

# The Short Happy Life of Litigation Between Tortfeasors: Contribution, Indemnification and Subrogation After Washington's Tort Reform Acts

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## INTRODUCTION

While many of the ramifications of Washington's 1981<sup>1</sup> and 1986<sup>2</sup> Tort Reform Acts have been divined by the courts, some pockets of uncertainty remain. One such area confronts parties involved in multiple tortfeasor civil litigation. The primary remaining issues are (1) whether a defendant can implead by way of a "third-party complaint" another tortfeasor whom the plaintiff has chosen not to sue; and (2) whether a defendant who has settled a lawsuit or has had a judgment taken against it may pursue other tortfeasors for reimbursement of the monies paid to the tort victim. Such an action might be brought under the theories of contribution, indemnification, or subrogation.

In 1981, the Washington Legislature for the first time created a limited right of contribution.<sup>3</sup> A jointly and severally liable defendant, forced to pay another tortfeasor's share of a settlement or judgment, could now sue for reimbursement.<sup>4</sup> But in 1986, the Legislature generally abolished joint and several liability and replaced it with proportionate liability, with defendants now responsible only for their respective shares of fault.<sup>5</sup> Two exceptions to the general rule of

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1. 1981 Wash. Laws ch. 27.

2. 1986 Wash. Laws ch. 305.

3. See WASH. REV. CODE § 4.22.040 and .050 (1996).

4. See WASH. REV. CODE § 4.22.040.

5. See WASH. REV. CODE § 4.22.070 (1996).

proportionate liability were created: "factual" and "procedural" joint and several liability.<sup>6</sup> The first exception involves the factual existence of an agency or employment relationship, or concerted action.<sup>7</sup> The second exception requires the procedural entry of a judgment against multiple defendants, with a fault-free plaintiff.<sup>8</sup>

The confusion about the propriety of an action for reimbursement arises mainly because of the imperfect meshing of these two acts. While the 1986 Act abolished joint and several liability, the right of contribution created by the 1981 Act remained.<sup>9</sup> And because contribution rests primarily on the existence of joint and several liability, the question arises as to whether a right of contribution serves any purpose under present law. The answer is that contribution still has vitality, but only when joint and several liability exists—now an infrequent occurrence.

Contribution enjoyed a short wave of popularity between 1981 and 1986.<sup>10</sup> It was common for defendants to implead other tortfeasors into lawsuits by third-party complaints, to make cross-claims against other defendants, and to pursue post-settlement or post-judgment claims.<sup>11</sup> But the basic premise for this internecine litigation was seriously undermined by the abolition of joint and several liability in 1986. Because defendants are now (as a general rule) only responsible for their own proportionate share of liability, they can never be forced to pay the share of another tortfeasor. Thus, after the 1986 Act, there has been generally no basis for contribution claims. However, this vestige of the past still inappropriately finds its way into current tort litigation.

This Article will discuss the propriety of claims for statutory contribution in two contexts: cases involving actively negligent tortfeasors, and cases involving both actively and passively negligent tortfeasors. It will also analyze whether, and under what circumstances, a right of reimbursement might be pursued under the equitable theories of contribution, subrogation, or indemnification.

This Article argues that unless an exception to the general rule of proportionate liability exists, a third-party complaint for contribution has no legal basis. The only applicable exception is the *factual* joint and several liability provision dealing with employment, agency, and

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6. See WASH. REV. CODE § 4.22.070(1)(a) and (b).

7. See WASH. REV. CODE § 4.22.070(1)(a).

8. See WASH. REV. CODE § 4.22.070(1)(b).

9. See WASH. REV. CODE § 4.22.040 and .070.

10. In this author's experience, this phenomenon occurred mainly at the trial level.

11. *Id.*

concerted action. The *procedural* joint and several liability provision does not apply to a third-party lawsuit, because judgment against multiple "defendants" will not be entered. Moreover, an agent or employee cannot sue the vicariously liable principal or employer for contribution. Thus, the only situation in which a third-party complaint can be brought by a principal/employer against an agent/employee is when it is brought to recoup monies the principal/employer could be forced to pay under a theory of vicarious liability.

Cross-claims for contribution between defendants are permissible but premature. While joint and several liability may arise under either the factual or the procedural exception, there is no need to seek contribution until one has actually been forced to pay another's share. Moreover, because a defendant seldom pays more than its proportionate share, post-settlement and post-judgment contribution actions are seldom necessary.

Outside of the *statutory* right of contribution, three equitable theories of reimbursement potentially exist: contribution, indemnification and subrogation.<sup>12</sup> However, the common law has long prohibited an actively negligent tortfeasor from using equity to seek reimbursement.<sup>13</sup> While the common law recognized several exceptions for passively negligent tortfeasors who sought indemnification from one whose active negligence subjected them to liability, the 1981 Act abolished this exception when it created the statutory right of contribution.<sup>14</sup>

Questions have been posed as to whether statutory contribution is even applicable in the agency/employment context, and whether other equitable theories should be used instead by a passively negligent party. This Article concludes that despite some conceptual flaws in the application of the statute, contribution is available to a principal/employer against the agent/employee whose active negligence rendered the principal/employer vicariously liable.

Because the 1981 Act abolished equitable (implied) indemnity, the only common-law reimbursement theory remaining is equitable subrogation.<sup>15</sup> However, courts will not resort to equity to fashion a remedy when a statutory or legal remedy already exists, and because contribution is available to an employer/principal, a claim for equitable subrogation is unnecessary.

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12. See discussion *infra*, Part II.

