A Study in Juristic Realism: The Historical Development and Interpretation of Construction Industry Indemnification Clauses in Washington

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I. INTRODUCTION

The interpretation and enforcement of contract indemnity provisions in multi-employer construction projects has generated substantial litigation in the Washington courts.[1] The relative frequency with which these cases arise, not to mention the often substantial damages involved, makes them of special interest to the practicing attorney. In particular, it is critical that any attorney practicing in the area of construction law be intimately familiar with the multitude of issues often associated with the litigation of construction industry indemnification clauses.

Litigation in this area arises most often in the context of major multi-employer construction projects. These projects typically involve the services of a general contractor who contracts directly with the owner to direct, supervise, and control the overall project. This general contractor, in turn, engages the services of various specialty subcontractors who undertake to perform and complete discrete portions of the overall project under the terms and conditions of individual subcontracts. The duties, responsibilities, and obligations of these project-related subcontracts are traditionally weighted heavily in favor of the general contractor and typically include a general, all-inclusive indemnification provision in which the subcontractor agrees as follows:

> To indemnify and save harmless the Contractor from

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1. This article focuses exclusively upon the analysis and interpretation of indemnity provisions in the Washington courts. For a survey of cases on this issue in other jurisdictions, *see* Annot., 68 A.L.R.3d 7 (1976).

> and against any and all suits, claims, actions, losses, costs, penalties, and damages, of whatsoever kind or nature, including attorney's fees, arising out of, in connection with, or incident to the Subcontractor's performance of this Subcontract.[2]

This type of indemnity clause clearly encompasses a wide variety of potential claims, including sub-subcontractor claims, materialmen claims, equipment rental claims, quality of work claims, and personal injury claims. As a practical matter, the very breadth and all-inclusive nature of the clause invite litigation for virtually any unanticipated project related loss, damage, or injury.

Despite the wide variety of potential claims encompassed by the typical indemnification clause, the vast majority of reported cases interpreting and enforcing construction industry indemnity clauses involve a fairly consistent fact pattern. In generic terms, the common scenario may be briefly summarized as follows: (1) a subcontractor's employee sustains a jobsite injury; (2) the injured employee makes a claim against the general contractor whose activities or negligence allegedly contributed to the injury;[3] and (3) the general contractor makes a claim against the subcontractor (employer) under the provisions of a subcontract indemnity provision. Faced with this scenario, the Washington courts have struggled for more than twenty years trying to develop a consistent approach to interpret these clauses and seeking to impart a practical and equitable interpretation within the principles of general contract law.

This struggle has resulted in significant changes in the state of the law. In a broad sense, the chronological progression of reported decisions evidences a transition from a literal

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2. *See* Jones v. Strom Constr. Co., 84 Wash. 2d 518, 521, 527 P.2d 1115, 1118 (1974); Tucci & Sons, Inc. v. Madsen, Inc., 1 Wash. App. 1035, 1036, 467 P.2d 386, 387 (1970). Most modern indemnity provisions have been rephrased and amended to reflect, inter alia, the considerations engendered in WASH. REV. CODE § 4.24.115 (1985) (indemnity for damages deriving from the sole negligence of the indemnitee). *See infra* notes 155-65 and accompanying text. For considerations relating to indemnity for the concurrent negligence of the indemnitor and the indemnitee, *see infra* notes 229-63 and accompanying text; considerations relating to industrial insurance statutes, specifically concerning employer immunity for injuries to employees, *see infra* notes 169-221 and accompanying text; and entitlement to attorney's fees in litigation involving enforcement of the clause itself, *see infra* notes 288-90 and accompanying text.

3. The typical case concerns a claim by the injured employee against the general contractor under the authority of Kelley v. Howard S. Wright Constr., 90 Wash. 2d 323, 582 P.2d 500 (1978). Careful study and analysis of the seminal *Kelley* decision and its progeny is a strict requisite for any attorney practicing in this area of law.

and strict enforcement of indemnity clauses[4] toward a requirement of indemnification only upon proof of an "overt act or omission" by the indemnitor, which causes, or participates in causing, the original and underlying loss.[5] A previous focus upon the literal language of the clause[6] has gradually surrendered to a more precise analytical focus upon the particular facts and circumstances underlying the claim for indemnification.[7] More specifically, reported decisions have evolved to a present focus upon the specific acts and activities of the indemnitor, and the causal relationship of these acts or omissions to the fact of loss, damage, or injury.[8] However, to state the progression of reported decisions on this issue in terms of evolution does not necessarily imply complete consistency. Rather, the very concept of evolution suggests a dynamic process, subject both to some internal inconsistency and to consequent analytical critique.

This Article develops how Washington courts historically have interpreted construction industry indemnification clauses. This Article first addresses the substantive and the primary issue of liability, vel non,[9] under construction industry indemnification provisions. This section offers a historical analysis of Washington case law on the subject and concludes with an analysis of the recent statutory amendments to section 4.24.115 of the Washington Revised Code,[10] which substantially impact the current state of the law and which should resolve many unsettled or ambiguous issues in the case law.[11] This Article then discusses some unique issues that have arisen in the context of attempts to judicially enforce these indemnification provisions. Finally, this Article proposes a model indemnification provision that equitably formulates the clause, taking into

4. *Tucci*, 1 Wash. App. at 1035, 467 P.2d at 386 presents perhaps the best example of this early approach. For extended discussion of *Tucci*, *see infra* notes 42-48 and accompanying text.

5. *See, e.g., Jones*, 84 Wash. 2d at 518, 527 P.2d at 1115. *Jones* clearly represents the seminal case in Washington on the issue and marks the judicial transition toward the modern approach to the analysis of construction industry indemnification provisions. *Jones* is discussed in detail *infra* notes 64-82 and accompanying text.

6. *See, e.g., Tucci*, 1 Wash. App. at 1038, 467 P.2d at 388.

7. *See, e.g., Jones*, 84 Wash. 2d at 520-21, 527 P.2d at 1118.

8. *Id.*

9. *See infra* notes 16-163 and accompanying text.

10. WASH. REV. CODE § 4.24.115 (1986) as amended by Act of April 4, 1986, ch. 305, § 601, 1986 WASH. LEG. SERV. 6 (West). *See infra* text accompanying note 157 for the text of the revised statute.

11. *See infra* notes 152-63 and accompanying text.

account the precepts enunciated in Washington case law and statutes.

By way of brief preliminary comment, it must be acknowledged that indemnity and hold harmless clauses are not unique to construction industry contracts. Washington appellate decisions have addressed the validity and enforceability of indemnity clauses in many contexts, including property management contracts,[12] franchise agreements,[13] and lease agreements,[14] as well as a county fair concession contract.[15] To a large extent, the courts' interpretation of clauses in these former contexts parallels the interpretation progressively imparted to indemnification clauses in construction industry contracts. In certain circumstances, a principle first articulated in a case concerning a construction industry indemnification clause is further developed and refined in a non-construction industry indemnification case. For this reason, this Article discusses certain non-construction industry cases when principles enunciated in those cases bear upon issues and principles germane to the interpretation of indemnity clauses in construction industry cases. Notwithstanding this brief discussion, the primary focus of this Article is upon the interpretation and enforcement of indemnity clauses in construction industry contracts.

II. THE FUNDAMENTAL ISSUE OF LIABILITY

The judicial development and interpretative evolution of construction industry indemnity clauses can be conveniently broken down into four distinct categories. Three of these categories relate to a chronological analysis of Washington case law; the fourth category relates to the impact of the recent amendments to section 4.24.115 of the Revised Code of Washington upon indemnity law.[16] The first of these categories develops the line of cases culminating in *Tucci & Sons, Inc. v.*

12. *See, e.g.*, Griffiths v. Henry Broderick, Inc., 27 Wash. 2d 901, 182 P.2d 18 (1947) (indemnity agreement between apartment owner and property agent upheld).

13. *See, e.g.*, Dirk v. Americo Mktg. Co., 88 Wash. 2d 607, 565 P.2d (1977) (indemnity clause in dealership contract did not protect the dealer from loss resulting from his own negligence).

14. *See, e.g.*, Calkins v. Lorraine Div. of Koehring, 26 Wash. App. 206, 613 P.2d 143 (1980) (indemnity clause in lease agreement did not release lessor/owner from loss because of owner's negligence).

15. *See, e.g.*, Parks v. Western Wash. Fair Assn., 15 Wash. App. 852, 553 P.2d 459 (1976) (although negligence is not necessary to establish liability, the indemnity clause did not make the indemnitor strictly liable).

16. *See infra* text accompanying note 157.

Madsen, Inc.,[17] which promoted strict, and often inequitable, enforcement of the indemnity provisions. The second category focuses exclusively upon the seminal Washington Supreme Court decision in *Jones v. Strom Construction Co.*,[18] which ameliorated the harsh principles enunciated in earlier cases and first articulated the "overt act or omission" test that remains the predicate for liability under these provisions.[19] The third category develops cases subsequent to *Jones* that further address the "overt act and omission" test. Finally, the fourth category analyzes the recent amendments to section 4.24.115[20] of the Revised Code of Washington on the substantive liability of a party under construction industry indemnity clause.

A. Early Case Law: Strict Enforcement of Indemnity Provisions

Historical analysis of relatively early case law that enforces indemnity provisions begins with a brief review of appellate decisions, culminating with the decision of the Washington Court of Appeals in *Tucci & Sons, Inc. v. Madsen, Inc.*[21]

1. The Historical Predicate

Although it arose outside the context of the construction industry, *Griffiths v. Broderick, Inc.*[22] enunciated the analytical precepts that influenced the interpretation of indemnity provisions in the construction industry for more than two decades. *Griffiths* concerned an action by an apartment owner against a property management company for losses associated with an injury to a tenant. The property manager based his defense on a provision in the property management contract that required the owner to hold the manager harmless from "any and all loss, damage or injury to any person or persons whomsoever, or property, arising from any cause or for any reason whatsoever in and about said premises."[23] Rejecting the owner's contention that the contract did not unequivocally indemnify for the consequences of the manager's negligence,

17. 1 Wash. App. 1035, 467 P.2d 386 (1970).
18. 84 Wash. 2d 518, 527 P.2d 1115 (1974).
19. *Id.* at 521-22, 527 P.2d at 1118.
20. *See infra* text accompanying note 157.
21. 1 Wash. App. 1035, 467 P.2d 386 (1970).
22. 27 Wash. 2d 901, 182 P.2d 18 (1947).
23. *Id.* at 903, 182 P.2d at 19.

the court enunciated the principle that continues to govern the general interpretation of indemnification clauses to this date:

> Contracts of indemnity, therefore, must receive a reasonable construction so as to carry out, rather than defeat, the purpose for which they were executed. To this end they should neither, on the one hand, be so narrowly or technically interpreted as to frustrate their obvious design, nor, on the other hand, so loosely or inartificially as to relieve the obligor from a liability within the scope or spirit of their terms.[24]

The court noted that the indemnity covenant at issue "could not be more 'sweeping and all-embracing in its terms' "[25] and held that the provision clearly contemplated a loss, damage or injury occasioned by negligence.[26] Specific language providing indemnification for losses occasioned by indemnitee's negligence was not required.[27]

Union Pacific Railroad v. Ross Transfer Co.[28] reaffirmed the principles enunciated in *Griffiths*. *Union Pacific* concerned the interpretation of an indemnification provision between the railroad and a general contractor. The provision required indemnification for any loss "caused by or resulting in any manner from any acts or omissions, negligent or otherwise, of the Contractor."[29] Citing *Griffiths* as the only Washington case on the issue, the court held that the language of the provi-

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24. *Id.* at 904, 182 P.2d at 19-20 (quoting 27 Am. Jur. *Indemnity* § 13 (1934)).

25. *Id.* at 905, 182 P.2d at 20.

26. *Id.* at 906, 182 P.2d at 20.

27. *Id.* at 906-10, 182 P.2d at 20-23. The court also rejected plaintiff's alternate contention that if the clause did provide for indemnification for the consequences of the indemnitee's negligence, it was void as against public policy. Addressing the public policy argument, the court distinguished cases involving common carriers wherein courts recognized the universal rule that a common carrier could not contractually relieve itself of liability for negligence in the performance of contracts of carriage. Discounting the proposition that the allowance of indemnification for one's own negligence would tend to promote negligence, the court analogized to the purchase of liability insurance policies, the express purpose of which was to indemnify insureds against losses occasioned by injuries resulting from their own negligence. On this basis, the court held that it was not against public policy to contractually indemnify against loss or injury attributable to one's own negligence.

28. 64 Wash. 2d 486, 392 P.2d 450 (1964).

29. *Id.* at 486, 392 P.2d at 450 (italics omitted). The injury in this case was the death of a railroad employee, which occurred during the course of contract performance. The parties stipulated that the joint negligence of the contractor and the railroad was the proximate cause of the employee's death. Accordingly, the single issue was whether the "acts or omission" language of the indemnity provision excluded liability for losses due to concurrent negligence.

sion required indemnification for losses due to the concurrent negligence of the parties.[30]

Following closely upon the court's decision in *Union Pacific* was *Continental Casualty Co. v. Seattle*,[31] which concerned almost identical facts and issues. The court again upheld liability under a broadly-worded indemnification clause requiring indemnity for losses due to any "act, action, neglect, omission or default" on the part of the contractor, if the losses were proximately caused by the joint negligence of the indemnitor and the indemnitee.[32] The case is noteworthy only for certain language regarding the interpretation of indemnity clauses first articulated in this decision: "'*Causation, not negligence, is the touchstone*' [of liability]."[33] This statement, identifying causation and disavowing negligence as the predicate for liability when interpreting indemnity clauses, is a principle often repeated in subsequent decisions.[34] As discussed in more detail below, this statement has caused some confusion and uncertainty about the present state of the law.[35]

The same general circumstances and issues presented in earlier cases arose in *Cope v. J. K. Campbell & Associates*,[36] which concerned the enforcement of an indemnity provision requiring indemnification for all losses "arising out of or in connection with the work to be performed under this Subcontract."[37] *Cope* is noteworthy primarily because the provision in its exception for losses "solely due to the fault or negligence of the [general] Contractor"[38] was the forerunner of many mod-

30. Critical to the decision was the court's perception that the exclusion of indemnification for losses attributable to joint negligence would render the contractual provision a "useless gesture" because there existed no claim for which the railroad could seek indemnification except one founded at least partially upon the railroad's own negligence. *Id.* at 490, 392 P.2d at 452.

31. 66 Wash. 2d 831, 405 P.2d 581 (1965).

32. *Id.* at 833, 405 P.2d at 582.

33. *Id.* at 835, 405 P.2d at 583 (quoting Buscaglia v. Owens-Corning Fiberglas, 68 N.J. 508, 515, 172 A.2d 703, 707 (1961) (emphasis in original)).

34. *See* Jones v. Strom Constr. Co., 84 Wash. 2d 518, 521, 527 P.2d 1115, 1118 (1974).

