Reading Tea Leaves: The Future of Negotiations for Tort Claimants Free From Fault

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I. INTRODUCTION

In April, 1991, the Washington Supreme Court issued an opinion in what the casual reader might consider to be a case raising only a technical question concerning workers compensation laws. The case, *Clark v. Pacificorp*,[1] concerned the Department of Labor and Industries' right to reimbursement for benefits paid to an injured worker from a recovery made by the injured worker in a suit against a party other than the worker's employer. The court held that the department did not lose that right to reimbursement merely because it was determined, in the suit brought by the worker, that the employer had also been at fault in the accident that caused the injuries.[2] The decision precludes what otherwise would have been opportunities for disasterous raids on the Workers Compensation Fund. The statements made in the opinion concerning the process of negotiation of settlements for tort law suits were, however, much broader than necessary for resolution of the technical question presented. They appear to have significance for the negotiation of settlements in all tort suits involving more than one defendant. Their presence in the opinion, like leaves left in a tea cup, provides a basis for predicting the

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1. 118 Wash. 2d 167, 822 P.2d 162 (1991) (the cases of Clark v. Pacificorp and Whitten v. Assoc. Bldg. Components, Inc. were consolidated for appeal in this case. Clark v. Pacificorp, 116 Wash. 2d 804, 808, 809 P.2d 176, 179 (1991)).

The Washington Supreme Court's original opinion in this case was printed in the *Washington Supreme Court Official Advance Sheets*. *See* Clark v. Pacificorp, 116 Wash. 2d 804, 809 P.2d 176 (1991). The court omitted that opinion from Volume 116 of *Washington Reports* pending a motion for reconsideration. The revised opinion was published on February 7, 1992. Clark v. Pacificorp, 118 Wash. 2d 167, 822 P.2d 162 (1991). The revisions concern the manner in which the department should pay benefits reducing its right to reimbursement.

2. *Clark*, 118 Wash. 2d at 183-92, 822 P.2d 170-75 (1991).

course that the negotiation of claims involving more than one defendant may take in the future.

This Article first reviews what a study of the 1986 Tort Reform Act reveals to be problems created by that Act for negotiators of settlements in tort suits. These problems are greatest for fault-free plaintiffs. Next, a summary of the previous law governing joint and several liability provides an understanding of these problems and the changes negotiators should make in their negotiation stategies. The court's success in avoiding the mandated disaster for the Workers Compensation Fund raises the possibility that the court may also provide fault-free plaintiffs with an easier escape from the perils and pitfalls created by the Act for the negotiation of settlements with multiple defendants. The likelihood, however, is that the court will not provide that escape. It therefore becomes appropriate to analyze carefully the statements made by the court concerning the negotiation process to ascertain their application to other situations. It is also appropriate to suggest how the law governing negotiation of tort cases involving multiple defendants should develop.

II. JOINT AND SEVERAL LIABILITY BEFORE THE 1986 TORT REFORM ACT

For present purposes, an adequate description of the Washington law of joint and several liability is set out in two decisions of the Washington Supreme Court.[3] In *Seattle-First National Bank v. Shoreline Concrete*,[4] the court rejected the argument that adoption of the principle of comparative negligence required abandonment of the rule of joint and several liability. In the course of its opinion, the court briefly summarized the law governing joint and several liability.

The court first noted that tortfeasors had long been held liable for all the harm proximately caused by their tortious conduct.[5] This principle applied both to joint tortfeasors (those who acted in common or breached a joint duty) and to those whose independent acts concurred to produce an indivisible

3. *See* Seattle First Nat'l Bank v. Shoreline Concrete, 91 Wash. 2d 230, 588 P.2d 1308 (1978), and Glover v. Tacoma General Hosp., 98 Wash. 2d 708, 658 P.2d 1230 (1983). *See also* Cornelius J. Peck, *Washington's Partial Rejection and Modificiation of the Common Law Rule of Joint and Several Liability*, 62 WASH. L. REV. 233, 235-39 (1987).

4. 91 Wash. 2d 230, 588 P.2d 1308 (1978).

5. *Id.* at 234, 588 P.2d at 1312.

injury.[6] The indivisibility of the harm caused, combined with the goal of providing full compensation to an injured party, allowed the injured party to seek full recovery from any one, or from all tortfeasors.[7] Problems of fairness among multiple tortfeasors were considered to be different from problems of fairness to the injured party.[8]

Fairness among multiple tortfeasors was provided by the 1981 statute establishing contribution among joint or concurrent tortfeasors.[9] The basis for contribution among persons who were jointly and severally liable was the comparative fault of each person.[10] The right to contribution could be enforced either in the original action brought against the joint tortfeasors or in a subsequent suit against them by a party who had paid more than its equitable share of the joint obligation.[11] Settlements were encouraged by the statute's provision that a settlement relieved a settling tortfeasor from all liability for contribution.[12] The claim of the releasing party against other tortfeasors was reduced by the amount paid pursuant to the settlement agreement, unless the amount paid was unreasonable at the time of the agreement.[13]

The law provided for a presettlement determination of whether the amount to be paid was reasonable.[14] If such a determination was not made and the amount paid was not sufficient, the statutory language established that the releasing party bore the loss of a reduced recovery from the remaining tortfeasors; on the other hand, the statutory language established that the remaining tortfeasors were the beneficiaries if the settling tortfeasor paid more than his equitable share. The Washington Supreme Court's decision in *Glover v. Tacoma General Hospital*[15] provided a list of factors to be considered in determining whether the settlement amount was reasonable.[16]

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

7. *Id.* at 236, 588 P.2d at 1312-13.

8. *Id.*

9. *See* 1981 Wash. Laws ch. 27, §§ 9-14 (codified at WASH. REV. CODE § 4.22.015-4.22.080 (1989)).

10. WASH. REV. CODE § 4.22.040(1) (1989).

11. WASH. REV. CODE § 4.22.050 (1989).

12. WASH. REV. CODE § 4.22.060(2) (1989).

13. *Id.*

14. WASH. REV. CODE § 4.22.060(1) (1989).

15. 98 Wash. 2d 708, 658 P.2d 1230 (1983).

16. *Id.* at 717-18, 658 P.2d at 1236; for a list of the reasonableness factors from the *Glover* decision, see *infra* note 26.

