obligation of excluding the possibility of fault and causation on the part of other entities. In conclusion, in a system of comparative fault, part and parcel of the plaintiff's affirmative case of proving that a defendant was at fault and is responsible in damages is proof that some other entity is not at fault and should not share in the responsibility in damages.

When the fault of nonparties is at issue, it is appropriate to impose upon a defendant the burden of producing some evidence that an unjoined entity is responsible in whole or part for the harm. The defendant's burden of production includes the duty of bringing forward sufficient evidence to make a *prima facie* case. The defendant must produce concrete evidence of the nonparty's contribution to the tortious harm. The defendant may not merely hint at possible involvement by other entities and leave the plaintiff with the impossible task of proving a negative. The plaintiff will instead be assured of a tangible evidentiary basis in which to respond. The ultimate burden of persuasion—to establish that the full share of responsibility belongs with the defendant—remains always upon the plaintiff. However, "although the defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact"³⁷³ that fault lies as well with other entities. Thus, the battle will be fully joined, and the plaintiff's affirmative case will not involve shadow boxing with an imaginary opponent.

When all is said and done, the dispute about burden of proof is not likely to be consequential in practice. Indeed, I submit that it is a false issue. The plaintiff indisputably has the burden of proving liability by the defendant, meaning that a failure of persuasion results in a verdict for the defendant. By contrast, the burden of proof on apportionment of fault—whether imposed on the plaintiff or on the defendant—is unlikely to affect the jury's calculation. Once the trier of fact has passed the threshold of liability and turns to the question of the degree of fault, the risk of nonpersuasion fades away.

It is necessary to assign the burden of proof on the threshold question of liability. Whether a party has any fault, and is therefore liable, is an issue that can be evaluated by weighing the evidence along a single dividing line between the negative

373. See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981) (unanimous decision allocating burdens of proof in employment discrimination case).

and the affirmative. In other words, the determination of fault versus non-fault is a question that can be answered "yes" or "no." The burden of persuasion on liability therefore has consequence in those cases where the evidence is evenly balanced. But when the issue of fault has already been answered in the affirmative, the question of apportionment does not lend itself to a simple, single, correct answer. On this point, it is essentially meaningless to say that the evidence is in equipoise or that the burden of proof on the question is not met. The large range of possible answers defeats any attempt to define the point at which the preponderance of the evidence is satisfied.

Once the threshold determination of liability is made, based on a preponderance of the evidence, some degree of fault will necessarily be allocated to the liable defendant. Because apportionment of fault is not an all or nothing proposition, a positive answer will always be given. A jury that has concluded that the defendant is at fault does not assess the percentage of fault according to a formula based on the preponderance of the evidence. This stage of the process implicates a more complex weighing of all the evidence.

United States Senator Larry Pressler and Mr. Kevin V. Schieffer, in arguing for reform of joint and several liability, suggest that "[t]here is no need to impose a requirement that any particular party bear the burden with respect to apportionment."³⁷⁴ The legislative report of a United States Senate committee on a proposed national products liability act endorses this approach:

[This bill] does not specify who has the burden of proof as to apportionment Based on the evidence presented, the trier of fact should apportion responsibility among all parties. All the parties will have an opportunity to present their case to the trier of fact as to the appropriate apportionment of responsibility, so that liability can be assigned based on that apportionment. The trier of fact shall make a determination as to apportionment without a requirement that any particular party "prove" which apportionment formula should be applied.³⁷⁵

This approach strikes me as the best of all alternatives.

374. Pressler & Schieffer, *supra* note 161, at 667.

375. SENATE COMM. ON COMMERCE, SCIENCE AND TRANSPORTATION, THE PRODUCT LIABILITY REFORM ACT, S. Rep. No. 422, 99th Cong., 2d Sess. 6970 (1986) (majority views).

RCW 4.22.070 does not specify who has the burden of proof on allocation of fault among all entities, although it unequivocally mandates that such an allocation of fault be made. Asking who has the burden of proof on this matter seems to be the wrong question. The plaintiff certainly must bear the burden of proof on the question of the defendant's culpable conduct and proximate causation of the harm. Likewise, the defendant should bear the burden of proof on the question of the plaintiff's culpable conduct and proximate causation of the harm. Once the existence of fault is established, the degree of fault is to be determined by the trier of fact, based upon *all* the evidence, without any meaningless instruction concerning who has the burden of proof. To instead "require any party to prove the 'correct' apportionment is unfair"³⁷⁶—the "imposition of burdens confuses the issue."³⁷⁷

D. Determining "Proportionate Share" of Damages in the Judgment

RCW 4.22.070(1) provides in pertinent part:

Judgment shall be entered against each defendant . . . in an amount which represents that party's proportionate share of the claimant's total damages.³⁷⁸

1. Introduction

To implement the general rule of "several only" liability,³⁷⁹ RCW 4.22.070(1) establishes a simple two-step approach to apportion liability according to responsibility. First, the statute provides that "the trier of fact shall determine the percentage of total fault which is attributable to every entity."³⁸⁰ Second, the statute provides that the court shall enter judgment against each defendant for "that party's proportionate share of the claimant's total damages."³⁸¹

The process is straightforward and, in my view, leaves nothing for interpretation. The ordinary reader of the statutory language would understand, for example, that *if* (1) the trier of fact finds a defendant to be 25 percent at fault, with

376. Pressler & Schieffer, *supra* note 161, at 667.

377. *Id.* at 668.

378. WASH. REV. CODE § 4.22.070(1) (1991).

379. *Id.*

380. *Id.*

381. *Id.*

the remainder of the fault being attributed in various shares to the plaintiff and other entities, joined or unjoined, *then* (2) the court shall enter judgment against this defendant for a 25 percent proportionate share of the plaintiff's total damages. However, the ordinary understanding has recently come under challenge by advocates of the state plaintiff's bar.

2. Two Variant Deconstructionist Interpretations

As perhaps the most novel of the deconstructionist interpretations propounded by the plaintiffs' bar, one commentator argues that a defendant's "proportionate share" of the damages is to be calculated by something more elaborate than a direct application of the defendant's percentage share of the fault to the total amount of the plaintiff's damages. Charles K. Wiggins suggests an interpretation of the statutory language that would convert the term "proportionate share" into a rather meaningless phrase, leaving trial lawyers free to urge a jury to award damages based upon loose notions of equity, quite aside from and perhaps unrelated to the comparative responsibility of the parties.³⁸²

Mr. Wiggins contends that there are three possible interpretations of the phrase "a party's proportionate share" in Subsection (1), only one of which is the ordinary meaning of "proportionate" as a simple and direct mathematical application:

First, under a "mechanical" interpretation, "proportionate share" could mean that the plaintiff's total damages are simply multiplied by the percentage of fault allocated to the defendant. Second, under a "party" approach, proportionate share could mean that the damages are multiplied by a proportion equal to the defendant's percentage of fault divided by the fault allocated to all parties, including plaintiff, defendants, and third-party defendants. Third, under a 'finder of fact' interpretation, "proportionate share" might be a number found as a fact by the trier of fact—in other words, the jury or judge would have to find both the percentage of fault allocated to all entities, and also the proportionate share of damages. The jury/judge might choose to calculate the proportionate share of damages based on the percentage of fault, or might apply some other calculus to reach its own best determination of a fair proportionate share

382. See Wiggins, *supra* note 61, at 215-22.

of damages to be assessed against this defendant.³⁸³

As demonstrated in detail below, Mr. Wiggins's second and third "interpretations" simply are not legitimate constructions of the statutory language. The plain meaning of "proportionate share," the basic structure of the statute, and the intent of the legislature to establish a general principle of comparative responsibility preclude these unsupported alternative approaches. Although critical of the results attained by the straightforward mathematical approach, Mr. Wiggins provides no support in the actual language of the statute for his alternatives. Nor does Mr. Wiggins adduce any support from the legislative history of the statute, or authority from any other comparative fault jurisdiction, to adopt his counterintuitive understandings of "proportionate share" in a comparative fault statute. I will look at both of Mr. Wiggins's alternate interpretations in turn and then return to the plain language approach, which in my view is plainly the correct approach.

a. The "Party" Approach

Mr. Wiggins makes no effort to justify his second alternate interpretation—the "party" approach—under the actual language of RCW 4.22.070. He does, however, explain how it would apply in practice. Under this variant approach, the defendant's share of liability would not be based directly upon its percentage share of the total fault attributable to all entities. Instead, the defendant's percentage share of the fault would be compared only to the sum of the shares of fault attributed to the other parties that had been *joined* to the lawsuit.³⁸⁴ Thus, before assigning a fractional share of liability to each defendant, the fault of *unjoined* entities would be subtracted from the total sum of the fault shares. In other words, all those parties joined to the action would, in addition to their own fault share, be held liable for a proportionate share of the fault allocated to any unjoined entities. The fault of unjoined entities would be reallocated to the parties.

Mr. Wiggins illustrates the "party" approach by postulating a case involving a comparatively negligent plaintiff, three defendants, and one unjoined entity.³⁸⁵ Mr. Wiggins hypothe-

383. *Id.* at 216.

384. *See id.* at 217.

385. *Id.*

sizes that a jury makes the following allocations of fault.³⁸⁶

TABLE 1

Plaintiff (P):	5 percent
Defendant 1 (D1):	5 percent
Defendant 2 (D2):	40 percent
Defendant 3 (D3):	30 percent
Unjoined Entity:	20 percent
Total Fault	100 percent

Under the simple mathematical approach (the approach I conclude that statute plainly employs), each defendant would be liable for a proportionate share of the plaintiff's total damages based upon an application of the found percentage of fault to the total amount of the plaintiff's damages. Thus, assuming P's total damages are \$100,000, D1 would be responsible for 5 percent or \$5,000, D2 for 40 percent or \$40,000, and D3 for 30 percent or \$30,000. The 20 percent share of the unjoined entity, which amounts to a \$20,000 proportionate share of the damages, would not be awarded.

Under Mr. Wiggins's "party" approach, we instead adjust that calculation to assign each of the parties a weighted fraction of the fault share attributed to the unjoined entity. If we assume \$100,000 in damages, the "party" approach would apply as follows:³⁸⁷

TABLE 2

Determining Sum of Fault Shares Attributed to Parties:

P	+	D1	+	D2	+	D3	=	x
5%	+	5%	+	40%	+	30%	=	80%

Determining Proportion of Each Defendant's Fault Share to Sum of Fault Attributed to Parties:

P:	5/80	×	\$100,000	=	\$ 6,250
D1:	5/80	×	\$100,000	=	\$ 6,250
D2:	40/80	×	\$100,000	=	\$50,000
D3:	30/80	×	\$100,000	=	\$37,500

Total Award

(Damages of \$100,000 Less P's Share of \$6,250)

386. I have substituted Defendants 1 through 3 for the fictional names used in Mr. Wiggins's hypothetical.

387. Wiggins, *supra* note 61, at 217.

As shown in these tables, under the "party" approach, the 20 percent fault share attributable to the unjoined entity is reallocated among all of the parties, including the plaintiff. In other words, the \$20,000 share of the damages corresponding to the unjoined entity's 20 percent share of the fault is divided on a fractional basis among the parties—\$1250 to D1, \$10,000 to D2, \$7,500 to D3, and \$1,250 to P.

The fatal flaw with Mr. Wiggins's "party" approach proposal is that there is absolutely nothing in Subsection (1) to support this calculation of the damage award. Mr. Wiggins can point to no language in the statute even hinting at a reallocation of an unjoined entity's share of the fault among the joined parties to the case according to this complex weighted fraction formula. Indeed, such an approach appears to be unprecedented in any jurisdiction.³⁸⁸ A small number of states do provide that, when a plaintiff is unable to collect a severally liable defendant's share of the damages, the uncollectible amount will be reallocated among the other parties according to their respective percentages of fault.³⁸⁹ None of these statutes, however, provide for reallocation of the percentage of fault attributed to an unnamed entity. And the Washington statute includes nothing that would suggest a reallocation of any party's or entity's fault to someone else in the award of damages.³⁹⁰ If such a complex and unusual system of damage cal-

388. In other states that have adopted comparative fault statutes providing for a general rule of several liability, the statutes have been uniformly interpreted to mean that a defendant's share of the liability is directly related to the defendant's share of the fault. *See, e.g.*, *Bisaillon v. Casares*, 798 P.2d 1368, 1371 (Ariz. Ct. App. 1990) (under Arizona comparative fault statute, defendant's liability was limited to percentage of damages reflecting percentage of fault); *Graber v. Westaway*, 809 P.2d 1126, 1128 (Colo. Ct. App. 1991) (under Colorado comparative fault statute, the jury must "apportion fault severally" among all entities and each defendant is then liable only for that "percentage of plaintiff's damages which represents the amount of fault attributable to him").

389. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-572h(g) (West 1991); MICH. COMP. LAWS ANN. § 600.6304(6) (West 1987); MO. ANN. STAT. § 537.067(2) (Vernon 1988).

390. During floor consideration of the Tort Reform Act of 1986, the Washington State Legislature considered just such a proposal. An amendment was offered under which the court would "reallocate" an insolvent defendant's uncollectible share of a several liability judgment "among all other parties who were allocated a percentage of fault, including a claimant at fault, according to the ratios of their respective percentages of fault." H. Journal, 49th Reg. Sess. & Spec. Sess. 1047 (1986). Thus, if the legislature had intended to provide for a reallocation of one culpable entity's share of fault among the parties of a lawsuit based upon some ratio of respective fault, that alternative approach was readily available. As finally enacted, however, RCW 4.22.070(1) does not include any such provision.

calculation was intended, we would certainly expect the statute to allude to it in some way. It does not.

Similarly, nothing in Subsection (1) suggests that the calculation of the "proportionate share" of damages owed by a severally liable defendant involves adding up the sum of the shares of fault of the parties to the case. By contrast, consider the separate paragraph of the statute which preserves a limited form of joint and several liability when a plaintiff was not contributorily at fault. Under Paragraph (1)(b), if the plaintiff is without fault, all defendants against whom judgment is entered are jointly and severally liable "for the *sum* of their proportionate shares of the claimant[']s total damages."³⁹¹ Thus, when the Washington State Legislature intended to direct the courts to add together the shares of fault of parties to reach a "sum," it clearly said so. The absence of any reference to the "sum of their proportionate shares" in the several liability-only provision of Subsection (1) plainly bars the importation of such a calculation formula into that part of the statute.³⁹²

Finally, the "party" approach runs directly contrary to the statute's explicit adoption of a "several only" rule, which generally limits a defendant's liability to its own share of fault. Under Mr. Wiggins's "party" approach, a defendant who is only partially at fault could easily be held liable for the potentially larger share of fault attributable to an unjoined entity. Consider the following scenario: the plaintiff is found to be 1 percent at fault, the joined defendant is found to be 20 percent at fault, and an unjoined entity is found to be 79 percent at fault. A comparison of the defendant's 20 percent share with the sum of the shares of percentage fault assigned to all parties leads to a fraction of 20/21—which converts to more than 95

391. WASH. REV. CODE § 4.22.070(1)(b) (1991) (emphasis added).

392. Moreover, if the term "proportionate share" in Subsection (1) involves a calculation of the sum of the parties' shares of fault, as Mr. Wiggins suggests, then what does the same term mean in Paragraph (1)(b) when the statute explicitly directs adding up the defendant's "proportionate shares" of fault to reach a "sum"? If the term "proportionate share" standing by itself in Subsection (1) requires addition of shares to reach a sum, then does the "sum" of "proportionate shares" in Paragraph (1)(b) involve some type of double multiplication? Nonsense. Mr. Wiggins's artificial reading of the term in one part of the statute leads to a confused and impossible understanding of the same term in another part of the statute. Both provisions in the same statute reinforce the common understanding of the term "proportionate share" as meaning that share of the damages which corresponds to the defendant's individual percentage share of the total fault.

percent. Although only 20 percent at fault, that defendant under the "party" approach would be on the hook for some 95 percent of the damages. This result is impossible to reconcile with the language or intent of the statute.

b. The "Fair" or Equitable Share Approach

As another variant twist upon the statute, Mr. Wiggins argues that holding a defendant liable for the defendant's "proportionate share" of the damages actually means that the jury may take whatever action strikes its members as roughly equitable, quite aside from the jury's own determination of the percentage of fault attributable to that defendant. As I have suggested, RCW 4.22.070(1) plainly sets forth a two-step approach.³⁹³ First, the jury determines the percentage of fault attributable to every entity, whether named as a party to the action or left unjoined. Second, the court then enters judgment against each defendant for that defendant's proportionate share of the damages. Comparative fault leads to comparative liability.

Mr. Wiggins, however, suggests adding a third intervening step to the statutory process. After the jury has already made an allocation of fault, Mr. Wiggins would ask the jury to return to the same subject and make some sort of ill-defined, unarticulated finding as to who should bear what share of the damages notwithstanding the earlier allocation of percentages of fault. As Mr. Wiggins acknowledges, the trier of fact could choose to set aside its earlier findings on the shares of fault allocated to all entities and instead apply "some other calculus to reach its own best determination of a fair proportionate share of damages to be assessed against this defendant."³⁹⁴

But where is this in the statute? The statute provides for the trier of fact to allocate percentages of fault to every responsible entity. There is no mention in the statute of another step in the jury's deliberations. There is no reference to a "fair" or equitable share approach. The statute refers to "proportionate share," a term that suggests quantity or magnitude—a mathematical concept. If percentage of fault is not to be the basis for apportionment of damages, then what is? What would this third step in the process involve? How would

393. Mr. Wiggins does acknowledge that the structure of RCW 4.22.070(1) supports the two-step approach. Wiggins, *supra* note 61, at 218.

394. *Id.* at 216.

the jury be instructed under Mr. Wiggins's "fair share" or "equitable share" approach? Because the jury is required by the statute to determine percentages of fault, what further would it be asked to do? How would the trial court or the reviewing appellate court assess what the jury had done? Mr. Wiggins's approach would produce an unguided, arbitrary process in violation of the due process rights of defendants.

3. The Ordinary Meaning of "Proportionate Share"

In the end, having found the variant deconstructionist interpretations wanting, we must return to where we started—an ordinary understanding of the plain language in the statute. The structure of the statute, the words of the statute, and the purpose of the statute independently and in combination confirm that the proportionate share of the damages assessed against individual defendants under RCW 4.22.070(1) corresponds directly to the percentage of fault attributed to that defendant by the trier of fact.

a. Structure of the Statute

As Mr. Wiggins acknowledges,³⁹⁵ the basic structure of the statute signals a simple "mechanical" application of each defendant's percentage share of the fault to the total amount of the plaintiff's damages to reach that defendant's proportionate share of the damages to be awarded. The first sentence of RCW 4.22.070(1) commands the "trier of fact" to "determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages."³⁹⁶ The second sentence directs the entry of judgment against each defendant "in an amount which represents that party's proportionate share of the claimant's total damages."³⁹⁷ A simple two-step process: (1) assign percentage of fault, and (2) award damages based upon that proportionate share.

Mr. Wiggins, however, suggests that the statute cannot be so easily understood because it uses two separate terms—"percentage of fault" and "proportionate share"—which he believes must have different meanings and involve different processes.³⁹⁸ But the use of two separate phrases in discussion

395. *Id.* at 218.

396. WASH. REV. CODE § 4.22.070(1) (1991).

397. *Id.*

398. Wiggins, *supra* note 61, at 215-16, 218-19. Mr. Wiggins also contends that

of two different steps of the process presents no difficulty or confusion. The trier of fact determines the "percentage of fault" while the court enters judgment based upon the "proportionate share" of the damages. The "percentage of fault" found by the trier of fact serves as the basis for the court's entry of judgment based on a "proportionate share" of the damages.³⁹⁹ Thus, the word "percentage" refers to the allocation of fault and the word "proportionate" refers to the translation of that allocation into an entry of judgment for a share of the damages.

b. The Plain Meaning of "Proportionate"

The legislative choice of the term "proportionate" also undermines Mr. Wiggins's proffer of an alternate approach. The term does not lead one to think about fractional shares based upon a sum of shares less than the whole or about an arbitrary equitable share chosen at random by the jury. Rather, the term "proportionate share" suggests to the ordi-

RCW 4.22.070(1) should not be applied in a strictly mathematical manner because such an approach makes it unnecessary for the court to hold a reasonableness hearing to approve a settlement as previously required under RCW 4.22.060. *Id.* at 220-21. Under the joint and several liability regime, when one of multiple defendants settled with the plaintiff, the amount of the settlement was credited against the plaintiff's damages before entering judgment against the nonsettling defendants. To protect the nonsettling defendants, the court was required to hold a hearing to determine whether the amount of the settlement was reasonable and therefore reflected a legitimate figure to credit against the plaintiff's damages as awarded against the remaining defendants. WASH. REV. CODE § 4.22.060 (1991). RCW 4.22.070 institutes a general rule of several liability and, even when the plaintiff is without fault, limits joint and several liability to the sum of the defendants' shares of fault, excluding any percentage share of fault allocated to nonparties. Accordingly, because the settling defendant's share of the fault and proportionate share of the damages will not be assessed against the remaining defendants, the reasonableness hearing is ordinarily unnecessary. Therefore, Mr. Wiggins argues, a "mechanical" interpretation of RCW 4.22.070 renders RCW 4.22.060 unnecessary. Mr. Wiggins thus concludes that adoption of the simple mathematical approach violates the principle that all provisions of a statute should be given effect. He simply forgets that RCW 4.22.070 is not without exceptions. As detailed later in this Article, *see infra* part III.E and part III.H, Paragraph (1)(a) preserves joint and several liability among tortfeasors acting in concert and of a principal for an agent, and Subsection (3) sets out three complete exceptions to the modification of joint and several liability. WASH. REV. CODE § 4.22.070(3) (1991). The reasonableness hearing requirement of RCW 4.22.060 retains full vitality whenever any of those exceptions come into play. *See also infra* part III.G (discussing settlement under Subsection (2)).

399. Washington Pattern Jury Instructions—Civil, § 41.04, 6 WASHINGTON PRACTICE 337 (1989) (Washington pattern jury instruction § 41.04 directs the jury to determine "what percentage of the total negligence is attributable to each entity" and explains that the jury's answers "will furnish the basis by which the court will apportion damages" among the defendants).

nary person a simple, mechanical, mathematical calculation. Black's Law Dictionary says that "proportionate" and "pro rata" are synonymous and mean "according to a certain rate, percentage, or proportion."⁴⁰⁰ Thus, the plain language, as well as the structure of the statute, compel the conclusion that the "proportionate" share of the damages is to be determined by application of a certain "percentage"—the percentage of fault.

Moreover, RCW 4.22.070 is not the only provision in this chapter of the Washington code that makes use of the term "proportionate." The comparative negligence statute, governing allocation of fault between plaintiffs and defendants, uses much the same language. RCW 4.22.005 speaks in terms of "charg[ing]" "contributory fault" to the plaintiff, and then using that factual determination to make a "proportionate[]" reduction in the judgment for damages.⁴⁰¹ Mr. Wiggins concedes⁴⁰² (as he must in light of the longstanding judicial construction of the comparative negligence statute⁴⁰³) that the proportionate reduction in recovery accomplished under RCW 4.22.005 is calculated directly from the percentage of fault chargeable to the plaintiff.

It would certainly be strange for the same term "proportionate" to be applied in one way as between plaintiffs and defendants under the comparative negligence statute and yet another way as among plaintiffs, defendants, and all other entities under the comparative fault statute. Before we could construe the comparative fault statute in such an unnatural manner, we would properly expect more direction in the language or at least the legislative history of the provision. But, as discussed, nothing in the actual language or in the legislative history of RCW 4.22.070 provides any support for any understanding of the statute other than one that ties the amount of liability in damages ("proportionate share" of damages) to the degree of fault ("percentage of fault").

c. *The Purpose of the Statute*

As I said at the outset of this Article, any proposed inter-

400. BLACK'S LAW DICTIONARY 1097-98 (5th ed. 1979).

401. WASH. REV. CODE § 4.22.005 (1991) ("any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages").

402. Wiggins, *supra* note 61, at 218-19.

403. See, e.g., *Godfrey v. State*, 84 Wash. 2d 959, 965, 530 P.2d 630, 633 (1975) (under the comparative negligence statute, "[r]ecovery will . . . be diminished in proportion to the percentage of negligence attributed to the party recovering").

pretation of the statute that serves to undermine the guiding principle of comparative fault in liability is not in accord with either the plain language of the provision or the history of its enactment.⁴⁰⁴ Following immediately after the statutory command to determine the percentage of fault, and after the direction to enter judgment for a proportionate share of damages, we find the third sentence of RCW 4.22.070(1), which reminds us of the basic legislative intent: liability of each defendant is to be "several only." The first two sentences must be understood in light of the third.⁴⁰⁵

By "several" liability, the statute means that each defendant is to be held responsible in damages only for his or her individual share of the fault.⁴⁰⁶ As one commentary states: "When joint and several liability is replaced with several liability, a defendant's liability to the plaintiff is directly *proportional* to his *percentage* of the total negligence."⁴⁰⁷ During the legislative debate, one member of the state senate explained that the statute codifies the "good public policy" of having "those persons who have contributed to the problem pay proportionate to their contribution."⁴⁰⁸

The essence of RCW 4.22.070 is comparative fault among all entities. There is no room in the statute for retreat.

E. Acting in Concert and Agency: The Vicarious Liability Provision

RCW 4.22.070(1)(a) reads:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.⁴⁰⁹

RCW 4.22.070 abolishes the doctrine of joint and several

404. See *supra* note 20 and accompanying text.

405. The Washington legislators well understood that they were abolishing the doctrine of joint and several liability when the plaintiff is contributorily negligent. See, e.g., S. Journal, 49th Reg. Sess. & 1st Spec. Sess. 466 (1986) (when the plaintiff is also at fault "joint and several liability goes out the door") (remarks of Sen. Talmadge); H. Journal, 49th Reg. Sess. & Spec. Sess. 1048 (1986) (provision "does away with joint and several liability") (remarks of Rep. Padden); *id.* (same) (remarks of Rep. McMullen); *id.* (same) (remarks of Rep. Wang).

406. See *supra* note 165.

407. 2 COMPARATIVE NEGLIGENCE § 13.30, at 1339 (1991).