35. In particular, the confusion engendered by this statement has returned to haunt the court in the very recent case of McDowell v. Austin Co., 105 Wash. 2d 48, 710 P.2d 192 (1985). The singular effect of this latest decision by the Washington Supreme Court has been to cast considerable doubt upon an otherwise fairly consistent analytical approach to this issue of indemnification liability. *See infra* notes 131-153 and accompanying text.

36. 71 Wash. 2d 453, 429 P.2d 124 (1967).

37. *Id.* at 454, 429 P.2d at 125.

38. *Id.*

ern indemnity clauses.[39] In *Cope*, the general contractor made a claim for indemnification against a subcontractor following a joint settlement with the subcontractor's employee for project-related injuries. Rejecting the then viable, but now statutorily discredited,[40] distinction between active and passive *tortfeasors* in the context of indemnification, the court noted that primarily matters of contract and not of tort were at issue. Under the authority of *Union Pacific*, the court required that the subcontractor fully indemnify the prime contractor for the latter's contribution to the settlement with the injured employee.[41]

2. Tucci & Sons, Inc. v. Carl T. Madsen, Inc.[42]

All of the foregoing cases concerned injuries, damages, or losses attributable, at least in part, to the negligence of the indemnitor (subcontractor). The operative principle running through these decisions was to enforce the indemnity clause and to require the indemnitor to fully indemnify the indemnitee (contractor) for all losses sustained. The courts made no attempt to allocate or apportion liability between the parties based upon considerations of comparative negligence. Rather, once triggered, the clause required complete indemnification. This conclusion was predicated upon the perceived intent of the parties in executing the indemnity provision and was consistently held not to violate public policy. As indicated, however, in virtually all of these cases the indemnitor contributed to the injury. Not until *Tucci & Sons, Inc. v. Carl T. Madsen, Inc.*[43] did the Washington courts address a situation in which indemnification was demanded for losses occasioned by the *sole* negligence of the indemnitee.

In *Tucci*, an employee of a subcontractor on a multi-employer construction project was injured on the job. The par-

39. The exception relating to losses attributable to the sole negligence of the indemnitee has been statutorily mandated by WASH. REV. CODE § 4.24.115 (1986) since its enactment in 1967.

40. WASH. REV. CODE § 4.22.040(3) (1985).

41. *Cope*, 71 Wash. 2d at 456, 429 P.2d at 125-26. Although without expressly citing the *Griffiths* case, the court reaffirmed the basic principle of *Griffiths* insofar as the attempted public policy argument of the subcontractor was concerned: "[W]e would add that we find no doctrine of public policy which renders unenforceable contracts to indemnify one against the loss sustained by reason of the other's negligence even though the party indemnified may, by his negligence, have contributed to cause the loss or injury." *Id.*

42. 1 Wash. App. 1035, 467 P.2d 386 (1970).

43. *Id.*

ties stipulated that the injury was caused by the sole negligence of the general contractor who incurred a judgment in favor of the injured employee. In turn, the general contractor sought indemnification from the employer by virtue of an indemnity provision in the subcontract in which the subcontractor agreed "[t]o indemnify and save harmless the CONTRACTOR from and against any and all suits, claims, actions, losses, costs, penalties, and damages, of whatsoever kind or nature, including attorneys' fees, arising out of, in connection with, or incident to the SUBCONTRACTOR'S performance of this SUBCONTRACT."[44] The subcontractor attempted to distinguish previous cases,[45] arguing that the language used in the subcontract failed to warrant a conclusion that indemnification was required for losses due to the indemnitee's *sole* negligence.[46] Noting that "it would be most difficult to assemble words which describe a more comprehensive and all-inclusive intent by the indemnitor to indemnify the indemnitee for all losses suffered by the indemnitee,"[47] the court held that an intent to indemnify for the indemnitee's sole negligence need not be explicitly set forth in a contract.

Clearly, the principle articulated in *Tucci* represents an extreme position. It is highly doubtful that any reasonable subcontractor contemplates or intends to impose liability under

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44. *Id.* at 1036, 467 P.2d at 387. The quoted indemnity provision represented a standard term in the Associated General Contractor form then in common use, appearing as subparagraph (k) on the back of the AGC subcontract form.

45. *See supra* notes 21-41 and accompanying text.

46. *Tucci*, 1 Wash. App. at 1038, 467 P.2d at 388.

47. *Id.* Accordingly, the court directed entry of judgment in favor of the indemnitee and required the subcontractor to fully indemnify the general contractor for losses and damages incurred in connection with the action by the injured employee. *Id.* at 1043, 467 P.2d at 391. It will be noted that the injury in *Tucci* predated the enactment of WASH. REV. CODE § 4.24.115 (1967), which purports to invalidate construction contract liability for the sole negligence of the indemnitee, and the court declined to apply the statute retroactively. Similarly, the court rejected the subcontractor's defense that its immunity under Washington Industrial Insurance law precluded liability. This consideration will be discussed in greater detail in a later section. For now, it is important to note that the court predicated this conclusion upon the distinction between a contract right to indemnification as opposed to a common-law right to indemnification:

> Invariably, when a contractual right of indemnity is the basis of the cause of action, the courts permit recovery by a third party from an injured workman's employer simply because the cause of action arises out of an *independently created* contractual right which is totally independent of the exclusive jurisdiction provisions of a workmen's compensation act, so long as the compensation act itself does not prohibit such agreements.

Tucci, 1 Wash. App. at 1041-42, 467 P.2d at 389-90 (emphasis in original).

an indemnity clause for injuries or losses from causes totally beyond its control. Nevertheless, under *Tucci* this "constructive" intent was imputed to the parties in an uncompromising fashion and with unduly harsh results.

Decisions immediately following tended simply to restate the principles enunciated in earlier cases. For example, in *Northern Pacific Railway v. National Cylinder Gas Division of Chemetron Corp.*,[48] the Washington Court of Appeals affirmed a judgment requiring indemnity for losses incurred through an injury to indemnitee's employee. The indemnity provision in question required the contractor to indemnify for all losses "arising or growing out of, or in any manner connected with the work performed under" the contract, excepting only losses attributable to the *sole* negligence of the indemnitee railroad.[49] Despite the absence of any finding of negligence on the part of the contractor, the court, quoting the trial court, concluded that "the agreement was a clear undertaking based upon causation rather than negligence or fault."[50] Reiterating the language of *Continental Casualty* regarding causation as constituting the touchstone of liability, the court concluded that the trial court's finding, that the contractor's activities in some way *caused* the injuries, was sufficient to establish liability.[51]

In *Tyee Construction Co. v. Pacific Northwest Bell Telephone Co.*,[52] however, indemnification was denied in a situation not involving a third-party claim.[53] The case concerned a broadly-worded indemnification clause that required the contractor to indemnify the owner for any and all losses arising from the performance of the contract. The contractor brought suit against the owner for labor and materials expended upon what was allegedly work beyond the scope of the original contract. The owner defended, in part, upon the basis of the indemnification provision. The court of appeals affirmed the trial court's determination that this provision applied only to third-party claims, and not to any damage caused by defects in the indemnitee's own plans and specifications. To hold otherwise, the court stated, would place upon the contractor the lia-

48. 2 Wash. App. 338, 467 P.2d 884 (1970).
49. *Id.* at 339-40 n.2, 467 P.2d at 886 n.2.
50. *Id.* at 343, 467 P.2d at 887.
51. *Id.* at 343-44, 467 P.2d at 888.
52. 3 Wash. App. 37, 472 P.2d 411 (1970).
53. *Id.* at 42, 472 P.2d at 414-15.

bility of extending "blanket coverage to any mishap of any nature arising from the conduct of the work."[54]

The principle that indemnity clauses applied only to third-party claims was subsequently qualified by the same panel of the Washington Court of Appeals in *Erickson Paving Co. v. Yardly Drilling Co.*[55] The indemnification provision in this case required the subcontractor to "indemnify and save harmless the contractor from and against any and all . . . losses . . . of whatsoever kind or nature . . . arising out of, in connection with, or incident to the subcontractor's performance of this subcontract."[56] In this case, indemnification was upheld for damages sustained by the general contractor's heavy equipment, damage that was arguably attributable to the joint negligence of the contractor and the subcontractor.[57] Holding that the plain meaning of the indemnity provision did not limit its application to third-party claims, and noting that the case did not involve loss due to the *sole negligence* of the indemnitee, the court held the subcontractor responsible for damage to the general contractor's equipment.[58]

In a chronological context, the line of cases from *Griffiths*[59] through *Erickson Paving*[60] extends into the early 1970's. Generally speaking, the courts strictly interpreted and literally enforced construction industry indemnity clauses.[61] Clearly, the judicial climate did not favor the interests of subcontractors. In 1974, however, the Washington Supreme Court handed down its decision in *Jones v. Strom Construction Co.*[62] This decision fundamentally changed the court's basic approach to the interpretation of indemnity clauses in construction contracts.

B. The Winds of Change: Jones v. Strom Construction Co.:[63] *the "Overt Act or Omission" Test*

Jones concerned an action by the prime contractor for indemnification against a subcontractor on a multi-employer

54. *Id.* at 42, 472 P.2d at 415.
55. 7 Wash. App. 681, 502 P.2d 334 (1972).
56. *Id.* at 684, 502 P.2d at 336.
57. *Id.* at 685, 502 P.2d at 337.
58. *Id.*
59. 27 Wash. 2d 901, 182 P.2d 18 (1947).
60. *Erickson Paving*, 7 Wash. App. at 681, 502 P.2d at 334.
61. *See, e.g., Tucci*, 1 Wash. App. 1035, 467 P.2d 386 (1970).
62. 84 Wash. 2d 518, 527 P.2d 1115 (1974).
63. *Id.*

construction project. The case concerned an injury to the subcontractor's employee who was injured on the job when a floor collapsed because of a lack of shoring. The general contractor was responsible for determining whether or not the floor needed to be shored and elected not to provide the shoring. The *sole* cause of the injury was the lack of shoring under the floor.[64] The injured employee brought suit against the general contractor who in turn sought indemnification from the subcontractor under an indemnity provision requiring indemnity "from and against any and all . . . damages, of whatsoever kind or nature, . . . arising out of, in connection with, or incident to the SUBCONTRACTOR'S performance of this SUBCONTRACT."[65] Notwithstanding the failure of the general contractor to identify any act of negligence on the part of the subcontractor that in any way contributed to the injury, the court, under the authority of *Tucci*, held that the language of the indemnity clause, as a matter of law, operated to require indemnification.[66] The trial court held that the injury in question indisputably occurred "in connection with, or incident to, performance of the subcontract."[67]

Reviewing prior Washington reported decisions on the enforceability of construction contract indemnity clauses, the Washington Supreme Court reversed the trial court, and, in the process, repudiated the trend of earlier decisions toward strict and uncompromising enforcement of such indemnity provisions. Specifically, the court overruled *Tucci* and *Griffiths* insofar as they were inconsistent with its present decision and explained in some detail the elements required to sustain future actions for indemnification.

In articulating the principle that became the heart of the decision, the court discussed in general terms the logical function of such construction contract indemnification clauses, predicating its analysis upon the presumed reasonable intent of the parties to the contract.[68] Focusing upon the relative participation of the parties in the overall contract work, the court

64. *Id.* at 519, 527 P.2d at 1117. The trial court, upon the general contractor's motion for a directed verdict, resolved the case on the issue of indemnification. In granting this motion, the trial court considered the evidence in a light most favorable to the subcontractor, thereby holding that the sole cause of the employee's injuries was the negligence of the general contractor.

65. *Id.* at 521, 527 P.2d at 1118.

66. *Id.* at 519, 527 P.2d at 1117.

67. *Id.* at 521, 527 P.2d at 1118.

68. *Id.* at 521-22, 527 P.2d at 1118-19.

declined to adopt an interpretation that would effectively constitute the subcontractor as the insurer of the general contractor's performance.[69] The court noted that, "[a]t first blush, the clause appears to be broad and sweeping in its language and coverage."[70] Nevertheless, the clause made no mention of, or reference to, the general contractor's "performance" of the primary contract; rather, the clause required indemnification for claims "arising out of," "in connection with," "or incident to" the subcontractor's performance of the subcontract.[71] On this basis, the court held as follows:

> It is, therefore, [the subcontractor's] performance of the subcontract, and losses 'arising' from, connected with, or incidental to that performance, which forms the keystone on which indemnity turns. Thus, it is clear that *unless an overt act or omission on the part of [the subcontractor] in its performance of the subcontract in some way caused or concurred in causing the loss involved, indemnification would not arise.* [The subcontractor's] mere presence on the jobsite inculpably performing its specified contractual obligations, standing alone, would not constitute a cause or participating cause.[72]

The significance of the *Jones* decision cannot be overemphasized. *Jones* represents a substantive restatement of the governing principles of Washington law on the subject of the enforceability of construction industry indemnity agreements. In substance, the decision marks a significant shift in the ana-

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> [I]t does not appear reasonable or in keeping with the overall purpose and intent of the subcontract, to isolate and read the indemnity clause in such a fashion as to virtually cast [the subcontractor/indemnitor] into the role of an insurer of [the general contractor/indemnitee's] performance of its separate and non delegated primary contractual obligations. Certainly, it could not have been the intent of the parties in executing a subcontract, which represented only approximately 1/20th of the overall contract price for the project, to constitute [the subcontractor] an indemnitor of [the general contractor] as against any and all losses or damages occurring to [the subcontractor] or its employees as a direct and sole result of the [general contractor's], or another of its subcontractor's negligence in the performance of duties not delegated to [the general contractor/indemnitee]. Such an interpretation does not appear to us to square with a realistic effort on the part of the parties to logically allocate as between them the risk of loss arising out of the construction project and the subcontract in question.

Id.

70. *Id.* at 521, 527 P.2d at 1118.

