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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

Cornelius J. Peck*

The substantial changes from the common law rule of joint and several liability made when the Washington Legislature adopted Section 401 of the 1986 Tort Reform Act have been discussed in an article previously published in this Review.[1] Those changes will certainly be challenged on both state and federal constitutional grounds. The statute is not likely to be held unconstitutional on its face and most certainly will not be declared unconstitutional in a case in which all responsible parties have been joined as defendants or could be so joined. The strongest challenges will probably be made in cases in which, as discussed in the article previously published in this Review, allocations of fault are made to entities not subject to the jurisdiction of the Washington courts, entities not sufficiently identified to permit joinder in a law suit, or entities enjoying an immunity from liability to the plaintiff. It will probably be necessary for the Washington Supreme Court to construe the challenged statutory language, and this suggests that the rulings on the challenges will be first obtained in state court litigation.

The substantive due process challenges deserve serious consideration. It is possible that they will be sustained. Washington constitutional law provides a stronger basis for substantive challenges than does federal constitutional law. The procedural due process challenges are more likely to succeed, whether challenged under federal or state constitutional law. Whether they do succeed depends in large part on the extent to which the judiciary is willing to give a sympathetic reading to, and supply corrections for, a poorly drafted statute. The possibility of a sympathetic treatment by the judiciary is diminished by the fact that the statute dismantles an important feature of the tort law which the judiciary constructed in the belief that it best served the interests of the public.[2]

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1. Peck, *Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability*, 62 WASH. L. REV. 233 (1987).

2. The Washington Supreme Court has played a leading role in developing tort law. It was one of the first courts to impose strict liability without privity of contract for defective food and drink. Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913). Its holding in Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932), which imposed liability on a manufacturer to a consumer based on warranties in advertisements, was a precursor of the strict liability imposed on manufacturers in Section 402(A) of

The procedural due process questions raised by Section 401 differ in substantial ways from questions in traditional procedural due process cases. In most of the decided cases a governmental body or a private individual was attempting to harm the interests of the person claiming due process protection. Due process requirements were established as protections for the defendant. Only a few of the cases involved a claim of due process in access to a judicial remedy. Persons contesting the constitutionality of Section 401 will argue that the limitations imposed and the procedures required by that Section fail to meet the requirements of due process for the assertion of a legally recognized claim. Existing case law will, therefore, provide guidance only by analogy for the solution of new problems, and will not directly control resolution of the questions presented. Definite and certain answers or predictions cannot be made. What follows will be a sketch of how constitutional principles may be applied and not a definitive and final disposition of the many arguments which may be anticipated.

SUBSTANTIVE DUE PROCESS

There is no doubt that state legislatures have the constitutional authority to make changes in common law principles of tort law. This general proposition is well established under both the United States[3] and Washington State Constitution.[4] Indeed, the Washington Supreme Court has itself abolished tort causes of action[5] and it has created new causes of action.[6]

the RESTATEMENT (SECOND) OF TORTS (1979). The Washington Supreme Court adopted the strict liability of Section 402(A) at an early date. Ulmer v. Ford Motor Co., 75 Wn. 2d 522, 452 P.2d 729 (1969). In Seattle-First Nat'l Bank v. Tabert, 86 Wn. 2d 145, 542 P.2d 774 (1975), the court adopted a consumer-oriented test for what constituted a defective product. Recently, the court concluded that its consumer-oriented test was preserved by the 1981 Tort and Product Liability Reform Act, despite some contrary indications in the legislative history of that Act. Couch v. Mine Safety Appliances Co., 107 Wn. 2d 232, 239 n.5, 728 P.2d 585, 589 n.5 (1986). The Washington court was a leader in imposing liability for mental anguish and physical harm caused by outrageous behavior. Contreras v. Crown Zellerbach Corp., 88 Wn. 2d 735, 565 P.2d 1173 (1977); Gadbury v. Bleitz, 133 Wash. 134, 233 P.2d 299 (1925). Recently, the court went beyond the liberal California Supreme Court, and recognized the right of children to recover damages for loss of parental consortium. Ueland v. Pengo Hydra-Pull Corp., 103 Wn. 2d 131, 691 P.2d 190 (1984).

3. Martinez v. California, 444 U.S. 277, 281–83 (1980) (adoption of an immunity statute); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 88 n.32 (1978); Silver v. Silver, 280 U.S. 117 (1929) (adoption of a host-guest statute); New York Central Ry. Co. v. White, 243 U.S. 188 (1917); *Cf.* Munn v. Illinois, 94 U.S. 113, 134 (1876).

4. Godfrey v. State, 84 Wn. 2d 959, 962–63, 530 P.2d 630 (1975) (adoption of comparative negligence); Shea v. Olsen, 185 Wash. 143, 53 P.2d 615 (1936) (adoption of a host-guest statute).

5. Wyman v. Wallace, 94 Wn. 2d 99, 615 P. 2d 452 (1980) (abolishing the action for alienation of affections).

6. Contreras v. Crown Zellerbach Corp., 88 Wn. 2d 735, 565 P.2d 1173 (1977); Grimsby v. Samson, 85 Wn. 2d 52, 530 P.2d 291 (1975) (tort of outrage is a compensable claim).

The broad power of a legislature to control tort liability is limited by the rule that it may not act arbitrarily.[7] This limitation on the legislature would appear to have great power if the legislative action affects a fundamental interest coming within the constitutional protection of liberty.[8] Certain common law rights must be considered as coming within the guarantees of liberty found in both the due process clause of the fourteenth amendment and article I, section 3 of the state constitution. The 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 that protection.[9]

Without any protection against invasions of physical and emotional integrity, existence would be reduced to a brutish state at which neither personal freedom nor liberty could exist. Complete protection is impossible, but withdrawal of what had existed at least raises questions of whether the legislative decision to expose persons to harm without remedy withdrew governmental protection of a constitutionally protected interest to a point inconsistent with the current concept of liberty.[10] The Washington Supreme Court has said, in the context of invalidating a statute on equal

7. *Martinez*, 444 U.S. at 282 n.6.

8. Griswold v. Connecticut, 381 U.S. 479, 492–93 (1965) (Goldberg, J,. concurring).

9. In Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980), Marshall applied this argument to property:

> I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common-law rights by Congress or a state government. The constitutional terms "life, liberty, and property" do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect. Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.

Pruneyard, 447 U.S. at 93–94.

10. *Cf.* Reitman v. Mulkey, 387 U.S. 369 (1967) (holding that, unlike the mere repeal of a statute, enactment of an initiative that incapacitated the State of California from preventing discrimination in the sale or rental of housing unconstitutionally involved the state in private discrimination in such transactions). Of course, limitations upon the right to recover damages for personal injuries do not constitute a positive encouragement to injure comparable to the predictable effects of enactment of the California initiative given the motives of its supporters, but it is predictable that the elimination of the deterrents of harm causing conduct will result in an increase in such conduct.