III. THE PROBLEMS CREATED BY THE 1986 TORT REFORM ACT

In 1986, I was privileged to serve as chair of a committee appointed by the insurance commissioner of the State of Washington to review and evaluate the changes made in Washington's tort system by the 1986 Tort Reform Act. In addition to the commissioner and the chair, the committee consisted of six attorneys and two nonlawyers. Three of the attorneys specialized in representing plaintiffs in tort litigation; the other three specialized in defending against tort actions. As might be expected, the attorneys' opinions diverged in their appraisal of the wisdom of the 1986 Act's substantive changes. The attorneys were, however, in substantial agreement that the Washington State Legislature had created a number of problems by accepting the Act as drafted. Those problems must not have been foreseen. It is nearly impossible to believe that the legislature or its draftpersons intended to create some of the difficulties for practitioners and judges revealed by studying the statutory language.[17]

One of the committee's concerns was that a major provision of the 1986 Act would seriously complicate settlements in cases involving multiple defendants and fault-free plaintiffs.[18] That provision is now found in Revised Code of Washington (RCW) 4.22.070.[19] It provides that in all actions involving fault

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17. For discussions of the problems, *see* Thomas Harris, *Washington's 1986 Tort Reform Act: Partial Tort Settlements After the Demise of Joint and Several Liability*, 22 GONZ. L. REV. 67 (1986-1987); Peck, *supra* note 3.

18. REPORT OF THE TORT REFORM COMMITTEE TO THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON ON THE 1986 TORT REFORM ACT 32 (1987) [hereinafter INSURANCE COMMISSIONER'S REPORT] (this report was subsequently submitted by the commissioner to the members of the 50th Legislature on January 15, 1987).

One of the defense attorneys on the committee may not have shared this concern because he believed that the legislature should have abolished all joint liability. *Id.* at 35. If there were no joint liability, there would be reason for delaying settlement with one of a number of tortfeasors because settlement with that party could safely proceed on the basis of what that party could and should pay.

19. The statutory provision is as follows:

§ 4.22.070. Percentage of fault - Determination - Limitations

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages, including the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities immune from liability to the claimant and entitites with any other individual defense against the claimant. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of

of more than "one entity," the trier of fact shall determine the percentage of the total fault attributable to every entity that caused a claimant's damages. Judgment shall be entered against each defendant for that defendant's proportional share of a claimant's total damages. Thus, a plaintiff receives no judgment for shares of damages attributable to entities not joined as defendants and receives no compensation for those portions of the losses suffered.

The section further provides that liability shall "be several only and shall not be joint."[20] The Act provides an exception for cases in which the trier of fact determines that the claimant was not at fault. The focus of attention in this Article is on that exception.

For cases in which a plaintiff is at fault and the liability of the defendants is "several only," the Act created few negotia-

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the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants total damages.

(2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contributions against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.

(3)(a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.

(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.

(c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.

WASH. REV. CODE § 4.22.070 (1989).

20. The legislature used the word "several" at this point in the statute with a new meaning when compared with prior law. Under prior law, a joint tortfeasor's several liability was for the total amount of a plaintiff's damages. For the purpose of this portion of the statute, the word, "several," means only that tortfeasor's proportionate share of the plaintiff's total damages.

To further confuse the terminology, the legislature gave a different meaning to the same word in subsection (1)(b). As used in that subsection, the word "several" means that if a plaintiff is free from fault, a joint tortfeasor should be liable for the total amount of the judgment entered against all of the defendants. This approximates the meaning the word had under the prior law, except that the liability does not include shares of the plaintiff's total damages that have been allocated to unjoined entities, to defendants who have been released by the plaintiff, to defendants who have an immunity from liability, or to defendants who have prevailed on any other defense.

tion complications. Negotiation of those cases may proceed with little regard for the effect a settlement would have on claims against other potential defendants. The inquiry focuses on determining the defendant's share of the total fault and the amount that the defendant can pay.[21]

Cases involving fault-free plaintiffs are much more complicated. The statutory language appears to limit joint and several liability of multiple defendants to cases in which a trier of fact has determined that the claimant was not at fault.[22] There is no statutory language providing for that joint and several liability without such a finding.

In addition, the statutory language seems to require that a judgment be entered to establish joint and several liability. This conclusion is supported by the provision establishing rights to contribution between defendants. The provision is limited to those defendants whose liability has been established pursuant to one of the section's specific exceptions to its general rule of several liability.[23] This restriction of the right to contribution suggests that only those against whom a judgment for joint and several liability has been entered have such a liability. Persons with such a liability have need for contribution, but for persons whose liabilities are established under the Act, there is no other provision for contribution. Specifically, there is no provision for contribution among persons who

21. There are unresolved questions concerning the effect of a settlement in an amount either larger or smaller than a defendant's proportional share of a claimant's total damages upon the claims against other severally liable defendants. Peck, *supra* note 3 at 254; Harris, *supra* note 17 at 76-77. It appears, however, that the amount paid in settlement of the claim against one tortfeasor with a several liability is irrelevant in determining the several liabilities of other tortfeasors. There is no direction requiring such consideration in determining the liabilities of other severally liable parties. Pursuant to the statutory language, their liability remains ". . . an amount which represents that party's proportionate share of the claimant's total damages." WASH. REV. CODE § 4.22.070(1) (1989). Likewise, there is no provision for contribution between defendants with only a several liability. It thus appears that the question for a settling claimant in reaching an agreement is whether the parties have agreed on a correct estimate of the share of the tortfeasor's fault based on separate liability. The question is not whether the amount received is the correct amount for that share of the total damages suffered.

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

23. RCW 4.22.070(2) provides for contribution between persons who are jointly and severally liable under subsections (1)(a) or (1)(b) of the section. WASH. REV. CODE § 4.22.070(2) (1989). Subsection (1)(a) provides for joint and several liability of persons who acted in concert or who acted as an agent or servant. In addition to the exceptions from several liability in subsections (1)(a) and (1)(b) of RCW 4.22.070, subsection (3) provides that nothing in the section shall apply to cases involving hazardous wastes, business torts, or generic products. WASH. REV. CODE § 4.22.070(3) (1989).

have settled before judgment.[24] The provision concerning contribution thus supports a conclusion that a fault-free plaintiff can establish the joint and several liability of multiple defendants only by obtaining a judgment against all of them. A settling defendant who plans to seek contribution from joint tortfeasors should insist upon a judgment.

If this is a correct understanding of the changes made by the 1986 Tort Reform Act, the settlement of claims of parties free from fault was enormously—one might say, disastrously—complicated by the legislation. For example, assume that a passenger involved in an automobile accident has valid claims against several drivers, an automobile manufacturer, and even a city or state government. Prior to the Act, a claim against a driver who had no means of responding other than an insurance policy might reasonably have settled within the limits of that policy. If the amount of the settlement was determined to be reasonable, the effect of the settlement was to reduce the claim against the other defendants by only the amount received in the settlement.[25]

In contrast, if joint and several liability exists under the Act only when such liability has been established by a judgment, a party free from fault who settled on the basis of policy limits prior to suit and judgment will lose the opportunity to recover that portion of the claim beyond the limits of the insurance policy from the other financially responsible tortfeasors. This results because, as noted before, the Act provides for exclusion from a judgment of joint and several liability of the total share of a claimant's damages allocable to a released defendant.

