

Litigation News



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Special Edition: Joint and Several Liability

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This Is Your Litigation Section – Thoughts from the Chair

by Jane Morrow

In the last issue of the Litigation Section newsletter I explored the concept of becoming better. Better lawyer, better practice, better person. This year as I take over as Chair of the Litigation Section, my goal is to achieve betterment. I envision making this Section rise to a level of becoming something better and more valuable to you, its members.

It is hard to measure improvement if you do not know from where you have started. Each year when you get your Bar license fee notice, there is a box for you to choose those WSBA sections of which you would like to be a member. Each of you receiving this newsletter checked the box marked “Litigation Section.” Rather than wondering what it is that the Litigation Section does, I welcome you to a tour of the Litigation Section – YOUR SECTION – of the Washington State Bar Association.

The Litigation Section Bylaws highlight the function and activities of this Section. The purpose or foundation of this Section is to benefit interested members of the Bar, their clients and the general public. The Bylaws further outline the ways in which the Section seeks to serve a beneficial purpose and that is:

- a. By providing the opportunity and forum for the interchange of ideas in the areas of trial advocacy, practice and procedure;

- b. By initiating and implementing common projects within said areas;
- c. By review of pending legislation and development of proposed statutory enactments to improve and facilitate the administration of justice;
- d. By assisting the courts in establishing rules and methods for the more certain and expeditious administration of justice; and
- e. By undertaking such other services as may be of benefit to the members, the legal profession and the public.¹

As an active member of the Section for several years and now the Chair of the Section, I have often asked myself: How well are our members being served? More importantly, what can we do better?

In the past, the Litigation Section has worked to be the voice of civil litigators practicing in this state. The Section has been involved in a wide range of activities of interest to those who handle civil matters in superior or federal court. Many of you may not realize that the Litigation Section’s recent appeal to the Supreme Court for the abolition of Local Rules led to the formation of a statewide Local Rules Task Force co-chaired by Justice Charles Johnson and Lish Whitson.

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The recent findings from the Task Force can be found on the WSBA Local Rules Task Force Webpage.²

Past activities of the Litigation Section have also included review and formal input concerning legislation and rule-making, a midyear CLE and skill training sessions, law student and new lawyer guidance and sponsorship of law school litigation competitions, production of various publications, including the Washington Civil Procedure Desk Book and the Civil Trial and Evidence Manual, and the publication of a quarterly newsletter addressing current developments and events in civil litigation.

As part of our efforts of making this Section more valuable to its members, each issue of this year's newsletters will focus on a specific area of interest to Washington's civil litigators. This newsletter serves to focus on the issue of "Joint and Several Liability." It is the hope of our Executive Committee that you will take away from it something that serves you and your practice.

Our members are committed to making this Section better and to that end we invite you to further direct the focus of the Section's work this year. Whether the energy of our group addresses civil court congestion or electronically stored information or something else, we would like your input. Comments, suggestions and/or compliments can be directed to the Litigation Section list serve: litigation-section@list.wsba.org or to the Chair of the Section: jm@medilaw.com.

Together is better. Together let's make this Section relevant.

Jane Morrow is the chair of the Litigation Section. At Otorowski Johnston Diamond & Golden, Bainbridge Island, her practice focuses on the representation of those who have suffered injuries or death due to the negligence of others.

- 1 Washington State Bar Association Litigation Section Bylaws, Article I. 1.2.
- 2 <http://www.wsba.org/lawyers/groups/local+rules+task+force.htm>.

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Post-Tegman Tort Reform

by Bob Siderius

For those of us practicing law today it is difficult to imagine our previous tort system in which a plaintiff's contributory negligence completely barred any right to recover against an at-fault defendant. A plaintiff found 1% at fault recovered nothing against a defendant found 99% at fault. An inherent unfairness existed in this system that was eventually addressed by the Washington State Legislature through the adoption of our first comparative fault statutes in 1973.

The Legislature advanced the comparative fault concepts with enactment of Tort Reform Acts in 1981 and 1986. Enacting any tort reform legislation is no easy task considering the competing interests either favoring or opposing modifications to tort liability laws. The work done by the Legislature in 1973, 1981, and 1986 was no doubt controversial, but clearly improved the overall fairness of our tort system.

As with any legislation, application of the new tort statutes revealed unintended consequences of the words and phrases used. As litigants and courts applied comparative fault, joint and several liability, contribution and other rules intended to promote fairness, we found continued instances of unfairness. A prime example of the struggle with application of our current laws is found in the Washington State Supreme Court's ruling in *Tegman v. Accident & Medical Investigations, Inc.*, 150 Wn.2d 102, 75 P.3d 497 (2003), a case which dealt with application of joint and several liability in a situation involving both negligent and intentional tortfeasors.

The time has come again for the Legislature to undertake the difficult task of tort reform. The time has come for a reexamination and modification of RCW 4.22.

Tegman and Joint Liability

In *Tegman*, the plaintiff hired one of the defendants, who represented himself as an attorney, to pursue a personal injury claim. The defendant was not an attorney. The defendant was, however,

working with licensed attorneys who participated in processing the plaintiff's claim. When the unlicensed defendant settled the plaintiff's claim without proper authorization, the plaintiff sued both the defendant non-lawyer for intentional torts (unlicensed practice, misrepresentation and other claims) and the defendant lawyers on negligence claims (negligent supervision, malpractice).

The State Supreme Court was asked to determine whether defendants could be held jointly liable when one defendant is liable for intentional misconduct while the other only is liable for negligent misconduct. The court applied RCW 4.22 and determined that the negligent defendants could not be held jointly liable for the plaintiff's damages.

The court's majority opinion is a well-reasoned application of RCW 4.22. Citing RCW 4.22.015, the majority states that "'fault' under chapter 4.22 RCW, does not include intentional acts. RCW 4.22.015 defines 'fault' to include 'acts or omissions, including misuse of product, that are in any measure negligent or reckless....'" *Tegman*, 150 Wn.2d at 109.

The court goes on to cite RCW 4.22.070, the statute establishing joint and several liability, concluding that only "at fault" defendants are subject to the joint and several liability: "...negligent defendants are jointly and severally liable only for that part of the total damages that they negligently caused. The at-fault defendants are not jointly and severally liable under RCW 4.22.070(1)(b) for any damages resulting from intentional acts or omissions." *Tegman*, 150 Wn.2d at 114.

The majority's opinion is understandable considering the statutory language used in RCW 4.22. The majority notes that "...it is not up to this court to rewrite the statute nor to construe it free of the legislature's plainly expressed meaning." *Tegman*, 150 Wn.2d at 115. While questions may exist regarding how plainly the Legislature expressed an intent to exclude intentional misconduct

from the scope of RCW 4.22, it is clear that the legislature must clean this up, not the courts.

Justice Chambers took issue with the *Tegman* majority opinion in an equally well-reasoned dissent. Justice Chambers cites RCW 4.22.070, which states in part that: "...defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimant's total damages." Justice Chambers properly notes that

"[t]he legislature could have said that *at fault parties* were liable for the sum of their damages, but the legislature did not. Fault free claimants are entitled to joint and several liability against all *defendants against whom judgment is entered* for the sum of their proportionate shares of the *claimant's total damages*. Defendants include both negligent and intentional defendants and total damages include those damages caused by both defendants who are intentional and negligent actors. The status quo for fault free claimants was maintained."

Tegman, 150 Wn.2d at 131 (emphasis in original).

Justice Chambers believed that the majority opinion would be unworkable and cause absurd results for litigants. That prediction has proven accurate in many instances where negligent and intentional acts have resulted in a single injury. One example occurred in a claim brought against an employer several years ago alleging negligent hiring. An employee was hired to supervise delivery of certain benefits. The employee engaged in a pattern of extortion and sexual assault upon women whose benefits he controlled. The employee was caught, fired by the employer and convicted of sexual assault. Several years later, the employer rehired him in a different office without conducting a background check or even looking at his existing personnel file. In his second job with the same

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employer the employee was again given a supervisory role over women, and again engaged in extortion and sexual abuse.