Also cf. Parratt v. Taylor, 451 U.S. 527 (1981) (in which it was concluded that availability of a tort claims procedure to remedy the negligent loss of a prisoner's personal property precluded the conclusion that there had been an unconstitutional taking of the prisoner's property). Absence of the tort remedy would have required consideration of what constitutional protection was required. Similarly, in Ingraham v. Wright, 430 U.S. 651 (1977), it was concluded that the availability of tort remedies satisfied due process requirements so that there was no invasion of the liberty interests of junior high school students who were subjected to corporal punishment without notice and hearing. In the course of its opinion the Court said, "Among the historic liberties so protected [is] a right to be free from and to

protection grounds: "The 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."

Interests that appear to be no more important have received protection as an aspect of liberty. Thus, the interest in educating a child in a school of the parents' choice, unmentioned in the Constitution, has been recognized as a liberty interest enjoying constitutional protection.[11] In *Smith v. Texas*[12] the right to labor was held to come within the protection afforded by the constitutional guarantee of liberty. In *Meyer v. Nebraska*[13] pursuit of an occupation as a teacher of a foreign language was given recognition as a liberty interest.[14] In *Truax v. Raich*[15] an alien's employment under a contract terminable at will received protection which invalidated a statute on equal protection grounds. What appear to be other lesser interests have also been held entitled to procedural due process.[16]

The right to bring an action for personal injuries has been held to be a fundamental right under the Montana[17] and Arizona[18] constitutions. However, those decisions were based in large part upon constitutional provisions which are not replicated in the Washington Constitution.[19] Moreover, the supreme courts of other states have refused to give a similar reading to comparable language found in their state constitutions.[20] Article I, section

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obtain judicial relief, for unjustified intrusions on personal security. . . ." 430 U.S. at 673 (citing the 39th article of the Magna Carta).

But cf. Paul v. Davis, 424 U.S. 693 (1976) (characterizing the interest in reputation as simply one of a number of interests which the state might protect against injury by virtue of its tort law so that damage to reputation inflicted by a governmental official did not constitute a deprivation of liberty or property).

11. Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925). *See also* Wisconsin v. Yoder, 406 U.S. 205 (1972) (religiously based conviction that secondary education will cause worldliness inconsistent with the values of Amish society protected from interference by a state compulsory education law).

12. 233 U.S. 630 (1914).

13. 262 U.S. 390 (1923).

14. The liberty preserved from deprivation without due process was said to include the right "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 399.

15. 239 U.S. 33 (1915).

16. *See infra* text accompanying notes 33–41.

17. Pfost v. State, 713 P.2d 495 (1985); White v. State, 203 Mont. 363, 661 P.2d 1272 (1983). *But see* Kelleher v. Big Sky of Montana, 642 F. Supp. 1128 (D. Mont. 1986) (holding that *White* and *Pfost* do not require invalidating a statute making the doctrine of assumption of risk applicable to ski area resorts and operators).

18. Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984).

19. Mont. Const. art. II, § 16 specifically guarantees that all persons shall have a "speedy remedy . . . for every injury of person, property or character." Ariz. Const. art. 18, § 6 specifically prohibits abrogation of "the right of action to recover damages . . ." and further provides that "the amount recovered shall not be subject to any statutory limitation."

20. Wilson v. Municipality of Anchorage, Alaska, 669 P.2d 569 (Alaska 1983); Fritz v. Regents of

10 of the Washington Constitution does provide "Justice in all cases shall be administered openly and without unnecessary delay," but that language certainly does not suggest that the right to bring a suit for personal injuries must be considered fundamental.

However, the Washington court has held that the common law right to be free from bodily invasion is a basis for a right to refuse life sustaining treatment which cannot be unreasonably limited by the state.[21] This common law right was sufficient to overcome the state's interest in the preservation of life, the protection of innocent third parties' interests, the prevention of suicide and the maintenance of ethical integrity in the medical profession. In reaching that conclusion the court also identified that right as the basis of the doctrine of informed consent which requires physicians to disclose to a patient all material facts and risks concerning the patient's condition, enabling the patient to make an informed choice regarding a proposed treatment.[22] It thus appears that what might have been considered merely a common law tort principle has a constitutional base which could preclude its elimination on standards comparable to those applied in determining whether the right to refuse life sustaining treatment can be limited by the state.

That a constitutionally protected interest requires legal protection has more recently been recognized in a decision of the Washington Supreme Court sustaining the issuance of an injunction against picketing to protest the performance of abortions in a medical office building.[23] The court said, "The right of privacy dictates protection of the private relationship between a woman and her physician, . . . and the physician's right to freely practice medicine and perform legal abortions."[24] The court apparently believed, erroneously, that the United States Supreme Court's decision in *Roe v. Wade*[25] required this protection against private action,[26] but it also based this protection on its own previous commitment to personal privacy.[27] The court provided that protection even though it was necessary to

Univ. of Colorado, 196 Colo. 335, 586 P.2d 23 (1978); Ryszkiewicz v. City of New Britain, 193 Conn. 589, 489 A.2d 793 (1984); Troyer v. Dept. of Health and Soc. Services, 722 P.2d 158 (Wyo. 1986).

21. *In re* Colyer, 99 Wn. 2d 114, 121, 660 P.2d 738 (1983), *modified, In re* Hamlin, 102 Wn. 2d 810, 689 P.2d 1372 (1984); Note, *Abortion, Protest, and Constitutional Protection,* 62 WASH. L. REV. 311 (1987).

22. *Colyer,* 99 Wn. 2d at 121, 660 P.2d at 743.

23. Bering v. Share, 106 Wn. 2d 212, 721 P.2d 918 (1986).

24. 106 Wn. 2d at 227, 721 P.2d at 928.

25. 410 U.S. 113 (1973).

26. Note, *Abortion, Protest, and Constitutional Protection,* 62 WASH. L. REV. 311, 328 (1987).

27. The Court stated:

Given this court's previous commitment to personal privacy, *see, e.g.,* State v. Koome, 84 Wn. 2d 901, 530 P.2d 260 (1975) (minor's right to abortion); In re Colyer, 99 Wn. 2d 114, 660 P.2d 738 (1983) (patient's right to die); In re Rosier, 105 Wn. 2d 606, 717 P.2d 1353 (1986) (privacy interest

limit the injunction to avoid an impermissible conflict with the defendants' constitutional rights of free speech. If the right to bring a suit for personal injuries is, like privacy, considered a constitutionally protected liberty interest, it would be more appropriate to provide protection where there was no possible conflict with a constitutionally protected right, but instead only conflict with a statute limiting recovery for personal injuries for the purpose of reducing the cost of insurance.

Recognition of an interest as an aspect of the liberty interest under the Washington Constitution does not require a constitutional provision expressly designating it as such.[28] If the right to bring an action for personal injuries is recognized as a fundamental interest under federal substantive due process, the question would appear to be whether there is a compelling state interest to justify the limitations imposed upon that right by legislation.[29] In making this test, consideration should be given to other means available to obtain the legislative objective.[30]

The test might otherwise be stated as requiring a state interest of sufficient magnitude to justify the limitation on the protected interest. More should be required than a merely "reasonable relation to some purpose within the competence of the state."[31] Still another phrasing of the test is that it involves a critical examination of the governmental interests and the extent to which they are served by the challenged legislation.[32] Of course, the Washington court might develop a lesser, but nonetheless stringent, standard for determining whether the statute meets the due process requirements of the Washington Constitution.[33]

The statutory limitations imposed upon the right to bring an action have been discussed in some detail.[34] The significance of these limitations will receive further consideration in the discussion of the procedural due

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in personal information), protection of that right, even from private invasion constitutes a compelling State interest justifying a reasonable place restriction on picketing.