13. See *id.*

14. See 1991 Wash. Laws ch. 27 (codified at WASH. REV. CODE § 4.22.040(3)).

15. See *Newcomer v. Masini*, 45 Wash. App. 284, 287, 724 P.2d 1122, 1125 (1986).

Section I summarizes the history and development of tort law in Washington, with an emphasis on the impact of the 1981 and 1986 Tort Reform Acts and their imperfect union. Section II outlines the traditional equitable remedies that are potentially available to a tortfeasor seeking reimbursement for having paid more than its share. Section III sets out the above-referenced thesis and explains why under current law a tortfeasor's suit for reimbursement should be the exception, not the rule. The need, and the basis, for such litigation is dependent upon the existence of joint and several liability—which now occurs only infrequently.

## I. THE DEVELOPMENT AND MODIFICATION OF TORT LAW IN WASHINGTON

Over time, by legislative enactment and case law, certain harsh common law doctrines have been modified. In 1973, the Washington Legislature enacted a "pure" comparative negligence system.<sup>16</sup> In 1981 and 1986, significant tort-reform legislation was enacted.<sup>17</sup> The 1981 Act authorized a tortfeasor's action for contribution for the first time in Washington history.<sup>18</sup> Later, the 1986 Act largely eliminated the doctrine of joint and several liability.<sup>19</sup> All this occurred against a backdrop of significantly expanding theories of tort liability.

### A. *A Brief Historical Review of Tort Law*

The law of torts is concerned with the allocation of losses arising out of human activities. It is a creature of social theory whose "primary purpose, of course, is to make a fair adjustment of the conflicting claims of the litigating parties."<sup>20</sup> Our courts and legislatures are routinely called upon to make adjustments to the rules to create a more equitable system. The Washington Legislature has indicated that while decisional law has resulted in significant progress and has eliminated the harshness of many common law doctrines, "the legislature has from time to time felt it necessary to intervene to bring about needed reforms."<sup>21</sup>

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16. See 1973 Wash. Laws 1st Ex. Sess. ch. 138, § 1 (former WASH. REV. CODE § 4.22.010 as amended in WASH. REV. CODE § 4.22.005 and .015 (1996)).

17. See 1981 Wash. Laws ch. 27 and 1986 Wash. Laws ch. 305.

18. See 1981 Wash. Laws ch. 27, § 12B (codified at WASH. REV. CODE § 4.22.040 and .050).

19. See WASH. REV. CODE § 4.22.070.

20. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 3, at 15 (5th ed. 1984).

21. 1981 Wash. Laws ch. 27, § 1.

The course of tort law since the late 1950s has been an expansion of tort liability. New theories and causes of action were created. The rules regarding statutes of limitation, contributory negligence, causation, and immunities were relaxed. Most of these changes worked to the benefit of injured parties in civil actions against a widely expanded list of tortfeasors.<sup>22</sup>

These trends occurred against the backdrop of a well-developed body of common law. Two of the harsher common law rules were joint and several liability,<sup>23</sup> and contributory negligence.<sup>24</sup> Joint and several liability was denounced as a system that imposed liability not based upon fault, but rather upon the ability to pay.<sup>25</sup> Under the common law, joint,<sup>26</sup> concurrent,<sup>27</sup> and successive<sup>28</sup> tortfeasors were jointly and severally liable for all indivisible harm<sup>29</sup> caused by their

22. See generally Gregory C. Sisk, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, 16 U. PUGET SOUND L. REV. 1, 11 (1992).

23. It had long been the rule that when multiple tortfeasors cause indivisible harm, each was "liable for the entire harm caused and the injured party [could] sue one or all to obtain full recovery." *Seattle-First Nat'l Bank v. Shoreline Concrete*, 91 Wash. 2d 230, 235, 588 P.2d 1308, 1312 (1978). For a general discussion of the doctrine of joint and several liability, see *id.* at 234-36, 588 P.2d at 1311-14. Joint and several liability has existed in Washington since at least 1901. See, e.g., *Doremus v. Root*, 23 Wash. 710, 713-714, 63 Pac. 572, 573 (1901).

24. The common law doctrine of contributory negligence dates to the early nineteenth century English case of *Butterfield v. Forrester*. 11 East 60, 103 Eng. Rep. 926 (K.B. 1809). See also *Hynek v. City of Seattle*, 7 Wash. 2d 386, 395-98, 111 P.2d 247, 251-53 (1941). The contributory negligence of a tort victim at common law worked as a total bar to recovery. See *Godfrey v. State*, 84 Wash. 2d 959, 965, 530 P.2d 630, 633 (1975). The 1973 Legislature altered this law to provide that a plaintiff's own fault no longer negated the right of recovery, it only diminished a recovery. *Id.* at 964-65, 530 P.2d at 633. This has become known as a "pure" comparative negligence system. *Id.* at 955, 530 P.2d at 633.

25. See, e.g., *Zakshersky v. City of New York*, 562 N.Y.S.2d 371, 373 (1990).

26. "Joint tortfeasors are those who have acted in common or who have breached a joint duty." *Seattle-First Nat'l Bank*, 91 Wash. 2d at 235, 588 P.2d at 1312 (citations omitted). There must exist "(1) a concert of action, (2) a unity of purpose or design, [and] (3) two or more defendants working separately but to a common purpose and each acting with the knowledge and consent of the others." *Rauscher v. Halstead*, 16 Wash. App. 599, 601, 557 P.2d 1324, 1325 (1976).