Under the majority ruling in *Tegman*, the employer in the example above could be liable for the damages caused only by its negligent hiring, and would not be liable for the damages caused by the employee's intentional acts of sexual assault. But how is a jury to distinguish damages caused by negligent hiring from damages caused by such sexual abuse? With this type of indivisible injury segregation cannot occur.

A recent reported case illustrates another *Tegman* problem. In *Doe v. Corporation of President of Church of Jesus Christ of Latter-Day Saints*, 141 Wn. App. 407, 167 P.3d 1193 (2007), the plaintiff alleged negligence on the part of the church (failure to report sexual abuse) and intentional misconduct on the part of an abusive step-father. The plaintiff argued that the defendants, including the church, had the burden of proving that damages could be segregated or they would be liable for all damages. The Court of Appeals, citing a federal court opinion, rejected the argument, noting: "*Tegman* clearly involved indivisible damages, and the court ordered segregation in spite of that fact." *Id.* at 440.

The court then states "...we are constrained by the *Tegman* court's clear holding and conclusion that segregation of damages is a role for the trier of fact. No subsequent decisions or actions by the legislature have undermined that holding." *Id.* at 441.

In a more recent decision, the Court of Appeals addressed *Tegman* issues in *Rollins v. King County Metro Transit*, 148 Wn. App. 370, 199 P.3d 499 (2009). There, a bus passenger was assaulted and brought a claim against Metro, alleging negligent failure to maintain a safe environment. None of the assailants were joined as defendants. Metro proposed an instruction requiring the jury to segregate out the damages caused by the intentional acts of the assailants. The court first notes that "Metro's argument illustrates the considerable confusion

that surrounds application of the tort reform act of 1986, chapter 4.22 RCW, and subsequent case law." *Id.* at 376. The court then approved a jury instruction that required the jury to award only damages caused by Metro's negligence and not include damages "caused by the acts of the unknown assailants and not proximately caused by negligence of the defendant [Metro]." *Id.* at 379-80.

Again, how is a jury to segregate out the negligently caused damages from the intentionally caused damages when the injury arises from a single event? And under the *Metro* instruction does the plaintiff, as a practical matter, not have the burden of segregating damages, contrary to prior court rulings allocating to the defendants the responsibility to segregate damages in situations of an indivisible injury and a fault-free plaintiff? See *Phennah v. Whalen*, 28 Wn. App. 19, 621 P.2d 1304 (1980).

It is unlikely that the majority in *Tegman* intended to alter the existing burdens of proof, or make it difficult if not impossible to recover against a negligent defendant in situations where both intentional and negligent acts contribute to a single injury. The *Tegman* ruling does just that, however. The "considerable confusion" surrounding application of RCW 4.22 will continue until the Legislature takes action to clarify it.¹

Joint Liability of Minimally at-Fault Defendants

The *Tegman* decision addresses one aspect of our joint and several liability laws. Another aspect of joint and several liability deserves attention by the Legislature as well. Prior to enactment of the comparative fault statutes in 1973, a minimally at-fault plaintiff could not recover any damages against defendants found liable for proximately causing the plaintiff's injuries. Enactment of the comparative fault statutes addressed that situation, but left open the possibility that a minimally at-fault defendant could bear responsibility for an overwhelmingly large proportion of a plaintiff's damages. Under the current statutes,

a defendant found to be 1% at fault, in the instance of a fault-free plaintiff, is jointly liable for 100% of the plaintiff's total damages. A variety of policy reasons have been cited to justify this result, but an inherent unfairness exists not unlike the unfairness of our former contributory negligence laws.

Should juries be given instructions that joint and several liability will result from any finding of fault by a defendant, even if it is minimal? Would such instructions affect a jury's determination of fault? Should joint liability in the instance of a fault-free plaintiff be limited to a multiplier, so that a minimally at-fault defendant is not at risk of paying 100% of the damages awarded to a plaintiff? Using a multiplier of four for instance, a defendant found to be 25% at fault could be held liable for 100% of a fault-free plaintiff's damages. At the same time a defendant found to be 5% at fault could be held liable for no more than 20% of the plaintiff's total damage claim. Other statutes incorporate multipliers for a variety of reasons; does it make sense to do so here?

Conclusion

The work done by our Legislature in 1973 and 1986 advanced the fairness of our tort system. However, the time has come for our Legislature to do the work needed to update and clarify RCW 4.22. The courts cannot and should not take on this responsibility.

Bob Siderius is a partner at Jeffers, Danielson, Sonn and Aylward, P.S. He has been a member of the WSBA's Litigation Section Executive Committee since 2006 and is the 2010 Chair-Elect. His practice consists primarily of civil litigation, as well as commercial work.

¹ An excellent examination of the *Tegman* decision can be found in *Tegman v. Accident & Medical Investigations, Inc.: The Re-Modification of Modified Joint and Several Liability By Judicial Fiat*, 29 SEATTLE U. L. REV. 729 (2006).

High Court Rejection of *Rollins* Review Bodes Bad Tidings for *Tegman*

by Franklin W. Shoichet

On September 9, 2009, the Washington Supreme Court denied defendant's petition for review in *Rollins v. King County Metro Transit*, 148 Wn. App. 370, 199 P. 3d 499 (2009). In doing so, the court dealt a serious, though not necessarily fatal, blow to its controversial opinion in *Tegman v. Accident & Medical Investigations*, 150 Wn.2d 102, 75 (P. 3d) 497 (2003).

The *Tegman* decision, which took many – the plaintiff's bar, most of all – by surprise, seemingly swept away the previously understood meaning of RCW 4.22.070 when both intentional and negligent wrongdoing proximately cause damage to a plaintiff. That statute, part of a 1986 tort reform package, had previously been interpreted to forbid allocation of “fault” to intentional wrongdoers. This scenario arose most often in the light of duties based on a “special relationship” between

- a defendant and an intentional wrongdoer which had obligated the defendant to control the intentional actor, or
- a defendant and the plaintiff, obligating the defendant to protect the plaintiff.

For instance, in *Welch v. Southland Corp.*, 134 Wn.2d 629, 952 P. 2d 162 (1998), the plaintiff sued a convenience store for injuries inflicted by an assailant as he left the store. The trial court denied plaintiff's motion to dismiss a defense that fault on the store's part should be apportioned with that of the unknown assailant. Our Supreme Court unanimously reversed, holding that because intentional acts are not included in the statutory definition of “fault,” a negligent tortfeasor is not entitled to apportion liability to an intentional tortfeasor. “If fault is to be apportioned to intentional tortfeasors,” said the court, “it is for the Legislature to make such a determination.” *Id.* at 637.

In *Tegman*, the court's 5-4 majority found a way around the unanimous *Welch* precedent by concluding that the Legislature had meant *all along* – as a matter of statutory construction – to require:

- (a) no assessment of “fault” against an intentional wrongdoer, but
- (b) segregation of damages between intentional and negligent wrongdoers, and
- (c) only proportional liability assessed against the negligent defendant, rather than joint and several liability for “intentionally based damages.”

However, there is a cryptic sentence towards the end of the majority opinion. “The legislative scheme,” as envisioned by the *Tegman* majority, “also serves to provide some relief to negligent defendants whose conduct is not as egregious as the intentional tortfeasor, *nor the cause of the intentionally based damages.*” *Tegman*, 150 Wn.2d at 119 (emphasis added). But those who bring “special relationship” cases noted that in such cases damages could only be assessed against the negligent defendant if its negligence was found to be such a “cause of the intentionally based damages.” And the law review article relied upon by the majority for its principal intellectual inspiration had expressly differentiated “duty to protect” or “control” cases. See Gregory C. Sisk, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, 16 U. PUGET SOUND L. REV. 1, 41 (1992).

How, then, to reconcile *Tegman* with itself?

A series of early skirmishes in federal courts reached different conclusions. Cf. *Christensen v. Royal Sch. Dist. No. 160*, 2006 WL 2237671, No. CV-02-185-FVS (E.D. Wash. 2006), *R.K. v. Corp. of President of Church of Jesus Christ of Latter*

Day Saints, 2006 WL 2506413, No. C04-2338RSM (W.D. Wash. 2006); see also *Fleming v. Church of Latter Day Saints*, 275 Fed. Appx. 626 (9th Cir. 2008).