Bering, 106 Wn. 2d at 229–30.

28. *In re* Luscier, 84 Wn. 2d 135, 524 P.2d 906 (1974) (the fundamental nature of parental rights as a part of the liberty interest requires appointment of counsel in a child deprivation proceeding).

29. Belle Terre v. Boraas, 416 U.S. 1, 18 (1974) (Marshall, J., dissenting); Roe v. Wade, 410 U.S. 113, 155 (1973); Griswold v. Connecticut, 381 U.S. 479, 496–497 (1965) (Goldberg, J., concurring); Bates v. Little Rock, 361 U.S. 516, 524 (1960); State v. Koome, 84 Wn. 2d 901, 530 P.2d 260 (1975).

30. Zablocki v. Redhail, 434 U.S. 374, 383 (1978).

31. Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).

32. Moore v. East Cleveland, 431 U.S. 494, 499 (1977). *Compare* Zablocki v. Redhail, 434 U.S. 374, 383 (1978), *with* Aptheker v. Secretary of State, 378 U.S. 500 (1964).

33. The Washington Supreme Court has indicated an interest in developing an intermediate standard of review for equal protection purposes in addition to the traditional two-tier standards of strict scrutiny and rational basis. *See* Macias v. Labor & Industries, 100 Wn. 2d 263, 268–69, 668 P.2d 1278 (1983); Hunter v. North Mason High School, 85 Wn. 2d 810, 815, 539 P.2d 845 (1975); *see also* Sanchez v. Labor & Industries, 39 Wn. App. 80, 88–89, 692 P.2d 192 (1984).

34. Peck, *supra* note 1.

process challenges to Section 401 of the 1986 Tort Reform Act. The justification for imposing these limitations on the right to recover for personal injuries is set out in the Preamble to the 1986 Tort Reform Act.[35] The dominant concern is the availability and affordability of insurance. The changes made in the law are for the purpose of meeting an insurance crisis caused by existing tort law. The preamble also mentions the goal of creating "a more equitable distribution of the cost and risk of injury . . ." and the effect upon the public through higher taxes and the loss of essential services. But it is the cost of insurance that caused these losses by the public, just as it is the cost of insurance that has discouraged health care providers and other professionals from continuing to provide services to the public. Tort law itself was not found to be unjust, nor was there a finding that damages were being awarded for losses that were not real nor properly the subject of monetary compensation.[36] The limitations imposed upon the right to recover for personal injuries therefore find their primary justification in the insurance crisis—or in the desirability of making insurance more available and affordable by making changes in an otherwise acceptable tort law.

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35. 1986 Wash. Laws ch. 305, § 100 reads as follows:

Sec. 100. PREAMBLE. Tort law in this state has generally been developed by the courts on a case-by-case basis. While this process has resulted in some significant changes in the law, including amelioration of the harshness of many common law doctrines, the legislature has periodically intervened in order to bring about needed reforms. The purpose of this chapter is to enact further reforms in order to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance.

The legislature finds that counties, cities, and other governmental entities are faced with increased exposure to lawsuits and awards and dramatic increases in the cost of insurance coverage. These escalating costs ultimately affect the public through higher taxes, loss of essential services, and loss of the protection provided by adequate insurance. In order to improve the availability and affordability of quality governmental services, comprehensive reform is necessary.

The legislature also finds comparable cost increases in professional liability insurance. Escalating malpractice insurance premiums discourage physicians and other health care providers from initiating or continuing their practice or offering needed services to the public and contribute to the rising costs of consumer health care. Other professionals, such as architects and engineers, face smiliar difficult choices, financial instability, and unlimited risk in providing services to the public.

The legislature also finds that general liability insurance is becoming unavailable or unaffordable to many businesses, individuals, and nonprofit organizations in amounts sufficient to cover potential losses. High premiums have discouraged socially and economically desirable activities and encourage many to go without adequate insurance coverage.

Therefore, it is the intent of the legislature to reduce costs associated with the tort system, while assuring that adequate and appropriate compensation for persons injured through the fault of others is available.

36. Section 301 of the 1986 Tort Reform Act imposes limitations on the amount of noneconomic damages which may be recovered, but does so on the basis that they constitute real damages the amount of which is to be computed by a jury uninformed of the limitation imposed by the formula established in the section.

It would unduly lengthen this article to set out all the financial and other data necessary to resolve the question of whether it was tort law or the financial practices of insurers that produced the crisis. As suggested in the first installment of this article[37] it appears likely that the crisis arose because of the investment policies followed by insurance companies with the reserve funds they accumulate to cover expected liabilities. When interest rates were high, insurers issued policies at rates lower than necessary to cover predictable losses, and did so because of the profits which could be made by investing the reserve funds prior to use in paying claims. When interest rates dropped, insurers found themselves with a premium structure inadequate to cover predictable losses and therefore imposed substantial increases in premiums. By the time cases challenging the constitutionality of Section 401 reach the supreme court there will be evidence concerning the profitability of the insurance industry during the crisis period. It may show that they continued to enjoy profitable operations. It also may be possible to determine whether the changes made in the law resulted in lower premiums and greater availability of insurance.

If the economic and statistical data do not support the claim that tort law produced the crisis and demonstrate that insurance has become neither more available nor affordable, the constitutional basis for the legislation will accordingly be weakened. But even if a rational basis remains for concluding that tort law was a significant factor in precipitating the crisis, the principal legislative justification for the limitations imposed on the right to recover damages for personal injuries appears, from the Act's preamble, to be that justice is too expensive. Concern for the availability and affordability of insurance appears to have displaced concern for justice. The balancing of the competing claims is not accomplished by determining that there is a rational basis for concluding that tort law and the rule of joint and several liability contributed to the insurance crisis. The question instead takes on aspects similar to the question of whether the common law right to be free from bodily invasion is a basis for a right to refuse life sustaining treatment, or the right to privacy a basis for limiting free speech.

37. Peck, *supra* note 1, at 234–35. The insurance commissioner has submitted to the state legislature a report from an Insurance Cycles Committee he appointed to study the problems of insurance availability and affordability. The subcommittee reported, at page 2, that there are very few risks for which insurance is truly unavailable. The report recognizes the existence of profit cycles for the insurance industry. One portion of the cycle is characterized as the "soft market," when rates are reduced below the level necessary to cover losses. The "hard market" cycle occurs when there is a drastic increase in premiums, sometimes involving increases in excess of those needed to make profits. The existence of such cycles is inconsistent with the premise that it is the rather stable substantive tort law which caused the rapid increases and raised questions of affordability of insurance. REPORTS OF THE LEGAL ACTION TASK FORCE (1986) (submitted to Insurance Commissioner Dick Marquart Dec. 1986 and reported by him to the members of the 50th Legislature on Jan. 15, 1987).