27. Concurrent tortfeasors are those whose separate acts, which breach independent duties, concur to produce a single injury. See *Seattle-First Nat'l Bank*, 91 Wash. 2d at 235, 588 P.2d at 1312. See also *Fugere v. Pierce*, 5 Wash. App. 592, 596, 490 P.2d 132, 134 (1971) (endorsing the holding of *Summers v. Tice*, 33 Cal. 2d. 80, 199 P.2d 1 (1948)).

28. Successive tortfeasors are those who, at different points in time, breach independent duties to the plaintiff, causing harm which may be divisible or indivisible. See *DeNike v. Mowery*, 69 Wash. 2d 357, 368, 418 P.2d 1010, 1017 (1966) (discussing classic example of original wrongdoer and subsequent treating physician who caused further harm).

29. An "indivisible" injury is one that cannot be divided into discrete harms. See *Seattle-First Nat'l Bank*, 91 Wash. 2d at 235-36, 588 P.2d at 1312. This indivisibility of harm is said to warrant the imposition of the entire liability upon any tortfeasor whose acts are a proximate cause of the harm. *Id.* See also *Rauscher*, 16 Wash. App. at 601, 557 P.2d at 1326. The

negligence.<sup>30</sup> The victim could sue any one of these tortfeasors and force that person to pay the entirety of the judgment.

The Washington Legislature recognized the harshness of contributory negligence two decades ago. The rule was abolished in 1973 in favor of a "pure" system of comparative negligence that permitted a plaintiff to recover some of his damages regardless of his degree of fault.<sup>31</sup> Joint and several liability was, however, not abolished.<sup>32</sup> This alignment of legal rules worked to the great benefit of tort victims.<sup>33</sup>

The dilemma created for defendants by the retention of joint and several liability and the abolition of contributory negligence was twofold. First, the expansive trends of tort law significantly increased the liability of remote actors with "deep pockets." As a result, they could now be required to pay a large judgment based upon only a small percentage of fault. Second, statutory comparative negligence applied only between the plaintiff and the defendants, not between the defendants themselves; neither contribution nor apportionment of fault was allowed.

In 1981, recognizing the harshness of the rule, the Washington Legislature created a statutory right of contribution among tortfeasors.<sup>34</sup> Under the 1981 Act, a defendant who was jointly and severally liable with another, and who had paid more than its share, could sue the other tortfeasor asking for "contribution" to the loss.<sup>35</sup>

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indivisible injury rule was incorporated into both the 1981 and 1986 acts. 1981 Wash. Laws ch. 27, § 11; 1986 Wash. Laws, ch. 305, § 402 (codified at WASH. REV. CODE § 4.22.030) (1996). The statute provides: "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." *Id.*

30. See, e.g., *Rauscher*, 16 Wash. App. at 602, 557 P.2d at 1324 (1976) (holding that all those who contribute to the pollution of streams may be joined as defendants in the same action).

31. See 1973 Wash. Laws 1st Ex. Sess. ch. 138, § 1 (former WASH. REV. CODE § 4.22.010, codified as amended in WASH. REV. CODE §§ 4.22.005-.015).

32. See *Seattle-First Nat'l Bank*, 91 Wash. 2d at 237, 588 P.2d at 1313.

33. "With the co-existence of comparative fault, joint and several liability, and [the absence of] contribution, the pendulum had swung as far as it was going to in favor of the plaintiff." Keri L. Ellison, *Developments in the Law, The 1986 Washington Tort Reform Act*, 23 WILLAMETTE L. REV. 211, 239 (1987).

34. 1981 Wash. Laws ch. 27, §§ 12 and 13 (codified at WASH. REV. CODE §§ 4.22.040 and .050 and sometimes referred to as the "Tort Reform Act of 1981"). Sections 12 and 13 were part of a larger products liability reform bill. See 1981 Wash. Laws ch. 27 (The title of the chapter is Tort Actions—Products Liability—Contributory Negligence—Contribution.).

35. See WASH. REV. CODE § 4.22.040(1) (1996). The statute provides:

A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death or harm, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose.

The Legislature substituted the right of contribution for implied indemnity, which it abolished.<sup>36</sup> However, one significant provision of the common law still remained: joint and several liability.

The doctrines of contributory negligence and joint and several liability evolved together.<sup>37</sup> They "grew out of the common law concept of the [need for] unity of cause [because] of action(s) the jury could not be permitted to apportion the damages, since there was but one wrong."<sup>38</sup> Because of the close relationship between the doctrines, the statutory abolition of contributory negligence caused some to question the propriety of retaining joint and several liability.<sup>39</sup>

In 1978 the Washington Supreme Court was asked whether the legislative adoption of comparative negligence mandated the judicial abolition of joint and several liability.<sup>40</sup> Although the Court answered the question in the negative, it recognized that the legislature had the authority to make such a change.<sup>41</sup> And, in 1986, the legislature did so.

### B. *The 1986 Tort Reform Act Replaced Joint and Several Liability with Proportionate Liability*

During the early and mid-1980s, "tort reform" swept the country. It was fueled largely by an insurance-availability crisis and public polls which showed few Americans supporting the underlying premise of joint and several liability.<sup>42</sup> A 1987 Harris Poll revealed that seventy

The basis for contribution among liable persons is the comparative fault of each such person. However, the court may determine that two or more persons are to be treated as a single person for purposes of contribution.

