

ARTICLES

The Constitutional Validity of the Modification of Joint and Several Liability in the Washington Tort Reform Act of 1986

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I. INTRODUCTION

With the Washington Supreme Court having recently invalidated the statutory cap placed on awards of noneconomic damages to tort plaintiffs¹ as a violation of the state constitutional right to a jury trial,² we may expect an increasing onslaught upon other controversial provisions of the Washington Tort Reform Act of 1986.³ In particular, the modification of the common law doctrine of joint and several liability, which was also accomplished by the Tort Reform Act and is codified at section 4.22.070 of the Washington Revised Code,⁴ has already become a target of plaintiffs' attorneys in tort litigation and has also come under repeated attack by commentators in Northwest regional law reviews.⁵ The need for eventual reso-

1. WASH. REV. CODE § 4.56.250 (1989).
 2. *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 771 P.2d 711, *amended*, 780 P.2d 260 (1989).
 3. Tort Reform Act of 1986, ch. 305, §§ 100-912, 1986 Wash. Laws 1354-67 (codified in scattered sections of WASH. REV. CODE (1989)).
 4. *Id.* § 401, 1986 Wash. Laws 1357 (codified at WASH. REV. CODE § 4.22.070 (1989)).
 5. 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) (primarily suggesting that the statute may infringe constitutional due process); Wiggins, Harnetiaux & Whaley, *Washington's 1986 Tort Legislation and the State Constitution: Testing the Limits*, 22 GONZ. L. REV. 193 (1987) (arguing that the statute violates numerous constitutional provisions). *Contra* Comment, *Development in the Law, The 1986 Washington Tort*

lution of this dispute by the Washington Supreme Court seems certain.

The legislative modification of Washington's joint and several liability rule sought to achieve greater fairness in tort law by ameliorating the harsh common law doctrine, which had held each defendant responsible for the entire tort judgment even if that defendant was found to have been only slightly at fault.⁶ The legislature also hoped thereby to reduce the uncertainty in tort law that had contributed to a crisis in the availability and affordability of liability insurance.⁷ To accomplish its purposes, 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.

The plaintiffs' bar and other detractors of the legislation have raised numerous challenges to this doctrinal modification, both in court and in the legal literature, based on provisions of the Washington Constitution.⁸ Some of the constitutional

Reform Act: Elimination of Joint and Several Liability (RCW 4.22.070), 23 WILLAMETTE L. REV. 211, 235 (1987) (concluding that statute is constitutionally valid).

6. The legislature stated that the purposes of the reforms enacted were "to create a more equitable distribution of the cost and risk of injury and increase the availability of insurance." Tort Reform Act of 1986, ch. 305, § 100, 1986 Wash. Laws 1354.

7. *Id.* Many respected commentators had concluded that the "escalating and unpredictable growth of the liability system" bore "a direct relationship to the current problems with the availability and affordability of liability insurance." Willard, *Troubling Trends in Our Civil Justice System and the Need for Tort Reform*, 34 FED. B. NEWS & J. 116, 117 (1987); see also STATE OF WASHINGTON, A REPORT TO THE LEGISLATURE FROM THE JOINT STUDY COMMITTEE ON INSURANCE AVAILABILITY AND AFFORDABILITY 3 (1985) (known as the Marquardt Report, after Washington Insurance Commissioner Dick Marquardt who headed the study committee, it concluded that the growth of tort litigation compounded problems caused by insurance industry practices); U.S. DEPT. OF JUSTICE, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986); Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1977).

8. The challenges to the Washington Tort Reform Act have been premised primarily upon the Washington State Constitution since the federal courts have rather uniformly rejected challenges to tort reform statutes on federal constitutional grounds. See, e.g., *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989); *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985); *In re Air Crash Disaster at Stapleton Int'l Airport*, 720 F. Supp. 1465 (D. Colo. 1989) (upholding Colorado statute abolishing joint and several liability against federal constitutional attack).

questions raised, particularly procedural due process concerns,⁹ will merit careful attention when the statute is interpreted by the courts in the context of actual cases. However, other constitutional challenges, especially those based on substantive due process¹⁰ and equal protection or privileges and immunities,¹¹ ultimately resolve into mere policy critiques of the direction taken by the state legislature in restoring some balance to the tort liability system. The wisdom of the statute, however, is not a proper subject of judicial review; instead, the courts must give "every reasonable presumption in favor of the constitutionality of the law."¹²

To balance the legal debate, this Article suggests that the statutory revision and partial abolition of joint and several liability was the necessary and appropriate next step in the evolution of modern tort law to a system founded upon the concept of comparative fault among all parties. Properly understood in its historical context and interpreted under established, rather than innovative and unfounded, principles of constitutional law, the modification of joint and several liability passes muster under the Washington Constitution.

II. BACKGROUND

A. *Historical Context of the Statutory Modification of the Joint and Several Liability Rule*

Prior to the adoption of comparative negligence and the development of a tort system based on apportionment of fault, the common law provided for joint and several liability among all tortfeasors who bore some responsibility for an innocent victim's injury.¹³ Although this concept of liability was initially limited to cases in which defendants had acted in concert, usually intentionally, to effect a single injury,¹⁴ the rule even-

9. See Peck, *supra* note 5, at 690-97.

10. See *id.* at 682-89 (suggesting a constitutionally protected fundamental right to recovery in tort for damages caused by wrongful conduct); Wiggins, Harnetiaux & Whaley, *supra* note 5, at 211-20, 242 (advocating recognition of a quid pro quo requirement before common law tort rules may be modified).

11. See Wiggins, Harnetiaux & Whaley, *supra* note 5, at 204-11, 239-41.

12. *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 643, 771 P.2d 711, 715, *amended*, 780 P.2d 260 (1989).

13. The doctrine of joint and several liability appears to have been first recognized in Washington in 1909. See *Nelson v. Bromley*, 55 Wash. 256, 104 P. 251 (1909).

14. Peck, *Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability*, 62 WASH. L. REV. 233, 235 (1987); Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 414-21 (1937).

tually expanded to cover multiple tortfeasors whose actions jointly, concurrently, or successively caused injury to a plaintiff.¹⁵

Under this doctrine, each tortfeasor was held jointly and severally liable for all damages that ensued.¹⁶ A plaintiff was permitted to obtain and enforce a judgment in the full amount of the damages against one or all of the joint tortfeasors.¹⁷ Thus, even a defendant whose role in the tortious conduct had been relatively minor could be charged with the entire judgment.

However, at common law there was an important exception to the rule of joint and several liability, indeed to the plaintiff's ability to recover from any defendant at all. If the plaintiff was found to have been contributorily negligent, that is, culpable to any degree for his own injury, he was absolutely barred from any recovery.¹⁸ Thus, even if one or more defendants had also contributed to the injury, the plaintiff's own negligence, however slight, made him ineligible to receive any award of damages.

The rules of joint and several liability and contributory negligence evolved together.¹⁹ Both doctrines "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."²⁰ This conceptual underpinning for joint and several liability began to collapse with the decline of the rule of contributory negligence and the advent of comparative fault in tort law.

As states introduced the concept of comparative fault and allowed partially culpable plaintiffs to recover by allocating the fault for injuries between plaintiffs and defendants, the premise that wrongs were inherently indivisible or that responsibility could not rationally be apportioned among multiple parties fell into disfavor. The adoption of comparative negligence between plaintiffs and defendants and the

15. W. KEETON, D. DOBBS, R. KEETON & G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 47 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON TORTS].

16. Seattle-First Nat'l Bank v. Shoreline Concrete Co., 91 Wash. 2d 230, 234-35, 588 P.2d 1308, 1312 (1978).

17. *Id.* at 235, 588 P.2d at 1312.

18. PROSSER AND KEETON ON TORTS, *supra* note 15, § 65.

19. Smith v. Department of Ins., 507 So. 2d 1080, 1090-91 (Fla. 1987).

20. Bartlett v. New Mexico Welding Supply, 98 N.M. 152, 157, 646 P.2d 579, 584 (N.M. Ct. App. 1982) (quoting Prosser, *supra* note 14, at 418).

abandonment of the strict contributory negligence rule sounded the death knell as well for the doctrine of joint and several liability among defendants.

A few states abolished the doctrine of joint and several liability by judicial action finding the rule inconsistent with the theory of comparative fault.²¹ The Washington Supreme Court declined to do so, holding that the adoption of comparative negligence did not require the abolition of the joint and several liability doctrine.²² The court recognized, however, that the legislature had the power to make such a change.²³

In 1986, the Washington State Legislature took that next step in the evolution of tort law by adopting the Tort Reform Act,²⁴ which, *inter alia*, abolished the doctrine of joint and several liability in most cases in which the plaintiff is partially at fault for his injuries. With the enactment of section 4.22.070 of the Washington Revised Code,²⁵ the legislature approached a pure comparative fault system which equates recovery of damages and the duty to pay with the degree of fault. The legislature concluded that a fuller realization of this progressive liability system required a change both in the common law rule of contributory negligence—which had been accomplished by statutory revision in 1973²⁶—and now in the doctrine of joint and several liability.

Thus, Washington joined a host of other states that have acted statutorily to abandon or significantly modify the joint and several liability doctrine.²⁷ To paraphrase the California

21. See, e.g., *id.* at 158, 646 P.2d at 585; *Laubach v. Morgan*, 588 P.2d 1071 (Okla. 1978); *Brown v. Keill*, 224 Kan. 195, 580 P.2d 867 (1978).

22. *Seattle-First*, 91 Wash. 2d at 234-38, 588 P.2d at 1311-14.

23. *Id.* at 237, 588 P.2d at 1313.

24. Tort Reform Act of 1986, ch. 305, §§ 100-912, 1986 Wash. Laws 1354-67.

25. WASH. REV. CODE § 4.22.070 (1989).

26. 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 (1989)).

27. For example, and this list is not definitive, the states of California, Colorado, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Louisiana, Michigan, Montana, Nevada, New York, Ohio, Oregon, Pennsylvania, Utah, Vermont, West Virginia, and Wyoming have abrogated joint and several liability, in whole or in part. CAL. CIV. CODE § 1431.2 (West 1990); COLO. REV. STAT. § 13-21-111(3.5) (1987); FLA. STAT. ANN. § 768.81(3) (West 1990); HAWAII REV. STAT. § 663-31 (1988); IDAHO CODE § 6-803 (1979 & Supp. 1989); IND. CODE ANN. § 34-4-33-5(b) (Burns 1986); IOWA CODE ANN. § 668.4 (West 1990); KAN. STAT. ANN. § 60-258a(d) (1983 & Supp. 1988); LA. CIV. CODE ANN. art. 2324 (West 1990); MICH. COMP. LAWS § 600.6304 (1987); MONT. CODE ANN. § 27-1-703 (1989); NEV. REV. STAT. ANN. § 41.141 (Michie 1987); N.Y. CIV. PRAC. L. & R. 1601 (McKinney 1990); OHIO REV. CODE ANN. § 2315.19 (Anderson 1981 & Supp. 1988); OR. REV. STAT. § 18.485 (1988); PA. STAT. ANN. tit. 42, § 7102(a), (b) (Purdon 1982); UTAH CODE ANN.

Supreme Court's statement respecting that state's statutory revision of the doctrine, Washington's "modification of the common law joint and several liability rule was not an isolated or aberrant phenomenon but rather paralleled similar developments in the evolution and implementation of the comparative-fault principle in other states."²⁸

A pure comparative fault system most nearly accomplishes the goal of a fair system of apportioning damages by holding both plaintiffs and defendants responsible for their actions to the extent to which they cause injury. As the New Mexico Court of Appeals held in abolishing the doctrine of joint and several liability in that state, this, simply, is "justice."²⁹

B. Washington's Statutory Modification of Joint and Several Liability (Washington Revised Code Section 4.22.070)

Section 4.22.070 of the Washington Revised Code reads:

(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 against the claimant in an amount 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

§ 78-27-38 to -40 (1987); VT. STAT. ANN. tit. 12, § 1036 (1973 & Supp. 1989); W. VA. CODE § 29-12A-7 (1986); WYO. STAT. § 1-1-109 (1988).

28. See *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1200, 753 P.2d 585, 592, 246 Cal. Rptr. 629, 635 (1988).

29. *Bartlett v. New Mexico Welding Supply*, 98 N.M. 152, 155, 646 P.2d 579, 582 (N.M. Ct. App. 1982) (quoting *Placek v. City of Sterling Heights*, 405 Mich. 638, 647, 275 N.W.2d 511, 519 (1979)).

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 claimants [sic] total 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.³⁰

Subsection 4.22.070(1) establishes the general rule of several liability: that a person should not be liable for more than his own proportionate share of the claimant's total damages. The responsibility then falls to the trier of fact to "determine the percentage of the total fault which is attributable to every entity which caused" the plaintiff's damages and each entity is liable to pay only its own share of the loss.³¹

However, under paragraph (b) of subsection 4.22.070(1), a limited form of joint and several liability is retained if the claimant is not at fault. In that case, the defendants to the action remain jointly and severally liable for "the sum of their proportionate shares of the claimants [sic] total damages,"³² that is, for the sum of all damages attributable to all defendants to the lawsuit. Thus, except 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 party to the suit, each defendant remains responsible for the total amount of damages proved by the plaintiff, less, of course, that portion attributed to the plaintiff's own comparative fault.

30. WASH. REV. CODE § 4.22.070 (1989).

31. *Id.* § 4.22.070(1).

32. *Id.* § 4.22.070(1)(b).

In addition, under paragraph (a) of subsection 4.22.070(1), a defendant remains responsible for the actions of another party if the defendant acted "in concert" with that person to cause the claimant's injury or the person causing the injury was an agent or servant of the defendant.³³

In two categories of actions, hazardous waste and business torts, subsection 4.22.070(3) preserves pure joint and several liability, making each defendant liable for the entire loss, less any share attributable to the plaintiff's fault.³⁴ A third exception,³⁵ involving assessment of liability on a market share basis for injuries caused by generic products, to which joint and several liability thus had not previously applied, "was singled out so as to indicate affirmatively that the legislature did not intend to change the existing law in this area."³⁶

III. RIGHT TO JURY TRIAL

Article I, section 21 of the Washington Constitution provides that "[t]he right of trial by jury shall remain inviolate."³⁷ In *Sofie v. Fibreboard Corporation*,³⁸ the Washington Supreme Court ruled that the provision in the Tort Reform Act of 1986 placing a cap or ceiling on the amount of noneconomic damages that could be awarded³⁹ unconstitutionally intruded upon the jury's function of determining the amount of a plaintiff's damages.⁴⁰

Prior to *Sofie*, there had been no suggestion that section 4.22.070 was vulnerable to challenge on this basis.⁴¹ Following this decision, however, plaintiffs' attorneys have increasingly viewed the jury right clause as an all-purpose weapon for attacking other provisions in the Tort Reform Act. There appears to be a belief among some in the plaintiffs' bar that the *Sofie* decision leads inevitably to the conclusion that the joint and several liability modification must also fall.

To the contrary, there is no logical connection between the

33. *Id.* § 4.22.070(1)(a).

34. *Id.* § 4.22.070(3)(a), (b).

35. *Id.* § 4.22.070(3)(c).

36. Comment, *supra* note 5, at 242.

37. WASH. CONST. art. I, § 21.

38. 112 Wash. 2d 636, 771 P.2d 711, *amended*, 780 P.2d 260 (1989).

