Washington's Product Liability Act

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The Washington Legislature in its 1981 session enacted Senate bill 3158,[1] the Tort and Product Liability Reform Act, a comprehensive change in product liability and tort law in the State of Washington. This change, perhaps the most sweeping legislative involvement in Washington tort law in this century, was accomplished after many years of extremely bitter political conflict over product liability and tort reform; Senate bill 3158, however, passed the legislature with little of the acrimony previously associated with the issue. This article explores the involvement of the legislature in product liability and tort reform historically, reviews the legislative history of Senate bill 3158, and discusses the relationship of the changes contained in the Act to the present law of the State of Washington.

I. The Recent History of Product Liability and Tort Reform in Washington

Because of rapidly increasing insurance premiums, concerns about the stifling of technological innovation, and general concerns about liability, the business community and the insurance industry in the State of Washington exerted considerable influence on the legislature of the mid-1970's to examine the questions of product liability and tort law. In 1976, Washington State House and Senate committees held hearings on product liability and the newly elected Insurance Commissioner formed a product liability task force. That task force drafted legislation that was submitted to the legislature in the 1977 session.[2] Furthermore, bills dealing with insurance reporting requirements[3]

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1. Act of April 17, 1981, ch. 27, 1981 Wash. Laws 112.

2. H. R. 1162, 45th Wash. Leg., Reg. Sess. (1977); S. 2744, 45th Wash. Leg., Reg. Sess. (1977).

3. H. R. 1416, 45th Wash. Leg., 1st Ex. Sess. (1977) (bill relating to products liabil-

and two bills sponsored by the Judicial Council to adopt contribution[4] and comparative fault were introduced.[5] None of the bills was enacted.

The House Judiciary Committee held hearings on product liability during the interim between the 1977 and 1979 sessions of the legislature. House bill 241,[6] introduced in 1979, was the product of those hearings. The bill provided for extensive changes in tort and product liability, but it did not succeed in passing the legislature.

Other bills introduced in the 1979 session included a bill providing for insurance reporting,[7] a bill calling for extensive changes in product liability law,[8] a bill modeled on the first draft of the Commerce Department's Model Uniform Product Liability Act,[9] and a bill establishing contribution among tortfeasors.[10] None of these bills succeeded. During the 1979 sessions principal attention focused on Senate bill 2333,[11] a fundamental revamp-

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ity insurance rates); H. R. 1411, 45th Wash. Leg., 1st Ex. Sess. (1977) (bill defining products liability insurance); H. R. 1410, 45th Wash. Leg., 1st Ex. Sess. (1977) (bill proposing insurance reporting requirements).

4. S. 2290, 45th Wash. Leg., Reg. Sess. (1977); H. R. 411, 45th Wash. Leg., 1st Ex. Sess. (1977). Both bills would have created the right of contribution and apportionment among tortfeasors.

5. H. R. 524, 45th Wash. Leg., Reg. Sess. (1977). The bill, providing that contributory fault of the plaintiff himself or attributed to him, or of any person whose conduct might have barred plaintiff's recovery, does not bar recovery, but diminishes the award of compensatory damages proportionately, according to the contributory fault.

6. H. R. 241, 46th Wash. Leg., Reg. Sess. (1979). The bill provided for comparative fault, contribution, a 12-year statute of repose, a definition of a "product liability action," and a section that allowed state of the art to be a defense to a design defect case.

7. H. R. 403, 46th Wash. Leg., Reg. Sess. (1979). The bill required extensive reporting by liability insurers for product liability and government tort liability insurance.

8. H. R. 843, 46th Wash. Leg., Reg. Sess. (1979); S. 2333, 46th Wash. Leg., Reg. Sess. (1979).

9. S. 3073, 46th Wash. Leg., Reg. Sess. (1979). This bill was sponsored by the author and was taken directly from the first draft of the Model Uniform Product Liability Act that was published in the Federal Register on January 12, 1979, for public comment. 44 Fed. Reg. 2,996 (1979). After receipt of public comment to the first draft, the final draft of the Model Uniform Act was promulgated by the United States Department of Commerce on October 31, 1979. *Id.* at 62,713.

10. S. 2677, 46th Wash. Leg., Reg. Sess. (1979) (bill providing essentially for contribution among or between joint tortfeasors).

11. S. 2333, 46th Wash. Leg., Reg. Sess. (1979). The bill went through many changes during the 1979 session of the Legislature. Senate bill 2333, as introduced, abolished joint and several liability, adopted contribution, established extensive affirmative defenses to a product liability claim, adopted an 8-year statute of repose for products claims, allowed a special defense to aircraft manufacturers with "an individual defense," and permitted the allocation of fault to persons not a party to the action. Substitute

ing of Washington's tort and product liability law. The bill passed both houses in different forms, but was defeated in the waning hours of the 1979 session when the Senate Majority Leader refused to permit the bill to emerge from the Senate Rules Committee. The senate thereafter passed Senate Resolution No. 140[12] at the end of the 1979 session, establishing a Senate Select Committee on Tort and Product Liability Reform to study the tort system in this and other states and to make recommendations to the legislature concerning possible legislation in the area of tort law and product liability law.[13]

II. Legislative History of Senate Bill 3158

As chairman of the Senate Select Committee on Tort and Product Liability Reform, the author sought to obtain all available objective evidence concerning the need or lack of need for a product liability law. There was considerable need for objective materials concerning the issue of product liability and tort reform given the rash of charges and countercharges in the debate on product liability and tort reform in the 1979 session of

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Senate bill 2333 passed the Senate Committee on Financial Institutions and Insurance. The bill extended the repose period to 10 years and added a section relating to affirmative defenses for governmental units. *See* S. 2333, 46th Wash. Leg., Reg. Sess. (1979) (1st substitute bill).

Thereafter, the author participated with several other members of the senate in negotiations on the bill that involved representatives of the Association of Washington Business, the Boeing Company, the insurance industry, the Washington State Bar Association, the Washington State Trial Lawyers Association, and the Seattle City Attorney. Many changes to the bill, including a defining of the extent to which industrial insurance liens could be affected by a product liability claim, exceptions to the strict repose period, and more extensive defenses to government units, were adopted. The bill passed the senate as amended. The house of representatives adopted many further changes to the bill, including an exemption from coverage under the bill for nuclear accidents, and sent the bill back to the senate.

12. S. Fl. Res. 140, 46th Wash. Leg., 1st Ex. Sess. (1979). The resolution established the Washington State Senate Select Committee on Tort and Product Liability Reform and charged it with the specific task of studying "proposals for reform of the tort system and the effects of reform, including but not limited to plaintiff recovery, workers' compensation and insurance costs." *Id.*

S. Fl. Res. 236, 46th Wash. Leg., Reg. Sess. (1980), continued the existence of the select committee and charged it with the responsibility of reporting its findings and recommendations to the senate prior to commencement of the 1981 legislative session.