For the same reasons, it would be unwise for a fault-free plaintiff to make a reduction in settling a claim against one of a number of potential defendants before trial because of doubts

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24. The 1986 Tort Reform Act amended RCW 4.22.030 to read, "Except as otherwise provided in RCW 4.22.070, if more than one person is liable to a claimant on an indivisible claim for the same injury, death or harm, the liability of such persons shall be joint and several." WASH. REV. CODE § 4.22.070 (1989). This suggests a possibility that joint and several liability has been preserved for cases that are settled without entry of a judgment. However, RCW 4.22.070 appears to be ". . . an exception that has all but swallowed the rule." Harris, *supra* note 17, at 73. RCW 4.22.030 now appears to apply only to those cases totally excluded from coverage by RCW 4.22.070(3). Those are cases involving hazardous wastes, business torts, and generic products. WASH. REV. CODE § 4.22.070(3) (1989).

25. Glover v. Tacoma General Hosp., 98 Wash. 2d 708, 711, 658 P.2d 1230, 1232 (1983).

concerning that person's liability. If it was determined in the subsequent trial against the other defendants that the person with whom the settlement was made was liable, the uncompensated damages allocable to that person would not be included in a judgment of joint and several liability entered against these remaining defendants. For similar reasons, it would be unwise for a fault-free plaintiff to release a party who had no assets and could not be expected to respond to a judgment. Despite the fact that the party is judgment proof, it is in the plaintiff's interest to join and retain that party as a defendant until judgment is entered.

Under the law prior to adoption of the 1986 Tort Reform Act, a fault-free plaintiff could recognize factors such as financial inability to respond and doubts concerning liability when entering into a settlement with one of multiple tortfeasors prior to trial. That recognition might have resulted, in some cases, in the reduction of what was considered to be the value of the claim against that tortfeasor. If the amount of the settlement was "reasonable," the fault-free plaintiff suffered no loss, even though the amount agreed upon was less than that tortfeasor's share of the total damages based on allocations in proportion to fault.[26]

Under the 1986 Act, despite the parties' efforts to determine a settling defendant's degree of fault and share of damages, if the settlement is less than the share allocated in a subsequent trial, the plaintiff will lose the difference. In addition, because the settling tortfeasor has been released from liability, he or she will have no incentive to contest the size of that allocation. That burden will fall on the plaintiff.

As noted above, fault-free plaintiffs will be subject to a reduction in the amount of a judgment because of an allocation of fault to an "entity" that has not been joined as a defendant. It is, therefore, amazing that the statute contains no definition

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26. In *Glover*, the court listed factors that are proper considerations for a trial judge in determining whether a settlement was reasonable. These include:

> [T]he releasing person's damages; the merits of the releasing person's liability theory; the merits of the released person's defense theory; the released person's relative faults; the risks and expenses of continued litigation; the released person's ability to pay; any evidence of bad faith, collusion or fraud; the extent of the releasing person's investigation and preparation of the case; and the interests of the parties not being released.

Id. at 717-18, 658 P.2d at 1236 (quoting Brief of Amicus). *See also* Luanne Coachman, Comment, *A Nonsettling Defendant's Perspective on Reasonableness Hearings Under Washington's 1981 Tort Reform Act*, 11 U. PUGET SOUND L. REV. 725 (1988).

of what an "entity" is. The statutory language makes it clear that an entity includes, but need not be, a defendant or a party to the law suit. Presumably an entity must be something capable of the fault that will be assigned to it; therefore, entities should not include inanimate objects or forces of nature. They are probably what were previously recognized as legal entities.

Another deficiency of the Act is that it does not state when an entity must be identified. At present, there does not appear to be any general court rule fixing the time at which entity identification shall be made. Therefore, a danger lurks for fault-free plaintiffs in that the identification and allocation of an entity could be made too late for joining that entity as a defendant.[27] This risk may lead some fault-free plaintiffs to join all persons and parties who were capable of fault as defendants, thus avoiding the risk of having damages assigned to these persons as entities.

Anecdotal information suggests that some attorneys representing fault-free plaintiffs have allegedly attempted to avoid losses in prejudgment settlements by agreeing with a potential defendant not to enforce or execute a judgment later entered against that person. The strategy is to keep the party with whom the agreement is reached as a defendant until judgment is entered. The plaintiff hopes that this will prevent deduction of that party's share of damages from the total damages for which all defendants will be jointly and severally liable. The party with whom the agreement is made will have a contractual right precluding enforcement of the judgment against him. Moreover, RCW 4.22.070(2) provides that a defendant who has satisfied a judgment has a right to contribution to be determined pursuant to RCW 4.22.060. Subsection (2) of that provision states that receipt of a "covenant not to enforce judgment, or similar agreement" discharges a person from all liability for contribution.[28]

This scheme is imaginative, but it will probably fail to obtain its objective. It assumes that a contract not to execute is

27. On November 7, 1991, the Washington Supreme Court published proposed changes in Court Rule 8 and Court Rule 12. *See* CT. R. 8, 12 (Proposed Official Draft 1991) (located at 118 Wash. 2d cxxxi, 818 P.2d xcv, xcvi). The effect of these changes will be to make allocation of fault to a nonparty an affirmative defense to be pleaded by a defendant claiming that such an allocation should be made. *Id.* For an additional discussion of the problems raised by allocations of fault to "entities," *see* Peck, *supra* note 3, at 243-49.

28. WASH. REV. CODE § 4.22.060(2) (1989).

not a release within the meaning of RCW 4.22.070(1). RCW 4.22.060 refers to "a release, covenant not to sue, covenant not to enforce judgment, or similar agreement" as being interchangeable for the purpose of determining the effect of a settlement agreement. That section was amended in 1987,[29] giving rise to an inference that the meaning of the word "settlement" in the 1986 Act should include a settlement made by a covenant not to enforce or execute.

Moreover, before the statute establishing a right to contribution was enacted, the court refused to accept recitals of a document[30] in determining whether it was a release or a covenant not to sue. This frustrated the attempts of claimants settling with one tortfeasor to keep alive the claim against other joint tortfeasors. Those cases suggest that a court will treat a contract not to execute as a release or settlement under RCW 4.27.070, in spite of recitals stating that an agreement is only a contract not to enforce a judgment.

Fault-free plaintiffs are not the only parties with reasons for avoiding prejudgment settlements. A "deep pocket" defendant may not want to settle regardless of how certain it is that it is subject to some liability. Pursuant to the Act, joint and several liability exists only if a trier of fact determines that the claimant was "not at fault." Apparently, a determination that the claimant bears only one percent of the total fault would be sufficient to deprive that claimant of a joint and several recovery.[31] Accordingly, deep pocket defendants may have

29. 1987 Wash. Laws ch. 212, § 1901(1) (codified at WASH. REV. CODE § 4.22.60(1) (1989)).