408. S. Journal, 49th Reg. Sess. & 1st Spec. Sess. 466 (1986) (remarks of Sen. Thompson).

409. WASH. REV. CODE § 4.22.070(1)(a) (1991).

liability in most contexts, substituting instead a general rule holding each tortfeasor separately responsible for its individual degree of culpability. However, the statute contains certain limitations and exceptions. Paragraph (1)(a) articulates the first limitation on the general rule. Under this provision, a party may be held responsible for the fault of another person (1) if that party and the other person "act[ed] in concert," or (2) if that other person "act[ed] as an agent or servant of the party."⁴¹⁰ Fault will not be divided among individuals acting in concert or when a principal or master is held to account for the deeds of an agent or servant. Paragraph (1)(a) "reflects the legislature's understanding that a party is appropriately held responsible for truly indivisible wrongs committed in concert and for those torts committed by one who acts as an agent or servant for another party."⁴¹¹

As discussed below, when the statute refers to persons "acting in concert," it means that two or more persons have combined together purposefully to commit a tortious act. Similarly, when a party anoints another person as an agent, the party asks the world to recognize the agent as his or her alter ego. In either case, the separate identities of the actors fades. The actions of one are treated as the actions of the other. Thus, it is impossible to apportion fault between the party and the other person with whom he or she acted in concert or who was employed as an agent or servant.⁴¹² Under a theory of

410. Professor Peck points out that Paragraph (1)(a) speaks in terms of a "party" being responsible for the fault of another "person" or for payment of the share of another "party," rather than using the word "entity," which is used elsewhere in the section to broadly denote both parties and nonparties. Peck, *Washington's Partial Rejection*, *supra* note 2, at 250. Professor Peck is quite correct to criticize the legislature for this inconsistent use of terminology. See REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* § 6.14, at 135 (2d ed. 1986) ("[C]onsistency, which sharpens the tools of language, is the ranking principle [of drafting]. Nothing will contribute so much to general clarity as following it, and nothing will contribute so much to obscurity as neglecting it"). However, the inconsistency appears to be inadvertent. As Professor Peck states, this "haphazard interchange" of terms "has no apparent purpose." Peck, *Washington's Partial Rejection*, *supra* note 2, at 250. There is no reason to believe that the legislature desired to limit the application of this section to natural persons and thereby preclude the possibility of acting in concert with or appointing as agent an artificial entity such as an organization or corporation. The term "person" in this particular portion of RCW 4.22.070 appears to have the same broad meaning as the word "entity" elsewhere in the statute. See *supra* part III.C.1 (discussing meaning of "entity").

411. Sisk, *supra* note 13, at 468.

412. Anderson, *supra* note 88, at 486 ("[b]ecause vicarious liability is based on the relationship between the actual tortfeasor and some other party responsible for the tortfeasor's conduct, assigning separate shares of liability to each is illogical").

vicarious liability, the wrong committed is, by definition, indivisible.

In the case of the ordinary joint tort, the tortfeasors may have engaged in parallel conduct that combines to harm the plaintiff or may have simply cooperated together in a lawful enterprise that, combined with negligence or other fault, led to injury. By contrast, there is an intimate alliance among persons acting in concert and between a principal or master and an agent or servant. In these contexts of vicarious liability, a different rule of liability is appropriate. Because the law treats people acting in concert as essentially a single entity, and because the ordinary rules of agency make a principal responsible for the actions of the agent, comparative fault has no application. Paragraph (1)(a) "simply recognizes a practical limitation on the ability to apportion fault among tortfeasors."⁴¹³

1. Concerted Action

Holding persons "acting in concert" responsible for each other's fault represents a return to first principles of law. By preserving vicarious liability when a party has acted in concert with another person, the legislature intended to return the doctrine of joint and several liability to its origins. Indeed, the doctrine of joint and several liability was first recognized in, and originally limited to, the context of concerted action.⁴¹⁴ The earliest decision on point was *Sir John Heydon's Case*⁴¹⁵ in 1613. In that case, the English court permitted suit on a joint tort where the defendants had engaged in a joint enterprise, so that "all coming to do an unlawful act, and of one party, the act of one is the act of all of the same party being present."⁴¹⁶ As Dean Prosser explained, when the parties acted in concert with a common purpose, each was liable "for the entire damage done, although one might have battered the plaintiff, while another imprisoned him, and a third stole his silver buttons."⁴¹⁷

413. Sisk, *supra* note 13, at 468.

414. WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS 1094 (1st ed. 1941) [hereinafter PROSSER ON TORTS]; 1 SPEISER et al., *supra* note 36, § 3.7, at 393; Sisk, *supra* note 13, at 436-37.

415. 77 Eng. Rep. 1150 (K.B. 1613).

416. *Id.* See also PROSSER ON TORTS, *supra* note 414, at 1094 (quoting *Sir John Heydon's Case*, 77 Eng. Rep. 1150, 1151 (K.B. 1613)).

417. PROSSER ON TORTS, *supra* note 414, at 1094.

In the early common law, to have acted in "concert" meant that the parties had acted to accomplish a wrongful purpose with a common design.⁴¹⁸ While an express agreement was not necessary, there had to be at least a tacit understanding among the parties.⁴¹⁹ And the mere fact of an agreement was not enough; the defendants had to actually commit acts of a tortious character in carrying the common wrongful design into execution.⁴²⁰ In other words, to constitute concerted activity, the defendants had to "intentionally unite in the wrongful act" or be present and actively assist or participate in the wrongdoing.⁴²¹ Indeed, the civil concept of concerted activity

418. One Washington decision rendered early in this century could be read as defining concerted action more broadly to mean only that the tortfeasors acted with a common plan or purpose, whether or not the purpose was wrongful in nature. In *Pealer v. Grays Harbor Boom Co.*, 54 Wash. 415, 103 P. 451 (1909), the Washington Supreme Court considered a case involving a suit against two lumber companies that had negligently permitted logs floating in the river to dam the flow and cause the water to flood back upon the plaintiff's land. The court upheld a jury instruction stating that the two companies should be found to have acted in concert if they had acted "with a common purpose in obtaining and securing these logs for rafting, and placing them on the market." *Id.* at 416, 103 P. at 452. The *Pealer* decision must be understood in historical context. At this point in time, the Washington Supreme Court was in the process of moving the doctrine of joint and several liability beyond the original limited context of concerted activity and extending it to tortfeasors who acted independently but whose concurrent actions united to cause a single injury. The seeds of a more expansive rule had been planted eight years before *Pealer* in *Doremus v. Root*, 23 Wash. 710, 63 P. 572 (1901), and were soon to blossom into the adoption of the modern doctrine of joint and several liability in *Nelson v. Bromley*, 55 Wash. 256, 104 P. 251 (1909), which was rendered later the same year that *Pealer* was decided. Accordingly, *Pealer* is best understood as an interim point in the development of the law, in which the court was stretching the traditional notion of concerted activity to extend the law of joint torts one step further along the path toward joint and several liability of concurrent tortfeasors. Indeed, the *Pealer* court, while mentioning the common law concept of acting in concert, stated that the real issue was whether "the acts of both [tortfeasors] contributed to the overflowing of plaintiff's land," or whether the case involved "damage done by one and not the other." *Pealer*, 54 Wash. at 417, 103 P. at 452. The court's analysis reveals that its concern was not with the traditional and strict concept of concerted activity, but rather with whether joint and several liability should apply to concurrent acts resulting in a single injury to the plaintiff's land. In any event, the court concluded its decision on this point by noting that the application of joint and several liability in that case was of no practical consequence. Both of the defendant companies were owned by the same parties and were under the same management, so the court stated that "it could make no possible difference" how the judgment was divided between them. *Id.* at 418, 103 P. at 453.

419. PROSSER ON TORTS, *supra* note 414, at 1094-95.

420. See RESTATEMENT (SECOND) OF TORTS § 876 cmt. b (1979).

421. 1 SPEISER et al., *supra* note 36, § 3.4, at 382 (the "settled and venerable rule" of concerted action "applies to tortfeasors who intentionally unite in the wrongful act, or who are present and assist or participate therein, actively and with common intent, so that the injury results from the joint wrongful act of the wrongdoer") (footnote omitted). See also *Thompson v. Johnson*, 180 F.2d 431, 433-34 (5th Cir. 1950) (same).

was derived from the criminal doctrine of aiding and abetting.⁴²²

In this early period, even the existence of a conspiracy was not sufficient for imposition of joint liability on those who did not directly act together in effecting the injury. The concept of conspiracy was later used to *expand* joint and several liability "beyond the active wrongdoer to those who had merely planned, assisted or encouraged his acts."⁴²³ Subsequently, the doctrine of joint and several liability was further extended to concurrent tortfeasors, taking the rule well beyond the initial context of tortfeasors acting in "conscious concert."⁴²⁴

From the early common law, we can thus derive a definition of "acting in concert" as involving an intentional combination of conduct and requiring all tortfeasors to actively engage in the wrongful act.⁴²⁵ Given the legislature's apparent desire

422. *Smith v. Cutter Biological, Inc.*, 823 P.2d 717, 726 (Haw. 1991). See also Peck, *Washington's Partial Rejection*, *supra* note 2, at 235 (concerted activity torts ordinarily were "intentional torts" and were "frequently criminal in nature").

423. PROSSER ON TORTS, *supra* note 414, at 1095. See also *Carroll v. Timbers Chevrolet, Inc.*, 592 S.W.2d 922, 925-26 (Tex. 1979).

424. *Welsh v. Gerber Prod., Inc.*, 839 F.2d 1035, 1037 (4th Cir. 1988).

425. If Paragraph (1)(b) is interpreted as returning the law of joint and several liability to the strict view of concerted activity in the early common law, the term presumably would not extend to individuals who were not present and actively involved in the wrongdoing, but who instead encouraged or planned the activity or assisted the active tortfeasors after the fact. As noted above, joint and several liability was extended to these conspiratorial activities at a later point in the development of the common law. The North Dakota comparative fault statute specifically preserves joint and several liability for tortfeasors who "act in concert in committing a tortious act or aid or encourage the act." N.D. CENT. CODE 32-03.2-02 (1991). The North Dakota Supreme Court has interpreted this language as distinguishing between "two different types of conduct by tortfeasors, those who act in concert in committing a tortious act and those who aid or encourage a tortious act." *Kavadas v. Lorenzen*, 448 N.W.2d 219, 224 (N.D. 1989). But see *Bergman v. Anderson*, 411 N.W.2d 336, 341 (Neb. 1987) (approving a definition of concerted activity as involving the mere encouragement of tortious conduct). If the North Dakota distinction is accepted, and it is a distinction grounded in the traditional common law understanding of concerted activity, it is notable that the Washington statute speaks only in terms of "acting in concert" and does not preserve joint and several liability for those tortfeasors who aid or encourage a tortious act. Under this interpretation, Paragraph (1)(b) holds a tortfeasor who acts in concert fully responsible for the actions of those with whom he or she combines in active wrongdoing. A tortfeasor who withholds from active participation in the wrongdoing, but who assists in planning or encouraging the conduct, would be liable only to the extent that the finder of fact concludes that this activity is independently culpable and contributed to the harm suffered by the plaintiff. In other words, fault would be separately allocated to the conspirator who was not present and did not directly participate in the wrongdoing. However, in some instances, involvement in planning or encouraging the wrongful activity of others might be viewed as creating an implied agency relationship, thereby subjecting the

to restore the original understanding of joint and several liability, this strict and narrow understanding of concerted action should govern application of Paragraph (1)(a).

Moreover, the modern understanding of concerted action confirms its continued narrow application. In recent years (before tort reform), the doctrine of joint and several liability was broadly extended to any case where the actions of more than one person had united in causing a single injury, even if those persons had acted independently of each other. There was generally no need to fit cases into the mold of concerted activity in order to impose joint and several liability. However, in a few recent cases, the courts have considered the existence of concerted activity when necessary to determine whether tort liability could be extended to a particular actor in a particular situation.

For instance, the question of concerted action has arisen in cases where a plaintiff has been injured by a generic product, such as a drug, but has been unable to identify the particular manufacturer that produced the individual product or dosage that actually harmed the plaintiff. In these cases, the question is whether liability should be imposed upon a member of the industry in the absence of direct evidence on causation, that is, evidence that the individual manufacturer produced the dosage that was taken by the plaintiff. One of the theories of liability offered by plaintiffs in these cases has been the allegation that all manufacturers in the industry acted in concert to distribute the product without adequate testing or otherwise cooperated in distribution of a defective product. These concerted activity allegations have met with little success.⁴²⁶

For example, in *Martin v. Abbott Laboratories*,⁴²⁷ the Washington Supreme Court considered a case involving a

person to liability under Paragraph (1)(b) as a principal responsible for the conduct of the agent who carries out the tortious deed.

426. See, e.g., *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1015 (D. S.C. 1981) (declining to apply concerted action theory for liability of drug manufacturers); *Sindell v. Abbott Laboratories*, 607 P.2d 924, 993 (Cal.), cert. denied, 449 U.S. 912 (1980) (same); *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 280 (Fla. 1990) (same); *Smith v. Cutter Biological, Inc.*, 823 P.2d 717, 726 (Haw. 1991) (same); *Rastelli v. Goodyear Tire & Rubber Co.*, No. 38, 1992 WL 60502 (N.Y. 1992) (declining to apply concerted action theory for liability of tire rim manufacturer); *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 598, 698 P.2d 368, (1984) (declining to apply concerted action theory for liability of drug manufacturers). But see *Abel v. Eli Lilly & Co.*, 343 N.W.2d 164, 176 (Mich.), cert. denied, 469 U.S. 833 (1984) (applying concerted action theory for liability of drug manufacturers).

427. 102 Wash. 2d 581, 689 P.2d 368 (1984).

woman who allegedly developed cancer as a result of prenatal exposure to DES, a drug taken by her mother during pregnancy. The plaintiff was unable to identify the particular pharmaceutical company which had produced the DES tablets taken by her mother. The court adopted a new theory by which manufacturers of the drug would be potentially subject to liability in proportion to their share of the market at the time the plaintiff's mother had ingested the drug.⁴²⁸ However, the *Martin* court did reject the concert of action approach to liability.⁴²⁹ The court did not directly define concerted action other than to say that "parallel or imitative conduct" by manufacturers in their testing and marketing of the drug did not rise to the level of acting in concert.⁴³⁰ Still the court signaled a narrow understanding of concerted activity through its favorable citation of the California Supreme Court's analysis of a similar allegation in the DES case of *Sindell v. Abbott Laboratories*.⁴³¹ The *Martin* court described the *Sindell* holding as restricting the "acting in concert" theory to those situations where it can be proved "that each defendant knew the other's conduct was tortious" and that the defendants encouraged one another in that conduct.⁴³²

Other courts have been more explicit in narrowly defining concerted activity. For example, in *Ryan v. Eli Lilly & Co.*,⁴³³ a federal district court declined to find that drug manufacturers who may have imitated the actions of competitors in producing and marketing a drug could be regarded as having acted in concert. The court explained that the concept of concerted action derives from the criminal law and "renders jointly and severally liable all who intentionally participate in an unlawful activity that proximately causes plaintiff's injury."⁴³⁴ Thus, the *Ryan* court defined concerted activity as entry into a "common endeavor" and intentional participation in conduct that is "tortious in nature."⁴³⁵

428. *Id.* at 602-07, 689 P.2d at 381-83. See also *infra* part III.H.3 (discussing market-share analysis of *Martin*).

429. *Martin*, 102 Wash. 2d at 595-99, 689 P.2d at 377-79.

430. *Id.* at 599, 689 P.2d at 379.

431. 607 P.2d 924 (Cal.), cert. denied, 449 U.S. 912 (1980).

432. *Martin*, 102 Wash. 2d at 598, 689 P.2d at 379.

433. 514 F. Supp. 1004 (D.S.C. 1981).

434. *Id.* at 1015.

435. *Id.* See also *Rastelli v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 222, 324 (N.Y. 1992) ("it is essential that each defendant charged with acting in concert have acted

The case of *Curtin v. Lataille*⁴³⁶ provides another example of the prevailing narrow application of the concerted activity concept in modern tort law. In *Curtin*, the Rhode Island Supreme Court considered whether members of a street gang were liable on a concerted action basis for aiding and abetting one of their members in a shooting.⁴³⁷ The court held that the civil tort standard of liability for persons acting in concert is the same as the criminal standard for aiding and abetting.⁴³⁸ On this basis, the court held that two elements must be proven for concerted action liability: (1) that the alleged aiders and abettors "share in the criminal intent of the principal," and (2) "that there exist a community of unlawful purpose."⁴³⁹

From both the early common law and the modern application of concerted action, the strict and narrow nature of the concept is manifest. Cooperation in a lawful enterprise, which results in harm to a third person through negligence, does not rise to the high level of concerted activity. Participation in a legitimate commercial relationship does not constitute acting in concert, even if a third person is harmed by the actions of one of the parties or by a product that was distributed by the parties through a contractual network. In our modern interdependent society, people and businesses will cooperate and work together in a wide variety of ways. Concerted activity involves something different in both the extent of association and the nature of motivation.

tortiously and that one of the defendants committed an act in pursuance of the agreement which constitutes a tort").

436. 527 A.2d 1130 (R.I. 1987).

437. *Id.* at 1131.

438. *Id.* at 1132.

439. *Id.* The Washington Court of Appeals considered a similar factual situation in *Foster v. Carter*, 49 Wash. App. 340, 742 P.2d 1257 (1987). Nine boys decided to engage in a "BB gun war," and one of the boys was injured by a shot in the eye. The injured boy and his mother brought suit against the boy who fired the shot and the boy's parents. The defendants sought contribution from the seven other participants, alleging that the boys had combined in a joint enterprise or concerted action. *Id.* at 342, 742 P.2d at 1259. The court concluded that, although the boys had a unity of purpose to play "BB gun war," there was no evidence of a concert of action against the injured boy. *Id.* at 345, 742 P.2d at 1260. Nor was there any evidence that the defendant boy's act of shooting the injured boy in the eye was done with the knowledge or consent of the other boys. *Id.* The *Foster* court's analysis is of limited use in determining the common law meaning of "acting in concert." The court was instead addressing the responsibility of the participants under the then prevailing general rule of joint and several liability among concurrent tortfeasors who engaged in a "common enterprise." *Id.* at 341, 345, 742 P.2d at 1258, 1260. Even so, it is notable that the court refused to find liability absent evidence that the boys had knowledge of or consented to the particular wrongful act that resulted in the plaintiff's injury.

For entities to be regarded as having acted in concert, they must have consciously joined together to act in an unlawful manner. Concerted activity cases generally involve such manifestly unacceptable and dangerous behavior as group assault upon an individual⁴⁴⁰ or highway drag-racing in which an innocent bystander is injured.⁴⁴¹ The purpose of the concert of action theory is "to deter antisocial behavior."⁴⁴² Accordingly, as one member of the Washington plaintiff's bar has acknowledged, concert of action cases "are rare events."⁴⁴³

440. See, e.g., *Thompson v. Johnson*, 180 F.2d 431 (5th Cir. 1950); *Lamb v. Peck*, 441 A.2d 14 (Conn. 1981); *Bergman v. Anderson*, 411 N.W.2d 336 (Neb. 1987).

441. See, e.g., *Bierczynski v. Rogers*, 239 A.2d 218 (Del. 1968); *Lemons v. Kelly*, 397 P.2d 784 (Or. 1964); *Skipper v. Hartley*, 130 S.E.2d 486 (S.C. 1963); *Andreassen v. Esposito*, 216 A.2d 607 (N.J. Super. 1966).

442. *Lyons v. Premo Pharmaceutical Labs, Inc.*, 406 A.2d 185, 190 (N.J. Super. 1979) (refusing to apply concerted action theory to a drug manufacturer because "there was nothing antisocial" about placing a drug on the market); see also RESTATEMENT (SECOND) OF TORTS § 876 illus. 1, 2 (1979) (presenting as illustrations of acting in concert a combination to rob, assault, and imprison an individual and a drag-race resulting in injury to an innocent third driver). As stated above in the text, the defining elements of "concerted activity" are the purposeful and illicit motivation of the actors in joining together and the inherently wrongful nature of the conduct. However, by saying that defendants engaging in concerted activity must "intentionally unite in the wrongful act," 1 SPEISER et al., *supra* note 36, § 3.4, at 382, we are not restricting the concept of concerted activity to intentional torts, although such cases frequently do involve intentional, even criminal, wrongdoing. As discussed earlier, intentional tortfeasors remain subject to joint and several liability in any event because intentional torts fall outside the meaning of "fault" for purposes of the Washington comparative fault statute. See *supra* part III.B.2 (discussing meaning of fault and the problem of the intentional tortfeasor). Thus, if concerted action were defined narrowly as including only intentional torts engaged in by multiple defendants, the express preservation of joint and several liability for individuals engaging in concerted activity found in Paragraph (1)(a) might appear superfluous. Instead, one may also be said to be acting in concert with another if both deliberately join in activity that is inherently wrongful for reasons other than the carrying out of an ultimate intent to cause harm. Drag-racing is a traditional example of concerted activity, with the participants being held jointly and severally liable for any harm that follows. If two drivers participate in an illegal drag-race that accidentally results in the death of an innocent bystander, they have not committed an intentional tort because the result was not intended by either driver. However, the drivers have engaged in concerted activity by consciously joining together in the anti-social conduct of drag-racing, an activity that is wrongful because of the unusually high risk (although not the certainty) of harm. In sum, while joining together to actively commit an intentional tort plainly would constitute concerted activity, the concept also encompasses joint activity with a common purpose that, while inherently wrongful and anti-social in nature, does not involve the intentional infliction of harm.

443. Kristin Houser, *Exceptions to the Tort Reform Act's Elimination of Joint and Several Liability*, in *LIVING WITH TORT REFORM: FIVE YEARS LATER* 294, 299 n.1 (sponsored by Washington St. Trial Lawyers Ass'n, Jan. 10, 1992).

2. Principal and Agent; Master and Servant

RCW 4.22.070(1)(a) imposes a regime of vicarious tort liability upon the relationship between a principal and an agent, as well as upon that particular form of agency relationship between a master and a servant. The "fiction of identity" between the principal and the agent underlies modern agency law.⁴⁴⁴ The principal may conduct affairs through the agent "as if he were present and acting in person."⁴⁴⁵ Accordingly, the law holds the principal responsible in substantial respects for the actions of the agent. Because of the significance of that legal relationship, Paragraph (1)(a) appropriately limits the general rule of several only liability, by holding the principal responsible for the fault of the agent and the master for the fault of the servant.⁴⁴⁶

"Agency" describes the consensual and fiduciary relationship that is created when an agent agrees to act on behalf of and under the direction of a principal.⁴⁴⁷ As the Washington Court of Appeals recently summarized: "The agency concept is flexible. The relation may be established for a limited purpose, or it may be broad. The relationship may be express or arise by inference from the relation of the parties. . . . The burden of establishing the agency relationship is on the party asserting it."⁴⁴⁸ The creation of the agency relationship and the scope of the principal's liability for the conduct of the agent is governed by the law of agency, a full description of which is beyond the scope of this Article.

A "servant" is a species of agent employed by a "master."⁴⁴⁹ The servant is a person "employed to perform services in the affairs of another . . . and who, with respect to his or her physical conduct in the performance of the service,

444. Oliver Wendell Holmes, *Agency*, 4 HARV. L. REV. 345, 350 (1891).

445. ROSCOE T. STEFFEN, AGENCY—PARTNERSHIP IN A NUTSHELL § 2, at 4 (1977).

446. WASH. REV. CODE § 4.22.070(1)(a) (1991).

447. STEFFEN, *supra* note 445, § 2, at 3 (emphasis in original) (citing RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958)). See also *Rho Co. v. Department of Revenue*, 113 Wash. 2d 561, 570, 782 P.2d 986, 991 (1989) ("[a]n agency relationship generally arises when two parties consent that one shall act under the control of another"). See generally HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 2, at 45 (2d ed. 1990).

448. *CKP, Inc. v. GRS Constr. Co.*, 63 Wash. App. 601, 608, 821 P.2d 63, 67 (1991).

449. STEFFEN, *supra* note 445, § 5, at 9; REUSCHLEIN & GREGORY, *supra* note 447, § 7, at 16.

is subject to the other's control or right of control."⁴⁵⁰ A servant works physically for a master, and is subject to the master's control over that work, but ordinarily has no additional agency authority to bind the master in contract.⁴⁵¹ A master is subject to liability for the torts of his or her servants committed in the scope of their employment.⁴⁵²

The defining element in the agency relationship is the principal's right of control over the agent.⁴⁵³ With this power to control the conduct of the agent or servant, the principal or master assumes responsibility—including liability in tort—for the actions of the agent or servant.⁴⁵⁴ Paragraph (1)(a) preserves this responsibility by expressly directing that the fault of the agent or servant be imputed to the principal or master. As I have written elsewhere, "[i]t is the agency or servant relationship, quite distinct from the ordinary relationship among tortfeasors, that calls for a different rule of liability here. It would be a strange and indefensible abrogation of the law of agency to provide for several liability in this unique context."⁴⁵⁵

Paragraph (1)(a) is deliberately written to hold the principal accountable for the actions of the agent and the master for the actions of the servant. But the opposite is not true. The agent or servant is *not* responsible under the statute for the fault of the principal or master. This is in full accord with principles of agency law. An agent, of course, is directly liable to the plaintiff for his or her own tortious conduct.⁴⁵⁶ Ordinarily, "the fact that the agent is acting within the scope of employment or the command of the principal [is not] a defense."⁴⁵⁷ However, in the absence of some form of mutual agency (such as a partnership),⁴⁵⁸ the agent has no right to control the conduct of the principal and thus has no responsibility

450. *Chapman v. Black*, 49 Wash. App. 94, 98, 741 P.2d 998, 1001 (1987). See also RESTATEMENT (SECOND) OF AGENCY § 2(2) (1958).

451. REUSCHLEIN & GREGORY, *supra* note 447, § 50, at 102.

452. RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).

453. *Chapman v. Black*, 49 Wash. App. 94, 99, 741 P.2d 998, 1001 (1987) (in an agency relationship, "[t]he crucial factor is the right of control"); REUSCHLEIN & GREGORY, *supra* note 447, § 5, at 12-13.

454. *Van Hook v. Anderson*, 64 Wash. App. 353, 364, 824 P.2d 509, 514 (1992) (vicarious liability "exists because of the master's right of control" over the servant).

455. Sisk, *supra* note 13, at 468.

456. RESTATEMENT (SECOND) OF AGENCY § 343 (1958).

457. REUSCHLEIN & GREGORY, *supra* note 447, § 124, at 198.

458. See *id.* § 177, at 256 ("[m]utual agency is an aspect of the partnership relation").

for the principal's wrongful actions.⁴⁵⁹ The agent will not be liable unless he or she has been a "responsible participant in a tort."⁴⁶⁰

Washington case law confirms the conclusion that while a principal may be vicariously liable for the actions of an agent, the agent will be liable only when he or she breaches an independent duty of care to the injured party. For example, in *Tennant v. Lawton*,⁴⁶¹ the Washington Court of Appeals considered the liability of a real estate agent for passing on to the buyer a misrepresentation from the seller that a parcel of land could support a sewage system and thus was "buildable." The court ruled that, under the law of agency, the real estate agent's duty was to the principal seller.⁴⁶² However, the court found an independent legal duty from the real estate agent to the buyer arising from the fact that a real estate broker "is a professional who is in a unique position to verify critical information given him by the seller."⁴⁶³ Because the real estate agent in *Tennant* should have been alerted by problems concerning the information received from the seller, but did nothing to verify that information, the court held the agent liable for the misrepresentation.⁴⁶⁴

In *Hoffman v. Connall*,⁴⁶⁵ the Washington Supreme Court adopted the holding in *Tennant* and held that a real estate agent is not liable for innocently and non-negligently conveying a seller's misrepresentation to a buyer.⁴⁶⁶ The court held that the real estate agent "must act as a professional, and will be held to a standard of reasonable care" in taking steps to avoid disseminating false information to buyers.⁴⁶⁷ The real estate agent's potential liability to a buyer is based upon an independent duty of care attendant upon his or her status as a licensed professional, and not upon a doctrine of vicarious lia-

459. See *id.* § 128, at 203 ("[o]f course, the agent is not liable for the negligence of the principal") (footnote omitted).

460. See RESTATEMENT (SECOND) OF AGENCY § 344 cmt. b (an agent who merely communicates a message from the principal to a person who commits a tortious injury upon a third party is "not a responsible participant in a tort which results from" the message and thus is not liable to the third party).