71. *Id.*

72. *Id.* at 521-22, 527 P.2d at 1118 (footnote omitted) (emphasis added).

lytical approach to the issue. Prior to *Jones*, the emphasis was singularly upon the *language* of the provision; that is, liability vel non was analytically derived from the breadth, scope and substance of the language per se.[73] *Jones*, however, shifts the court's focus from the internal language of the clause to an empirical analysis of the activities of the indemnitor and predicates liability upon proof of a causal connection between such activities and the injury or loss.[74]

For example, prior to *Jones*, the general contractor clearly was entitled to indemnification on the singular basis that the employee's injury indisputably arose "in connection with or incidental to" the activities of the subcontractor on the project.[75] The *Jones* decision, however, holds that it is insufficient that the employee of a subcontractor (indemnitor) merely sustain injuries in the course of performing construction activities on the project; rather, entitlement to indemnification requires proof that *an overt act or omission on the part of the subcontractor in its performance of the subcontract* caused or concurred in causing the loss.[76] Moreover, this "overt act or omission" test engenders the requirement of culpable conduct on the part of the subcontractor; that is, the subcontractor's "mere presence on the jobsite inculpably performing its specified contractual obligations" does not constitute a legally sufficient cause or participating cause.[77]

Notwithstanding that the court clearly articulated the substantive predicate for liability in future construction contract indemnity claims, the language of the *Jones* decision is not without ambiguity. In reaching its conclusion and formulating the "overt act or omission" test, the court nevertheless continued to pay lip service to the precept in *Continental Casualty*:[78] "Causation of loss is the touchstone of liability under a construction contract indemnity clause, rather than negligence, although negligence may be incidental to the cause."[79]

The foregoing language regarding causation is somewhat difficult to reconcile with the clear import of the overt act or omission test. If "non-culpable" conduct on the part of a sub-

73. *See, e.g.*, *Tucci*, 1 Wash. App. at 1035, 467 P.2d at 386.
74. *Jones*, 84 Wash. 2d at 521-22, 527 P.2d at 1118.
75. *See, e.g.*, *Tucci*, 1 Wash. App. at 1035, 467 P.2d at 386.
76. *Jones*, 84 Wash. 2d at 521-22, 527 P.2d at 1118.
77. *Id.* at 522, 527 P.2d at 1118.
78. 66 Wash. 2d 831, 405 P.2d 581 (1965).
79. *Jones*, 84 Wash. 2d at 521, 527 P.2d at 1118.

contractor in the performance of the subcontract does not, as a matter of law, constitute a cause or a participating cause for purposes of triggering an indemnity provision, it follows that some *culpable* conduct on the part of the subcontractor is required to trigger the indemnification provision. Culpable conduct, by definition, requires or implies some degree of fault, or, at the very least, some failure to adhere to recognized standards of conduct.[80] This definitional construct is, of course, the basis of negligence.

Accordingly, on the one hand, *Jones* appears to be saying that some degree of culpable conduct, or negligence, on the part of the subcontractor is required to trigger an indemnity clause, but, on the other hand, by merely articulating the *Continental Casualty* principle, appears to be saying that negligence is not necessarily required. The distinction is functionally difficult to reconcile, and decisions subsequent to *Jones* have failed to completely resolve the issue. In fact, the most recent decision of the Washington Supreme Court on this issue[81] graphically emphasizes this obvious anomaly.

C. Case Law Subsequent to Jones*: Culpability and Proximate Causation*

There has been a plethora of recent decisions on the enforceability of contractual indemnity provisions both within and without the construction industry setting. Certain recent non-construction industry cases are of particular interest for their refinement of the "overt act or omission test" enunciated in *Jones* into the more traditional terminology of proximate or direct causation.[82] Fundamentally, indemnification cases subsequent to *Jones* are divided into three general categories. The first category consists of those cases that basically reiterate and apply the *Jones* principle. The second category of cases involves decisions that have reformulated the *Jones* test into terms of the more traditional principles of proximate or direct causation. The third "category" consists of a single recent case, *McDowell v. Austin Co.*[83] that is worthy of particular attention

80. *See* BLACK'S LAW DICTIONARY, 454 (rev. 4th ed. 1968): "Culpable. Blamable; censurable; involving the breach of legal duty or the commission of a fault."

81. McDowell v. Austin Co., 105 Wash. 2d 48, 710 P.2d 192 (1985) (For further discussion of this recent decision in the context of *Jones*, see *infra* notes 129-51 and accompanying text).

82. *See infra* notes 111-28 and accompanying text.

83. 105 Wash. 2d 48, 710 P.2d 192 (1985).

because of its apparent inconsistency with the fundamental principle enunciated in *Jones*.

1. Continued Application of the Overt Act or Omission Test

First among the non-construction industry cases is *Redford v. Seattle*.[84] *Redford* concerned an owner's claim for indemnity against a contractor for losses sustained by reason of an injury to the contractor's employee while performing work under the contract. The indemnity provision required the contractor to indemnify and to hold harmless the owner from and against any and all liability for injury or property damage sustained by the contractor or its employees in connection with the performance of the contract "except negligence and willful misconduct of [the owner]."[85] Both the owner and the contractor stipulated that they had acted negligently and that their respective negligence was a proximate cause of the employee's injuries.[86] Reviewing a court of appeals' decision[87] affirming the trial court's grant of partial summary judgment, the supreme court upheld an order of indemnification in favor of the owner.[88] In obiter dictum, the court made citation to *Jones*, stating that the *Jones* decision "limited the scope of such indemnification agreements to those cases in which some activity of the employer contributed to the injury."[89]

In contradistinction to the majority of post-*Jones* cases, *Tri-M Erectors v. Drake Co.*,[90] represents an unfortunate anomaly and rather atavistic application of pre-*Jones* principles. This case concerned a claim by the general contractor on the Kingdome Stadium project against a subcontractor. The gen-

84. 94 Wash. 2d 198, 615 P.2d 1285 (1980).

85. *Id.* at 200, 615 P.2d at 1286.

86. *Id.* at 201, 615 P.2d at 1287.

87. Redford v. Seattle, 24 Wash. App. 484, 602 P.2d 717 (1979).

88. *Redford*, 94 Wash. 2d at 207-08, 615 P.2d at 1287.

89. *Id.* at 205, 615 P.2d at 1288.

90. 27 Wash. App. 529, 618 P.2d 1341 (1980). The history of this case at the court of appeals is somewhat confusing. The initial published decision of the court reversed the trial court's grant of summary judgment in favor of the general contractor, holding that a factual issue existed as to whether the employee injury was due to the sole negligence of the general contractor. If it were determined that it were solely negligent, the court stated that indemnification would be prohibited. *See* 25 Wash. App. 264 (1980) (not officially published). This initial opinion, however, was subsequently withdrawn, and in a later published opinion by the same judge, the court affirmed the grant of summary judgment in favor of the general contractor, holding the indemnity provision applicable. Discussion of the substantive issues involved in this case relate solely to the second opinion of the Washington Court of Appeals.

eral contractor sought indemnification for costs and expenses incurred in successfully defending a personal injury lawsuit brought by an employee of the subcontractor for project-related injuries.[91] The indemnity provision at issue purported to require indemnification by the subcontractor:

> from all claims, suits and actions (including costs, expenses and reasonable attorney's fees incurred by Contractor or others in defending same) . . . on account of any injury, death or damage . . . caused by or . . . arising from any act or omission of Subcontractor . . . in any way connected with the performance of this Subcontract.[92]

Reviewing the trial court's grant of summary judgment in favor of the general contractor,[93] the court distinguished *Tri-M* from a case in which a general contractor seeks indemnification for substantive damages or loss resulting from an injury or accident.[94] Acknowledging the viability of the *Jones* decision, the court nevertheless rejected the subcontractor's defense, which was substantially predicated upon the *Jones* holding. The court reasoned that it was the attempted breadth of the indemnity provision in *Jones* that resulted in a judicial construction that indemnity was not required absent an overt act or omission by the subcontractor.[95] The court noted that the present indemnity provision did not suffer from the same infirmities as did the clause in *Jones* because the clause specifically related indemnification to losses "caused by or arising from any act or omission of [the] subcontractor."[96] Unfortunately, although paying appropriate attention to the "act or omission" language of *Jones*, the court does not discuss or suggest that the subcontractor caused, or participated in causing, the employee injury. Rather, to sustain liability, the court merely reasoned as follows:

> In contrast to the facts in *Jones* are those in the subject case. Pursuant to the subcontract, Tri-M was to perform steel rebar work. Tri-M held the rebar in place with guy

91. *Tri-M Erectors*, 27 Wash. App. at 529, 618 P.2d at 1341. In fact, the claim for contribution was asserted as a counterclaim in the context of a lawsuit by the subcontractor to recover expenses incurred in repairing damage resulting from an accident during performance of extra work on the contract.

92. *Id.* at 532, 618 P.2d at 1343.

93. *Id.* at 531, 618 P.2d at 1342-43.

94. *Id.* at 532, 618 P.2d at 1343.

95. *Id.* at 533-34, 618 P.2d at 1344.

96. *Id.* at 534, 618 P.2d at 1344.

> wires. The injury to Finmore was caused by and occurred during the process of moving these guy wires. Tri-M conceded that Finmore was engaged in work, which 'involved' the rebar cages and which 'affected' their construction. The accident was thus 'connected with the performance' of the subcontract and fell within the language of the indemnity provision.[97]

As evidenced from the rationale of the decision, the court focused solely upon the consideration that the accident and the underlying injury occurred in connection with the performance of the subcontract. The decision substantively ignores the *Jones* "overt act or omission" requirement[98] and ignores *Jones'* qualitative limit on the indemnitor's liability in which the subcontractor's inculpable performance of its contract obligations, standing alone, does not constitute a cause or participating cause.[99] The only suggested explanation for this oversight is the court's characterization of the action as a suit for damages for defense costs as opposed to damages for actual liability.[100] The distinction, however, is immaterial because defense costs were specifically identified as an element of damages within the scope of the clause.[101] Thus, these costs were substantively identified with the underlying damages arising out of any claim that could later become the basis of an indemnification action.[102] Accordingly, liability for defense costs is properly assessed only when there first exists a viable claim for indemnification. To assert otherwise results in a logical and practical anomaly.

The predicate for liability enunciated in *Jones* was later strongly reaffirmed in *Brame v. St. Regis Paper Co.*[103] In this case, Brame, a subcontractor's employee, was injured while working on a construction project and filed suit against the general contractor and the owner alleging that each was negligent. The general contractor impleaded the subcontractor by way of third-party complaint, basing its claim solely upon an indemnification clause in the subcontract and asserting no spe-

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97. *Id.*

98. *Jones*, 84 Wash. 2d at 521-22, 527 P.2d at 1118.

99. *Id.* at 522, 527 P.2d at 1118.

100. *Tri-M Erectors*, 27 Wash. App. at 532, 618 P.2d at 1344-45.

101. *Id.* Costs, expenses and reasonable attorney's fees incurred by [the] contractor in defending claims, suits and actions were expressly identified as an element of damages for which indemnification was required.

102. *Id.*

103. 97 Wash. 2d 748, 649 P.2d 836 (1982).

cific claim of negligence against the subcontractor.[104] The trial court held that the indemnity clause was unenforceable under the rule enunciated in *Jones*.[105] On appeal, the supreme court affirmed this dismissal because of the indemnitee's failure to allege an overt act of negligence on the part of the indemnitor that would support a claim for indemnity under *Jones*.[106]

Gall Landau v. Hurlen Constr. Co.,[107] similarly represents continued adherence to the *Jones* doctrine. Gall Landau, the general contractor on an office building construction project, subcontracted with Hurlen to furnish and drive timber piles. Although Hurlen performed its subcontract duties in strict conformance to the plans and specifications, the work proved defective. Gall Landau brought an action against Hurlen seeking damages on the basis of a subcontract clause requiring indemnification for any losses arising out of the subcontractor's performance of the work. After reviewing prior case law on the issue, the court restated the general principle that liability under subcontract indemnity clauses required proof that the loss was "caused by or contributed to by the negligence of the indemnitor."[108] A subcontractor's mere jobsite presence and nonculpable performance of its contract obligations does not support a claim for indemnification.[109] Citing to the *Jones* principle, the court stated that "something more is necessary to trigger a duty to indemnify than the subcontractor's mere presence on the jobsite inculpably performing its specified contractual obligations."[110]

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104. *Id.* at 751, 649 P.2d at 837.

105. *Id.* at 752, 649 P.2d at 838. In rendering this decision, however, the trial court stated that the supreme court in *Jones* had held the indemnity clause at issue to be per se unenforceable. Correcting the trial court's misinterpretation of this aspect of the *Jones* decision, the *Brame* court noted that the indemnity clause in *Jones* was not necessarily unenforceable, but that *Jones* "limited the scope of such indemnification agreements to those cases in which some activity of the employer contributed to the injury." *Id.* at 751, 649 P.2d at 838. (quoting Redford v. Seattle, 94 Wash. 2d 198, 615 P.2d 1285 (1979)).

106. *Id.* 97 Wash. 2d at 751, 649 P.2d at 837-38.

107. 39 Wash. App. 420, 693 P.2d 207 (1985).

108. *Id.* at 427, 693 P.2d at 211. (quoting *Brame*, 97 Wash. 2d at 751, 669 P.2d at 837-38). *See supra* notes 103-106 and accompanying text.

109. *Landau*, 39 Wash. App. at 427-28, 693 P.2d at 211-12. Reliance for this proposition was expressly predicated upon the seminal *Jones* decision. Because the general contractor failed to allege that an overt act by the subcontractor contributed to the loss, the trial court's grant of summary judgment in favor of the subcontractor was affirmed.

110. *Id.* at 428, 693, P.2d at 212.

2. Refining the Concept: Toward a Traditional Model of Proximate Causation

Although the following cases do not involve indemnity agreements in construction industry contracts, they clearly affect indemnification in the construction industry setting. In some instances the cases specifically rely upon construction industry cases, and, in particular the *Jones* decision, to determine liability. In all instances these cases further explain the requirement of causation or participating causation as a prerequisite to imposing indemnity liability.

A test analytically analogous to the *Jones* "overt act or omission test" was applied to an indemnity agreement between the Western Washington Fair Association and the operator of the exclusive "snow cone" concession at the Puyallup Fair.[111] In *Parks v. Western Washington Fair Assn.*, a fair patron was injured when she slipped on what was allegedly ice from a snow cone in the aisle of a grandstand. The patron brought suit against the Fair Association, which, in turn, tendered defense and demanded indemnification pursuant to the following provision: "In consideration of the privileges granted by this contract, the concessionaire agrees to protect and indemnify and hold harmless the Association from any and all claims . . . [resulting] either directly or indirectly from the activities and business of the concessionaire in connection with this contract."[112]

Noting that the indemnitor held the exclusive snow cone concession at the Fair, the court acknowledged that application of a simple "but-for" causation test mandates indemnification because the injured party could not possibly have slipped on ice from a snow cone if the indemnitor had not first sold the snow cone.[113] The court, however, held such a causative link to be too attenuated.[114] Although negligence was not necessarily required, the court held that "there must be some evidence of control by the indemnitor over the instrumentality or conditions causing the accident in order to impose liability to indemnify or defend."[115] This "control test" is analytically analogous to the "overt act or omission" test enunciated in *Jones*; both

111. Parks v. Western Wash. Fair Assn., 15 Wash. App. 852, 553 P.2d 459 (1976).
112. *Id.* at 853, 553 P.2d at 460.
113. *Id.* at 857, 553 P.2d at 462.
114. *Id.*
115. *Id.*

tests require a showing of culpable conduct on the part of the indemnitor.