13. The members of the committee included the author, Senator Del Bausch of Olympia, Senator R. Ted Bottiger of Graham, Senator George Clarke of Mercer Island, Senator Jeannette Hayner of Walla Walla, Senator John Jones of Bellevue, and Senator Don Talley of Kelso. *See* Washington State Senate Select Committee on Tort & Product Liability Reform, Final Report 1 (1981) [hereinafter cited as Report].

the legislature.[14] Furthermore, because of behind-the-scenes negotiations between the various interests concerned with product liability and tort reform in the 1979 session,[15] it was also the author's feeling that the process of the senate select committee should be as open and as public as possible.

The senate select committee directed the committee staff to gather information about product liability and tort reform laws from other jurisdictions. The staff contacted people with expertise in the area of product liability law, product liability insurance, and tort reform generally. The findings and recommendations of the United States Commerce Department's Task Force on Product Liability and Accident Compensation and the closed claim survey of the Insurance Services Office, an independent insurance industry statistical and rate-making organization, were examined very closely.[16]

The committee took testimony in a series of public hearings across the state on the issues of product liability and tort reform.[17] The committee heard from Professor Victor E. Schwartz, Chairman of the United States Commerce Department Task Force on Product Liability and Accident Compensation, representatives from the Washington State Trial Lawyers Associations, representatives from the Washington Association of Defense Counsel, representatives of the Insurance Services Office in San Francisco, representatives from the insurance industry and various business groups, and representatives from the Washington State Bar Association.[18] Nine public hearings were held prior to the 1981 legislative session.[19]

Additionally, the senate select committee sent the various insurance companies doing business in the State of Washington

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14. The battle over products liability in the 1979 session was the subject of very extensive media coverage. In its most simplistic form, the debate devolved into a battle in which proponents of the bill were labeled "anti-consumer," while opponents of the bill were charged with being "anti-business." The charges became much more heated when Senate bill 2333 ultimately failed to pass the legislature.

15. The author had the opportunity to participate in negotiations on a product liability and tort reform bill in the 1979 session of the legislature. *See* note 11 *supra*. Those negotiations were conducted in private with members of the senate and various interest groups present. The public hearing of the Senate Committee on Financial Institutions and Insurance was only a preliminary to these negotiating sessions conducted behind closed doors in the room of the Senate Majority Caucus.

16. REPORT, *supra* note 13, at 8-10.

17. *Id.* at 4-8.

18. *Id.*

19. *Id.*

a questionnaire concerning their volume of business, profitability, and claims and litigation experience in the product liability field.[20] The committee requested information for the years 1973 to 1978.[21] Fifteen of the eighteen companies to whom the questionnaires were directed responded to the senate select committee.[22]

In general, it was clear from the survey of the senate select committee that there had been a large increase in product liability insurance costs between 1974 and 1976.[23] Product liability losses exceeded premiums generally for all companies during the period from 1973 to 1975.[24] However, as new rates began to be reflected after 1975, the profitability of most companies improved greatly and only a small number of companies responding to the questionnaire indicated an unacceptable loss/premium ratio for the years 1977 and 1978.[25] Because of the limited participation of businesses in the Insurance Commissioner's program designed to provide product liability insurance to high risk insureds, there did not seem to be as severe a problem regarding the availability of product liability insurance in Washington as was originally anticipated.[26] The questionnaire also revealed that the greatest number of product liability claims closed were for amounts under $10,000.00.[27]

Because of uncertainties in the development of product liability law in this and other states and relatively high insurance

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20. *See id.* at 12. The questionnaire sought the following information for the years 1973 through 1978: number of policies written, earned premium dollar value of those policies, profit or loss on product liability insurance, loss-to-premium ratios, use of Insurance Services Office (ISO) services, number of product liability claims, and number of lawsuits and the results of those lawsuits. *Id.* at 12-13.

The Insurance Commissioner is developing mandatory reporting of this type of data for product liability insurance on forms adopted by the National Association of Insurance Commissioners. *See id.* at 15.

21. *Id.* at 12.

22. *Id.*

23. *Id.* at 13.

24. *Id.* at 14.

25. *Id.*

26. *Id.* Only a very small number of firms participated in the Insurance Commissioner's Map-Wash Program. That program was designed to help find insurers for high risk enterprises that could not find product liability insurance coverage in the marketplace. *Id.*

The cost of product liability coverage, however, may have been high enough to cause firms to forego insurance coverage entirely. *See* Model Uniform Product Liability Act § 101(A)(3), 44 Fed. Reg. 62,713, 62,716 (1979).

27. REPORT, *supra* note 13, at 14.

premiums for product liability insurance due to underwriter uncertainty about the risk associated with product liability,[28] the select committee felt that a product liability statute was needed to establish clear guidelines for the assertion of a product liability cause of action and to provide a fair apportionment of responsibility for fault among or between tortfeasors. Senate bill 3158, based in part on the Model Uniform Product Liability Act of the United States Commerce Department Task Force on Product Liability and Accident Compensation[29] and the Uniform Comparative Fault Act,[30] was introduced in the 1981 session of the legislature and passed with little controversy.[31]

In attempting to make clear the intent of the legislature with respect to Senate bill 3158, the Senate Select Committee on Tort and Product Liability prepared a draft report with a section-by-section analysis of the bill. That analysis was incorporated into the Journal of the Senate at the time the bill passed the senate. The draft report and the final report of the committee, along with questions and answers on the floor of the senate concerning specific issues of legislative intent, should become part of the legislative history of the Act.[32] Furthermore, for those sections based on the Model Uniform Product Liability Law, the section-by-section analysis for the Model Uniform Product Liability Act[33] should also be of assistance in interpreting the provisions of Senate bill 3158.

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28. The extreme variations in the premiums for product liability insurance between 1973 and 1979 reported to the Washington State Senate Select Committee on Tort & Product Liability Reform reflected the uncertainty on the part of insurance underwriters about the trend in the law of product liability. *See id.* at 13. *See also* Model Uniform Product Liability Act § 101, 44 Fed. Reg. 62,713, 62,716-17 (1979).

29. *See* note 9 *supra.*

30. 12 UNIFORM LAWS ANNOTATED 33 (master ed. Supp. 1980).