39. WASH. REV. CODE § 4.56.250 (1988).

40. *Sofie*, 112 Wash. 2d at 643-66, 771 P.2d at 715-27.

41. *See, e.g.*, Wiggins, Harnetiaux & Whaley, *supra* note 5, at 239-44 (although presenting a laundry list of purported constitutional objections to § 4.22.070, the authors did not include the right to jury trial provision among them).

conclusion that the noneconomic damages cap infringed upon the right to trial by jury and the argument that the joint and several liability modification is similarly infirm. By contrast to the damages cap, section 4.22.070 strengthens the role of the jury in deciding tort actions by ensuring that the jury's determinations on the apportionment of fault are enforced in the entry of the judgment.

The distinctly different nature of the joint and several liability change from the damages cap is illustrated by the Florida Supreme Court's decision in *Smith v. Department of Insurance*.⁴² In that case, the Florida Supreme Court struck down a cap on noneconomic damages in tort cases as a violation of the right of access to the courts under the Florida Constitution.⁴³ But the court upheld a separate provision in Florida's tort reform statute which provided that each defendant in a personal injury action would be liable only for his own percentage share of the plaintiff's losses.⁴⁴ The court found that this distinct provision did not violate any right of access to the courts "because that right does not include the right to recover for injuries beyond those caused by the particular defendant."⁴⁵ Likewise, the right to trial by jury does not include the right to recover damages for which a particular defendant is not responsible.

The actual holdings of the *Sofie* court confirm the inapplicability of the trial by jury guarantee to the joint and several liability modification. The *Sofie* court stressed the fundamental constitutional magnitude of the "jury's fact-finding function," which includes "the determination of the amount of damages."⁴⁶ The cap on damages was held to violate this constitutional guarantee because it had the effect of "directly predetermining the limits of a jury's fact-finding powers" on the issue of damages.⁴⁷

No such intrusion into the jury's fact-finding powers, however, is occasioned by a limitation on the joint and several liability doctrine. The opposite is true. The jury is granted the power to apportion culpability among all parties and responsible entities. By apportioning fault, the jury also determines

42. 507 So. 2d 1080 (Fla. 1987).

43. *Id.* at 1087-90.

44. *Id.* at 1090-91.

45. *Id.* at 1091.

46. *Sofie*, 112 Wash. 2d at 651, 771 P.2d at 719.

47. *Id.* at 666, 771 P.2d at 727.

the cause of that share of the damages. Thus, the jury's key role in determining responsibility and allocating fault is actually strengthened by section 4.22.070. In contrast with the cap on damages, which the *Sofie* court held nullified the jury's findings, section 4.22.070 removes the artificial joint and several liability rule under most circumstances and instead gives fuller effect to the jury's allocation of fault among the defendants.

In sum, the key to the result in *Sofie* was that the imposition of a cap on damages "directly change[d] the outcome of a jury determination."⁴⁸ By eliminating joint and several liability in most cases, section 4.22.070 not only does not change the outcome of the jury's determination on the degree of fault, it confirms that decision and requires that the jury's findings be reflected in the final award of damages against each individual defendant.

IV. DUE PROCESS

A. *Substantive Due Process and Fundamental Fairness*

Although objections to section 4.22.070 may be garbed in constitutional clothing, a common theme in many of these arguments is that the partial abolition of joint and several liability is simply unfair.⁴⁹ The detractors of this statutory revision apparently believe that, under principles of fundamental fairness, a plaintiff must be allowed to place the full burden of damages on any one of several tortfeasors available to be sued, however large or small that entity's contribution to the harm. In essence, this fundamental fairness argument reflects an attempt to engraft a heightened "substantive" protection onto the due process clause of the Washington Constitution,⁵⁰ and to thereby confer on the courts the authority to adjudge the wisdom of legislative enactments.

This effort to revive discarded notions of substantive due process should be firmly rejected as inconsistent with precedent in Washington. In *Aetna Life Insurance Company v. Washington Life and Disability Insurance Guaranty Association*,⁵¹ the Washington Supreme Court ruled:

48. *Id.* at 654, 771 P.2d at 720.

49. See Wiggins, Harnetiaux & Whaley, *supra* note 5, at 236-38 (characterizing modifications in § 4.22.070 as "unfair" and therefore "unreasonable").

50. WASH. CONST. art. I, § 3.

51. 83 Wash. 2d 523, 520 P.2d 162 (1974).

Th[e] unfortunate history of the due process clause in the United States Supreme Court presents to this court a sobering lesson in the necessity for judicial deference to the legislature in the exercise of its police power to accomplish economic regulation.

Were we to accept appellant's invitation to void the act here on substantive due process grounds, we would set a precedent for embarking upon a course already traveled and finally rejected by the United States Supreme Court.⁵²

The Washington Constitution's due process clause is patterned after the federal constitutional counterpart and provides that "[n]o person shall be deprived of life, liberty, or property without due process of law."⁵³ Because of the virtual identity of language in both clauses, the Washington Supreme Court has ruled that the state constitutional provision generally is to be read together with the due process clause of the United States Constitution.⁵⁴ Therefore, holdings of the United States Supreme Court regarding due process, while not controlling, are entitled to great weight.⁵⁵

The United States Supreme Court has continually refused to adopt any heightened scrutiny of the substance of legislation under the due process clause. In *Duke Power Company v. Carolina Environmental Study Group*,⁵⁶ the Court expressly declined to adopt a "more elevated standard of review" for a due process challenge to a statutory limitation on tort liability.⁵⁷ Washington courts have likewise held that a statute may be invalidated on "substantive" due process grounds only if it is arbitrary or unreasonable.⁵⁸

In any event, accusations of substantive due process violations cast against section 4.22.070 turn the truth upside-down. The true inequity was that the doctrine of joint and several liability lingered on after the advent of the theory of comparative

52. *Id.* at 534, 520 P.2d at 169.

53. WASH. CONST. art. I, § 3. The United States Constitution provides that "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

54. *See, e.g., In re Young*, 95 Wash. 2d 216, 622 P.2d 373 (1980).

55. *See, e.g., In re Reismiller*, 101 Wash. 2d 291, 678 P.2d 323 (1984); *In re Young*, 95 Wash. 2d 216, 622 P.2d 373 (1980); *Olympic Forest Prods. v. Chaussee Corp.*, 82 Wash. 2d 418, 421-22, 511 P.2d 1002, 1005 (1973).

56. 438 U.S. 59 (1978).

57. *Id.* at 83-84.

58. *Danielson v. City of Seattle*, 45 Wash. App. 235, 244, 724 P.2d 1115, 1120 (1986), *aff'd*, 108 Wash. 2d 788, 742 P.2d 717 (1987); *Grader v. City of Lynnwood*, 53 Wash. App. 431, 438-39, 767 P.2d 952, 956, *cert. denied*, 110 S.Ct. 243 (1989).

fault moved modern tort law beyond the rigid concepts of the common law.⁵⁹

The detractors who challenge the basic equity of section 4.22.070 forget that true fairness requires consideration of the defendant as well as the plaintiff. As the Kansas Supreme Court held in rejecting the doctrine of joint and several liability:

There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the codefendant to pay more than his fair share of the loss. The same is true if one of the defendants is wealthy and the other is not.⁶⁰

Under the prior, incomplete system adopted in 1973,⁶¹ which provided for comparative fault only between plaintiffs and defendants, plaintiffs were encouraged to target "deep

59. At common law, three strict and often harsh rules of liability prevailed:

1. A plaintiff who was contributorily negligent, however slightly, could not recover any amount from any defendant;
2. A defendant who was responsible only in part for a plaintiff's injury could not obtain contribution from other negligent defendants for monies paid to a plaintiff; and
3. A plaintiff had the right to collect all damages awarded in the judgment against any one of several defendants, at the plaintiff's unrestricted election.

Over a period of years, slowly but deliberately, the Washington Legislature abandoned the all-or-nothing common law approach. That outdated legal regime based on concepts of the unity of harm and the refusal to measure degrees of fault has now been largely superseded by a progressive comparative fault system. In 1973, the Washington Legislature adopted a pure comparative negligence statute to replace the contributory negligence rule with the concept of relative fault between plaintiffs and defendants. 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 (1989)). This was the first step. In 1981, the legislature enacted legislation permitting a defendant who bore the brunt of a judgment to seek contribution from other defendants also found to be at fault. Act of April 17, 1981, ch. 27, §§ 12-14, 1981 Wash. Laws 118-19 (codified at WASH. REV. CODE § 4.22.040-.060 (1989)). This was the second step. Finally, through the Tort Reform Act of 1986, the legislature put in place a complete and nearly pure system of comparative fault by largely abandoning the doctrine of joint and several liability. Tort Reform Act of 1986, ch. 305, § 401, 1986 Wash. Laws 1357 (codified at WASH. REV. CODE § 4.22.070 (1989)).

60. *Brown v. Keill*, 224 Kan. 195, 203, 580 P.2d 867, 874 (1978).

61. 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 (1989)).

pocket" defendants, typically entities, such as governmental agencies and large corporations, who although perhaps only marginally at fault had a greater ability to pay. Consider the example of an immune or judgment-proof defendant who was 70 percent at fault, another "deep pocket" defendant who was 10 percent at fault, and a plaintiff who was 20 percent at fault. Under the governing law prior to the 1986 Tort Reform Act, the plaintiff who was 20 percent responsible for his or her own damages could recover 80 percent of the damages from the defendant who was only 10 percent responsible. It is impossible to justify such a result; this outcome properly cannot obtain under the new statute.⁶²

Washington's new approach—a nearly pure comparative fault system among all parties and entities—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. Under a tort system of liability based on comparative fault, the "primal concept that . . . the extent of fault should govern the extent of liability—remains irresistible to reason and all intelligent notions of fairness."⁶³ Section 4.22.070 fully comports with principles of fundamental fairness under any theory of substantive due process.

*B. Purported Due Process Right to Quid Pro Quo or
Adequate Alternative Remedy for Change in
Common Law Rule*

It is much too late in the day to contend that any party has a vested due process right in the continuation of a common law rule—or any rule of law—for his own benefit.⁶⁴ Simply because the doctrine of joint and several liability persisted for decades before the evolution to comparative fault does not make it an inalienable right. As the Washington Supreme Court held in *Godfrey v. State*:⁶⁵

62. *But see* WASH. REV. CODE § 4.22.070(3) (1989) (defining three exceptions to the modification of joint and several liability).

63. *Bartlett v. New Mexico Welding Supply*, 98 N.M. 152, 156, 646 P.2d 579, 583 (N.M. Ct. App. 1982), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (N.M. 1982) (quoting *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975)); *see also* *Laubach v. Morgan*, 588 P.2d 1071, 1075 (Okla. 1978).

64. *See* *New York Cent. R.R. v. White*, 243 U.S. 188, 198 (1917) ("no person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit").

65. 84 Wash. 2d 959, 530 P.2d 630 (1975).

Due process does not prevent a change in the common law as it previously existed. There is neither a vested right to an existing law which precludes its amendment or repeal nor a vested right in the omission to legislate on a particular subject. The Fourteenth Amendment does not curtail a state's power to amend its laws, common or statutory, to conform to changes in public policy. A vested right, entitled to protection from legislation, must be something more than a *mere expectation* based upon an anticipated continuance of the existing law; *it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another.*⁶⁶

Indeed, in the context of the Tort Reform Act of 1986, the Washington Supreme Court in *Daggs v. City of Seattle*⁶⁷ explained that "a tort victim has no right to recover under the old common law system, even if the new Tort Reform Act would adversely affect the total amount he or she would receive as damages."⁶⁸

Although challengers to section 4.22.070 generally stop short of asserting any vested right in the continuation of a common law rule, they contend there is a due process requirement of some quid pro quo or adequate alternative remedy that must be provided to plaintiffs in exchange for the loss of the joint and several liability doctrine.⁶⁹ But this reasonable substitute remedy demand is simply another way of contending that plaintiffs had a vested right in the common law joint and several liability rule. Only if the right is regarded as vested in some manner can it be contended that a quid pro quo is a prerequisite to its alteration.⁷⁰

66. *Id.* at 962-63, 530 P.2d at 632 (citations omitted; emphasis in original); *see also* *Silver v. Silver*, 280 U.S. 117, 122 (1929) ("the Constitution does not forbid the creation of new [common law] rights, or the abolition of old ones . . . to attain a permissible legislative object"); *Grimesy v. Huff*, 876 F.2d 738, 744 (9th Cir. 1989) (finding no fifth amendment violation in statute withdrawing cause of action and thereby barring pending claim); *In re Consolidated United States Atmospheric Testing Litig.*, 820 F.2d 982, 989 (9th Cir. 1987) (a cause of action "is inchoate and affords no definite or enforceable property right until reduced to final judgment"), *cert. denied*, 485 U.S. 905 (1988); *Baldwin v. City of Waterloo*, 372 N.W.2d 486, 492 (Iowa 1985) (there is no vested due process right in the continuation of the doctrine of unlimited joint and several liability).

67. 110 Wash. 2d 49, 750 P.2d 626 (1988).

68. *Id.* at 57, 750 P.2d at 630.

69. Wiggins, Harnetiaux & Whaley, *supra* note 5, at 211-20.

70. One commentator has expressed the view that the due process clause of the federal constitution restricts the authority of the legislature to limit the rules governing tort recoveries without providing just compensation for the loss suffered by

Given the clear statement by the Washington Supreme Court that the legislature is free to alter common law rules, "both judicial precedent and common sense call for the courts to reject [the quid pro quo theory]."⁷¹ As one commentator has warned:

To require a legislature to create a "reasonable substitute" every time that it abrogates or modifies outmoded common law actions or defenses forces state policymakers into a legislative straight jacket. Moreover, by immunizing common law rights from total abrogation, the doctrine effectively raises common law causes of action to the level of constitutional rights, a status they were never intended to have. The fundamental assumption of common law development has always been that doctrines and rights could grow or recede, depending on the social needs or mores of the time. To freeze common law rights under the protection of the due process clause destroys this potential for evolution and undermines the creative potential of the common law.⁷²

Of those few states which have applied a quid pro quo analysis to changes in common law rules, a number have viewed that requirement as incorporated within state constitutional provisions guaranteeing a remedy for legal wrongs.⁷³

the change. Rudolph, *The Tort Crisis: Causes, Solutions, and the Constitution*, 11 U. PUGET SOUND L. REV. 659, 674-81 (1988). This argument, however, seems to be simply a variant of the quid pro quo theory since compensation would not be required unless the governmental action involved the taking of a vested property right. Moreover, Professor Rudolph formulates this requirement in terms of an affirmative obligation on behalf of the government to protect citizens from intentional or negligent infliction of injury by providing for a statutory remedy. *Id.* Very recently, however, the United States Supreme Court rejected the idea that the due process clause not only limits the use of governmental powers but affirmatively requires that they be exercised to protect citizens, absent the formulation of a special ward relationship between the government and the citizen seeking protection. *DeShaney v. Winnebago County Dept. of Social Servs.*, 109 S.Ct. 998 (1989). In any event, Professor Rudolph views the joint and several liability modification in the Tort Reform Act as justifiable under his analysis because it increases fairness in the liability system. Rudolph, *supra*, at 675.

71. Comment, *Developments in the Law, The 1986 Washington Tort Reform Act: Noneconomic Damages Cap (RCW 4.56.250)*, 23 WILLAMETTE L. REV. 211, 215, 227 (1987).

72. Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 787 (1977); see also Prendergast v. Nelson, 199 Neb. 97, 113, 256 N.W.2d 657, 671 (1977) ("[t]here is no merit to the argument that if a common law right is to be taken away something must be given in return").

73. See, e.g., *Firemen's Fund Am. Ins. Co. v. Coleman*, 394 So. 2d 334, 335-56 (Ala. 1980); *Caviness v. City of Vale*, 86 Or. 554, 562-63 169 P. 95, 98 (1917); *Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983). See generally Redish, *supra* note 72, at 788.

Although an early draft of the Washington Constitution of 1889 contained a clause guaranteeing that "every person shall have remedy by due course of law for injury done to him in his person, property or reputation,"⁷⁴ that remedy language was dropped altogether by the Washington constitutional convention.⁷⁵ In *Shea v. Olson*,⁷⁶ the Washington Supreme Court declared that Washington's Constitution lacked any remedy provision:

In this state, the constitution contains no such [remedy] provision, but only the general "due process" and "equal protection" clauses. There is, therefore, no express, positive mandate of the constitution which preserves [tort] rights of action from abolition by the legislature⁷⁷

In view of the court's rulings in *Shea* and *Godfrey v. State*,⁷⁸ affirming unequivocally the authority of the Legislature to modify and abolish rules of the common law, the quid pro quo theory has no currency in Washington.⁷⁹ Any attempt

74. JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889, at 51 (B. Rosenow ed. 1962).

75. Instead of adopting a remedy provision similar to the Oregon Constitution as was proposed at the Washington constitutional convention, *id.* at 499 & n.18, the Washington Constitution, article I, § 10, states only: "Justice in all cases shall be administered openly, and without unnecessary delay." It is a quantum leap from that "open access" provision to a guarantee of a right to a particular tort remedy or substantive rule of law.

76. 185 Wash. 143, 53 P.2d 615 (1936).

77. *Id.* at 160-61, 53 P.2d at 622.

One student law review Comment has urged implication of a remedy provision into article I, § 10 of the Washington Constitution to limit legislative modification of tort law rules. Comment, *State Constitutional Remedy Provisions and Article 1, Section 10 of the Washington State Constitution: The Possibility of Greater Judicial Protection of Established Tort Causes of Action and Remedies*, 64 WASH. L. REV. 203 (1989). The student author acknowledged that remedy language had been deleted by the constitutional framers, *id.* at 215-18, and that the *Shea v. Olson* decision expressly disclaimed the presence of a remedy guarantee in the Washington Constitution, *id.* at 218-19. Nevertheless, the author, invoking "the state court's freedom to confer additional rights and safeguards," suggested that neither the adverse historical record nor precedent should dissuade Washington courts from adopting a constitutional provision which the framers omitted. *Id.* at 219, 225-26. This unusually bald appeal to judicial activism in its rawest form is unlikely to be accepted.

78. *Godfrey*, 84 Wash. 2d 959, 962-63, 530 P.2d 630, 632 (1975); see also *supra* text accompanying note 66 (quoting *Godfrey*).

79. The only true case law support for the quid pro quo theory is a concurring opinion in a 1936 Washington decision. See *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 426-27, 63 P.2d 397, 410 (1936) (Tolman, J., concurring). The most recent decisions, *Godfrey v. State*, 84 Wash. 2d 959, 530 P. 2d 630 (1975) and *Daggs v. City of Seattle*, 110 Wash. 2d 49, 750 P. 2d 626 (1988), emphatically reject attempts to vest common law rules into constitutional mandates.

to devise a new right to an adequate alternative remedy before supposedly vested common law rules may be modified must be squarely rejected. The quid pro quo concept is actually just part and parcel of a substantive due process theory, another theory which has been discredited in Washington.⁸⁰

In any event, even if a quid pro quo were required, section 4.22.070, together with other related statutes, amply supplies that substitute remedy. This is clearly seen when the abolition or limitation of joint and several liability is considered in the fuller context of the evolution of a comparative fault system in Washington.

Prior to the adoption of the 1973 comparative negligence statute,⁸¹ a culpable defendant could avoid judgment by showing even the slightest culpability on the part of the plaintiff. Thus, in the ordinary case where a plaintiff bears at least some responsibility for his own injury, the abolition of joint and several liability takes nothing away from the plaintiff that was available at common law. At common law, that contributorily negligent plaintiff was barred absolutely from any recovery. The equitable quid pro quo for abrogating the harsh rule of contributory negligence and allowing a partially culpable plaintiff to recover is now to also limit the plaintiff's recovery against a given defendant to the share of damages caused by that defendant.

In the case of the truly innocent plaintiff, who is not even slightly at fault for his own injury, the 1986 Tort Reform Act preserves joint and several liability among those defendants to the action against whom judgment is entered.⁸² It is true that this is a limited form of joint and several liability and does not require those defendants to pay the proportionate share of damages attributable to the actions of immune entities, entities released by the plaintiff, or entities that have an individual defense to liability. These limitations, however, are amply justified.

In the case of entities released by the plaintiff and entities that have an individual defense to liability, the inability to obtain recovery is properly laid at the plaintiff's door. Once a plaintiff releases an entity from liability, there is no logical

80. See *supra* notes 51-58 and accompanying text.

81. 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 (1989)).

82. WASH. REV. CODE § 4.22.070(1)(b) (1989).

reason to permit the plaintiff to hold an unreleased defendant liable for the released entity's share of the loss. It is appropriate that a plaintiff "profit[] from a wise settlement and suffer[] from a poor one."⁸³ Similarly, if 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.

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.⁸⁴ 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.⁸⁵ 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.

Because governmental entities have largely shed the cloak of sovereign immunity, the instances in which a culpable entity may assert immunity from suit are decreasing. Probably the most common circumstance in which immunity may still be claimed is also the one in which the presence of an adequate alternative remedy is most manifest.⁸⁶ Under the workers'

83. Harris, *Washington's 1986 Tort Reform Act: Partial Tort Settlements After the Demise of Joint and Several Liability*, 22 GONZ. L. REV. 67, 90 (1986/87) (viewing this result as a disadvantageous one).

84. *Brown v. Keill*, 224 Kan. 195, 203, 580 P.2d 867, 874 (1978).

85. *In re Air Crash Disaster at Stapleton Int'l Airport*, 720 F. Supp. 1465, 1466-67 (D. Colo. 1989).

86. One other recurring situation involves injuries to children who were not properly supervised or warned by their parents. Parents are immune from liability to their children in this situation. *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, 82-84 (1986). However, in a lawsuit brought against a third party for the child's injury, it is likely that a parent could waive immunity and be joined as a

compensation statute, an employer is immune from suit in an action involving injuries to an employee,⁸⁷ although a tort action may still be brought against a third party, such as the manufacturer of machinery or equipment used by the employee at the time of the injury. Under section 4.22.070, an injured employee may no longer recover from the third party that share of the damages which were attributable to the actions of the immune employer. Nevertheless, there are two reasons why the injured employee cannot complain about a deprivation of just compensation.

First, there was certainly nothing just about the former regime under which liability for the total loss could be imposed on a third party although the plaintiff had already been compensated by workers' compensation for the employer's share of the liability.⁸⁸ The old rule, which placed full liability on a third-party tortfeasor when an employer was at least partially responsible, was indefensible. Since the industrial insurance program functions as a statutory substitute for a tort action accusing the employer of wrongful conduct, the employee's claim for the employer's share of the damages should be regarded as having been satisfied by the payment of workers' compensation benefits.

Second, and in keeping with the principle that industrial insurance is a substitute for a tort action against the employer, the workers' compensation statute was amended in the Tort Reform Act of 1986 to assure 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."⁸⁹ Subsection (f) was added to Wash-

defendant in order to allow the child to take advantage of the limited joint and several liability provision. If the parent were so joined, and assuming that the child was without contributory blame, the other defendants would remain jointly and severally liable for that portion of the damages attributable to the parent's neglect. Peck, *supra* note 14, at 245. But even if a parent cannot be so joined, 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.

87. WASH. REV. CODE § 51.04.010 (1989).

88. However, under the prior system, the employee who recovered from a third party was required to reimburse the state Department of Labor and Industries or the self-insured employer for at least part of the workers' compensation benefits already paid. WASH. REV. CODE § 51.24.060 (1985).

89. Comment, *Development in the Law, The 1986 Washington Tort Reform Act:*

ington Revised Code section 51.24.060⁹⁰ to provide that workers who can show their injuries were caused in part by an employer or coemployee will be able to keep the entire judgment against third-party tortfeasors and will not have to reimburse the Department of Labor and Industries for any workers' compensation benefits.

In this way, the Tort Reform Act "gives back to the injured worker some of what . . . the elimination of joint and several liability[] takes away."⁹¹ This additional benefit quite adequately compensates employees for the loss of joint and several liability while also avoiding the inequity of holding a third party liable for all damages when an employer or coemployee was also partially at fault. Indeed, at least one commentator believes the Tort Reform Act is unduly generous in this respect and that "[a] favored class of personal injury claimants has been created at the expense of the industrial insurance funds and industry."⁹²

Even if the new comparative fault system does not always provide as much in the way of recovery to a plaintiff as the prior common law system, that is no basis for a constitutional challenge. The Washington Supreme Court has upheld against constitutional attack statutory compensation systems which did not precisely duplicate the benefits available at common law. For example, in *Haddenham v. State*,⁹³ the court approved a statute that simultaneously abolished all claims against the state arising out of criminal conduct and instituted a system of fixed compensation for crime victims. The court noted that tort claims against the state were abrogated in consideration for the provision of assured compensation to all crime victims "irrespective of questions of negligence and fault."⁹⁴ Likewise, in *Stertz v. Industrial Insurance Commission*,⁹⁵ the court upheld the workers' compensation scheme as part of the statutory compromise assuring a certain recovery although the injured employee had "to accept far less than he had often won

Apportionment of Damages in Workers' Compensation (RCW 51.24.060), 23 WILLAMETTE L. REV. 211, 249, 250 (1987).

90. Tort Reform Act of 1986, ch. 305, § 403, 1986 Wash. Laws 1358-61 (codified at WASH. REV. CODE § 51.24.060(f) (1989)).

91. Comment, *supra* note 89, at 249-50.

92. Bush, *The Impact of the Tort Reform Act Upon the Industrial Insurance Act*, 22 GONZ. L. REV. 121, 130 (1986/87).

93. 87 Wash. 2d 145, 550 P.2d 9 (1976).

94. *Id.* at 151, 550 P.2d at 13.

95. 91 Wash. 588, 158 P. 256 (1916).

in court."⁹⁶

In addition to the direct alternative remedies to joint and several liability afforded to contributorily negligent plaintiffs through the adoption of a comparative fault system and to injured workers by protected benefits under the workers' compensation program, a substantial quid pro quo may also be found in the overall benefits achieved through tort reform. The enhancement of equity and justice through a pure comparative fault system and the availability and reduction in costs of insurance anticipated by the legislature are substantial benefits to the entire community.⁹⁷ This societal quid pro quo inures to the benefit of plaintiffs as well because the increased availability and affordability of insurance means that more defendants in civil actions will have adequate insurance to pay judgments.

C. *Procedural Due Process*

Concerns have also been raised about procedural problems in the implementation of section 4.22.070.⁹⁸ In particular, it has been suggested that proper notice and an opportunity to be heard may be lacking when fault is attributed to an entity that is not actually joined as a defendant in the lawsuit.⁹⁹

Although a cause of action may be a "species of property protected by the . . . Due Process Clause,"¹⁰⁰ that proposition "does not answer the question of what process is due."¹⁰¹ The modification of the joint and several liability rule is a substantive change in the cause of action that is not subject to review under due process.¹⁰² Instead, because the value of an inchoate cause of action "is contingent on successful prosecution to judg-

96. *Id.* at 590-91, 158 P. at 258.

97. See *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 160 n. 18, 695 P.2d 665, 681-82 n.18, 211 Cal. Rptr. 368, 385 n.18 (a viable medical malpractice insurance industry would constitute an adequate quid pro quo benefit), *appeal dismissed*, 474 U.S. 892 (1985); *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585, 599 (1980) (societal quid pro quo for cap on tort damages found in the availability and reduction in costs of insurance, the reduction in medical costs, and the preservation of health care services for the benefit of the entire community, including plaintiffs). See generally Comment, *supra* note 71, at 224-25 & nn.45-46.

98. Peck, *supra* note 5, at 690-93.

99. *Id.* at 694-703.

100. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

101. *In re Consolidated United States Atmospheric Testing Litig.*, 820 F.2d 982, 989-90 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988).

102. *Logan*, 455 U.S. at 432-33; *In re Air Crash Disaster at Stapleton Int'l Airport*, 720 F. Supp. 1465, 1467 (D. Colo. 1989) (upholding Colorado's abolition of joint and several liability against due process challenge).

ment,"¹⁰³ the only due process inquiry "focuses on assuring access to fair procedures for its prosecution."¹⁰⁴

Thus, the question presented is whether the procedures for apportioning fault among all responsible entities, including entities not actually joined as defendants, allow a plaintiff an "opportunity to present his case and have its merits fairly judged."¹⁰⁵ As long as all entities responsible for a plaintiff's injury (including unjoined entities) are described in some way and as long as the plaintiff has an opportunity to be heard and present evidence on the culpability of these entities, the minimal procedural guarantees of due process will be satisfied.

In the usual case, the identity of unjoined entities that may also be responsible for the injury will be readily apparent. In any event, the plaintiff will be apprised of the existence of such entities through discovery and the listing of witnesses for the trial. Whether or not the plaintiff can name an entity as a party, the plaintiff will have had ample opportunity to explore that entity's potential responsibility and to meet any evidence concerning the culpability of nonparty entities. Even though one of the chairs at trial may be "empty" in the sense that an entity has not been or cannot be joined as a party, that entity may still be called to court as a witness if identified.

Moreover, whether or not an unjoined entity has any incentive to contest the allocation of fault to it, both plaintiffs and defendants will have strong incentives to present evidence and confront witnesses on the question of the entity's culpability.¹⁰⁶ The nonparty status of the entity should raise no difficulties, at least not of constitutional dimension, in the presentation of the case by the adverse plaintiffs and defendants. The courts can establish rules requiring adequate notice and an opportunity to be heard on the attribution of fault to entities not joined in the lawsuit. Indeed, these are precisely

103. *In re Consolidated United States Atmospheric Testing Litig.*, 820 F.2d at 989; see also *Haddenham v. State*, 87 Wash. 2d 145, 149, 550 P.2d 9, 13 (1976) ("a tort cause of action is not vested until it has been reduced to judgment").

104. *In re Consolidated United States Atmospheric Testing Litig.*, 820 F.2d at 989.

105. *Logan*, 455 U.S. at 433; see also *Parratt v. Taylor*, 451 U.S. 527, 540 (1981) (procedural due process guarantees the right to reasonable notice and a meaningful opportunity to be heard).