Then, in *Doe v. Corporation of President of Church of Jesus Christ of Latter-Day Saints*, 141 Wn. App. 407, 167 P. 3d 1193 (2007), although the allegedly negligent defendant obtained reversal with a holding that it did not have the duty alleged by plaintiffs, Division I addressed the *Tegman* question in dictum:

... [I]t was appropriate to segregate damages resulting from negligence from those resulting from intentional acts. It was inappropriate to hold negligent defendants (the LDS Church) jointly and severally liable for damages caused by the intentional acts. ...

Although the *Doe* plaintiffs sought review of this and other aspects of the Appeals Court decision, the defendant church and its allies correctly pointed out in briefs opposing review that the *Tegman* portion of the briefs was *dicta*. The Washington Supreme Court denied review on all issues on September 3, 2008. *Doe v. Corp. of President of Church of Jesus Christ of Latter-Day Saints* 164 Wn.2d 1009 (2008).

But in *Rollins*, bus passengers attacked by unknown assailants brought an action against the county transit system, alleging neglect of common carrier duties in failing to maintain a safe environment. The county, relying on *Tegman*, contended that the jury be instructed that plaintiff

... prove “the percentage of damages caused by negligent conduct and the percentage of damages caused by the assailants' intentional conduct.” [It] also proposed a special verdict form requiring the jury to calculate these percentages.

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Rollins, 148 Wn. App. at 376. It did so in the hope that the jury would segregate most, if not all, damages as attributable to the assailants, again relying on *Tegman*. The assailants were unknown and had not been “John or Jane Doed” as defendants. But the trial court and then the appeals court found *Tegman* inapposite:

Tegman is about joint and several liability. Here, Metro is the only defendant and negligence is the plaintiffs’ only theory. To recover at all, plaintiffs had to prove their injuries were proximately caused by Metro’s negligence. There is no issue of joint and several liability in this case.

Rather, as the trial court observed, this case is akin to *Welch*. The intentional conduct of unknown assailants was a proximate cause of injury in both cases, but no recovery was sought for those injuries. Here and in *Welch*, plaintiffs sought recovery only for damages proximately caused by the defendant’s negligence. In neither case was there a risk that the negligent defendant would be held liable for the assailants’ “share” of the damages, so there was no need for the jury to determine the size of that share or to deduct it from its damages award.

The jury here was instructed that plaintiffs had to prove that Metro was negligent, that Metro’s negligence was a proximate cause of plaintiffs’ injury, that there may be more than

one proximate cause of an injury, and that its verdict should be for Metro if it found the sole proximate cause of injury was a cause other than Metro’s negligence. The court also instructed the jury about calculating damages:

In calculating a damage award, you must not include any damages that were caused by acts of the unknown assailants and not proximately caused by negligence of the defendant. Any damages caused solely by the unknown assailants and not proximately caused by negligence of defendant King County must be segregated from and not made a part of any damage award against King County.

Id. at 379. The *Rollins* court specifically termed the *Doe* analysis of *Tegman* to be *dicta*. *Id.* at 380-81.

Although King County and its allies in the defense bar sought review, the high court denied the county’s petition for review almost a year to the day after rejecting review in *Doe*.

The differences between *Tegman* and *Rollins* are easily grasped. *Tegman* involved a host of defendants, some sued for intentional torts, others for merely negligent torts, one for both. As the *Rollins* Appeals Court opinion recognizes, there was only one defendant before it. Moreover, *Rollins* involved a classic duty to protect third persons, a common carrier’s enhanced duty of care to protect passengers, while none of the numerous *Tegman* briefs and opinions considered

the Legislature’s intent with regard to “special relationship” cases and those cases where a defendant’s negligence *does* proximately cause “intentionally based damages.”

The rejection of the *Rollins* review now offers considerable assistance to plaintiffs’ lawyers who assert “special relationship” duties to protect or to control. Keeping an intentional tortfeasor in the case offers little advantage to the plaintiff, no matter how emotionally satisfying that might be. Indeed, common experience seems to be that such persons rarely have the resources to pay any sort of judgment, and insurance for their conduct is exceedingly unlikely. It may be necessary to name intentional actors initially as a defendant for discovery purposes, but the wise plaintiff’s counsel will no doubt – except where there is a solvent intentional tortfeasor – avoid the *Tegman* trap by simply dismissing or keeping them out of the case.

At some future time, our Supreme Court may be asked to revisit *Tegman* and decide whether the complete absence of any legislative history to support its construction of the statute can be squared with its now seriously undermined decision.

Franklin W. Shoichet has practiced law in Seattle for 33 years. A considerable portion of his practice is devoted to civil litigation on behalf of violent crime victims or their families, especially in the case of homicide. This frequently involves issues of insurance coverage and lawsuits based on breaches of “special relationship” duties.

Dealing with a Defaulting Co-Defendant when Joint and Several Liability Is at Issue

by Kasey D. Huebner

On several occasions during my practice I have been faced with a situation similar to the following:

I represent a manufacturer in a multi-defendant personal injury lawsuit. The owner of the product, who has limited or no assets or insurance, is a co-defendant in the lawsuit. He or she has not appeared or answered, and plaintiff has sought entry of a default order or default judgment against the owner. While I have alleged fault on the part of the plaintiff, the jury might not find comparative fault. Thus, under RCW 4.22.070, my client faces potential joint and several liability for any default judgment entered against the owner.

This article addresses how to handle this situation by describing the default process, the inherent risks to a non-defaulting defendant when a default judgment is entered against a co-defendant in a tort action, and recommended strategies for avoiding potential joint and several liability for a defaulting co-defendant.

1. The Difference Between an Order of Default and Default Judgment.

In a tort action, the default process typically occurs in two stages. First, the plaintiff will ask for entry of an order of default against the party that has not appeared. Then, the plaintiff seeks a default judgment, which often includes a damages hearing. Each of these steps in the default process has independent significance, and it is important not to confuse an order of default with a default judgment.

Civil Rule 55(a)(1) provides that "when a party against whom a judgment for affirmative relief is sought has failed to appear, plead, or otherwise defend as provided by these rules and that fact is made to appear by motion and affidavit, a motion for default may be made." Once a motion for entry of default has been filed,

a party who has not appeared "may not respond to the pleading nor otherwise defend without leave of court." CR 55(a)(2); see also *Hayworth v. McDonald*, 67 Wash. 496, 500, 121 P. 984 (1912). Parties who have appeared in the action may continue to defend. CR 55(a)(2); see also WASH. CIV. PRO. DESKBOOK, § 55.5(4). Consequently, an order of default applies only to defendants who have not appeared and prevents such parties from defending against the lawsuit.

Once default judgment is entered there is a deemed "admission of all factual allegations necessary to establish the plaintiff's claim for relief." *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 333, 54 P.3d 665 (2002). A default judgment does not, however, "admit any conclusions of law contained within the complaint or the amount of damages." *Id.* Thus, it is not until the court has entered a default judgment, as opposed to an order of default, that a non-appearing party is deemed to have admitted the factual allegations of the plaintiff's complaint.

Civil Rule 55(b)(2) provides that, when the amount of damages claimed by the plaintiff is uncertain, the court may require a hearing, trial or other investigation to determine the amount of damages recoverable by the plaintiff. At least one Washington court has determined that an inquiry regarding the amount of plaintiff's damages is a mandatory step in determining damages through the default judgment process. *Smith*, 113 Wn. App. at 333 ("The trial court *must* conduct a reasonable inquiry to determine the amount of damages.") (emphasis added). Pursuant to Washington law, plaintiffs in personal injury actions may not identify the amount of damages sought in their complaints. RCW 4.28.360. Accordingly, until there is a damages hearing, a court typically should not enter default judgment against a defendant in a personal injury action.