*Id.*

36. 1981 Wash. Laws ch. 27, § 12 (codified as amended in WASH. REV. CODE § 4.22.040(3) (1996)). In pertinent part, this section states that "[t]he common law right of indemnity between active and passive tortfeasors is abolished." *Id.*

37. See *Washburn v. Beatt Equip. Co.*, 120 Wash. 2d 246, 292, 840 P.2d 860, 885 (1992).

38. William L. Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 418 (1937).

39. One noted commentator summarized the policy argument for abandoning the rule of joint and several liability as follows:

If a plaintiff may recover despite fault, suffering only a diminishment of recovery in proportion to that fault, it is unjust to impose on a tortfeasor a liability greater than the proportionate fault of the tortfeasor whose wrongdoing combined with the conduct of the plaintiff and other parties to cause the harm. In other words, responsibility for harm done should be distributed in proportion to the fault of all the parties involved and not governed by concepts of causation.

Cornelius J. Peck, *Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability*, 62 WASH. L. REV. 233, 238 (1987).

40. See *Seattle-First Nat'l Bank*, 91 Wash. 2d at 236-38, 588 P.2d at 1313 (1978).

41. See *id.* at 237, 588 P.2d at 1313.

42. See Kathryn T. Hicks, *The Case for Reform: An Economic Analysis of Joint and Several Liability after Comparative Negligence*, 17 CAP. U. L. REV. 187, 197 (1988).

percent of the United States population favored the elimination of joint and several liability among defendants in tort actions.<sup>43</sup> "Ultimately the law must coincide with public opinion, and cannot stand against it[.]"<sup>44</sup> The Washington Legislature's response was the adoption of what has become known as the "Tort Reform Act of 1986,"<sup>45</sup> which largely abrogated the doctrine of joint and several liability.<sup>46</sup> The Washington Supreme Court held that the Act makes it clear that proportionate liability is "intended to be the general rule. . . ."<sup>47</sup> The declared legislative purpose for this modification was to remedy the unjustness of joint and several liability, and to address the concern about affordable liability insurance.<sup>48</sup> The Preamble to the Tort Reform Act states, in part, that its purpose "is to enact further reforms in order to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance."<sup>49</sup>

Proportionate liability is now the general rule in Washington. A plain reading of the Tort Reform Act of 1986 and three recent Washington Supreme Court decisions confirm that the Act largely abolished joint and several liability in favor of a general rule of several<sup>50</sup> ("proportionate") liability.<sup>51</sup> The trier of fact determines

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43. See *id.*

44. See KEETON ET AL., *supra* note 20, § 3, at 18.

45. 1986 Wash. Laws ch. 305, §§ 100-912.

46. 1986 Wash. Laws ch. 305, § 401 (codified as amended in WASH. REV. CODE § 4.22.070 (1996)). The "centerpiece" of the Tort Reform Act of 1986 was the modification of joint and several liability. See Sisk, *supra* note 22, at 6. "In this single section of the Act, the Washington Legislature established a new foundation for tort liability—one of individual responsibility in direct proportion to individual fault." *Id.* In addition to the joint and several liability provision, the 1986 Act also addressed the accelerated waiver of the physician-patient privilege in section 101 (codified at WASH. REV. CODE § 5.60.060 (1996)); the reasonableness of attorney's fees in section 201 (codified at WASH. REV. CODE § 4.24.005 (1996)); limitation of actions for medical malpractice in section 502 (codified at WASH. REV. CODE § 4.16.350 (1996)); the "felony defense" in section 501 (codified at WASH. REV. CODE § 4.24.005 (1996)); the "alcohol defense" in section 902 (as amended by 1987 Wash. Laws ch. 212, § 1001 and 1994 Wash. Laws ch. 275, § 30, codified at WASH. REV. CODE § 5.40.060 (1996)); and several other provisions now scattered throughout Washington's Revised Code. See 1986 Wash. Laws ch. 305, §§ 100-912.

47. *Washburn v. Beatt Equip. Co.*, 120 Wash. 2d 246, 294, 840 P.2d at 860, 886 (1992) (citations omitted). Indeed, proportionate liability is "an exception that has all but swallowed the general rule." *Id.* at 294 n.7, 840 P.2d at 886 n.7.

48. See *id.* at 292-93, 840 P.2d at 885.

49. 1986 Wash. Laws ch. 305, § 100.

50. Some have correctly criticized the use of the term "several" on the basis that at common law "several" liability meant that any one of several defendants could be forced to pay for the entire harm. See Bryan Harnetiaux, *RCW 4.22.070, Joint and Several Liability, and the Indivisibility of Harm*, 27 GONZ. L. R. 193, 198 n.19 and accompanying text (1991/92). "Joint" liability referred to the plaintiff's right to join all tortfeasors in a single action. *Id.* "Proportionate liability" is the more accurate term. *Id.*



the percentage of the total fault attributable to every "entity" that caused the plaintiff's damages.<sup>52</sup> "Entities" include the plaintiff(s), defendant(s), third-party defendant(s), released and dismissed parties, and any nonparty who possesses a defense or an immunity (except immune employers).<sup>53</sup>

When joint and several liability exists, a defendant will usually be responsible only for their share of fault as it is apportioned between those defendants actually named in the suit.<sup>54</sup> "Empty chairs"<sup>55</sup> were created for immune and absent entities and those with personal defenses. Joint and several liability now only arises procedurally or by establishing certain facts.<sup>56</sup> In some circumstances because of the inapplicability of the Act; however, common law joint and several liability may continue to govern.<sup>57</sup>

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51. See *Anderson v. City of Seattle*, 123 Wash. 2d 847, 850, 873 P.2d 489, 491 (1994); *Gerrard v. Craig*, 122 Wash. 2d 288, 292, 857 P.2d 1033, 1035 (1993); and *Washburn*, 120 Wash. 2d at 294, 840 P.2d at 886.