461. 26 Wash. App. 701, 615 P.2d 1305 (1980).

462. *Id.* at 706, 615 P.2d at 1309.

463. *Id.*

464. *Id.* at 707-08, 615 P.2d at 1310.

465. 108 Wash. 2d 69, 736 P.2d 242 (1987).

466. *Id.* at 75-78, 736 P.2d at 246.

467. *Id.* at 77, 736 P.2d at 246.

bility imposed upon an innocent *agent* for the wrongful actions of the *principal*.

F. The Limited Form of Joint and Several Liability Among Defendants Liable to an Innocent Plaintiff

RCW 4.22.070(1)(b) provides:

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimant[']s total damages.⁴⁶⁸

The most important distinction drawn in RCW 4.22.070 is that between the innocent and the culpable plaintiff. Subsection (1) enunciates a general rule of "several only" liability among tortfeasors, by which the extent of each defendant's liability for the plaintiff's total damages is proportionate to the percentage of the total fault attributable to that defendant.⁴⁶⁹ However, when the plaintiff is without culpability, the general rule of comparative responsibility is set aside. Under Paragraph (1)(b), if the plaintiff or claimant is without fault, the defendants to the action remain jointly and severally liable to the plaintiff.⁴⁷⁰

The meaning and effect of Paragraph (1)(b) is vital to the operation of the statute. This paragraph preserves a *limited* form of joint and several liability. In the case of the faultless plaintiff, the defendants against whom judgment is entered remain jointly and several liable for "the sum of their proportionate shares of the claimant[']s total damages."⁴⁷¹ In other words, the joint and several liability calculation is limited to the sum of the proportionate shares of the judgment attributable to the percentages of fault for each of the defendants against whom the judgment is ultimately entered. No defendant is held responsible "for that part of the damages attributable to the fault of an entity which was released by the plaintiff, is immune from liability, has an individual defense against the plaintiff, or otherwise was not made a party to the suit."⁴⁷² In

468. WASH. REV. CODE § 4.22.070(1)(b) (1991).

469. *Id.* § 4.22.070(1).

470. *Id.* § 4.22.070(1)(b).

471. *Id.*

472. Sisk, *supra* note 13, at 440. See also Houser, *supra* note 443, at 299 (Under

sum, the statute retains joint and several liability only among the "named defendants."⁴⁷³

The interpretation and effect of Paragraph (1)(b) has previously been fully discussed at length in the sections of this Article analyzing the statutory requirement that fault be allocated to every responsible entity, whether or not joined to the lawsuit.⁴⁷⁴

G. Settlement and Contribution Under Comparative Fault

RCW 4.22.070(2) provides:

If a defendant is jointly and severally liable under one of the exceptions listed in subsection (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.⁴⁷⁵

1. Pure Comparative Fault

In a world of pure comparative fault—that is, under the general rule of "several only" liability established by Subsection (1)—the issues of settlement and contribution among tortfeasors are simple.⁴⁷⁶ Because each defendant is severally liable only for its own proportionate share of the damages based upon its individual percentage of the total fault, the settlement of one tortfeasor has no effect upon the liability of any other tortfeasor. As the New Mexico Court of Appeals

Paragraph (1)(b), "a claimant who is found not at fault in causing the injury gets a limited break in that the defendants *against whom a judgment is entered* share jointly in the sum of damages assessed against each one of them. In other words, if there is no judgment against one entity either because the statute of limitations has run against that entity or it is exempt from suit (as with an employer), the remaining defendants are not liable for that share of the fault." (emphasis in original); Peck, *Reading Tea Leaves*, *supra* note 175, at 339 ("a plaintiff receives no judgment for shares of damages attributable to entities not joined as defendants and receives no compensation for those portions of the losses suffered"); Wiggins et al., *supra* note 13, at 236 n.229 (noting that under Paragraph (1)(b), "the defendants are *not liable* for the proportionate damages allocated to nonparty entities") (emphasis in original).

473. *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 669, 771 P.2d 711, 728, *amended*, 780 P.2d 260 (1989).

474. See *supra* part III.C.1.c to g.

475. WASH. REV. CODE § 4.22.070(2) (1991).

476. See *Harris, Partial Tort Settlements*, *supra* note 53, at 88 (in a system of pure several liability, there is no need for contribution or calculation of credit to be given nonsettling defendants for settling defendant's payment to plaintiff).

explained in *Wilson v. Galt*.⁴⁷⁷

If the injured person settles and releases one tortfeasor, the consideration paid would satisfy only that tortfeasor's percentage of fault, even though no jury determination of the amount of his liability exists at the time of settlement. If the injured person pursues his claim against the other tortfeasors, recovery will only be had against them for their respective shares of the fault.⁴⁷⁸

In sum, "[e]ach defendant has a liability to the plaintiff that can be neither increased nor decreased by the relative amount of some other defendant's payment to the plaintiff."⁴⁷⁹ For that reason, the plaintiff is "entitled to keep the advantage of his or her bargaining, just as he or she must live with an inadequate settlement should the jury determine larger damages or a larger proportion of fault than the injured party anticipated when settlement was reached."⁴⁸⁰ Thus, the plaintiff does bear "the risk of an undervalued settlement," but the plaintiff also "is able to keep any portion of the settlement that is above the settler's equitable share of the obligation."⁴⁸¹

By the same token, in a system of pure comparative fault, the "equitable need for contribution vanishes" because no defendant will be obliged to pay more than its own percentage share of the fault.⁴⁸²

477. 668 P.2d 1104 (N.M. Ct. App. 1983).

478. *Id.* at 1109.

479. *Gray v. Chacon*, 684 F. Supp. 1481, 1485 (S.D. Ind. 1988) (discussing Indiana's comparative fault statute as abolishing joint and several liability). See also Eilbacher, *supra* note 170, at 909 (under Indiana comparative fault statute, a settlement by one tortfeasor does not affect the nonsettling defendants "since the terms of such settlement are not determinative of the extent of any defendant's liability for damages").

480. *Dobson v. Camden*, 705 F.2d 759, 769 ("[f]airness demands that the benefits of the bargain remain where the bargaining parties place them, and that nonsettling tortfeasors pay damages in proportion to their fault"), *rev'd on reh'g on other grounds*, 725 F.2d 1003 (5th Cir. 1984) (en banc); *Geier v. Wikel*, 603 P.2d 1028, 1030 (Kan. 1979) (discussing Kansas comparative fault statute). See also *Roland v. Bernstein*, 828 P.2d 1237, 1239 (Ariz. Ct. App. 1991) (under Arizona comparative fault statute, the "benefit of an advantageous settlement" is given to the plaintiff, just as the plaintiff who makes a "disadvantageous settlement" must "b[ear] that consequence").

481. David Randolph Smith & John W. Wade, *Fairness: A Comparative Analysis of the Indiana and Uniform Comparative Fault Acts*, 17 IND. L. REV. 969, 983 (1984) (discussing Indiana comparative fault statute). See also Eilbacher, *supra* note 170, at 910-11 (whether the plaintiff will "gain a windfall or suffer a penalty" depends on "the accuracy of plaintiff's forecast" of the percentage of fault that will be assigned to the settling defendant and the amount of the damages to be awarded).

482. *Teepak, Inc. v. Learned*, 699 P.2d 35, 35 (Kan. 1985). See also *Roland v. Bernstein*, 828 P.2d 1237, 1238 (Ariz. Ct. App. 1991) (there is no contribution under

2. Limitations on and Exceptions to Comparative Fault

The general rule of comparative fault established in RCW 4.22.070 is subject to certain limitations and exceptions that make it impossible to completely escape from the earlier regime of settlement credits and contribution among tortfeasors.⁴⁸³ Paragraph (1) establishes two limitations upon the general rule of "several only" liability. Under Paragraph (1)(a),⁴⁸⁴ persons acting in concert are jointly and severally liable, and a principal or master remains responsible for the fault of an agent or servant.⁴⁸⁵ Under Paragraph (1)(b),⁴⁸⁶ if the plaintiff is without fault, the defendants against whom judgment is entered are jointly and severally liable for the sum of their proportionate shares of the damages.⁴⁸⁷ Subsection (2)⁴⁸⁸ clarifies that, in such cases, the previous statutory rules governing contribution and settlement—found in RCW 4.22.040,⁴⁸⁹ 4.22.050,⁴⁹⁰ and 4.22.060⁴⁹¹—remain applicable. Moreover, Subsection (3)⁴⁹² articulates three complete exceptions to the comparative fault statute, meaning that the preexisting statutory rules for contribution and settlement continue to apply of their own force to cases falling within the scope of those exceptions.

a. Contribution

RCW 4.22.040 provides that "[a] right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death, or harm, whether or not judgment has been recovered against all or any of them."⁴⁹³ Contribution thus allows the loss to be distributed among the tortfeasors "by requiring each other to pay a proportionate share to one who

comparative fault); *Wilson v. Galt*, 668 P.2d 1104, 1108 (N.M. Ct. App. 1983) (there is no contribution in a system of several liability); *Harris, Partial Tort Settlements, supra* note 53, at 83 ("each wrongdoer is responsible only for his own percentage share and has no reason or authority to interject himself into another alleged wrongdoer's dispute") (footnote omitted).

483. See generally *Harris, Partial Tort Settlements, supra* note 53.

484. WASH. REV. CODE § 4.22.070(1)(a) (1991).

485. See *supra* part III.E.

486. WASH. REV. CODE § 4.22.070(1)(b) (1991).

487. See *supra* part III.F.

488. WASH. REV. CODE § 4.22.070(2) (1991).

489. *Id.* § 4.22.040.

490. *Id.* § 4.22.050.

491. *Id.* § 4.22.060.

492. *Id.* § 4.22.070(3).

493. *Id.* § 4.22.040(1). See generally *Anderson, supra* note 88.

has discharged their 'joint' liability" by compensating the plaintiff for damages.⁴⁹⁴ The basis for contribution is the comparative fault of each person.⁴⁹⁵

Under Paragraph (1)(b), when the plaintiff is without contributory negligence, each defendant will be held jointly and severally liable to the extent of the sum of the proportionate shares of the other defendants who are retained in the action for the entry of an adverse judgment.⁴⁹⁶ Under RCW 4.22.050(1), if the comparative fault of the parties has already been established by the court in the original action, a defendant who is required to pay damages in an amount that exceeds the defendant's individual proportionate share, may recover a judgment for contribution against the other defendants who have paid less than their proportionate shares of the total damages.⁴⁹⁷ Thus, resolution of claims for contribution arising from joint and several liability under Paragraph (1)(b) will be simple—the percentages of fault assigned to each defendant in the original action by the plaintiff will establish the amount of contribution to which each of the jointly and severally liable defendants will be entitled.

Determining contribution in the case of defendants held responsible for the fault of other persons under Paragraph (1)(a) may be more difficult. This statutory paragraph holds persons acting in concert jointly and severally liable for each other's conduct and also holds a principal or master responsible for the fault of an agent or servant pursuant to the law of agency.⁴⁹⁸ The underlying rationale for this limitation on the comparative fault rule is that the degree of fault among those acting in concert or in an agency relationship is truly indivisible.⁴⁹⁹

Because "in concert" activity and the agency relationship do give rise to vicarious liability based upon a theory of indivisible fault, the argument could be made that it is simply impossible to allocate comparative responsibility among such

494. PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 36, § 51, at 341.

495. WASH. REV. CODE § 4.22.040(1) (1991).

496. *See supra* part III.F.

497. WASH. REV. CODE § 4.22.050(1) (1991) ("If the comparative fault of the parties to a claim for contribution has been established previously by the court in the original action, a party paying more than that party's equitable share of the obligation, upon motion, may recover judgment for that contribution.").

498. *See supra* part III.E.1 and part III.E.2.

499. *See supra* part III.E.

entities. If so, the inability to make a finding on the percentage share of fault attributable to each entity will make it more difficult to establish a basis for measuring the amount of contribution.

With respect to concerted activity, however, it is one thing to say that the vicarious nature of culpability is such that no division of fault should be made that would limit the plaintiff's ability to recover the full amount of the judgment from any single defendant. It is another to conclude that assessment of degrees of responsibility is impossible even among the tortfeasors themselves. Given the intimate cooperation and wrongful purpose of those acting in concert, the culpability of each tortfeasor is properly regarded as identical in degree—from the perspective of the plaintiff. The plaintiff has suffered a single harm from a group of others acting as a single entity to achieve an anti-social purpose.⁵⁰⁰ However, among those who joined in concert, there may indeed be levels or degrees of blameworthiness, measured according to who proposed the action, who took the leading role in carrying out the wrongful purpose, etc. The trier of fact can intelligently assign shares of fault based upon these and similar factors, which will then serve as a measure for contribution among those who are guilty of wrongful concerted activity.⁵⁰¹

As between a principal and an agent, allocation of fault may well be impossible.⁵⁰² The principal is vicariously liable for the very same culpable act as the primarily liable agent. As one commentator has noted, “[b]ecause vicarious liability is based on the relationship between the actual tortfeasor and some other party responsible for the tortfeasor’s conduct, assigning separate shares of liability to each is illogical.”⁵⁰³ Accordingly, comparative fault cannot serve as the basis for

500. See *supra* part III.E.1.

501. In the event that allocation of comparative fault among those acting in concert were deemed truly impossible, contribution among the tortfeasors would presumably be assessed on the “equality is equity” basis, “which means that each tortfeasor is required ultimately to pay a pro rata share, arrived at by dividing the damages by the number of tortfeasors.” See PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 36, § 50, at 340 (footnote omitted).

502. Under RCW 4.22.040(1), “the court may determine that two or more persons are to be treated as a single person for purposes of contribution.” WASH. REV. CODE § 4.22.040(1) (1991). This provision means that someone seeking contribution from a principal may obtain full contribution for the fault attributed to the agent, thereby treating both as a single entity. Unfortunately, the statute provides no guidance when contribution is sought *between* the principal and the agent.

503. Anderson, *supra* note 88, at 486.

contribution between a vicariously liable principal and a primarily liable agent.⁵⁰⁴ Instead, in accordance with the common law of agency,⁵⁰⁵ when a principal is held liable for the unauthorized tortious actions of an agent, the principal would presumably remain entitled to full indemnification from the agent.⁵⁰⁶

For those cases that fall within the complete exceptions of Subsection (3), the rules presented above governing contribution among tortfeasors would continue to apply with full and independent force.

b. Settlement

Prior to tort reform, when a defendant had settled with a plaintiff and that settlement was judicially determined to be a reasonable one, the defendant was released from any further liability in contribution to other defendants.⁵⁰⁷ RCW 4.22.060 provided for a hearing before the trial court to determine the reasonableness of the settlement, affording every party an opportunity to present evidence.⁵⁰⁸ The remaining nonsettling defendants were entitled to a *pro tanto* credit for the dollar amount of a reasonable settlement as an offset from the final judgment on the plaintiff's total amount of damages.⁵⁰⁹

When a defendant is held responsible for the fault of another person, either under the exceptions in Subsection (3)

504. See *Kirk v. Moe*, 114 Wash. 2d 550, 556, 789 P.2d 84, 87 (1990) (holding that a vicariously liable principal has a right of contribution against a primarily liable agent, but not explaining the measurement of contribution).

505. See generally STEFFEN, *supra* note 445, § 39, at 1001-04 (discussing employer's right of indemnity against employee).

506. Thomas V. Harris, *Washington's Unique Approach to Partial Tort Settlements: The Modified Pro Tanto Credit and the Reasonableness Hearing Requirement*, 20 GONZ. L. REV. 69 (1985) (arguing the Washington contribution statute should not be construed as abolishing the principal's right to full indemnity from the agent); Harris, *Partial Tort Settlements*, *supra* note 53, at 78-79 (same). An agent might also be permitted to seek contribution from the principal if the principal's directions or actions led to the agent's primary liability to the plaintiff. See Karen P. Clark, Note, "*Respondeat Inferior*": *The Rule of Vanderpool v. Grange Insurance Association*, 64 WASH. L. REV. 419, 436 (1989) (because "contribution rights can run in either direction," Washington law presents "no theoretical barrier to an agent seeking contribution from a principal").

507. WASH. REV. CODE § 4.22.060(2) (1991). See generally Harris, *Partial Tort Settlements*, *supra* note 53; Anderson, *supra* note 88, at 494-500.

508. WASH. REV. CODE § 4.22.060(1) (1991). See generally *Glover v. Tacoma Gen. Hosp.*, 98 Wash. 2d 708, 658 P.2d 1230 (1983) (on standards for determining reasonableness of settlement under RCW 4.22.060).

509. WASH. REV. CODE § 4.22.060(2) (1991).

or by reason of concerted activity or an agency relationship under Paragraph (1)(a), the reasonableness hearing requirement and *pro tanto* credit rule of RCW 4.22.060 continue to apply.⁵¹⁰

However, the reasonableness of one tortfeasor's settlement is irrelevant to those defendants held jointly and severally liable to an innocent plaintiff under Paragraph (1)(b). Each defendant is subject to a joint and several judgment only for the sum of the shares of fault attributable to the remaining nonsettling defendants. Defendants will not be responsible in damages for the percentage shares of fault attributable to culpable entities that are not joined to the action or to tortfeasors who are released from the action by settlement. As one commentator on settlements under Washington's comparative fault statute states, "nonsettling defendants are not liable for the proportionate share ultimately attributed to the settling defendant by the trier of fact."⁵¹¹ The United States Court of Appeals for the Ninth Circuit adopted an identical approach with respect to partial settlements in federal securities cases:

This scheme contemplates a partial settlement Nonsettling defendants are . . . barred from further rights of contribution from the settling defendants. At trial, the jury is asked not only to determine the total dollar damage amount, but also the percentage of culpability of each of the nonsettling defendants as well as that of the settling defendants. Nonsettling defendants as a whole will then be required to pay the percentage of the total amount for which they are

510. Harris, *Partial Tort Settlements*, *supra* note 53, at 77-80. The preexisting rules governing the effect of a release under RCW 4.22.060 will also continue to apply, including the line of cases governing the effect of a release of the agent or principal upon the liability of the other. *See, e.g.*, *Vanderpool v. Grange Ins. Ass'n*, 110 Wash. 2d 483, 486-87, 756 P.2d 111, 112-13 (1988) (a plaintiff's settlement with a vicariously liable principal does not automatically release the primarily liable agent); *Glover v. Tacoma Gen. Hosp.*, 98 Wash. 2d 708, 722, 658 P.2d 1230, 1238 (1983) (when a plaintiff settles with a solvent agent from whom he or she could have received full compensation, the principal is released by operation of law, because the principal is only secondarily liable under a theory of respondeat superior); *Pickett v. Stephens-Nelsen, Inc.*, 43 Wash. App. 326, 331, 717 P.2d 277, 280 (1986) (when a plaintiff settles with an agent who is financially unable to compensate the plaintiff, the plaintiff may protect the right to proceed against the principal if the judge determines the settlement is reasonable and considers on the record the fact that full compensation was unlikely to be obtained from the agent).

511. Harris, *Partial Tort Settlements*, *supra* note 53, at 91 (footnote omitted). *See supra* parts III.C.1.c (discussing allocation of fault to entities released by the claimant) and III.F (discussing limited form of joint and several liability among defendants against whom judgment is entered in favor of an innocent plaintiff).

responsible. The nonsettling defendants will be jointly and severally liable for that percentage, and will continue to have rights of contribution against one another.⁵¹²

Therefore, just as in the "several only" liability context,⁵¹³ the fact of a settlement by one defendant will neither increase nor decrease the potential liability of the nonsettling defendants.⁵¹⁴

512. *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1231 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 232 (1990). *See also Stefano v. Smith*, 705 F. Supp. 733, 737-38 (D. Conn. 1989) (under Connecticut law, the trier of fact must determine the percentage of fault attributable to a settling defendant, multiply that percentage against the judgment, and deduct that resulting amount from the judgment; the sum remaining provides the basis for entry of judgment against the remaining defendants according to the dictates of joint and several liability). *But see Peck, Reading Tea Leaves, supra* note 175 (arguing that RCW 4.22.070 creates severe complications for negotiation of settlements, particularly in cases of faultless plaintiffs and multiple tortfeasors).

513. *Harris, Partial Tort Settlements, supra* note 53, at 89 n.122 ("[b]oth several liability, and the proportionate credit rule in joint and several liability . . . , produce the same result").

514. In a recent article, Professor Peck suggests that the Washington Supreme Court's decision in *Clark v. Pacificorp*, 118 Wash. 2d 167, 822 P.2d 162 (1991), may be interpreted to require a judicial hearing to determine the allocation of fault before any settlement may be made in a case of a faultless plaintiff where the defendants would be jointly and severally liable under Paragraph (1)(b). *Peck, Reading Tea Leaves, supra* note 175, at 355-57, 359-60. To the contrary, the *Clark* court was addressing the unique situation of settlement in the context of a tort suit by a worker against a third person, where the settling parties wished to allocate fault to the worker's employer who was immune from direct suit under the workers' compensation statute. Under an amendment to the workers' compensation statute, allocation of fault to the employer would eliminate or reduce the lien of the employer (usually represented by the Department of Labor and Industries) upon the the worker's settlement for reimbursement of workers' compensation benefits that had been paid to the worker. *See infra* part IV.B. If the worker and the third person were able by their own agreement to establish the share of fault to be assigned to the employer, they could thereby deprive the Department of any right to reimbursement without allowing the Department an opportunity to be heard and to contest the allocation of fault to the employer. *See Clark*, 118 Wash. 2d at 180-81, 822 P.2d at 169-70. To prevent collusion between the parties to manipulate the allocation of fault to the employer, the supreme court ruled that a judicial hearing is necessary to determine the amount of fault that should be allocated to the nonparty employer and thus the amount by which the Department's lien will be reduced. *Id.* By contrast, when one tortfeasor reaches a settlement with a fault-free plaintiff, the remaining nonsettling tortfeasors will not be held responsible in damages for the share of fault ultimately allocated by the trier of fact to the settling tortfeasor. Thus, the settlement between the plaintiff and the settling tortfeasor does not prejudicially impact the potential liability of the nonsettling tortfeasors who are not party to the settlement agreement. Accordingly, there is no need for a presettlement judicial hearing to protect the rights of the nonsettling tortfeasors in a Paragraph (1)(b) case. Similarly, if a joint settlement is reached with all tortfeasors, the interests of each are adequately protected through their decisions whether to consent to the terms of the settlement agreement and there is therefore no need to obtain judicial approval of the settlement. In sum, the settlement hearing ruling in *Clark* has no logical application to the very different context of settlement in a case of multiple tortfeasors.

Thomas V. Harris, a Washington attorney, has authored a comprehensive analysis of partial tort settlements under the Tort Reform Act of 1986, including proposed revisions to the statutes to clarify the effects of the move to the comparative fault system under RCW 4.22.070.⁵¹⁵ For a more detailed discussion of settlement and contribution, together with helpful examples of the statute's operation, the reader is referred to Mr. Harris's article.

H. *The Exceptions to the Statutory Modification of Joint and Several Liability*

Although RCW 4.22.070 establishes a general rule of comparative responsibility among tortfeasors, with certain limitations in the contexts of vicarious liability and the innocent plaintiff, there are three exceptions in the statute.⁵¹⁶ If a case falls within one of these three exceptions, RCW 4.22.070 has no application and the common law rules of joint and several liability or assessment of liability on other bases would continue to govern.⁵¹⁷

In two categories of actions, those involving hazardous wastes or substances⁵¹⁸ and certain business torts,⁵¹⁹ Subsection (3) preserves common law joint and several liability; each defendant remains liable for the entire loss, less any share attributable to the plaintiff's fault.⁵²⁰ The third exception involves the assessment of liability on a market share basis for injuries caused by certain generic products, such as drugs, when the manufacturer cannot be identified.⁵²¹ Each of these three exceptions, their purpose, their scope, and their application are discussed below.

1. The Hazardous Waste or Substance Exception

RCW 4.22.070(3)(a) provides:

- (a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal

515. Harris, *Partial Tort Settlements*, *supra* note 53.

516. WASH. REV. CODE § 4.22.070(3) (1991).

517. See *infra* part V (discussing future of common law doctrine of joint and several liability).

518. WASH. REV. CODE § 4.22.070(3)(a) (1991). See *infra* part III.H.1.

519. *Id.* § 4.22.070(3)(b). See *infra* part III.H.2.

520. Fault continues to be allocated between plaintiffs and defendants pursuant to the comparative negligence statutes. WASH. REV. CODE §§ 4.22.005-015 (1991).

521. *Id.* § 4.22.070(3)(c). See *infra* part III.H.3.

sites.⁵²²

This exception was examined by the Washington Supreme Court in *Sofie v. Fibreboard Corporation*.⁵²³ In *Sofie*, a former pipefitter afflicted with lung cancer sought damages from asbestos manufacturers. Based upon Paragraph (3)(a), the trial court instructed the jury to apply joint and several liability among all manufacturers.⁵²⁴ On appeal, the asbestos manufacturers, although conceding that asbestos is a "hazardous substance," argued that the exception applies only to problems relating to hazardous waste and environmental pollution.⁵²⁵ Based upon the plain language of the exception—which contains no language explicitly limiting the provision to environmental litigation—the Washington Supreme Court rejected this interpretation.⁵²⁶

The *Sofie* court placed considerable weight upon the evolution of the exception during the legislative process.⁵²⁷ An early version of the exception as considered on the floor of the state senate provided for joint and several liability "if the cause of action involves a violation of any state or local law relating to solid wastes, hazardous wastes or substances, air, water, or high or low level radioactive wastes or substances."⁵²⁸ The final version enacted by the legislature more broadly refers to "any cause of action relating to hazardous wastes or substances or solid waste disposal sites."⁵²⁹ The court ruled that "the simple use of the word 'or'" in the provision indicates that the exception applies not only to cases involving "solid waste disposal sites," but also to "hazardous substance" cases.⁵³⁰ Moreover, the court reasoned, the words "any cause of action" mean "in simple and plain terms" that the provision is not limited to causes of actions founded upon certain environmental pollution statutes.⁵³¹ Accordingly, the court held that the exception in Paragraph (3)(a) "includes 'hazardous sub-

522. *Id.* § 4.22.070(3)(a).

523. 112 Wash. 2d 636, 771 P.2d 711, *amended*, 780 P.2d 260 (1989).

524. *Id.* at 667, 771 P.2d at 727.

525. *Id.* at 668, 771 P.2d at 728.

526. *Id.* at 668-69, 771 P.2d at 728.

527. *Id.*

528. *Sofie*, 112 Wash. 2d at 668, 771 P.2d at 728 (quoting S. Journal, 49th Reg. Sess. & 1st Spec. Sess. 467 (1986)).

529. WASH. REV. CODE § 4.22.070(3)(a) (1991).

530. *Sofie*, 112 Wash. 2d at 668, 771 P.2d at 728.

531. *Id.* at 669, 771 P.2d at 728.

stances' wherever they may be found."⁵³²

The *Sofie* court's broad statement—that the exception applies to "‘hazardous substances’ wherever they may be found"⁵³³—has led plaintiffs in some cases to argue that the exception applies whenever a hazardous substance is present at the time of the injury, even if the substance has nothing whatsoever to do with the injury. Thus, if an automobile collides with a truck carrying a hazardous substances, these advocates would argue that the exception applies, even if the only injuries suffered result from the physical collision of the vehicles and not from any discharge of the materials carried by the truck. Or they would contend that joint and several liability applies when a worker handling hazardous substances is injured, even if the injury occurs because the worker suffers a fall at the worksite rather than from any injurious exposure to the substance.