106. See *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1231 (9th Cir. 1989) (although there will be "finger-pointing" at the "empty chair" of settling defendants whose fault must still be apportioned as against remaining defendants in securities litigation, the "financial motives of both plaintiffs and non-settling defendants to vigorously press their arguments at trial will be unchanged").

the kinds of mechanical matters pertaining to the procedures of the courts over which the Washington Supreme Court has asserted exclusive authority.¹⁰⁷

Even before the Tort Reform Act of 1986, when an injured employee brought a personal injury action against a third party, the Washington Supreme Court held the third party was entitled to contend that the employer had been solely at fault, notwithstanding the fact that the employer was immune from liability under the workers' compensation program and thus had not been joined as a defendant.¹⁰⁸ This pronouncement would appear to answer any argument that attributing fault to an unjoined entity is somehow improper. If evidence of another person's conduct is relevant to a case, whether that person is a party has no bearing on whether that evidence should be admitted and considered by the trier of fact.¹⁰⁹

One commentator has suggested that the due process requirements of notice and an opportunity to be heard would be violated by assignment of fault to an unknown entity, such as a "phantom" driver of an automobile who leaves the scene of an accident without being identified.¹¹⁰ Assuming fault may indeed be attributed to an unidentified tortfeasor under the statute,¹¹¹ it is not clear why this raises any insurmountable due process obstacles.¹¹² The fact that an entity cannot be

107. *State v. Smith*, 84 Wash. 2d 498, 501-02, 527 P.2d 674, 676-77 (1974).

108. *Lamborn v. Phillips Pac. Chem. Co.*, 89 Wash. 2d 701, 706-07, 575 P.2d 215, 219 (1978); *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wash. 2d 85, 88, 549 P.2d 483, 486 (1976).

109. *See Lamborn*, 89 Wash. 2d at 706, 575 P.2d at 219.

110. *Peck*, *supra* note 5, at 697.

111. Subsection 4.22.070(1) specifies several types of entities whose percentage of fault must be determined by the trier of fact—"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." *See WASH. REV. CODE* § 4.22.070(1) (1989). Since unknown entities are not so denominated, an argument could perhaps be made that the statute does not contemplate apportionment of fault to an unknown tortfeasor. However, the subject provision begins by stating that the "trier of fact shall determine the percentage of fault which is attributable to every entity which caused the claimants [sic] damages." *Id.* (emphasis added). Accordingly, the listed entities appear to be simply representative examples "includ[ed]" within the broader category of "every entity." *Id.*

112. In *Bartlett v. New Mexico Welding Supply*, 98 N.M. 152, 646 P.2d 579 (N.M. Ct. App. 1982), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (N.M. 1982) the New Mexico Court of Appeals abolished the doctrine of joint and several liability in the context of an automobile accident in which 70 percent of the fault was assigned by the jury to an unknown driver who left the scene of the accident. *Id.* at 153, 646 P.2d at 580. Without expressly addressing possible due process concerns, the court held it was

identified does not necessarily mean there is any lack of evidence concerning the entity's existence or the extent to which that 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.

Certainly a defendant is entitled to avoid liability altogether by proving that an unknown entity was the sole cause of the plaintiff's harm. There is, therefore, 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. Similarly, a defendant indisputably could argue that an accident occurred, not because of the defendant's negligence, but rather by virtue of unusual weather conditions. In blaming an "Act of God," a defendant would not then be required to call the Almighty to the stand to be examined. Thus, the behavior of a "phantom" or unknown tortfeasor can be verified by evidence in much the same way as the parties establish the objective circumstances surrounding or the context underlying an alleged tort.

Admittedly, section 4.22.070 neglects to spell out precise procedures to be applied after the adoption of the pure comparative fault system. But the fact that a statute's "language leaves a number of issues of interpretation and application to be decided in future cases . . . provide[s] no justification for striking down the measure on its face."¹¹³ Even critics of section 4.22.070 have generally acknowledged that the judiciary is empowered to develop solutions to most procedural problems that arise so as to sustain and implement a new statutory scheme.¹¹⁴

proper to instruct the jury to apportion negligence to all tortfeasors, including the unknown driver. *Id.* at 159, 646 P.2d at 586.

113. *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1193, 753 P.2d 585, 587, 246 Cal. Rptr. 629, 631, *reh'g denied*, 44 Cal. 3d 1188, 246 Cal. Rptr. 629, 753 P.2d 585 (1988) (considering constitutional challenge to statute limiting joint and several liability).

114. Peck, *supra* note 5, at 693.

V. EQUAL PROTECTION/PRIVILEGES AND IMMUNITIES

A. Introduction

Article I, section 12 of the Washington Constitution provides: "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."¹¹⁵

In *American Network, v. Washington Utilities & Transportation Commission*,¹¹⁶ the Washington Supreme Court reaffirmed its longstanding position: "The privileges and immunities clause of the Washington State Constitution (article I, section 12) and the equal protection clause of the fourteenth amendment are substantially identical and have been considered by this Court as one issue."¹¹⁷ The central command of the equal protection and privileges and immunities clauses, of course, is that the government may not treat classes of people differently unless there is a reasonable basis for the differentiation.¹¹⁸

Detractors of the statutory modification of joint and several liability contend that classifications purportedly created by section 4.22.070 violate the constitutional guarantees of equal protection under the federal constitution and of privileges and immunities under the state constitution.¹¹⁹ They argue that, applying a form of elevated scrutiny, the statute impairs a constitutionally recognized right of injured plaintiffs to full compensation for all damages sustained. Moreover, they entreat the Washington courts to adopt a construction of Washington's

115. WASH. CONST. art. I, § 12.

116. 113 Wash. 2d 59, 776 P.2d 950 (1989).

117. *Id.* at 77, 776 P.2d at 960; see also *In re Borders*, 114 Wash. 2d 171, 175, 789 P.2d 786 (1990) (the privileges and immunities clause provides protection substantially identical to that of the equal protection clause); *Caminiti v. Boyle*, 107 Wash. 2d 662, 676, 732 P.2d 989, 998 (1987) (the privileges and immunities clause provides protection substantially identical to that of the equal protection clause), *cert. denied*, 484 U.S. 1008 (1988).

118. *Haddenham v. State*, 87 Wash. 2d 145, 150, 550 P.2d 9, 13 (1976) ("[t]he guaranty is not of absolute equality, requiring the law to treat all persons exactly alike" but rather whether there is a reasonable basis for the lines drawn).

119. Wiggins, Harnetiaux & Whaley, *supra* note 5, at 198-200, 204-11, 239-41. The equal protection/privileges and immunities arguments by opponents of the statute track and duplicate much of the argument pertaining to substantive due process objections to the fundamental fairness of the modification of joint and several liability. Accordingly, the earlier discussion concerning the basic equity underlying this statutory implementation of the comparative fault basis for modern tort liability has relevance for this inquiry as well. See *supra* notes 59-63 and accompanying text.

privileges and immunities clause that extends beyond equal protection, giving heightened protection to tort plaintiffs and circumscribing legislative authority to effect changes in common law liability doctrines.

By so contending, these commentators urge the Washington courts to embrace a novel and unduly intrusive model for judicial review of legislative enactments, one untethered to objective constitutional standards. Unless the Washington courts are to embark upon an unprecedented era of activism, overturning long-standing principles of constitutional interpretation and engaging in exacting scrutiny of statutes touching upon a broad array of public concerns, this invitation should be declined. In any event, section 4.22.070 does not deny any plaintiff access to relief. By any standard, its provisions are rationally, indeed substantially, related to the important purpose of furthering greater equity in the rules for imposition of tort liability.

B. *Standard of Review*

Under traditional equal protection analysis, most statutes are reviewed under a deferential rational basis test. Where no "suspect classification," such as race, or "fundamental right" is involved,¹²⁰ the test is whether any difference in treatment established by statutory classifications "is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the legislature's actions were irrational."¹²¹ The rational basis test is satisfied "if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose."¹²²

Opponents of Washington's Tort Reform Act, however, contend that the revision or abrogation of common law tort rules, such as the modification of joint and several liability found in section 4.22.070, must be analyzed under an elevated level of judicial scrutiny. They do not contend that a modification of common law doctrines may be subjected to strict scrutiny, which applies to classifications that affect a suspect class

120. See generally *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-40 (1985); *Forbes v. Seattle*, 113 Wash. 2d 929, 940 & n.11, 785 P.2d 431, 437 n.11 (1990).

121. *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

122. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196 (1982); see also *Paulson v. County of Pierce*, 99 Wash. 2d 645, 652, 664 P.2d 1202, 1207 (statute "will not be invalidated unless it rests on grounds wholly irrelevant to the achievement of a legitimate state objective"), *appeal dismissed*, 464 U.S. 957 (1983).

or impinge upon a fundamental constitutional right. Rather, they urge the courts to apply an "intermediate" or "heightened" level of review, arguing that injured plaintiffs constitute some sort of "semi-suspect" class and that the right to recovery in tort is an important, if not fundamental, right warranting a level of protection higher than that of rational basis.¹²³

The premises of this argument, however, are flawed. First, the United States Supreme Court has reserved intermediate scrutiny for certain unique classifications, such as gender or illegitimacy, which demonstrate at least some of the traditional indicia of a suspect class.¹²⁴ And the Washington courts have not departed from the two-tiered scrutiny model even in these contexts. Instead, gender, for example, has been treated as a "suspect" class under Washington law.¹²⁵

It has yet to be persuasively demonstrated that tort plaintiffs "define a 'discrete and insular' group in need of 'extraordinary protection from the majoritarian political process.'" ¹²⁶

123. Peck, *supra* note 5, at 683 (asserting that "[t]he right to a remedy for physical harm inflicted on a person by what is recognized as wrongful conduct should be at the forefront of those rights entitled to [constitutional] protection"); Wiggins, Harnetiaux & Whaley, *supra* note 5, at 198-200, 204-11, 339-41 (arguing indemnification for personal injuries is a substantial property right warranting application of intermediate scrutiny analysis to statutes affecting the right); Comment, *Constitutional Challenges to Washington's Limit on Noneconomic Damages in Cases of Personal Injury and Death*, 63 WASH. L. REV. 653, 666 (1988) (contending that "the right to be compensated for personal injuries is important enough that statutes burdening the right trigger intermediate scrutiny").

124. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (gender); *Craig v. Boren*, 429 U.S. 190 (1976) (gender); *Mathews v. Lucas*, 427 U.S. 495, 505 (1975) (illegitimacy).

125. *American Network, Inc. v. Washington Utils. & Transp. Comm'n*, 113 Wash. 2d 59, 77-78 n.5, 776 P.2d 950, 960 n.5 (1989).

126. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1975) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938)). The objective evidence indicates that the interests of tort plaintiffs are well represented in the democratic political process. The American Trial Lawyers Association (ATLA), representing plaintiffs' attorneys, created a political action committee (PAC) to contribute money to legislative candidates opposed to tort reform measures. Maxwell, *Law-Firm Influence: Law-Related PACs Get \$2.75 Million Start on 1990 Election*, 76 A.B.A. J. 18 (Jan. 1990). The ATLA PAC "raised more than \$3.5 million in the 1987-88 [campaign] cycle, ranking it 13th among the nation's roughly 4,200 PACs." *Id.* The Washington State Trial Lawyers Association (WSTLA) has flexed similar political muscle. In 1988, WSTLA contributed \$148,551 to political candidates according to the state Public Disclosure Commission; only a business PAC and the state medical association contributed more to Washington State candidates. *Puget Sound Bus. J.*, Jan. 15, 1990, at 11, col. 2. Moreover, WSTLA employs two full time lobbyists to present the organization's views on tort reform to Washington legislators. *Id.* at 11, col. 3. In light of this activity, the argument that the interests of those opposed to tort reform are not fairly represented in the political process rings rather hollow.

Since everyone is equally subject to the "slings and arrows of outrageous fortune," the suffering of an injury cannot be viewed as an immutable characteristic akin to race or gender. Being an injured plaintiff is more a circumstance than a status implicating the core principles of equal protection. Indeed, it may be questioned whether tort plaintiffs possess sufficiently similar or unique characteristics so as to constitute a "class" at all.¹²⁷

Second, the argument that a right to compensation for a personal injury is a substantial right that requires heightened protection misstates the question here. The definition of precisely what "right" is at issue is crucial. Section 4.22.070 does not abolish any tort cause of action or limit access to the courts to prosecute a tort claim.

The very recent decision of the North Dakota Supreme Court in *Kavadas v. Lorenzen*¹²⁸ is instructive. The North Dakota court *does* apply intermediate scrutiny to statutes that "completely prevent[] a class of injured persons from maintaining an action to recover for their injuries."¹²⁹ However, the court did not extend elevated scrutiny to a statute similar to section 4.22.070. Rather, it concluded that "[t]he elimination of joint and several liability affects the amount of damages that an injured party may recover [but] that party is not denied access to the courts."¹³⁰ Likewise, the Iowa Supreme Court, in *Beeler v. Van Cannon*,¹³¹ declined to apply heightened scrutiny to a partial abolition of joint and several liability, saying, "[i]nvolved is only the continued effectiveness of a common law principle which, though it impacts greatly on the amount of [plaintiff's] recovery, does not determine whether he is in or

127. See *Hale v. Port of Portland*, 308 Or. 508, 525, 783 P.2d 506, 515-16 (1989) (in rejecting a challenge to a statutory damages cap based on Oregon's "privileges and immunities" clause, court rejected view that tort plaintiffs with a claim against a governmental entity, possessing some immunity from suit, constituted a class treated adversely to tort plaintiffs in general; holding, with respect to the latter, that "[t]hose members of the total population who happen to be injured as a result of negligently created dangerous conditions on a road or other kinds of negligence for which they can hold someone fully liable are not an identifiable 'class' who . . . are given special privileges by virtue of antecedent personal or social characteristics or societal status, i.e., they could not already be singled out from the general population before their various accidents").

128. 448 N.W.2d 219 (N.D. 1989).

129. *Id.* at 222 (citations omitted).

130. *Id.* at 223.

131. 376 N.W.2d 628 (Iowa 1985).

out of court."¹³²

Section 4.22.070 does not place any cap on damages to be awarded or, in and of itself, limit the ability of injured plaintiffs to recover for all damages sustained. Although a plaintiff may not be able to recover all damages attributable to the actions of judgment-proof or immune entities, that is an obstacle imposed separately by the financial circumstances of other culpable parties or by other statutes that confer immunity upon certain entities. Section 4.22.070 does not directly prevent a plaintiff from seeking and obtaining full recovery by collecting individually from each responsible entity.

Thus, advocates of heightened scrutiny of modified joint and several liability do not really assert the right to maintain a tort action or to recover full compensation for injuries. Rather, they insist that a plaintiff has the right to recover the entire award from any individual defendant he decides to target for collection of the judgment, regardless of the share of fault attributable to that individual defendant. To examine the "right" actually asserted, this author submits, is to answer the question whether it is worthy of heightened protection. And both state and federal courts have consistently refused to apply intermediate scrutiny to statutes abolishing or modifying joint and several liability.¹³³

Even looked at in its broader incarnation as an alleged right to recover damages for personal injuries, the precedents of both the federal courts and the Washington Supreme Court plainly establish that the rational basis level of scrutiny must apply to restrictions upon tort liability and revisions of common law doctrines.

In *Duke Power Company v. Carolina Environmental Study Group*,¹³⁴ the United State Supreme Court rejected heightened scrutiny as applied to a statutory limitation on the total amount of damages recoverable after a nuclear accident.¹³⁵ The Court characterized this restriction on tort recovery as "a classic example of an economic regulation—a

132. *Id.* at 630, 376 N.W.2d at 630.

133. *E.g.*, *In re Air Crash Disaster at Stapleton Int'l Airport*, 720 F. Supp. 1465, 1466 (D. Colo. 1989); *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1202 n.9, 753 P.2d 585, 593 n.9, 246 Cal. Rptr. 629, 637 n.9, (1988); *Smith v. Department of Ins.*, 507 So. 2d 1080, 1091 (Fla. 1987); *Beeler v. Van Cannon*, 376 N.W.2d 628, 630 (Iowa 1985); *Kavadas v. Lorenzen*, 448 N.W.2d 219, 223 (Iowa 1989).