30. Haney v. Cheatham, 8 Wash. 2d 310, 318, 111 P.2d 1003, 1006 (1941); Rust v. Schlaitzer, 175 Wash. 331, 336, 27 P.2d 571, 573 (1933).

31. An interesting but unresolved question is whether a plaintiff is entitled to a jury instruction concerning the consequence under the 1986 Tort Reform Act of finding the plaintiff responsible for any fault. Prior to adoption of comparative negligence, juries were instructed that a finding of contributory negligence was a bar to recovery. Poole's Seed & Implement Co. v. Rudene, 117 Wash. 150, 155, 200 P. 1104, 1106 (1921); Akin v. Bradley Eng. & Mach. Co., 51 Wash. 658, 662-63, 99 P. 1038, 1040 (1909). Currently, under the doctrine of comparative fault, juries are instructed to determine the degree of fault attributable to a claimant. If a special verdict form is used, the jury is instructed that the judge will make an appropriate reduction in the claimant's recovery. If a special verdict has not been ordered, the jury is instructed that it should make such a reduction. Perhaps these instructions are more easily understood than an instruction concerning joint and several liability. An instruction concerning the effect of a finding of fault on the part of the plaintiff might be considered so complicated that it would confuse a jury, and therefore, should not be given. I shall forego the opportunity to attempt a resolution of the question within this Article.

a great incentive to avoid settlement until determinations of fault are made. If the plantiff is found to have been at fault, the "deep pocket" defendant will escape liability for the shares of damages attributable to other defendants and entities.

IV. THE WORKERS COMPENSATION CASE

The recent Washington Supreme Court decision in *Clark v. Pacificorp*[32] has added to the problems and uncertainties created by the statute concerning settlement negotiations. It offers enigmatic but important indications that the process of negotiating settlements will become more complicated than originally suggested by analysis of the statutory language. One indication is that future settlement negotiations involving multiple defendants will be more formal and will be more likely to require judicial action.

Clark involved two separate workers compensation cases. These cases addressed the effect of a finding of fault on the part of an employer in a tort law suit brought by an injured worker against a party other than the worker's employer. The question was whether the Department of Labor and Industries lost its "lien," or its right to be reimbursed for benefits it paid a worker from the amount recovered in the third party suit. Thus, the cases raised an apparently narrow and technical question under workers compensation laws. The significance of statements made in the opinion for problems of settling tort claims outside the workers compensation context might, therefore, be overlooked.

The question of the effect on the department's lien pursuant to a finding of employer fault arose because of unsatisfactory drafting of another provision of the 1986 Tort Reform Act.[33] That provision added a new paragraph to the Industrial Insurance Act that related to third party tort suits. The paragraph reads:

(f) If the employer or a co-employee are determined under

32. 118 Wash. 2d 167, 822 P.2d 162 (1991).

33. Washington's Industrial Insurance Act provides the exclusive remedy against an employer for a worker injured in the course of employment. WASH. REV. CODE § 51.04.010 (1989). The only exception is for injury resulting from the deliberate intention of the employer to produce the injury. WASH. REV. CODE § 51.24.020 (1989). The Act does provide, however, that an injured employee may seek damages from a third person, not in the worker's same employment, who is liable for the injury. WASH. REV. CODE § 51.24.030 (1989). Such a suit is commonly referred to as a third party tort suit.

> RCW 4.22.070 to be at fault, (c) and (e) of this subsection do not apply and benefits shall be paid by the department and/or self-insurer to or on behalf of the worker or beneficiary as though no recovery had been made from a third party.[34]

Subsection (c) establishes the "lien" or right to reimbursement. It provides for payment to the department or a self-insurer, out of a third party recovery, of the amount of the compensation and benefits the department or self-insurer has paid to an injured worker. Subsection (e) provides that if the third party recovery is in excess of the compensation and benefits paid, no further worker benefit payments shall be made until the amount of the benefits that would otherwise have been paid equal that excess.

The inadequacies of Washington's legislative history make it impossible to state with certainty why the legislature made this change in the Act when it enacted the 1986 Tort Reform Act. A good guess is that it was expected to ameliorate the consequences the Tort Reform Act imposed on injured workers by limiting the recoveries possible in their third party tort suits. The limitation comes about because RCW 4.22.070(1) requires an allocation of fault to an entity even though it is immune to suit by the claimant. Such an allocation due to employer fault has the effect of reducing the damages recovered by an injured worker in a third party tort suit by an amount proportional to the fault of his or her immune employer. Probably, the new paragraph was added to soften the injured worker's loss by allowing him or her to keep the third party recovery without dimunition by the amount of the department's lien. This could have been accomplished at no cost to many of the proponents of the 1986 Act,[35] and it could have been expected to reduce opposition to adoption of the Act.

In any event, as written, the provision appears to provide for the complete loss of the department's lien without consideration of the proportion of the employer's fault. Moreover, as enacted, the 1986 Tort Reform Act made no provision for notification to the department or self-insurers that an employer had been designated an entity to which fault should be allocated. Thus, the department or a self-insurer might be

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34. WASH. REV. CODE § 51.24.060(1)(f) (1989).

35. *See* Wallace M. Rudolph, *The Tort Crisis: Causes, Solutions, and the Constitution*, 11 U. PUGET SOUND L. REV. 659 n.3 (1988).

deprived of a lien without opportunity to contest the allocation of fault proposed between an injured worker and a third party defendant. The absence of a requirement of notice that fault might be allocated to an employer strengthens the proposition that the legislature in 1986 had no concern over the department's total loss of the right to reimbursement.

Although this notification defect was promptly corrected,[36] loss of reimbursement still affected an employer's experience rating, resulting in higher worker compensation premiums than otherwise would have been required. The possibilities for collusion between the plaintiff and defendant in a third party tort suit against the interests of the department and insured employers remained, but they appeared to be unavoidable because the statutory provision, read literally, permitted total loss of the right to reimbursement on the basis of an allocation of a small percentage of fault to an employer.[37]

It is significant to the settlement of tort claims generally that the Washington Supreme Court refused to accept a literal reading of the language of the 1986 Tort Reform Act. The statutory language made no reference to the proportion of an employer's fault to the total fault resulting in injury to a worker. Instead, it provided that if it was determined that an employer was "at fault" in a suit under RCW 4.22.070, the paragraphs creating the department's lien did not apply. The conclusion that the loss was total was reinforced by the direction that "benefits shall be paid by the department and/or self-insurer . . . as though no recovery had been made from a third party."[38]

The court stated that the question presented in *Clark v. Pacificorp* was whether a finding of fault on the part of an employer reduced the department's right to reimbursement by the percentage of the employer fault found or whether it entirely eliminated the department's right to reimbursement.[39] The court held that the provision ". . . requires a reduction of the Department's right to reimbursement in accordance with

36. In 1987, the legislature eliminated the deficiency of notice by enacting a requirement of notice to the department or to self-insurers, who then could file notices of interest in the recovery and intervene to protect their statutory interests in the recovery. WASH. REV. CODE § 51.24.030(2) (1989).