52. See WASH. REV. CODE § 4.22.070(1). The statute provides:

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 except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities with any other individual defenses against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title 51 RCW. 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 the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except: [as set forth in WASH. REV. CODE § 4.22.070(1)(a) and (1)(b)].

*Id.*

53. See *id.* The statutory list of entities is "illustrative, as opposed to restrictive." *Arbitration of Fortin*, 82 Wash. App. 74, 84, 914 P.2d 1209, 1214 (1996). The legislature did not intend to limit the apportionment of fault to only those entities specifically enumerated in RCW 4.22.070(1). See *id.*

54. See WASH. REV. CODE § 4.22.070. See also *Anderson*, 123 Wash. 2d at 851, 873 P.2d at 491; *Gerrard*, 122 Wash. 2d at 292, 857 P.2d at 1035; and, *Washburn*, 120 Wash. 2d at 294, 840 P.2d at 886.

55. An empty chair, or nonparty "entity," describes the circumstance of a tortfeasor who is not present in the courtroom, yet can still be apportioned fault by the parties to the suit. See WASH. REV. CODE § 4.22.070(1).

56. See *infra* notes 59-72 and accompanying text.

57. See WASH. REV. CODE § 4.22.070(3) (1996).

C. *The Exceptions to Proportionate Liability: "Factual" and "Procedural" Joint and Several Liability*

The 1986 Act creates two exceptions to the general rule of proportionate liability. "Factual" joint and several liability arises when a person acts as the "agent or servant" of a party, or when both were "acting in concert."<sup>58</sup> Acting in concert is said to require consciously acting together in an unlawful manner.<sup>59</sup>

"Procedural" joint and several liability arises when the claimant is free of fault and judgment is entered against multiple defendants.<sup>60</sup> This type of joint and several liability is a modified version of the common law rule: when a plaintiff is fault free, only those defendants *against whom judgment is entered* are liable, and then only for "the sum of their proportionate shares" of the plaintiff's total damages.<sup>61</sup> Recall that at common law, the plaintiff could single out one of several tortfeasors for suit and force that defendant to pay for the entirety of the harm.<sup>62</sup> Defendants now are generally not liable for the share of any at-fault entity that has no judgment taken against it as a defendant.<sup>63</sup>

These two distinct statutory forms of joint and several liability can logically be denominated "procedural" and "factual." *Factual* joint and several liability arises under the agent/employee or acting-in-concert exception of subsection (1)(a) of the Act.<sup>64</sup> A plaintiff may establish joint and several liability *factually*, by introducing facts which establish the employment or agency relationship, or the conspiracy. This *factual* exception is in contrast to the second form of joint and several liability under subsection (2)(b) where the fault-free plaintiff may *procedurally* establish joint and several liability through the procedural entry of a judgment against multiple defendants.<sup>65</sup>

Under the factual exception, joint and several liability can arise between an employer and its employee for such torts as negligent driving. Under the procedural exception, two motorists whose independent acts of negligence united to cause the plaintiff injury may

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58. WASH. REV. CODE § 4.22.070(1)(a).

59. See *Moen v. Island Steel*, 75 Wash. App. 480, 487, 878 P.2d 1246, 1250 (1994), *rev'd on other grounds*, 128 Wash. 2d 745, 762 n.8, 912 P.2d 472, 481 n.8 (1996). See also *Martin v. Abbott Lab.*, 102 Wash. 2d 581, 596, 689 P.2d 368, 377-78 (1984).

60. See WASH. REV. CODE § 4.22.070(1)(b) (emphasis added).

61. *Id.* (emphasis added).

62. See *Seattle-First National Bank*, 91 Wash. 2d at 235, 588 P.2d at 1312.

63. See *supra* notes 46, 51, and 52.

64. See WASH. REV. CODE § 4.22.070(1)(a).

65. See WASH. REV. CODE § 4.22.070(1)(b).

be held jointly and severally liable, but only when the plaintiff is fault-free and a judgment has been entered against both defendants. At first blush, the 1986 Act may appear to have expanded common law joint and several liability, but in fact it did not. Although defendants who would not have been jointly and severally liable previously—namely, tortfeasors who could segregate the harms caused—may now, so long as a judgment is entered against them, use the common law requirement that damages be “indivisible” for joint and several liability to exist.<sup>66</sup> Thus, if the defendants can segregate the plaintiff’s damages, then each defendant is liable only for that harm it actually caused.<sup>67</sup> In addition, the defendants are entitled to an apportionment of fault among all harm-causing entities, even for those damages that are indivisible.<sup>68</sup>

The 1986 Act also wholly exempts three types of claims from the reformed liability scheme: hazardous wastes and substances; tortious interference with a contract or business relationship; and fungible product claims.<sup>69</sup> These claims remain subject to common-law joint and several liability rules.<sup>70</sup>

Under the Act, a party can be jointly and severally liable for the acts of a nonparty, as was the case under the common law. Subsection (1)(a) provides that “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.”<sup>71</sup>

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66. See WASH. REV. CODE § 4.22.030 (1996).

67. See, e.g., *Phennah v. Whelan*, 28 Wash. App. 19, 29, 621 P.2d 1304, 1310 (1980), review denied, 95 Wash. 2d 1026 (1981) (holding that once a plaintiff has proven that successive tortfeasors caused some damage, the burden of segregating those damages is upon the defendants).