This argument can be dismissed rather easily. By saying that the exception applies to hazardous substances "wherever they may be found," the court was merely explaining that the provision is not limited to cases where a hazardous substance is found at a toxic waste site. The *Sofie* court was not repealing the essential element of causation. Paragraph (3)(a) applies only if the hazardous substance is the instrumentality that caused the injury. Any other interpretation leads to absurd results.

The more difficult question is whether the *Sofie* court extended the exception beyond the narrow purpose the legislature had in mind and beyond the limits of a rational basis to support an exception to an otherwise generally applicable rule of comparative responsibility. Although the court's analysis is in accord with the plain language of the exception, the court failed to adhere to the rule of construction that when a general provision is qualified by an exception, the exception should be read narrowly "in order to preserve the primary operation of the provision."⁵³⁴ Doubts as to the proper interpretation of an exception are to be resolved in favor of the general provi-

532. *Id.* at 668, 771 P.2d at 728.

533. *Id.*

534. See *Commissioner v. Clark*, 489 U.S. 726, 739 (1989). See also *Hall v. Corporation of Catholic Archbishop*, 80 Wash. 2d 797, 801, 498 P.2d 844, 847 (1972) ("[i]t is a well settled rule of statutory construction that exceptions to legislative enactments must be strictly construed").

sion.⁵³⁵ Instead, as we shall see, the *Sofie* court's broad reading of Paragraph (3)(a) has created an exception without an underlying purpose and therefore one without clear definition and scope.

The legislative history of the exception indicates a modest purpose and thus a limited application. Paragraph (3)(a) apparently originated as an amendment offered by Senator Philip A. Talmadge on the floor of the state senate.⁵³⁶ Senator Talmadge explained:

What this amendment is designed to do, is to allow the continuation of the process that Senator Kreidler has undertaken in the area of Superfund to urge the parties to that controversy to come to an agreement both as to the funding of the state Superfund and as to the liability issue.

If we were not to have this amendment in place, there is zero incentive for large business in this state to attempt to develop a funding mechanism to deal with Superfund, because their liability would be several only and that means only their share of the fault. However, that could be determined in situations involving hazardous waste.⁵³⁷

Senator Talmadge's reference to "Superfund" is to the state version of the federal Superfund law.⁵³⁸ The state version, which is codified at RCW Chapter 70.105B,⁵³⁹ was developed and sponsored by Senator Kreidler. Like its federal counterpart, the law is designed to promote the cleanup of hazardous waste dumpsites by holding all property owners jointly and severally liable for all damages resulting from the depositing of hazardous materials.⁵⁴⁰ Senator Talmadge's amendment was intended to preserve joint and several liability in order to further the goals of the state Superfund law.

535. *State v. Wright*, 84 Wash. 2d 645, 652, 529 P.2d 453, 458 (1974); *State v. Christensen*, 18 Wash. 2d 7, 19, 137 P.2d 512, 518 (1943).

536. The amendment read:

The defendants shall be jointly and severally liable if the cause of action involves a violation of any state or local law relating to solid wastes, hazardous wastes or substances, air, water, or high or low level radioactive wastes or substances. If legislation is enacted in 1986 creating joint and several liability for causes of action relating to solid wastes or hazardous wastes or substances, then this subsection shall be null and void.

S. Journal, 49th Reg. Sess. & 1st Spec. Sess. 467 (1986).

537. *Id.* (remarks of Sen. Talmadge).

538. 42 U.S.C.A. §§ 9601-9675 (West 1983 & Supp. 1992).

539. WASH. REV. CODE ch. 70.105B (1991).

540. *See id.* § 70.105B.040(2) (providing that all persons liable for release of "hazardous substances" shall be jointly and severally liable).

The amendment was adopted by voice vote. The language of the exception did evolve before enactment, and the final version does more generally refer to "any cause of action relating to hazardous wastes or substances or solid waste disposal sites."⁵⁴¹ However, there is no indication in the legislative history that the motivating purpose behind the exception changed along with the wording.

Based upon this legislative history, commentators writing prior to the *Sofie* decision understood Paragraph (3)(a) as a narrow exception tied to the legislature's "concern that several liability alone would not provide sufficient incentives for large businesses to participate in the state superfund for cleaning up waste depositories."⁵⁴² As another commentator explained:

The first exception to abolishment of joint and several liability, causes of action relating to hazardous wastes o[r] substances or solid waste disposal sites, is the result of the legislature's intent to maintain an incentive for large businesses to contribute to a funding mechanism similar to the Environmental Protection Agency Superfund for hazardous waste cleanup. The potential of joint liability for this type of tortious conduct will presumably instill into these businesses a willingness to create and fund a statewide system by which hazardous waste pollution can be cleaned up. The fund also would be used to defray the cleanup costs of a landfill in which hazardous wastes were deposited.⁵⁴³

When the *Sofie* court looked beyond the narrow legislative purpose and extended the exception to broadly impose joint and several liability in any case involving tortious injury by reason of exposure to a hazardous substance, the exception lost its underlying meaning. Although the Washington Supreme Court may not be faulted for giving full effect to the plain words of the exception, the consequence in this particular instance is to create a crisis of meaning and justification for the exception. As I suggested in my earlier article, "[b]y taking the exception beyond the legislature's concerns with environmental pollution and the proposed 'Superfund' toxic waste cleanup bill, the Washington Supreme Court's broader construction may slip the exception from its mooring to a rational and nar-

541. *Id.* § 4.22.070(3)(a).

542. Peck, *Washington's Partial Rejection*, *supra* note 2, at 251 (footnote omitted).

543. McFadden, *supra* note 13, at 242-43.

row purpose."⁵⁴⁴

Without being anchored to the legislature's stated purpose, the exception becomes vulnerable to a constitutional equal protection challenge from defendants insisting that their liability be adjudicated under the same principle of comparative fault that is generally applied to other tortfeasors under RCW 4.22.070. What is the rational basis for imposing joint and several liability upon one group of defendants simply because the plaintiff's injury is caused by a hazardous substance while applying a general rule of comparative fault to other defendants whenever the plaintiff's injury is caused by any other instrumentality? For example, why should the rule of tort liability change when the injury is caused by a hazardous substance rather than a hazardous product or a hazardous activity? Because no principled answer to these questions is apparent, the *Sofie* court's broad application of the exception leaves the statutory provision without rational justification.

Moreover, if we divorce Paragraph (3)(a) from its specific legislative purpose, it is difficult to give clear content to its terms. The legislative history indicates that the exception applies to hazardous wastes and substances that pollute the environment, especially when wastes or substances are leaking into the environment from toxic waste disposal sites. The applicability of the exception to particular conduct and to types of wastes or substances should be determined by the relationship of the proviso to the need to prevent and clean-up environmental pollution. But if we instead apply the exception whenever a hazardous waste or substance or disposal site serves as the instrumentality for harm, troubling problems of definition arise. What is a "hazardous waste or substance"? For that matter, what is a "substance"? And what is a "solid waste disposal site"? Does that include a county dump which does not contain hazardous wastes? Or is the term "solid waste disposal site" to be understood in reference to "hazardous waste or substance" and thus apply only to a site for storage of hazardous wastes and substances?

With respect to Paragraph (3)(a), Kristin Houser, a plaintiff's attorney specializing in toxic tort cases, comments:

In *Sofie*, the court was not required to explore the issue of what constitutes a hazardous substance in any depth since

544. Sisk, *Constitutional Challenges*, *supra* note 13, at 471-72 n.180.

the defendant conceded that asbestos was one. Definitional questions will undoubtedly spawn more litigation. For example, to be "hazardous" does the substance have to be something that is known to injure all who are exposed to it at certain doses (like arsenic), or would it be enough that a significant number of those exposed to the toxins suffer injury (like asbestos), or would it even extend to those substances that can cause very severe injury, but only to a small percentage of those exposed (i.e., perhaps, dioxin). Further questions could arise over what is a "substance": e.g., is radiation a "substance"; is electricity a "substance," and so forth.⁵⁴⁵

Indeed, the definitional problem may be more fundamental than simply comparing the relative toxic nature of dangerous chemicals. Is water a "hazardous substance"? The individual scalded by boiling water or drowning in a lake might certainly so conclude. What about ordinary concrete? The person falling from a height onto a concrete floor will find it hazardous. The courts undoubtedly will reject as absurd any attempt to stretch the term "hazardous waste or substance" to include water or concrete, and they will be correct in doing so. But what rationale will support that conclusion? Without reference to the underlying legislative purpose of cleaning up environmental pollution, what is to be our guiding star? How should we define the terms of the exception?

Ms. Houser suggests looking to the definition of "hazardous wastes and substances" in other federal and state laws regulating hazardous materials.⁵⁴⁶ For example, the Washington

545. Houser, *supra* note 443, at 296-97. In *Sofie*, the Washington Supreme Court found it significant that the final version of the exception spoke in broader terms than the earlier draft of the exception that was adopted by amendment on the Senate floor. *Sofie*, 112 Wash. 2d at 668-69, 771 P.2d at 728. Under this reasoning, it would be significant that the earlier amendment made specific reference to "high or low level radioactive wastes or substances," in addition to "hazardous wastes or substances." S. Journal, 49th Reg. Sess. & 1st Spec. Sess. 467 (1986). Because the final version enacted as RCW 4.22.070(3)(a) lists only "hazardous wastes or substances," with no mention of radioactivity, it could be argued that radioactive materials are outside the scope of the statutory language. However, it could just as easily be contended that the term "hazardous wastes or substances" was later settled upon as a broader term that encompasses all dangerous materials, whether the danger is chemical or radioactive. If the exception is narrowed and connected to legislative concerns about environmental pollution and the cleanup of hazardous waste sites, the legislative purpose would plainly extend to radioactive pollution and radioactive material disposal sites.

546. Houser, *supra* note 443, at 297-98. Interestingly, in the state statutes cited by Ms. Houser, the terms "hazardous substance" or "hazardous waste" appear in the context of environmental regulation statutes. That the Washington Legislature used

Hazardous Waste Management Act defines "hazardous substances" and "hazardous wastes" synonymously as including "all dangerous and extremely hazardous waste,"⁵⁴⁷ which in turn is described as having such characteristics as "pos[ing] a substantial present or potential hazard to human health, wildlife, or the environment";⁵⁴⁸ "hav[ing] . . . toxic properties that may cause death, injury or illness or hav[ing] mutagenic, teratogenic, or carcinogenic properties";⁵⁴⁹ being "corrosive, explosive, flammable, or [generating] pressure through decomposition or other means";⁵⁵⁰ and being "highly toxic to man or wildlife."⁵⁵¹ The Washington Hazardous Substance Information Act defines "hazardous substances" by reference to a long list of other federal and state statutes and regulations.⁵⁵²

These definitions are as good as any. The fact that the legislature has used the same term in another statute is undoubtedly owed some weight in attempting to define its meaning in this context. But until the courts identify some underlying purpose for Paragraph (3)(a), it will be impossible to determine how the statute should apply and what its terms mean in the context of the statutory goal. In order to restore a sense of purpose to the exception, both to give it a rational basis and to provide a touchstone for giving meaning to its terms, the Washington Supreme Court may need to revisit its expansive ruling in *Sofie* and revive a narrower interpretation that is more closely tethered to the legislative history.

2. The Business Torts Exception

RCW 4.22.070(3)(b) provides:

(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.⁵⁵³

the same term elsewhere in such a context provides further indication that the use of the same phrase in Paragraph (3)(a) was likely intended as a reference to statutes relating to environmental pollution. In sum, the best evidence is that, in enacting the hazardous waste exception, the legislature was concerned with the discharge of hazardous wastes or substances into the environment.

547. WASH. REV. CODE § 70.105.010(14), (15) (1991).

548. *Id.* § 70.105.010(5).

549. *Id.* § 70.105.010(5)(a).

550. *Id.* § 70.105.010(5)(b).

551. *Id.* § 70.105.010(6)(a)(ii).

552. WASH. REV. CODE § 70.102.010(5) (1991).

553. *Id.* § 4.22.070(3)(b).

This exception was adopted as an amendment on the floor of the state senate.⁵⁵⁴ Senator Philip A. Talmadge, the author of the amendment, justified the exception as necessary to prevent interference with the development of unique principles of law in the distinctive area of business torts.⁵⁵⁵ Senator R. Ted Bottinger joined in urging adoption of the exception, stating that the area of business torts was outside the legislative concern with availability and affordability of insurance.⁵⁵⁶

The scope of Paragraph (3)(b) could be measured in three different ways: (a) the *nature of the parties theory*—as applying to tort suits between business or commercial entities, thereby setting as the benchmark the nature of the parties to the dispute; (b) the *nature of the relief theory*—as applying to tort suits which seek damages solely for economic loss, thereby limiting the exception to suits requesting certain forms of relief; or (c) the *nature of the cause of action theory*—as applying to causes of action for interference with contracts or business relations, thereby confining the exception to cases based on certain theories of liability. The plain language of the exception, together with the legislative history, make clear that the nature of the cause of action is the determining factor. Before confirming that conclusion, I will first dismiss the other two possibilities.

a. *Nature of the Parties Theory*

The first possible interpretation of RCW 4.22.070(3)(b)—as applying only to disputes between business or commercial entities—may be readily discarded. Although Senator Talmadge in introducing this provision twice described the exception as involving “business torts,”⁵⁵⁷ nothing in his supporting statement suggests that its application turns upon a characterization of the affected parties as “businesses.” Nor does the wording of the exception provide any support for reading it as a provision designed to provide special treatment to business interests. Although denomination of this statutory paragraph as the “business torts” exception may be appropriate as a shorthand

554. S. Journal, 49th Reg. Sess. & 1st Spec. Sess. 468 (1986).

555. *Id.* (remarks of Sen. Talmadge).

556. *Id.* (remarks of Sen. Bottinger). See also Peck, *Washington's Partial Rejection*, *supra* note 2, at 251 (describing legislative purpose behind exception); McFadden, *supra* note 13, at 243 (same).

557. S. Journal, 49th Reg. Sess. & 1st Spec. Sess. 468 (1986) (remarks of Sen. Talmadge).

reference, the scope of this provision is not to be defined by an arbitrary characterization of the tortfeasor or the victim of the tortious conduct.

b. Nature of the Relief Theory

In his statement supporting the amendment that became the business torts exception, Senator Talmadge contrasted "business torts" with "personal injury actions."⁵⁵⁸ From this one could draw the inference that the type of relief sought is the element that distinguishes those cases falling within the exception from those other cases that remain subject to the comparative fault rules of RCW 4.22.070. To the contrary, Senator Talmadge's statement is better understood as simply illustrating the wide spectrum of fault-based torts that, in the absence of a specific exception, would be within the coverage of the comparative fault enactment, ranging from personal injury torts to property damage torts, and including that species of property damage claims that are generically known as business torts.

Moreover, it would be a fundamental error to circumscribe the Washington comparative negligence and comparative fault statutes according to the type of injury or damage sustained, as opposed to the fault-based nature of the tortious conduct. As one Washington appellate court has stated, "the comparative fault doctrine shall apply to *all* actions based on 'fault,' " whatever the theory of liability.⁵⁵⁹ There is no reasoned basis for carving exceptions out of the principle of comparative fault based on the type of recovery sought rather than the nature of the tortious conduct.

Courts in other jurisdictions have generally refrained from limiting the concept of comparative fault to claims involving either personal injury or casualty damage to physical property. For example, although the Washington appellate courts have not yet addressed the question, there is no reason why fault should not be compared and allocated in an action for negligent misrepresentation, although the harm suffered in such cases is ordinarily pecuniary in nature. As the Minnesota Supreme Court observed in *Florenzano v. Olson*,⁵⁶⁰ the "major-

558. *Id.*

559. *Lundberg v. All-Pure Chemical Co.*, 55 Wash. App. 181, 186, 777 P.2d 15, 19 (1989) (emphasis added).

560. 387 N.W.2d 168 (Minn. 1986).

ity of . . . states considering the issue . . . have held principles of comparative responsibility applicable to cases of negligent misrepresentation."⁵⁶¹ Dean Prosser stated that there is "no apparent reason for distinguishing negligent misrepresentation from any other negligence in [the application of contributory or comparative negligence concepts]."⁵⁶² And, indeed, there is no apparent reason why the degree of justifiable reliance—a central element in a negligent misrepresentation case—cannot be compared in the same manner as other forms of fault in other fault-based actions resulting in other types of harm. Negligence is negligence.

The language of the Washington comparative fault statutes supports this conclusion. As explained earlier,⁵⁶³ the concept of fault incorporated in RCW 4.22.070 is derived from the Washington comparative negligence statutes. RCW 4.22.005 mandates application of comparative fault between plaintiffs and defendants in actions "seeking to recover damages for injury or death to person or harm to property."⁵⁶⁴ This language should be understood to reach pecuniary harm caused by culpable conduct. Indeed, an interpretation of the phrase "harm to property" as not including economic harm would be difficult to understand and artificially restrictive. An injury to a pecuniary interest manifestly constitutes damage to economic property.

Courts in other jurisdictions have applied comparative fault statutes, with language similar to the Washington provision, to cases involving purely economic or pecuniary harm. In *Lippes v. Atlantic Bank of New York*,⁵⁶⁵ a New York appellate court dealt at length with the "injury to property" concept and found that the purpose behind the comparative fault statute "was to release the concept of damage apportionment from the parochial confines of accident cases and to broaden its applica-

561. *Id.* at 176. See also *Robinson v. Poudre Valley Fed. Credit Union*, 654 P.2d 861 (Colo. Ct. App. 1982) (holding that fault is appropriately allocated between plaintiff and defendant by application of comparative fault principles to negligent misrepresentation case); *Cypress Oilfield Contractors, Inc. v. McGoldrich Oil Co.*, 525 So. 2d 1157 (La. Ct. App. 1988) (applying comparative fault to misrepresentation); *Borchardt v. Wilk*, 456 N.W.2d 653, 655 (Wis. Ct. App. 1990) (discussing apportionment of fault by trial court in negligent misrepresentation case).

562. PROSSER, *supra* note 100, § 107, at 706. See also *Florenzano v. Olson*, 387 N.W.2d 168, 176 (Minn. 1986) (citing PROSSER).

563. See *supra* part III.B.1.

564. WASH. REV. CODE § 4.22.005 (1991).

565. 419 N.Y.S.2d 505 (N.Y. App. Div. 1979).

tion flexibly to reach any breach of legal duty or fault"⁵⁶⁶ Likewise, in *Darnell Photographs, Inc. v. Great American Ins. Co.*,⁵⁶⁷ the Colorado Court of Appeals applied the comparative fault statute to an action against an insurer for negligently failing to add additional insurance coverage. The court flatly rejected the argument that the phrase "damage to property" should be limited to casualty harm rather than economic injury:

It is well recognized that comparative negligence statutes have been enacted to ameliorate the harsh results which sometimes occur under the doctrine of contributory negligence. To adopt the narrow construction of the statute proposed by defendant would defeat the purpose for which it was designed; therefore, we hold that the phrase "injury to property" in the comparative negligence statute is not necessarily limited to a physical injury to tangible property, but rather includes any damage resulting from invasion of one's property rights by actionable negligence.⁵⁶⁸

Courts in Massachusetts and New Jersey have reached the same conclusion.⁵⁶⁹

The Washington Supreme Court has assumed the applicability of comparative fault principles to cases which involved allegation of only pecuniary losses. The court has referred to comparative fault in such commercial contexts as a claim based upon an architect's negligence in taking measurements that

566. *Id.* at 511. See also *Murph & Fritz's Place, Inc. v. Loretta*, 447 N.Y.S.2d 205, 208 (N.Y. City Ct. 1982) (negligent representation case).

567. 519 P.2d 1225 (Colo. Ct. App. 1974).

568. *Id.* at 1226 (citation omitted).

569. See, e.g., *O'Malley v. Putnam State Deposit Vaults, Inc.*, 458 N.E.2d 752, 760 (Mass. Ct. App. 1983) (applying comparative fault statute with "injury to person or property" language to company's negligent failure to prevent conversion of plaintiff's gold coins by company officer); *H. Rosenblum, Inc. v. Adler*, 461 A.2d 138, 152 (N.J. 1983) (applying comparative fault statute with "injury to person or property" language to suit by investor seeking solely pecuniary damages for accounting malpractice). See generally VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE*, § 2.2, at 36 (2d ed. 1986); Jay M. Allen, Note, *Damage Apportionment in Accounting Malpractice Actions: The Role of Comparative Fault*, 1990 B.Y.U. L. REV. 949, 968-74.

The Kansas Supreme Court initially ruled that the language "property damage" in the Kansas comparative fault statute did not apply to actions for economic damages. *Federal Sav. & Loan Ins. Corp. v. Huff*, 704 P.2d 372 (1985). The Kansas legislature responded by specifically adding the words "economic loss" to the statute. KAN. STAT. ANN. § 60-258a (Supp. 1991). See generally *Pizel v. Zuspahn*, 803 P.2d 205 (Kan. 1990) (discussing statutory change).

resulted in additional expenses in a construction project,⁵⁷⁰ and a claim by a builder for lost rent and added costs due to a county's negligent suspension of a building permit.⁵⁷¹

Accordingly, distinguishing between cases based upon the nature of the relief sought would introduce an alien element into the interpretation and application of the comparative fault statute. Each of the three exceptions to RCW 4.22.070 instead direct the reader to the nature of the "cause of action" and thus to the nature of the tortious conduct.

c. *Nature of the Cause of Action Theory*

Having rejected each of the alternative interpretations of the second exception to RCW 4.22.070, we are left with the plain language of the statute, which is where we should always return. Paragraph (3)(b) simply and directly ties the scope of the exception to the assertion of a "cause of action arising from the tortious interference with contracts or business relations."⁵⁷² The legislative history likewise focuses upon the nature of the legal theory. Senator Talmadge, the author of the exception, expressed concern that elimination of joint and several liability in this particular context would disturb the development of the unique rules governing interference with contracts and business relations.⁵⁷³ Moreover, Senator Bottinger concurred in the addition of this exception, saying it would have no impact on the legislative purpose of reducing insurance rates since "you cannot buy insurance to cover this."⁵⁷⁴ Like Senator Talmadge, Senator Bottinger's remarks plainly are directed to the nature of the tortious activity and the unavailability of insurance for indemnification of liability for conduct that amounts to interference with contracts or business relations.

The scope of Paragraph (3)(b), therefore, is coextensive with the scope of the tortious interference cause of action. Although a full survey of the law of interference with con-

570. *Seattle Western Ind. v. David A. Mowat Co.*, 110 Wash. 2d 1, 9, 750 P.2d 245, 250 (1988).

571. *J & B Dev. Co. v. King County*, 100 Wash. 2d 299, 308, 669 P.2d 468, 474 (1983), *overruled on other grounds by Meany v. Dodd*, 111 Wash. 2d 174, 759 P.2d 455 (1988).

572. WASH. REV. CODE § 4.22.070(3)(b) (1991).

573. S. Journal, 49th Reg. Sess. & 1st Spec. Sess. 468 (1986) (remarks of Sen. Talmadge).

574. *Id.* (remarks of Sen. Bottinger).

tracts or business relations is beyond the scope of this Article, a short summary of the legal doctrine is in order. Protection of contractual arrangements and concrete business expectancies provides a measure of commercial stability and reliability to marketplace transactions.⁵⁷⁵ However, the "policy of the common law [has always been] in favor of free competition."⁵⁷⁶ Thus, the law also recognizes the general privilege of each actor in the economic marketplace to seek to influence others and to take appropriate actions to "maximize economic interests."⁵⁷⁷ In a free market economy, the law must accommodate an aggressively competitive economic order and not unreasonably restrict free movement and change in the marketplace.⁵⁷⁸ As a leading treatise says, "it is no tort to beat a business rival to prospective customers."⁵⁷⁹

Within the framework of a free market system, the tort of wrongful interference with contract and business relations "draws a line beyond which no member of the community may go in intentionally intermeddling with the business affairs of others."⁵⁸⁰ The difficulty lies in finding that line between permissible vigorous competition and impermissible wrongful interference. Commentators agree that mere interference is not enough; the interference must be shown to be *wrongful* in some manner.⁵⁸¹ In order to avoid suppressing the free market, courts appear to be gravitating toward a standard that "restricts tort liability to those cases in which the defendant's act is independently wrongful."⁵⁸² As the Washington Supreme Court held in *Pleas v. City of Seattle*,⁵⁸³ before an

575. John Danforth, Note, *Tortious Interference With Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity*, 81 COLUM. L. REV. 1491, 1493 (1981).

576. PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 36, § 130, at 1012 (footnote omitted).

577. See *Birkenwald Distrib. Co. v. Heublein, Inc.*, 55 Wash. App. 1, 12, 776 P.2d 721, 727 (1989) (interference with contract case).

578. Gina M. Grothe, Note, *Interference With Contract in the Competitive Marketplace*, 15 WM. MITCHELL L. REV. 453, 458 (1989).

579. PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 36, § 130, at 1012.

580. *Pleas v. City of Seattle*, 112 Wash. 2d 794, 801, 774 P.2d 1158, 1162 (1989) (quoting *Rock Falls v. Chicago Title & Trust Co.*, 300 N.E.2d 331, 333 (Ill. App. Ct. 1973)).

581. PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 36, § 129, at 979 ("liability turns on the purpose for which the defendant acts, with the indistinct notion that the purpose must be considered improper in some undefined way").

582. Harvey S. Perlman, *Interference With Contract and Other Economic Expectancies*, 49 U. CHI. L. REV. 61, 62 (1982).

583. 112 Wash. 2d 794, 774 P.2d 1158 (1989).

interference will be deemed actionable, the trier of fact must detect "either the defendant's pursuit of an improper objective of hurting the plaintiff or the use of wrongful means that in fact cause injury to plaintiff's contractual or business relationships."⁵⁸⁴

The tort applies both to wrongful disruption of contractual relationships (that is, rights established by agreement) and of business expectancies (that is, interests not yet reduced to a contract right).⁵⁸⁵ In *Pleas*, the Washington Supreme Court combined the rules governing contractual and business expectancy interference into a single tort of " 'wrongful interference with . . . economic relationships.' "⁵⁸⁶ The elements of this cause of action are:

- (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy by the alleged interfering party; (3) intentional interference inducing or causing breach or termination of the relationship or expectancy; and (4) resultant damage.⁵⁸⁷

In defense, the defendant may establish that the interference was justified or its actions were privileged.⁵⁸⁸ A defendant " 'who in good faith asserts a legally protected interest of his own which he believes may be impaired by the performance of a proposed transaction is not guilty of tortious interference.' "⁵⁸⁹ Similarly, a defendant may not be held liable for wrongful interference when it merely has exercised its privilege to compete in the free marketplace or to act in promotion

584. *Id.* at 803-04, 774 P.2d at 1163.

585. The terms "business relations" or "business expectancies" include prospective economic advantages that are reasonably concrete and immediate in terms of expectation. For example, the Washington courts have extended protection to commercial interests in the pursuit and competition of a construction project, *Pleas v. City of Seattle*, 112 Wash. 2d 794, 774 P.2d 1158 (1989) (city intentionally and improperly blocked a legitimate construction project), and the prospective sale of property to a willing customer, *Sunland Invest., Inc. v. Graham*, 54 Wash. App. 361, 773 P.2d 873 (1989) (real estate contract vendee sued vendor for tortious interference with prospective sale of land to others).