31. The bill was initially heard in the Senate Judiciary Committee where there was little opposition to its enactment. The bill passed the senate 43 to 5. The bill was subsequently heard in the House Law, Justice, and Ethics Committee and passed the house 97 to 1. Governor Spellman signed the bill on April 17, 1981. *See* Act of April 17, 1981, ch. 27, 1981 Wash. Laws 112.

32. It was the author's belief that a legislative history more complete than is the usual practice in this state was particularly critical for this controversial bill which will undoubtedly face early judicial scrutiny.

33. 44 Fed. Reg. 62,713, 62,716-50 (1979).

III. Specific Provisions of the Act

A. Definition of the Cause of Action

The portions of the Tort and Product Liability Reform Act defining a product liability cause of action were substantially adopted from the Model Uniform Product Liability Act.[34] The committee believed that existing Washington law defining the cause of action for product liability was confusing.[35] The Washington Supreme Court in the case of *Seattle-First National Bank v. Tabert*,[36] adopted the consumer expectation test for analyzing whether or not the manufacturer of products should be held strictly accountable for any damage caused by that product. Washington's Tort and Product Liability Reform Act preserves the consumer expectation test as the touchstone of the analysis of whether or not to impose liability, but sets forth explicit definitions for a product liability claim.[37]

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34. Model Uniform Product Liability Act § 102(D), 44 Fed. Reg. 62,713, 62,717 (1979). *Compare* Act of April 17, 1981, ch. 27, § 4, 1981 Wash. Laws 112.

35. The committee noted in its Report:

> Historically, one of the most confusing areas in product liability tort law involves the variety of causes of actions—such as negligence, warranty and strict liability—available to the plaintiff seeking recovery for injuries allegedly resulting from a defective product. Testimony before the Select Committee reflected general agreement that the creation of a single cause of action, termed a 'product liability claim' in the UPLA, eliminates this confusion and should be adopted.

REPORT, *supra* note 13, at 16. The committee also felt that a clarification of the various types of product claims, for example, product defect, design defect, inadequate warnings, or breach of warranty, was essential.

36. 86 Wash. 2d 145, 542 P.2d 774 (1975). The Washington Supreme Court stated:

> Thus, we hold that liability is imposed under section 402A if a product is not reasonably safe. This means that it must be unsafe to an extent beyond that which would be reasonably contemplated by the ordinary consumer. This evaluation of the product in terms of the reasonable expectations of the ordinary consumer allows the trier of the fact to take into account the intrinsic nature of the product. The purchaser of a Volkswagen cannot reasonably expect the same degree of safety as would the buyer of the much more expensive Cadillac. It must be borne in mind that we are dealing with a relative, not an absolute concept.
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> In determining the reasonable expectations of the ordinary consumer, a number of factors must be considered. The relative cost of the product, the gravity of the potential harm from the claimed defect and the cost and feasibility of eliminating or minimizing the risk may be relevant in a particular case. In other instances the nature of the product or the nature of the claimed defect may make other factors relevant to the issue.

Id. at 154, 542 P.2d at 779.

37. Act of April 17, 1981, ch. 27, § 4(3), 1981 Wash. Laws 112. *See also* REPORT, *supra* note 13, at 35-37.

Under existing Washington law, various theories have been advanced as the basis for a cause of action for product liability including strict liability, negligence, warranty, contract, and others.[38] Section 2(4) of the Tort and Product Liability Reform Act provides that there shall be a *single* cause of action termed a "product liability claim" for any damage caused by the "manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage or labeling of the relevant product."[39] Section 4 of the Act defines the burden of proof for each of the types of product liability claims. The concept of strict liability is retained for actions based on warranty or product defects.[40]

In a more substantial departure from existing law, a negligence standard is imposed for those cases involving a defective product design or inadequate warnings.[41] To demonstrate a

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38. The supreme court in Ulmer v. Ford Motor Co., 75 Wash. 2d 522, 452 P.2d 729 (1969), discussed the history of claims involving defective products and the various theories utilized in this state to establish liability against the manufacturer of a defective product. The court adopted the formulation of a product liability claim found in the RESTATEMENT (SECOND) OF TORTS § 402A (1965), but noted that the rule of section 402A was "not exclusive." 75 Wash. 2d at 531, 452 P.2d at 734. *See also* Berg v. Stromme, 79 Wash. 2d 184, 484 P.2d 380 (1971).

39. All prior theories for the pleading of a claim for product liability are abolished by the Act. Except insofar as limited in the Act itself, section 2(4) provides for a single cause of action and section 4 provides for the burden of proof for the various aspects of that single cause of action. Thus, for a cause of action arising after the effective date of Senate bill 3158, negligence, warranty, etc. cannot form the basis for a cause of action involving product liability. A party need only plead the existence of a product liability claim and meet the burden of proof set forth in section 4 for a claim against a manufacturer. REPORT, *supra* note 13, at 32.

40. The concept of strict liability in product liability claims in Washington originated with the adoption of the RESTATEMENT (SECOND) OF TORTS § 402A (1965), by the supreme court in Ulmer v. Ford Motor Co., 75 Wash. 2d 522, 452 P.2d 729 (1969). The supreme court in Wenatchee Wenoka Growers Ass'n v. Krack Corp., 89 Wash. 2d 847, 853, 576 P.2d 388, 391 (1978), rejected the notion that Washington's interpretation of section 402A rested on negligence per se and stated: "Washington is a no-fault state with respect to claims originating under Restatement § 402A." This no-fault notion was reaffirmed in Seay v. Chrysler Corp., 93 Wash. 2d 319, 609 P.2d 1382 (1980).

The committee felt that strict liability was the appropriate analytical tool for cases involving product defect or breach of warranty. The cases involving design defects or inadequate warnings were believed to be more appropriately analyzed in negligence terms because those cases, although framed in strict liability terminology, more closely resemble negligence cases. REPORT, *supra* note 13, at 37.

41. The Washington courts have indicated that strict liability is applicable in all product liability claims regardless of whether the theory is product defect, design defect, or inadequate warnings. In Seattle-First Nat'l Bank v. Tabert, 86 Wash. 2d 145, 149-50, 542 P.2d 774, 776 (1975), the supreme court specifically applied strict liability in a design

defect in design, the trier of the fact must look to see if:

> at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, outweighed the burden on the manufacturer to design a product that would have prevented those harms and the adverse effect that an alternative design that was practical and feasible would have on the usefulness of the product.[42]

The plaintiff thus bears the burden of demonstrating an alternative design that was practical and feasible. For an action based on the inadequacy of the product warnings, it must be shown that:

> at the time of manufacture, the likelihood that the product will cause the claimant's harm or similar harms, and the seriousness of those harms, rendered the warnings or instructions of the manufacturer inadequate and the manufacturer could have provided the warnings or instructions which the claimant alleges would have been adequate.[43]

The Act also specifically adopts a post-manufacture duty for product manufacturers to warn consumers of dangers with respect to a product.[44]

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defect case:

> A product may be just as dangerous and capable of producing injury whether its condition arises from a defect in design or from a defect in the manufacturing process. While a manufacturing defect may be more easily identified or proved, a design defect may produce an equally dangerous product. The end result is the same, a defective product for which strict liability should attach.