68. See WASH. REV. CODE § 4.22.070(1). Indeed, one of the most important aspects of the 1986 Act is the monumental paradigm shift from joint and several liability for all harm (unless the defendants could segregate seemingly “indivisible” harm) to a system of apportioning liability based on “fault,” free from anachronistic notions of causation and divisibility. See WASH. REV. CODE § 4.22.015 (1996). Now, even where harm is indivisible, the jury apportions responsibility to every harm-causing entity based upon its fault. For example, one defendant could be found 25% at fault for a plaintiff’s indivisible injuries. This determination involves the nature of the parties’ conduct, and the extent of the causal relation between that conduct and the resultant harm. See *id.*

69. See WASH. REV. CODE §§ 4.22.070(3)(a)-(c) (1996).

70. See, e.g., *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 667, 771 P.2d 711, 727-28, modified by 780 P.2d 260 (1989) (concluding under WASH. REV. CODE § 4.22.070(3) in a products liability action that asbestos is a “hazardous substance,” and thus common law joint and several liability principles apply).

71. WASH. REV. CODE § 4.22.070(1)(a) (emphasis added). See also *Gass v. McPherson’s Inc.*, 79 Wash. App. 65, 70, 899 P.2d 1325, 1328 (1995) (observing in dicta that such a result is supported by the Act).

Thus, even if a plaintiff is at fault, a defendant employer/principal can be jointly and severally liable for the acts of its nonparty employee/agent. Similarly, even if the plaintiff is at fault, a defendant can be jointly and severally liable for the fault of those who have acted in concert. The rule would likewise apply if the employee/agent or co-conspirator was a named defendant.

Who has the burden of apportioning fault to a nonparty depends on who desires to blame the "empty chair." The 1986 Act mandates that the trier of fact allocate fault to all "entities" that caused the claimant's damages.<sup>72</sup> Any party can assert that an entity is at fault. However, this provision is not self-executing. One of the parties must present evidence of an entity's fault before the allocation procedure is invoked.<sup>73</sup> "Only the plaintiff, however, can assert that another person is liable to the plaintiff."<sup>74</sup> If the plaintiff does not do so, the burden is on the defendant to provide such proof. Additionally, Washington court rules now require a defendant to assert nonparty entity fault as an affirmative defense.<sup>75</sup> The rule also requires a defendant to identify the entity, if known.<sup>76</sup>

A plaintiff may wish to apportion fault to a nonparty who is jointly and severally liable with the defendant, such as its employee. A defendant may wish to establish the fault of a nondefendant for the purpose of reducing its own share and proportionate fault.<sup>77</sup> "[T]he person at fault is not liable to the plaintiff—the plaintiff has made no claim against him or her—but his or her fault nevertheless operates to reduce the 'proportionate share' of damages that the plaintiff can recover from those against whom the plaintiff has claimed."<sup>78</sup> Thus, the locus of the burden to plead and prove nonparty fault is dependent upon the circumstances.

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72. See WASH. REV. CODE § 4.22.070(1).

73. See *Adcox v. Children's Orthopedic Hosp.*, 123 Wash. 2d 15, 25, 864 P.2d 921, 928 (1993).

74. *Mailloux v. State Farm Ins.*, 76 Wash. App. 507, 511, 887 P.2d 449, 452 (1994).

75. See WASH. CIV. R. 12(i) (1996-97). The rule provides:

Nonparty at Fault. Whenever a defendant or a third party defendant intends to claim for purposes of RCW 4.22.070(1) that a nonparty is at fault, such claim is an affirmative defense which shall be affirmatively pleaded by the party making the claim. The identity of a nonparty claimed to be at fault, if known to the party making the claim, shall also be affirmatively pleaded.

*Id.*

76. See WASH. CIV. R. 12(i) (1996-97); see also *Henderson v. Tyrell*, 80 Wash. App. 592, 625, 910 P.2d 522, 541 (1996) (holding that defendant's failure to affirmatively plead nonparty fault precluded introduction of such evidence at trial).

77. See WASH. REV. CODE § 4.22.070(1).

78. *Mailloux*, 76 Wash. App. at 512, 887 P.2d at 452.

There is still some uncertainty as to whether a fault-free plaintiff could settle with a defendant, and establish procedural joint and several liability between the settling defendant and the remaining defendants, by using the device of retaining the settling defendant as a party. Examples of possible procedures might include a loan receipt agreement, the entry of a covenant not to enforce, or a covenant not to execute a judgment, all of which would leave a settling defendant as a party. Judgment could later be entered against the settling defendant and the nonsettling defendants, and *procedural* joint and several liability could arguably arise under subsection (1)(b) of the 1996 Act.<sup>79</sup>

A contrary and more forceful argument can be made that the settling defendant has been "released" by the plaintiff,<sup>80</sup> or has an individual defense, or is immune from liability because the plaintiff cannot recover any money from that defendant. The 1986 Act provides that "[j]udgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant[.]" or who have prevailed on an individual defense.<sup>81</sup> Thus, the 1986 Act does not authorize a judgment to be entered against an immune or released defendant, or one with a defense. Alternatively, it can be argued that a "judgment" (as that term is used in the 1986 Act) with real, adverse consequences has not been entered.<sup>82</sup> Such a hollow judgment cannot create joint and several liability.

#### D. Third-Party Practice

The 1986 Act strongly suggests that third-party practice under Washington's Civil Rules is improper in most cases. The impleader procedure under this rule involves a defendant filing a "third-party" complaint (here, for contribution) against a stranger to the suit, and

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79. See WASH. REV. CODE § 4.22.070(1)(b).