2. The Risks to a Non-Defaulting Defendant when Default Judgment Is Entered Against a Co-Defendant.

Washington permits an application of joint and several liability where "the plaintiff is fault-free and judgment has been entered against two or more defendants." *Kottler v. State*, 136 Wn.2d 437, 446, 963 P.2d 834 (1998); see also RCW 4.22.070. The "fault-free plaintiff" rule applies only to defendants who have had judgment entered against them. *Kottler*, 136 Wn.2d at 447. A plaintiff may recover the full damages owed by the jointly and severally liable defendants from a single defendant who is jointly and severally liable "to any degree." *McCluskey v. Handorff-Sherman*, 68 Wn. App. 96, 104, 841 P.2d 1300 (1992). As a result, if default judgment is entered against a co-defendant, then a non-defaulting defendant who later has judgment entered against it would be jointly and severally liable for the default judgment if the plaintiff is fault-free.

There are several serious problems with this scenario, which have not been clearly addressed by Washington courts, but which the United States Supreme Court recognized in *Frow v. De La Vega*, 82 U.S. 552 (1872).

If the court in such a case as this lawfully can make a final decree against one defendant separately, on the merits, while the cause was proceeding undetermined against the others, then this absurdity might follow: there might be one decree of the court sustaining the charge of joint fraud committed by the defendants; and another decree disaffirming the said charge, and declaring it to be entirely unfounded, and dismissing the complainant's bill. ... Such a state of things is unseemly and absurd, as well as unauthorized by law.

Id. at 554. Other federal courts have held that consistent damages awards "are essential among joint tortfeasors ...

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[o]therwise, plaintiffs armed with joint and several liability on a single claim could seek to execute on a larger damage award from a party against whom the court awarded a much smaller damage verdict.” *Hunt v. Inter-Globe Energy, Inc.*, 770 F.2d 145, 148 (10th Cir. 1985); see also *Dundee Cement Co. v. Howard Pipe & Concrete Prods., Inc.*, 722 F.2d 1319, 1324 (7th Cir. 1983).

As recognized by these federal courts, entry of default judgment against a defendant who has not appeared and answered can lead to prejudice to a non-defaulting defendant, as well as other unacceptable results, particularly where joint and several liability is at issue. For example:

- The non-defaulting defendant could be jointly and severally liable for a judgment that is entered against a defaulting defendant early in the case, before the non-defaulting defendant has had an opportunity to complete discovery or adequately prepare a defense. Therefore, assuming that a non-defaulting co-defendant were permitted to present evidence at a damages hearing related to a default judgment, that defendant likely would not be as prepared to address damages as it would be at a trial following complete pre-trial discovery.
- Certain facts could be “deemed admitted” as a result of a judgment entered against the defaulting party that could prejudice a non-defaulting defendant at trial or lead to jury confusion. In one product liability case in which I represented the manufacturer, a default judgment against the owner of the product would have deemed admitted the factual allegation that the owner “knew the product was dangerous but failed to warn of this danger.” A deemed admission on the part of the co-defendant that the product was dangerous plainly would

prejudice the manufacturer in a product liability suit.

- The jury could reach a liability decision that contradicts the default judgment entered against the co-defendant.
- The jury could reach a damages decision that contradicts the damages found by the court following the default damages hearing.
- The damages hearing necessary to enter default judgment against the co-defendant would be duplicative of trial and would waste the court’s and the parties’ time and resources.

For all of these reasons, it is essential to have a plan of action in place should a plaintiff seek default judgment against one or more of your client’s co-defendants.

3. Recommended Strategies for Avoiding Joint and Several Liability for a Defaulting Co-Defendant.

The following are strategies for avoiding default judgment against a co-defendant that I have successfully employed when my clients faced potential joint and several liability with a defaulting co-defendant.

a. Ask for an Appearance and an Answer.

Sometimes avoiding the entry of a default judgment against a co-defendant can be as simple as placing a call to co-defense counsel. Often a default judgment occurs because the attorney representing the party either does not realize that the answer deadline has passed or has failed to appear due to an oversight. If it looks like a co-defendant’s deadline to answer is approaching and the co-defendant has not appeared, a telephone call to notify the co-defendant’s attorney that the case is at risk of default can prompt an appearance and answer, avoiding the risk of default judgment altogether.

If the defaulting co-defendant is not represented, you can call the party di-

rectly to inform him or her that an order of default could be entered. However, in this circumstance you must exercise extreme care to assure that your contact with the defaulting party does not run afoul of RPC 4.2 or 4.3.

b. Explain Your Position to the Court Early and Often.

Entry of an order of default might not negatively impact a non-defaulting defendant, unless that defendant has some reason to want the co-defendant to be able to defend itself against the lawsuit. Nevertheless, I typically file a brief response to a request for an order of default against a co-defendant stating my client does not object to an entry of an order of default, but also noting that my client *will* object to any attempt to have default judgment entered against the co-defendant due to the risk of joint and several liability and the potential inconsistencies between the default judgment and the jury’s verdict.

If the plaintiff seeks a formal entry of default judgment against the defaulting defendant, I file a more formal and detailed brief outlining the prejudice my client will experience and the other inherent problems that exist when default judgment is entered against a defendant where joint and several liability is at issue. I cite *Frow* and related cases in support of my argument. Courts generally find such arguments persuasive and have declined to enter default judgment against my clients’ co-defendants when joint and several liability potentially was at issue.

c. Provide the Court with a Trial Procedure for Dealing with a Defendant Against Whom a Default Order Has Been Entered.

The court might have concerns regarding how trial will proceed when a default order, but not a default judgment, has been entered against a co-defendant. First, make sure the court understands that entry of a default order means only that the defaulting defendant may not

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Should Juries Be Informed of the Consequences of Their Apportionment Decisions?

by Ian Birk and Lorraine Lewis Phillips

I. Introduction

The jury, as the trier of fact, traditionally determines: 1) liability; 2) the amount of damages; and 3) the percentage of fault attributable to each party. However, courts generally do not instruct juries on the effect of their decisions. Thus, jurors generally are not told that, as a consequence of the apportionment of fault, a 1% at-fault defendant could pay 100% of the judgment, or that assigning 1% fault to the plaintiff could destroy joint and several liability. *Should juries be informed of the consequences of their apportionment decisions?*

II. Joint and Several Liability in Washington

Under common law, multiple tortfeasors were jointly and severally liable for the entire harm and the injured party could sue one tortfeasor and recover all of his or her damages, without naming the other tortfeasors. Joint and several liability arose from “[t]he cornerstone of tort law [which] is the assurance of

full compensation to the injured party.” *Seattle First Nat’l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 236, 588 P.2d 1308 (1978). The Washington Supreme Court held: “[s]o long as each tortfeasor’s conduct is found to have been a proximate cause of the indivisible harm, we can conceive of no reason for relieving that tort-feasor of his responsibility to make full compensation for all harm he has caused the injured party.” *Id.* Contributory negligence by a plaintiff was a complete bar to recovery.

In 1973, Washington adopted comparative negligence, which permits a plaintiff to recover damages even though he or she may also be partially at fault. 1973 Wash. Laws, 1st Ex. Sess., ch. 138, § 1, codified at RCW 4.22.050-.015.¹ In 1981, the legislature established the right to contribution between tortfeasors. 1981 Wash. Laws, ch. 27, §§ 12–14, codified at RCW 4.22.040-.060. Then, the Washington legislature enacted the Tort Reform Act of 1986 and “generally abolishe[d]” joint and several liability.

Kottler v. State, 136 Wn.2d 437, 446, 963 P.2d 834 (1998). The stated purpose of the Tort Reform Act of 1986 was “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.” 1986 Wash. Laws, ch. 305, § 100. Under RCW 4.22.070(1), several liability is the general rule. However, there is joint and several liability among defendants against whom judgment is entered if the plaintiff is without fault. RCW 4.22.070(1)(b); *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 294, 840 P.2d 860 (1992).

III. Apportionment Situations

Joint and several liability matters most when a plaintiff asserts claims against two or more defendants, at least one of whom has insufficient insurance coverage or assets with which to satisfy the plaintiff’s claims. Whether the plaintiff is at fault controls both

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appear and defend at trial; it does not deem any of plaintiff’s factual or legal allegations admitted. After clarifying this, I have successfully argued that the defendant against whom a default order has been entered should be treated as a *de facto* “empty chair” at trial. This means that the defendant’s name will appear on the jury verdict form and that the other parties to the lawsuit may argue about the defaulting defendant’s fault (or lack of fault) and plaintiff’s damages (or lack of damages), but that the defaulting defendant may not appear to defend itself at trial. The only practical difference between a defaulting defendant and a true “empty chair” defendant is that, should the jury determine that the defaulting defendant is liable for plaintiff’s damages, it will result in a binding judgment against the defaulting party

(and potential joint and several liability with any co-defendants also found to be at fault).

d. Do Not Let the Plaintiff Misuse a Default Order or Default Judgment.