Similarly, in *Dirk v. Americo Marketing Co.*,[116] a U-Haul dealer attempted to enforce an indemnity provision in a U-Haul dealership contract in which the parent company agreed to indemnify the dealer for losses occasioned by defects in the U-Haul equipment. At trial, the superior court found first that at the time of the collision the van was defective within the meaning of the indemnification agreement;[117] and second, that the accident causing the loss resulted from the indemnitee's negligence in towing the van.[118] Seeking enforcement of the indemnification clause, the plaintiff argued for application of a simple "cause-in-fact" analysis, arguing that the accident would not have occurred "but-for" the defective van being stalled on the side of the road.[119] Under the authority of *Jones*, the trial court strictly construed the indemnity clause against the indemnitee and in favor of the indemnitor, finding that the phrase "occasioned by" meant "caused by."[120] The court rejected the plaintiff's contention that a simple "but-for" causation analysis applied and instead required a more direct causal relationship.[121] Affirming the decision of the superior court, the Washington Supreme Court analyzed the factual circumstances and applicable law under the principles enunciated in *Jones*:

> In *Jones v. Strom Construction Co.*, . . . this court interpreted a hold-harmless clause indemnifying the contractor from all claims 'arising out of,' 'in connection,' or 'incident to' the subcontractor's 'performance.' This is broader language than 'occasioned by.' This court held that 'unless an overt act of omission' on the part of the subcontractor 'caused or concurred in causing the loss involved, indemnification would not arise.' In *Jones*, the contractor's negligence

116. 88 Wash. 2d 607, 565 P.2d 90 (1977).

117. *Id.* at 608-09, 565 P.2d at 91. The underlying loss which prompted the claim for indemnification arose out of the rental of a U-Haul van in Seattle, Washington, by a private party. The van became disabled on a journey to Eastern Washington. Plaintiff was the authorized U-Haul dealer in the area and proceeded to pick up the van where it had been left on the roadway and tow it into its own service station. In the process of the towing operation, the van was struck by a vehicle, the occupants of which made claim against the dealer who, in turn, settled the suits and commenced an action for indemnification against the parent company.

118. *Id.* at 610, 565 P.2d at 91-92.

119. *Id.*

120. *Id.* at 613, 565 P.2d at 93.

121. *Id.* at 612, 565 P.2d at 93.

> was the sole cause of the accident. The court observed that the accident would not have happened but for the subcontractor's presence on the job; however, this was not sufficient to constitute a 'cause' of the accident. The respondent compares *Jones* to this case, arguing that, although the accident would not have happened unless the defective van was on the roadside, the defect is a remote and indirect cause of the accident; that the negligence of the appellant, was the direct cause of the accident. We essentially agree with respondent's analysis although we note that it is inexact to the extent that it is comparing a situation of no culpability (the subcontractor) to a situation of remote culpability (the defective van).
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> In *Tucci & Sons, Inc. v. Carl T. Madsen, Inc.*, . . . the Court of Appeals held that, under an indemnity clause which was nearly identical to that in *Jones*, the subcontractor agreed to indemnify the contractor for losses sustained by the indemnity even though such loss may be occasioned solely by the negligence of the indemnitee. The court found that, if the employee had not been working pursuant to the subcontract, he would not have been injured, using the 'but for' rationale urged by the appellant here. While this authority would be most helpful to appellant's position, it was specifically overruled in *Jones* insofar as it was inconsistent with *Jones*.[122]

Properly analyzed, *Dirk* imposes a stricter burden of proof upon a party seeking contractual indemnification. Not only is proof of culpable conduct required, but the indemnitee must prove that the culpable conduct had a direct and proximate causal relationship to the loss.[123]

Finally, Jefferson County sought indemnification against Puget Sound Power & Light Company when a citizen, injured in an accident, sued the county in *Scruggs v. Jefferson County*.[124] The plaintiff's car struck a utility pole owned and maintained by the power company under a franchise agreement with the county and brought suit against both the county and Puget Power alleging negligence. The court of appeals denied indemnification, accepting the trial court's finding that

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122. *Id.* at 611-12, 565 P.2d at 92-93 [citations omitted].

123. *Id.* at 612, 565 P.2d at 93. The *Dirk* decision also predicated a denial of liability for indemnification upon the general principle that indemnification will not lie for losses resulting from the negligent acts of the indemnitee unless such intention is expressed in unequivocal terms in the contract.

124. 18 Wash. App. 240, 567 P.2d 257 (1977).

the accident was caused by the negligence of the plaintiff driver and by the county's failure to post a speed limit sign, not by the mere presence of the power pole.[125] The court determined that the power pole was a condition and not a cause of the accident.[126] Even under a "but-for" analytical approach to causation, "[a]t most, the pole was merely a passive, nonculpable cause-in-fact of the injuries."[127] Consequently, only an indirect causal relationship existed between the power pole and the county's loss, such that the type of loss incurred was not contemplated by the indemnity clause in question.[128]

3. McDowell v. Austin Co.: Tucci *Revisited*

The primary significance of the *Jones* decision is the radical change in the court's analytical approach to liability vel non. Previous case law tended to singularly predicate liability upon the language of the provision itself.[129] *Jones*, however, focused upon the activities of the indemnitor[130] and his causal relationship, if any, to the underlying loss or injury.[131] Cases following *Jones* generally recognized,[132] and often refined,[133] this analytical approach. Unfortunately, the latest appellate decision on this issue, *McDowell v. Austin Co.*,[134] casts some doubt upon the continued efficacy of the *Jones* analysis. Although the case substantively turns upon the relatively narrow question of whether an intent to indemnify for concurrent negligence must be specifically addressed in the agreement,[135]

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125. *Id.* at 244, 567 P.2d at 259-60.

126. *Id.*

127. *Id.*

128. *Id.* at 244, 567 P.2d at 260. The decision also predicated a denial of indemnification upon the "rule that an indemnity contract will not be construed to indemnify the indemnitee against losses resulting to him through his own negligent acts where such contention is not expressed in unequivocal terms."

129. *See, e.g.*, *Tucci*, 1 Wash. App. at 1035, 467 P.2d at 386.

130. Jones v. Strom Constr. Co., 84 Wash. 2d 518, 521-22, 527 P.2d 1115, 1118-19 (1974).

131. *Id.*

132. *See generally supra* notes 82-109 and accompanying text.

133. Various cases subsequent to *Jones*, particularly in the non-construction industry context, tended to refine the *Jones* concept of causative participation in the loss into more traditional concepts of negligence and proximate causation. *See supra* notes 111-28 and accompanying text.

134. 105 Wash. 2d 48, 710 P.2d 192 (1985).

135. The court held that language requiring indemnification for "all liability" encompassed liability for concurrent negligence. For additional discussion of this issue in *McDowell*, *see infra* notes 232-38 and accompanying text.

the actual language of the decision and its implications transcend this narrow issue.

McDowell involved an injury to a subcontractor's employee that resulted in a claim against the general contractor. The general contractor sought indemnification from the employer under a subcontract provision purporting to require such indemnification "against *all liability* for personal injury, . . . sustained by any person . . . employed by the subcontractor . . . caused . . . by an act or omission, negligent or otherwise, *by owner or [general] contractor*."[136] The trial court granted summary judgment for the subcontractor, reasoning that the provision's language did not require indemnification for injuries caused by the concurrent negligence of the parties.[137] On appeal, the Washington Court of Appeals reversed,[138] holding that the indemnity provision encompassed *any liability*, including liability attributable to concurrent negligence.[139]

The employer appealed to the Washington Supreme Court, arguing that the language of the clause was "ambiguous on the issue of indemnification against concurrent negligence,"[140] and that the clause was unenforceable "because it fails to express clearly an intent [to] . . . indemnify . . . in circumstances of concurrent negligence."[141]

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136. *McDowell*, 105 Wash. 2d at 49-50, 710 P.2d at 193 [emphasis added in original]. A second independent indemnity provision in the subcontract obligated the employer to indemnify the general contractor for injuries sustained by others, *i.e.*, non-employees, if the injuries were caused by the employer, regardless of concurrent or other causation by anyone else, including the general contractor. *Id.* at 50, 710 P.2d at 193.

With regards to the employee's injury, the general contractor and employer jointly contributed toward the settlement of this claim, and then sought recovery of amounts respectively paid by them to the employee by way of such settlement. The case was resolved at the trial court level upon cross-motions for summary judgment. *Id.*

137. McDowell v. Austin Co., 39 Wash. App. 443, 447, 693 P.2d 744, 747 (1985).

138. *Id.*

139. *Id.* at 450, 693 P.2d at 748. However, the court held that there existed a factual question as to the cause of injury. If the injury were determined to have been proximately caused by the sole negligence of the general contractor, WASH. REV. CODE § 4.24.115 (1985) would operate to invalidate the indemnity provision. *Id.* at 452-53, 693 P.2d at 750. The case was accordingly remanded for resolution of this material issue of fact. *Id.* The prospective effect of this statute upon construction industry indemnity provisions, and the *McDowell* case in particular, is discussed in greater detail *see infra* notes 152-163 and accompanying text.

140. *McDowell*, 105 Wash. 2d at 51, 710 P.2d at 194.

141. *Id.* at 52, 710 P.2d at 194. *McDowell* addressed the specific issue of indemnification for injuries resulting from the concurrent negligence of the parties, which is discussed in greater detail in another section of this article. *See infra* text accompanying notes 234-36. At present, however, it suffices to note that the court held

The fairly narrow ratio decidendi of the case is not particularly problematic in terms of either analytical approach to resolution of the issue. It is, however, clearly inconsistent with the principles and approach articulated in *Jones*.[142]

Perhaps the most problematic aspect of the decision is the court's continued reliance upon the old *Continental Casualty* principle, "[c]ausation, not negligence, is the touchstone" of liability.[143] Although *Jones* articulated this statement, the principle that flows from it is difficult to reconcile with the substance of the *Jones* decision.[144] The *McDowell* court, however, employs the *Jones* principle to return to an analytical approach that focuses upon the indemnity agreement's language rather than an approach that focuses on the "reasonable," albeit presumed, "overall purpose and intent"[145] of the parties, analyzing that intent in the context of the parties' activities. In particular, *McDowell* focuses upon the provision's language of indemnification against "liability."[146] Although the court does not specifically address the linguistic dissimilarity between this language and the more commonly encountered language that provides indemnification for "suits, claims, actions, losses, costs, penalties, and damages,"[147] it implicitly makes a substantive distinction between such language in its following analysis of liability:

> Parties are free to establish liability instead of negligence as the triggering mechanism of an indemnity contract. . . . Here, [the provision] provides by its terms that any liability borne by [the general contractor] that was caused—or allegedly caused—by [the general contractor's] conduct triggers [the employer's] duty to indemnify [the general contractor] completely. The trigger operates independently of how [the general contractor's] conduct caused the liability.[148]

The most striking aspect of the above language is its fail-

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that the language of the provision in question encompassed circumstances involving concurrent negligence.

142. Because the actual holding of the case may be narrowly construed, advocates of a continued application of the *Jones* principle may regard the following as obiter dicta.

143. *McDowell*, 105 Wash. 2d at 51, 710 P.2d at 194. *See also supra* text accompanying notes 31-5 and 75-9 for further discussion of this issue.

144. *See supra* notes 75-81 and accompanying text.

145. *Jones*, 84 Wash. 2d at 522, 527 P.2d at 1118.

146. 105 Wash. 2d at 53-54, 710 P.2d at 195.

147. *See Jones*, 84 Wash. 2d at 521, 527 P.2d at 1118.

148. *McDowell*, 105 Wash. 2d at 51-52, 710 P.2d at 194.

ure to consider the subcontractor's causal relationship to the injury. That is, indemnification is triggered independently from any analysis of the employer's causal participation in the underlying loss. This analysis, of course, is inconsistent with the analytical approach undertaken by the court in *Jones* who faced similar circumstances. The decision's operative effect casts the subcontractor as the virtual insurer of the general contractor for injuries to the subcontractor's employees.[149] In substance, *McDowell* clearly engenders subcontractor liability far beyond that contemplated by *Jones*. For example, under *McDowell*, an injury to the subcontractor's employee would constitute the basis of a claim for indemnity against the employer when attributable solely to the negligence of a third-party subcontractor, or to the joint negligence of the general contractor and a third-party subcontractor. The *Jones* analysis creates exceptions to this rule.[150] By failing to consider the employer's conduct and, further, by rejecting the necessity for any causal connection between the employer's act or omission and the injury, the court greatly expanded the scope of a subcontractor's potential liability on multi-employer construction projects.[151]

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149. In *Jones*, the court denied the general contractor indemnity for several reasons. First, the clause dealt only with the subcontractor's performance and not with the performance [or non-performance] of the general contractor. *See Jones*, 84 Wash. 2d at 522, 527 P.2d at 1118. Secondly, the language of the clause in *Jones* was ambiguous and was drafted by the general contractor. *Id.*; *accord* Madsen v. Babler, 25 Wash. App. 880, 610 P.2d 958 (1978). Finally, the percentage of the general contract attributable to the subcontractor was small. *Id.*

In *McDowell*, however, the subcontractor was at fault, and the language of the clause was unambiguous. 105 Wash. 2d at 51-2, 710 P.2d at 194. This is exemplified by dicta in the decision relating to the issue of indemnification for concurrent negligence, wherein the court states: "In this situation, the *Calkins* rule is not necessary for notifying [the employer/subcontractor] of its role as insurer for the indemnitee's liability." *Id.* at 53, 710 P.2d at 195.

150. *Jones*, 84 Wash. 2d at 522, 527 P.2d at 1118.

151. One additional consideration concerning the *McDowell* decision is worthy of parenthetical note inasmuch as it is indicative of the general focus of the decision. The consideration relates to a statement by the court of the function of indemnity agreements in the construction industry as follows: "Parties rely on indemnity agreements for allocating the responsibility to purchase insurance when a construction project is initiated." *McDowell*, 105 Wash. 2d at 54, 710 P.2d at 196. This statement, of course, constitutes dictum and may represent no more than careless drafting on the part of the author of the opinion. In and of itself, the statement is obviously inconsistent with the general rule that "the fact that the defendant carries liability insurance is completely immaterial on the main issue of liability . . . ." Williams v. Hofer, 30 Wash. 2d 253, 265, 191 P.2d 306, 312 (1948). Thus, the unwarranted intrusion of this statement into the analysis is juristically problematical. More important, however, is the mere fact that the court would employ this consideration to justify the

D. Section 4.24.115 of the Revised Code of Washington: 1986 Amendments

Notwithstanding the clear import of the *Jones* decision upon construction industry indemnification, considerable confusion continued to exist in the case law regarding the required causal relationship between the acts or omissions of the indemnitor and the underlying injury or loss.[152] The existing confusion should be substantively resolved with the recent enactment of statutory amendments to section 4.24.115[153] of the Revised Code of Washington. Although the statutory amendments address a variety of issues relating to construction industry indemnification in general,[154] they particularly and directly apply to the basic issue of liability per se.