586. *Pleas*, 112 Wash. 2d at 803, 774 P.2d at 1163 (quoting *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 582 P.2d 1365, 1368 (Or. 1978)).

587. *Sea-Pac Co. v. United Food & Commer. Workers Local 44*, 103 Wash. 2d 800, 805, 699 P.2d 217, 219-20 (1985). See also *Pleas*, 112 Wash. 2d at 800, 774 P.2d at 1161; *Joy v. Kaiser Aluminum & Chem. Corp.*, 62 Wash. App. 909, 912, 816 P.2d 90, 92 (1991).

588. *Pleas*, 112 Wash. 2d at 800, 774 P.2d at 1161; *Joy*, 62 Wash. App. at 913, 816 P.2d at 92.

589. *Brown v. Safeway Stores, Inc.*, 94 Wash. 2d 359, 375-76, 617 P.2d 704, 713 (1980) (quoting *Singer Credit Corp. v. Mercer Island Masonry, Inc.*, 13 Wash. App. 877, 884, 538 P.2d 544, 549 (1975)).

of its own economic interests,⁵⁹⁰ other than by wrongful means such as inducing a contract breach to obtain customers or other prospective advantage.⁵⁹¹

In sum, the substantive law governing of the cause of action for tortious interference as developed in Washington case law defines the scope of the exception to comparative fault stated in RCW 4.22.070(3)(b).

3. The Generic Products or "Market Share" Liability Exception

RCW 4.22.070(3)(c) provides:

(c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.⁵⁹²

As the commentators agree,⁵⁹³ and the legislative history confirms,⁵⁹⁴ Paragraph (3)(c) was intended to preserve the common law authority of the Washington Supreme Court to consider alternative approaches to liability when the manufacturer of a fungible or generic product cannot be identified. The court had previously adopted such an alternative approach in *Martin v. Abbott Laboratories*.⁵⁹⁵

In *Martin*, a woman had allegedly developed cancer as a result of prenatal exposure to the drug diethylstilbestrol (DES), which had been taken by her mother during pregnancy.⁵⁹⁶ Although the plaintiff's mother could recall the size of the drug dosages she had taken, she could not remember the name of the pharmaceutical company that had produced the tablets.⁵⁹⁷ In cases involving a generic or fungible product (that

590. *Birkenwald Distrib. Co. v. Heublein, Inc.*, 55 Wash. App. 1, 12, 776 P.2d 721, 727 (1989).

591. PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 36, § 129, at 986.

592. WASH. REV. CODE § 4.22.070(3)(c) (1991).

593. Peck, *Washington's Partial Rejection*, *supra* note 2, at 251; Sisk, *supra* note 13, at 472-73; McFadden, *supra* note 13, at 243-44.

594. S. Journal, 49th Reg. Sess. & 1st Spec. Sess. 469 (1986) (remarks of Sen. Talmadge) (describing the predecessor amendment to Paragraph (3)(c) as "carv[ing] out an exception for alternate market share liability as decided by the Supreme Court of this state").

595. 102 Wash. 2d 581, 689 P.2d 368 (1984).

596. *Id.* at 583, 689 P.2d at 371. See also *supra* part III.E.1 (discussing the *Martin* court's analysis of concerted activity theory of liability).

597. *Martin*, 102 Wash. 2d at 584, 689 P.2d at 371.

is, an "identical-type product"⁵⁹⁸), the court recognized that it may not always be possible to ascertain which of several manufacturers in the industry produced the particular dosage that injured a particular plaintiff, especially when the injury is not manifested until many years later. Accordingly, if the plaintiff is to be compensated at all for the harm caused by the culpable behavior of *some* member of the drug industry, the court concluded that it was necessary to hold *every* manufacturer liable in proportion to its share of the market during the period at issue.⁵⁹⁹

Under a "market share" theory of manufacturer liability, a producer of a fungible product in a generic form is held responsible in damages based merely upon its participation in the market for the product. The plaintiff is relieved from proving that the harm was actually caused by the particular actions of that precise member of the industry. In the *Martin* decision, the Washington Supreme Court adopted a "market share alternate liability" approach.⁶⁰⁰ A manufacturer of DES is subject to liability unless it can prove that could not have been the manufacturer of the dosage ingested by the plaintiff's mother, such as by establishing that it did not produce or market the type of DES taken, or that it did not sell the drug in that geographic area or at that point in time.⁶⁰¹ Each manufacturer joined to the action by the plaintiff will be presumed initially to have had an equal percentage share of the market and thus will be equally responsible in damages along with every other defendant.⁶⁰² However, a manufacturer may reduce its proportional share of liability by proving that it had a lower share of the market at the time in question.⁶⁰³

The imposition of liability upon members of an entire industry based upon market share has been criticized as an

598. PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 36, § 103, at 714.

599. *Martin*, 102 Wash. 2d at 602-07, 689 P.2d at 381-83. See generally Sharon Novak, Comment, *Into the Quagmire: Washington Adopts Market Share Liability in DES Cases*, 21 GONZ. L. REV. 199, 241-42 (1985-86) (concluding that the court failed to articulate a theory that provides the fairest and most efficient resolution of the problem); Mark Reeve, Note, *Washington Adopts Market Share Liability for DES Producers*, 60 WASH. L. REV. 543, 547 (1985) (characterizing Washington's adoption of market share liability for DES manufacturers as an "appropriate innovation").

600. *Martin*, 102 Wash. 2d at 602-07, 689 P.2d at 381-83.

601. *Id.* at 605, 689 P.2d at 382.

602. *Id.*

603. *Id.* at 605-06, 689 P.2d at 382. See also *George v. Parke-Davis*, 107 Wash. 2d 584, 591-94, 733 P.2d 507, 511-13 (1987) (discussing calculation of market share for DES).

"abandon[ment of] the fundamental principle of causation" in tort law.⁶⁰⁴ One commentator has described this alternate form of liability as based on the dubious "notion that it is better to impose liability on someone who has caused *no* harm—at least if he somehow 'had it coming' anyway—than to leave uncompensated someone who clearly has been wronged."⁶⁰⁵ One court that rejected the market share theory has ruled that "the public policy favoring recovery on the part of an innocent plaintiff does not justify the abrogation of the rights of a potential defendant to have a causative link proven between that defendant's specific tortious acts and the plaintiff's injury."⁶⁰⁶ An alternate or market share theory imposes liability upon a defendant for merely creating a risk of harm, without any actual showing that the risk created by the defendant's particular conduct was realized in injury to this plaintiff. Moreover, courts and commentators suggest that by ignoring the requirement of a nexus between the plaintiff's injury and the blameworthy conduct of a particular manufacturer, the market share theory discourages product "research and development while adding little incentive to" increase the safety of products because "all companies face potential liability regardless of their [safety] efforts."⁶⁰⁷

The theory has also been criticized as based on the unrealistic assumption that it is possible as a practical matter to establish the market shares of individual manufacturers, especially many year later. Appellate courts, such as the Washington Supreme Court in *Martin*, that have adopted market share liability "have done so while ruling on pretrial motions and have not had the benefit of first having heard evidence on the

604. *Smith v. Cutter Biological, Inc.*, 823 P.2d 717, 730 (Haw. 1991) (Moon, J., dissenting) (dissenting from the adoption of market share liability in a case involving a suit by a hemophiliac who was exposed to the AIDS virus through blood products).

605. HUBER, *supra* note 44, at 81 (emphasis in original). See also *Martin*, 102 Wash. 2d at 602, 689 P.2d at 381 ("this court is faced with a choice of either fashioning a method of recovery for the DES case which will deviate from traditional notions of tort law, or permitting possibly tortious defendants to escape liability to an innocent, injured plaintiff").

606. *Case v. Fibreboard Corp.*, 743 P.2d 1062, 1067 (Okla. 1987).

607. *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 247 (Mo. 1984); Keith C. Miller & John D. Hancock, *Perspectives on Market Share Liability: Time for a Reassessment?*, 88 W. VA. L. REV. 81, 103-04 (1985); David M. Schultz, *Market Share Liability in DES Cases: The Unwarranted Erosion of Causation in Fact*, 40 DEPAUL L. REV. 771, 811-12 (1991); Jonathan B. Newcomb, Comment, *Market Share Liability for Defective Products: An Ill-Advised Remedy for the Problem of Identification*, 76 NW U. L. REV. 300, 317-20 (1981).

availability of market share data."⁶⁰⁸ As subsequent litigation experience has shown, there is little reliable information available to determine the manufacturers' percentages of the market.⁶⁰⁹ Because of the long lapse in time from the sale of the drug to the filing of the tort actions, the fact that many manufacturers are no longer in business, and given that the drug was prescribed for a number of different uses, it is impossible to fairly allocate the market among the hundreds of companies that produced the drug.⁶¹⁰ As a result, determinations of market share percentages are likely to be arbitrary and unfair,⁶¹¹ or defendants will be unable to establish their market shares and thus be left with liability for "a wholly speculative and disproportionate amount of the damages."⁶¹² Even if definition of market share is theoretically possible, there will be "a tremendous cost, both monetarily and in terms of the workload, on the court system and litigants in an attempt to establish percentages [of market share] based on unreliable or insufficient data."⁶¹³

Adhering to the fundamental requirement of cause-in-fact, most courts have dismissed actions in which a plaintiff could not connect a product to a particular producer.⁶¹⁴ The highest courts in only six states have accepted a market share exception to the requirement of proximate causation, and they have only done so in the context of generic medical products.⁶¹⁵ Although the theory arguably would apply whenever

608. *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324, 337 (Ill. 1990). See also *Martin*, 102 Wash. 2d at 582-84, 689 P.2d at 371 (case arose on motions for summary judgment).

609. *Smith*, 560 N.E.2d at 337.

610. *Id.*; *Novak*, *supra* note 599, at 234-36; *Newcomb*, *supra* note 607, at 325-26.

611. *Smith*, 560 N.E.2d at 338.

612. *Id.*

613. *Id.* at 338. See also David A. Fischer, *Products Liability—An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623, 1657 (1981) ("[t]he legal fees and administrative costs arising from litigation of this magnitude easily could rival the cost of the plaintiff's judgment").

614. See, e.g., *Tidler v. Eli Lilly & Co.*, 95 F.R.D. 332 (D.D.C. 1982), *aff'd*, 851 F.2d 418 (D.C. Cir. 1988); *Morton v. Abbott Laboratories*, 538 F. Supp. 593 (M.D. Fla. 1982); *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004 (D.S.C. 1981); *Gray v. United States*, 445 F. Supp. 337 (S.D. Tex. 1978); *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324 (Ill. 1990); *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67 (Iowa 1986); *Payton v. Abbott Labs*, 437 N.E.2d 171 (Mass. 1982); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984); *Shackil v. Lederle Laboratories*, 561 A.2d 511 (N.J. 1989). See generally Teresa M. Schwartz, *Product Liability Reform by the Judiciary*, 27 GONZ. L. REV. 303, 319 (1991-92) ("[f]or products other than DES, courts overwhelmingly have rejected market share and other forms of collective liability").

615. *Sindell v. Abbott Laboratories*, 607 P.2d 924, (Cal.) *cert. denied*, 449 U.S. 912 (1980) (DES); *Conley v. Boyle Drug Co.*, 570 So. 2d 275 (Fla. 1990) (DES); *Smith v.*

injuries are caused by a fungible product in a generic form, the Washington courts have not extended the market share approach beyond the single context in which it was devised—cases involving the drug DES. Indeed, in *Lockwood v. AC & S, Inc.*,⁶¹⁶ although concluding it was unnecessary to resolve the issue in that case, the Washington Supreme Court acknowledged that “the use of market-share alternate liability theory in the asbestos products context is not without difficulties.”⁶¹⁷ Asbestos is not a completely fungible product, as asbestos products contain different amounts of asbestos and have varying propensities to release asbestos fibers.⁶¹⁸ In sum, departing from the traditional requirement of proximate causation to address the conundrum of identification in generic product cases plunges the courts into a new “quagmire” of problems.⁶¹⁹

In enacting the generic product exception of Paragraph (3)(c), the legislature did not intend to comment upon the wisdom of market share liability nor to encourage the court to expand the approach to new frontiers of products liability.⁶²⁰ Paragraph (3)(c) is a statement of permission, not of command or commendation.

Shortly before final passage of the Tort Reform Act of 1986, Senator Talmadge suggested that the legislation had “substantial difficulties in its definition of alternate market-share liability” and predicted that it amounted to “an invitation for great difficulty in the interpretation of that area of the law.”⁶²¹ Senator Talmadge missed the point; the vagueness of the statutory language was deliberate. The statute was not

Cutter Biological, Inc., 823 P.2d 717 (Haw. 1991) (blood products); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y. 1989), *cert. denied*, 493 U.S. 944 (1989) (DES); *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 368 (1984) (DES); *Collins v. Eli Lilly & Co.*, 342 N.W.2d 37 (Wis.), *cert. denied*, 469 U.S. 826 (1984) (DES).

616. 109 Wash. 2d 235, 744 P.2d 605 (1987).

617. *Id.* at 245 n.6, 744 P.2d at 612.

618. *Goldman v. Johns-Manville Sales Corp.*, 514 N.E.2d 691, 700-01 (Ohio 1987); Craig A. Etter, Note, *The Causation Problem in Asbestos Litigation: Is There an Alternative Theory of Liability*, 15 IND. L. REV. 679, 691-92 (1982).

619. See Novak, *supra* note 599.

620. Professor Peck suggests that the exception may be read to extend market share liability to cases involving such goods as nails, screws, bolts, grain, and lumber. Peck, *Washington's Partial Rejection*, *supra* note 2, at 251. Although the exception may not preclude the Washington Supreme Court from exercising its common law authority to extend the market share theory beyond its present narrow context of generic drugs, neither should the statute be read as an invitation to explore the outer limits of group-based liability.

621. S. Journal, 49th Reg. Sess. & 1st Spec. Sess. 1483 (1986) (remarks of Sen. Talmadge).

intended to provide detailed and specific direction to appellate courts. Rather, the legislature wished to leave the court a free hand, allowing the court to decide whether, when, and how the common law should be molded to devise rules of liability to apply in the unique context of fungible products manufactured in a generic form.⁶²² As Senator Talmadge himself had explained when introducing the amendment that later evolved into Paragraph (3)(c), the provision was designed to “carve[] out an exception for alternative market-share liability as *decided* by the Supreme Court in this state”⁶²³—the exception leaves room for common law decision. Paragraph (3)(c) is simply a “hands-off” provision.

However, borrowing from the *Martin* analysis, Paragraph (3)(c) does circumscribe the boundaries of market share liability by limiting the potential extension of the theory to those cases involving products manufactured without identifying characteristics. In *Martin v. Abbott Laboratories*, the Washington Supreme Court adopted the theory in the narrow context of a fungible drug with a chemically identical formula that had been produced “in a ‘generic’ form which did not contain any clearly identifiable shape, color, or markings.”⁶²⁴ Paragraph (3)(c) similarly speaks in terms of “a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.”⁶²⁵

Because of this limiting language, Professor Peck argues that the exception is “not well drafted” and may fail to serve its purpose.⁶²⁶ He apparently believes that the market share liability theory should also apply when a fungible product *did* indeed possess an identifying attribute, but owing to the passage of time or for other reasons a plaintiff nonetheless is unable to describe the product and thereby connect it with a particular manufacturer.⁶²⁷ Such an extension of market share liability is precluded by the legislature’s choice of statutory language. Under Paragraph (3)(c), if a manufacturer has

622. See Houser, *supra* note 443, at 296 (with Paragraph (3)(b), “[t]he legislature . . . was simply making it clear that it did not intend to tamper with existing law in this area”).

623. S. Journal, 49th Reg. Sess. & 1st Spec. Sess. 469 (1986) (remarks of Sen. Talmadge) (emphasis added).

624. *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 602, 689 P.2d 368, 381 (1984).

625. WASH. REV. CODE § 4.22.070(3)(c) (1991).

626. Peck, *Washington’s Partial Rejection*, *supra* note 2, at 251.

627. See *id.* (suggesting that market share liability should apply to use of asbestos notwithstanding that asbestos products frequently bear a trade name or mark).

impressed an identifying mark or other characteristic upon its product, it may not later be held responsible merely because a plaintiff finds it difficult to recreate that identification. Unless the manufacturer has contributed to the identification problem by creating an indistinguishable product, the plaintiff remains responsible for establishing the nexus between a particular injury and a particular wrongdoer.

I. Conclusion

At the beginning of Part III of this Article, I suggested that the language of RCW 4.22.070 was sufficiently direct that its application would raise few significant issues of statutory interpretation.⁶²⁸ The length of the ensuing discussion would seem to belie that observation. For a statute that I said was not in need of much interpretation, I have certainly devoted substantial and extended attention to that very question. Notwithstanding, I do not retreat from my preliminary observation. In its central aspects, RCW 4.22.070 *does* speak clearly and unequivocally. The basic structure of the statute, establishing a general regime of comparative responsibility, cannot be the subject of any genuine dispute. Rather, the necessity of my expanded analysis of the statute is attributable to the breadth of its application and to the ceaseless efforts of its detractors to devise alternative constructions to limit its operation and effect.

Although it was perhaps an inevitable next stage in the evolution toward a system grounded in comparative fault, the statutory modification of joint and several liability in RCW 4.22.070 was nevertheless a fundamental change in Washington law. With certain defined limitations and exceptions, RCW 4.22.070 mandates allocation of fault among all tortfeasors in all circumstances. The statute sweeps broadly. Because it touches so many aspects of tort law, a comprehensive study of the statute requires an examination of a wide range of topics. In addition, although the basic structure of the statute is plainly apparent, and its application in the ordinary case should be straightforward, a statutory reform of this magnitude is bound to generate a few areas of legitimate controversy. Accordingly, I have addressed particular areas of uncertainty, such as the application of comparative fault to the hybrid case

628. See *supra* part III.A.1.

of the combined acts of negligent and intentional tortfeasors,⁶²⁹ and the delineation of the scope of the hazardous waste exception in a rational manner consistent with the legislative purpose.⁶³⁰

Moreover, as something of a tribute to the creativity of tort reform's detractors, much of the foregoing discussion was necessary to identify and dispute the variant interpretations of RCW 4.22.070 that have recently been invented by the opponents of comparative responsibility. I have explained that the legislative intent to hold each tortfeasor liable according to its share of fault, as reflected in the statutory language and the legislative history, would be frustrated by these "dis-interpretations." Accordingly, to sustain the plain meaning of the statute precludes acceptance of deconstructionist interpretations, such as the proposal that fault not be allocated against non-party entities,⁶³¹ and the theory that the statute's direction for entry of judgment against each defendant for its "proportionate share" of the damages instead permits the jury to assign damages based upon an equitable basis other than the percentage of fault allocated to each defendant.⁶³²

Therefore, despite the length of the intervening discussion, I end with the same simple theme with which I began—the statute can speak for itself. By the adoption of RCW 4.22.070, the legislature intended to equate liability with fault. In nearly all applications, the statute's language leads unambiguously and ineluctably to that conclusion. In cases of doubt, the statute should be understood in light of the guiding principle of comparative fault in liability. In that way, the statute will be interpreted and applied in the true spirit of tort reform.

IV. FILLING IN THE GAPS: READING THE COMPARATIVE FAULT ACT TOGETHER WITH OTHER STATUTES

A. Introduction

Whenever a new act is enacted by the legislature, the courts inevitably will be called upon to consider its meaning, not only in isolation, but also as it applies in relation to other statutory schemes. In some instances, the fit will be smooth; the new statute and the old will rest together easily, each occu-

629. See *supra* part III.B.2.b.

630. See *supra* part III.H.1.

631. See *supra* part III.C.1.f and g.

632. See *supra* part III.D.

pying a part of that field of the law in harmony with the other and without overlap or confusion. In other instances, however, the new and the old statutes will lie together uneasily, with apparent conflicts in their respective universes of coverage and command.

In this part of the Article, I look at two situations that demand an attempt to reconcile RCW 4.22.070 with another statute operating in the same area—one situation in which the Washington Supreme Court has recently given the answer and the other in which the appellate courts have yet to speak. First, I will discuss the intersection between comparative fault under the Tort Reform Act of 1986 and the Industrial Insurance Act, which traditionally has provided for benefits to injured workers on a no-fault basis.⁶³³ The Washington Supreme Court recently was required to weigh the “competing interests”⁶³⁴ of tort reform and the workers’ compensation system in determining whether the state government lost its traditional right to reimbursement of workers’ compensation benefits paid when the worker later recovered damages in tort from a third person and fault was allocated to the immune employer. The court’s resolution of this problem is a model for reconciliation of other statutory provisions with the command of comparative responsibility in RCW 4.22.070. The court resolved the conflict by applying the underlying principle of comparative fault to reduce the state government’s right to reimbursement in correlation with the employer’s share of the fault for the injury to the worker.

Second, I examine the relationship between the comparative fault rule for tort liability established by RCW 4.22.070 in the Tort Reform Act of 1986 and the “retailer relief” provision adopted in the Product Liability Act of 1981.⁶³⁵ RCW 7.72.040(2)⁶³⁶—commonly known as the “retailer relief” provision—reflects an earlier legislative attempt to ameliorate the harsh effects of joint and several liability by generally exempting a non-manufacturing product seller from liability. However, the “retailer relief” statute is subject to certain exceptions; for example, holding the product seller jointly and severally liable if the manufacturer is insolvent and thus

633. See *infra* part IV.B.

634. *Clark v. Pacifcorp*, 118 Wash. 2d 167, 183-84, 822 P.2d 162, 171 (1991).

635. See *infra* part IV.C.

636. WASH. REV. CODE § 7.72.040(2) (1991).

unable to respond in damages to the plaintiff.⁶³⁷ The question then is whether the exceptions to the "retailer relief" statute continue to apply and thereby impose joint and several liability upon a passive distributor or retailer of a product, or whether the subsequently enacted rule of comparative fault supplements and supersedes the earlier, imperfect attempt to correct the flaws of joint and several liability. To fully illustrate the manner in which I believe RCW 4.22.070 should be reconciled with other statutory enactments, I work through each of the steps of this analysis, reaching the conclusion that both statutes must be read together as a further limitation on the liability of non-manufacturing product sellers.

B. Comparative Fault and the Industrial Insurance Act

Under the Washington Industrial Insurance Act, an employee injured on the job is entitled to workers' compensation benefits.⁶³⁸ In exchange for providing the worker with an assured source of compensation, the employer is granted immunity from tort liability for injuries to the employee, whether caused by the employer or a coemployee.⁶³⁹ Unless an employer so elects and is qualified to be a self-insurer,⁶⁴⁰ all employers must pay premiums to the state workers' compensation fund managed by the Department of Labor and Industries.⁶⁴¹ In sum, "the industrial insurance program functions as a statutory substitute for a tort action accusing the employer of wrongful conduct"⁶⁴²

Although an action against the employer is barred under the Industrial Insurance Act, the worker is still permitted to bring a tort action against a third person, such as the manufacturer of machinery or equipment used by the employee at the

637. *Id.* § 7.72.040(2)(b).

638. *Clark v. Pacifcorp*, 118 Wash. 2d 167, 174, 822 P.2d 162, 166 (1991).

639. WASH. REV. CODE § 51.04.010 (1991). See generally *Clark*, 118 Wash. 2d at 184, 822 P.2d at 171 ("The act was created to provide sure and certain relief for injured workers and their beneficiaries. It was created through compromise. Both employees and employers gave up their common law rights and defenses in exchange for a no-fault system of compensation. The employer received immunity from suit, and the employee received compensation and benefits deemed by the Legislature to be sufficient recompense."); *Stertz v. Industrial Ins. Comm'n*, 91 Wash. 588, 590-91, 158 P. 256, 258 (1916) (upholding the workers' compensation statute as a valid compromise that assures the employee of benefits while immunizing the employer from tort liability).

640. WASH. REV. CODE § 51.14.020 (1991).

641. *Id.* § 51.16.035-.210.

642. *Sisk*, *supra* note 13, at 452.

time of the injury.⁶⁴³ Before tort reform, the third person defendant, if found liable, would be responsible in damages for the full amount of the employee's injuries, notwithstanding that the employer's fault may have contributed to the accident. This result followed directly from the doctrine of joint and several liability. Because of the employer's immunity from suit, the third person was also unable to obtain any contribution from the employer.⁶⁴⁴ However, the employee who recovered from a third person was required to reimburse the Washington State Department of Labor and Industries or the self-insured employer for at least part of the workers' compensation benefits already obtained.⁶⁴⁵ When the employee recovered from the third person, the Department or employer would have a lien upon that recovery for the amount of the benefits to be reimbursed.⁶⁴⁶

With the enactment of the Tort Reform Act of 1986, an injured employee may no longer recover from the third person that share of the damages that is attributable to the actions of the employer.⁶⁴⁷ Under RCW 4.22.070, fault must be allocated by the trier of fact to "every entity," specifically including "entities immune from liability to the claimant."⁶⁴⁸ Thus, rather than requiring the third person to bear the employer's share of the responsibility, industrial insurance benefits paid to the worker are the exclusive compensation to the worker for the employer's share of the fault.

"[I]n keeping with the principle that industrial insurance is a substitute for a tort action against the employer,"⁶⁴⁹ the workers' compensation statute was amended by the Tort Reform Act of 1986 to provide that workers who can show their injuries were caused in part by an employer or co-employee will be able to retain the entire judgment against third person tortfeasors and will not have to reimburse the Department for all of the workers' compensation benefits.⁶⁵⁰

643. WASH. REV. CODE § 51.24.030-.110 (1991).

644. *Montoya v. Greenway Aluminum Co.*, 10 Wash. App. 630, 639, 519 P.2d 22, 28 (1974) (the immunity of the employer under the Industrial Insurance Act "applies to claims by a third party against the employer for contribution or indemnity").

645. WASH. REV. CODE § 51.24.060 (1985).

646. *Id.*

647. *See supra* part III.C.1.d.

648. WASH. REV. CODE § 4.22.070(1) (1991).

649. Sisk, *supra* note 13, at 452.

650. S. Journal, 49th Reg. Sess. & 1st Spec. Sess. 464 (1986) (remarks of Sen. Bottinger) (the amendment to the workers' compensation statute was designed to

The amendment added a new Subsection (f) to RCW 51.24.060(1) that reads:

If the employer or co-employee are determined under RCW 4.22.070 to be at fault, (c) and (e) of this subsection do not apply and benefits shall be paid by the department and/or self-insurer to or on behalf of the worker or beneficiary as though no recovery had been made from a third person.⁶⁵¹

Based upon this language—that workers' compensation benefits should be paid as though "no recovery" had been made from a third person—commentators (including myself) understood the statute to mean that "employees injured in whole or in part by the negligence of their employer or co-employee [have] the ability to collect both the *full* amount of their workers' compensation benefits and the *full* amount of a judgment against the third party."⁶⁵² In other words, the statute was interpreted to mean that, whenever *some* fault was allocated to the employer, the Department's lien for reimbursement of benefits was eliminated in *full*. However, this "all or nothing" approach is difficult to reconcile with the underlying principle of *comparative* responsibility that animates RCW 4.22.070. Moreover, a complete elimination of the Department's right to reimbursement would provide a windfall to workers in many cases at the expense of the state compensation fund.⁶⁵³

In *Clark v. Pacificorp*,⁶⁵⁴ the Washington Supreme Court addressed this anomaly in the conjunction between the comparative fault provision of RCW 4.22.070 and the amendment to the workers' compensation statute codified in RCW 51.24.060(1)(f). In two cases consolidated on appeal, the survi-

prevent a "double whammy" whereby the employer's share of the fault would not be collectible in a tort action against a third person and the employee would also be obliged to refund the workers' compensation benefits from the tort recovery against the third person).