To the extent that changes from joint and several liability were based on the inequity of making a party whose fault was comparatively slight liable for all of a plaintiff's harm, protection of a fundamental interest would require justification for the failure to use alternatives with a less drastic effect on plaintiff's claim. Joint and several liability could have been limited to defendants whose fault was greater than that of the plaintiff or to defendants whose fault exceeded a substantial but fixed percentage of total fault.[38] Thus, although substantive due process protection has generally fallen into disfavor, it is not beyond possibility that the Washington courts will conclude that there was not a state interest of sufficient magnitude to justify the limitations imposed on the previous protection given a fundamental liberty interest, and therefore invalidate Section 401 on substantive due process grounds.

LEGISLATIVE INVASION OF JUDICIAL POWER

Section 401 may be held to be an unconstitutional invasion of the judicial power conferred on the courts by the Washington Constitution, and hence an incursion going beyond the power of the legislature. In 1933, the Washington Legislature, like a number of other state legislatures, enacted a statute generally referred to as a Little Norris-LaGuardia Act.[39] The statute, like the federal statute from which it drew its popular name, attempted to impose drastic limitations upon the issuance of injunctions in labor disputes. In *Blanchard v. Golden Age Brewing Co.*,[40] the Washington Supreme Court invalidated a major portion of the statute on the theory that it attempted to divest courts of their constitutional powers. The provisions were declared void as an encroachment by the legislature upon the judiciary.[41] This characterization was facilitated by express terms in the statute depriving courts of jurisdiction. In that way it differed in an important way from Section 401 of the 1986 Tort Reform Act. Nevertheless, statements made in the opinion have possible applicability to Section 401. The Court said:

> Undoubtedly, the legislature may prescribe reasonable regulations governing court procedure. . . . As a matter of comity between the separate departments of government, the courts will always recognize reasonable regulations prescribed by the legislature, even though they may seemingly have the appearance of being restrictions. But the courts are not required to recognize a legislative restriction which has the effect of depriving them of a constitutional grant or of one of their inherent powers. What the legislature has not

38. Other state legislatures made use of such limitations. See Peck, *supra* note 1, at 239–42.
39. The Washington statute is now found in WASH. REV. CODE §§ 49.32.011-.910 (1986).
40. 188 Wash. 396, 63 P.2d 397 (1936).
41. *Id.* at 415.

> given, it cannot take away. The legislature cannot indirectly control the action of the court by directing what steps must be taken in the progress of a judicial inquiry, for that is a judicial function . . . .
>
> Nor, again, is it any answer herein to say that there is no vested right in a particular form of remedy. It is not a question of the *right* of a litigant to a particular remedy, but, rather, a question of the *power* of the court to employ a particular form of remedy necessary to protect a right. In this connection, it may be observed that there is a vital distinction between legislative abolition of causes of action and a legislative interference with the judicial processes respecting an *existing* cause of action. This distinction was drawn in the recent case of *Shea v. Olson,* 185 Wash. 143, 53 P.(2d) 615 . . . .[42]

Section 401 may be read as a statute that does not abolish a cause of action but instead directs the courts concerning the form of the remedy to be used to protect a right recognized by the statute. As such, it is an attempt to control the progress of a judicial inquiry into a personal injury claim. So viewed, Section 401 would appear to fall within the condemnation of the *Golden Age Brewing Co.* decision. It is more likely, however, that Section 401 will be viewed as a reshaping and restatement of the rights of a person who has suffered personal injuries. It limits the rights of a person who has been partially at fault to individual and proportional claims against persons responsible for the injuries, and the right of a person who has not been at fault to a joint but only proportional claim against those persons joined as defendants in a law suit. Substantively, it uses proportional fault rather than causation for determining the extent of liability or recovery.

The *Golden Age Brewing Co.* decision is not a venerable precedent and it probably would not be decided the same way by a court today. It is therefore unlikely to provide a basis for invalidating Section 401. Moreover, the court's more recent decision sustaining the constitutionality of a comparative negligence statute's modifications of the rules governing personal injury actions strongly suggests that it will not view Section 401 as an unconstitutional invasion of judicial powers.[43]

PROCEDURAL DUE PROCESS

The strongest challenge to the constitutionality of Section 401 will be on procedural due process grounds. There can be no doubt that a claim for personal injuries enjoys procedural due process protection. Much lesser interests have enjoyed such protection. The United States Supreme Court has held such protection applies to the interest in property purchased on an

42. *Id.* at 418.
43. Godfrey v. State, 84 Wn. 2d 959, 530 P.2d 630 (1975).

installment contract,[44] wages subject to garnishment,[45] good time credits earned in a state penitentiary,[46] a clergyman's interest in an automobile license,[47] avoidance of a transfer from a prison to a mental hospital,[48] the right to obtain liquor,[49] the right to electrical service,[50] ten days of schooling,[51] and uninterrupted receipt of welfare benefits.[52]

The cases establishing the procedural requirements of due process usually involve an attempt to deprive a person of something of value and that person's resulting claim to due process protection. However, while recognizing that it has seldom been asked to view access to the courts as an element of due process, the Supreme Court has held that due process standards protect persons who initiate legal proceedings. In *Boddie v. Connecticut*[53] the Court held that a welfare recipient of limited financial resources could not be denied a divorce because of that person's inability to pay a court filing fee. Access to the courts was required because marriage involves interests of fundamental importance in our society and the state has a monopoly over the means of dissolving a marriage, much as a state has a monopoly over compelling compensation for personal injuries.[54]

Of even greater significance than *Boddie* with respect to whether Section 401 must meet the requirements of procedural due process is the Court's decision in *Logan v. Zimmerman Brush Co.*[55] *Logan* involved an Illinois statute that prohibited discrimination in employment against the handicapped. The statute's enforcement procedure required the enforcing commission to convene a fact-finding conference within 120 days after a complaint was filed. Mr. Logan filed a complaint but, apparently through inadvertence, the commission did not schedule a conference until five days after the statutory period. The Illinois Supreme Court held that the failure to observe the 120 day period deprived the commission of jurisdiction to

44. Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972).
45. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).
46. Wolff v. McDonnell, 418 U.S. 539 (1974).
47. Bell v.Burson, 402 U.S. 535 (1971).
48. Vitek v. Jones, 445 U.S. 480 (1980).
49. Wisconsin v. Constantineau, 400 U.S. 433 (1971), *as interpreted in* Paul v. Davis, 424 U.S. 693 (1976).
50. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978).
51. Goss v. Lopez, 419 U.S. 565 (1975).
52. Goldberg v. Kelly, 397 U.S. 254 (1970).
53. 401 U.S. 371 (1971).
54. *Compare* Ortwien v. Schwab, 410 U.S. 656, 659 (1973), *with* United States v. Kras, 409 U.S. 434, 441–46 (1973) (both distinguishing *Boddie* on grounds that the interests involved were not fundamental and that in those cases government did not possess a monopoly of the means for dealing with the problems presented).
55. 455 U.S. 422 (1982); *see* T. Terrell, *Causes of Action as Property: Logan v. Zimmerman Brush Co. and the "Government-As-Monopolist" Theory of the Due Process Clause*, 31 EMORY L.J. 491 (1982).

hear the case. The Supreme Court reversed, holding that Logan's claim under the statute constituted a form of property of which he could not be deprived without due process. Barring the claim because of a negligent failure to schedule the conference within the statutory period constituted a violation of the due process required by the fourteenth amendment. Illinois was not required to provide handicapped persons protection against discrimination in employment, but if the state created such an entitlement that entitlement was protected by due process. It follows that even if a state is not required to recognize that a person suffering physical and/or emotional injuries is entitled to compensation, if it does so the procedures established to vindicate claims for such compensation must meet the standards of due process.