80. In *Shelby v. Keck*, 85 Wash. 2d 911, 918, 541 P.2d 365, 370 (1975), the court held that a covenant not to execute judgment between the plaintiff and a defendant was in actuality a binding settlement and required that defendant's dismissal from the case as no "justiciable controversy remained between him and the plaintiff." See also J. Michael Philips, *Looking out for Mary Carter: Collusive Settlement Agreements in Washington Tort Litigation*, 69 WASH. L. REV. 255 (1995). But see *Jensen v. Beard*, 40 Wash. App. 1, 9-10, 696 P.2d 612, 618 (1985) (concluding that "loan receipt" agreement between the plaintiff and one defendant was valid and enforceable, and was not a release).

81. WASH. REV. CODE § 4.22.070(1).

82. See *Sisk*, *supra* note 22, at 50-53.

thus making it a party.<sup>83</sup> A third-party complaint may only name as a defendant a nonparty "who is or may be liable" to the defendant/third-party plaintiff.<sup>84</sup> However, a condition precedent to the right of contribution is the existence of joint and several liability.<sup>85</sup> And, a third-party defendant cannot be jointly and severally liable with a third-party plaintiff/defendant, unless an employment or agency relationship exists, or concerted action has occurred. Thus, a *prima facie* element of a contribution cause of action is usually absent.

The contribution statute was enacted in 1981 when joint and several liability was the rule, not the exception. The 1986 Act altered that situation and significantly undermined the underlying basis—and the need—for a claim of contribution. Such a claim requires not only joint and several liability, but also requires the party to pay another person's share of liability.<sup>86</sup> Since a defendant will generally never pay more than its proportionate share, there will be no need for a defendant to sue another tortfeasor for having overpaid.

Filing a third-party complaint against another tortfeasor cannot create *procedural*<sup>87</sup> joint and several liability. The 1986 Act indicates that judgment is entered only against "each defendant" and the courts have held accordingly.<sup>88</sup> The Act uses the term "third-party defendants" in the very sentence in which it states that judgment shall be entered only against "defendants."<sup>89</sup> It is, therefore, fairly obvious that the legislature intended to exclude third-party defendants from joint and several liability under the *procedural* exception.<sup>90</sup> "A person

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83. See WASH. CIV. R. 14(a) (1996-97). The rule provides in pertinent part: When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.

*Id.*

84. WASH. CIV. R. 14(a).

85. See WASH. REV. CODE § 4.22.040(1).

86. *Id.*

87. See WASH. REV. CODE § 4.22.070(1)(b).

88. See *Anderson*, 123 Wash. 2d at 850, 873 P.2d at 491; *Gerrard*, 122 Wash. 2d at 292, 857 P.2d at 1035; *Washburn*, 120 Wash. 2d at 294, 840 P.2d at 886.

89. See WASH. REV. CODE § 4.22.070(1).

90. See *Anderson*, 123 Wash. 2d at 852, 873 P.2d at 492 ("a defendant against whom judgment is entered, as that term is used in RCW § 4.22.070(1)(b), must be a *named defendant in the case when the court enters its final judgment*" (emphasis added)); *Gerrard*, 122 Wash. 2d at 298, 857 P.2d at 1038-39; and *Washburn*, 120 Wash. 2d at 294, 840 P.2d at 886; see also *Cooper v. Viking Ventures*, 53 Wash. App. 739, 745, 770 P.2d 659, 662 (1989) (affirming imposition of sanctions under Wash. Civ. R. 11 for defendant's refusal to dismiss "frivolous" third-party complaint for contribution and indemnification against another defendant who had settled with the plaintiff).

is not liable to the plaintiff at all, much less jointly and severally, if he or she has not been named by the plaintiff."<sup>91</sup> This can change only if the plaintiff amends the complaint and asserts a direct claim against the third-party defendant. Therefore, a third-party complaint for contribution does not have a good faith basis to be filed in cases involving the *procedural* joint and several liability exception.<sup>92</sup>

This rule is the same in other jurisdictions which have adopted contribution statutes. In *Pyramid Condominium Ass'n v. Morgan*,<sup>93</sup> the court considered the question under Maryland law.<sup>94</sup> Two tort defendants filed third-party complaints for contribution against a number of companies whom the plaintiff had not sued in the federal court diversity action.<sup>95</sup> The plaintiff had, however, sued these third-party defendants in a separate state court action.<sup>96</sup>

The third-party defendants' motion to dismiss the contribution claims was granted.<sup>97</sup> The *Morgan* court noted that jurisdictional requirements barred the plaintiff from suing the third-party defendants in federal court.<sup>98</sup> Therefore, the third-party defendant could never be directly liable to the plaintiff in that lawsuit.<sup>99</sup>

Because the third-party defendant companies could not be liable to the plaintiff, they likewise could not have any "derivative" liability for contribution.<sup>100</sup> "When a plaintiff has no right of action against a third-party, there can be no contribution entitling the defendant to join the third party as a defendant under the Uniform [Contribution Among Tortfeasors] Act, notwithstanding the fact that liability under the Act may be joint or several."<sup>101</sup>

The rule disallowing a third-party complaint for contribution is particularly appropriate under Washington's statutory scheme, which requires third-party defendants to be "defendants against whom

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91. *Mailloux*, 76 Wash. App. at 513, 887 P.2d at 452.

92. Note that this would apply only to *procedural* joint and several liability cases under subsection (1)(b), and not to *factual* joint and several cases under subsection (1)(a). See WASH. REV. CODE §§ 4.22.070(1)(a) and (1)(b). *Factual* joint and several liability can arise whether certain tortfeasors are even made party to the suit. See WASH. REV. CODE § 4.22.070(1)(a).

93. 606 F. Supp. 592 (D. Md. 1985).