651. WASH. REV. CODE § 51.24.060(1)(f) (1991).

652. Stephen D. Thompson, Comment, *Development in the Law, The 1986 Tort Reform Act: Apportionment of Damages in Workers' Compensation (RCW 51.24.060)*, 23 WILLAMETTE L. REV. 211, 250 (1987) (emphasis added). See also Charles R. Bush, *The Impact of the Tort Reform Act Upon the Industrial Insurance Act*, 22 GONZ. L. REV. 121, 127-28 (1986/87); Peck, *Washington's Partial Rejection*, *supra* note 2, at 254; Sisk, *supra* note 13, at 452-53.

653. *Clark v. Pacificorp*, 118 Wash. 2d 167, 185, 822 P.2d 162, 172 (1991) (if the right to reimbursement is wholly eliminated, "the plaintiff may be made more than whole at the expense of the compensation fund").

654. 118 Wash. 2d 167, 822 P.2d 162 (1991).

vors of deceased workers had collected workers' compensation benefits as beneficiaries and then prosecuted wrongful death actions against third persons.⁶⁵⁵ In both cases, the plaintiffs reached a settlement or proposed settlement with the third person.⁶⁵⁶ The plaintiffs then contended that the deceased worker's employer had also been partially at fault, and thus that the Department's lien for reimbursement had been eliminated under the statute.⁶⁵⁷ The Department appeared in both actions to contest the elimination of the lien.⁶⁵⁸ When the consolidated appeals came before the Washington Supreme Court, "the central issue [was]: does RCW 51.24.060(1)(f) provide for elimination or merely a reduction of the Department's lien if the worker's employer or co-employee is determined to be at fault under RCW 4.22.070?"⁶⁵⁹

The *Clark* court concluded that RCW 51.24.060 "should be interpreted to require a reduction of the right to reimbursement in proportion to the employer's share of fault."⁶⁶⁰ The court read the amendment to the Industrial Insurance Act in light of the comparative fault principles of the 1986 Tort Reform Act. Because RCW 51.24.060(1)(f) specifically mentions RCW 4.22.070, the court ruled that the reference would be "superfluous if it were not meant to require a reduction [of the Department's lien] in proportion to fault."⁶⁶¹ The statutes must be construed "[i]n accordance with the principles of comparative fault, tort reform, and adequate compensation for injured workers."⁶⁶² Accordingly, the court held, RCW 51.24.060(1)(f) must be read to provide for a proportionate reduction in reimbursement, and not an elimination of the lien, unless the employer's fault exceeds the third person's percentage of fault.⁶⁶³

A trier of fact shall apportion fault to all at-fault entities in accordance with RCW 4.22.070. This includes the injured worker or beneficiary, the employer, and the third party. Each party shall then pay his proportionate share of damages. The Department pays the employer's share in the

655. *Id.* at 172-74, 822 P.2d at 165-66.

656. *Id.* at 173-74, 822 P.2d at 165-66.

657. *Id.*

658. *Id.*

659. *Clark*, 118 Wash. 2d at 175, 822 P.2d at 166.

660. *Id.* at 190, 822 P.2d at 174.

661. *Id.* at 183, 822 P.2d at 171.

662. *Id.* at 172, 822 P.2d at 165.

663. *Id.* at 190-91, 822 P.2d at 174-75.

form of workers' compensation benefits. Where the employer's share of fault exceeds the benefits paid, the Department's right to reimbursement is reduced; where it exceeds the third party's share of fault, the right is eliminated.⁶⁶⁴

Applying comparative fault to proportionately reduce the Department's lien for workers' compensation benefits ensures that the employee will not enjoy a double recovery of damages, that the employer will not profit from its own wrongdoing, and that the third person will pay only its proportionate share of the damages.⁶⁶⁵ In sum, the *Clark v. Pacificorp* decision stands as a model for reading RCW 4.22.070 in conjunction with another statutory regime, by seeking the result most consistent with the central principle of comparative fault among all responsible for an injury.

C. Comparative Fault and the "Retailer Relief" Statute

1. Introduction

In 1986, the legislature largely abandoned the common law doctrine of joint and several liability, generally limiting it to narrow circumstances where the claimant is without fault and all responsible entities have been joined to the action. As I have written elsewhere, RCW 4.22.070 of the Tort Reform Act of 1976 articulates a "new approach—a nearly pure comparative fault system among all parties and entities—[that] is characterized by the touchstone principle of fairness that the law should not place the full burden of liability upon one who is only partly responsible for a loss."⁶⁶⁶

As an earlier step in the evolution of Washington liability

664. *Clark*, 118 Wash. 2d at 172, 822 P.2d at 165. In a footnote to the opinion, the *Clark* court provided two illustrations of the application of its ruling. *Id.* at 191 n.12, 822 P.2d at 175 n.12. In the first example, the employee's damages are determined to be \$100,000, and the employer is determined to be 10 percent at fault. The employer's proportionate share of the damages thus is \$10,000. Therefore, if the Department has paid \$30,000 in workers' compensation benefits, the employee would be required to reimburse \$20,000 of those benefits. In the second example, the employee's damages are again determined to be \$100,000, but the employer's share of fault is determined to be 40 percent. The employer's proportionate share of the damages thus is \$40,000. Therefore, if the Department again has paid \$30,000 in workers' compensation benefits, the Department is required to continue to pay benefits until the total paid equals the employer's share of the fault. And when the employer's share of fault exceeds that of the third person tort defendant, the right to reimbursement would be eliminated. *Id.*

665. *Id.* at 190, 822 P.2d at 174-75.

666. Sisk, *supra* note 13, at 446.

law to a comparative fault system, the Product Liability Act of 1981⁶⁶⁷ created a special "safe harbor" for retailers, distributors, and other non-manufacturing product sellers who were not responsible for the design or manufacture of an allegedly dangerous product.⁶⁶⁸ This "retailer relief" provision exempted these entities from the then-prevailing general rule of joint and several liability and generally directed that they would be be liable only for their own conduct.⁶⁶⁹ However, because the doctrine had not yet been modified by the 1986 Act, the retailer relief statute still allowed joint and several liability to be imposed upon non-manufacturers when the actual manufacturer of a product was insolvent or otherwise not amenable to suit.⁶⁷⁰

When the Washington State Legislature passed the 1986 Tort Reform Act, it failed to specifically coordinate the new statute with this previous enactment. The 1986 Act, although adopting a general rule of comparative fault for nearly all other actors, does not expressly extend its benefit to those product sellers who were granted special protection just five years earlier. Nevertheless, to leave product sellers outside the ambit of RCW 4.22.070 would have the perverse effect of placing the favored child of the 1981 reforms in the position of the pretermitted heir of the 1986 statute. This gap in the statutory scheme is now beginning to surface and to be the subject of sharp contention in litigation at the trial court level.

The question, then, is whether the general rule of several liability under the Tort Reform Act of 1986 (RCW 4.22.070), applies to product liability claims made against retailers and distributors, thereby supplementing or superseding the exception in the Product Liability Act of 1981, which imposed joint and several liability upon non-manufacturing product sellers when the manufacturer was insolvent or otherwise not amenable to suit (RCW 7.72.040). The language and intent of the 1986 Act and of the exceptions to the retailer relief provision in the 1981 Act are apparently inconsistent. I suggest that a careful analysis of the two statutes, a diligent attempt to read the two enactments together, an application of longstanding principles of statutory interpretation, and a study of the legis-

667. Product Liability Act of 1981, ch. 27, 1981 Wash. Laws, 1st Ex. Sess. 112.

668. WASH. REV. CODE § 7.72.040(1) (1991).

669. *Id.*

670. *Id.* § 7.72.040(2).

lative purpose lead us to a conclusion that is in harmony with the reforming purpose of the 1986 statute. In the following sections, I outline the type of analytical approach that I believe a court should apply in filling the gaps in interpretation when the comparative fault statute must be reconciled with other legislation.

2. The Historical Evolution of Liability Law for Non-Manufacturing Product Sellers From the Common Law to the 1981 Product Liability Act and the 1986 Tort Reform Act

a. *The Common Law Period*

A distributor, retailer, or other intermediary ordinarily acts as a mere conduit in the chain of a product's distribution and thus is not responsible for any defect in design or manufacture. In a typical transaction, the retailer or distributor receives goods in a sealed package or as a finished product and simply passes it on to the consumer, without doing anything that could contribute to any defect in the product or to any danger the product may pose to a consumer. Indeed, in some cases, the product seller may never even take possession of the item, but instead simply pass along an order to the manufacturer for shipment directly to the purchaser.

Nevertheless, during the common law period, Washington courts followed the majority approach of imposing strict liability upon product sellers irrespective of causal responsibility for the nature or condition of the product.⁶⁷¹ Prior to 1981, a plaintiff who suffered an injury from an allegedly defective product could recover from anyone in the chain of distribution.⁶⁷² Although a retailer, wholesaler, or distributor may have had no responsibility for the product's design or manufacture, and usually had no opportunity to discover any defect, it was nevertheless subject to strict liability for a defective product.⁶⁷³

671. See generally Frank J. Cavico, Jr., *The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products*, 12 NOVA L. REV. 213, 218-20 (1987) (summarizing majority rule that extended strict product liability to retailers, wholesalers, and distributors); Burt A. Leete, *Caught in the Middle: The Need for Uniformity in Products Liability Statutes Affecting NonManufacturer Sellers*, 18 WAKE FOREST L. REV. 997, 998-1000 (1982) (same).

672. Celia E. Holuk and Donna L. Walker, Comment, *Products Liability—Tort Reform: An Overview of Washington's New Act*, 17 GONZ. L. REV. 357, 359 (1982).

673. See, e.g., *Seattle-First Nat'l Bank v. Volkswagen of America, Inc.*, 11 Wash. App. 929, 525 P.2d 286 (1974), *aff'd*, 86 Wash. 2d 145, 542 P.2d 774 (1975).

Strict liability was even applied to distributors of products that were shipped directly to the purchaser and thus had never been in the possession of the supplier.⁶⁷⁴ In sum, under the common law doctrine of joint and several liability, the seller's liability was coextensive with that of the manufacturer.

However, even during the common law era, several courts and commentators recognized the inherent inequity involved in imposing liability upon intermediate parties not responsible for design or manufacture of a product.⁶⁷⁵ In *Sam Shainberg Co. v. Barlow*,⁶⁷⁶ the Mississippi Supreme Court refused to extend strict product liability to a retailer and wholesaler of shoes. The court observed that the allegedly defective shoes had been sold by the retailer in exactly same condition as they had left the manufacturer, that neither the retailer nor wholesaler had participated in design or manufacture of the shoes, and that the defect was a latent one not discoverable by the retailer. The court recognized that an extension of strict liability to these intermediaries "would make each retail merchant an insurer or guarantor of every one of the thousands of items that he might handle merely as a sales conduit."⁶⁷⁷

In *Atkins v. American Motors Corp.*,⁶⁷⁸ the Alabama Supreme Court adopted the concept of strict products liability but refused to "impose[] liability equally on all 'sellers' without regard to culpability causally related in fact to the defective condition of the product"⁶⁷⁹ The court explained that

to hold liable in tort a retailer of a packaged product, purchased from a reputable manufacturer without knowledge of its unsafe condition, for the mere selling of a defective product is to fully equate for liability purposes a tort remedy with a breach of warranty remedy, the effect of which is to destroy the distinction between the two.⁶⁸⁰

The Louisiana Court of Appeal reached the same conclu-

674. *Zamora v. Mobil Oil Corp.*, 104 Wash. 2d 199, 201, 704 P.2d 584, 586 (1985).

675. See generally Cavico, *supra* note 671, at 226-33 (summarizing critiques of application of strict products liability to non-manufacturing sellers); John G. Culhane, *Real and Imagined Effects of Statutes Restricting the Liability of Non-manufacturing Sellers of Defective Products*, 95 DICK. L. REV. 287, 294-95 (1991) (same).

676. 258 So. 2d 242 (Miss. 1972).

677. *Id.* at 246.

678. 335 So. 2d 134 (Ala. 1976).

679. *Id.* at 138.

680. *Id.* at 139.

sion. In *McCauley v. Manda Bros. Provisions Co.*,⁶⁸¹ a plaintiff filed suit against a retailer and manufacturer of allegedly contaminated packaged food. The court acknowledged that strict liability had been imposed upon retailers in other jurisdictions, but declined to follow that approach.⁶⁸² The court dismissed the action against the retailer, holding "that, in the absence of negligence or knowledge of the defect or unwholesomeness of the product sold, a retailer of a pre-packaged food product, which is not the manufacturer thereof, sold for public consumption, cannot be held liable for injuries resulting from the consumption thereof."⁶⁸³

More than one court questioned the logic of holding non-manufacturing product sellers liable merely because they were links in the chain of distribution. As the Arizona Court of Appeals observed recently:

Merely pointing to an entity which is in the "stream of commerce" or part of the "enterprise" is not enough [to impose strict liability]. If it were, the trucking company which hauled the product from the manufacturer to the retailer would be strictly liable, as would the newspaper which advertised the product which induced the customer to buy.⁶⁸⁴

In *Wellman v. Supreme Farmstead Equipment, Inc.*,⁶⁸⁵ a plaintiff brought a strict liability action against an intermediary and the manufacturer, alleging injury by reason of a defect in a piece of farm machinery.⁶⁸⁶ The intermediary firm was engaged in the business of selling farm equipment and had arranged the sale, for which it received a commission.⁶⁸⁷ However, the intermediary firm had not been involved in the transfer of title. The purchase order was sent to the manufacturer that had shipped the machinery directly to the customer.⁶⁸⁸ The New York trial court held that under circumstances where the intermediary "neither designed, manufactured, delivered or installed the equipment which was purchased," "it

681. 202 So. 2d 492 (La. Ct. App. 1967), *aff'd*, 211 So. 2d 637 (La. 1968).

682. *Id.* at 497.

683. *Id.*

684. *Dillard Dept. Stores, Inc. v. Associated Merchandising Corp.*, 782 P.2d 1187, 1191 (Ariz. Ct. App. 1989).

685. 420 N.Y.S.2d 353 (N.Y. Sup. Ct. 1979).

686. *Id.* at 353.

687. *Id.* at 354.

688. *Id.*

would be a distortion to hold that [the intermediary] . . . should respond in damages" under strict liability.⁶⁸⁹ The court further held:

The predicate for holding the distributor liable solely because he may be a chain in the link by which the product reached the hands of the plaintiff and primarily because of some financial gain obtained by someone situated as [the intermediary firm], is illogical. Responsibility should walk hand in hand with fault and should not be premised upon either the immediate availability of an individual or corporation as a target, nor is it sensible to require such a distributor to respond merely because some financial gain was obtained.⁶⁹⁰

Professor Richard A. Epstein of the University of Chicago Law School agrees. He has emphasized that

the radical revision introduced [by court decisions and the Restatement of Torts] in the treatment of intermediate parties should not be confused with the traditional form of strict liability. It is a dubious form of *vicarious* liability for the wrongs of others that serves none of the proper purposes of the products liability law.⁶⁹¹

Indeed, it was the unfairness of a rule imposing strict liability upon a non-negligent distributor or retailer that ultimately led the Washington State Legislature to adopt a retailer relief statute as the first step away from artificial and inequitable absolute liability.

b. The Product Liability Act of 1981—The "Retailer Relief" Statute (RCW 7.72.040)

Because of the manifest inequity of holding retailers and distributors jointly and severally liable for product defects over which they had no control, the Washington Legislature was moved in 1981 to establish a different rule for those product sellers who took no part in the manufacturing, altering, or assembling of a product. In the Product Liability Act of 1981, the legislature created a "safe harbor" protection for non-manufacturing product sellers, subject only to certain narrow

689. *Id.* at 355.

690. *Id.*

691. RICHARD A. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 64 (1980) (emphasis in original).

exceptions.⁶⁹² Under RCW 7.72.040(1),⁶⁹³ “a product seller other than a manufacturer” is liable only for claims based upon the product seller’s own (1) negligence, (2) breach of an express warranty, or (3) intentional misrepresentation or concealment of information about the product.⁶⁹⁴

However, consistent with the 1981 Act’s retention of joint and several liability as a general rule, RCW 7.72.040(2)⁶⁹⁵ provides that the non-manufacturing product seller acquires the liability of a manufacturer if (1) there is no solvent manufacturer subject to service of process, (2) it is “highly probable” that the claimant could not enforce a judgment against any manufacturer, (3) the product seller is a controlled subsidiary of a manufacturer, or vice versa, (4) the product seller provided plans or specifications for the product which proximately caused the product’s defects, or (5) the product was marketed under the non-manufacturing product seller’s trade or brand name.⁶⁹⁶

692. WASH. REV. CODE § 7.72.040 (1991). On the “retailer relief” statute, see generally Holuk and Walker, *supra* note 672, at 426-30; Philip A. Talmadge, *Washington’s Product Liability Act*, 5 U. PUGET SOUND L. REV. 1, 10-11 (1981).

693. WASH. REV. CODE § 7.72.040(1) (1991).

694. RCW 7.72.040(1) provides:

- (1) Except as provided in subsection (2) of this section, a product seller other than a manufacturer is liable to the claimant only if the claimant’s harm was proximately caused by:
- (a) The negligence of such product seller; or
 - (b) Breach of an express warranty made by such product seller; or
 - (c) The intentional misrepresentation of facts about the product by such product seller or the intentional concealment of information about the product by such product seller.

Id.

695. *Id.* § 7.72.040(2).

696. RCW 7.72.040(2) provides:

- (2) A product seller, other than a manufacturer, shall have the liability of a manufacturer to the claimant if:
- (a) No solvent manufacturer who would be liable to the claimant is subject to service of process under the laws of the claimant’s domicile or the state of Washington; or
 - (b) The court determines that it is highly probable that the claimant would be unable to enforce a judgment against any manufacturer; or
 - (c) The product seller is a controlled subsidiary of a manufacturer, or the manufacturer is a controlled subsidiary of the product seller; or
 - (d) The product seller provided the plans or specifications for the manufacture or preparation of the product and such plans or specifications were a proximate cause of the defect in the product; or
 - (e) The product was marketed under a trade name or brand name of the product seller.

Id. RCW 7.72.040 was amended in 1991 by the addition of Subsection (3), which exempts pharmacists from Subsection (2) if the pharmacist dispenses the product as

c. *The Tort Reform Act of 1986—The Comparative Fault Act*
(RCW 4.22.070)

At the time the 1981 Act was adopted, proponents of tort reform argued that the legislation did “not go far enough in reducing the liability of products sellers and [instead] prefer[red] provisions eliminating joint and several liability”⁶⁹⁷ That next step in the evolution of modern liability law was not long in coming. As discussed throughout this Article, the 1986 Tort Reform Act embraced the principle of comparative fault, adopting a general rule of several only liability based upon each tortfeasor’s percentage share of the fault.

If the 1986 adoption of comparative fault governs, a defendant to a products liability action, whether a manufacturer or a distributor or retailer, would not be liable for any portion of the loss for which it was not responsible. The trier of fact would separately allocate fault to every entity involved, including both the manufacturer of the allegedly defective product and the product seller. No fault would be allocated to any entity for the presence of defects in a product over which the entity had absolutely no control. Accordingly, if directly and solely applicable, RCW 4.22.070 would plainly relieve mere conduits in the chain of product distribution from the risk of liability for unknown defects in a product.

3. Reconciling the 1981 Retailer Relief Statute and 1986
Comparative Fault Act

a. *Introduction*

When two apparently conflicting statutes are set side-by-side in a particular case, a court should first attempt to interpret them in such a manner as to give effect to both, so long as the reconciliation does not distort the statutory language.⁶⁹⁸ Consistent with this principle of statutory construction, I will conclude that the 1986 Act’s partial abolition of joint and several liability (RCW 4.22.070) should be read to supplement the 1981 Act’s “retailer relief” provision (RCW 7.72.040). In this way, the modest limitation in the 1981 “retailer relief” provi-

manufactured and pursuant to a prescription by a licensed practitioner and if the pharmacist complies with statutory recordkeeping requirements. *Id.* § 7.72.040(3).

697. Staff Report, S.B. 3158, 47th Leg. Sess. Washington State Senate Judiciary Committee (1981) (outlining testimony of witnesses on Product Liability Act of 1981).

698. *Tommy P. v. Board of Cty. Comm’rs of Spokane Cty.*, 97 Wash. 2d 385, 391-92, 645 P.2d 697, 700-01 (1982).

sion can be harmonized with the broader abrogation of joint and several liability in the 1986 Act.

b. A Simple (and Wrong) Interpretation That Avoids Conflict Between the Statutes

Under certain circumstances, such as when the manufacturer is not amenable to suit or is insolvent, RCW 7.72.040(2) departs from the general rule that a non-manufacturing product seller is liable only for its own negligence and instead provides that the product seller "shall have the liability of a manufacturer."⁶⁹⁹ Under RCW 4.22.070, fault is separately allocated to each entity according to the extent of its culpability for and causation of the injury. The threshold question is whether there is any conflict between the two statutes. The answer turns upon the meaning of that phrase—"the liability of a manufacturer."

The simplest way in which to read the 1981 and 1986 statutes together would be to (1) view RCW 7.72.040(2) as narrowly applying only a theory of liability to non-manufacturing product sellers, while (2) RCW 4.22.070 directs separate allocation of fault between a manufacturer and a product seller, whatever may be the underlying theory of liability. So understood, RCW 7.72.040(2)'s reference to "the liability of a manufacturer" means only that the non-manufacturing product seller would be subject to strict liability—a theory of liability that otherwise would be reserved only for the product manufacturer itself.⁷⁰⁰ Under this simple approach, the statute's imposition of "the liability of a manufacturer" would not mean that the product seller would be substituted for the actual manufacturer; it would only allow the addition of the product seller as another defendant potentially subject to strict liability.

If this path were taken, our journey would come to an end in the world of comparative fault. Under RCW 4.22.070, the trier of fact must allocate fault in all fault-based actions (including strict liability)⁷⁰¹ to all culpable entities (including nonparty entities not joined to the lawsuit).⁷⁰² Although the

699. WASH. REV. CODE § 7.72.040(2) (1991).

700. *Id.* § 7.72.030 (standards of liability of a manufacturer).

701. See *supra* part III.B.1 (discussing the definition of fault in RCW 4.22.015 as incorporated into RCW 4.22.070).

702. See *supra* part III.C.1.f (discussing allocation of fault to nonparty entities).

theory of strict liability would apply to the product seller under RCW 7.72.040(2), RCW 4.22.070 would nevertheless permit the trier of fact to allocate all of the fault to the manufacturer as the sole party with causal responsibility for any defect in the product, even if the actual manufacturer were insolvent or unavailable. Indeed, the conclusion that all fault should be allocated to the manufacturer actually responsible for a defect would almost certainly follow in the vast majority of cases. Thus, while the exception to the retailer relief provision in RCW 7.72.040(2) would potentially expose the product seller to strict liability, the fault allocation process of RCW 4.22.070 would ensure that liability would never be imposed for any share of the fault attributable to the conduct of the actual manufacturer. In other words, what RCW 7.72.040(2) gives, RCW 4.22.070 takes away. And this sleight of hand would be accomplished while theoretically giving full effect to the language of each statute.

This neat and simple approach does have the virtue of resolving the problem while avoiding any conflict between the statutes. At least superficially, it also is grounded in the actual language of the exception to the statute—construing “the liability of a manufacturer” as only adopting a theory of strict liability. This approach has only one flaw—it is not a faithful interpretation of RCW 7.72.040 in light of its context and legislative purpose. Unfortunately, the simplest resolution is not the correct one.

Looking at the plain language of RCW 7.72.040(2), there is more than one possible way to understand the direction that a product seller “shall have the liability of a manufacturer.” Rather than merely a reference to a theory of liability, the provision could just as easily be read as saying that, for liability purposes, the product seller will be treated as if it were the manufacturer of the product. When the manufacturer is not available to provide a remedy to the plaintiff, the non-manufacturing product seller steps into the shoes of the manufacturer and assumes full responsibility (both culpably and causally) for any defects in the product. When fault is allocated by the trier of fact under RCW 4.22.070, any fault attributable to the manufacturer of the product would be diverted to the non-manufacturing product seller.

The full context of the provision supports this interpretation. Under RCW 7.72.040(2), the non-manufacturing product

seller "shall have the liability of a manufacturer" if, inter alia, the manufacturer is not subject to service of process or the plaintiff probably could not enforce a judgment against the manufacturer.⁷⁰³ The manifest purpose of this exception is to provide an alternative source of recompense to the plaintiff when the manufacturer becomes practically unavailable.⁷⁰⁴ As one commentator on retailer relief statutes says, the product seller is "'transformed' into a manufacturer (thus subject to strict liability) when the manufacturer is unavailable to the plaintiff."⁷⁰⁵ The retailer relief statute merely allows the product seller to "defer" liability to the manufacturer,⁷⁰⁶ with the significant caveat that the manufacturer be available to accept that liability. Otherwise, the product seller becomes the substitute for the manufacturer, vicariously subject to liability as though it were an alter ego.

In addition, this alternative reading of RCW 7.72.040(2) better comports with the legislative purpose. The legislative history clarifies that the phrase—"the liability of a manufacturer"—was simply another way of saying that the traditional rule of joint and several liability would apply to hold the product seller liable for the full amount of the plaintiff's damages.⁷⁰⁷ The effect of joint and several liability is to hold one tortfeasor jointly responsible for the conduct of other tortfeasors. Indeed, the Washington Senate Select Committee on Tort and Product Liability Reform, which designed the provision, explained that the non-manufacturing product seller should have "primary liability" if no solvent manufacturer was

703. WASH. REV. CODE § 7.72.040(a)(b) (1991). The remaining provisions of Subsection (2) further confirm that the subsection places the product seller in the position of the manufacturer of the product at issue. A product seller will also have "the liability of a manufacturer" if the product seller is a controlled subsidiary of the manufacturer or the manufacturer is a controlled subsidiary of the product seller, the product seller provided the plans or specifications for the product, or the product is marketed under the trade or brand name of the product seller. *Id.* § 7.72.040(2)(c)(e). In each instance, the product seller has assumed direct responsibility for the particular product and thus is treated as the alter ego of the manufacturer.

704. Culhane, *supra* note 675, at 297 (rather than leave the plaintiff without a remedy, retailer relief statutes generally retain the product seller as a "guarantor" if recovery may not be had from the actual manufacturer).