Prior to the 1986 statutory amendments, section 4.24.115 of the Revised Code of Washington, a section restricted to construction contracts, was relatively limited in scope on the issue of indemnification. Section 4.24.115 provided, in relevant part, as follows:

> A covenant, promise, agreement or understanding . . . purporting to indemnify against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the indemnitee, his agents or employees is against public policy and is void and unenforceable.[155]

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result reached in the decision. In any event, the decision does not bode well for future litigants resisting enforcement of construction industry indemnification agreements.

152. *Compare, e.g.*, Brame v. St. Regis Paper Co., 97 Wash. 2d 748, 649 P.2d 836 (1982) (requiring the pleading of subcontractor's negligence); Gall Landau v. Hurlen Constr. Co., 39 Wash. App. 420, 693 P.2d 207 (1985) (requiring the pleading of subcontractor's negligence), *with McDowell*, 105 Wash. 2d at 48, 710 P.2d at 192; Tri-M Erectors v. Drake Co., 27 Wash. App. 529, 618 P.2d 1341 (1980).

153. WASH. REV. CODE § 4.24.115 (1986) (Act of April 4, 1986, ch. 305 § 601, 1986 Wash. Leg. Serv. 6 (West)). *See infra* note 157 and accompanying text.

154. *See infra* notes 206-13 and accompanying text. The statute also addressed issues relating to indemnification for acts of concurrent negligence, and the industrial insurance immunity of subcontractor employers.

155. Interestingly, at least two Washington superior courts held the 1967 enactment to be unconstitutional as violative of WASH. CONST. art. II, § § 19 and 38, which respectively prohibit a bill from containing more than one subject and disallow any amendment to a bill which changes the scope and object of the bill. *See, e.g.*, Jones v. Strom Constr. Co., No. 204145 (Pierce County Sup. Ct. October 17, 1972); Glen Falls Ins. Co. v. Vietzke, No. 696543 (King County Sup. Ct. July 29, 1969). At the appellate court level, both *Jones*, 84 Wash. 2d at 518-20, 527 P.2d at 1117, and *Tri-M Erectors*, 27 Wash. App. at 534 n.2, 618 P.2d at 1344 n.2, acknowledged questions concerning constitutionality of the statute. These questions, however, are likely resolved with the substantial reenactment of the statute in the 1986 legislative session.

Despite the potentially severe impact of the 1985 statute on construction industry indemnification, no reported cases exist in which the statute was employed to invalidate an indemnity clause or to deny indemnification. This fact is largely attributable to the construction industry's immediate amendment of their indemnity provisions in standard forms to exclude indemnity for damages caused by the *sole* negligence of the indemnitee. An additional factor is the Washington appellate courts' consistent refusal to apply the statute to the actual *language* of indemnity provisions. Instead, the courts only applied the statute in an ex post facto or empirical sense, requiring factual circumstances of sole negligence by the indemnitee as a predicate for the statute's application.[156] Although the statute purported to identify circumstances in which an indemnity provision is unenforceable, it did not address the particular issue most troublesome to the courts. That is, it did not address the particular facts and circumstances under which indemnification was and should be required.

The 1986 statutory amendments substantially alleviate this shortcoming, and should provide clear future direction to judicial decision makers. As amended, the statute in its entirety now reads as follows:

> A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of, any building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate, including moving and demolition in connection there-

156. The court of appeals' decision in McDowell v. Austin Co., 39 Wash. App. 443, 693 P.2d 744 (1985) exemplifies this approach. In this case, the indemnity clause required indemnification "against all liability . . . , caused . . . , by an act or omission, negligent or otherwise by [indemnitee] . . . ." *Id.* at 445, 693 P.2d at 745-46. Despite the obvious intent of the clause to require indemnification for damage attributable to the negligence, including the sole negligence, of the indemnitee, the court declined to invalidate the clause under the statute. Rather, the case was remanded for resolution of the factual issue concerning the cause of injury. Upon remand, if the injury was determined to have been caused by the sole negligence of the indemnitee, "RCW § 4.24.115 would invalidate the indemnity agreement." *Id.* at 453, 693 P.2d at 750. If, however, the injury did not result from the sole negligence of the indemnitor, indemnification would be required. *Id.* at 452, 693 P.2d at 750. Thus, the impact of the statute was determined not by analysis of the language of the provision (*i.e.*, analytically), but functionally, in the context of the facts giving rise to the injury (*i.e.*, empirically).

> with, purporting to indemnify against liability for damages arising out of bodily injury to persons or damage to property:
>
> (1) Caused by or resulting from the sole negligence of the indemnitee, his agents or employees is against public policy and is void and unenforceable;
>
> (2) Caused by or resulting from the concurrent negligence of (a) the indemnitee or the indemnitee's agents or employees, and (b) the indemnitor or the indemnitor's agents or employees, is valid and enforceable only to the extent of the indemnitor's negligence and only if the agreement specifically and expressly provides therefore, and may waive the indemnitor's immunity under industrial insurance, Title 51 RCW, only if the agreement specifically and expressly provides therefore and the waiver was mutually negotiated by the parties. This subsection applies to agreements entered into after the effective date of this 1986 section.[157]

As amended, the statute provides that an indemnity provision is valid and enforceable "only to the extent of the indemnitor's negligence."[158] In this regard, the statute represents a clear affirmation of the principles and holding articulated in *Jones* that required causal participation of the indemnitor in the injury.[159]

Alternatively, the amended statute rejects the holdings and analytical approach engendered in the *Tri-M Erectors*[160] and *McDowell*[161] decisions. The amended statute compels judicial focus on the acts or omissions of the indemnitor and, moreover, mandates that this analytical focus be framed in terms of traditional negligence principles.[162] Thus, the statutory amendments are a significant legislative victory for the subcon-

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157. WASH. REV. CODE § 4.24.115 (1986) (Act of April 4, 1986, ch. 305 § 601, 1986 WASH. LEG. SERV. 6 (West)).

158. *Id.*

159. *Jones*, 84 Wash. 2d at 521-22, 527 P.2d at 1117-18.

160. *Tri-M Erectors*, 27 Wash. App. at 531-33, 618 P.2d at 1344-45. *See supra* notes 90-102 and accompanying text.

161. *McDowell*, 105 Wash. 2d at 49-50, 710 P.2d at 194-95. *See supra* notes 129-151 and accompanying text.

162. WASH. REV. CODE § 4.24.115 (1985). The concept of negligence, of course, contemplates not only some degree of culpable conduct, but the element of proximate cause. In this regard, the courts would be well advised to pay careful attention to the earlier decisions of Dirk v. Americo Mktg. Co., 88 Wash. 2d 607, 555 P.2d 90 (1977), Scruggs v. Jefferson County, 18 Wash. App. 240, 567 P.2d 257 (1977), and Parks v. Western Wash. Fair Assn., 15 Wash. App. 852, 553 P.2d 459 (1976), insofar as these decisions address in some detail the concept of proximate causation in the context of indemnification issues. *See supra* notes 111-28 and accompanying text.

tracting industry. In any event, the amended statute certainly provides a more equitable allocation of risk between general contractors and subcontractors on multi-employer construction projects.[163]

III. Specific Issues Impacting the Application and Enforcement of Indemnity Provisions

Section II of this Article has focused exclusively upon an analysis of liability vel non under construction industry indemnity provisions, discussing in some detail the particular circumstances that give rise to liability under these provisions. As evidenced by the chronological progression of Washington case law, our courts gradually moved from an approach requiring strict, literal enforcement of these provisions[164] toward a more realistic and practical approach, which focuses on the causal participation of the indemnitor in the underlying loss.[165] This approach recently received legislative approval in the 1986 statutory amendments to section 4.24.115[166] of the Revised Code of Washington. Additional factors and legal considerations, however, affect the determination of liability. Accordingly, this section of the Article discusses some of the additional considerations impacting the enforcement of indemnity provisions in the construction industry.

A. Industrial Insurance Act: Employer Immunity

A major and recurrent issue in construction industry indemnity cases is the enforceability of the indemnity provision vis-a-vis the employer immunity afforded by the Washington Industrial Insurance Act.[167] These cases are discussed

163. Clearly, the amended statute removes the subcontractor from the role of "insurer" for the general contractor's performance of the overall project. *See, e.g.*, *Jones*, 84 Wash. 2d at 522, 527 P.2d at 1118-19. *Cf. McDowell*, 105 Wash. 2d at 53, 710 P.2d at 194. Fundamentally, in the language of *Jones*, the effect of the statute would appear to "square with a realistic effort on the part of the parties to logically allocate as between them the risk of loss arising out of the construction project and the subcontract in question." *Jones*, 84 Wash. 2d at 522, 527 P.2d at 1118.

164. *See* Tucci & Sons, Inc. v. Madsen, Inc., 1 Wash. App. 1035, 467 P.2d 386 (1970).

165. *See Jones*, 84 Wash. 2d at 518, 527 P.2d at 1115.

166. *See supra* text accompanying note 157.

167. WASH. REV. CODE § 51.04.010 (1985). The obvious conflict between the issues of industrial insurance employer immunity and contractual indemnification provisions has been succinctly stated by the Washington Supreme Court as follows:

> The Industrial Insurance Act, RCW Title 51, is a strong public policy statement toward limiting an employer's liability for their employees' job-related injuries. Indemnity provisions operate to circumvent the provisions of

under three general headings: claims for indemnification in the absence of a contractual indemnity provision; claims for indemnification on the basis of a contractual indemnity provision and, in particular, the degree of specificity required to waive the employer's industrial insurance indemnity;[168] and claims for indemnification under Washington's relatively new tort contribution statute.[169]

1. Non-Contractual Claims for Indemnification Against Employers

Virtually without exception, the courts hold that an employer's duty to indemnify a third party for injury to an employee will not be implied in the absence of a contract between the parties. *Montoya v. Greenway Aluminum*[170] concerned an action by an injured employee against a third-party lessor of property for his alleged failure to properly maintain the premises. The trial court ruled as a matter of law that the third party was not entitled to indemnification from the employer because the Washington Industrial Insurance Act established statutory compensation as the sole remedy against an employer and barred any remedy of common law.[171] On appeal, the court framed the issue in language formulated by Larson in his treatise on workman's compensation as follows: "[W]hether a third party in an action by the employee can get contribution or indemnity from the employer, when the employer's negligence has caused or contributed to the injury."[172]

Noting strong policy arguments for the positions of both

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the act by allowing an employer's liability for its employees' job-related injuries. In general, WASH. REV. CODE § 51.04.010 grants tort immunity to employers and, in exchange, gives employees sure and certain relief for any job-related injury. Indemnity provisions operate to circumvent the provisions of the act by allowing employers to be ultimately liable for tort damages resulting from an employee's job-related injury. Thus, indemnity provisions in effect waive the immunity of the Industrial Insurance Act. WASH. REV. CODE § 51.04.060, however, voids pro tanto any attempt by an employee or employer to exempt themselves from the benefits or burdens of the Act.

Brown v. Prime Constr. Co., 102 Wash. 2d 235, 238, 684 P.2d 73, 75 (1980).

168. The statutory amendments to WASH. REV. CODE § 4.24.115 (1986) specifically address this issue. *See supra* text accompanying note 157. *See also infra* notes 208-13 and accompanying text.

169. WASH. REV. CODE § 4.22.040 (1985).

170. 10 Wash. App. 630, 519 P.2d 22 (1974).

171. *Id.* at 632-33, 519 P.2d at 24-26.

172. *Id.* at 630-31, 519 P.2d at 23.

the claimant and the employer, the court, nevertheless, affirmed the decision of the trial court and denied indemnification.[173] The court discussed in some detail the overriding policy reasons engendered in the provisions of the Industrial Insurance Act and held: "An indemnity will not exist in this state in the face of the Industrial Insurance Act in the absence of a contract between the indemnitor and indemnitee."[174] The court, however, did not reach the specific issue of whether a contract must contain a specific written indemnity provision as a sine qua non for recovery.[175] Rather, the decision stands merely for the proposition that indemnity will not be implied against an employer in the absence of contract.[176]

2. Contract Waivers: Specificity of Intent

Clearly, an action for indemnification predicated upon an employer's negligence will not lie at common law in the face of the immunity afforded employers under the Industrial Insurance Act.[177] A different issue is presented, however, when an employer is obligated by contract to indemnify a third party for injuries to an employee. As a general rule, the Washington courts enforce the employer's contractual liability under such circumstances,[178] but have not been in complete agreement as to the degree of specificity required in the contract language to effectively waive the employer's industrial insurance immunity.[179] Recent developments, such as *Brown v. Prime Construction Co.*,[180] moderate the uncertainty on this issue. The 1986 amendments to section 4.24.115 of the Revised Code of Washington further address, and likely resolve, the

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173. *Id.* at 639, 519 P.2d at 28.

174. *Id.* at 635-36, 519 P.2d at 26.

175. *Id.* at 635, 519 P.2d at 26.

176. *See also*, Seattle-First v. Shoreline Concrete, 91 Wash. 2d 230, 588 P.2d 1308 (1978) (employer immunized when participating in industrial insurance); Davis v. Niagara Machine, 90 Wash. 2d 342, 581 P.2d 1344 (1978) (no intention to create third party beneficiary); Olch v. Pac. Press & Shear, 19 Wash. App. 89, 573 P.2d 1355 (1978) (mere purchase of equipment does not waive immunity).

177. *See Montoya*, 10 Wash. App. at 634-35, 519 P.2d at 26.

178. *See Tucci*, 1 Wash. App. at 1038, 467 P.2d at 388. *See also* Stocker v. Shell Oil Co., 105 Wash. 2d 546, 716 P.2d 306 (1986) (duty to indemnify prevails over borrowed servant defense).

179. *Compare, e.g.*, Calkins v. Lorraine Div. of Koehring, 26 Wash. App. 206, 613 P.2d 143 (1980) (specific language required) *with* Noia v. Ferrell-Penning, Inc., 36 Wash. App. 13, 671 P.2d 790 (1983) (express waiver not required).

180. 102 Wash. 2d 235, 684 P.2d 73 (1984).

issue. Nevertheless, the development of the court's approach to this issue over the years is of interest.

The issue was first squarely presented in *Tucci & Sons, Inc. v. Madsen, Inc.*[181] when the indemnitor argued that the "exclusive jurisdiction" provisions of the Washington Industrial Insurance Act operated to invalidate any employer agreement purporting to waive the employer's immunity under such statute.[182] The court flatly rejected this position, noting a clear distinction between the common-law right to contribution from a negligent employer and a demand for contractual indemnity not necessarily predicated upon negligence:

> Invariably, when a contractual right of indemnity is the basis of the cause of action, the courts permit recovery by a third party from an injured workman's employer simply because the cause of action arises out of an independently created contractual right which is totally independent of the exclusive jurisdiction provisions of a workmen's compensation act, so long as the compensation act itself does not prohibit such agreements.[183]

Acknowledging an apparent statutory prohibition against an employer waiving the benefits of the Industrial Insurance Act,[184] the court nevertheless determined that the law "was not intended to prevent an employer from making special provisions for an injured employee beyond those which the employee might receive under the workmen's compensation act."[185] Accordingly, without extended analysis or discussion, the court held that the industrial insurance statute did not preclude enforcement of the indemnity provision.[186]

The first Washington decision to raise the issue of the specificity required of language in an indemnity provision to

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181. 1 Wash. App. at 1039-43, 467 P.2d at 388-91.