The 1986 Tort Reform Act recognizes that claims for compensation are valid and should be enforced. The preamble to the Act recites the difficulties that counties, cities, and other governmental entities have experienced with insurance costs, the similar difficulties experienced by physicians and other health care providers, and the unavailability and unaffordability of insurance. It concludes with the statement: "it is the intent of the legislature to reduce the costs associated with the tort system, *while assuring that adequate and appropriate compensation for persons injured through the fault of others is available.*"[56]

It is, however, difficult to imagine a provision more deficient than Section 401 in providing procedural due process protection. Section 401 requires the trier of fact in an action involving more than one entity to determine the percentage of fault attributable to *every* entity which caused the claimant's damages and to enter a judgment against each defendant for that defendant's proportionate share of the claimant's total damages. There will be no recovery in that suit against an entity to which fault has been assigned unless that entity is or has been made a party to the lawsuit. (Of course, there is a possibility of recovery if the entity can be made a defendant in a subsequent lawsuit.) Assignment of fault to a nonjoined entity thus will usually have the effect of reducing the compensation received by a person injured through the fault of others.

Section 401 does not state first, who, if anyone other than the trier of fact, is to identify the entities to which fault will be attributed; second, when the entities are to be identified; third, how they are to be identified; fourth, who has the burden of proof with respect to the allocation of fault to an entity; fifth, what that burden of proof is; or sixth, what the effect of the attribution of fault to an entity will be in a subsequent suit between the plaintiff and the entity. The statutory language would not preclude identifying an entity in

56. 1986 Wash. Laws ch. 305, § 100 (emphasis added).

closing oral argument, or, indeed, in a judge's preparation of findings of fact and conclusions of law.

A common sense treatment of the problems left unresolved by the statute would be to place the obligation of identifying an entity to which fault is to be allocated on the defendant or defendants who seek to reduce their liability by the allocation. That identification should take place at a time that meets procedural due process standards, and provides plaintiff adequate opportunity to respond. A sensible rule would be that the identification be made in an answer or amended answer filed well before trial. A similar common sense treatment would place the burden of proof for the allocation on the defendant or defendants, much as would be done with any affirmative defense. That burden should be to establish the basis for the allocation by a preponderance of the evidence, the standard commonly used in civil cases. Of course, if the plaintiff chose to join an identified entity as a party defendant, the burden of proof should then shift to the plaintiff.

Judicial development of these common sense solutions to the problems left unresolved by the legislature would be consistent with the cooperative approach to law-making which has been required to sustain and implement many statutory schemes.[57] The United States Supreme Court has said that the degree of proof required for particular types of proceeding is the kind of question traditionally left to the judiciary to resolve.[58] The Washington

57. A comparable example involving the possibility that the statute would be declared unconstitutional was the enactment of Section 301 of the Taft-Hartley Act, providing that suits for violation of contracts between an employer and a labor union might be brought in federal district courts. If the section were read as merely establishing venue in the district courts, it would have been unconstitutional because it would apply to suits between citizens of the same state on the basis of state, not federal, law and hence would be beyond the judicial power conferred on federal courts by article III of the United States Constitution. In what is now known as the Steelworkers Trilogy, the Supreme Court established that the law governing collective bargaining agreements is federal law, and made arbitration the kingpin of the federal labor policy. Subsequent decisions developed the law to an elaborate, but very satisfactory, state that could not have been contemplated by Congress when it adopted the Taft-Hartley Act. The history of the creative role of the Court in dealing with what was probably a defective statutory provision is set out in Peck, *Comments on Judicial Creativity*, 69 IOWA L. REV. 1, 33–37 (1983).

58. Santosky v. Kramer, 455 U.S. 745, 755–56 (1982). Judicial development of the burdens of proof and defenses in suits under Title VII of the Civil Rights Act of 1964 provide an example. The Supreme Court provided the definition of what constitutes a prima facie case of disparate treatment (discrimination), and assigned the burden of articulating a legitimate nondiscriminatory reason for the challenged action to the defendant in response to a prima facie case. If the defendant articulates such a reason, the presumption of the prima facie case is eliminated, but the trier of fact may accept the permissible inference established by the prima facie case upon weighing all of the evidence presented. If the defendant succeeds in establishing such an explanation, the plaintiff still may prove that it was used as a pretext to accomplish prohibited discrimination. Throughout the entire process the burden of persuasion rests on the plaintiff. *See* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Supreme Court's development of a concept of an accelerated waiver of the physician-patient privilege provides an apt example of meeting constitutional due process requirements in the area of personal injury litigation.[59] The certainty of a conclusion that the legislature wanted the judiciary to produce common sense supplements to the statutory language is diminished by the legislation's manifest disapproval of much of the law the judiciary did develop. Moreover, the specific draconian treatment directed by the statute for persons injured or killed while committing a felony[60] or while under the influence of liquor or drugs[61] cautions against an uncritical belief that common sense resolution of the problems is what the legislature desired.

However, even if the judiciary does provide common sense solutions for the unresolved problems, substantial constitutional questions remain. It is elementary that due process requires notice, a meaningful opportunity to be heard, an opportunity to know the opposing evidence, and the opportunity to confront and cross-examine adverse witnesses.[62] If a plaintiff's claim for compensation is reduced by attributing fault to an unjoined entity, has the plaintiff the requisite opportunity of knowing the opposing evidence and confronting and cross-examining the adverse witnesses? Need the plaintiff be informed only of the evidence and witnesses presented by a defendant seeking to attribute fault to an unjoined entity?

Discovery may be obtained against an entity even though it has no interest in the lawsuit. Nonparties may be subpoenaed to appear for the

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59. *See* Phipps v. Sasser, 74 Wn. 2d 439, 445 P.2d 624 (1968).

60. Section 501 of the 1986 Tort Reform Act provides that it is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony if the felony was causally related to the injury or death in time, place, or activity. The failure to use the familiar phrase "proximate cause" must have been intended. The statute as enacted would thus have barred recovery for the death of a teenager who entered a building for the purpose of theft if he was killed by a spring gun even though a Washington statute makes it a crime to set a spring gun. WASH. REV. CODE § 9.41.180 (1986). A person transporting marijuana in a very careful manner so as not to attract attention would apparently have been barred from recovery if his automobile was hit by a careless driver who crossed the median of a highway. In the 1987 session of the Legislature, Section 501 was amended to require that the felony be a proximate cause of the injury or death if it is to bar recovery. 1987 Wash. Laws ch. 212, § 901.