705. *Id.*

706. Cherry v. Siemens Medical Systems, Inc., 565 N.E.2d 215, 218 (Ill. App. Ct. 1990).

707. Washington State Senate Select Committee on Tort and Product Liability Reforms, Final Report, December 1980, reprinted in S. Journal, 47th Reg. Sess. 617, 632 (1981); Section-By-Section Analysis of S.B. 3158, Washington State Senate Judiciary Committee 6 (1981).

available to compensate the plaintiff.⁷⁰⁸ Thus, when RCW 7.72.040(2) adds the non-manufacturing product seller back into the liability formula, it equates the product seller with the manufacturer and holds the seller "responsible for the damages associated with a product liability claim even if the defect in the product was the manufacturer's responsibility."⁷⁰⁹

In sum, Subsection (2) of RCW 7.72.040 is a vicarious liability provision.⁷¹⁰ In certain specified circumstances, such as when the actual manufacturer is beyond the reach of recovery, the product seller is held directly liable for the conduct of the manufacturer with respect to manufacturing and design defects. So understood, there is an unavoidable conflict between this exception to the retailer relief statute and the general abolition of joint and several in the comparative fault statute.

c. To the Extent of Conflict, the 1986 Comparative Fault Act Must Prevail Over the 1981 Retailer Relief Statute

To the extent that the 1981 retailer relief exception and the 1986 comparative fault statute conflict, the broader and more recent reform adopted in the 1986 Tort Reform Act must prevail. When two statutes relating to the same subject matter are found to be incompatible, the later act impliedly repeals the earlier act to the extent of the incompatibility, especially when the later act covers the entire subject.⁷¹¹ In *Great Northern Railway Co. v. Glover*,⁷¹² the Washington Supreme Court considered whether a later statute had impliedly repealed an earlier statute, notwithstanding the specific direction in the

708. Washington State Senate Select Committee on Tort and Product Liability Reforms, Final Report, Dec. 1980, reprinted in S. Journal, 47th Reg. Sess. 617 (1981).

709. Talmadge, *supra* note 692, at 11.

710. See EPSTEIN, *supra* note 691, at 64 (holding product sellers strictly liable together with product manufacturers is "a dubious form of vicarious liability for the wrongs of others that serves none of the proper purposes of the products liability law" (emphasis in original)).

711. Local 497, Int'l Bhd. of Elec. Workers v. Pub. Util. Dist. 2, 103 Wash. 2d 786, 788-89, 698 P.2d 1056, 1057 (1985) (implied repeal occurs when two acts are so clearly inconsistent with or repugnant to each other that they cannot be reconciled and both given effect by a fair and reasonable construction); State ex rel. Reed v. Spanaway Water Dist., 38 Wash. 2d 393, 397, 229 P.2d 532, 534 (1951) (later act operates as a repeal of earlier act when the later act covers the entire subject matter, is complete, and is intended to supersede prior legislation on the subject). See generally 1A SINGER, *supra* note 254, § 23.09, at 331-32 ("repeal may arise by necessary implication in the enactment of a subsequent act").

712. 194 Wash. 146, 77 P.2d 598 (1938).

earlier enactment that no subsequent act be construed as repealing any of its provisions unless the later act expressly so provided.⁷¹³ The later statute contained no express repeal of the prior legislation.⁷¹⁴ The *Glover* court nevertheless was obliged to find an implicit repeal, in favor of the more recent statute, because the two acts were inconsistent and irreconcilable.⁷¹⁵ The same result follows here.

The Tort Reform Act of 1986 is expansive in its effect. By its terms, the Act was intended to apply to “*all* actions filed on or after August 1, 1986.”⁷¹⁶ Thus, to the extent of inconsistency with any prior legislative action, the 1986 Act not only impliedly but also expressly takes precedence. Moreover, RCW 4.22.070, the comparative fault provision, makes a broad sweep. The provision begins by commanding that the trier of fact determine the percentage of fault attributable to “*every* entity” in “*all* actions” involving the fault of more than one entity.⁷¹⁷ Accordingly, the breadth of this provision and its application to all tort cases could not be more vigorously expressed.

RCW 4.22.070 contains several defined limitations and exceptions to the general rule of several liability. A limited form of joint and several liability is preserved if the claimant is not at fault.⁷¹⁸ A defendant also remains responsible for the actions of another person if the defendant acted “in concert” with that person or if the person was an agent or servant of the defendant.⁷¹⁹ In addition, there are three exceptions to RCW 4.22.070: (1) hazardous substance and waste torts, (2) certain business torts, and (3) cases involving assessment of

713. *Id.* at 155-56, 77 P.2d at 603.

714. *Id.* at 157, 77 P.2d at 603.

715. *Id.* at 156-57, 77 P.2d at 603.

716. Tort Reform Act of 1986, ch. 305, § 910, 1986 Wash. Laws 1367 (emphasis added). See also *supra* note 55 (discussing effective date of Tort Reform Act of 1986).

717. WASH. REV. CODE § 4.22.070(1) (1991) (emphasis added). See *United States v. Smith*, 111 S. Ct. 1180, 1188 (1991) (because the Liability Reform Act, by its plain language, provides for immunity from tort liability for “*any* employee of the Government” acting within the scope of employment, 28 U.S.C.S. 2679(b)(1) (1990) (emphasis added), the statute could not be construed such that federal government employees “who were already protected by other statutes . . . cannot now benefit from the more generous immunity available under the Liability Reform Act”).

718. WASH. REV. CODE § 4.22.070(1)(b) (1991). See also *supra* part III.F (discussing the limited form of joint and several liability among defendant against whom judgment is entered in favor of an innocent plaintiff).

719. WASH. REV. CODE § 4.22.070(1)(a) (1991). See also *supra* part III.E (discussing liability of defendants who have engaged in concerted action or who have an agency relationship with another person).

liability on a market share basis for injuries caused by generic products.⁷²⁰ Each of these defined limitations and exceptions was adopted for deliberate legislative reasons.⁷²¹ When a statute specifically mentions exceptions, other exceptions may not be added by the courts.⁷²² The legislature did not see fit to include any provision in RCW 4.22.070 to exempt product liability claims or claims against non-manufacturing product sellers from the general rule of several liability. Such an exception may not now be engrafted upon the otherwise unqualified language of RCW 4.22.070.

d. The Legislature Intended to Extend the Rule of Comparative Fault to Non-Manufacturing Product Sellers

In construing a statute, we may glean further evidence of legislative intent from a consideration of the legislative history.⁷²³ Statements by a prime sponsor of a bill at the time of its consideration by the legislature are particularly strong indicia of legislative intent.⁷²⁴ The bill's sponsors may be expected to be particularly well-informed about its purpose, meaning, and intended effect.⁷²⁵ Senator Talmadge, although ultimately opposed to many of the reforms in the Tort Reform Act of 1986, nonetheless was a primary sponsor of the bill and was active in the legislative debate. His remarks on the proposal to modify joint and several liability leave no doubt about the breadth of its application, including its extension to product liability claims: "I would urge the members of the Senate to remember that this particular legislation touches upon environmental matters, *product matters*, defamation, work place safety and a variety of very difficult issues."⁷²⁶

720. WASH. REV. CODE § 4.22.070(3) (1991). See also *supra* part III.H (discussing exceptions to statute).

721. See *supra* parts III.E, III.F, and III.H (discussing the statutory limitations and exceptions and their legislative purposes). See also Sisk, *supra* note 13, at 467-73 (same).

722. *Jepson v. Department of Labor & Ind.*, 89 Wash. 2d 394, 404, 573 P.2d 10, 16 (1977) ("[w]here a statute provides for a stated exception, no other exceptions will be assumed by implication").

723. *Washington Pub. Utility Districts' Utilities Sys. v. Public Utility Dist. No. 1*, 112 Wash. 2d 1, 7, 771 P.2d 701, 705 (1989).

724. *Marine Power v. Human Rights Comm'n*, 39 Wash. App. 609, 619-20, 694 P.2d 697, 703 (1985).

725. 2A SINGER, *supra* note 254, § 48.15, at 377.

726. S. Journal, 49th Reg. Sess. & 1st Spec. Sess. 494-95 (1986) (remarks of Sen. Talmadge) (emphasis added).

The house debates are even more pertinent to the present inquiry. In discussing the need to "correct that joint and several liability problem," Representative Barnes used the particular example of a wholesaler in a product distribution chain.⁷²⁷ He explained that, under then current law, a wholesaler would be exposed to joint and several liability merely because it was a conduit, and despite the fact that such an intermediary would have little or no independent fault.⁷²⁸ In sum, the intent of the legislature to apply the provisions of RCW 4.22.070 to product liability claims against non-manufacturing sellers of products— notwithstanding any inconsistent provisions in RCW 7.72.040— is plain.

e. Because the Exceptions to RCW 7.72.040 Were Grounded in the Doctrine of Joint and Several Liability, the New Rule of RCW 4.22.070 Takes Precedence

RCW 4.22.070 establishes a general rule of several liability. By providing that non-manufacturing product sellers are generally liable only for their own culpable conduct, the 1981 retailer relief provision is largely in harmony with this approach. However, to the extent that the exceptions to RCW 7.72.040 would permit recourse to joint and several liability when RCW 4.22.070 would not, the latter statute must prevail. The law of tort liability underwent a sea change in the 1986 Tort Reform Act, placing parties to a tort action on a new course. Because the exceptions to the 1981 retailer relief provision reflect a now outmoded approach to liability law, those exceptions are largely superseded by the 1986 Act.

RCW 7.72.040 was an evolutionary step on the road toward a system of comparative fault. It provided a limited "safe harbor" from the doctrine of joint and several liability to distributors and retailers. However, because joint and several liability was still the rule of the day, the legislature restricted the protections granted under RCW 7.72.040 through the insertion of various exceptions, so that a plaintiff would not be left without some defendant able to satisfy a judgment. The legislature expressly described these exceptions—such as the insolvent manufacturer exception—as applying "traditional rules of joint

727. H. Journal, 49th Reg. Sess & Spec.Sess. 1067-68 (1986) (remarks of Rep. Barnes).

728. *Id.*

and several liability."⁷²⁹ Indeed, the legislature emphasized the retention of joint and several liability in the 1981 Act by enacting an express provision adopting the doctrine as the prevailing rule.⁷³⁰

In sum, the 1981 Act in general, and the exceptions to RCW 7.72.040 in particular, were grounded in the concept of joint and several liability. For example, under RCW 7.72.040(2)(b), non-manufacturing product sellers remained subject to joint and several liability when there was no solvent manufacturer against which the plaintiff could enforce a judgment.⁷³¹ Thus, the distributor or retailer, who had acted merely as a link of the chain of distribution, became responsible to pay the plaintiff's damages not based on its actual contribution to the product defect, but solely because of its ability to pay.

By contrast, RCW 4.22.070 enacted in the 1986 Act reflects a strong sentiment against holding a defendant liable based merely upon ability to pay. An underlying premise of a comparative fault system is that party A should not be held liable in damages simply because party B cannot be. The legislature appreciated that the general abolition of joint and several liability means that plaintiffs must take defendants as they find them and thus may be left without recovery if a defendant becomes insolvent. As has always been true when there is a single defendant, if a defendant is not able to satisfy the judgment, the plaintiff assumes the risk of noncollection. By enacting RCW 4.22.070, the legislature understood that a plaintiff could no longer shift liability from one defendant to another "when there are multiple defendants and one goes broke."⁷³²

To hold a non-manufacturing product seller liable as a

729. Washington State Senate Select Committee on Tort and Product Liability Reforms, Final Report, Dec. 1980, *reprinted in* S. Journal, 47th Reg. Sess. 617, 632 (1981); Section-By-Section Analysis of S.B. 3158, Washington State Senate Judiciary Committee 6 (1981).

730. Product Liability Act of 1981, ch. 27, § 11, 1981 Wash. Laws, 1st Ex. Sess. 112 (codified as amended at WASH. REV. CODE § 4.22.030 (1991)). *See also* Senate Select Committee on Tort and Product Liability Reforms, Final Report, Dec. 1980, *reprinted in* S. Journal, 47th Reg. Sess. 628, 635 (1981) (legislature believed the rule on joint and several liability should continue to be recognized and thus codified it in the 1981 Act). RCW 4.22.030 was amended by the 1986 Act to provide that joint and several liability would apply "[e]xcept as otherwise provided in RCW 4.22.070." Tort Reform Act of 1986, ch. 305, § 402, 1986 Wash. Laws 1358. Accordingly, RCW 4.22.070 takes precedence.

731. WASH. REV. CODE § 7.72.040(2)(b) (1991).

732. *See* H. Journal, 49th Reg. Sess. & Spec. Sess. 1063 (1986) (remarks of Rep.

manufacturer under RCW 7.72.040(2)(b), when the responsible manufacturer, is insolvent contradicts this basic tenet of a comparative fault system. The exception in RCW 7.72.040(2)(b) is precisely the type of access to a "deep pocket"—imposition of liability based on ability to pay rather than on extent of responsibility—that RCW 4.22.070 was passed to prevent.

Legislative tort reform in Washington has been a step-by-step evolutionary process. Accordingly, when there is a conflict between tort reform statutes, the legislature's broader and more recent reform (comparative fault under RCW 4.22.070) must prevail over earlier piecemeal efforts (the limited retailer relief provision of RCW 7.72.040).⁷³³ To the extent of the conflict between the statutes, the 1986 Act's general repudiation of joint and several liability must be understood as a repeal of the joint and several liability exceptions to the retailer relief provision of the 1981 Act.⁷³⁴

Armstrong) (opposing tort reform legislation because an injured plaintiff would not receive the whole award if there are "multiple defendants and one goes broke").

733. See *Dietz v. General Electric Co.*, 821 P.2d 166, 171 (Ariz. 1991) (statute "abrogating joint and several liability and establishing a system of several liability making each tortfeasor responsible for paying for his or her percentage of fault and no more" as part of Arizona tort reform "must prevail over" earlier statutory provision prohibiting assessment of fault against employer immune from liability to employees under the workers' compensation program).

734. In a real sense, the 1986 Act does not truly *repeal* the 1981 Act, even in part, but rather builds and expands upon what the legislature had created in the "retailer relief" statute, namely protection of non-manufacturing product sellers from liability. See *United States v. Smith*, 111 S. Ct. 1180, 1188 (1991) ("[T]he rule disfavoring implied repeals simply is not implicated by the facts of this case, because the Liability Reform Act [extending immunity from tort liability to all federal government employees acting within the scope of their employment] does not repeal anything enacted by the Gonzalez Act [which had earlier created limited immunity from tort liability for military doctors]. The Liability Reform Act adds to what Congress created in the Gonzalez Act, namely protection from liability for military doctors.") (emphasis in original). The 1981 "retailer relief" statute did not create liability for product sellers—that exposure to liability had been accomplished by judicial extension of strict liability to the conduits in the chain of product distribution. The 1981 Act instead created a "safe harbor" for non-manufacturing product sellers by essentially eliminating joint and several liability with the manufacturing in most circumstances. The 1986 Act widened the harbor further by expanding the circumstances under which joint and several liability would not apply.

*f. Given the Special Solitude of the Legislature for
Retailers and Distributors, Depriving Those
Intermediaries of the Benefits of
Comparative Fault Would Be
Absurd*

In 1981, despite the general retention of a rule of joint and several liability, the legislature carved out a special "safe harbor" for non-manufacturing product sellers. The legislature recognized the unfairness of the then prevailing approach that essentially "ma[d]e each retail merchant an insurer or guarantor of every one of the thousands of items [it] handles merely as a sales conduit."⁷³⁵ Indeed, as one jurist protested, holding intermediate sellers of products liable coextensively with the manufacturer, even though these passive conduits had done nothing that directly contributed to any injury, was "heavy-handed to point of injustice."⁷³⁶ Accordingly, from among all possible defendants to tort liability claims, the legislature singled out retailers and distributors for a special dispensation from the rule of joint and several liability (RCW 7.72.040(1)). However, in keeping with the mood of the times, there remained a few exceptions to this protection (RCW 7.72.040(2)).

The legislature has now moved a step further and adopted a general rule of several liability for *all* defendants. It would be absurd to deny the benefit of that comparative fault rule to the one class of defendants—non-manufacturing product sellers—that had earlier been the beneficiary of special solicitude from the legislature. Statutes "should be construed to effect their purpose and unlikely, absurd, or strained consequences should be avoided."⁷³⁷ The 1981 Act revealed a strong legislative intent to *restrict* the liability of non-manufacturing parties in products liability cases. It would be perverse to convert RCW 7.72.040 into a basis for imposing a stricter standard of liability upon non-manufacturers than the comparative fault standard which is now applied to nearly all other defendants. Accordingly, in furtherance of the legislative policy, RCW 4.22.070 should be understood to both take precedence over and to supplement RCW 7.72.040, thereby permitting imposition of

735. See *Sam Shainberg Co. v. Barlow*, 258 So. 2d 242, 246 (Miss. 1972).

736. *Bailey v. Montgomery Ward & Co.*, 6 P.2d 108, 117 (Ariz. Ct. App. 1967) (Molloy, J., dissenting).

737. *State v. Fjermestad*, 114 Wash. 2d 828, 835, 791 P.2d 897, 901 (1990).

joint and several liability against non-manufacturing product sellers only if permitted by the exceptions or limitations to *both* statutes.⁷³⁸

4. Conclusion

In conclusion, the 1981 and 1986 Act should be harmonized to the extent possible with primary effect being given to the more recent 1986 Act when conflict is unavoidable. When RCW 7.72.040(2) would impose joint and several liability, and RCW 4.22.070 would not, RCW 4.22.070 prevails. However, RCW 4.22.070 takes priority only to the extent of conflict with RCW 7.72.040(2). Thus, when RCW 4.22.070 would permit application of joint and several liability, RCW 7.72.040(2) would be given effect as a continuing part of the statutory code.⁷³⁹

Accordingly, a non-manufacturing product seller may be held liable as manufacturer for a defect in a product only if *both* of the following prerequisites are met:

- (1) the plaintiff was entirely blameless in the accident which led to his or her injury, thereby bringing the case

738. Moreover, statutes should be read so as to avoid constitutional problems. If RCW 7.72.040 and RCW 4.22.070 are construed in a manner that leaves non-manufacturing product sellers in a worse position than other tort defendants, substantial equal protection problems arise. Given that non-manufacturing product sellers typically are not in a position to contribute to any defect in a product, there are compelling reasons to give preferential treatment to such sellers. (Indeed, to hold that a product seller will be held liable only when it is causally responsible for the product defect is not really preferential treatment at all but merely an application of the basic element of proximate causation.) There is no principled basis for placing non-manufacturing product sellers in a disfavored category. Especially given the earlier solicitude shown by the legislature for passive intermediaries in the distribution chain, no rational basis would exist for depriving distributors of the full benefits of several liability under the 1986 Act.

739. Therefore, in some instances, a non-manufacturing product seller may still be held vicariously liable for the conduct of a manufacturer. If, for example, the plaintiff is without fault so that joint and several liability may be applied to defendants under RCW 4.22.070(1)(b), and the manufacturing is joined as a defendant to the judgment but is insolvent, the product seller would remain responsible under RCW 7.72.040(2)(b) for the full amount of the plaintiff's damages. This is indeed an anomalous—and I believe unjustifiable—result. It is also inconsistent with the spirit of tort reform; that is, the principle that an individual should be held liable only to the extent of its own responsibility. But when RCW 4.22.070 lifts its general injunction against joint and several liability, the application of RCW 7.72.040(2) ceases to be in direct conflict. Thus, as long as RCW 7.72.040(2) remains on the statute books (and assuming no constitutional infirmities in disparate treatment of product sellers from other defendants, *see supra* note 738), it must be given effect when its operation is not contrary to the provisions of the later enactment.

within the limited joint and several liability rule of RCW 4.22.070(1)(b), or the case falls within one of the specific exceptions to comparative fault in RCW 4.22.070(3); *and*

(2) the case falls within an exception to the retailer relief statute, thereby allowing application of joint and several liability to non-manufacturing product sellers under RCW 7.72.040(2).

In all other cases, a non-manufacturing product seller may be held liable only for its own independently culpable conduct. Fault must be allocated under RCW 4.22.070 among all entities allegedly responsible for the product, including the manufacturer, whether or not the manufacturer is available or is joined to the lawsuit. As stated in RCW 7.72.040(1), a product seller will be liable only for its own negligence, the breach of an express warranty made by the seller, or intentional misrepresentation of facts or concealment of information about the product, if the product seller's conduct is the proximate cause of the plaintiff's harm.⁷⁴⁰

A retailer or distributor typically is not responsible for a defect in a product.⁷⁴¹ Having not manufactured or designed the product, the seller is no more responsible for a manufacturing or design defect than the truck company which transported the product. Moreover, as a general rule, "a seller does not have a duty to inspect or test a product for possible defects unless he has reason to know that the product is likely to be dangerously defective."⁷⁴² Although a retailer who sells an article "which is in a condition dangerous to human life" is required "to exercise reasonable care to ascertain patent defects," the seller is not liable for injuries resulting from latent defects and "is not required to dismantle the article or make a factory type inspection."⁷⁴³ Even the limited inspection duty imposed upon sellers of inherently dangerous products does not apply to a distributor that does not have actual possession or control of the product.⁷⁴⁴ In addition, unless the prod-

740. WASH. REV. CODE § 7.72.040(1) (1991).

741. Culhane, *supra* note 675, at 294.

742. *Martin v. Schoonover*, 13 Wash. App. 48, 55, 533 P.2d 438, 442 (1975). *See also Koker v. Armstrong Cork, Inc.*, 60 Wash. App. 466, 477, 804 P.2d 659, 666 (1991) (the duty to inspect a product or test for defects rests on the manufacturer, not the retailer).

743. *Burnett v. Hunt*, 5 Wash. App. 385, 391-92, 486 P.2d 1129, 1133 (1971).

744. *In Zamora v. Mobil Oil Corporation*, 104 Wash. 2d 199, 704 P.2d 584 (1985), the Washington Supreme Court refused to impose a duty of inspection upon a distributor of propane who never had possession or control of the gas. Even though propane may

uct seller is aware of problems with the product, the seller has no duty to warn of possible defects.⁷⁴⁵

In sum, a non-manufacturing product seller is unlikely to be held liable in negligence in the run-of-the-mill case.⁷⁴⁶ When RCW 4.22.070 supersedes the exceptions in RCW 7.72.040(2), the unique duties of a product manufacturer with respect to design, fabrication, inspection, and the duty to warn may not be transported to a passive product seller, whether or not the manufacturer is amenable in damages. This conclusion is hardly surprising or unfair to the consumer. As Professor Epstein has said, "there is no consumer expectation that [distributors and retailers] will do more than pass their products down the chain of distribution."⁷⁴⁷

V. *The Future of Joint and Several Liability: Statutory Tort Reform and the Common Law*

[A] statute is not an alien intruder in the house of the common law, but a guest to be welcomed and made at home there as a new and powerful aid in the accomplishment of its appointed task of accommodating the law to social needs.

Chief Justice Harlan F. Stone⁷⁴⁸

A. *The Spirit of Statutory Tort Reform as the Inspiration to Common Law Tort Reform*

The courts, of course, are obliged to faithfully and fully apply RCW 4.22.070, as well as the other provisions of the 1986

be an inherently dangerous product, the court held that the seller had no "duty to obtain control or possession of the product in order to inspect it." *Id.* at 203, 704 P.2d at 587 (emphasis in original). As one commentator on product liability has stated, a "consumer generally will be in a better position than an intermediate seller to prevent injury from occurring, because the middleman may never even touch or see the defective product." David P. Griffith, Note, *Products Liability—Negligence Presumed: An Evolution*, 67 TEX. L. REV. 851, 874-75 (1989).

745. See *Zamora*, 104 Wash. 2d at 205, 704 P.2d at 588 (seller that was unaware of any defect had only a duty to warn about general dangers of a product).

746. The more the retailer [seller] is only a conduit for the product, the less likely he can be held in negligence. Conversely, the more the [seller] takes an active part in preparing the product for final use and takes the role of a manufacturer or assembler, the more likely he can be found liable in negligence.

Martin v. Schoonover, 13 Wash. App. 48, 54-55, 533 P.2d 438, 442 (1975); see also *Zamora v. Mobil Oil Corp.*, 104 Wash. 2d 199, 204, 704 P.2d 584, 587-88 (1985).

747. EPSTEIN, *supra* note 691, at 61.

748. Chief Justice Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 15 (1936).

Tort Reform Act, in all circumstances encompassed within the language of the statute. Likewise, the spirit of tort reform as enacted by the legislative branch should inspire and inform the judicial development of the common law in those areas not subject to the direct command of the statute. In 1986, the Washington State Legislature spoke to vital questions of public policy concerning the future of modern tort law and in so doing purposefully embraced the "primal concept that . . . the extent of fault should govern the extent of liability—[a principle that] remains irresistible to reason and all intelligent notions of fairness."⁷⁴⁹ The central concept of comparative fault adopted by the legislature is "a new generative impulse transmitted to the legal system."⁷⁵⁰ Washington courts should give heed not only to the express charge of the Tort Reform Act in its specific provisions but also to "the social policy and judgments expressed in legislation by the lawmaking agency which is supreme."⁷⁵¹

As Chief Justice Roger J. Traynor said more than twenty years ago, "we no longer can afford to have judges retreat into formalism, as they have recurringly done in the past to shield wooden precedents from any radiations of forward-looking statutes while they ignored dry rot in the precedents themselves."⁷⁵² From the most ancient of times, common law courts have appropriately turned to statutorily-declared principles of law to guide the development of the common law in areas lying near, but just outside the realm of the statute.⁷⁵³ For example, the adoption of statutes in the late nineteenth century granting legal powers to married women gave "impetus to new judge-made rules" further recognizing that women were

749. *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1231 (Cal. 1975).

750. *See Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 351 (1937) ("a legislative policy . . . is itself a source of law, a new generative impulse transmitted to the legal system").

751. Chief Justice Stone, *supra* note 748, at 14 ("Apart from its command, the social policy and judgments expressed in legislation by the lawmaking agency which is supreme, would seem to merit that judicial recognition which is freely accorded to the like expression in judicial precedent.").

752. Traynor, *supra* note 7, at 402.

753. Landis, *supra* note 67 (describing early common law doctrine of the "equity of the statute," which extended the effect of statutes beyond their terms to analogous situations); Page, *supra* note 65 (discussing historical practice of juristic common law system in borrowing statutory rules, standards, and principles); Robert F. Williams, *Statutes as Sources of Law Beyond Their Terms in Common-Law Cases*, 50 GEO. WASH. L. REV. 554, 570-94 (1982) (surveying uses by courts of statutory policy in common law reasoning).

entitled to "participation in the legal benefits of living."⁷⁵⁴ Common law judges "amplified the range"⁷⁵⁵ of emancipation statutes by extending the rights, as well as the responsibilities, of women into other areas of the law. As the United States Supreme Court reminds us, "[i]t has always been the duty of the common law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common law principles—many of them deriving from earlier legislative exertions."⁷⁵⁶

The Washington Tort Reform Act of 1986 builds upon earlier "legislative exertions" in the adoption of comparative negligence in 1973⁷⁵⁷ and in the 1981 "retailer relief" provision to ease the harsh impact of joint and several liability upon conduits in the chain of product distribution.⁷⁵⁸ RCW 4.22.070 is the product of "responsible findings of fact and expressions of the felt needs of society"⁷⁵⁹ concerning the social effects of expanding tort liability law, and the attraction of comparative fault as a foundation for imposing liability. The statutory principles adopted by the people's representatives assembled in the legislature—principles that reflect "the more direct and accurate expression of the popular will"—warrant the deliberate attention of common law courts.⁷⁶⁰ In sum, the Tort Reform Act of 1986 should not be regarded by the judiciary as a statute which is "to be obeyed grudgingly, by construing it narrowly and treating it as though it did not exist for any purpose other than that embraced within the strict construction of its words."⁷⁶¹

754. Traynor, *supra* note 7, at 413. See also Williams, *supra* note 753, at 583-84; Landis, *supra* note 67, at 223-24; McCluskey v. Bechtel Power Corp., 363 So. 2d 256, 262-64 (Miss. 1978) (describing how Mississippi courts in the Nineteenth Century "receive[d] [the woman's law] into the body of law" as a principle from which to reason in common law cases).