The supreme court applied a similar strict liability analysis to cases involving inadequate warnings in Teagle v. Fischer & Porter Co., 89 Wash. 2d 149, 570 P.2d 438 (1977). The court also rejected the contention that negligence was a factor in the adequacy of warnings in Little v. PPG Indus., Inc., 92 Wash. 2d 118, 594 P.2d 911 (1979).

42. Act of April 17, 1981, ch. 27, § 4(1)(a), 1981 Wash. Laws 112.

43. *Id.* § 4(1)(b). A manufacturer need not warn of an obvious or open danger. Haysom v. Coleman Lantern Co., 89 Wash. 2d 474, 479, 573 P.2d 785, 789 (1978).

44. Act of April 17, 1981, ch. 27, § 4(1)(c), 1981 Wash. Laws 112, states:

> A product is not reasonably safe because adequate warnings or instructions were not provided after the product was manufactured where a manufacturer learned or where a reasonably prudent manufacturer should have learned about a danger connected with the product after it was manufactured. In such a case, the manufacturer is under a duty to act with regard to issuing warnings or instructions concerning the danger in the manner that a reasonably prudent manufacturer would act in the same or similar circumstances. This duty is satisfied if the manufacturer exercises reasonable care to inform product users.

Although there are no Washington cases on a post-manufacture duty to warn, the com-

Claims based on fraud, intentionally caused harm, or the Consumer Protection Act, chapter 19.86 of the Revised Code of Washington, are not covered by the Act.[45] The recovery of direct or consequential economic loss under title 62A of the Revised Code of Washingon, the Uniform Commercial Code, is also not covered by the Act.[46] Finally, the Act preserves the existing Washington law on damages, although the Model Uniform Product Liability Act proposed a restriction on the items of damages that may be recoverable by a claimant in a product liability claim.[47] The select committee felt that judicial elaboration of the items of damages recoverable by claimants in product liability actions was warranted.

B. Retailer Relief

The Act attempts to allow relief from liability for sellers of products.[48] The select committee heard from retailer organiza-

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mittee believed liability should extend to manufacturers in such a situation, as did the promulgators of the Model Uniform Product Liability Act. *See* Model Uniform Product Liability Act § 104(c)(6), 44 Fed. Reg. 62,713, 62,721 (1979).

45. Act of April 17, 1981, ch. 27, § 2(4), 1981 Wash. Laws 112.

46. *Id.* §§ 2(6), 3(2); REPORT, *supra* note 13, at 32-33. *See also* Model Uniform Product Liability Act, 44 Fed. Reg. 62,713, 62,719 (1979). The committee felt that recovery for direct or consequential economic loss should be left to the Uniform Commercial Code. The parties could appropriately contract in the commercial setting on those issues.

In Berg v. General Motors Corp., 87 Wash. 2d 584, 555 P.2d 818 (1976), the supreme court held that a purchaser of a defective engine for a fishing boat could recover from the manufacturer the economic loss, *i.e.*, profits lost from fishing, caused by the defective product. The Act overrules the *Berg* case and adopts the analysis of the California Supreme Court in Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), that the Uniform Commercial Code governs as to recovery for direct or consequential economic loss, but that there is no product liability claim under the Act for direct or consequential economic loss standing alone. Senate bill 3158 is confined to physical harm to persons and property and leaves economic loss, standing alone, to the UCC. *See also* Daughtry v. Jet Aeration Co., 91 Wash. 2d 794, 592 P.2d 631 (1979).

47. The Model Uniform Product Liability Act defines "harm" as:

> (1) damage to property; (2) personal physical injuries, illness and death; (3) mental anguish or emotional harm attendant to such personal physical injuries, illness or death; and (4) mental anguish or emotional harm caused by the claimant's being placed in direct personal physical danger and manifested by a substantial objective symptom. The term 'harm' does not include direct or consequential economic loss.

Model Uniform Product Liability Act § 102(F), 44 Fed. Reg. 62,713, 62,717 (1979). The committee declined to adopt the Model Uniform Product Liability Act's strict definition of harm, particularly as to mental anguish or emotional harm not directly attendant upon personal physical injuries or illness.

48. Act of April 17, 1981, ch. 27, § 5, 1981 Wash. Laws 112. The Act also indicates that sellers of products include those who sell products and those who lease products. *Id.* § 2(1). Lessors of products in Washington have been held subject to product liability

tions and small business organizations that too often their members were subjected to claims for product liability when, in fact, the manufacturer was responsible for the defect in the product. The Act provides that a seller of a product is not liable to the claimant unless that seller was in some fashion negligent, breached an express warranty, or intentionally misrepresented or concealed facts or information about the product.[49]

In certain instances, as a matter of policy, it was felt that a product seller should be responsible for the damages associated with a product liability claim even if the defect in the product was the manufacturer's responsibility. A product seller will be responsible for the damages to a claimant if, in general, the product manufacturer is unable to respond to judgment in Washington or the product seller is substantially controlled by the product manufacturer.[50]

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actions, Baker v. City of Seattle, 79 Wash. 2d 198, 484 P.2d 405 (1971); wholesalers and retailers were held subject to product liability in Seattle-First Nat'l Bank v. Tabert, 86 Wash. 2d 145, 542 P.2d 774 (1975). *See* 45 WASH. L. REV. 431 (1970).

The term "product seller" does not include most sellers of real property, professionals who utilize products, second hand dealers, and finance lessors.

49. Act of April 17, 1981, ch. 27, § 5(1), 1981 Wash. Laws 112, states:

> [A] product seller other than a manufacturer is liable to the claimant only if the claimant's harm was proximately caused by:
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> (a) The negligence of such product seller; or
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> (b) Breach of an express warranty made by such product seller; or
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> (c) The intentional misrepresentation of facts about the product by such product seller or the intentional concealment of information about the product by such product seller.