182. *Id.* at 1035, 467 P.2d at 386. *See supra* notes 42-47 and accompanying text.

183. *Tucci*, 1 Wash. App. at 1040-41, 467 P.2d at 389-90. *See also* Redford v. Seattle, 94 Wash. 2d 198, 615 P.2d 1285 (1980).

184. WASH. REV. CODE § 51.04.060 (1986). *See also supra* note 167.

185. *Tucci*, 1 Wash. App. at 1042, 467 P.2d at 390.

186. *Id.* at 1043, 467 P.2d at 391. The court, however, did not specifically address the specificity required in contract language to waive industrial insurance immunity; rather, this conclusion was assumed to follow from the general principal that such immunity could be waived by the contract. Similarly, the general issue of the waiver of an employer's Industrial Insurance immunity was addressed in Jones v. Strom Constr. Co., 84 Wash. 2d 518, 521-22, 527 P.2d 1115, 1117-18 (1974), which concerned the interpretation and application of an indemnity provision identical to that in *Tucci*. *Jones*, however, also assumed the sufficiency of the language of the clause to operate as a waiver of the employer's immunity, contingent only upon proof of an overt act.

effectively waive an employer's industrial insurance immunity was *Calkins v. Lorraine Division of Koehring*.[187] *Calkins* concerned an injury to a lessee's employee and the injured employee's action against the lessor alleging that the crane's defective condition was a causative factor in the injury. The lease agreement inclusively obligated the employer to indemnify the lessor for injury to workmen caused by the operation, handling or transportation of the equipment. Defending against a claim for indemnity under the lease provision, the employer asserted that the Industrial Insurance Act immunized the company from any liability for injury to an employee notwithstanding the contractual indemnity provision. Thus the employer argued that the court lacked jurisdiction over the indemnity claim.[188] Analyzing the lease provision, the court identified a strong public policy "disfavor[ing] agreements purporting to deprive an employer of the immunity provided by the Industrial Insurance Act."[189] To operate as a valid and effective waiver of industrial insurance immunity, the court accordingly held that "such an intent should be clearly expressed in the agreement."[190] Because the provision "did not expressly state an intent to deprive [the employer] of his immunity under the Industrial Insurance Act," the clause failed to effectively waive the employer's immunity.[191]

In both *Noia v. Ferrell-Penning, Inc.*,[192] and *Jones v. Bayley Construction*,[193] the subcontract indemnity provision obligated the subcontractor to indemnify the contractor against damages caused by the work of the subcontractor, except for those damages caused by the sole negligence of the contractor. In both cases, the subcontractor indemnitor resisted enforcement of the provision, in part, because the contract failed to waive the employer's industrial insurance immunity. Rejecting this defense, however, Division I of the Washington Court of Appeals held that, although public policy requires a clear expression of intent to waive the employer's immunity, "an

187. 26 Wash. App. 206, 613 P.2d 143 (1980).

188. *Id.* at 208, 613 P.2d at 144.

189. *Id.* at 209, 613 P.2d at 145.

190. *Id.*

191. *Id.* at 210, 613 P.2d at 145.

192. 36 Wash. App. 13, 671 P.2d 790 (1983) (subcontractor's employee fell off scaffold and contractor and subcontractor stipulated to concurrent negligence).

193. 36 Wash. App. 357, 674 P.2d 679 (1983) (subcontractor's employee fell through skylight hole).

express waiver of immunity is not required . . . ."[194] In both cases, the appellate court held that the indemnity clause "clearly expresses an intent to provide for indemnification" sufficient to operate as a waiver of the employer's industrial insurance immunity.[195]

Recent pronouncements from the Washington Supreme Court on this particular issue came in *Brown v. Prime Construction Co.*.[196] *Brown* substantially alleviated the potential inconsistency represented, on one hand, by the *Calkins*[197] decision, and on the other hand, by the decisions in *Noia* and *Bayley Construction*. The facts involved an injury to a subcontractor's employee, a resultant action against the general contractor, and a consequent claim for indemnification by the general contractor against the employer under two separate contract provisions. First, a standard form subcontract indemnity clause purported to require that the subcontractor indemnify the contractor for all damages arising out of work performed in connection with the subcontract, except damages caused by the sole negligence of the general contractor.[198] Second, the subcontract obligated the subcontractor to assume all responsibilities owed by the contractor to the owner under the general contract. The contract required indemnification for employee injuries and stated that such indemnification would not be limited by workman's compensation acts or other employee benefit acts.[199]

Reviewing previous Washington decisions on the issue, the *Brown* court identified *Calkins* as setting forth the proper statement of controlling law on the subject: "Where employers agree to contract away their immunity under the Act and to indemnify third parties for employee benefits, such an intent

194. *Id.* at 364, 674 P.2d at 684; *see also Noia*, 36 Wash. App. at 16, 671 P.2d at 793.

195. *See Bayley Constr.*, 36 Wash. App. at 364, 674 P.2d at 684, and *Noia*, 36 Wash. App. at 16, 671 P.2d at 793; *see also* Postlewaite Const. Inc. v. Great Am. Ins. Co., 106 Wash. 2d 96, 100, 720 P.2d 805, 806-07 (1986) (discussing specificity required to establish intent).

196. 102 Wash. 2d 235, 684 P.2d 73 (1984).

197. 26 Wash. App. 206, 210, 613 P.2d 143, 145 (1980) (contract did not expressly provide for indemnity in case of concurrent negligence, and did not expressly waive lessee's immunity).

198. *Brown*, 102 Wash. 2d at 236, 684 P.2d at 74. This clause was virtually identical to that presented in both *Noia*, 36 Wash. App. at 13, 671 P.2d at 790, and *Bayley Constr.*, 36 Wash. App. at 364, 674 P.2d at 684.

199. *Brown*, 102 Wash. 2d at 237, 684 P.2d at 74.

should be clearly expressed in the agreement."[200] Accordingly, the Washington Supreme Court for the first time articulated the standard under which such indemnity clauses must be evaluated:

> We hold that an indemnity clause of this type is enforceable only if it clearly and specifically contains a waiver of the immunity of the Workman's Compensation Act, either by so stating or by specifically stating that the indemnitor assumes potential liability for actions brought by its own employees.[201]

The court then held that the indemnity provision failed to meet this test and consequently denied indemnification.[202]

McDowell v. Austin Co.[203] constitutes the only subsequent construction industry case applying the *Brown* rule that relates to the enforceability of indemnity clauses vis-a-vis the employer's industrial insurance immunity. A subcontractor's injured employee sued Austin Co. in *McDowell*. The general contractor demanded indemnity against the employer under a subcontract provision requiring, in relevant part, indemnification against liability for personal injuries sustained by any person directly or indirectly employed by the subcontractor or its subcontractors.[204] Because the language of the clause provided specifically for suits by the subcontractor's employees, Division I of the Washington Court of Appeals enforced the provision under the *Brown* test, reasoning that "[a]n employer cannot

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200. *Id.* at 239, 684 P.2d at 75, (quoting Calkins v. Lorraine Div. of Koehring Co., 26 Wash. App. 206, 209, 613 P.2d 143, 145 (1980)).

201. *Id.* at 239-40, 684 P.2d at 75. In articulating this standard, the decision specifically modified *Brame*, *Tucci* and *Northwest Airlines* and disapproved *Noia* and *Bayley*, explaining that all of these decisions were inconsistent with the court's present holding. *Id.* *See also* Stocker v. Shell Oil Co., 105 Wash. 2d 546, 549, 716 P.2d 306, 308 (1986) ("To be enforceable against the indemnitor for actions brought by its own employees, an indemnity agreement must contain express language to that effect.")

202. *Brown*, 102 Wash. 2d at 240, 684 P.2d at 75. Similarly, the court rejected the general contractor's contention that, notwithstanding the shortcomings of the subcontract provision, the indemnity provision of the main contract, incorporated by reference into the subcontract, satisfied the standard set by the court. The court held that the two provisions when read together would create a conflict, and thus there was an ambiguity between the terms of the subcontract and the main contract. *Id.* at 241, 684 P.2d at 76. In the case of such a conflict, according to the terms of the subcontract, the subcontract terms were controlling, and, in any event, such ambiguity would be resolved most strictly against the drafter, which was, of course, the general contractor. *Id.* Finally, the court held that both provisions, read together, failed to clearly express an intent to waive the employer's industrial insurance immunity. *Id.*

203. 105 Wash. 2d 48, 710 P.2d 192 (1985).

204. *McDowell*, 39 Wash. App. at 445, 693 P.2d at 745.

agree to indemnify another against suits for injuries sustained by any person directly or indirectly employed by subcontractor without intending to waive its immunity under the Industrial Insurance Act as to those suits."[205] Thus, an express waiver of the employer's industrial insurance immunity was not required.

Notwithstanding the judicial posture of *Brown*, a degree of uncertainty continued to exist concerning the specificity required in indemnity provisions to effectively waive an employer's industrial insurance immunity. Although *Brown* spoke in terms of a clear expression of intent to contract away industrial insurance immunity,[206] the decision nevertheless permitted considerable judicial latitude in determining whether any given provision actually adhered to the articulated standard.[207] The 1986 statutory amendments to section 4.24.115 of the Revised Code of Washington directly address this issue and restrict the judicial discretion afforded under *Brown*. As amended, the statute specifically provides that a construction industry indemnity provision "may waive the indemnitor's immunity under Industrial Insurance, Title 51 RCW, only if the agreement specifically and expressly provides therefor and the waiver was mutually negotiated by the parties."[208] In its present form, the revised statute clearly constitutes legislative approval of the *Calkins* decision,[209] and rejection of the holdings of both *Noia*[210] and *Bayley Construction*.[211]

Thus, legislative fiat has effectively settled the issue concerning the degree of specificity required to waive an employer's industrial insurance immunity in construction industry indemnity clauses. It is safe to assume that, in response to the statute, standard form construction contracts will immediately be revised to reflect and incorporate an express waiver of industrial insurance immunity. Such an express waiver, however, does not necessarily address the fur-

205. *Id.* at 448, 693 P.2d at 747.

206. *Brown*, 102 Wash. 2d at 239, 684 P.2d at 75.

207. *See, e.g., McDowell*, 39 Wash. App. at 443, 693 P.2d at 744.

208. WASH. REV. CODE § 4.24.115 (1986) (Act of April 4, 1986, ch. 305, § 601, 1986 Wash. Leg. Serv. 6 (West)) [Emphasis added.]

209. 26 Wash. App. 206, 613 P.2d 143 (1980).

210. 36 Wash. App. 13, 671 P.2d 790 (1983).

211. 36 Wash. App. 357, 674 P.2d 679 (1984).

ther statutory requirement of "mutual negotiation."[212] Mutual negotiation introduces an entirely new concept into this issue. How the courts will respond to this requirement remains open to question. One viable approach is to analyze and construe the mutual negotiation requirement analogously to the judicial doctrine that has developed concerning disclaimers of warranties in consumer sales transactions under the Washington Uniform Commercial Code.[213]

3. Effect of Tort Contribution Statute Upon Employer's Liability for Indemnification

The 1981 Washington Legislature enacted the Tort and Products Liability Reform Act, which established a right of contribution among persons jointly and severably liable for the same harm.[214] In an unsurprising development, parties defending against personal injury claims of injured workmen immediately began exploring the possibility of using this statute to maintain actions against employers for contribution, or partial indemnity, notwithstanding the industrial insurance statute. At issue was whether a party could maintain such a cause of action under the tort contribution statute, and, specifically, whether the new statute overrode the employer immunity provided by the Industrial Insurance Act.

The issue was squarely presented in *Glass v. Stahl Specialty Co.*[215] in which an equipment manufacturer sought statutory contribution. The manufacturer alleged that the employer's concurrent and contributing negligence was a causative factor in the loss. The court held that the Tort Reform Act did not extend the right of contribution to permit action against allegedly negligent employers, thus reaffirming the strong public policy underlying the exclusive jurisdiction and the employer immunity concepts of the Industrial Insurance

212. WASH. REV. CODE § 4.24.115 (1986) (Act of April 4, 1986, Ch. 305, § 601, 1986 Wash. Leg. Serv. 6 (West)).

213. *See, e.g.*, WASH. REV. CODE § 62A.2-316 (1986). Washington cases construing this statute have consistently required that a disclaimer of warranties of merchantibility or fitness in the sale of consumer goods be explicitly negotiated between the buyer and seller, in addition to the statutory requirement that the sales agreement set forth with particularity the qualities and characteristics which are not being warranted in a consumer transaction. *See, e.g.*, Berg v. Stromme, 79 Wash. 2d 184, 484 P.2d 380 (1971); Thomas v. Ruddell Lease Sales, 43 Wash. App. 208, 716 P.2d 911 (1986).

214. WASH. REV. CODE § 4.22.040 (1985).

215. 97 Wash. 2d 880, 652 P.2d 948 (1982).

Act.[216] Fundamentally, the basis for the court's decision was its clearly correct perception that under the exclusive jurisdiction provisions of the Industrial Insurance Act an employer cannot be "liable" to an injured employee.[217] Accordingly, an employer does not fall within the category of persons who may be "jointly and severably liable" for an injury vis-a-vis an employee.[218] The court refused to read into the Act any such conclusion absent a specific legislative statement of intent to require contribution from negligent employers under the Tort Reform Act.[219]

B. Negligence of Injured Employee Not Imputed to Employer so as to Create Indemnity Obligation in an Otherwise Non-Negligent Employer

As discussed earlier, an indemnitee must allege and prove that some act or omission of the indemnitor caused, or participated in causing, the underlying injury for which indemnification is sought in order to obtain indemnity under a construction industry indemnity contract.[220] In *Wickland v. Gus J. Bouten Construction Co.*,[221] the court addressed whether the negligence of the injured employee could be imputed to an indemnitor/employer under general principles of tort law to establish the necessary predicate for enforcement of the indemnity clause. *Wickland* concerned the typical tripartate scenario: a suit by a subcontractor's employee against the general contractor, and the defendant's claim against the employer under a broadly worded subcontract indemnity clause. On the underlying claim, the jury found the general contractor 75 percent negligent, the injured employee 25 percent negligent, and the employer/subcontractor faultless. In a subsequent hearing on the third-party indemnity claim, the court denied enforcement of the clause given the jury's finding of no negligence on the part of the employer.