37. *See* Peck, *supra*, note 3.

38. WASH. REV. CODE § 51.04.010(f) (1989); *see supra* text accompanying note 34 (complete text of statutory provision).

39. Clark v. Pacificorp, 118 Wash. 2d 167, 183, 822 P.2d 162, 170 (1991).

the employer's share of fault." [40]

In support of this nonliteral reading, the court argued that the reference to RCW 4.22.070 would be superfluous if it were not meant to require a reduction in proportion to fault.[41] Of course, if the legislature had intended a reduction in proportion to a fault determination made pursuant to RCW 4.22.070, it could very easily have so provided expressly rather than leaving the matter to be determined by inference. Moreover, if the legislature intended that the department lose only a proportional share of its lien, the legislature should not have gone on to provide that benefits be paid by the department or a self-insurer as though no third party recovery had been made. An inherent weakness in the court's opinion is that there is no explanation of the legislative purpose in the clause in RCW 51.25.060(1)(f).

The court offers a more acceptable ground for its decision by arguing that where there is uncertainty after examining the language of an act, "new legislation should be presumed to be in line with prior judicial decisions in a field of law."[42] The untoward—indeed, one might say unacceptable—consequences of a literal reading of the provision that had been added to the Industrial Insurance Act in 1986 were sufficient to create an uncertainty that the legislature had a deliberate purpose of visiting such a severe loss on employers because of slight fault.[43] Just as a reasonable person does not come to a complete halt when crossing a busy intersection merely because the words "Don't Walk" appear on a properly posted sign, a court should avoid calamity resulting from a slavishly literal reading of a statute.[44]

The court noted that Washington had adopted comparative negligence, that it had a policy of protecting state compensation funds, and that it had a policy of providing adequate compensation, but not full tort damages, in work-related injury

40. *Id.* at 172, 822 P.2d at 165.

41. *Id.* at 183, 822 P.2d at 171.

42. *Id.* at 184, 822 P.2d at 171.

43. Indeed, in one of the cases before the court, the trial judge had stated his conclusion that the employer must have been at least one percent at fault; this was the basis for imposing a complete loss of the Department's right to reimbursement! Brief of Department of Labor and Industries at 2-3, Clark v. Pacificorp, 118 Wash. 2d 167, 822 P.2d 162 (1991) (Nos. 57121-0, 57130-9).

44. "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of the makers." Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892).

cases.[45] The policy of protecting the insurance fund would be defeated if the right to reimbursement were eliminated; at the same time, the worker might obtain more than full compensation. The Tort Reform Act injected an element of fault into the traditional no-fault workers compensation scheme. Thus, a narrow construction limiting the effect of an employer's fault to reduction of the department's lien would create less conflict than with a no-fault scheme.[46] Limiting the effect of RCW 51.24.060(1)(f) to a proportional reduction[47] of the department's lien would protect the compensation fund while assuring a fairer and more equitable distribution of liability among the parties at fault.[48] Despite the elegance of the court's analysis, one is left with substantial reason for believing the court simply rejected the legislature's willingness to impose on the Workers Compensation Fund rather than on injured workers the cost of a large part of the relief it gave to third party defendants.

V. SIGNIFICANCE FOR OTHER TORT CLAIM NEGOTIATIONS

Can a similar rescue operation be performed by construction of statutory language that, read literally, would have a devastating effect on the settlement of claims of persons without fault? When consideration is given to the overburdened court dockets, the need for increasing the number of superior court judges, the burdens imposed on citizens called for jury duty, the expense of litigation, and the emotional distress imposed by trials, it is obvious that negotiated settlement of tort cases has a social value equivalent to protecting an insurance fund. Negotiated settlement of cases, rather than trial, has been a traditional method of resolving most disputes, and it has been used for all but a very small proportion of tort cases.[49] It is unlikely that the legislature intended to create

45. *Clark*, 118 Wash. 2d at 184, 822 P.2d at 171.

46. *Id.* at 186, 822 P.2d at 172.

47. The court describes exactly how to calculate the proportionate reduction. *Id.* at 191, 822 P.2d at 175. This information was absent in the court's original opinion. *See supra* note 1.

48. *Clark*, 118 Wash. 2d at 186, 822 P.2d at 172. The court noted that the purpose of the Industrial Insurance Act was to furnish sure and certain relief to injured workers, not full tort damages. *Id.* at 186 n.9, 822 P.2d at 172 n.9.

49. Richard E. Miller & Austin Sarat, *Grievances, Claims, and Diputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 544-45 (1980-1981); Marc A. Franklin et al., *Accidents, Money, and the Law: A Study of Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1, 10 (1961); Maurice Rosenberg & Michael I. Sovern,

major obstacles for the settlement of claims of persons without fault. Indeed, Washington adopted comparative negligence to facilitate recoveries by injured persons, not to burden fault-free claimants.[50]

When the legislature adopted comparative negligence, it did so with the view that equity in the distribution of liability between joint and concurrent tortfeasors was a matter for resolution by the tortfeasors rather than the injured plaintiff.[51] In 1986, the legislature abandoned that view for claimants who are at fault. In contrast, it did not do so completely for faultless claimants. This is evidenced by the express exception preserving joint and several liability of multiple defendants for faultless claimants. It is further evidenced by the provision made in the 1986 Act for contribution between defendants subjected to joint and several liability.

The preamble to the 1986 Tort Reform Act states that its purpose is to create a more equitable distribution of the cost and risk of injury.[52] A conclusion that tortfeasors should have no responsibility for sharing liabilities with an entity to which the law has given immunity from liability is understandable and possibly equitable. Even though in many cases the reasons for the immunity might not be applicable to the joined tortfeasors, an immunity suggests that the conduct of the immune party was not a wrong to the plaintiff.[53] If one assumes that a person can be both immune and at fault, it is at least questionable why others should pay for harm allocable to an immune party who has no liability to the plaintiff. Likewise understandable and arguably equitable is a conclusion that there is no reason joined tortfeasors should bear a liability of a defendant with a valid defense against the claim of even an innocent plaintiff. That defense may have rendered his

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Delay and the Dynamics of Personal Injury Litigation, 59 COLUM. L. REV. 1115, 1124 (1959); ALFRED E. CONARD ET AL., AUTOMOBILE ACCIDENT COSTS AND PAYMENTS 184, 241-42 (1967). *See also* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 27-28 (1983).

50. Seattle-First National Bank v. Shoreline Concrete Co., 91 Wash. 2d 230, 236, 588 P.2d 1308, 1313 (1978).

51. *Id.*

52. 1986 Wash. Laws, ch. 305, § 100.