50. Act of April 17, 1981, ch. 27, § 5(2), 1981 Wash. Laws 112, provides:

> A product seller, other than a manufacturer, shall have the liability of a manufacturer to the claimant if:
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> (a) No solvent manufacturer who would be liable to the claimant is subject to service of process under the laws of the claimant's domicile or the state of Washington; or
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> (b) The court determines that it is highly probable that the claimant would be unable to enforce a judgment against any manufacturer; or
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> (c) The product seller is a controlled subsidiary of a manufacturer, or the manufacturer is a controlled subsidiary of the product seller; or
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> (d) The product seller provided the plans or specifications for the manufacture or preparation of the product and such plans or specifications were a proximate cause of the defect in the product; or
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> (e) The product was marketed under a trade name or brand name of the product seller.

The factual situations noted in (a) and (b) should be determined at the time of the filing of the product liability action.

C. State of the Art and Custom in the Industry

In a departure from the provisions of the Model Uniform Product Liability Act concerning compliance or noncompliance with industry custom, technological feasibility, and government and nongovernment regulatory standards,[51] the senate select committee felt that evidence of custom in the industry, technological feasibility, or compliance or noncompliance with government or nongovernment standards should go to the trier of fact, but should not carry any presumption as to liability.[52] Section 6 of Washington's Tort and Product Liability Reform Act was not intended to overrule the line of cases in Washington that have held negligence per se applicable to the violation of a statutory or administrative standard,[53] but is merely designed to permit, on an evidentiary basis, the transmission of information concerning the background to the manufacture of the product to

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51. The Model Uniform Product Liability Act provides that industry custom, safety or performance standards, and practical technological feasibility are relevant to the establishment or defense of a product liability claim, but practical technological feasibility, legislative or administrative standards, and mandatory government specifications carry liability implications. Model Uniform Product Liability Act §§ 107, 108, 44 Fed. Reg. 62,713, 62,728-31 (1979).

52. Act of April 17, 1981, ch. 27, § 6(1), 1981 Wash. Laws 112, states:

> Evidence of custom in the product seller's industry, technological feasibility or that the product was or was not, in compliance with nongovernmental standards or with legislative regulatory standards, or administrative regulatory standards, whether relating to design, construction or performance of the product or to warnings or instructions as to its use may be considered by the trier of fact.

Under previous Washington law, the treatment of industry custom, nongovernmental standards, and state of the art in an industry was unclear. In Haysom v. Coleman Lantern Co., 89 Wash. 2d 474, 573 P.2d 785 (1978), the supreme court held that the introduction of a nongovernmental safety code was discretionary with the trial court. In Cantu v. John Deere Co., 24 Wash. App. 701, 603 P.2d 839 (1979), *rehearing denied*, 93 Wash. 2d 1011 (1980), the court held that where the plaintiff makes state of the art or industry standards an issue, the defendant is entitled to respond. The court in *Cantu* did not discuss whether a defendant could first raise the issue.

53. *See, e.g.*, Kelley v. Howard S. Wright Construction Co., 90 Wash. 2d 323, 582 P.2d 500 (1978); Bayne v. Todd Shipyard Corp., 88 Wash. 2d 917, 568 P.2d 771 (1977). In Davis v. Niagara Machine Co., 90 Wash. 2d 342, 581 P.2d 1344 (1978), the supreme court held that WISHA safety regulations do not create a duty running from an employer to a third-party manufacturer because the statute intended to protect employees only.

The committee adopted section 6, as an evidentiary rule. *See* REPORT, *supra* note 13, at 39-40. If a plaintiff can establish that the defendant violated an administrative or legislative standard, liability should attach per se if the *Davis* test is met. Similarly, a plaintiff's violation of such a standard can carry liability implications. Berry v. Coleman Systems Co., 23 Wash. App. 622, 596 P.2d 1365, *rehearing denied*, 92 Wash. 2d 1026 (1979).

the trier of fact.

This section also provides that compliance with a specific mandatory government contract specification relating to design or warnings by the manufacturer shall be an absolute defense to a product liability claim.[54] Conversely, failure by a manufacturer to comply with a specific mandatory government specification shall result in a finding that the product was not reasonably safe within the meaning of section 4(1). The intention of section 6 was to indicate that where any government imposed upon a manufacturer certain requirements with respect to a product, the manufacturer would not be held responsible for liability based on negligence under section 4(1). The manufacturer would still be subject to strict liability for a defective product or a breach of warranty under section 4(2). Section 6 applies *only* in the government contract situation and *only* in instances where the specification was mandatory for the manufacturer. It is not intended to apply where the manufacturer had any role in negotiating the specification with the applicable government agency.[55]

D. Statute of Repose and Statute of Limitations

Because of business and insurance industry concern regarding the "tail" on product liability claims,[56] the select committee felt that a statute of repose was necessary; the committee did not feel that it was fair to hold manufacturers responsible for damages caused by products whose useful safe life had passed. Section 7 of the Act provides that a product seller is not liable to a claimant if the harm was caused after the "useful safe life" of a product. The "useful safe life" is presumed to be 12 years although that presumption may be rebutted by a preponderance

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54. Act of April 17, 1981, ch. 27, § 6(2), 1981 Wash. Laws 112. This section speaks only to a product claim based on design defect or inadequate warnings, and not a claim based on section 4(2) product defect or warranty. Building to mandatory government specifications suggests that the government established the standard for design and created the intrinsic problems with the product that require a warning to users, and the government should bear any liability for design features it mandated. Model Uniform Product Liability Act § 108(D), 44 Fed. Reg. 62,713, 62,730 (1979). Note, the absence of the word "contract" after "government" in the second sentence of section 6(2) was inadvertent and carries no interpretational implications.

55. A question and answer on the floor of the Senate regarding this issue is reported in the Senate Journal (to be printed in 1982) and substantiates this assertion.

56. REPORT, *supra* note 13, at 9.

of the evidence.[57] Specific exceptions to the statute of repose concept—products warranted for a longer period of time, products about which the product seller has intentionally misrepresented or concealed facts or information, and products that involve prolonged exposure to harm—were set forth in section 7(1)(b).[58]

With respect to the statute of limitations, the committee specifically considered the case of *Ohler v. Tacoma General Hospital,*[59] in which the Washington Supreme Court adopted the discovery rule for product liability actions. Section 7(3) of the Act is designed to overrule the *Ohler* case and to return Washington to the standard that the statute of limitations runs from "the time the claimant discovered or in the exercise of due diligence should have discovered the harm and its cause." *Ohler* demanded knowledge on the part of the claimant of all legal elements of the cause of action before the statute of limitations ran,[60] and the committee felt that this rendered the statute of

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57. The concept of the "useful safe life" was adopted from the Model Uniform Product Liability Act. Whereas the Model Uniform Act adopts an evidentiary standard of "clear and convincing" before the presumption of 10 years may be rebutted, section 7(2) of the Washington Act states that the presumption may be rebutted by a preponderance of the evidence, and sets forth a twelve-year presumption. Act of Apr. 17, 1981, ch. 27, § 7(2), 1981 Wash. Laws 112. *Compare* Model Uniform Product Liability Act § 110, 44 Fed. Reg. 62,713, 62,732 (1979).