61. Section 902 of the 1986 Tort Reform Act provided that it was a complete defense to an action for personal injury or death that the person injured or killed was under the influence of intoxicating liquor or any drug that contributed more than fifty percent to his injuries or death. The defense would apparently have been applicable if the liquor or drug was not a cause of the accident. Section 902 was amended in the 1987 session of the legislature to require that the condition be a proximate cause of the injury or death if it is to bar recovery. 1987 Wash. Laws ch. 212, § 1001.

62. Goldberg v. Kelly, 397 U.S. 254, 269 (1970); Willner v. Committee on Character & Fitness, 373 U.S. 96, 103–04 (1963); Interstate Commerce Comm'n v. Louisville & Nashville R.R., 227 U.S. 88, 93–94 (1913); Foundation for the Handicapped v. Department Social & Health Servs., 97 Wn. 2d 691, 648 P.2d 884 (1982), *cert. denied*, 459 U.S. 1146 (1983); Godfrey v. State, 84 Wn. 2d 959, 530 P.2d 630 (1975); Perry v. Perry, 51 Wn. 2d 358, 318 P.2d 968 (1957).

taking of a deposition and to produce documentary evidence.[63] In such cases, the plaintiff will receive notice of the deposition and be given an opportunity to be present and examine or cross-examine the deposed witness.[64] The entity may also be subpoenaed to appear as a witness at trial. The plaintiff and the defendant or defendants will thus have an adversarial confrontation. The entity being deposed or testifying, however, may have less incentive to oppose attributing fault than would exist if that entity were subject to possible liability. Has a plaintiff had the benefit of the confrontation required for due process purposes if the party to whom fault will be allocated, reducing plaintiff's recovery, is indifferent as to whether that allocation is made? Will determinations made without adverseness of interests have the reliability usually required for judicial determinations?

An additional unanswered question is whether there is a justiciable case or controversy in a proceeding where the entity to which fault may be allocated has no concern about whether that allocation is made. As mentioned above, Section 401 specifically provides that fault may be attributed to entities immune from liability to the plaintiff. These entities will have no incentive to contest an allocation of fault. Financially irresponsible entities without immunity will likewise have no incentive to contest an allocation of fault. Would either lack of incentive deprive the entity of standing as a party to the lawsuit because its addition would convert at least a portion of the suit into something other than a case or controversy, and thus involve the court in a matter beyond judicial power?[65] Of course, default by a financially irresponsible defendant in the past did not deprive a lawsuit of its status as a case or controversy. However, one can more readily accept as reliable a confession against interest which does not injure another than a confession which reduces a plaintiff's recovery.

If a court lacks jurisdiction over a suit between an injured party and an immune entity or an entity with no interest in defending the suit, does attributing fault to such an entity become justiciable because it is being used defensively by an adverse party with a real interest in making the allocation? If such a case presents a justiciable controversy, it is an unusual controversy, resembling those in which the United States Supreme Court permitted a party to a lawsuit to raise the constitutional right of a nonparty to the litigation.[66] In those cases the decision to depart from usual judicial

63. WASH. R. SUPER. CT. 26, 45(b), (d).

64. WASH. SUPER. CT. CIV. R. 30(b), (c).

65. *Cf.* United States v. Johnson, 319 U.S. 302 (1943); Muskrat v. United States, 219 U.S. 346 (1911); Chicago & G.T.R. Co. v. Wellman, 143 U.S. 339 (1892); Lord v. Veazie, 49 U.S. 251 (1850).

66. *E.g.*, Barrows v. Jackson, 346 U.S. 249 (1953) (caucasian sued for breach of a restrictive covenant affecting land entitled to raise the constitutional claims of noncaucasians); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (parochial and other private schools entitled to raise interest of parents in raising their children).

standards and permit raising a nonparty's right was recognized as necessary to preserve important constitutional rights of the third parties.[67] The cases provide little support for permitting attributing fault, with a potential for subsequent liability, to the absent party for the purpose of reducing the cost of insurance.

The United States Supreme Court has noted that its policy of withholding even a constitutional power to resolve disputes on the basis of third parties' rights rests on two grounds. First, the courts should not adjudicate such rights unnecessarily, and it may in fact be that the holder of the rights does not wish to assert them. Second, third parties will usually be the best proponents of their own rights; courts depend on effective advocacy and therefore prefer to construe legal rights only when the most effective advocates of those rights are before them.[68] If fault were attributed to an unjoined entity, usually the entity would not wish to have the determination made and it would usually be the best proponent of the proposition that such an attribution not be made. These considerations suggest that a court should refuse to permit litigation of the fault of a nonjoined entity. Refusal to require litigation of the fault of a nonjoined entity would be consistent with the ancient but generally accepted proposition that a person who is otherwise liable to another for harm to land or a chattel is not relieved of liability because a third person has a legally protected interest in the land or chattel superior to that of the claimant.[69]

It may be objected that a plaintiff is in no position to object to lack of confrontation or justiciability of a nonjoined entity if the plaintiff has the opportunity to make that entity a party to the litigation. And, considering the broad interpretation which the Washington Court has given to the Washington long-arm statute, is it unlikely that an entity outside the state could not be made subject to the personal jurisdiction of a Washington court.[70] Civil Rules 19 and 13 permit, and sometimes require, the joinder of parties other than those the plaintiff wishes to sue. However, requiring a personal injury plaintiff to join designated entities as parties defendant in a lawsuit attaches a condition to what, as suggested above, is probably a constitutionally protected interest. A state may not require an individual to

67. Barrows v. Jackson, 346 U.S. 255, 257, 259 (1983); NAACP v. Alabama, 357 U.S. 449, 459 (1958).

68. Singleton v. Wulff, 428 U.S. 106, 113–14 (1976).

69. RESTATEMENT (SECOND) OF TORTS § 895 (1979). Comment d states, as a modern justification of the rule, that the plaintiff should not be compelled to litigate the claim of a third party who is not in court, when his right, or even his possession without other right, is at least clearly superior to the tortfeasor's entire absence of right.

70. P. Trautman, *Long-Arm and Quasi In Rem Jurisdiction in Washington*, 51 WASH. L. REV. 1 *passim* (1975).

display an ideologically objectionable message on license plate as a condition of driving an automobile.[71] While objections to pursuing a particular source of compensation do not rise as high as first amendment rights of speech and thought, there is at least a plausible argument that a state may not condition a plaintiff's right to a hearing of his or her claim for personal injuries upon suing persons whom, for a variety of reasons, he or she does not believe to be responsible for those injuries.