53. If immunity means there was no wrong, there is difficulty in reaching a conclusion that the immune party was at fault. If the party was not at fault, logically his conduct should not be part of the total fault.

otherwise faulty conduct nontortious; therefore it is not a basis for compensation.

A similar rationale cannot be supplied for faultless claimants who have been injured by joint tortfeasors. In such cases, the conduct of all tortfeasors is wrongful and a cause in fact of the plaintiff's injuries. Nevertheless, the statute appears to exclude from joint and several liability the total percentage of an innocent plaintiff's damages allocable to a tortfeasor from joint and several liability if the plaintiff has made a settlement with that tortfeasor. The statute excludes such liability regardless of the reasons for making that settlement. A possible justification for requiring this result is that it is equitable to require the innocent plaintiff to exercise care and obtain adequate compensation from a tortfeasor. The statute, however, contains no provision for determining whether the claimant exercised care and had satisfactory reasons for failing to obtain more adequate compensation. Prior law provided for a hearing on whether a settlement was reasonable.[54]

Relentless pursuit of the theory that a claimant must bear the costs of his mistakes results in a failure to consider the predictable effect of exclusion on prompt negotiation of settlements or the predictable involvement and retention of otherwise unnecessary parties in litigation. Such involvement entails both emotional costs and litigation expenses. Nor does the theory give consideration to how long innocent claimants must wait before receiving any compensation from multiple tortfeasors. Their liability ultimately could, consistent with the legislative judgment of equity, be established as joint and several. They should not have to wait to receive what is equitably due them. Most certainly it was not the legislature's purpose to produce these complications. Indeed, these consequences probably were not even anticipated or considered.

The decision in *Clark v. Pacificorp* suggests the possibility that the court will hold that the Act does not require the exclusion of shares of damages attributable to defendants who have settled from judgments imposing joint and several liability.[55] Such a decision would be for as good a cause as that

54. WASH. REV. CODE § 4.22.060(1) (1989).

55. Analysis of the statute might proceed along these lines:

The provision of RCW 4.22.070(1) requiring exclusion from judgments of the share of a claimant's damages attributable to a defendant with whom a claimant has settled is found in the first paragraph of that section. The purpose of that paragraph is to

served in *Clark*, and it would do little more damage to statutory language than did *Clark*.

The court should not, however, have to perform a salvaging exercise to correct what appears to have been a legislative error. More hopeful is the possibility that problems in the *Clark* opinion will result in corrective legislative action. When the effects of that decision are felt, both plaintiff and defense lawyers may argue for statutory change to facilitate negotiations. Their joint effort should have greater credibility than that enjoyed by the plaintiff's bar in 1986. Indeed, if problems grow, as may be expected, even the judiciary will have an interest in making a change.

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establish a general rule that the remaining defendants' liabilities shall be several and not joint. The provision governing claims of parties free from fault is found in a separate paragraph. A purpose of allowing fault free claimants to proceed generally as prior to the Act is found in RCW 4.22.070(2). That subsection may be read to provide that claims for contribution of jointly and severally liable tortfeasors be decided as they were before enactment of the statute. Indeed, that subsection specifically states, ". . . and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060." WASH. REV. CODE § 4.22.070(2) (1989).

Reference to RCW 4.22.040(1) reveals its specific statement: "A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim . . . *whether or not judgment has been recovered against all or any of them.*" WASH. REV. CODE § 4.22.040(1) (1989) (emphasis added).

A conclusion that there should not be a total exclusion of the share of damages allocable to a defendant with whom a settlement was made would not nullify the 1986 legislation with respect to fault free claimants. The 1986 Act could still be given effect with respect to their claims by excluding from their recoveries the shares of entities with immunities, entities with separate defenses, or even entities which for one reason or another could not be joined as defendants.

Alternatively, the court might note that the provision in RCW 4.22.070(1) is for exclusion of the shares of "defendants" with whom a claimant has settled, not for exclusion of settlements made with parties prior to suit or trial. Thus, it could be held inapplicable to settlements made prior to trial, or at least settlments made prior to suit.

Accepting this analysis would require tolerance of considerable strain on the language of the 1986 Act. The strain would not be much greater, however, than that required to conclude that the legislature did not intend that a finding of any fault on the part of an employer was to cause the Department of Labor and Industries or a self-insurer to lose a right to reimbursement.

The analysis falters, in my judgment, because the language of RCW 4.22.070(1)(b) expressly limits a judgment for joint and several liability to the sum of the proportionate shares of the defendants against whom the judgment is entered. The provision of RCW 4.22.070(2) relating to contribution is limited to defendants held jointly and severally liable under one of the subsections of RCW 4.22.070(1). It thus does not include persons who were not defendants. In addition, if the legislature had intended to preserve joint and several liability for innocent claimants, it could have done so by including such claims within RCW 4.22.070(3), which lists causes of action that are not affected by the 1986 Tort Reform Act.

The court said that the language of RCW 4.22.070(1) is "clear and unambiguous"[56] that "the trier of fact *shall* determine the percentage of the total fault which is attributable to *every* entity which caused the claimant's damages."[57] The word "shall" is presumed to be mandatory. Therefore, the court held that RCW 51.24.060(1)(f) and RCW 4.22.070 require a trier of fact to determine the percentage of total fault attributable to every entity.[58] The court quoted a law review note:

> "[T]he only satisfactory method of dealing with multiple party accidents through comparative negligence is to bring all the parties into court in a single action, apportion the fault and then allocate the damages based on this apportionment.[59]

The court also said:

> Through the adoption of comparative negligence, tort reform, and the incorporation of these two statutes, we believe the Legislature intended to bring all entities which are liable for a claimant's injuries before the court for a determination of fault *before* any settlement is reached or damages are awarded. Bringing all parties before the court in one fault determination hearing prevents manipulation by any one party.[60]

Apparently out of concern for how these standards might affect the negotiation process, the court said:

> RCW 4.22.070 on its face does not require a full trial to determine the issue of fault. The words "trier of fact" refer to a judge; they do not implicate a full trial. We find that an apportionment of fault between all at-fault entities serves as a basis for compromise in settlement negotiations. Therefore our holding does not hamper settlement proceedings.[61]

The *Clark* case was one in which the benefits of making determinations of fault in a single hearing were particularly apparent. At the time of the trials, it appeared that by agreeing to fix only a small share of fault on the employer, the par-

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56. Clark v. Pacificorp, 118 Wash. 2d 167, 181, 822 P.2d 162, 170 (1991).

57. *Id.* at 181, 822 P.2d at 170 (quoting WASH. REV. CODE § 4.22.070(1) (1989)) (emphasis added by the court in *Clark*).

58. *Id.*

59. *Id.* at 185, 822 P.2d at 172. *See also* Joel E. Smith & Alan D. Campbell, *Comparative Negligence*, 49 WASH. L. REV. 705, 715 (1974).