The committee felt the 12-year period was fairer and that the burden of proof to rebut the presumption should be a preponderance of the evidence in order that a claimant could present his or her claim to the trier of fact. The statute of repose should operate to bar a claim only if the evidence was clear that the useful safe life had expired. The time of the useful safe life is measured from the time of delivery. REPORT, *supra* note 13, at 40-43.

58. Act of April 17, 1981, ch. 27, § 7(1)(b), 1981 Wash. Laws 112, provides:

> A product seller may be subject to liability for harm caused by a product used beyond its useful safe life, if:
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> (i) The product seller has warranted that the product may be utilized safely for such longer period; or
>
> (ii) The product seller intentionally misrepresents facts about its product, or intentionally conceals information about it, and that conduct was a proximate cause of the claimant's harm; or
>
> (iii) The harm was caused by exposure to a defective product, which exposure first occurred within the useful safe life of the product, even though the harm did not manifest itself until after the useful safe life had expired.

The committee believed that there were certain instances in which, for reasons of public policy, the statute of repose concept should not apply. Those instances are enumerated in section 7(1)(b). *See* REPORT, *supra* note 13, at 41-42.

59. 92 Wash. 2d 507, 598 P.2d 1358 (1979).

60. The supreme court in *Ohler* stated: "We hold that appellant's claim against Tacoma General did not accrue until she discovered or reasonably should have discovered all of the essential elements of her possible cause of action, *i.e.*, duty, breach, causa-

limitations virtually nonexistent in the absence of a legislative change.

E. Comparative Fault

Washington adopted comparative negligence in 1973.[61] At that time, the Washington Legislature intended to abrogate the doctrine of contributory negligence, which completely barred a negligent plaintiff from recovering damages from a negligent defendant.[62] That statute, however, did not address those situations where an additional degree of fault was present such as gross negligence, recklessness, willful and wanton misconduct, or strict liability. In *Seay v. Chrysler Corp.*,[63] the Washington Supreme Court held that a plaintiff's contributory negligence could not be a damage reducing factor in a product liability action. Specifically, the supreme court declined to recognize the concept of comparative fault in a product liability action.

In sections 8, 9, and 10 of the Act, the select committee adopted the concept of comparative fault for product liability actions. The Act allows for "pure" comparative fault,[64] in which the fault of the claimant, as defined in section 9, could be compared against the fault of the defendant. The Act provides that any nonintentional conduct of the claimant may be compared to

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tion, damages." *Id.* at 507, 598 P.2d at 1360. The court also stated:

> While we agree with the trial court that the discovery rule should be extended to this products liability case, we disagree with the court's formulation and application of the rule. Like our above holding about Tacoma General, we now hold that appellant's claim against Air Shields did not accrue until after she discovered or reasonably should have discovered all the essential elements of her possible cause of action.

Id. at 514, 598 P.2d at 1362.

61. WASH. REV. CODE § 4.22.010 (1979). Section 17 of the Act repeals title 4, section 22.010 of the Revised Code of Washington, the comparative negligence statute. The Committee intended that section 17 should be read in connection with section 15. Comparative negligence should remain the law of the State of Washington for all claims arising prior to the effective date of the new Product Liability Act. For all acts arising thereafter, the concept of comparative fault contained in sections 8 through 10 applies.

62. The supreme court in Godfrey v. State, 84 Wash. 2d 959, 965, 530 P.2d 630, 633 (1975), indicated that WASH. REV. CODE § 4.22.010 "changes the factor of contributory negligence from a total bar to recovery to a factor that mitigates damages." (court's emphasis).

63. 93 Wash. 2d 319, 609 P.2d 1382 (1980).

64. "Pure" comparative fault may be distinguished from the comparative fault system adopted in several jurisdictions where a contributory bar is present if the plaintiff's fault exceeds 50% or exceeds that of the defendant. Washington's "pure" system permits the plaintiff to recover "the most miniscule amount to near total recovery." Godfrey v. State, 84 Wash. 2d 959, 965, 530 P.2d 630, 633 (1975).

the conduct of the defendant.[65]

F. Joint and Several Liability

The Washington Supreme Court in the case of *Seattle-First National Bank v. Shoreline Concrete Co.*,[66] held that joint and several liability was the proper theory for apportionment of damages against multiple tortfeasors. The select committee agreed with the supreme court that joint and several liability must be the rule for liability in Washington. The select committee felt that, although the fault of various defendants should be more equitably apportioned via contribution, the injured plaintiff should be able to recover the full amount of loss sustained by plaintiff by any or all of the defendants. The loss of the plaintiff was an integral whole and recovery should not rest on the fortuity of whether a particular defendant was able to respond to judgment.[67]

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65. Act of April 17, 1981, ch. 27, § 9, 1981 Wash. Laws 112, defines "fault" 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."

66. 91 Wash. 2d 230, 588 P.2d 1308 (1978).

67. This view was very aptly expressed by the supreme court in *Shoreline Concrete*:

> [T]he harm caused by both joint and concurrent tort-feasors is indivisible. The distinguishing factor between these types of tort-feasors is the duty breached. Joint tort-feasors breach a joint duty whereas concurrent tort-feasors breach separate duties.
>
> Since the harm caused by both joint and concurrent tort-feasors is indivisible, similar liability attaches. We have long held that such tort-feasors are each liable for the entire harm caused and the injured party may sue one or all to obtain full recovery. While respondent correctly notes that such liability at common law applies only to joint tort-feasors, the indivisible nature of the harm caused by both of these tort-feasors requires at a minimum, that each be wholly responsible for the entire harm caused.
>
> While the indivisibility of the harm caused warrants imposition of entire liability upon those tort-feasors, sound policy reasons also support application of the procedural, or several, aspect of the liability rule. The cornerstone of tort law is the assurance of full compensation to the injured party. To attain this goal, the procedural aspect or our rule permits the injured party to seek full recovery from any one or all of such tortfeasors. So long as each tort-feasor'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. What may be equitable between multiple tort-feasors is an issue totally divorced from what is fair to the injured party.

Id. at 235-36, 588 P.2d at 1310.