These problems regarding confrontation and justiciability become even greater in those cases in which a defendant attributes fault to an unidentified and unidentifiable entity. Thus, fault may be attributed in a freeway accident to the driver of a "phantom" car which disappeared without identification, to the unknown person who destroyed or removed a traffic signal, to the child or adult who dropped what became slippery debris on the floor of a store or restaurant, to the child or adult who broke and left a bottle in the sand of a commercial bathing beach, to the unidentified surgeon who returned what became a defective implement for further use, to the unknown person who started a fire which could not be put out for lack of water pressure, or to a man carrying fireworks wrapped in newspapers. It is unlikely, but it is possible that fault will be attributed to a rapist who broke into an inadequately guarded motel or apartment house and criminally assaulted an occupant.[72] The list could be extended almost indefinitely, and each example might involve substantial and difficult questions of liability. In every case, attribution to that entity will reduce the recovery of even a plaintiff entirely free from fault.[73] The arbitrariness of reduction, made upon the suggestion of imaginative defense counsel, bears at least a resemblance to the barring of a claim because a commission, perhaps enjoying sovereign immunity or immunity for performance of a discretionary function, negligently failed to schedule a timely conference on the merits of a claim.

71. Wooley v. Maynard, 430 U.S. 705, 714–17 (1977).

72. *See* Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970); Trentacost v. Brussel, 82 N.J. 214, 412 A.2d 436 (1980). The Act does define "fault" but the definition of fault found in WASH. REV. CODE § 4.22.015 will probably be held applicable since Section 401 is added to that section of the Code. That definition of fault does not include intentional torts.

73. Section 401(l) requires the trier of fact to determine the percentage of the total fault which is attributable "to every entity" which caused the claimant's damages. Paragraph (b) provides that, if the claimant was not at fault, the defendants against whom the judgment is entered shall be jointly and severally liable, but that liability is only for the sum of their proportionate shares of the claimant's total damages. Thus, the share of the claimant's damages attributable to the proportionate fault of an unjoined entity will not be included in the judgment for joint and several liability.

SUBSEQUENT LITIGATION

Still another problem remains for those cases in which an entity, to which fault may be attributed, has not been joined as a party to the lawsuit. That nonjoinder may have occurred because the defendant identified an entity which plaintiff did not want to make a party defendant. For example, in an auto accident case a defendant might identify the vehicle manufacturer as an entity for failing to produce a vehicle with a crash-worthy interior, and the plaintiff may, understandably, have decided he did not want to take on the difficulties of litigating a design defect case with the manufacturer. Or, the entity might not have been joined because it could not be identified and located without a substantial and expensive investigation, or because, absent a prior determination of proportion of fault to be assigned to the entity, the effort of obtaining substituted service under the Washington long arm statute appeared unwarranted. Perhaps it was not joined because it was uninsured and, absent a determination that its share of the total fault was substantial, foreseeable problems of satisfying a judgment rendered its involvement undesirable. Perhaps it was not joined because it was believed that it could assert an immunity which would preclude its further involvement in the suit. The significance of attributing fault to a nonjoined entity and the resulting reduction of plaintiff's damage will, of course, depend upon the effect the judgment has in a subsequent lawsuit between the plaintiff and the entity.

The Tort Reform Act of 1986 does not specifically provide for successive suits against entities not joined in a prior suit, but, as mentioned previously, it does require attributing a share of fault to nonjoined entities. It does not, however, state the significance of that attribution for subsequent lawsuits. The general rule has been that a judgment against one of two or more persons liable for a tort does not terminate the claim against the others.[74] However, the nonjoined person has not been bound by the judgment in the prior action.[75] The fundamental principles of due process discussed above require this result.[76]

The situation is not as clear with respect to the effect on the plaintiff of the judgment in the prior action. The proposition proposed by the Council to the American Law Institute for the Restatement (Second) of Judgments is that ordinarily the plaintiff in the prior action may not relitigate issues

74. RESTATEMENT (SECOND) OF JUDGMENTS § 94 (Tent. Draft No. 3, 1976).

75. RESTATEMENT (SECOND) OF JUDGMENTS § 93 (1942); RESTATEMENT (SECOND) OF JUDGMENTS § 78(3) (Tent. Draft No. 2, 1975).

76. In addition to the authorities discussed above, *supra* note 50, see Esmieu v. Schrag, 88 Wn. 2d 490, 497, 563 P.2d 203 (1977); R.R. Gable, Inc. v. Burrows, 32 Wn. App. 749, 753, 649 P.2d 177 (1982). Possibly a person might be bound by the judgment in a suit he could have entered as a matter of right under Civil Rule 24. *See infra* note 73.

determined against him in the first action.[77] Thus, a plaintiff would be bound by the determination in the prior action of the extent of his damages,[78] and presumably the percentage of fault attributable to an entity that was not joined in the first suit.

The Washington Supreme Court has not yet decided that preclusive effect should be given to a prior judgment. However, the court of appeals applied an estoppel from a prior judgment to a plaintiff who brought a suit against a nonparty to the suit producing the judgment.[79] The court relied on a decision of the Washington Supreme Court giving clear indications that mutuality was no longer required for collateral estoppel in Washington.[80] It therefore appears likely that in litigation under Section 401 a person seeking compensation for personal injuries will be limited in a subsequent suit against an entity not joined in the first suit by both the determination of the total amount of damages and by the determination of the percentage of fault attributable to the entity. On the other hand, the entity will be bound by neither.

INDISPENSABLE PARTIES

As previously stated, courts will be barred by constitutional considerations from giving a binding effect to a judgment on an unjoined entity. Whether or not courts impose on a plaintiff a preclusive effect of a former judgment in a subsequent suit against a previously unjoined entity, they will have to consider whether a plaintiff's claim has been given a due process hearing in a proceeding in which portions of that claim may be allocated to unjoined persons or entities when that allocation is not binding on the nonjoined person or entity. The problem thus posed is comparable to that of the necessity of joining indispensable parties to a lawsuit.

Washington Rule for Superior Court 19 and Federal Rule of Civil Procedure 19 are both entitled "Joinder of Persons Needed for Just Adjudication." Both state, in subsection (b), that if a person who ought to be joined as a party if feasible cannot be joined, "the court shall determine whether in equity and good conscience the action should proceed among the parties before it . . . ." They both direct that in making that determination consideration should be given to "whether a judgment rendered in the person's absence will be adequate . . . ." However, both are

77. RESTATEMENT (SECOND) OF JUDGMENTS § 94 comment a (Tent. Draft No. 3, 1976); RESTATEMENT (SECOND) OF JUDGMENTS § 88 (Tent. Draft No. 2, 1975).

78. RESTATEMENT (SECOND) OF JUDGMENTS § 94, illustration 1 (Tent. Draft No. 3, 1976).

79. Lucas v. Velikanje, 2 Wn. App. 888, 471 P.2d 103 (1970).

80. Henderson v. Bardahl Int'l Corp. 72 Wn. 2d 109, 431 P.2d 961 (1967), *noted in* 44 WASH. L. REV. 449 (1969).

directed toward the problem of protecting defendants selected by a plaintiff for the suit, and provide for dismissing the action upon concluding that the action should not proceed. The cases involving the joint and several liability of tortfeasors were decided at a time when such liability was recognized for all tortfeasors. They were, therefore, concerned with whether justice could be done between the plaintiff or plaintiffs and the defendant tortfeasors and not with whether justice could be done for the plaintiff under a rule of several liability.[81] Nevertheless, the decisions that gave rise to the rules offer some guidance—or at least quotable language—for the problems created by Section 401.