134. 438 U.S. 59 (1978).

135. *Id.* at 83-88.

legislative effort to structure and accommodate 'the burdens and benefits of economic life.'"¹³⁶ The federal courts of appeals have also rejected heightened scrutiny of limitations on tort damages.¹³⁷

Several commentators contend¹³⁸ that the Washington Supreme Court adopted a heightened scrutiny approach toward limitations on tort recovery in *Hunter v. North Mason High School*.¹³⁹ In that decision, the court invalidated on equal protection grounds a claims filing statute that effectively shortened the statute of limitations for commencing actions against governmental as opposed to private parties. In the course of its decision, the court stated that "[t]he right to be indemnified for personal injuries is a substantial property right, not only of monetary value but in many cases fundamental to the injured person's physical well-being and ability to continue to live a decent life."¹⁴⁰

However, the Washington Supreme Court has already dismissed the misinterpretation of *Hunter* as mandating elevated scrutiny of statutes implicating tort recovery. In *Daggs v. City of Seattle*,¹⁴¹ the court rejected the argument that a city ordinance requiring a tort victim to wait sixty days after filing a claim with the city before filing suit violated equal protection rights, notwithstanding that the delay meant the plaintiffs must proceed under the newly effective Tort Reform Act with its restrictions on damage recovery rather than under the prior common law.¹⁴² The court acknowledged the language quoted above from *Hunter v. North Mason High School*, but noted that "[s]ignificantly, however, the opinion did not specify which standard of review it applied."¹⁴³ The *Daggs* court observed that "[t]he more recent decisions surrounding claims filing ordinances and statutes appear to follow a minimal scrutiny

136. *Id.* at 83 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)).

137. *Boyd v. Bulala*, 877 F.2d 1191, 1196-97 (4th Cir. 1989); *Lucas v. United States*, 807 F.2d 414, 422 (5th Cir. 1986); *Hoffman v. United States*, 767 F.2d 1431, 1435-37 (9th Cir. 1985).

138. Peck, *supra* note 5, at 683-84 (quoting *Hunter v. North Mason High School*, 85 Wash. 2d 810, 814, 539 P.2d 845, 848 (1975), without citation to the decision); Wiggins, Harnetiaux & Whaley, *supra* note 5, at 199, 210; Comment, *supra* note 123.

139. 85 Wash. 2d 810, 539 P.2d 845 (1975).

140. *Id.* at 814, 539 P.2d at 848.

141. 110 Wash. 2d 49, 750 P.2d 626 (1988).

142. *Id.* at 55-57, 750 P.2d at 629-30.

143. *Id.* at 56, 750 P.2d at 630.

standard of review."¹⁴⁴

This line of analysis also appears to have been confirmed in the recent *Sofie v. Fibreboard Corporation* decision.¹⁴⁵ In reviewing the Tort Reform Act's cap on noneconomic damages in tort, the Washington Supreme Court held that "[i]n matters of economic legislation, we follow the rule giving every reasonable presumption in favor of the constitutionality of the law or ordinance."¹⁴⁶ By thereby classifying the statutory limitation on tort damages as a "matter[] of economic legislation," the *Sofie* court implicitly suggested that the rational basis test would apply to any equal protection challenge.¹⁴⁷

Moreover, on several occasions, the Washington Supreme Court has taken pains to limit elevated scrutiny to a narrow range of cases.¹⁴⁸ In *State v. Smith*,¹⁴⁹ the court rejected "dicta appearing from time to time in our cases" that implied that heightened scrutiny could be applied to laws not infringing upon fundamental rights or creating a suspect classification.¹⁵⁰ Indeed, the *Smith* court, to emphasize its point, expressly overruled those prior decisions to the extent they enunciated a contrary view.¹⁵¹ The court refused to apply heightened scrutiny to a penal statute involving possible incarceration and thereby "substitute its judgment for that of the legislature."¹⁵²

The Washington Supreme Court again adopted a cautious approach to heightened scrutiny in *In re Mayner*.¹⁵³ In that decision, the court reversed an appellate court opinion embracing a broader view of heightened scrutiny in the context of a statutory classification affecting a prisoner's credit for time incarcerated after sentencing.¹⁵⁴ The court carefully limited such intrusive review to the unique context of an earlier case that involved a classification that was based on wealth and

144. *Id.* (citing *Coulter v. State*, 93 Wash. 2d 205, 608 P.2d 261 (1980)).

145. 112 Wash. 2d 636, 771 P.2d 711, *amended*, 780 P.2d 260 (1989).

146. *Id.* at 643, 771 P.2d at 715.

147. *See supra* notes 134-37 and accompanying text (discussing *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978)).

148. The United States Supreme Court has also been very reluctant to apply heightened or intermediate scrutiny to any new classifications. *See Kademas v. Dickinson Pub. Schools*, 108 S. Ct. 2481, 2487-88 (1988).

149. 93 Wash. 2d 329, 610 P.2d 869, *cert. denied*, 449 U.S. 873 (1980).

150. *Id.* at 336, 610 P.2d at 874.

151. *Id.* at 336 n.2., 610 P.2d at 874 n.2.

152. *Id.* at 337, 610 P.2d at 875.

153. 107 Wash. 2d 512, 730 P.2d 1321 (1986).

154. *Id.* at 517-19, 730 P.2d at 1324-25.

entailed an additional deprivation of liberty.¹⁵⁵ In that earlier case, *In re Phelan*,¹⁵⁶ the court had used an intermediate level of scrutiny to review a denial of credit for presentence jail time against a minimum sentence because the following interests were implicated: (1) a "deprivation of liberty in addition to that which would otherwise exist" (the failure to credit presentence jail time effectively lengthened the incarceration beyond the actual sentence) and (2) "a classification based solely on wealth" (persons unable to post bail remained in jail while those with adequate security were released pending trial).¹⁵⁷ The *Mayner* court's literal construction of *Phelan* and its restriction of heightened scrutiny to the precise blend of factors present in that case makes it clear that the court viewed *Phelan* as anomalous and was reluctant to extend the use of heightened scrutiny beyond that unique context.¹⁵⁸

The *Mayner* court also recognized the strong policy reasons for adhering to a rational basis test in adjudicating equal protection challenges to most statutes. Liberal application of heightened scrutiny, the court feared, would lead to "judicial activism in areas of legislative concern" and to "increased judicial review of legislative enactments" across a range of subjects.¹⁵⁹

The *Mayner* court's concerns are forcefully illustrated in the present controversy. Advocates of elevated scrutiny argue that the right to recovery in tort is a significant or important right warranting heightened protection because the money recovered may be "fundamental to the injured person's physical well-being and ability to continue to live a decent life."¹⁶⁰ If elevated scrutiny were to be triggered whenever a monetary benefit is "fundamental" to a person's "physical well-being and ability to continue to live a decent life," then many areas of

155. *Id.* (citing *State v. Phelan*, 100 Wash. 2d 508, 671 P.2d 1212 (1983)).

156. 100 Wash. 2d 508, 671 P.2d 1212 (1983).

157. *Id.* at 514, 671 P.2d at 1215; see also *In re Mayner*, 107 Wash. 2d at 517, 730 P.2d at 1324 (describing specific ruling in *Phelan*); *In re Borders*, 114 Wash. 2d 171, 175, 786 P.2d 789, 792 (1990) (same).

158. *Mayner*, 107 Wash. 2d at 517-19, 730 P.2d at 1324-25; see also *State v. Schaaf*, 109 Wash. 2d 1, 21, 743 P.2d 240, 250 (1987) (the court indicated that intermediate review was to be applied sparingly, saying "[w]e deem it unwise to apply the heightened scrutiny test where the statute in question does not directly implicate physical liberty.").

159. See *In re Mayner*, 107 Wash. 2d at 519, 730 P.2d at 1325.

160. *Hunter v. North Mason High School*, 85 Wash. 2d 810, 814, 539 P.2d 845, 848 (1975).

concern previously left to the discretion of the legislature will soon be swept into the courtroom.

Legislative enactments relating to welfare or other benefit programs, crime victim's compensation, or workers' compensation, as examples, also involve benefits that may be vital to the economic survival and well-being of individuals. Yet these subjects of legislation have long been recognized as quintessential examples of economic and social legislation subject only to rational basis review.¹⁶¹ If the proponents of heightened scrutiny of tort legislation were to prevail, a plethora of economic and social concerns would be endowed with constitutional status and subjected to exacting, substantive judicial evaluation. The end result would be to "constitutionalize" much of what has traditionally been within the legislative province. Such a radical shift in the balance of governmental responsibilities should not be undertaken.¹⁶²

C. *Application of Equal Protection Test*

Underlying the rational basis test "is the notion that the party challenging the classification has the heavy burden of overcoming the presumption of a statute's constitutionality."¹⁶³ The Washington Supreme Court has ruled that "[t]he legislature's discretion in making classes is wide and, when a statutory classification is challenged, facts are presumed sufficient to justify it. The burden is on the challenger to prove that the classification does not rest on a reasonable basis."¹⁶⁴

Detractors of the modified joint and several liability rule contend that four general "classifications" have been invalidly created by section 4.22.070:

(1) the distinction between "innocent" and culpable plaintiffs for purposes of determining whether a limited form of joint and several liability applies to the defendants;

161. See, e.g., *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980) (retirement benefits); *Dandridge v. Williams*, 397 U.S. 471 (1970) (welfare benefits); *Johnson v. Tradewell Stores*, 95 Wash. 2d 739, 630 P.2d 441 (1981) (industrial insurance program); *Haddenham v. State*, 87 Wash. 2d 145, 550 P.2d 9 (1976) (crime victims' compensation).

162. See also Redish, *supra* note 72, at 776 (apart from suspect class categories calling for heightened scrutiny under equal protection, "it is dangerous for the generally unrepresentative judiciary to veto fundamental social policy judgments formulated by the representative units of government" (footnote omitted)).

163. *Yakima County Deputy Sheriff's Ass'n v. Board of Comm'rs*, 92 Wash. 2d 831, 835, 601 P.2d 936, 938 (1979), *appeal dismissed*, 446 U.S. 979 (1980).

164. *Id.* at 835-36, 601 P.2d at 938 (citations omitted).

- (2) the distinction between defendants acting concurrently and defendants acting in concert or in an agency relationship for purposes of determining whether a defendant may be held responsible for the conduct of another;
- (3) the distinction between defendants and other nonparty entities also responsible for the injury in applying the limited joint and several liability rule; and
- (4) the distinctions drawn by the three exceptions to the statute for hazardous waste torts, business torts, and market-share liability cases.

There are reasonable, indeed quite substantial, bases for these four classifications. Each is based upon legitimate and important distinctions properly taken into account in the statutory scheme.

1. Distinction Between "Innocent" and Culpable Plaintiffs

Under subsection 4.22.070(1)(b),¹⁶⁵ the general rule that defendants are only severally liable for their proportionate share of the total fault is set aside when the plaintiff suffering bodily injury or incurring property damages was not at fault for his own damages.

It is difficult to conceive of a distinction more appropriately taken into account in adopting a liability scheme than the one between plaintiffs who were and who were not contributorily negligent. Certainly the Washington Legislature could reasonably regard culpable plaintiffs as "different in relevant respects" from "innocent" plaintiffs.¹⁶⁶ Indeed, the principles of equal protection are not truly implicated since culpable plaintiffs are not in any sense similarly situated to those plaintiffs who bear no responsibility for their injuries.

The substantial nature of this distinction is confirmed by the great weight placed upon it at common law. As discussed above,¹⁶⁷ a plaintiff at common law who was contributorily negligent, however slightly, was barred from any recovery. Yet it could not seriously be maintained that the common law contributory negligence rule—which distinguished between innocent and culpable plaintiffs for the crucial purpose of determining whether *any* recovery was to be allowed—consti-

165. WASH. REV. CODE § 4.22.070(1)(b) (1989).

166. See *New York State Club Ass'n v. City of New York*, 108 S. Ct. 2225, 2235 (1988).

167. See *supra* notes 18 and 59 and accompanying text.

tuted a deprivation of equal protection. If the significant difference between culpable and nonculpable plaintiffs was justifiably considered at common law as the basis upon which the very right to recover turned, surely it was not inappropriate for the legislature to take this same difference in blameworthiness into account in determining when joint and several liability would be preserved.

2. Distinction Between Defendants Acting Concurrently and Defendants Acting in Concert or in an Agency Relationship

For defendants who have acted concurrently or successively in bringing about an injury to a plaintiff, section 4.22.070 abolishes or modifies the doctrine of joint and several liability. However, under subsection 4.22.070(1)(a),¹⁶⁸ a party may still be held liable for the fault of another person when the parties are "acting in concert" or when that other person is "acting as an agent or servant of the party." This provision 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.

As discussed earlier,¹⁶⁹ the joint and several liability rule originated in the context of tortfeasors who acted in concert to bring about an injury. In such a case, the wrong that was committed and the injury that occurred were truly indivisible. Since both parties acted purposefully together, it would make little sense to attempt to apportion fault between them. The legislature's determination to hold parties acting in concert responsible for each other's conduct is thus manifestly justified; this rule simply recognizes a practical limitation on the ability to apportion fault among tortfeasors.

Holding a principal or master vicariously liable for the conduct of his agent or servant is likewise a justified departure from the general principle of several liability. It 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.

168. WASH. REV. CODE § 4.22.070(1)(a) (1989).

169. See *supra* note 14 and accompanying text.

3. Distinction Between Defendants and Nonparties

Detractors of the statutory modification of joint and several liability also contend that it is a deprivation of equal protection to prevent a plaintiff, who has not been contributorily negligent, from collecting from a defendant the share of damages attributable to the actions of a nonparty entity.¹⁷⁰ Under subsection 4.22.070(1)(b),¹⁷¹ only a limited form of joint and several liability is preserved where the plaintiff is not at fault. Each defendant is jointly and severally liable for the sum of the proportionate shares of all party defendants, but no defendant is obligated to pay that share of damages attributable to the conduct of another entity that has not been joined as a party to the lawsuit.

To begin with, the distinction between parties and nonparties is largely a false classification for equal protection purposes. Under subsection 4.22.070(1)(b), joint and several liability is limited to that portion of the damages attributable to those who are named as defendants to the action. With three primary exceptions discussed below, however, a plaintiff has the power to make any entity a party to the action. 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 damages is not awarded. Plaintiffs cannot properly challenge a classification which they themselves can easily change.

There are three principal exceptions:¹⁷² (1) entities released from liability by the plaintiff, (2) entities immune

170. Wiggins, Harnetiaux & Whaley, *supra* note 5, at 240-41.

171. WASH. REV. CODE § 4.22.070(1)(b) (1989).

172. In addition to these three principal exceptions to the plaintiff's power to make any entity a defendant, there is also the scenario of the "phantom" or unknown tortfeasor, *see supra* notes 111-14 and accompanying text, and the possibility that personal jurisdiction could not be obtained over a responsible entity residing outside of the state. However, as with the other exceptions, the fact that such entities are unavailable to be made parties to a lawsuit is not engendered by section 4.22.070. In any tort lawsuit, whether involving multiple defendants or not, a plaintiff may be unable to find or identify the entity responsible for an injury or be unable to assert personal jurisdiction over a putative defendant. Those circumstances are not created by the statute at issue here. Moreover, with respect to the question of personal jurisdiction, the problem is likely an illusory one. As Professor Peck has stated, "considering the broad interpretation which the Washington Court has given to the Washington long-arm statute, is it [sic] unlikely that an entity outside the state could not be made subject to the personal jurisdiction of a Washington court." Peck, *supra* note 5, at 696 (citing Trautman, *Long-Arm and Quasi In Rem Jurisdiction in Washington*, 51 WASH. L. REV. 1 (1975)).

from liability to the plaintiff, and (3) entities with an individual defense against the plaintiff. None of these limitations on amenability to suit are created by section 4.22.070, and the equal protection challenge is thus misdirected.