G. Contribution

Some of the most controversial portions of Senate bill 2333 in the 1979 legislative session were those sections of the bill pertaining to the apportionment of fault.[68] The Washington Supreme Court in *Wenatchee Wenoka Growers Association v. Krack Corp.*,[69] refused to recognize the concept of contribution among tortfeasors in this state. The select committee felt, however, that some mechanism to more equitably apportion fault among or between joint tortfeasors was necessary. For that reason, the committee adopted the right of contribution of section 12 and 13.

The Tort and Product Liability Reform Act abolishes the common law right of indemnity between active and passive tortfeasors and establishes the right of contribution. The right of contribution may be enforced in the original action or in a separate action and a one-year statute of limitations is adopted for the independent contribution action.[70] Where one party has completely discharged the liability of the claimant, contribution is still available against other joint tortfeasors.[71]

The statute does not speak to the issue of whether an action for contribution by a manufacturer over and against a negligent employer in a workplace injury is available. The supreme court

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68. Engrossed Senate bill 2333 passed the Washington Senate and provided in section 2 for the allocation of fault. S. 2333, 46th Wash. Leg., Reg. Sess. (1979) (engrossed bill). The trier of fact was to establish a percentage of fault for each claimant, each defendant, who was a retailer, distributor or manufacturer, each third party defendant, each immune party such as an employer, and each person released by the claimant. *Id.* § 2(1). The court was to enter judgment against each defendant individually for the percentage allocated by the trier of fact. If a defendant was insolvent, that defendant's fault was reallocated to all other parties. *Id.* § 2(5). Section 12 of Engrossed Senate bill 2333 also allowed the lien of the Department of Labor and Industries in a workplace injury to be that figure by which benefits exceeded the share of liability of the claimant, the employer, and the claimant's fellow servants. *Id.* § 12. The Act does not permit the apportionment of fault to the "empty chair," *i.e.*, parties not joined in the lawsuit, as Engrossed Senate bill 2333 would have allowed.

69. 89 Wash. 2d 847, 576 P.2d 388 (1978).

70. Act of April 17, 1981, ch. 27, §§ 12(1), 13(2)-(3), 1981 Wash. Laws 112. The committee intended that the right of contribution be substituted for the common law right of active/passive indemnity. Active/passive indemnity provided by the common law applies in all those claims in which the right of contribution provided by the statute is not allowed. The committee did not intend that parties would not have available to them the common law right of active/passive indemnity and the right of contribution allowed in the new Product Liability Act.

71. *Id.* § 12(2).

in *Seattle-First National Bank v. Shoreline Concrete Co.*,[72] rejected the possibility of such third party action. The Act does not speak directly to the issue of the workplace injury because the committee believed that other committees of the legislature dealing with the questions of industrial insurance should attempt to deal with this issue. It is possible, however, to argue that the enactment of a statutory right of contribution does not permit the allegation of a third party claim for contribution over and against a negligent employer.[73]

Sections 12, 13, and 14 of the Act apply to all tort actions, not just to product liability actions. The select committee felt that the right of contribution should be available throughout the tort law system in the State of Washington.[74]

H. Settlement Agreements

Section 14 of the Act provides that where a party enters

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72. 91 Wash. 2d 230, 588 P.2d 1308 (1978).

73. REPORT, *supra* note 13, at 25-26. The Washington Supreme Court has held that the Industrial Insurance Act "immunizes" the conduct of an employer so as to bar a third party action for indemnity or contribution by a manufacturer against that employer. That bar is not present where the employer voluntarily assumes an independent duty or obligation to the third party. Seattle-First Nat'l Bank v. Shoreline Concrete Co., 91 Wash. 2d 230, 588 P.2d 1308 (1978).

It could be argued that the Act expressly adopts the fault apportionment policy of contribution and thereby implicitly overrules the Industrial Insurance Act employer immunity, or that the Act expands upon those instances where an "independent duty" may be discerned by the courts. Carl J. Madsen, Inc. v. Babler Bros., 25 Wash. App. 880, 610 P.2d 958 (1980). *See also* Redford v. City of Seattle, 94 Wash. 2d 198, 615 P.2d 1285 (1980).

74. Two Senate Resolutions created the Washington State Senate Select Committee on Tort and Product Liability Reform, and charged the committee with the responsibility of proposing changes in the entire tort system, not just product liability. S. Fl. Res. 236, 46th Wash. Leg., Reg. Sess. (1980); S. Fl. Res. 140, 46th Wash. Leg., 1st Ex. Sess. (1979). Sections 8 through 14 of the Act deal essentially with the entire Washington tort system and are to be codified in a section of the Revised Code of Washington separate from that of sections 2 through 7 of the Act, relating to product liability. Act of April 17, 1981, ch. 27, § 16, 1981 Wash. Laws 112.

It could be suggested that the Act contains two subjects in violation of WASH. CONST. art. 2, § 19, which requires that a statute embrace no more than one subject. This section of the Washington Constitution, however, is liberally construed to sustain the validity of a statute. Water Dist. No. 105 v. State, 70 Wash. 2d 337, 485 P.2d 66 (1971). Further, the title may be very broad where the act has numerous subjects incidental to the title; there need be only "some rational unity" between the title and the subdivisions in the act. Tri-M Erectors, Inc. v. Donald M. Drake Co., 25 Wash. App. 264, 606 P.2d 709 (1980). Thus, since the Act is "an act relating to tort actions" and historically, product liability and the apportionment of fault via comparative fault and contribution have been considered together, the argument that the bill contravenes the Washington Constitution is without merit.

into a settlement agreement with the claimant, if the settlement agreement is a reasonable one, all liability on the part of that defendant for contribution and for claims by the claimant is discharged. The senate select committee felt that the process of settlement of lawsuits must be encouraged. The ability of a party entering into a settlement with the claimant to be discharged from all claims, including contribution, was essential to fulfill the policy of encouraging settlement.

To protect parties entering into settlement agreements from the possibility that such settlement agreements would be deemed unreasonable long after settlement was achieved, the Act provides that a court must review a settlement agreement to determine whether the amount paid was reasonable.[75] The trial courts will determine the reasonableness of the settlement agreements on a case-by-case basis, analyzing a number of potential factors.[76]

If the amount of the settlement is reasonable, the amount of the plaintiff's claim against the remaining defendants is reduced by the amount paid pursuant to the agreement.[77] If the amount of the settlement is unreasonable, the court must determine what would have been a reasonable settlement and reduce the claim of the plaintiff against the other defendants by that reasonable amount.[78] An unreasonable settlement does not affect

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75. In adopting section 15(2) of the Act, the committee inadvertently made the sections of the Act relating to contribution retroactive without making section 14 of the Act with respect to settlement agreements retroactive also. The committee intended that the process for determining the reasonableness of settlement should be utilized for those claims in which the right of contribution is retroactive.