In one case, the plaintiff obtained a default order, but attempted to use it as a default judgment, by asking the court to deem that certain facts had been admitted by virtue of the court’s entry of the default order. My client objected, clarifying that the effect of a default order was that the defaulting defendant could not defend itself against the lawsuit. Because no default judgment has been entered (and should not be entered for the reasons stated above in Section 2), no facts had been deemed admitted for any purpose.

Similarly, should the court for some reason enter a default judgment against a co-defendant, make certain that *your client* is not precluded from arguing against any and all facts asserted in the plaintiff’s complaint. If your client has appeared and answered, the fact that a default has been entered against a co-defendant should not be used to prevent your client from presenting a full and complete defense to the court and the jury.

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whether the solvent defendant(s) will be liable to cover the fault attributed to the insolvent defendant(s), and whether, as a practical matter, the plaintiff will be able to collect full damages.

For example:

- in a case arising from a go-cart injury, a plaintiff brought claims against an under-insured go-cart operator and against the go-cart manufacturer.
- in a motor vehicle case, the lead driver in a three-vehicle collision brought claims against a minimally insured motorist and against a commercial driver.
- in a pedestrian injury case, the plaintiff brought claims against a minimally insured motorist and against a municipality.

In each case, the solvent defendant's incentive is to argue for some fault to be attributed to the plaintiff, even if the amount is small, so that the solvent defendant will not be jointly and severally liable for the insolvent defendant's fault. The insolvent defendant is arguably unaffected. While joint and several liability with the solvent defendant would give the plaintiff a means to collect the judgment, potentially sparing the insolvent defendant from bankruptcy or years of garnishment, the paying co-defendant would nevertheless have a right of contribution under RCW 4.22.040-.060. The insolvent defendant may need to evaluate the respective likelihood of the plaintiff or the co-defendant pursuing whatever he or she is able to pay.

The jury's knowledge of the consequence of attributing even a small amount of fault to the plaintiff could lead the jury to refuse to do so in order to ensure that the plaintiff is able to collect the damages the jury decides should be paid. However, it could also lead the jury to apportion fault to avoid perceived injustice in the rule of joint and several liability if they thought one defendant may end up bearing the cost of an insolvent defendant's fault.

IV. Informing Juries of the Effects of Apportioning Fault

The case for informing the jury of the effect of its apportionment of fault comes from states that adopted proportionate liability, but continued to bar recovery where plaintiffs were as much as or more at fault than the defendants.² In the seminal case of *Seppi v. Betty*, 579 P.2d 683 (Idaho 1978), the Idaho Supreme Court determined that Idaho juries may be informed of Idaho law that a finding that the plaintiff is 50% or more at fault bars recovery. *Id.* at 692. The court recognized the general rule that "it is reversible error for the trial court to instruct the jury as to what effect their answers will have on the final outcome of the case." *Id.* at 688 (internal quotations omitted). But the court determined that the risk of the jury's assuming that comparative fault by the plaintiff would merely reduce, rather than bar, recovery, required that the jury be informed of the actual rule in certain cases. *Id.* at 690. The court determined that most states with similar comparative fault laws had relaxed the traditional rule against informing the jury of the consequences of its decisions. *Id.* at 691 (citing cases). The court did not mandate informing the jury, and recognized that doing so would not be appropriate in cases that were so complex that the instructions would confuse or mislead the jury. *Id.* at 692.

One commentator has called for Washington to adopt a similar rule of informing juries of the consequences of apportionment. Julie K. Weaver, *Jury Instructions on Joint and Several Liability in Washington State*, 67 WASH. L. REV. 457 (1992). At least some of the concerns identified by the Idaho court have some relevance in Washington. The Idaho court noted that, where the rule precluded recovery in cases where the jury allocated fault 50-50 to the plaintiff and defendant, defense counsel was in a position "to exploit the sense of equity implicit in such a finding without the plaintiff's counsel being able to argue the critical legal import of such a determination." *Seppi*, 579 P.2d at 690. In

Washington, counsel for a relatively better-able-to-pay defendant might seek a small allocation of fault to the plaintiff in the hope that the jury would view a small allocation as inconsequential. Similarly, plaintiff's counsel might seek to create joint and several liability through a similar, inconsequential-seeming allocation to a defendant capable of responding to a judgment.

The primary objection to informing the jury of the consequence of an allocation is that it is not relevant to the factual determination of fault. Further, it is improper for counsel to suggest that the jury make a decision on an improper basis, e.g., *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 139-40, 750 P.2d 1257 (1988); *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984); *State v. Reeder*, 46 Wn.2d 888, 892, 285 P.2d 884 (1955). Ultimately, the case for informing the jury rests on what the Idaho court in *Seppi* called the jurors' "inherent" tendency "to adjust their verdicts to accord with their notions of the justice of the cause." *Seppi*, 579 P.2d at 690. Juries are allowed to ask questions of witnesses and the court, CR 43(k), 51(i), and one judge we contacted noted that they increasingly ask about insurance coverage. There is some force, moreover, in the Idaho court's confidence that Idaho juries would not lightly disregard that state's "common-sense" rule "once it is properly explained to them." *Seppi*, 579 P.2d at 692. Nevertheless, it is questionable that the practice of informing the jury of the consequences of allocation is as straightforward where the question is one of joint and several liability, rather than the effect of the plaintiff's fault.

V. Difficulties in Informing Juries

The jury's role is to be a fact finder, not the ultimate arbiter of justice. Fact finding is a determination of liability, damages, and the proportion of fault. If, however, the jurors are informed of *all* the potential ramifications of modified joint and several liability, they may

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Strategies for Release of an At-Fault or Potentially At-Fault Party, Including the Effect on Joint and Several Liability and Dealing with an Empty Chair at Trial

by Arissa Peterson

Release of an At-Fault Party

The release and settlement of an at-fault or potentially at-fault party in a tort action may affect certain rights of the nonsettling defendants. Therefore, it is important to understand the effect a release may have on the litigation and implications at trial, such as the availability of contribution and indemnity among joint tortfeasors.

Under RCW 4.22.070(1), a defendant is liable only for his/her/its proportionate share of fault, unless: (1) that defendant acted in concert with another person or party, in which case that defendant is jointly and severally liable for the proportionate shares of fault of those with whom that defendant acted in concert; or (2) another person was acting as an agent or servant of that defendant, in which case that defendant is liable for the proportionate share of fault of its agent or servant; or (3) plaintiff was not at fault, in which case each defendant against whom judgment

is entered is jointly and severally liable for the sum of the proportionate shares of fault of all defendants against whom judgment is entered, but does not include the fault of immune entities or released entities. RCW 4.22.070.

Traditional joint and several liability is retained in cases involving hazardous wastes or substances, tortious interference with contracts, and generic products. RCW 4.22.070(3)(a)-(c). RCW 4.22.070(2) provides that, if a defendant is jointly and severally liable under RCW 4.22.070(1)(a) or RCW 4.22.070(1)(b), then that defendant's right 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 (establishing the right of contribution), RCW 4.22.050 (governing enforcement of contribution), and RCW 4.22.060 (governing the effect of settlement on the right to contribution, reasonable-

ness hearings, and the entitlement of a nonsettling defendant to an offset).

Under RCW 4.22.070(2), the offset provisions of RCW 4.22.060 come into play only where a nonsettling defendant is jointly and severally liable for a settling defendant's proportionate share of fault because of concert of action or agency, or because plaintiff is not at fault. Where a nonsettling defendant is not jointly and severally liable under RCW 4.22.070(1)(a), RCW 4.22.070(1)(b), or RCW 4.22.070(3) for a settling defendant's proportionate share of fault, such nonsettling defendant is not entitled to an offset for the reasonable value of the settlement. *Waite v. Morissette*, 68 Wn. App. 521, 525, 843 P.2d 1121 (1993).