The first exception, like the general distinction between parties and nonparties, comes about only through the voluntary actions of a plaintiff. If a plaintiff voluntarily settles with one or more defendants, or decides simply to release a responsible entity, 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.

As for the other two exceptions, for immune entities and for those with an individual defense,¹⁷³ the inability to prosecute a tort action against such entities is not created by the statute at issue here. Although subsection 4.22.070(1)(b) may limit the joint and several liability obligation to the sum of the damages attributable to those made party defendants, the statute does not, in and of itself, create any obstacles to joining every responsible entity as a party to the action. The real problem emanates from the barriers to party status created by statutes that provide immunity or create individual defenses. Thus, the true complaint lies not with section 4.22.070 but with these other provisions of law.¹⁷⁴

Moreover, any consideration of equal protection principles must take into account equal and fair treatment of the defendant as well as the tort plaintiff. As explained earlier,¹⁷⁵ basic indicia of fairness do not lead to the conclusion that an individual defendant should be obligated to pay that portion of damages attributable to the conduct of another entity simply because, for whatever reason, a plaintiff is unable to hold that other entity accountable. In upholding Colorado's abolition of

173. As noted earlier in the substantive due process section, *see supra* notes 84-85 and accompanying text, the availability of an individual defense to an entity that may be partially responsible for the injury is usually attributable to the actions or omissions of the plaintiff. For example, if a plaintiff sleeps on his rights and fails to timely file an action against an entity before the statute of limitations runs, the plaintiff is properly held accountable for this failure. There is no equitable basis to shift any loss caused by the plaintiff's neglect to other defendants in the action.

174. *See In re Air Crash Disaster at Stapleton Int'l Airport*, 720 F. Supp. 1465, 1466-67 (D. Colo. 1989) (complaint about inability to recover share of damages attributable to conduct of immune entities should be directed to immunity statutes, not to abolition of joint and several liability).

175. *See supra* notes 59-63 and accompanying text.

joint and several liability against an equal protection challenge in *In re Air Crash Disaster at Stapleton International Airport*,¹⁷⁶ a federal district court ruled that "[t]he statutory effect of shifting the loss caused by an immune tortfeasor to the plaintiff is rationally related to the legitimate government interest in requiring defendants to pay no more than their judicially determined share of the loss."¹⁷⁷ Indeed, now that the common law theory of indivisible wrongs has been abandoned in favor of the modern approach of comparative fault, imposition of liability on a defendant beyond his proportionate share of fault begins to look punitive in nature.

4. Distinctions Based on the Three Statutory Exceptions

Finally, equal protection attacks could be made upon the three specific exceptions to the modification of joint and several liability in subsection 4.22.070(3).¹⁷⁸ There are, however, very substantial rationales behind each of these exceptions.

The first exception provides: "Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites."¹⁷⁹ One commentator has described the basis for this exception as follows:

The first exception to abolishment of joint and several liability, causes of action relating to hazardous wastes of substances or sold 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 clean-up. The potential of joint liability for this type of tortious conduct will presumably instill into these businesses a willingness to create and fund a state-wide system by which hazardous waste pollution can be cleaned up. The fund would also be used to defray the clean-up costs of a landfill in which hazardous wastes were deposited.¹⁸⁰

176. 720 F. Supp. 1465 (D. Colo. 1989).

177. *Id.* at 1467.

178. WASH. REV. CODE § 4.22.070(3) (1989).

179. *Id.* § 4.22.070(3)(a).

180. Comment, *supra* note 5, at 242-43 (footnotes omitted); see also S. Journal, 49th Reg. Sess. & 1st Spec. Sess. at 467 (1986); Peck, *supra* note 14, at 250, 251 (1987). In *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 771 P.2d 711, *amended*, 780 P.2d 260 (1989), the Washington Supreme Court, citing the plain and unqualified language of subsection 4.22.070(3)(a), broadly construed the hazardous waste exception to apply whenever hazardous substances, wherever found, are a factor in the tortious injury. *Id.* at 668-69, 771 P.2d at 727-28. By taking the exception beyond the legislature's concerns with environmental pollution and the proposed "Superfund" toxic waste

The second exception reads: "Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations."¹⁸¹ The same commentator also explained this exception as follows:

The assumption that people do not buy insurance for negligent business transactions led to the enactment of the exception concerning tortious interference with contracts. Therefore, there would be no impact on insurance rates from this exception. Thus, an exception for this class will not have an impact on insurance affordability or availability.¹⁸²

In addition, the legislature was concerned not to interfere with the development of unique principles of law in the distinctive category of business torts.¹⁸³

The third exception reads: "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."¹⁸⁴ The purpose of this provision was to preserve the market-share approach to liability¹⁸⁵ adopted by the Washington Supreme Court in *Martin v. Abbott Laboratories*.¹⁸⁶ In this type of case, it may not be possible to ascertain which of several manufacturers of a generic and fungible product, specifically drugs, produced the particular batch or dosage that injured the individual plaintiff. In cases such as these, if a plaintiff is to be compensated at all, the Washington court concluded it was necessary to hold all manufacturers liable for their share of the market for that product.¹⁸⁷ Accordingly, this third exception is not really an exception at all since a market-share, rather than a joint and several liability approach, has been applied in such

cleanup bill, the Washington Supreme Court's broader construction may slip the exception from its moorings to a rational and narrow purpose. To the extent this is the case, the court may need to revisit the issue in the future and revive a narrower interpretation to ensure the constitutional validity of the exception.

181. WASH. REV. CODE § 4.22.070(3)(b) (1989).

182. Comment, *supra* note 5, at 243; *see also* S. Journal, *supra* note 180, at 468; Peck, *supra* note 14, at 251.

183. S. Journal, *supra* note 180, at 468.

184. WASH. REV. CODE § 4.22.070(3)(c) (1989).

185. Comment, *supra* note 5, at 243; *see also* S. Journal, *supra* note 180, at 468; Peck, *supra* note 14, at 251.

186. 102 Wash. 2d 581, 689 P.2d 368 (1984).

187. *Id.* at 602-07, 689 P.2d at 381-83. *See generally* Comment, *Into the Quagmire: Washington Adopts Market Share Liability in DES Cases*, 21 GONZ. L. REV. 199 (1985/86).

situations. The exception simply preserves the state of the law as it previously applied to this unique category of cases.

The Washington Supreme Court has held that "the legislature is allowed a wide discretion in the selection of classes" in the enactment of statutes.¹⁸⁸ Moreover, there is no deprivation of equal protection "merely because classifications made by . . . laws are imperfect"¹⁸⁹ or because the categories are "unartfully drawn."¹⁹⁰ As shown by the legislative purpose behind each of these exceptions outlined above, a substantial rationale warrants treating these cases differently and defining the exceptions in this manner.¹⁹¹ The legislature's discretion in adopting these exceptions was well exercised.

Moreover, even if these three exceptions were susceptible to attack, the challenge would more appropriately come from defendants asserting a deprivation of equal protection by the application of an exception to remove a case from the general several liability rule. It is not plaintiffs who are aggrieved by these exceptions but rather defendants in hazardous waste or business tort cases who may lose the protections and equitable treatment afforded by the limitation of joint and several liability. And, in any event, as one commentator has concluded, "even if a successful equal protection attack is made, the result is more likely to be an invalidation of the exceptions than an invalidation of" section 4.22.070 as a whole.¹⁹²

188. *Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass'n*, 83 Wash. 2d 523, 530, 520 P.2d 162, 167 (1974).

189. *City of Dallas v. Stanglin*, 109 S. Ct. 1591, 1596 (1989) (citing *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970)).

190. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 175 (1980).

191. Comment, *supra* note 5, at 248-49.

192. Peck, *supra* note 14, at 252. Even if one part of a statute is unconstitutional, the remainder will stand "unless the invalid provisions are unseverable and it cannot reasonably be believed that the legislature would have passed the one without the other, or unless the elimination of the invalid part would render the remainder of the act incapable of accomplishing the legislative purposes." *State v. Anderson*, 81 Wash. 2d 234, 236, 501 P.2d 184, 185-86 (1972). The presence of a severability clause in the statute is given great weight as "assurance to the court that it may properly sustain the separation sections or provisions of a partially invalid act without hesitation or doubt as to whether the legislature would have adopted the valid portion had they been advised of the invalidity of the affected part." *Id.* at 236, 501 P.2d at 186. The Tort Reform Act of 1986 does contain a severability clause. Tort Reform Act of 1986, ch. 305, § 911, 1986 Wash. Laws 1367. Moreover, given the overwhelming support for tort reform in general and modification of joint and several liability in particular shown in the legislative history, it cannot reasonably be doubted that the legislature would have enacted section 4.22.070 without the three exceptions had it anticipated that the exceptions would be found invalid. See H. Journal, 49th Reg. Sess. & Spec. Sess. at 1068-69, 1082 (1986) (adoption of amendment with present language of section 4.22.070

D. Alternative Approach Based on Washington Privileges and Immunities Clause

Although the Washington Supreme Court has consistently followed the equal protection approach of the United States Supreme Court in interpreting the Washington privileges and immunities clause, the Washington Constitution does not contain an equal protection clause as such. Instead, article I, section 12 prohibits the granting by law of "privileges or immunities" to any "citizen, class of citizens, or corporation" which "upon the same terms shall not equally belong to all citizens or corporations."¹⁹³

Because of this difference of language, some detractors of tort reform suggest that a construction of this "privileges and immunities" clause that should be adopted which differs from that applied under the federal equal protection provision.¹⁹⁴ Not surprisingly, these commentators believe such a different interpretation would lead to the application of a higher level of judicial scrutiny in examining the modification of joint and several liability. That does not, however, appear to be the case.

At the time of the Washington constitutional convention in 1889, two clauses of the United States Constitution protected the "privileges and immunities" of citizens. Both provisions, which it may be assumed were within the contemplation of the

by a vote of 65-32 after debate focusing on the joint and several liability issue); *id.* at 1082 (final passage of bill by a vote of 66-31); S. Journal, *supra* note 180, at 498 (initial passage by vote of 32-13, final passage by vote of 31-16).

193. WASH. CONST. art. I, § 12.

194. Wiggins, Harnetiaux & Whaley, *supra* note 5, at 204-11.

In *State v. Gunwall*, 106 Wash. 2d 54, 720 P.2d 808 (1986), the Washington Supreme Court articulated six neutral and nonexclusive factors to be considered in determining whether to adopt an interpretation of a state constitutional provision independent of the analytical framework developed for its federal counterpart. *Id.* at 58-63, 720 P.2d at 811-13. These six criteria are: "(1) textual language, (2) differences in the texts, (3) constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern." *Id.* at 58, 720 P.2d at 811. The wording of article I, § 12, referring to "privileges or immunities," obviously differs from the language of equal protection, although it does find parallels in other provisions of the federal Constitution. There apparently is no historical record of what the constitutional framers intended by the adoption of the state privileges and immunities clause, although it may be doubted that the common law doctrine of joint and several liability, which had not yet been recognized in Washington, was included among the list of protected "privileges." And the fact that the federal Constitution "is a grant of enumerated powers to the federal government" while the state constitution "serves to limit the sovereign power which inheres directly in the people and indirectly in the elected representatives," *id.* at 62, 720 P.2d at 812, does not help give substance to this particular state constitutional provision.

Washington convention, have been rather narrowly construed. In the early case of *State v. Vance*,¹⁹⁵ the Washington Supreme Court referred to the state privileges and immunities clause and said “[b]y analogy these words as used in the state constitution should receive a like definition and interpretation as that applied to them when interpreting the federal Constitution.”¹⁹⁶

The “privileges and immunities” clause in article IV, section 2 of the federal Constitution¹⁹⁷ prohibits a state from discriminating against citizens of other states with respect to “fundamental” rights of state citizenship.¹⁹⁸ Disparity of treatment between residents and nonresidents with respect to such “privileges and immunities” is permitted only for “substantial reason[s].”¹⁹⁹ Similarly, the “privileges and immunities” clause of the fourteenth amendment of the United States Constitution²⁰⁰ protects United States citizens from abrogation by any state of those rights which are fundamental to the citizens of a free government, such as the right to travel freely from state to state, to vote, and to petition the Congress for redress of grievances.²⁰¹

Accordingly, the phrase “privileges and immunities” has been viewed as describing those fundamental attributes of citizenship essential to a free society. By contrast, the equal protection clause of the fourteenth amendment is a broader, although more limited, protection. Whereas those few fundamental rights of citizens that qualify as “privileges and immunities” may be entitled to more substantial protection from infringement, equal protection requires equal treatment in all respects unless a reasonable basis exists for differentiation. The Washington Supreme Court has extended the privileges and immunities clause beyond federal equal protection analysis only where fundamental rights—such as voting rights, physical

195. 29 Wash. 435, 70 P. 34 (1902).

196. *Id.* at 458, 70 P. at 41.

197. “The Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the Several States.” U.S. CONST. art. IV, § 2.

198. *Baldwin v. Fish & Game Comm’n*, 436 U.S. 371, 378-88 (1978).

199. *Toomer v. Witsell*, 334 U.S. 385, 396 (1948).

200. “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” U.S. CONST. amend. XIV, § 1.

201. *Twining v. New Jersey*, 211 U.S. 78, 97 (1908); *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1872).

liberty, or women's rights—were at issue.²⁰² As Justice Jackson said, "instances of valid 'privileges and immunities' must be but few."²⁰³

One law review commentary²⁰⁴ suggests giving substance to the state privileges and immunities clause by reference to Justice Cooley's definition in his 1883 treatise of "privileges and immunities" as employed in article IV, section 2 of the federal Constitution.²⁰⁵ Justice Cooley's definition was paraphrased in the Washington Supreme Court's early discussion of the state privileges and immunities clause in *State v. Vance*.²⁰⁶ In his treatise, Justice Cooley describes "privileges and immunities" in this way:

Although the precise meaning of "privileges and immunities" is not very conclusively settled as yet, it appears to be conceded that the Constitution secures in each State to the citizens of all other States the right to remove to, and carry on business therein; the right by the usual modes to acquire and hold property, and to protect and defend the same in the law; the right to the usual remedies for the collection of debts and the enforcement of other personal rights, and the right to be exempt, in property and person, from taxes or burdens which the property, or persons, of citizens of the same State are not subject to.²⁰⁷

Accepting Justice Cooley's definition as an authoritative source,²⁰⁸ however, does not lead to any conclusion that common law tort doctrines have been endowed with the status of protected "privileges and immunities." Even his references to

202. See *O'Day v. King County*, 109 Wash. 2d 796, 813 n.6, 749 P.2d 142, 151-52 n.6 (1988).

203. *Edwards v. California*, 314 U.S. 160, 183 (1941) (Jackson, J., concurring).