755. Traynor, *supra* note 7, at 415.

756. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 392 (1970).

757. Act of April 24, 1973, ch. 138, § 1, 1973 Wash. Laws, 1st Ex. Sess. 949 (codified as amended at WASH. REV. CODE § 4.22.005-.015 (1991)).

758. Product Liability Act, ch. 27, § 5, 1981 Wash. Laws, 1st Ex. Sess. 112 (codified as amended at WASH. REV. CODE § 7.72.040 (1991)). See generally *supra* part IV.C (discussing the retailer relief provision).

759. See Willard Hurst, *The Content of Courses in Legislation*, 8 U. CHI. L. REV. 280, 291 (1941) (encouraging "the study of statutes not as rules but as responsible findings of fact and expressions of felt needs of society").

760. See Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 406 (1908).

761. Stone, *supra* note 748, at 14 (decrying the mistaken "habit of narrow construction of statutes" and failure to treat enactments "as recognitions of social

B. *The Message of Statutory Tort Reform for the Common Law Court*

What does it mean to say that the Tort Reform Act of 1986 and the modification of joint and several liability in RCW 4.22.070 should be "receive[d] . . . fully into the body of the law as affording not only a rule to be applied but a principle from which to reason"?⁷⁶² It does not mean that the general principle of comparative fault articulated in the statute must prevail throughout the law of tort fault-based liability. Indeed, RCW 4.22.070 expressly contemplates a continuing role for joint and several liability in a number of contexts, including when the plaintiff is innocent of any contributory fault or when a case falls within certain general exceptions for cases involving hazardous substances, generic products, or certain business torts. Indeed, RCW 4.22.030 directs that, "[e]xcept as otherwise provided in RCW 4.22.070," liability of tortfeasors on an indivisible claim shall be joint and several.⁷⁶³ Accordingly, statutory tort reform sends a more subtle, yet nevertheless significant, message for the common law courts.

To begin with, as discussed earlier,⁷⁶⁴ RCW 4.22.070 should be liberally applied with a presumption that the compelling concept of comparative fault is the general rule of tort liability, subject only to clearly defined and limited exceptions. The courts "should not focus the microscope of judicial analysis on a few words in the entire Act, and in the process erode the overriding purpose of the Act."⁷⁶⁵ The statute's purpose of correlating individual responsibility in damages with the extent of individual fault should inform all questions of interpretation of the statute.

In addition, the enactment of the 1986 Tort Reform Act, and the adoption of new principles of equitable treatment among parties to liability actions, should be the occasion for a reexamination by the courts of recent departures from long-standing rules of the common law. In particular, the courts should explore anew the extension of joint and several liability

policy"); see also Williams, *supra* note 753 (criticizing failure of courts to recognize the persuasive force of policies underlying statutes).

762. See 3 POUND, *supra* note 68, at 656.

763. WASH. REV. CODE § 4.22.030 (1991).

764. See *supra* part III.A.2 (discussing the duty of the courts to give full effect to the intent and spirit of RCW 4.22.070).

765. *McCluskey v. Bechtel Power Corp.*, 363 So. 2d 256, 264 (Miss. 1978) (interpreting Mississippi workers' compensation statute).

to contexts where the causal link between a minor actor's conduct and the tortious harm is attenuated.

The doctrine of joint and several liability as applied in the decades leading up to the 1986 Reform Act had come to be inequitable and unduly expansive in two primary ways. First, the adoption of comparative negligence had abrogated the artificial view that a tort claim resulting in indivisible harm was a unitary wrong incapable of apportionment.⁷⁶⁶ Once the concept of comparative fault had been applied between plaintiffs and defendants, it became impossible to justify holding one of several tortfeasors liable for the entire harm when that tortfeasor had been at fault only in part. The concept of comparative fault—apportioning liability on the basis of percentage of fault—became irresistible, particularly in those situations where the plaintiff had also contributed to the injurious incident.

This first flaw in the doctrine of joint and several liability has been comprehensively addressed by the Tort Reform Act. RCW 4.22.070 establishes the general principle of liability in accordance with comparative fault. This matter is now the subject of statutory codification. RCW 4.22.070 also marks the boundaries of comparative fault, by setting forth certain principled departures from the general rule of several only liability. In those narrow contexts in which the statute provides for a continuation of joint and several liability, the courts have no authority to second-guess that legislative judgment and expand several liability through common law adjudication. In sum, the nature and the scope of comparative fault has not been left open for judicial refinement.

Second, in the years leading up to the Tort Reform Act of 1986, the combination of joint and several liability and the gradual relaxation of the requirement of proximate causation had greatly magnified the liability of remote actors whose fault and contribution to the risk of harm was minimal.⁷⁶⁷ By weak-

766. See *supra* part II.A (discussing the developments in tort law leading to tort reform).

767. For examples of cases tracing the causal link for an injury beyond the immediate tortfeasor to more remote actors, see, e.g., *Dickinson v. Edwards*, 105 Wash. 2d 457, 716 P.2d 814 (1986) (motorcyclist was injured in an accident with an intoxicated motorist; potential liability extended to restaurant owner and motorist's employer who furnished and served alcoholic beverages to the motorist); *Petersen v. State*, 100 Wash. 2d 421, 671 P.2d 230 (1983) (plaintiff was injured when her car was struck by another vehicle driven by a recently released state hospital psychiatric patient; liability extended to state psychiatrists who treated and released the patient). See also Martin

ening the requirement of a direct causal nexus between a defendant's conduct and an injury to a plaintiff, the courts multiplied the number of possible targets in a tort lawsuit. This in turn dramatically increased the likelihood that remote actors found to have made only a negligible contribution to the circumstances resulting in injury would nevertheless be exposed to liability for the entire loss under the doctrine of joint and several liability.

Peter W. Huber perceptively sketches how the relaxation of proximate causation permitted plaintiffs' lawyers and a phalanx of experts to

trace out for the jurist all the antecedent causes of a calamity, from the crushed sports car at the intersection, to the accommodating bartender who had poured drinks for the driver, to the great-aunt who had lent the car, to General Motors which had designed it, to the municipality that had planted the hedge near the traffic light, to the psychiatrist who had counseled the driver on alcoholism The old, formalist rules would have cut through a crowd like this in short order, shunning speculation about remote causes on the assumption that such speculation would more likely cause accidents in court than prevent them elsewhere. But with the new rules, the law could range far afield and pursue the most distant suspected malefactors.⁷⁶⁸

The adoption of RCW 4.22.070 resolved one part of the problem of joint and several liability by endorsing the general principle of comparative fault and establishing its appropriate parameters. The other part of the problem—the dilution of the element of proximate causation—remains to be addressed through a case-by-case reevaluation by the common law courts. The spirit of tort reform animating the statutory modification of joint and several liability modification points the way for a judicial reconsideration of the extension of liability to remote and attenuated causes of an injury. Hopefully, the future will see a revitalization of the requirement of “some direct relation between the injury asserted and the injurious conduct

v. Abbott Laboratories, 102 Wash. 2d 581, 689 P.2d 368 (1984) (eliminating the requirement of proximate causation in the case of injuries resulting from manufacture of the drug DES, instead imposing a rule of industry-wide apportionment of liability) (discussed *supra* part III.H.3).

768. PETER W. HUBER, GALILEO'S REVENGE—JUNK SCIENCE IN THE COURTROOM 12 (1991).

alleged.”⁷⁶⁹

C. *A Trilogy of Cases on Legal Causation: A Model for Common Law Reform*

Even before the enactment of the Tort Reform Act of 1986, a judicial revival of proximate causation was underway in Washington at the intermediate appellate court level. In a series of motor vehicle accident cases beginning about the time that tort reform was adopted legislatively, Division One of the Washington Court of Appeals reaffirmed the court’s common law authority to declare how far to extend liability for a defendant’s remote actions when an injury occurs as a more direct result of an immediate cause.

The trilogy of cases began in 1985—less than a year before the legislature adopted the 1986 tort reform legislation—with the appellate court’s decision in *Klein v. City of Seattle*.⁷⁷⁰ A motorist had been killed when another driver, who was speeding and had been drinking, crossed the center line on a public bridge and collided with the decedent’s automobile.⁷⁷¹ Rather than pursuing the immediate and most obvious wrongdoer—the other driver—the decedent’s estate brought an action against the City of Seattle, alleging negligent design and maintenance of the public roads.⁷⁷² The jury found that the city had been negligent but that the city’s negligence was not a proximate cause of the decedent’s death.⁷⁷³ On appeal, the Washington Court of Appeals, Division One, affirmed, holding that the city’s negligence “as a matter of law” was not a proximate cause of the accident.⁷⁷⁴ Given the “extreme carelessness” of the at-fault driver who had been speeding and crossed the center line, the court as “a matter of public policy” refused to hold the city responsible for “guard[ing] against this degree of negligent driving.”⁷⁷⁵

In the 1989 case of *Braegelmann v. Snohomish County*,⁷⁷⁶ the same court encountered a very similar situation. A motor-

769. See *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311, 1318 (1992) (stating standard for proximate causation under Racketeer Influenced and Corrupt Organizations Act).

770. 41 Wash. App. 636, 705 P.2d 806 (1985).

771. *Id.* at 637, 705 P.2d at 807.

772. *Id.* at 637, 705 P.2d at 806.

773. *Id.*

774. *Id.* at 639, 705 P.2d at 807.

775. *Id.* at 639, 705 P.2d at 807-08.

776. 53 Wash. App. 381, 766 P.2d 1137 (1989).

ist was killed and his passenger-daughter was injured when another "highly intoxicated" and speeding driver crested the top of a hill on the wrong side of the road and struck the vehicle head on.⁷⁷⁷ The motorist's wife and the mother of the passenger filed suit both against the at-fault driver, alleging negligent driving, and against the county, alleging negligent construction, design, and maintenance of the road.⁷⁷⁸ The trial court dismissed the county on summary judgment.⁷⁷⁹ On appeal, the Washington Court of Appeals, Division One, explained that proximate causation consists of two elements—cause-in-fact and legal causation.⁷⁸⁰ Although cause-in-fact is ordinarily an issue for the trier of fact and thus not susceptible to summary judgment, the question of legal causation is one for the courts:

Legal causation . . . requires a determination of whether liability should attach as a matter of law, given the existence of cause in fact. Determining factors in resolving an issue of legal causation have been described as mixed considerations of logic, common sense, justice, policy, and precedent. One of the policy considerations is how far the consequences of defendant's acts should extend.⁷⁸¹

The court of appeals acknowledged that the plaintiff had offered expert affidavit testimony that the highway design was improper and did not afford the at-fault driver sufficient sight distance, and that the posted speed limit exceeded the maximum safe speed for the highway.⁷⁸² Nevertheless, on the authority of *Klein*, the court ruled that "policy considerations dictate" that the county had no duty to protect against "extreme conduct."⁷⁸³ The court noted that, as in *Klein*, there had been a head-on collision in which the at-fault driver was speeding and crossed the center line.⁷⁸⁴ Moreover, in this case, there was the "additional factor" of the at-fault driver being "highly intoxicated" at the time of the collision.⁷⁸⁵

The third decision came two years later in the 1991 single

777. *Id.* at 382, 766 P.2d at 1138.

778. *Id.* at 383, 766 P.2d at 1138-39.

779. *Id.* at 383, 766 P.2d at 1139.

780. *Id.* at 384, 766 P.2d at 1139.

781. *Braegelmann*, 53 Wash. App. at 384-85, 766 P.2d at 1139 (citations omitted).

782. *Id.* at 385, 766 P.2d at 1140.

783. *Id.* at 386, 766 P.2d at 1140.

784. *Id.*

785. *Id.*

motorist case of *Cunningham v. State*.⁷⁸⁶ Early one morning, a legally intoxicated motorist drove into a concrete barrier at the gate to a military base.⁷⁸⁷ Investigators for the motorist concluded that the road to the gate was not properly signed, lighted, and striped, and that the barrier should have been constructed with an impact attenuation device.⁷⁸⁸ The motorist's attorney, however, failed to file a claim against the federal government before expiration of the statute of limitations.⁷⁸⁹ The motorist then filed an action for legal malpractice against his attorneys.⁷⁹⁰ The trial court granted summary judgment for the attorneys.⁷⁹¹ Although the attorneys may have been negligent in failing to file a timely action, the Washington Court of Appeals, Division One, concluded that the motorist would not have recovered against the federal government.⁷⁹²

Once again, the court's decision was grounded upon the legal element of proximate causation. After examining the factual record, the *Cunningham* court stated "that neither logic, common sense, justice, nor policy favors finding legal causation here."⁷⁹³ The court cited the following factors: (1) the motorist had a blood alcohol level twice the legal level for automobile drivers; (2) the motorist admitted the gate was sufficiently well lit that he was aware of its presence; (3) despite his awareness of the gate, the motorist did not significantly lessen his speed; and (4) the motorist did not drive

786. 61 Wash. App. 562, 811 P.2d 225 (1991).

787. *Id.* at 564, 811 P.2d at 226. The motorist's passenger was also seriously injured. *Id.* The passenger filed suit in federal court against the motorist, the United States, and several other entities. *Id.* Several of the claims against the United States were dismissed on the grounds that the federal government's decisions in designing and placing the road and barrier involved policy factors and thus were shielded from liability under the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C.S. § 2680(a) (1990). *Id.* The passenger's remaining claims were ultimately settled. *Id.* at 565.

788. *Cunningham*, 61 Wash. App. at 564, 811 P.2d at 226.

789. *Id.* at 565, 811 P.2d at 227.

790. *Id.* Notwithstanding that the statute of limitations had expired, the motorist also named various entities that allegedly were responsible for the negligent construction and design of the road and gate to the military base.

791. *Id.*

792. The court also concluded that the motorist's claims against the federal government based upon road and gate design and placement would have been barred by collateral estoppel. *Id.* at 565-70, 811 P.2d at 227-29. The motorist had been a defendant to the passenger's earlier action against the United States and, in that capacity, had vigorously litigated the federal government's liability for those claims under the Federal Tort Claims Act. *Id.* at 569, 811 P.2d at 229.

793. *Cunningham*, 61 Wash. App. at 571, 811 P.2d at 230.

attentively.⁷⁹⁴ Under these circumstances, and in light of the precedents of *Klein* and *Braegelmann*, the court concluded that the federal government's negligent failure to provide adequate lighting and striping on the road to the gate was not a proximate cause of the accident.⁷⁹⁵

Because these three cases arose before the effective date of the Tort Reform Act of 1986, RCW 4.22.070 was not applied. Still, these decisions have continuing importance even under the new regime of comparative fault.⁷⁹⁶ In two of the decisions, it is true that the posture of the cases was such that the exposure of the governmental entity as a remote actor would be minimal under tort reform, even in the absence of a complete dismissal on proximate causation grounds. However, in the remaining case of the trilogy, application of RCW 4.22.070 would not protect the governmental entity from being held fully responsible in damages despite the minimal and attenuated degree of causation. A reasonable result in this third case depends upon the court's revitalization of legal causation as a meaningful limitation on the bounds of tort liability.

I will illustrate this point by examining the facts of each case with an application of RCW 4.22.070. In *Klein*, the motorist's estate brought suit only against the city and neglected to name the at-fault driver.⁷⁹⁷ Under RCW 4.22.070, fault nevertheless would be allocated against an unjoined at-fault driver.⁷⁹⁸ Even if the city's negligence were regarded as *one* proximate cause of the accident, the great share of the fault certainly would be allocated to the unjoined at-fault driver based upon his "extreme carelessness."⁷⁹⁹ And because the at-fault driver was not joined as a defendant to the action, the city would not be responsible for that proportionate share of the damages attributable to the percentage share of fault allo-

794. *Id.*

795. *Id.*

796. This trilogy of cases on legal causation has had influence beyond Division One of the Washington Court of Appeals. In *Re v. Tenney*, 56 Wash. App. 394, 783 P.2d 632 (1989), Division Two of the Court of Appeals applied *Braegelmann* in the context of a motorcyclist's collision with a truck. The *Re* court held that a grain elevator operator's negligence in permitting obstruction of a highway was not a proximate cause of the accident. The truck driver had made a change of lane and the motorcyclist was inattentive and driving at excessive speed when he attempted to pass the truck on the left and then collided with the truck. *Id.* at 398-99, 783 P.2d at 634.

797. *Klein*, 41 Wash. App. at 637, 705 P.2d at 807.

798. See *supra* part III.C.1.f (discussing allocation of fault to nonparty entities).

799. See *Klein*, 41 Wash. App. at 639, 705 P.2d at 807.

cated to the nonparty driver.⁸⁰⁰ Accordingly, even if the deceased motorist was free from contributory fault, the estate would not be able to charge the city with liability for more than its presumably small share of the damages attributable to its small share of the fault.

In *Cunningham*, the application of RCW 4.22.070 would have had even less effect. That case involved a one car accident.⁸⁰¹ Before the Tort Reform Act of 1986, the comparative negligence statute already provided for an allocation of fault between plaintiffs and defendants. Even if the *Cunningham* court had determined that the federal government bore some legal responsibility for the accident, a comparative negligence analysis should expose the government to little liability. The trier of fact undoubtedly would have allocated a minimal share of the fault to the government in comparison with the plaintiff himself, as a highly intoxicated driver who drove at full speed into an obstruction of which he admitted he was at least somewhat aware.⁸⁰² Of course, in both *Klein* and *Cunningham*, even a proportionate allocation of responsibility would have left the governmental entities involved liable in at least some small measure, notwithstanding the remoteness of their purportedly negligent conduct from the injury to the motorists.

More importantly, the remaining *Braegelmann* case illustrates the vital and continuing importance of the legal causation trilogy even in the world of comparative fault. In *Braegelmann*, the deceased motorist's estate brought suit both against the at-fault driver for negligent driving and against the county for negligent road construction and design.⁸⁰³ Given the extreme conduct of the at-fault driver in speeding, crossing the center line, and being highly intoxicated,⁸⁰⁴ the trier of fact would presumably allocate most of the fault to that driver and assign a minimal share of fault to the county.

However, the facts of the *Braegelmann* case indicate that the deceased motorist was likely without contributory fault, as he apparently was proceeding safely in his own lane of traffic when the at-fault driver crested a hill at high speed and on the

800. See *supra* part III.C.1.f (discussing allocation of fault to nonparty entities) and part III.F (discussing the limited form of joint and several liability among defendants liable to an innocent plaintiff).

801. *Cunningham*, 61 Wash. App. at 564, 811 P.2d at 226.

802. See *id.* at 572, 811 P.2d at 230.

803. *Braegelmann*, 53 Wash. App. at 383, 766 P.2d at 1138-39.

804. *Id.* at 386, 766 P.2d at 1140.

wrong side of the road.⁸⁰⁵ Under Paragraph (1)(b) of RCW 4.22.070, when the person suffering injury is without fault, "the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares" of the damages.⁸⁰⁶ Although the county's share of fault might be markedly small—perhaps as low as one percent—the county would remain jointly and severally liable with the at-fault driver who had been joined to the lawsuit.⁸⁰⁷ In the not uncommon event that the at-fault driver would be unable to satisfy his or her share of the damages, the county as the "deep pocket" would be left with the public treasury doors wide open.

The *Braegelmann* legal causation ruling intervenes to prevent that absurd result. Accordingly, even after tort reform, the *Klein-Braegelmann-Cunningham* trilogy remains as an important judicial limitation upon the liability of remote and often minor actors, at least when a more immediate actor has engaged in particularly egregious conduct.

In its most recent foray into the question of legal causation in the context of motor vehicle accidents, the Washington Court of Appeals, Division One, refused to extend the legal causation holding in *Braegelmann* to a case that arguably involved less egregious conduct on the part of the motorist. In *Stephens v. City of Seattle*,⁸⁰⁸ a motorcyclist, who apparently had been drinking and was speeding, was injured when he struck a negligently designed curb.⁸⁰⁹ The motorcyclist brought suit against the city for negligent design of the intersection.⁸¹⁰ The trial court granted summary judgment on proximate causation grounds, but the court of appeals reversed.⁸¹¹ Because this was an appeal from a summary judgment and the evidence on the motorcyclist's speed and alcohol level was conflicting, the court was obliged to look at the evidence in the light most favorable to the motorcyclist.⁸¹² Although there was evidence that the motorcyclist had been drinking, but was not legally intoxicated, the results of the blood alcohol test

805. *Id.* at 382, 386, 766 P.2d at 1137, 1138.

806. WASH. REV. CODE § 4.22.070(1)(b) (1991).

807. See *supra* part III.F (discussing the limited form of joint and several liability among defendants liable to an innocent plaintiff).

808. 62 Wash. App. 140, 813 P.2d 608 (1991).

809. *Id.* at 141, 813 P.2d at 609.

810. *Id.*

811. *Id.*

812. *Id.* at 142-43, 813 P.2d at 609.

were disputed.⁸¹³ Moreover, the motorcyclist may have exceeded by only five miles per hour that speed which an expert witness postulated as the basis for his opinion that the hazardous roadway, rather than the rate of speed, was the cause of the accident.⁸¹⁴ Under these circumstances, the court said it could not hold "as a matter of law that the sole proximate cause" of the accident was the motorcyclist's own negligence.⁸¹⁵

Because the speed limit was 30 miles per hour⁸¹⁶ and the court assumed the motorcyclist had been traveling about 20 miles in excess of that posted limit,⁸¹⁷ and because the hospital's blood test indicated he had been drinking alcohol,⁸¹⁸ the *Stephens* decision may be questioned. In accord with the court in *Klein*,⁸¹⁹ I would ask whether a city designing a road must guard against the possibility that the road will be used by someone who displays the combined negligence of operating a motor vehicle after drinking and substantially exceeding the speed limit. Nevertheless, while I might quibble with the particular result, the *Stephens* decision reflects no retreat from the court's revival of a meaningful limit on legal causation. The result in *Stephens* turns primarily upon the substantially unsettled state of the factual record on summary judgment, with significant disputes about the results of the blood alcohol test and the various estimates of the motorcyclist's speed.⁸²⁰ Viewing the disputed facts of the case in the light most favorable to the motorcyclist, a reasonable court could conclude that the city's purportedly negligent design of the intersection was not a remote but rather a directly contributing cause of the accident. Moreover, although the question of legal causation arises in a single vehicle accident as well as a multiple vehicle accident,⁸²¹ a finding of a superseding cause that

813. *Stephens*, 62 Wash. App. at 142, 813 P.2d at 609.

814. *Id.* at 144, 813 P.2d at 610. The speed limit at the intersection was 30 miles per hour. *Id.* at 142, 813 P.2d at 609. For purposes of the summary judgment motion, the Court accepted the lower estimate of the motorcyclist's speed as 50 miles per hour. *Id.* at 144, 813 P.2d 610. An expert witness stated that the hazardous condition of the roadway was the cause of the crash, assuming a motorcycle speed of 45 miles per hour. *Id.* at 143-44, 813 P.2d at 609.

815. *Stephens*, 62 Wash. App. at 144, 813 P.2d at 610.

816. *Id.* at 142, 813 P.2d at 609.

817. *Id.* at 144, 813 P.2d at 610.

818. *Id.* at 142, 813 P.2d at 609.

819. *Klein*, 41 Wash. App. at 639, 705 P.2d at 807.

820. *Stephens*, 62 Wash. App. at 142-44, 813 P.2d at 609-10.

821. In *Cunningham*, 61 Wash. App. at 572, 811 P.2d at 230, the court held that,

breaks the chain of causation is more likely to occur in a context where the egregious conduct of yet another tortfeasor intervenes to directly cause harm to the plaintiff. More importantly, whatever the merits of the particular decision in *Stephens*, the case is one more example that the Washington appellate courts are continuing to exercise the supervisory common law role of determining in each case whether, as a matter of public policy, "the connection between defendant's act and its ultimate result is 'too remote or insubstantial to impose liability.'"⁸²² The enduring exercise of this judicial authority is more important than the result it produces in a particular case.

D. Conclusion

The legislature's enactment of the Tort Reform Act of 1986 was "but one stage in an ongoing process of development of the law."⁸²³ The torch has now been passed back to the courts. The spirit of the Tort Reform Act in general, and of RCW 4.22.070 in particular, should continue to inspire the evolution of common law joint and several liability. In the future, in those few areas where joint and several liability still applies, the courts should demand a closer nexus between the culpable conduct alleged and the injury or damage asserted before a defendant may be held responsible as a joint tortfeasor. In the role of a common law court, the judiciary should exercise its authority to limit the scope of liability within proper bounds by asking "whether the conduct has been so significant and important a cause that the defendant should be legally responsible."⁸²⁴ The common law revitalization of a meaningful limit of legal causation, together with the statutory adoption of comparative fault, will serve the ends of justice and of true reform.

although the case involved a one car accident, *Klein and Braegelmann* could not be distinguished on the ground they involved two car accidents. The court held that "[f]or purposes of a legal causation analysis, this is a distinction without a difference." *Id.* As the court stated, the question remains whether as a matter of policy, "the connection between defendant's act and its ultimate result is 'too remote or insubstantial to impose liability.'" *Id.* (citation omitted).

822. *Id.* (quoting *Hartley v. State*, 103 Wash. 2d 768, 781, 698 P.2d 77, 86 (1985)).

823. See *Williams*, *supra* note 753, at 558 (citing JAMES WILLARD HURST, DEALING WITH STATUTES 40 (1982)).

824. PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 36, § 42, at 273.

VI. CONCLUSION

Although it has been six years since the enactment of RCW 4.22.070, the statute remains in its infancy. Litigating attorneys are still learning the ramifications of the changes and studying how to respond to them in terms of litigation and settlement strategy. The Washington appellate courts have yet to address most of the issues that have or will arise in the application of the comparative responsibility principle. In the life of the law, six years is a very short time. There are always "growing pains" as a new statute is implemented in practice.⁸²⁵ It is not surprising that there remains some degree of uncertainty about the full meaning and effect of this dramatic change in the ground rules for modern tort liability.

Nevertheless, as I have attempted to show through this Article's comprehensive examination of the statute's provisions, the basic contours of the enactment stand out sharply and clearly. The plain language of RCW 4.22.070 and each of its subsections and paragraphs, together with an appreciation of the legislative intent reflected both in the structure and wording of the statute and in the legislative history, enshrine the central principle of comparative fault. Indeed, RCW 4.22.070 may properly be denominated as the Washington Comparative Fault Act.

The State of Washington, through enactment of RCW 4.22.070, has set its feet firmly on the path of comparative fault as a measure of responsibility, subject only to the limited qualifications and narrow exceptions delineated in the statute. Under this Washington Comparative Fault Act, the extent of liability ordinarily will be commensurate with the degree of fault. If the courts adhere to that basic understanding, the promise of tort reform will be fulfilled.

825. Eilbacher, *supra* note 170, at 923 (discussing implementation of the new Indiana comparative fault statute).