Where proportionate liability applies, a defendant can never be liable for more than its percentage share, so the reasons for allowing credits where liability is

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make factual decisions based on information that is not relevant to the factual inquiry. This risk is well recognized and is a central concern of evidence law. The consequence of the allocation, as determined by the legislature and the courts, is extraneous to the task the jury is asked to perform.

There are substantial practical difficulties in informing the jury, as well. How would the parties inform the jury of possible unjust outcomes as a result of its apportionment decisions? Another judge we interviewed thought it would be difficult to accurately convey the effect of the fault allocation on joint and several liability without using hypothetical examples. Would a myriad of hypotheticals be given to the jury to cover whether each of various defendants might be insolvent, or the effect of assigning a percentage of fault to the

plaintiff? Or, would there be a "mini-trial" as to the solvency of all defendants? In addition, the challenge of instructing the jury would be compounded by the risk of improperly commenting on the evidence in the event any "hypothetical" too closely resembled the facts of the case in question. See Wash. Const. art. IV, sec. 16; *City of Seattle v. Smiley*, 41 Wn. App. 189, 192, 702 P.2d 1206 (1985) (an inaccurate statement of the law may be an impermissible comment on the evidence).

VI. Conclusion

Our research did not reveal that Washington's practice of not instructing juries on joint and several liability is often a point of contention. It remains the default rule, despite the concerns voiced by the *Seppi* court and others that have found it appropriate to inform juries of

the consequences of apportioning fault. If Washington courts were to take an approach similar to Idaho, one judge cautioned, "if you go down that road, there will be no turning back."

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- 1 The Washington legislature adopted the "pure" form of comparative negligence, which permits a plaintiff to recover some damages even where his or her fault is greater than that of the defendant(s) from whom recovery is sought.
 - 2 In Washington, a plaintiff is barred from recovery if the plaintiff is more than 50% at fault by reason of intoxication. RCW 5.40.060(1).

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joint and several are not present in proportionate liability. The nonsettling defendant in such cases is simply not liable for the settling defendant's proportionate share of fault, so no credit is needed to prevent the claimant from securing more than a full recovery. Under this statute, 100% fault will be attributed among all parties, including settling defendant Y, but defendant X will only be liable for his or her percentage share. Assuming that the plaintiff is without fault and that there are multiple defendants in the current action, each defendant X (excluding Y) will be jointly and severally liable for their sum total percentage of fault. It is entirely possible that a plaintiff may settle with a defendant prior to trial and that defendant's proportionate share of liability at trial is substantially less than what the defendant settled for. Policy considerations of encouraging settlements outweigh the risk that plaintiffs will enjoy a "windfall" from pre-trial settlements. To reduce the nonsettling defendants' proportionate shares would "give the benefit of an advantageous settlement to the nonsettling tortfeasor rather than the plaintiff who negotiated it." *Waite*, 68 Wn. App. at 527. On the flip side, it is possible plaintiff may settle for far less than the proportionate share of liability at trial. Therefore, courts consider that the risk to plaintiff to obtain more or less in settlement than plaintiff may obtain at trial is balanced out over the long-run.

What constitutes a release? For purposes of RCW 4.22.060, a "release" is any legal agreement that has the effect of releasing the defendant, regardless of the name applied to the agreement, and includes a covenant not to sue, covenant not to execute or similar instrument. RCW 4.22.060(2). Washington recognizes that a Mary Carter agreement is a release for purposes of RCW 4.22.060 since it has the effect of a settlement. *Romero v. West Valley Sch. Dist.*, 123 Wn. App. 385, 390-91, 98 P.3d 96 (2004). A Mary Carter agreement is an agreement entered into between plaintiff and one defendant who will agree to settle the case in a way that makes the amount

of the settlement contingent upon the outcome of plaintiff's claim against a nonsettling defendant. If the result of an agreement is to put an end to defendant's risk, the agreement will be considered a "release." A Mary Carter agreement is a powerful tool for plaintiffs because it keeps the settling defendant in the case for apportionment of fault purposes and reduces the non-settling defendant's ability to point the finger at an empty chair at trial. The settling defendant will be present at trial to defend itself, can point out the fault of the non-settling defendant, and can avoid arguing issues of causation or damages.

A release by the plaintiff of one joint tortfeasor does not discharge the other tortfeasors unless the release so provides, but the release reduces the claim against the other tortfeasors in the amount of the consideration paid for the release or by the percentage of fault assigned to the settling defendant(s), depending on whether there is joint or joint and several liability. Under RCW 4.22.070 the damages resulting from negligence must be segregated from those resulting from intentional acts, and the negligent defendants are jointly and severally liable only for the damages resulting from their negligence. *Tegman v. Accident & Med. Investigations, Inc.*, 150 Wn.2d 102, 75 P.3d 497 (2003).

A reasonableness hearing is unnecessary in most cases after the 1986 Act since a plaintiff is unable in most cases to obtain a judgment for proportionate liability of defendants who have been released through settlement, so the nonsettling defendants are only responsible for their own proportionate share of liability. A reasonableness hearing is still necessary where a plaintiff's claim is exempt from the coverage of RCW 4.22.070 or where the parties make the validity of the agreement contingent upon the court's approval.

In sum, absent concert of action or agency, nonsettling defendants are not entitled to: (1) contribution; (2) a reasonableness hearing; (3) an offset for the value of the settlement. Under these circumstances, a nonsettling defendant

may reduce his damages only by attempting to apportion fault to the settling person or entity. To preserve the right to apportion fault, a defendant must have appropriately pleaded it, not waived it and must be prepared to prove the fault of others. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 864 P.2d 921 (1993).

Strategies for Handling an Empty Chair at Trial

RCW 4.22.070 was crafted to achieve a compromise between traditional joint and several tort liability according to which a plaintiff may recover all of his or her damages from any one of two or more at-fault defendants that a jury finds caused the same injury, and comparative fault, under which a tortfeasor ultimately pays only that percentage of a plaintiff's damages that corresponds to that tortfeasor's share of causal fault. RCW 4.22.070(1) allows for the allocation of fault to a nonparty at fault ("empty chair") by providing that "entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title 51 RCW." Therefore, nearly any nonparty other than an immune employer can be named as an empty chair.¹ Indeed, the statute "encourages trials when the principal issue is the liability of the empty chair, that is, a party that is either not represented, immune from suit, or otherwise not in the courtroom." *Hiner v. Bridgestone/Firestone, Inc.*, 138 Wn.2d 248, 260-61, 978 P.2d 505 (1999).

However, only the plaintiff can assert that another person is liable to plaintiff. If a party other than the plaintiff proves fault that is the proximate cause of plaintiff's damages, the person at fault is not liable to plaintiff because plaintiff made no claim against the nonparty,

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but the nonparty's fault nevertheless operates to reduce the proportionate share of damages that the plaintiff can recover from those against whom the plaintiff has asserted a claim. *Adcox*, 123 Wn.2d at 25-26. Therefore, the empty-chair defense can be a powerful tool in any defendant's arsenal, as there are important implications when a plaintiff either settles or fails to plead against a third party that may be at fault. Since under RCW 4.22.070 only parties against whom judgment can be entered are jointly and severally liable, any allocation of fault to an empty chair reduces plaintiff's recovery against the defendants for whom judgment can be entered.

To invoke an empty-chair defense, it must be affirmatively pled under Civil Rule 12(i), which shall include the "identity of any nonparty claimed to be at fault, if known to the party making the claim." The nonparty at fault defense is not automatic. A party must present sufficient evidence of another entity's fault to support the claim otherwise a trial judge cannot submit the issue of allocation to the jury. *Adcox*, 123 Wn.2d at 25-26. Before "fault" can attach as defined in RCW 4.22.015 as acts or omissions that are in "any measure negligent or reckless toward the person or property of the actor or others," there must be a causal connection between the conduct and the damages. See Comment to Washington Pattern Instruction 41.04.