60. *Clark*, 118 Wash. 2d at 186, 822 P.2d at 172.

61. *Id.* at 191-92, 822 P.2d at 175.

ties could divide a worker's "savings" from a complete elimination of the department's "lien" on the third party recovery. If the percentage of employer fault were kept low, this could be done at the cost of a slight reduction in the damages agreed upon and awarded in the worker's recovery on the third party tort suit. Now that it has been established that there will be only a proportional reduction of the department's right to reimbursement, the opportunity for collusion has been greatly reduced, if not eliminated.[62]

The facts of the companion case, *Whitten*, increased the court's concern for avoiding opportunities for unfair treatment. In that case, the worker and the third party defendant settled the case between them prior to the time that the employer's fault was determined.[63] The determination made was not based on evidence presented at a hearing.[64] Instead, as mentioned above, the trial judge said he believed it was certain that

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62. There will be no joint and several liability between an employer and a third party tort defendant because the employer is an "entity" with immunity to suit by the worker. Pursuant to the statute, the share of a claimant's damages allocated to an employer will not be included in the judgment against the third party defendant. Because tort damages are usually more generous than benefits under the Workers' Compensation Law, the worker in most cases will not benefit from the proportional reduction of the department's claim for reimbursement as much as the worker loses in that proportional reduction of his or her claim against the third party.

63. *Clark*, 118 Wash. 2d at 173-74, 822 P.2d at 166. This would appear to conflict with the 1987 addition to the statute, which was designed to prevent settlements without notice to the department. *See* WASH. REV. CODE § 51.24.030(2) (1989). This addition was made in response to the Insurance Commissioner's Report. *See* INSURANCE COMMISSIONER'S REPORT *supra* note 18. The report notes that the new subsection (f) of RCW 51.24.060(1) did not require that the department, self-insurers, or employers be notified that the employer had been identified as an entity to which fault might be allocated or otherwise make provision for involving them in litigation in which such an allocation might be made. INSURANCE COMMISSIONER'S REPORT, *supra* note 18, at 44.

In *Clark*, the court held that the purpose of the notice requirement had been met because in both cases the department had been notified that the injured worker would pursue a third party claim. 118 Wash. 2d at 179, 822 P.2d at 168-69. That notice is not the same as notice that the employer will be designated as an entity to which fault should be allocated. In *Clark*, the issues concerning fault and elimination of the lien were not decided when the federal court certified the questions to the Washington Supreme Court. But in the second of these two consolidated cases, *Whitten v. Assoc. Bldg. Components*, the trial court made its finding of fault at the same time it granted the department's motion to intervene. *Id.* Nevertheless, the court affirmed the finding of fault and remanded the case for determination of the reimbursement issue. *Clark*, 118 Wash. 2d at 195, 822 P.2d at 177. The decision demonstrates that RCW 51.24.030(2) should be amended to require specific notice that an employer has been designated an entity to which fault will be allocated.

64. Brief of the Department of Labor and Industries at 13-14, Clark v. Pacificorp, 118 Wash. 2d 167, 822 P.2d 162 (1991) (Nos. 571-21-0, 57130-9).

the employer was at least one percent at fault. It was on that basis that the department was to lose its entire right to reimbursement.

Because of these special circumstances, it can be argued that application of the court's comments about the settlement process should be limited to cases involving third party tort claims and the reimbursement rights of the department or a self-insurer. At one point the court stated its holding was a consequence of the combined effect of the provision added to the workers compensation law relating to third party suits and the general statutory provision relating to allocation of fault.[65] Earlier, however, it had stated that its holding was based on a conclusion that the workers' compensation provision had incorporated the provisions relating to allocation of fault.[66] If so, it is RCW 4.22.070 that requires that there be only a proportionate reduction in the department's right to reimbursement, and it is RCW 4.22.070 that provides the basis for the court's analysis of how settlement negotiations must be conducted. The first statement establishes the decision as applicable to all negotiations involving RCW 4.22.070 and indicates that it is not limited to settlements in workers compensation cases. Indeed, most of the statements made in the opinion refer to settlement negotiations generally; they are not limited to the facts of the case. Opportunities for manipulation by one of several parties will exist in multiparty cases other than those involving workers compensation,[67] giving additional reason for concluding that the court's comments have general applicability.

The reassurance offered that the court's holding will not hamper settlement proceedings likewise appears to have been directed to negotiations generally. The court said:[68]

> We find that an apportionment of fault between all at-fault entities serves as a basis for compromise in settlement negotiations. Therefore our holding does not hamper settlement proceedings.

The reassurance is not fully satisfying. For example, even if the words "trier of fact" do not require a full trial for alloca-

65. *See Clark*, 118 Wash. 2d at 180-81, 822 P.2d at 169-70.

66. *Id.* at 180, 822 P.2d at 169.

67. Consider the problems posed by "Mary Carter" agreements. *See, e.g.*, Lumy v. Stinnett, 488 P.2d 347 (Nev. 1971); Cox v. Kelsey-Hayes Co., 594 P.2d 354 (Okla. 1978); General Motors Corp. v. Lahocki, 410 A.2d 1039 (Md. 1980).

68. *Clark*, 118 Wash. 2d at 191-92, 822 P.2d at 175.

tions of fault, what will happen if one of the parties, dissatisfied with the allocations made, announces that it now desires a full jury trial? Will participation in the "one fault determination hearing" constitute an election of remedies or in some other manner remove allocation issues from the jury trial? Or will it have a consequence no greater than recognition that settlement efforts have failed?

The basis for compromise, the court said, is to be an allocation of fault between *all* at-fault entities, and the allocation is to be made by the trier of fact, not the parties. The court also said that the statute reserves the question of percentages of fault to the trier of fact,[69] and, according to the court, it is to be resolved "in one fault determination hearing" to prevent manipulation by any one party.[70] The court's statement, quoted above, is that the determination is to be made *before* any settlement is reached.[71] Does this mean parties should not undertake to settle a case without involving a "trier of fact" and participating in a fault allocation hearing?

When triers of fact are involved, are they to insist that entities other than the parties be joined before attempting to reach settlement?[72] Are triers of fact to insist on consideration of the fault of entities that cannot be identified sufficiently to permit joinder as parties, such as the phantom car that disappeared after causing an accident on a freeway or the person who left a broken bottle in the sand of a swimming beach?[73] Is the trier of fact to be actively involved in determining the percentages of fault and then to approve the allocations made

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69. *Id.* at 181, 822 P.2d at 170.

70. *Id.* at 186, 822 P.2d at 172.

71. The rigidity of this requirement is suspect, however, given the court's approval of the settlement made in the companion case, *Whitten v. Assoc. Bldg. Components*; *see Clark*, 118 Wash. 2d at 187, 822 P.2d at 172-73. In that case, the plaintiff had settled with the defendant prior to the department's intervention in the case and without a prior fault determination.