76. No standards to guide the courts in the elaboration of what constitutes a "reasonable" settlement are provided in this statute. Presumably, a multiplicity of factors will enter into this calculation and will include such questions as the legal and evidentiary questions present in the case, the dollar amount of the settlement in light of the value of the case, the presence and extent of liability insurance coverage, the cost of litigation, and other factors. REPORT, *supra* note 13, at 54-55.

77. Act of April 17, 1981, ch. 27 § 14(2), 1981 Wash. Laws 112.

78. *Id.* In a typical case, a plaintiff has brought a claim for product liability against three defendants. Defendant 1 settles with the plaintiff for $25,000 and that settlement is declared reasonable by the court. The plaintiff goes to trial with defendants 2 and 3. The jury finds that plaintiff has sustained $100,000 in damages and that the plaintiff is 50% at fault while defendants 2 and 3 are each 25% at fault. The plaintiff recovers a net judgment from defendants 2 and 3 of $50,000 and that $50,000 is reduced by the $25,000 already received by the plaintiff from defendant 1. The plaintiff makes a net recovery of $25,000 judgment from defendants 2 and 3. Defendants 2 and 3 are jointly and severally liable for the $25,000 figure; contribution between defendants 2 and 3 would be allowed, but defendant 1 would be exonerated from liability for contribution.

If the settlement were found to be unreasonable, and the court finds that a reason-

the validity of the agreement between the plaintiff and the defendant so agreeing, but the plaintiff makes a settlement at his risk because the court can reduce the claim of the plaintiff against other defendants by the amount of a reasonable settlement. The claims of the other defendants against the defendant making an unreasonable settlement with the plaintiff remain discharged by the settlement.[79] Again, section 14 relating to settlement agreements applies to all tort actions.

I. Miscellaneous Provisions

The Act modifies the existing judicial product liability law in Washington only to the extent provided for in the statute.[80] The statute applies only to those claims *arising on or after* the effective date of the Act, July 26, 1981.[81] The select committee found a need for an extended effective date so that people dealing with product claims could have some warning as to the change in the law. Nevertheless, because of the importance of the right of contribution, the Act provides that the right of contribution provided in sections 12 and 13 of the Act shall be

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able settlement would have been $50,000, the plaintiff would still go to trial with defendants 2 and 3 and would recover a net judgment of $50,000 from those defendants. Plaintiff's net recovery would be zero as the $50,000 would be reduced by $50,000, the value of the reasonable settlement.

79. *Id.* § 14(3). It could be argued that the contribution claims are not discharged if the settlement between the claimant and the settling defendant was unreasonable. Section 14(3) indicates specifically that the agreement the claimant and the defendant entered into remains unaffected by an unreasonable settlement. The intent of section 14 generally, however, is to encourage the settlement of cases, and the discharge of a defendant from liability for contribution by settling with a claimant is designed to effectuate that policy. *See* REPORT, *supra* note 13, at 54. Even if the settlement is unreasonable, in the absence of collusion or fraud upon the court, the settling defendant should be exonerated from liability from contribution.

The more difficult question is whether a defendant not joined in the principal action by the plaintiff and not joined by one of the defendants would lose a right of contribution when the plaintiff and a defendant settle. Presumably defendants ordinarily will utilize Washington Civil Rule 14 to join other parties who are potentially liable to the plaintiff to help defray any judgment that a plaintiff might recover. If, however, a plaintiff and a defendant agree to settle without joining a known defendant with the intent of keeping that defendant from participating in the proceeding on the reasonableness of the settlement, a right of contribution should be allowed the defendant who was not joined.

80. Act of April 17, 1981, ch. 27, § 3(1), 1981 Wash. Laws 112. Although it could be argued that because this section refers only to sections 2 through 7, existing product liability cases involving comparative fault and contribution apply, the argument is without merit. Sections 8 through 14 of the Act, by their terms, apply to all tort actions, including product liability actions, and change existing product liability law.

81. *Id.* § 15(1).

applied retroactively to all actions in which trial on the underlying actions has taken place prior to the effective date of the Act.[82] The language of "trial on the underlying action" would mean all those instances in which there had not been a judgment entered in the case prior to July 26, 1981.[83] Settlements achieved prior to July 26, 1981, are not affected by the retroactive application of contribution.[84]

IV. Conclusion

The work on product liability and tort reform accomplished by the Washington State Legislature in the Tort and Product Liability Reform Act was significant from several standpoints. The legislature attempted to deal with a highly controversial and complex issue with detailed and careful study. The Act itself is a product of compromises among various groups interested in the issue, but the major issues of product liability and tort law in the State of Washington were addressed. Furthermore, because of the comprehensive nature of the changes envisioned by the Act, possible future adjustments to provisions in the Washington Product Liability Act may be required. Careful monitoring of those possible changes by the bench and bar is necessary in order to sustain the balanced approach to the issues contemplated by the Senate Select Committee on Tort and Product Liability Reform. Finally, it may be anticipated that the provisions of the Act will be subject to close and intense judicial scrutiny. It was the intention of the author and the members of the select committee to provide as detailed a legislative history setting forth the intent of the legislature as could be accomplished. The incorporation of a draft committee report with a detailed analysis into the Senate Journal, substantial questions and answers on the floor of the senate, and a final report were a departure from the limited legislative history that has been the tradition in the Washington Legislature. Commen-

82. *Id.* § 15(2).

83. Clearly, in some instances, a summary judgment may well have disposed of the principal issues in the case. The author believes that in such a situation, trial on the underlying action means the entry of a judgment on the principal issues. Furthermore, the retroactivity feature of section 15(2) should not apply to those cases where a judgment that no right of contribution existed was entered prior to April 17, 1981, the date Governor Spellman signed the bill. The entry of a judgment differentiates such a case from the usual type of case contemplated by section 15(2), where no judgment on the issue of contribution had been entered and trial had not occurred prior to July 26, 1981.

84. Act of April 17, 1981, ch. 27, § 15(2), 1981 Wash. Laws 112.

tators have suggested the need for a balanced product liability act in this state.[85] The legislature has not heeded those who would irrevocably damage the tort law system; the legislature also saw the need for change in the law of product liability and tort law; the legislature confronted the uncertainty and lack of predictability in the law, while preserving the right of injured consumers to obtain redress for injuries caused by defective products.

85. See Comment, *Product Liability Reform Proposals in Washington—A Public Policy Analysis*, 4 U. PUGET SD. L. REV. 143 (1980). That comment argued persuasively for a product liability act that clearly defined the cause of action, adopted comparative fault, and allowed a right of contribution among or between joint tortfeasors.