The general contractor appealed, contending that the negligence of the injured employee must be imputed to the employer to "trigger" the indemnity clause and require an equal contribution from the employer for the loss sustained by

216. *Id.* at 888-89, 652 P.2d at 953.
217. *Id.* at 887, 652 P.2d at 952.
218. *Id.*
219. *Id.* at 888-89, 652 P.2d at 952-53.
220. *See, e.g.*, Jones v. Strom Constr. Co., 84 Wash. 2d 518, 527 P.2d 1115 (1974).
221. 36 Wash. App. 71, 674 P.2d 184 (1983).

the general contractor in the employee action.[222] Reviewing *Jones* and the subsequent cases, which increasingly operated to require causative participation by the employer in the underlying injury, the court rejected the indemnitee's argument, stating as follows: "We do not believe this position reflects the trend of Washington law. An employer cannot be held to contribution when it has not acted negligently."[223] Acknowledging the general viability of the doctrines of imputed negligence and respondeat superior, the court nevertheless noted that these doctrines only held the controlling party "accountable for the acts of its agent *toward a third party*."[224] In the situation presented, the court held that "the employee [had] violated no duty to a third party, [thus] there [was] no negligence to impute."[225] Absent imputed negligence, no act or omission of the employer had contributed to the injury, and the employer accordingly could not be held to indemnity.[226]

C. Indemnity for Concurrent Negligence: Specificity and Clearly Expressed Intent

Indemnity for acts of concurrent or joint negligence is referenced in various preceding sections of this article,[227] but warrants further discussion. Washington appellate decisions have generally been inconsistent in their approach and determination of the degree of specificity required in the language of an indemnity clause to trigger indemnification for loss attributable to the concurrent negligence of the parties.[228] Although the 1986 amendments to the Revised Code of Washington[229] directly address and presumably resolve this issue, a brief review of the historical development of this issue in the courts is worthwhile.

In a historical sense, the genesis of indemnity for concurrent and joint negligence derives from *Griffiths v. Broderick*,

222. *Id.* at 73, 674 P.2d at 185.

223. *Id.* at 74, 674 P.2d at 187.

224. *Id.* at 75, 674 P.2d at 187 [emphasis in original].

225. *Id.*

226. *Id.* at 76-77, 674 P.2d at 188.

227. *See, e.g., supra* text accompanying notes 140-41.

228. *Compare, e.g.*, Noia v. Ferrell-Penning, Inc., 36 Wash. App. 13, 671 P.2d 790 (1983) (express provision for concurrent negligence not required) *with* Calkins v. Lorraine Div. of Koehring, 26 Wash. App. 206, 613 P.2d 143 (1980) (express provision for concurrent negligence required).

229. *See supra* text accompanying note 157.

Inc.[230] Although *Griffiths* did not distinguish between indemnity for sole negligence and for concurrent negligence, it, at least, suggested that a broad indemnity clause, by its terms, required indemnification for losses attributable to the joint negligence of the indemnitor and the indemnitee.[231]

Three recent construction industry decisions by the Washington Court of Appeals directly concern and inconsistently resolve this issue. In *Noia v. Ferrell-Penning, Inc.*,[232] the court determined that "an express provision for concurrent negligence is [not] required to create an enforceable contractual right to indemnity. The agreement need only clearly express an intent to provide for indemnification."[233] In *Calkins v. Lorraine Division of Koehring*,[234] however, the court reached a conflicting conclusion, holding that an indemnity provision must expressly provide for "indemnity where [the parties] were concurrently negligent." [235] Finally, in *McDowell v. Austin Co.*,[236] Division I of the court of appeals expressly rejected the *Calkins* holding and denied that "an intent to indemnify against concurrent negligence must be clearly expressed in order for an indemnity agreement to be enforceable against an employer."[237] The court concluded that a general and all inclusive expression of intent to indemnify for losses attributable to the negligence of the indemnitee included indemnity for acts of concurrent negligence.[238]

At the Washington Supreme Court level, two very recent decisions strongly indicate a judicial trend toward requiring a greater degree of specificity in the language of indemnity provisions before imposing liability for damages attributable to the concurrent negligence of the parties. In *Northwest Airlines v. Hughes Air Corp.*,[239] the court interpreted an indemnity provi-

230. 27 Wash. 2d 901, 182 P.2d 18 (1947).

231. *Id.* at 905-07, 182 P.2d at 21-2.

232. 36 Wash. App. 13, 671 P.2d 790.

233. *Id.* at 16, 671 P.2d at 791-92. Although *Noia* was overruled by *Brown*, 102 Wash. 2d at 235, 684 P.2d at 73, insofar as the issue of a waiver of industrial insurance immunity was concerned, the *Brown* decision did not address this second aspect of the *Noia* decision.

234. 26 Wash. App. 206, 613 P.2d 143 (1980).

235. *Id.* at 210, 613 P.2d at 145.

236. 39 Wash. App. 443, 693 P.2d 744, *aff'd*, 105 Wash. 2d 48, 710 P.2d 192 (1985).

237. *Id.* at 450, 693 P.2d at 749.

238. *Id.* The court also noted that *Brown* had not addressed this aspect of the *Noia* decision.

239. 104 Wash. 2d 152, 702 P.2d 1192 (1985). The appeal arose in the context of the trial court's grant of summary judgment in favor of the lessee, which effectively

sion in a commercial lease agreement. The issue was whether the indemnity provision was unenforceable as against public policy because it operated to require indemnification for damages attributable to the sole negligence of the indemnitee.[240]

Tracing the chronology of Washington case law construing indemnification provisions, the court acknowledged previous holdings to the effect that "it was not against public policy for parties to enter into indemnity agreements in commercial leases whereby one party contractually agrees to indemnify, to be financially responsible for the other party's negligence."[241] The court acknowledged *Griffiths* for the proposition that a broad-form indemnification clause historically operated to require indemnification for the negligence of the indemnitee.[242] However, the court suggested that this approach no longer represented the state of the law, noting that "Washington currently requires . . . that more specific language be used to evidence a clear and unequivocal intention to indemnify the indemnitee's own negligence."[243] The court concluded by affirming the principle that indemnification for one's own negligence does not violate public policy per se, yet strongly suggested that a stricter standard would apply in the future:

> Clearly, these rules do not say that indemnification clauses are void as against public policy or that, as a matter of law, an indemnitor cannot be held responsible for an indemnitee's sole negligence. What these rules require is that, for an indemnitor to be responsible for the indemnitee's own negligence, the agreement must be clearly spelled-out.[244]

The second and final Washington Supreme Court decision on this issue, though consistent with earlier case law in terms

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denied enforcement of the provision. *Id.* at 153, 702 P.2d at 1193. On an intermediate appellate level, the Washington Court of Appeals reversed the decision of the trial court. 37 Wash. App. 344, 679 P.2d 968 (1984). The effect of the Washington Supreme Court's decision was to affirm the court of appeals decision. 104 Wash. 2d at 153, 702 P.2d at 1193.

240. *Northwest Airlines*, 104 Wash. 2d at 158, 702 P.2d at 1193. Because the case arose outside the context of a construction contract, the provisions of WASH. REV. CODE § 4.24.115 (1986), which would have otherwise invalidated the provision, were inapplicable.

241. *Northwest Airlines*, 104 Wash. 2d at 154, 702 P.2d at 1193.

242. *Id.* at 155, 702 P.2d at 1193-94.

243. *Id.*

244. *Id.* at 157-58, 702 P.2d at 1194. Although *Northwest Airlines* stopped short of expressly disapproving the lower appellate court decisions in *Noia* and *McDowell* on this issue, or expressly approving the principle enunciated in *Calkins*, it did, at a minimum, suggest that the latter decision represented a correct statement of the law.

of result, represented a fundamental change in the court's analytical approach to this issue. Previous decisions analyzed the issue exclusively in terms of public policy.[245] *McDowell v. Austin Co.*,[246] however, represented a departure from this approach and predicated the issues resolution upon a "notice" analysis.[247] *McDowell* concerned an indemnity provision "against all liability . . . caused . . . by an act or omission, negligent or otherwise, by . . . [the general contractor]."[248] The appellant [indemnitor] argued that the provision was ambiguous on the issue of indemnification for concurrent negligence, and was consequently unenforceable because the provision failed to clearly express an intent to indemnify for concurrent negligence.[249] This argument was predicated upon *Calkins*, which disfavored indemnification for liability resulting from one's own negligence, and upon *Calkins* requirement that such agreements are enforceable only if expressed in clear and unambiguous terms.[250]

Although the court acknowledged that earlier decisions supported *Calkins*' disfavor of contracts that required indemnity for a party's own negligence[251] and cited the general rule that such indemnity obligations be "expressed in clear and unequivocal terms,"[252] the court noted a long-standing preference toward enforcement of indemnity agreements as executed by the parties.[253] The court resolved the conflict between these principles by examining the purpose of the rule requiring specificity in the language of the indemnification provision: "At least one court stated that the purpose of this rule is to prevent injustice, and to insure that a contracting party has *fair notice* that a large and ruinous award can be assessed against it solely by reason of negligence attributable to the other contracting

245. *See Northwest Airlines*, 104 Wash. 2d at 152, 702 P.2d at 1192; *see, e.g.*, Griffiths v. Henry Broderick, Inc., 27 Wash. 2d 901, 182 P.2d 18 (1947).

246. 105 Wash. 2d at 48, 710 P.2d at 192.

247. For additional discussion of *McDowell*, *see supra* notes 129-51 and accompanying text.

248. *McDowell*, 105 Wash. 2d at 53, 710 P.2d at 194.

249. *Id.* at 50, 710 P.2d at 193.

250. *Id.* at 52, 710 P.2d at 194.

251. *Id.* at 52, 710 P.2d at 194. Both Jones v. Strom Const. Co., 84 Wash. 2d 518, 527 P.2d 18 (1974) and *Griffiths*, 27 Wash. 2d at 901, 182 P.2d at 18 were cited in support of this proposition.

252. *McDowell*, 105 Wash. 2d at 53, 710 P.2d at 194.

253. *Id.* at 53-54, 710 P.2d at 195. Specific reliance for this second proposition was predicated on *Griffiths*, 27 Wash. 2d at 901, 182 P.2d at 18, and upon Redford v. Seattle, 94 Wash. 2d 198, 615 P.2d 1285 (1980).

party."[254] Accordingly, under the umbrella of "fair notice" analysis, the court enforced the parties' agreement, holding that the provision "provided fair notice to [the employer] that it would be liable for 'all liability' to [its] employees caused by [the general contractor's] conduct."[255] Thus, express reference to "concurrent negligence" was not required where the provision itself expressly provided indemnification against liability attributable to the indemnitee's own negligence.[256] In this situation, the *Calkins*' rule was "not necessary for notifying [the employer] of its role as insurer for the indemnitee's liability."[257]

At best, the recent consecutive decisions handed down in *Noia*, *Calkins*, *Northwest Airlines*, and *McDowell* resulted in continued uncertainty in the state of the law and certainly failed to definitively resolve this issue. On one hand, *McDowell* can be read for the proposition that a broad indemnity provision includes indemnity for acts of concurrent negligence.[258] At a minimum, this conclusion is derived analytically from the result. On the other hand, because *McDowell* approves the principles enunciated in *Northwest Airlines* and refuses to expressly disapprove or overrule *Calkins*, a case can be made for the proposition that inclusion of clear, express, and unequivocal language relating to concurrent negligence is required in most circumstances.[259] In any event, the issue continued to require definitive resolution.

This resolution was forthcoming from the legislature with the enactment of the 1986 amendments to section 4.24.115[260] of the Revised Code of Washington. By legislative fiat, a current indemnity agreement, which purports to indemnify against the parties' concurrent negligence "is valid and enforceable only to the extent of the indemnitor's negligence *and only if the agree-*

254. *McDowell*, 105 Wash. 2d at 53, 710 P.2d at 195 (citing Joe Adams & Sons v. McCann Const. Co., 475 S.W.2d 721, 722 (Tex. 1971)) [emphasis added]. Although the quoted language speaks in terms of "sole negligence," it has obvious application to situations involving indemnification for losses attributable to the concurrent negligence of the parties.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 52-53, 710 P.2d at 194.

260. *See supra* text accompanying note 157.

ment specifically and expressly provides therefore . . . ."[261] In substance, the amended statute represents legislative approval of the *Calkins* decision, and an implicit legislative disapproval of *Noia*. It is a safe assumption that the construction industry will react to the 1986 statutory amendments by revising the standard subcontract forms to specifically include an obligation to indemnify for losses attributable to concurrent negligence.

D. Allocation or Apportionment of Loss

With the original enactment of section 4.24.115 of the Revised Code of Washington in 1967,[262] most standard form provisions in construction contracts excluded liability for damages attributable to the *sole negligence* of the indemnitee.[263] Although less commonly encountered, and most often in the context of a general contract, some indemnity provisions continued to exclude liability for damages attributable to the *negligence* of the indemnitee.[264] Although seemingly inconsequential, the inclusion of an exception for *sole negligence* as opposed to an exception for *negligence* drastically affected the liabilities of the parties to the agreement. The distinction arose in connection with the apportionment of damages.

Under Washington case law, an indemnity provision excepting liability for the *negligence* of the indemnitee required apportionment of liability based upon the parties' relative fault.[265] On the other hand, indemnity provisions excepting liability only for the *sole negligence* of the indemnitee did not require apportionment.[266] In effect, the latter provision was an all or nothing proposition. That is, under an indemnity provision excepting liability only for the indemnitee's *sole negligence*, the burden of proof was upon the indemnitee to establish that some negligence by the indemnitor, however minimal or attenuated,[267] contributed to the injury. In terms of per-

261. WASH. REV. CODE § 4.24.115 (1986) (emphasis added). *See supra* text accompanying note 157.

262. *See supra* text accompanying note 155.

263. *See, e.g.*, Noia v. Ferrell-Penning, Inc., 36 Wash. App. 13, 671 P.2d 790 (1983).

264. *See, e.g.*, Redford v. Seattle, 94 Wash. 2d 198, 615 P.2d 1285 (1980).

265. *Id.*

266. *See, e.g., Noia*, 36 Wash. App. at 16-17, 671 P.2d at 793.

267. For example, a case recently litigated by the author involved an allegation by the indemnitee that the indemnitor's negligence included a failure to specifically warn its employees on the date of the accident that "they should be careful of falling objects" on a multi-employer high-rise construction project, notwithstanding the

centages, such negligence may have been 50 percent or 10 percent or 1 percent—the degree was immaterial. Once the indemnitor's concurrent negligence was established, the indemnitor was held to indemnification for the full extent of the loss.[268]

Again, the 1986 amendments to section 4.24.115[269] of the Revised Code of Washington bear directly upon this specific issue, and, in substance, legislatively mandate an apportionment of damages, regardless of whether the indemnity provision reads in terms of negligence or sole negligence. The statutory amendments specifically retain language that invalidates any indemnity agreement purporting to require indemnification for losses attributable to the sole negligence of the indemnitee.[270] The amended statute, however, provides additional protection to indemnitors in that it further mandates that a construction industry indemnity provision "is valid and enforceable only to the extent of the indemnitor's negligence"[271] in circumstances involving the concurrent negligence of the parties.[272] Both as a practical matter and from a standpoint of equity, the 1986 statutory amendments represent a positive resolution of this issue.