If the plaintiff brings in the nonparty as a defendant in the case, plaintiff has just shifted the burden of proof with regard to that party's fault. Therefore, if a nonparty's fault is slight, plaintiff's counsel may determine the better strategy (while arguably risky), is not to bring the empty chair into the lawsuit but rather force the defendant who identified the nonparty to prove fault. This would also insulate plaintiff against any potential Rule 11 sanctions for adding the nonparty to the suit with insufficient proof.

Discovery should also be utilized to determine the identity of all potential nonparties at fault early in the litiga-

tion, since plaintiff may be successful in preventing a defendant from putting on evidence of an empty chair defense at trial if it was not affirmatively pled and was not disclosed in discovery. The defendant who was tagged as the empty chair may come into the lawsuit with a very defensive and aggressive strategy to get out of the case since there may be less or scanty evidence and it may feel it is the lesser target or the plaintiff would have named the empty-chair defendant in the first place. When defendants employ the oft-used form affirmative defense that "Plaintiff's alleged damages, if any, were caused in full or in part by a nonparty, etc." or "reserves the right to name nonparties" in the answer, plaintiff should quickly learn the details of any nonparty through discovery and ask the defendant to identify the *names* of the nonparties or risk a motion to strike the boiler-plate affirmative defense.

A defendant should be vigilant about preparing the empty-chair defense at trial to meet its evidentiary burden. This will include fact and expert witness development and use of documents and exhibits, some or several of which may need to be obtained directly from the nonparty at fault through subpoena process, provided such party is not a defunct or bankrupt corporation or otherwise unavailable to usual discovery methods. A nonparty at fault may be unwilling to cooperate with subpoenas and deposition requests given the risk of being brought into the lawsuit, leading to added discovery costs and motion practice, especially if the nonparty resides out of state. Therefore, the costs of proving an empty-chair defense should be considered early in the litigation.

If a chair is left empty at trial, a defendant must fully develop the nonparty's culpability to maximize the effective implementation of the chosen trial strategy. A poorly developed empty-chair defense strategy or one not supported by sufficient evidence could backfire and put more emphasis on the defendant asserting the empty-chair defense. Jurors may perceive the empty-chair defense as strategy or diversion, especially where there are other defendants who are not

asserting an empty chair. The jury could "punish" the defendant who tries to place blame on a nonparty who is unavailable to defend itself and allocate a higher percentage of fault to the defendant trying to blame the empty chair. On the other hand, when an empty-chair defense is presented well with sufficient evidence and testimony, the jury is more likely to believe that there is a player with a share of the fault who is not before the court and may allocate higher fault to the empty chair if it perceives the empty chair as having significant fault. The jury may also arrive at a lower overall damage amount regardless of how it allocates fault among the defendants and empty chairs at trial.

More than just an evidentiary issue, whether to name or not name an empty chair involves an analysis of ultimate trial strategy. If a defendant identifies an empty chair that is then brought into the lawsuit by the plaintiff, the end result could be positive – a cooperative joint defense against the plaintiff, or the opposite effect – the defendants going head-to-head, making the plaintiff's case easier to prove at trial. Defendants therefore should consider the various scenarios when evaluating whether to name other tortfeasors as potential nonparties at fault, including whether a defendant can truly establish a compelling case against the nonparty, the stakes of the case, the financial status of the parties, and any other risks and benefits of identifying the nonparty at fault.

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¹ Also exempt from apportionment are employers under a federal workers' compensation act, the Longshore and Harbor Workers' Compensation Act. *Esparza v. Skyreach Equip., Inc.*, 103 Wn. App. 916, 936-41, 15 P.3d 188 (2000) (applying a federal pre-emption analysis to extend RCW 4.22.070(1)'s apportionment exemption to include entities immune under the federal act).

Refusing to Permit Comparative Fault in an “Enhanced Injury” Case: A Theory with Unintended Effects on Joint and Several Liability

by Caryn Geraghty Jorgensen and Vanessa Scott-Thorson

As consumers, we naturally assume that the vehicles we drive will provide reasonable protection to our loved ones in the event of an accident. But should this assumption relieve us, as drivers, of responsibility for catastrophic injuries caused by product defects when our negligence causes the accident in the first instance? This question has created a jurisdictional split on whether to permit or prohibit contributory negligence as an affirmative defense in so-called “enhanced injury” or “crashworthiness” cases. Appellate courts have yet to declare which view will prevail here in Washington. As this article explains, permitting a plaintiff to avoid comparative fault when enhanced injuries are at issue would not only contradict Washington’s comparative fault statute, it would have an unintended impact on joint and several liability.

The crashworthiness principle began at common law as a simple recognition that a manufacturer should be responsible for product related harm even when the product did not cause the accident in the first instance. See *Baumgardner v. Am. Motors Corp.*, 83 Wn.2d 751, 522 P.2d 829 (1974). This fairly straightforward principle, however, often is invoked by at-fault plaintiff drivers (or their estates) as a means to avoid responsibility for their own contributory, accident-causing fault. At-fault plaintiffs argue that their own accident-causing fault is legally irrelevant in “pure” crashworthiness cases – cases in which they seek recovery solely for injuries enhanced by a product defect and not for injuries caused by the accident itself.

Whether referred to as enhanced injury, crashworthiness, or second collision, this doctrine, recognized by nearly all 50 states (except Virginia, see *Slone v. General Motors Corp.*, 457 S.E.2d 51, 53 (Va. 1995)), imposes liability on motor vehicle manufacturers for defective designs that cause “enhanced injuries” in the course of or following an initial

accident. Consider this straightforward example: Joe Smith falls asleep at the wheel and collides with a telephone pole. Two minutes later, before the conscious and reasonably intact Joe can get out of his car, the gas tank explodes and he suffers fatal injuries. Here, the explosion as a factual matter causes injuries separate, or enhanced, from the initial accident (striking the telephone pole).

On our nation’s roads, as compared to hypothetical situations, motor vehicle accidents and the resulting segregation of first collision from second collision injuries are rarely so clear-cut. Consider this more complicated example: Jane Jones falls asleep at the wheel while traveling at highway speeds. She steers off the traveled portion of the highway and onto the gravel shoulder. In her attempt to re-enter the road, she loses control and rolls her vehicle four times, traumatically striking her head during each roll. As the vehicle comes to rest at the end of the fourth roll, the car roof collapses and Jane is declared dead at the scene. The coroner concludes that Jane suffered two, equally fatal, injuries – head trauma and positional asphyxia. Here, the head injuries are a result of the forces of the rollover itself – they were a direct result of Jane’s accident-causing fault. The positional asphyxia, however, is the enhanced injury caused, in theory, not by the accident itself, but by the collapsed roof.

In both hypothetical scenarios – Joe’s and Jane’s, the decedent’s estate may sue the car manufacturer under the crashworthiness doctrine for the injuries related to alleged defective design: the gas tank should not have exploded and the roof should not have collapsed. In either case, is the defendant manufacturer entitled to raise contributory fault as an affirmative defense? Will the jury be permitted to compare and allocate accident-causing fault and injury-causing fault? In other words, will the jury be permitted to decide whether, and to

what extent, each person or entity that in fact contributed to cause the injuries is responsible therefor?

Courts and legal scholars alike acknowledge clear majority and minority views on whether to permit the contributory negligence defense in alleged enhanced injury cases. The majority view, held by at least 20 states, permits the fact finder to evaluate the accident as a whole, including the initial accident, the alleged defect, and all resulting injuries. Courts leave to the jury allocation of fault between accident causation (the negligent driver) and injury causation (the alleged product defect), applying principles of comparative fault and proximate cause.

The majority rule courts reason that (1) each party or non-party’s conduct is a proximate cause of the total injuries and, therefore, should be compared, see, e.g., *Whitehead v. Toyota Motor Corp.*, 897 S.W.2d 684 (Tenn. 1995), and (2) admitting comparative fault evidence is consistent with well-settled tort law. See, e.g., *Hinkamp v. Am. Motors Corp.*, 735 F. Supp. 176, 178 (E.D. N.C. 1989) (“since the doctrine of contributory negligence is a traditional, fundamental principle of negligence law ... it is applicable to Plaintiff’s enhanced injury claims”), *aff’d* 900 F.2d 252 (4th Cir. 1990); *Montag v. Honda Motor Co.*, 75 F.3d 1414, 1419 (10th Cir. 1996) (requiring jury to compare plaintiff’s initial negligence with the fault of a product manufacturer “is certainly reasonable and consistent with Colorado’s comparative fault statute”).