204. Wiggins, Harnetiaux & Whaley, *supra* note 5, at 205-06.

205. T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (5th ed. 1883).

206. 29 Wash. 435, 458, 70 P. 34, 41 (1902).

207. T. COOLEY, *supra* note 205, at 491-92.

208. It is not wise to place too much weight upon Justice Cooley's definition. It is derived from Justice Bushrod Washington's discussion in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (No. 3,230), in which he was sitting as a circuit justice. Justice Washington's definition reflected "notions of 'natural rights,'" *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371, 387 (1978), that is, the theory that "without specific constitutional moorings, posited certain vital principles in our free republican government, which will determine and overrule an apparent abuse of legislative powers." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 405-06 (1978) (footnote omitted). This "natural rights" view was discarded before the adoption of the Washington Constitution in 1889. See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868); see also *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 281 n.10 (1985).

the right "to protect and defend [property] in the law" and "the right to the usual remedies for . . . the enforcement of other personal rights,"²⁰⁹ propose nothing more than a general right of equal access to the courts to seek remedies according to the law. Nothing in Justice Cooley's definition suggests that substantive common law tort principles should be elevated to a preeminent position in the hierarchy of constitutional rights.²¹⁰

Moreover, in Washington, it has already been established that a person has no right or "privilege" in the continuation of any rule of the common law.²¹¹ Certainly the common law doctrine of joint and several liability cannot be regarded as a constitutional right or "privilege" when it was not even recognized as part of Washington tort law until some twenty years after the adoption of the state constitution.²¹² The assertion that common law tort doctrines qualify for special treatment as vital constitutional "privileges" appears to "spring . . . from pure intuition" based on familiarity with and the perceived value of such rules rather than from an anchored process of constitutional analysis "that is at once articulable, reasonable and reasoned."²¹³

Thus, in the end, an approach that focuses upon the particular language of the state privileges and immunities clause ultimately leads to the same result as does equal protection analysis in the case of tort liability modification. Perhaps it is for this reason that, in general, the Washington Supreme Court's "interpretation of the State's privileges and immunities clause . . . has followed the federal interpretation of the equal

209. T. COOLEY, *supra* note 205, at 491-92.

210. Moreover, since Justice Cooley also refers to rights to "carry on business," "to acquire and hold property," and to "collection of debts," as among those protected by the federal "privileges and immunities" clause, T. COOLEY, *supra* note 205, at 491-92, a broad reading of this discussion would require giving heightened scrutiny to a host of other laws regulating business, property, and creditor-debtor relationships. Instead, Justice Cooley is better understood as simply saying, on a level of generality, that equal treatment and a fair right of access and opportunity must be allowed, not that substantive principles of tort or property law must be accorded constitutional status.

211. See *supra* notes 64-70 and accompanying text.

212. The doctrine of joint and several liability appears to have been first adopted in Washington in the 1909 case of *Nelson v. Bromley*, 55 Wash. 256, 104 P. 251 (1909). The fact that this doctrine was not expressly acknowledged as part of Washington's common law at the time of the 1889 constitutional convention significantly undermines the theory that joint and several liability is a "privilege" within the meaning of article I, § 12. See *State v. Gunwall*, 106 Wash. 2d 54, 62, 720 P.2d 808, 812 (1986) ("[p]reexisting [state] law can . . . help to define the scope of a constitutional right later established").

213. See *Gunwall*, 106 Wash. 2d at 63, 720 P.2d at 813.

protection clause."²¹⁴ An analysis based on the different language of the state provision does not appear to either improve much upon or add appreciably to the federal approach in terms of the practical results likely to be reached.

E. Oregon's Interpretation of Its State Privileges and Immunities Clause

Of the many states with a privileges and immunities clause in their state constitutions, only Oregon has adopted a construction of such a provision that fails to adhere to federal equal protection analysis.²¹⁵ At least some of the members of the Washington Supreme Court appear to be quite intrigued by Oregon's approach. When the constitutionality of the damages cap provision in the Tort Reform Act of 1986 was before the court in *Sofie v. Fibreboard Corporation*,²¹⁶ the parties were requested to file supplemental briefs discussing "how or whether the Oregon court's methodology" for construing Oregon's privileges and immunities clause should affect the Washington court's analysis.²¹⁷ The court ultimately decided the *Sofie* case on grounds other than the privileges and immunities clause; however, the court outlined Oregon's approach in dicta in a footnote²¹⁸ and suggested that this analysis might be relevant if the question arose in another case.²¹⁹

Although Oregon has not yet formulated a precise methodology for its variant approach,²²⁰ the Oregon Supreme Court has given a construction to its "privileges and immunities" clause²²¹ that is both narrower and broader than the historical sense of the phrase would suggest. Rather than limiting the

214. *Snyder v. Munro*, 106 Wash. 2d 380, 386, 721 P.2d 962, 965 (1986).

215. Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of Equal Protection*, 13 VT. L. REV. 222, 225-26 (1988).

216. 112 Wash. 2d 636, 771 P.2d 711, *amended*, 780 P.2d 260 (1989).

217. Letter from Steven P. Helgeson, deputy clerk of the Washington Supreme Court, to counsel in *Sofie v. Fibreboard Corp.*, No. 54610-0 (Sept. 26, 1988) (inviting counsel to review the Schuman article, *supra* note 215, and "submit supplementary briefs explaining how or whether the Oregon court's methodology should affect [its] analysis of the issues in light of the factors discussed in *State v. Gunwall*, 106 Wash. 2d 54, 720 P.2d 808 (1986)").

218. *Sofie*, 112 Wash. 2d at 642-43 n.2, 771 P.2d at 714-15 n.2.

219. *Id.* at 642, 771 P.2d at 714.

220. Schuman, *supra* note 215, at 229.

221. The Oregon provision is virtually identical to the Washington clause and reads: "No law shall be passed granting to any citizen or class of citizens privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." OR. CONST. art. I, § 20.

phrase "privileges and immunities" to certain fundamental rights of citizenship, the Oregon court regularly invokes the state constitutional provision whenever a statute affects "some advantage" to which a person "would be entitled but for a choice made by a government authority."²²² However, the protection accorded to such "privileges and immunities" is more diffuse; absolute or heightened protection is not invariably accorded to "privileges and immunities" so broadly defined. Except for statutory classifications which invidiously discriminate against classes of people based on immutable personal characteristics,²²³ the Oregon courts are deferential to the choices made by the political branches of government.²²⁴ The Oregon approach tends to be one of judicial restraint that accords the legislature broad discretion in drawing lines within statutes to implement policy choices.²²⁵

In adopting its unique analysis of the state "privileges and immunities" clause, the Oregon Supreme Court neglected to consider the contemporary understanding of the term "privileges and immunities" when the Oregon Constitution was adopted in 1859. The court instead looked to the general historical context in which the Oregon "privileges and immunities" clause arose: "Antedating the Civil War and the equal protection clause of the fourteenth amendment, its language reflects early egalitarian objections to favoritism and special privileges for a few rather than the concern of the Reconstruction Congress about discrimination against disfavored individuals or groups."²²⁶ Notwithstanding the Oregon court's view of the clause's origination as a bar to the granting of special privileges or monopolies to powerful interests, the court has also extended its protective effects to rights against adverse discrimination as well.²²⁷

In theory, the Oregon approach evaluates the nature of the classification established in a statute and applies defined

222. *City of Salem v. Bruner*, 299 Or. 262, 267, 702 P.2d 70, 74 (1985).

223. *Hewitt v. State Accident Ins. Fund Corp.*, 294 Or. 33, 42, 653 P.2d 970, 977-78 (1982).

224. *Gale v. Department of Revenue*, 293 Or. 221, 646 P.2d 27 (1982).

225. *City of Klamath Falls v. Winters*, 289 Or. 747, 750, 619 P.2d 217, 227 (1980) ("[f]undamentally, classification is a matter committed to the discretion of the legislature and the courts will not interfere with the legislative judgment unless it is palpably arbitrary").

226. *State v. Clark*, 291 Or. 231, 236, 630 P.2d 810, 814, *cert. denied*, 454 U.S. 1084 (1981).

227. *Id.*

rules depending upon the type of classification. If the law results in "disparate treatment of persons or groups by virtue of characteristics which they have apart from the law in question,"²²⁸ then the statute is viewed as operating upon a "true" class of people.²²⁹ Ordinarily, this analysis is restricted to those groups of people who "share relevant traits, which are widely regarded as significant personal, ethnic or social characteristics."²³⁰ However, the Oregon courts have also applied this prong of the analysis to less invariable characteristics, even legal categories defined by other statutes, which exist apart from the particular law under challenge.²³¹

Section 4.22.070 of the Washington Revised Code, for example, distinguishes between contributorily negligent and innocent plaintiffs and between parties and non-parties in determining whether and to whom joint and several liability applies. Although these lines are not drawn on the basis of ethnic or social factors, the statute may nevertheless be said to affect a "true" class because culpability and party status exist independently of the statute.²³² However, even when a "true" class is implicated, the Oregon courts will still sustain the classification unless the additional element of "invidious discrimination," generally against a class based on immutable personal characteristics, such as race or gender, is present.²³³

If a group of people is categorized as a class only by virtue of the particular statute being challenged, the Oregon approach "requires that the government decision to offer or deny the advantage [the "privilege and immunity"] be made

228. *Id.* at 239, 630 P.2d at 816; see also *Northwest Advancement, Inc. v. State Bureau of Labor, Wage and Hour Division*, 96 Or. App. 133, 142, 772 P.2d 934, 941 (1989).

229. Schuman, *supra* note 215, at 230-37.

230. *Id.* at 237.

231. See, e.g., *Northwest Advancement, Inc.*, 96 Or. App. at 141, 772 P.2d at 941 (class of newspaper vendors and carriers); *Jungen v. State*, 94 Or. App. 101, 105, 764 P.2d 938, 941 (1988) (category of those who receive workers' compensation under another statute), *review denied*, 307 Or. 658, 772 P.2d 1341, *cert. denied*, 110 S. Ct. 322 (1989). However, the Oregon Supreme Court's latest statement on the matter appears to reserve the "true" class analysis for those categories based upon "antecedent personal or social characteristics or societal status," that is, factors by which a person is "singled out from the general population." *Hale v. Port of Portland*, 308 Or. 508, 520, 783 P.2d 506, 516 (1989).

232. *But see supra* note 231 (discussing *Hale v. Port of Portland*).

233. *Northwest Advancement, Inc.*, 96 Or. App. at 141, 772 P.2d at 941; *Jungen*, 94 Or. App. at 105, 764 P.2d at 941.

'by permissible criteria and consistently applied.'"²³⁴ In other words, the statute affecting an "advantage" must employ "objective, consistent, and impersonal" criteria in demarcating the statutory classification.²³⁵

To continue the example, the distinctions drawn in section 4.22.070 based on the culpability of the plaintiff or the party status of the alleged tortfeasor do turn on "objective, consistent, and impersonal criteria" as determined on the facts of each case. The comparative fault of a party is adjudged by an impartial trier of fact based on reasonably objective criteria in the form of factual evidence. Assuming that a plaintiff desires to make an entity a party defendant, the susceptibility of that entity to suit turns upon "objective, consistent, and impersonal criteria" established by statutes defining immunities or individual defenses. In any event, as demonstrated above, it cannot plausibly be maintained that the classifications purportedly created by section 4.22.070 are "wholly irrational"²³⁶ or "palpably arbitrary."²³⁷

While the invocation of the state "privileges and immunities" clause allows the Oregon courts the freedom to reach results at variance with the United States Supreme Court's equal protection rulings, it is not apparent that this occurs with any frequency or that the Oregon approach requires, rather than merely permits, a contrary outcome. Indeed, while different labels and language are employed, most of the analysis applied by the Oregon courts under the heading of "privileges and immunities" would be equally at home in the context of an equal protection examination.

The Oregon approach, while interesting, can be seen as simply a variant upon and not at odds with equal protection analysis. Although the Oregon courts purport to have forsaken any weighing of interests in favor of neutral application of defined rules,²³⁸ the element of balancing inevitably comes

234. *City of Salem v. Bruner*, 299 Or. 262, 269, 702 P.2d 70, 74 (1985) (quoting *State v. Freeland*, 295 Or. 367, 377, 667 P.2d 509, 516 (1983)).

235. Schuman, *supra* note 215, at 239; see also *State v. Clark*, 291 Or. 231, 238, 630 P.2d 810, 816 ("[a]ttacks on . . . laws . . . have generally been rejected whenever the law leaves it open to anyone to bring himself or herself within the favored class on equal terms"), *cert. denied*, 454 U.S. 1084 (1981).

236. *Gale v. Department of Revenue*, 293 Or. 221, 228, 646 P.2d 27, 33 (1982).

237. *City of Klamath Falls v. Winter*, 289 Or. 757, 769, 619 P.2d 217, 227 (1980), *appeal dismissed*, 451 U.S. 964 (1981).

238. *Hale v. Port of Portland*, 308 Or. 508, 526, 783 P.2d 506, 516 (1989); *State v. Kennedy*, 295 Or. 260, 266, 666 P.2d 1316, 1321 (1983); Schuman, *supra* note 215, at 244.

back in, even if somewhat disguised. For example, not every "true" or "suspect" classification is impermissible. The court will explore whether the classification is "invidious," that is, "whether the government's system of classification . . . reflects prejudiced or stereotypical thinking."²³⁹ This examination of the purpose or intent of the classification must be regarded as a balancing of factors, akin to considering whether the classification is justified by a compelling or important purpose. Similarly, when statutorily-created classifications or "true" classes not subject to "invidious" discrimination have been reviewed, the permissibility of the lines drawn is often measured in terms of rationality,²⁴⁰ an apparent reversion to traditional equal protection analysis. Indeed, the equal protection question—whether statutory lines have been rationally drawn—should begin with the Oregon court's inquiry into whether the classifications are made "by permissible criteria . . . [which are] consistently applied."²⁴¹

In any event, even assuming that Oregon's approach could be imported to Washington consistently with an historical appreciation of the phrase "privileges and immunities" as understood at the time of the framing of the Washington Constitution in 1889, it would provide little solace to those seeking to subject the statutory modification of joint and several liability to exacting judicial scrutiny. The Oregon courts have eschewed a "fundamental rights" analysis as part of that state's equality guarantee and have declined to apply any form of heightened review to statutes affecting the "privilege" of suing for compensation for personal injury.²⁴²

VI. SPECIAL LEGISLATION

Commentators²⁴³ point to the prohibition in article II, section 28, clause 17 of the Washington Constitution against "pri-

239. Schuman, *supra* note 215, at 235; *see also* Hewitt v. State Accident Ins. Fund Corp., 294 Or. 33, 41, 653 P.2d 970, 977 (1982) (discussing "invidious" or "stereotypical" thinking in context of gender classification).

240. *E.g.*, McIntyre v. Crouch, 98 Or. App. 462, 469, 780 P.2d 239, 244 (1989); Northwest Advancement, Inc. v. State Bureau of Labor, Wage and Hour Division, 96 Or. App. 133, 143, 772 P.2d 934, 940-41 (1989).

241. City of Salem v. Bruner, 299 Or. 262, 267, 702 P.2d 70, 74 (1985); State v. Freeland, 295 Or. 367, 375, 667 P.2d 509, 516 (1983).