The usual starting point for a discussion of necessary and indispensable parties is the United States Supreme Court's decision in *Shields v. Barrow*.[82] In that case the Court dismissed an action because an indispensable party defendant was absent, and on the ground "that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court."[83] Of greater possible pertinence to the problems created by Section 401, the Court undertook to define those persons without whom litigation could or could not proceed:

> 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.[84]

The key phrases are "and finally determine the entire controversy and do complete justice, by adjusting all the rights involved in it," and "that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." They have a possible applicability to the legislative direction that a court determine the proportion of fault to be attributed to a nonjoined, and possibly unknown, entity. If

81. *See, e.g.*, 7 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1623 (2d ed. 1986).

82. 58 U.S. 130 (1854).

83. *Id.* at 141 (citing the Court's earlier decision in Mallow v. Hinde, 12 Wheat 193, 198 (1827)).

84. *Id.* at 139.

the court cannot make a binding determination of the obligations of a party not before the court, can it in equity and good conscience leave the plaintiff with no remedy for a portion of what is recognized as a wrongful injury caused by the defendant or defendants before it? The implication of the quoted language in Section 401 has imposed on the courts a duty inconsistent with the exercise of judicial power.

It must be remembered that the opinion in *Shields v. Barrow* was concerned with the rights and obligation of defendants not before a court, and not the rights of a plaintiff who had initiated the legal proceeding. The Court's most recent comprehensive consideration of the subject of necessary and indispensable parties is *Provident Bank v. Patterson,*[85] which likewise concerned the interests of a possible defendant. The Court held it error to dismiss the case because a decree could have been formulated so as adequately to protect the interests of the nonjoined party. More important for present purposes, it made it clear that questions of necessary and indispensable parties do not go to the jurisdiction of a court, but are instead to be determined by resort to equitable principles.[86]

A constitutional aspect of joinder of necessary and indispensable parties did appear in the United States Supreme Court's decision in *Western Union Co. v. Pennsylvania.*[87] In that case, acting pursuant to a Pennsylvania statute, a trial court had ordered the escheat of unclaimed deposits made in Pennsylvania for money orders which Western Union had been unable to deliver. The Pennsylvania Supreme Court affirmed, but the United States Supreme Court held that the escheat would constitute a deprivation of the property held by Western Union without due process of law because the Pennsylvania court could not bind other states. These states might also attempt to escheat the undelivered funds. The original jurisdiction of the United States Supreme Court for resolution of controversies between states provided an alternative forum in which all of the claims of different states to escheat the funds could be resolved. Noting the inability of the Pennsylvania courts to bring before them all those states and afford a full hearing with a final, authoritative determination, the Court said: "As a result, their judgments, which cannot, with the assurance that comes only from a full trial with all necessary parties present, protect Western Union from having to pay the same single obligation twice, cannot stand."[88]

85. 390 U.S. 102 (1968).

86. 390 U.S. at 120–22; *see also* C. WRIGHT, *supra* note 81, § 1611. The Court also alluded to, but did not decide the question of whether the nonjoined party might be bound by the judgment if he could have entered the case. *Patterson,* 390 U.S. at 114; *see* C. WRIGHT, *supra* note 81, § 1608, at 103.

87. 368 U.S. 71 (1961).

88. *Id.* at 80.

If Western Union would be deprived of property without due process of law by a court's decision because of the absence of a party with an adverse claim, will not a plaintiff similarly be deprived of a claim for compensation recognized under state law and entitled to due process protection by allocation of a part of that claim to a nonjoined and perhaps unidentifiable entity? *Western Union* did involve the danger of imposed multiple liabilities whereas a claimant would be denied only a portion of a claim, but the results in both cases involve a comparable financial loss. It should be remembered that if constitutional protections apply, the procedures established in a statute creating a right are not definitive of what due process requires.[89]

The Washington Court of Appeals has found a constitutional dimension to the question of absence of indispensable parties. In *Lakemoor Community Club v. Swanson,*[90] the plaintiffs brought an action to enjoin the construction of a road on portions of lots in a subdivision to provide access to land outside that subdivision. The defendants filed a counterclaim, seeking to condemn portions of the lots for ways of necessity under Washington law. The court of appeals affirmed the trial court's dismissal of the counterclaim without prejudice for failure to join indispensable parties. In doing so it said: "The failure to serve indispensable parties to a lawsuit, although not jurisdictional, results in the inability of the trial court to render a judgment that affords all interested persons their rights to due process of law."[91]

The counterclaim in *Lakemoor Community Club* did seek affirmative relief of condemnation of land, and thus is a case presenting the question of fairness to nonjoined persons against whom a claim is asserted. It was, however, a claim that was also asserted defensively, because if granted it would have defeated the plaintiff's suit for an injunction. As such, it bears a resemblance to a defendant's attempt in a personal injury suit to reduce liability by attribution of fault to an unjoined entity. This aspect of the opinion is reinforced by the court's quotation of *Shields v. Barrow* for the concern that a controversy not be left in a condition that "its final termination may be wholly inconsistent with equity and good conscience."[92]

Conceivably, the Washington courts may resolve the problems of necessary and indispensable parties by avoiding the constitutional questions and construing Section 401 to apply only to entities which can be identified in a

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89. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Arnett v. Kennedy, 416 U.S. 134 (1974); *see* Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State,* 62 CORNELL L. REV. 445, 462 (1977).

90. 24 Wn. App. 10, 600 P.2d 1022 (1979).

91. *Id.* at 17, 600 P.2d at 1026; *see* 3A J. MOORE, FEDERAL PRACTICE §§ 19.10, .04 (2d ed. 1978).

92. *Id.*

manner permitting their joinder as parties to the lawsuit. It was the concern for joinder of parties, the uncertainties about whether all parties could be located and would desire to sue, and the resulting complexity of litigation that led the United States Supreme Court in *Illinois Brick Co. v. Illinois*[93] to reaffirm its holding that the anti-trust laws did not permit recovery by subsequent, or indirect, purchasers from defendants who had allegedly engaged in a price-fixing conspiracy. The suggested construction of Section 401 would, however, appear to be contrary to the statutory directive that "the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages."

CONCLUSION

As stated at the beginning, it was not the purpose of this article to provide a definitive and final disposition of the question of the constitutionality of Section 401. The dimensions of the problems may become better understood as litigation occurs and solutions evolve. At the present, however, it appears to this author that Section 401 should not be accepted by the court as an adequate legislative treatment of tort liabilities. *Logan v. Zimmerman Brush Co.* establishes that due process protection applies to claims created by state law. It is irrational and arbitrary to expose a right, which deserves a very high ranking as a liberty interest, to severe but inadequately defined limitations, giving no indication how the serious constitutional questions presented should be avoided or resolved. Section 401 should therefore be held an unconstitutional denial of due process in any case in which it is proposed that an allocation of fault be made to an entity not subject to the jurisdiction of the Washington courts or to an entity not sufficiently identified to permit its joinder in a lawsuit.

93. 431 U.S. 720, 739–45 (1977).