On the other hand, the minority view, held by roughly ten states, focuses solely on the “second” collision and finds any mention of comparative fault relating to the “first” collision legally irrelevant. These courts reason that (1) because motor vehicle accidents are foreseeable, “the triggering factor of the accident is simply irrelevant,” *D’Amario*

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v. Ford Motor Co., 806 So.2d 424, 433 (Fla. 2001) (quoting *Jimenez v. Chrysler Corp.*, 74 F.Supp.2d 548, 566 (D.S.C. 1999)), and (2) apportionment issues are moot because damages are already limited to those caused solely by the defective product (or “second collision”) and not the initial accident. See, e.g., *Reed v. Chrysler Corp.*, 494 N.W.2d 224 (Iowa 1992).

Which view should Washington adopt? No Washington appellate court has addressed the issue of allocation of accident-causing fault in a crashworthiness case. In fact, in 2004, in the unpublished portion of its decision in *Magana v. Hyundai*, 123 Wn. App. 306, 94 P.3d 987 (2004), Division II of the Court of Appeals declined to answer this very question. *Id.* (“Because Hyundai failed to demonstrate Magana’s contributory fault and because the trial court consequently properly denied this affirmative defense, we need not resolve the broad legal issue of contributory fault in a crashworthiness case ... the resolution of this issue must await another day.”). Although no case has decided this issue, Washington’s statutory principles of allocation of fault and proximate cause entrust to juries the evaluation of “all fault” contributing to cause an injury.

At the heart of Washington’s comparative fault statute is this pervasive rule: “[i]n 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 ...” RCW 4.22.070(1). “Fault” is defined as “acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability or liability on a product liability claim.” RCW 4.22.015. Consistent with this statute, Washington explicitly requires allocation of fault in all tort cases in which “fault” is alleged, including product liability cases. *Lundberg v. All-Pure Chem. Co.*, 55 Wn. App. 181, 186, 777 P.2d 15 (1989) (“The defense of contributory fault applies to product

liability claims in the same way that it applies to other cases”).

In fact, Washington courts have been careful not to limit the application of comparative fault to only certain types of tort cases. See, e.g., *Hiner v. Bridgestone/ Firestone*, 138 Wn.2d 248, 260, 978 P.2d 505 (1999) (“Nothing in [RCW 4.22.015] definition suggests that only certain parts of it apply in certain types of cases. ... The language of RCW 4.22.070(1) is similarly quite broad, applying to ‘all actions involving fault of more than one entity.’”) (emphasis in original). Consequently, the comparative fault statute should preclude Washington courts from adopting the minority rule that prohibits allocation of fault to accident-causing conduct in crashworthiness cases.

If Washington law requires apportionment of all fault in all tort cases, then it should be for the legislature, and not the trial courts, to make an exception for so-called “enhanced injury” cases. Any other result would be contrary to the letter and spirit of Tort Reform here in Washington, remove issues from jury consideration that are statutorily reserved to the fact finder, and present unintended consequences for litigants.

Consider the Jane Jones example above. There, the claim is for wrongful death, but what caused the death – head trauma or positional asphyxia? Is it not a factual question whether this even is an enhanced injury case? The defendant automobile manufacturer would argue that the death was caused by head trauma that was a direct result of the rollover itself. Thus, the plaintiff’s decedent’s fault – the accident-causing fault – necessarily would be at issue. The plaintiff would argue, conversely, that the head trauma was survivable and that the positional asphyxia caused when the roof collapsed was the fatal injury mechanism. Under the minority view, plaintiff’s decedent’s fault would not be at issue. Is there not, though, a third possibility? A jury could find that the initial injury (head trauma) and the enhanced injury (asphyxia) combined to cause the death – a result that would necessarily require allocation


of fault between Jane Jones and the car manufacturer. If plaintiff had been successful on her summary judgment motion seeking to dismiss comparative fault as an affirmative defense, the court would have preemptively deprived the jury of its right to “determine the percentage of the total fault which is attributable to every entity which caused the claimant’s damages.” RCW 4.22.070(1).

Even more troubling in the context of Washington’s tort system, however, is that the minority view permits plaintiffs to cherry-pick the allocation rule under which their case is judged simply by virtue of how the injury claim is framed and who is, as a matter of fact, at fault. If the plaintiff (or plaintiff’s decedent) is at fault, the plaintiff is motivated to frame her injury as enhanced and to impose the minority rule to avoid allocation of fault to plaintiff and its attendant reduction in her recovery. If a third party is at fault, however, the plaintiff would resist application of the minority rule to maximize the potential for joint and several liability between the car manufacturer and the negligent third-party driver. In other words, the plaintiff, in an attempt to impose joint and several liability, would ardently resist any effort by a negligent defendant driver to exculpate himself from the actual consequences of his negligence by characterizing plaintiff’s injuries as enhanced.

A revision to the Joe Smith hypothetical illustrates this problem. Assume that, rather than Joe falling asleep and hitting a telephone pole, Sam Stone runs a red light and slams into the driver’s side of Joe’s car. Both cars come to a stop. Joe, who is conscious and seemingly intact, is unable to get out of the car because his door is stuck shut. Two minutes later, while Joe is on his phone to the 9-1-1 dispatcher, his gas tank explodes, inflicting fatal injuries. Here, Joe’s estate undoubtedly will seek recovery against both Sam Stone and the car manufacturer. With a fault-free decedent, it would behoove Joe’s estate to name both as party defendants thereby avoiding the empty-chair defense and ensuring, by virtue of joint

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and several liability, that one, the other, or both of those alleged to be “at fault” will be 100% accountable for all damages resulting from the death.

What if, however, defendant driver Sam Stone pled the lack of crashworthiness of Joe Smith’s vehicle as an affirmative defense? Would the minority rule let Sam and his negligent driving off the hook? Should Sam be off the hook? The logical extension of the minority view is that framing injuries in product liability cases as “enhanced” should not only exculpate negligent, accident-causing plaintiffs, it should exculpate negligent, accident-causing defendants as well. Such a result is antithetical to Washington’s tort recovery principles. Perhaps most significantly, application of the minority rule in Washington could result in the elimination of joint and several liability between negligent tortfeasors and product manufacturers whose combined fault cause harm to a fault-free plaintiff in a crashworthiness case.

In Washington, tortfeasors have long been held liable for all injuries proximately caused by their fault, even if those injuries

later are exacerbated or contributed to by another’s negligence. See *Lindquist v. Denzel*, 92 Wn.2d 257 (1979) (whether subsequent medical treatment is negligent does not affect the original tort-feasor’s liability and it is left to the jury to decide how to allocate responsibility for plaintiff’s overall damages); *McCoy v. Suzuki*, 136 Wn.2d 350 (1998) (manufacturer’s liability for product defect extended to rescuer coming to aid of passengers notwithstanding the intervening negligence of others). Product liability cases should be no different. A negligent driver should be as exposed to responsibility for injuries resulting from vehicle defects as he would be for injuries resulting from subsequent, negligent medical care. In either case, the jury should decide whether, and to what extent, he is “at fault.”

Washington’s Tort Reform Act demands that every person and entity “at fault” for a plaintiff’s injuries be held responsible for the damages proximately caused thereby, including the plaintiff herself. The minority rule in crashworthiness cases is simply unnecessary, and has unwarranted results under Washington’s tort system, including undermining the ability to attribute fault

to all potentially “at-fault” persons and entities and a failure to hold all injury-causing defendants jointly and severally liable when the plaintiff is fault free. We entrust in our juries the decision-making power found in the concepts of “fault” and “proximate cause.” In both scenarios discussed above – whether the rollover or the exploding gas tank – Washington juries are armed with the instructions necessary to reasonably and fairly allocate fault and evaluate causation. Let us let them do that which the Legislature has conferred on them as both a right and a responsibility – let the jury decide.

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