72. For example, in an ordinary auto accident case, if the trier of fact believes the injuries may have been aggravated by a design defect, should the trier of fact insist upon involvement of the manufacturer of the vehicle? The court states that the statutory provisions require a trier of fact to determine the percentage of the total fault attributable to *every* entity which caused the plaintiff's damages, not merely those attributable to the parties or entities identified by the parties to a lawsuit. *Clark*, 118 Wash. 2d at 182, 822 P.2d at 170.

73. *See* Cornelius J. Peck, *Constitutional Challenges to the Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability Made by the 1986 Washington Tort Reform Act*, 62 WASH. L. REV. 681, 697 (1987).

before the parties may reach a settlement? How else can triers of fact prevent manipulation?

Parties may persuade a trier of fact to perform a rubber stamp after negotiations take place before the trier of fact in a hearing. Even if the trier of fact adopts such a passive role, however, a substantial amount of the fact-finder's time will be required for those hearings.

Are parties who are subject to joint and several liability and who acknowledge that the claimant is faultless no longer entitled to make an out-of-court settlement seeking contribution later from other parties? Prior to the decision in *Clark*, it appeared that such a party might do so provided that the settlement released other tortfeasors from liability.[74] The court's statements in *Clark* appear to preclude that course of action, relegating parties to the "one fault determination hearing." A defendant could obtain contribution under RCW 4.22.070(2) only after entry of a fault allocation judgment. Most persons contemplating a settlement that releases all tortfeasors, therefore, will be unwilling to enter into a settlement without a prior fault determination. The court's statements cast serious doubt on the possibility that they could later obtain contribution from other tortfeasors without that determination.

As mentioned above, defendants have an incentive to go through trial in the hope that the claimant will be found partially, even though only slightly, at fault. Therefore, absent other considerations, there probably will not be many occasions upon which a defendant would seek an out-of-court settlement with a fault-free claimant. Perhaps some defendants will want to eliminate creditors' doubts about their financial stability. Others may want to have a matter resolved promptly because of a concern for preserving evidence against other tortfeasors. Moreover, it is easy to imagine cases in which there is no chance of allocating fault to a claimant and, yet, the need for prompt settlement is so great that all would acknowledge it. An example of such a need is a requirement of expensive medical treatment for a child who survived an automobile accident in which both parents were killed.

A recent Washington Supreme Court decision suggests

74. Harris, *supra* note 17, at 83-85.

RCW 4.22.040(1) provides that the right to contribution could be enforced either in the original action against joint tortfeasors or in a separate action brought for that purpose. WASH. REV. CODE § 4.22.040(1) (1989).

that another source of pressure upon defendants' insurers may induce them to seek prompt settlement of a faultless plaintiff's claim of joint and several liability. In *Industrial Indemnity Company v. Kallevig*,[75] the Washington Supreme Court held that a single violation of the unfair claims settlement practices established by the Washington Insurance Commissioner is a *per se* unfair trade practice under the Consumer Protection Act.[76] The consequences of such a violation include liability for attorney fees and treble damages up to $10,000.[77] The Insurance Commissioner's rules establish as an unfair practice:

> (6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear. . . . If two or more insurers are involved, they should arrange to make such payment, leaving to themselves the burden of apportioning it.[78]

While there are no cases holding that a third party claimant can recover from an insurance company for a violation of the commissioner's rules, a strong argument has been made that such liability should exist.[79] The insurance commissioner's rule seems to preclude delay based on a slight chance that a claimant will be found to be partially at fault. Therefore, both insurers and claimants may desire a return to a system permitting prompt settlement of claims, leaving the

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75. 114 Wash. 2d 907, 792 P.2d 520 (1990).

76. WASH. REV. CODE § 19.86.010-.86.920 (1989 & Supp. 1990).

77. WASH. REV. CODE § 19.86.090 (1989).

78. *See* WASH. ADMIN. CODE § 284-30-330 (1990). The commissioner's rules are promulgated pursuant to R.C.W. 48.30.010(2). They provide:

> The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance, specifically applicable to the settlement of claims:
>
> . . .
>
> (5) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed.
>
> (6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear. In particular, this includes an obligation to effectuate prompt payment of property damage claims to innocent third parties in clear liability situations. If two or more insurers are involved, they should arrange to make such payment, leaving to themselves the burden of apportioning it.
>
> (7) Compelling insureds to institute or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings.

WASH. ADMIN. CODE § 284-30-330 (1990).

79. David Middaugh, *A Potential Revolution in Insurance Claim Settlement Practices*, TRIAL NEWS, Mar., 1991, at 1.

allocation of liabilities to a later proceeding between tortfeasors.

VI. CONCLUSION

The 1986 Tort Reform Act appears, at least upon a literal reading, to have imposed substantial barriers to efficient and expeditious settlement of claims of parties free from fault against more than one potential defendant. A prudent fault-free plaintiff will bring into a lawsuit every party to whom an allocation of fault is possible without regard for the ability of those parties to respond to a judgment. In many situations, such a claimant will lose portions of a possible recovery from a financially responsible defendant because the claimant finds it necessary to settle with another defendant on the basis of liability. This is inconsistent with the Act's objective of providing an equitable distribution of the costs of injury. Equity would not cause a partial loss of the deserved compensation because of pressing financial need.

Poor draftsmanship created a situation in which the Department of Labor and Industries and self-insurers under Workers' Compensation could be unfairly deprived of the right to reimbursement for benefits paid from recoveries made by workers in third party tort suits. The court's decision in *Clark v. Pacificorp* resolved some of the ambiguities and eliminated some of the flaws in the 1986 Act.[80] Its bold and creative action avoided unprincipled raids on the Worker's Compensation Fund. This stirs hope that the court might undertake an equally important but tactically more difficult task of correcting the Act's very unsatsifactory system for negotiation and settlement of claims of parties without fault. The court is not likely to undertake that task. But the directions it has given for how negotiations must proceed under the Act should lead to legislative reconsideration of the provisions causing those difficulties. The complications of the negotiation of settlement of cases involving a fault-free claimant and multiple tortfeasors may lead plaintiff attorneys, defense attorneys, insurers, and even judges to seek legislative relief.

One of the provisions deserving reconsideration is that which requires a trier to fact to make allocations of fault in all cases, both those tried and those settled, to establish the joint

80. Clark v. Pacificorp, 118 Wash. 2d 167, 182, 822 P.2d 162, 170 (1991).

and several liability of multiple tortfeasors. Another is the provision that apparently requires that all damages proportionate to the share of fault allocable to a joint tortfeasor with whom a claimant has settled be excluded from a judgment later entered against the other tortfeasors. If the legislature eliminated these requirements, negotiation of settlements for fault-free claimants could proceed much as they did prior to enactment of the 1986 Tort Reform Act.