242. *See e.g.*, Hale v. Port of Portland, 308 Or. 508, 783 P.2d 506 (1989); Jungen v. State, 94 Or. App. 101, 105, 764 P.2d 938, 940 (1988), *review denied*, 307 Or. 658, 772 P.2d 1341, *cert. denied*, 110 S. Ct. 322 (1989).

243. Wiggins, Harnetiaux & Whaley, *supra* note 5, at 218-19, 242.

vate or special laws . . . [f]or limitation of civil or criminal actions"²⁴⁴ as yet another basis for a constitutional challenge to section 4.22.070. The Washington Supreme Court has defined the term "special legislation" in this way:

A law is special in a constitutional sense, when, by force of an inherent limitation, it arbitrarily separates some persons, places or things from others upon which, but for such limitation, it would operate. The test of a special law is the appropriateness of its provisions to the objects that it excludes.²⁴⁵

Because there are three defined exceptions to the general modification of joint and several liability in section 4.22.070, this "special legislation" provision may be implicated, but it is not violated. The minimal standard is whether "any exclusions from a statute's applicability . . . [are] rationally related to the purpose of the statute."²⁴⁶

As explained in detail above,²⁴⁷ the three statutory exceptions are rationally, indeed substantially, justified. Further, each was created for a purpose that is entirely compatible with the objectives of the Tort Reform Act of 1986: to establish a more equitable tort liability system and to increase the availability of liability insurance. In this context, then, a "special legislation" challenge adds nothing to the equal protection arguments.²⁴⁸

VII. SEPARATION OF POWERS

Detractors of section 4.22.070 also contend that the substantive modification of the joint and several liability doctrine infringes upon separation of powers principles.²⁴⁹ Their argument appears to be that the judiciary possesses an inherent

244. WASH. CONST. art. II, § 28, cl. 17.

245. *YMCA of Seattle v. Parish*, 89 Wash. 495, 498, 154 P. 785 (1916) (citations omitted); see also *Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass'n*, 83 Wash. 2d 523, 537, 520 P.2d 162, 171 (1974).

246. *Pfeifer v. City of Bellingham*, 112 Wash. 2d 562, 570, 772 P.2d 1018, 1023 (1989) (quoting *City of Seattle v. State*, 103 Wash. 2d 663, 675, 694 P.2d 641, 649 (1985)).

247. See *supra* notes 178-192 and accompanying text.

248. See *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wash. 2d 107, 143, 744 P.2d 1032, 1057 (1987) (relying on rational basis equal protection analysis to reject special legislation challenge to statute), *amended*, 750 P.2d 254, *appeal dismissed*, 109 S. Ct. 35 (1988); *Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass'n*, 83 Wash. 2d 523, 537, 520 P.2d 162, 171 (following same line of analysis).

249. *Wiggins, Harnetiaux & Whaley, supra* note 5, at 202-04, 243. *But see Peck, supra* note 5, at 689-90 (concluding that the statutory modification of joint and several liability is not likely to be viewed as an unconstitutional invasion of judicial powers).

and inviolable power to award the full amount of damages suffered by a plaintiff, even if additional liability is imposed beyond a defendant's proportionate share of the damages. Not surprisingly, there is no authority for this startling proposition.

Although the common law may traditionally have been the product of judicial decisionmaking, it has long been established that the legislature may effect changes in or outright abrogation of the rules that obtained at common law.²⁵⁰ Washington courts have accepted legislative prescriptions instituting significant changes in tort rules of liability and damage recovery, causes of action, immunities, statutes of limitations, evidentiary rules and presumptions, qualifications of witnesses and subjects of testimony, testimonial privileges, and the discretion of courts.²⁵¹

In *Suburban Fuel Co. v. Lamoreaux*,²⁵² the Washington Court of Appeals upheld against separation of powers attack a statute that prohibited any award of damages to an unregistered contractor seeking to enforce a construction contract. The court rejected the argument that a statute unconstitutionally encroaches upon the judicial power because it directs a change in the substantive law to be applied by the courts in adjudicating lawsuits:

It is true that a change in substantive law or the abolition of a right or cause of action otherwise existing prevents a court from doing what it was able to do before the statute was passed. However, such a change in substantive or procedural law is not necessarily an unconstitutional impairment of judicial function. Were the law otherwise, the legislature

250. See, e.g., *Daggs v. City of Seattle*, 110 Wash. 2d 49, 57, 750 P.2d 626, 630 (1988); *Godfrey v. State*, 84 Wash. 2d 959, 962-63, 530 P.2d 630, 632 (1975); *Shea v. Olson*, 185 Wash. 143, 157, 53 P.2d 615, 622 (1936); see also *supra* notes 65-68 and 76-78 and accompanying text.

251. See, e.g., *Godfrey*, 84 Wash. 2d 959, 530 P.2d 630 (adoption of comparative negligence); *Shea*, 185 Wash. 143, 53 P.2d 615 (creating new immunity from tort liability); *Rodriguez v. Niemeyer*, 23 Wash. App. 398, 595 P.2d 952 (1979) (statutes of limitations); *Miller v. Paul Revere Life Ins. Co.*, 81 Wash. 2d 302, 501 P.2d 1063 (1972) (rules of evidence); *State v. Ryan*, 103 Wash. 2d 165, 691 P.2d 197 (1984) (rules of evidence in criminal cases); *Adams v. Hinkle*, 51 Wash. 2d 763, 322 P.2d 844 (1958) (presumptions); *State v. Thomas*, 58 Wash. 2d 746, 364 P.2d 920 (1961) (presumptions in criminal cases); *Campbell v. Campbell*, 146 Wash. 478, 263 P. 957 (1928) (witnesses); *Cook v. King County*, 9 Wash. App. 50, 510 P.2d 659 (1973) (testimonial privileges); *State v. Ammons*, 105 Wash. 2d 175, 713 P.2d 719, *amended*, 718 P.2d 796 (Sentencing Reform Act limiting discretion of judges in criminal sentencing), *cert. denied*, 479 U.S. 930 (1986).

252. 4 Wash. App. 179, 480 P.2d 216 (1971).

would be powerless or seriously handicapped in exercising its powers in accordance with developing needs.²⁵³

Those urging separation of powers flaws in section 4.22.070²⁵⁴ rely heavily upon the Washington Supreme Court's decision in *City of Tacoma v. O'Brien*,²⁵⁵ which held that a statute mandating a particular legal ruling in a case violated separation of powers principles. The statute at issue in *O'Brien* effectively found that "existing contracts, entered into at least six months prior to the legislation, have become economically impossible to perform."²⁵⁶ Thus, the legislature had statutorily decreed an irrebutable presumption and applied it to pre-existing contracts. In other words, the *O'Brien* court was confronted with "a legislative finding that contracts entered into prior to the legislation have become impossible to perform."²⁵⁷ The legislature had, in effect, *adjudicated* the case, rather than simply stating the rule of law which was to apply.²⁵⁸

By contrast, section 4.22.070 does not "dictate[] how the court should decide a factual issue [or] affect[] a final judgment" in a pending case.²⁵⁹ The statute does not adjudicate any existing legal dispute; it merely modifies the common law rule of joint and several liability and thereby changes the substantive law that will be applied in the future.

Changes in substantive law, even those that establish the rule of decision in future litigation, have never been held to be outside the legislative province. The legislature must be accorded the authority necessary "to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."²⁶⁰ Indeed, the Washington Supreme Court has declared that it is the legislature, rather than the judiciary, which is most capable of making the public policy judgments involved in assessing the merits of comprehensive changes in the liability system which entail broad societal impact.²⁶¹

253. *Id.* at 181-82, 480 P.2d at 218.

254. Wiggins, Harnetiaux & Whaley, *supra* note 5, at 204.

255. 85 Wash. 2d 266, 534 P.2d 114 (1975).

256. *Id.* at 272, 534 P.2d at 117.

257. *American Nat'l Can Ass'n v. State*, 114 Wash. 2d 236, 252, 787 P.2d 545, 553 (1990).

258. *Id.*

259. *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wash. 2d 107, 144, 744 P.2d 1032, 1058 (1987), *amended*, 750 P.2d 254, *appeal dismissed*, 109 S. Ct. 35 (1988).

260. *Munn v. Illinois*, 94 U.S. 113, 134 (1876).

261. *Burkhart v. Harrod*, 110 Wash. 2d 381, 385-86, 755 P.2d 759, 761 (1988) (stating

Finally, section 4.22.070 does not intrude upon the inherent authority of the Washington Supreme Court to promulgate rules of procedure as established in *State v. Smith*.²⁶² The modification of joint and several liability is a substantive, not a procedural, change in tort law, rights, and remedies.²⁶³ The fact that new rules of procedure may be necessary to implement this substantive change in the law of tort liability raises no separation of powers concerns.

VIII. SINGLE SUBJECT IN BILL

Article II, section 19 of the Washington Constitution provides: "No bill shall embrace more than one subject, and that shall be express in the title."²⁶⁴ Although none of the commentators in the legal literature have suggested this provision as a basis for a constitutional challenge to section 4.22.070, some plaintiffs have argued that the Tort Reform Act of 1986, as a whole, is unduly comprehensive in scope because it deals with both tort rules and liability insurance regulation²⁶⁵ and thus runs afoul of this constitutional limitation.

The "single subject" requirement of the state constitution has been liberally construed by the Washington Supreme Court.²⁶⁶ In the modern world, with an increasing awareness of the interdependent and interrelated nature of so many aspects of life and the world in which we live, the legislature must be free to adopt broad and comprehensive legislation that attempts to deal with numerous aspects of a single but many-faceted problem. The "single subject" requirement must not be interpreted so as to foster uncoordinated, piecemeal resolutions of troublesome and complex matters; article II, section 19 was not intended "to so tie the hands of the legislature as to

that modification of the common law rule that social hosts are not liable for actions of intoxicated guests should be left to legislature).

262. 84 Wash. 2d 498, 502, 527 P.2d 674, 677 (1974).

263. See *id.* at 501, 527 P.2d at 677 (contrasting "substantive law, rights and remedies" with procedural rules pertaining "to the essentially mechanical operations of the courts").

264. WASH. CONST. art. II, § 19.

265. Tort Reform Act of 1986, ch. 305, §§ 906-909, 1986 Wash. Laws 1366-67 (insurance related provisions).

266. *Scott v. Cascade Structures*, 100 Wash. 2d 537, 545-46, 673 P.2d 179, 183 (1983) (upholding comprehensive 1981 tort reform and products liability act); *Casey v. Fred Hutchinson Cancer Research Center*, 56 Wash. App. 749, 785 P.2d 484 (1990).

make legislation extremely difficult, if not impossible."²⁶⁷ Accordingly, the legislature is allowed wide discretion in the selection of bill titles and subject matter²⁶⁸ and a constitutional violation will be found only in those "rare cases" involving "extreme and obvious violations of article II, section 19."²⁶⁹

In *Smith v. Department of Insurance*,²⁷⁰ the Florida Supreme Court upheld a tort reform statute, including modification of joint and several liability, against a similar "single subject" state constitutional attack. The court recognized that the area of tort liability and the objective of creating a stable market for liability insurance were closely related.²⁷¹ As a matter of "common sense," the court appreciated that tort reform legislation had to address both matters in order to be effective.²⁷²

These conclusions apply with equal force to the legislation enacted in 1986 by the Washington Legislature to deal with a liability insurance crisis and to promote increased equity in the tort liability system. These problems evolved together and were properly addressed concurrently in a single bill. There is certainly more than a "rational unity"²⁷³ among the various provisions of the Tort Reform Act of 1986, and it therefore is valid under article II, section 19.

IX. CONCLUSION

The detractors of the Washington Tort Reform Act of 1986 are understandably hopeful that the Washington Supreme Court's rejection of the damages cap provision²⁷⁴ presages the future fate of other controversial provisions in the Act. The noneconomic damages cap, however, was a singular and distinct provision which was uniquely vulnerable to constitutional attack because it imposed a somewhat arbitrary ceiling on

267. *Casco Co. v. Public Util. Dist. No. 1*, 37 Wash. 2d 777, 788, 226 P.2d 235, 241 (1951) (quoting *Marston v. Humes*, 3 Wash. 267, 275, 28 P. 520, (1891)).

268. See *State Fin. Comm. v. O'Brien*, 105 Wash. 2d 78, 80-81, 711 P.2d 993, 993-94 (1986).

269. *Casey*, 56 Wash. App. 749, 785 P.2d 484 (1990) (listing the "extreme and obvious" cases in which violations of article II, § 19 were found).

270. 507 So. 2d 1080 (Fla. 1987).

271. *Id.* at 1086-87.

272. *Id.*

273. See *State v. Grisby*, 97 Wash. 2d 493, 498-99, 647 P.2d 6, 9 (1982), *cert. denied*, 459 U.S. 1211 (1983).

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

recovery of damages. By contrast, the modification of joint and several liability is a principled provision which reflects the evolution of the modern tort liability system to one grounded upon comparative fault. As such, while it may be subject to criticism on policy grounds, it is not susceptible to challenge as arbitrary or unreasonable.

Accordingly, the invalidation of the noneconomic damages cap should and likely will turn out to represent, not the beginning of the end for tort reform in Washington, but merely the collapse of a single weak provision in what otherwise is a milestone in the progression toward a pure system of comparative fault among all parties in tort litigation. Foes of the Tort Reform Act's modification of joint and several liability will find section 4.22.070 a tougher nut to crack than the ill-starred damages cap. Although certain provisions of tort reform packages enacted by various states, particularly ceilings on damages, have met uneven fates, courts in other jurisdictions have uniformly found statutes revising or abolishing joint and several liability to pass constitutional muster.²⁷⁵

There is, of course, room for debate about the particular means by which this reform was accomplished by the legislature and whether section 4.22.070 should be revised and clarified to better realize the provision's purpose.²⁷⁶ However, the time had come to abandon the general rule of joint and several liability. By adopting a rule of several liability and comparative fault to govern in most instances of tortious injury, the legislature took a giant stride forward toward realization of the touchstone principle that "the extent of fault should govern the extent of liability."²⁷⁷

It would be unfortunate if the obsolete former regime

275. *E.g.*, *In re Air Crash Disaster at Stapleton Int'l Airport*, 720 F. Supp. 1465 (D. Colo. 1989); *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 246 Cal. Rptr. 629, 753 P.2d 585 (1988); *Smith v. Department of Ins.*, 507 So.2d 1080 (Fla. 1987); *Beeler v. Van Cannon*, 376 N.W.2d 628, 629-30 (Iowa 1985); *Baldwin v. City of Waterloo*, 372 N.W.2d 486, 492 (Iowa 1985); *Kavadas v. Lorenzen*, 448 N.W.2d 219 (N.D. 1989).

276. The legislature stated that the purposes of the reforms enacted were "to create a more equitable distribution of the cost and risk of injury and increase the availability of insurance." Tort Reform Act of 1986, ch. 305, § 100, 1986 Wash. Laws 1354. If revisions of the particular language or provisions of section 4.22.070 should prove necessary in order to more fully realize these purposes, the petition for amendment should be made to the people's representatives in the legislature, not through the medium of a constitutional challenge in the courts.

277. See *Bartlett v. New Mexico Welding Supply*, 98 N.M. 152, 157, 646 P.2d 579, 583 (N.M. Ct. App. 1982) (quoting *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975)).

imposing the full burden of liability upon each individual defendant regardless of the degree of fault were to be exhumed now by judicial fiat. The provisions of the Washington Constitution offer no justification for disinterring the enervated common law rule of joint and several liability from its well-deserved and timely burial.