E. Reciprocal Indemnification Clauses

The judicial construction and enforcement of a unique reciprocal indemnity provision occurred in *Prociw v. Baugh Construction Co.*[273] The indemnity provision required mutual indemnification between the contractor and subcontractor for losses and damages arising out of each parties' performance of its respective subcontract obligations. The court faced the task

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undisputed testimony that all of the employees, including the injured party, were at all times fully aware of this danger as a general rule on such projects.

268. *See, e.g.*, *Noia*, 36 Wash. App. at 16-17, 671 P.2d at 793.

269. *See supra* text accompanying note 157.

270. *Id.*

271. *See supra* text accompanying note 155.

272. *Id.* On its face, the statute does not appear to address a situation wherein the loss is attributable to the negligence of the indemnitor and a third-party subcontractor, absent any contributory negligence of the indemnitee. Under such circumstances, in a contract action the indemnitee would arguably be entitled to seek full indemnification from a single indemnitor, notwithstanding this indemnitor's limited causal participation in the fact of injury. Of course, a claim for contribution may exist as between the culpable parties. *See, e.g.*, Karnatz v. Murphy Pac. Corp., 8 Wash. App. 76, 503 P.2d 1145 (1972). For a discussion of *Karnatz*, *see infra* text accompanying notes 275-278.

273. 9 Wash. App. 750, 515 P.2d 518 (1973).

of applying the indemnity clause to a loss caused by the joint negligence of the indemnitee and indemnitor. Faced with this situation, the court required an equal apportionment of damages between the joint and reciprocal indemnitors, without regard for the proportion of negligence attributable to each.[274] Although analytically suspect and obviously result oriented, the court's decision appears equitable under the particular circumstances of the case.

F. Liability of Independent Indemnitors of a Common Obligation

A unique set of circumstances also occurred in *Karnatz v. Murphy Pacific Corp.*[275] in which two separate contractors were allegedly liable under separate contractual indemnity provisions. The court rejected allocating or apportioning damages based upon the comparative fault of the indemnitors and held each indemnitor liable for one-half of the amount for which recovery was sought. Analogizing the situation to common law contribution, the court noted that the doctrine, although founded in equity, applied equally with respect to contract obligations.[276] Since neither indemnity provision "contemplated the existence of the other, [n]or provided for apportionment of liability for costs in the event of multiple coverage[,] . . . neither indemnitor had the primary obligation . . . ."[277] Thus, the doctrine of contribution required equal apportionment of the loss.[278]

G. Negligence of Third-Party Subcontractor

A common situation occurs when the underlying loss, injury or damage is attributable, not to the negligence of the indemnitee/general contractor, but to the sole negligence of a third-party subcontractor on the project. For a variety of reasons, the general contractor may elect not to proceed directly against the third-party subcontractor, but instead may elect to bring an action against the employer of the injured party.[279]

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274. *Id.* at 754, 515 P.2d at 520-51.

275. 8 Wash. App. 76, 503 P.2d 1145 (1972).

276. *Id.* at 82, 503 P.2d at 1148.

277. *Id.* at 81-82, 503 P.2d at 1148.

278. *Id.* at 82, 503 P.2d at 1148.

279. Liability in such circumstances is generally predicated upon the allegation that the employee injury "resulted from, arose out of, in connection with, or incident to" the employer's performance of the subcontract. The nature and substance of the

Jones and its progeny appear to foreclose this possibility. This conclusion follows from the functional effect of the *Jones* overt act or omission test and from the express language of the decision. That is, *Jones* specifically holds that a form indemnity provision does not require indemnification "as against any and all losses or damages . . . as a direct and sole result of [the indemnitee's], *or another of its subcontractor's*, negligence in the performance of duties. . . ."[280]

H. Third-Party Cause of Action

Absent a manifest intent in the language of the agreement, a third-party has no direct cause of action against an indemnitor under a construction contract indemnity agreement.[281] In *Simons v. Tri-State Construction Co.*[282] a homeowner sought damages from an underground utilities contractor for the City of Hoquiam alleging removal of lateral support as a result of construction activities. No evidence of any negligence on the part of the contractor existed, and all work was performed in compliance with the city's plans and specifications. The court rejected the plaintiff's theory that the indemnity provision of the contract between the contractor and the city created a direct cause of action against the indemnitor and found, instead, that the contractor's compliance with the city's plans and specifications for the project obviated any direct liability on its part.[283] In addition, the court found no evidence to support a third-party beneficiary theory of contract liability. Consequently, the indemnity agreement ran only to the city and required that the city be directly indemnified for liability claims, losses, and damages.[284] The court left unresolved the issue of any potential claim by the city for indemnity against the contractor by means of an appropriate cross-claim or independent action.[285]

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allegation derives from the still prevalent broad language of construction industry indemnity provisions.

280. Jones v. Strom Constr. Co., 84 Wash. 2d 518, 527 P.2d 1115 (1974) (emphasis added). *But cf.* McDowell v. Austin Co., 39 Wash. App. 443, 693 P.2d 774, *aff'd*, 105 Wash. 2d 48, 710 P.2d 192 (1985).

281. Simons v. Tri-State Constr. Co., 33 Wash. App. 315, 655 P.2d 703 (1982).

282. *Id.*

283. *Id.* at 325, 655 P.2d at 707-08.

284. *Id.*

285. *Id.* at 326, 655 P.2d at 708.

I. Recovery of Attorney Fees in Action Seeking Enforcement of Indemnity Clause

Various indemnity cases discuss the recovery of attorney fees under a typical general contractual provision, which allows the prevailing party an award of attorney fees in an action upon the contract. The *Jones* case conclusively resolved this issue when the court held, as a matter of first impression, that "in the absence of express contractual terms to the contrary, an indemnitee may not recover legal fees incurred in establishing his right to indemnification."[286] Attorney fees expended in establishing or defending against a claim to indemnification, however, should not be confused with an allowance of such fees for the defense of the claim indemnified against. Under a properly worded indemnity provision, and assuming entitlement to indemnification, an indemnitee is allowed as an element of damages the amount of attorney fees expended in defense of the claim for which indemnification is sought.[287] Only in third-party or independent actions seeking indemnification are attorneys' fees disallowed absent express contract terms to the contrary.[288]

IV. DRAFTING THE MODEL CLAUSE

In view of the high costs of litigation, it is of obvious benefit to owners, prime contractors and subcontractors to include in their contracts an indemnity provision free from ambiguity. It is also beneficial that a provision be consistent with the principles governing indemnity clauses in construction industry contracts both as articulated by the courts and as determined by the legislative amendments to section 4.24.115[289] of the Revised Code of Washington. The following proposed model indemnity provision addresses many of the issues involved in the interpretation and application of indemnity provisions that have been considered by the courts and affected by the revised statute. To a large extent, the language and format of the proposed clause is adopted from subparagraph (k) of the Associated General Contractor subcontract form. The language of the AGC provision, however, has been amended to reflect and

286. *Jones*, 84 Wash. 2d at 523, 527 P.2d at 1119.

287. *See* Griffiths v. Henry Broderick, Inc., 27 Wash. 2d 901, 905-07, 182 P.2d 18, 21-22 (1947).

288. *See* Tri-M Erectors v. Drake Co., 27 Wash. App. 529, 618 P.2d 1341 (1980).

289. *See supra* and accompanying text 157.

incorporate principles of current Washington law, and represents a fair and equitable allocation of liability in construction industry contracts. With this in mind, a model clause is proposed as follows:

> INDEMNIFICATION
>
> The Subcontractor agrees to indemnify and save harmless the Contractor, its officers, agents and employees, from and against any and all suits, claims, actions, losses, costs, penalties, and damages of whatsoever kind or nature, including attorney fees, arising out of, in connection with, or incident to the work of this Subcontract, except to the extent caused by the negligence of the Contractor and/or an independent third-party Subcontractor on the project, even though some act or omission, negligent or otherwise, of the Contractor may also be a cause of the loss or damage. In the event of litigation between the parties to enforce the rights under this paragraph, reasonable attorney fees shall be allowed to the prevailing party. This indemnification obligation shall include, but is not limited to, all claims against the Contractor by an employee or former employee of the Subcontractor, and the Subcontractor expressly waives all immunity and limitation on liability under any Industrial Insurance Act, other worker's compensation act, disability benefit act, or other employee benefit act of any jurisdiction which would otherwise be applicable in the case of such a claim.

This proposed clause directly addresses specific issues and problems arising in the context of litigation on this issue. Although not necessarily in order within the language of the clause, the following issues are considered.

First, the provision contains an express waiver of the employer's industrial insurance immunity, which is without question sufficient to meet the standards enunciated in *Brown*[290] and the recent amendments to section 4.24.115[291] of the Revised Code of Washington.

Second, the clause contains an express provision for an award of attorney fees to the prevailing party in an action to enforce indemnification. Such fees would otherwise be disallowed under *Jones*[292] and *Tri-M Erectors*.[293]

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290. Brown v. Prime Const. Co., 102 Wash. 2d 235, 684 P.2d 73 (1984). *See supra* notes 198-204 and accompanying text.

291. *See supra* text and accompanying note 157.

292. *Jones*, 84 Wash. 2d at 518, 527 P.2d at 1115.

Third, the clause complies with the statutory prohibition against indemnification for damages attributable to the sole negligence of the indemnitee.[294] In accord with the 1986 statutory amendments,[295] the clause requires the apportioning of liability between the general contractor and subcontractor based upon their comparative fault. This conclusion, of course, derives from the exception for indemnification liability predicated upon the "negligence" of the contractor, as opposed to the more commonly encountered language excepting only the "sole negligence" of the contractor.[296]

Fourth, by also excepting liability for loss attributable to the negligence of a third-party subcontractor, the clause effectively qualifies and limits the liability of the indemnitor to losses and damages caused by his own acts or omissions. Although this language certainly goes beyond the strict holding of the *Jones* decision, which speaks only of the *sole negligence* of third-party subcontractors,[297] the language is clearly consistent with the spirit of *Jones*. In any event, the language recognizes the practical realities inherent in a multi-employer construction project.

Finally, the clause specifically obligates indemnity for acts of joint or concurrent negligence, and thus conforms to the standards of the 1986 legislative amendments to section 4.24.115[298] of the Revised Code of Washington.

V. CONCLUSION

The interpretation and enforcement of construction industry indemnity provisions are well delineated in Washington case law. Analysis of the historical progression of Washington case law reveals a judicial trend toward imparting to these clauses a just and equitable interpretation that accords with the realities of major multi-employer construction projects.[299] In general, the courts have consistently recognized principles associated with freedom of contract between the parties to

293. *Tri-M Erectors*, 27 Wash. 2d at 529, 618 P.2d at 1341. *See supra* notes 286-88 and accompanying text for further discussion of this issue.

294. WASH. REV. CODE § 4.24.155 (1985).

295. *See supra* text accompanying note 157.

296. *See supra* notes 264-74 and accompanying text.

297. *Jones*, 84 Wash. 2d at 522, 527 P.2d at 1118.

298. *See supra* text accompanying note 157.

299. *See, e.g., Jones*, 84 Wash. 2d at 518, 527 P.2d at 1115.

such agreements.[300] Nevertheless, a conspicuous trend in the cases requires an increasing degree of specificity in the language of indemnity provisions to precipitate or trigger an obligation to indemnify under circumstances that would otherwise not entail common law liability.[301] This judicial trend has received express legislative approval in the recent 1986 amendments to section 4.24.115[302] of the Revised Code of Washington.

The following principles are now mandated by case law and statute. A party may not receive indemnification for losses attributable to its sole negligence.[303] Indemnification may not be enforced against an employer absent an express and specific waiver of the industrial insurance immunity to which the employer would otherwise be entitled,[304] and such waiver must be "mutually negotiated"[305] by the parties. Similarly, liability to indemnify for losses attributable to the concurrent negligence of the parties also requires specific and express language providing therefor.[306] Moreover, the obligation to indemnify for losses attributable to the joint negligence of the parties is limited to the extent that the indemnitor's negligence causally participated in the underlying loss.

Insofar as future litigation is concerned, there will undoubtedly arise new and unforeseen issues that will affect the future interpretation, application, and development of construction industry indemnification clauses.[307] As a general rule, cases concerning the enforcement of these clauses involve

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300. *See, e.g.*, Stocker v. Shell Oil Co., 105 Wash. 2d 546, 716 P.2d 306 (1986); Cope v. J.K. Campbell & Assoc., 71 Wash. 2d 453, 429 P.2d 124 (1967).

301. *See, e.g.*, *Stocker*, 105 Wash. 2d at 546, 716 P.2d at 306; Calkins v. Lorraine Div. of Koehring, 26 Wash. App. 206, 613 P.2d 143 (1980).

302. *See supra* text accompanying note 157.

303. WASH. REV. CODE § 4.24.115 (1985).

304. WASH. REV. CODE § 4.24.115 (1986). *See supra* note and accompanying text 157. *See also Stocker*, 105 Wash. 2d at 549-0, 716 P.2d at 309; *Brown*, 102 Wash. 2d at 239, 684 P.2d at 76.

305. WASH. REV. CODE § 4.24.115 (1986). *See also supra* notes 215-218 and accompanying text.

306. WASH. REV. CODE § 4.24.115 (1986). *See also Calkins*, 26 Wash. App. at 206, 613 P.2d at 143.

307. For example, the contractual liability of an indemnitor to *fully* indemnify for losses attributable to the concurrent negligence of the indemnitor and a third party is not specifically addressed by the recent amendments to WASH. REV. CODE § 4.24.115 (1985). *See supra* note 278. Although the *Jones* analysis regarding the indemnitor's causal participation in the loss, and the "spirit" of the recent statutory amendments suggest that the indemnitor's liability should, under any circumstances, be limited to the extent its negligence participates in the loss or injury, the issue is not definitively resolved.

substantial damages, which alone often provides the impetus for continued litigation. In addition, the unique facts of these cases increases the likelihood that the courts will continue to be asked to resolve these issues. Finally, creative or sloppy (the distinction will depend upon the perception of the parties) drafting of the indemnification clause will inevitably lead to further litigation as the parties attempt to enhance their respective positions vis-a-vis liability and attempt to incorporate recent judicial pronouncements and the statutory amendments into their contracts. Continued litigation on this subject is unavoidable, and future clarifications and refinements of existing principles of law must be anticipated. Nevertheless, both the majority of recent Washington decisions and the recent statutory amendments to section 4.24.115 of the Revised Code of Washington provide consistent guidance and direction toward resolving issues concerning construction industry indemnity clauses in most foreseeable circumstances.