94. See *id.*

95. See *id.* at 594.

96. See *id.*

97. See *Morgan*, 606 F. Supp. at 599.

98. See *id.*

99. See *id.* at 598.

100. See *id.*

101. *Morgan*, 606 F. Supp. at 598.

judgment is entered" before *procedural* joint and several liability will arise.<sup>102</sup>

An employee/agent does not have to be a party-defendant to create joint and several liability for its employer/principal under the *factual* exception.<sup>103</sup> An employer/principal may have a legal basis to bring a third-party suit for contribution against an employee/agent. This will not of course relieve the employer/principal of its vicarious liability; it will, however, result in the employee/agent also being found liable.<sup>104</sup>

Strategically, "filling the empty chair" by way of impleading a nonparty tortfeasor is often foolhardy. First, the nonparty tortfeasor is an "entity" to whom fault can be apportioned.<sup>105</sup> Defendants are not liable for the shares of nonparty entities, unless they are agents, employers or concerted actors.<sup>106</sup> Thus, if the plaintiff is fault free and amends the complaint to make a direct claim against the third-party defendant, the defendant who impleads another tortfeasor has done nothing more than create joint and several liability where it previously did not exist.

Secondly, filling the empty chair brings an attorney into the courtroom to argue that the third-party defendant is not at fault, but rather that the defendant is. Otherwise, the empty chair would have had no one to "defend" it but the plaintiff, whose recovery will be diminished proportionately by any fault assigned to the empty chair.<sup>107</sup> A plaintiff would typically prefer to present its case-in-chief against the defendant without having to worry about defending empty chair entities. The quality and sequence of the plaintiff's presentation is often compromised. Furthermore, a savvy plaintiff's attorney takes much pleasure in watching tortfeasors blame each other in front of the jury.

### E. Reasonableness Hearings

Reasonableness hearings are a creature of the Tort Reform Act of 1981. These are essentially evidentiary hearings to determine whether, based upon various judicially determined factors, an amount paid by

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102. WASH. REV. CODE § 4.22.070(1)(b).

103. See WASH. REV. CODE § 4.22.070(1)(a).

104. See *id.*

105. See WASH. REV. CODE § 4.22.070(1).

106. See WASH. REV. CODE § 4.22.070(1) and (1)(a).

107. See WASH. REV. CODE § 4.22.070(1).



a defendant in settlement was "reasonable."<sup>108</sup> They serve two basic purposes: (1) to establish the right to contribution of a jointly and severally liable defendant settling under the 1981 Act;<sup>109</sup> and (2) to establish the right of a nonsettling, jointly and severally liable defendant to obtain a "credit," or reduction of its judgment obligation, for the reasonable amount paid by a settling defendant.<sup>110</sup> They serve to prohibit the manipulation of the value of a case by settling parties to the detriment of the nonsettling defendant.<sup>111</sup>

The requirement of the reasonableness hearing was enacted in 1981—at a time when joint and several liability was the rule, not the exception.<sup>112</sup> Five years later, the exact opposite occurred; joint and several liability became the exception, not the rule. But, as with the contribution statute, the provision for reasonableness hearings was not accordingly revised in 1986.<sup>113</sup> This is likely because both retain some limited application. Our Supreme Court recently stated that a decision on the continuing necessity of such hearings "must await another day."<sup>114</sup>

The requirement for a reasonableness hearing is tied to the right of contribution. Both are founded upon the assumption that joint and several liability exists. In *Waite v. Morissette*,<sup>115</sup> the court concluded that a nonsettling defendant who is not jointly and severally liable is *not* entitled to a credit for amounts paid by settling defendants.<sup>116</sup> At issue was the continuing effect of the offset provision and the reasonableness hearing requirement of the 1981 Act after the passage of the 1986 Act.<sup>117</sup>

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108. See, e.g., *Glover v. Tacoma Gen. Hosp.*, 98 Wash. 2d 708, 715-18, 658 P.2d 1230, 1235-36 (1983).

109. See WASH. REV. CODE § 4.22.040(2)(b) (1996).

110. See WASH. REV. CODE § 4.22.060(2) (1996). See, e.g., *Stout v. State*, 60 Wash. App. 527, 803 P.2d 1352, (1991) (pre-1986 Tort Reform Act case reducing jury verdict against nonsettling defendant by amounts paid by settling defendants).

111. See *Adams v. Johnston*, 71 Wash. App. 599, 604, 860 P.2d 423, 426 (1993), review denied, 124 Wash. 2d 1020 (1994); Philip A. Talmadge, *Washington's Product Liability Act*, 5 U. PUGET SOUND L. REV. 1, 19 (1981).

112. 1981 Wash. Laws ch. 27, § 14 (codified as amended in WASH. REV. CODE § 4.22.060 (1996)).

113. See 1986 Wash. Laws ch. 305, § 100-912.

114. *Washburn*, 120 Wash. 2d at 298, 840 P.2d at 888.

115. 68 Wash. App. 521, 843 P.2d 1121 (1993).

116. See *id.*

117. See WASH. REV. CODE § 4.22.060(1) (1996). The statute provides:

A party prior to entering into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with a claimant shall give five days' written notice of such intent to all other parties and the court. The court may for good cause authorize a shorter notice period. The notice shall contain a copy of the proposed agreement. A

The *Waite* court concluded that the 1986 Act "established proportionate liability" with the limited exceptions of where defendants act in concert, a person acts as an agent or servant of a party, or a claimant is not at fault.<sup>118</sup> The court went on to say that the reasonableness hearing provision of the 1981 Act is only applicable to those few exceptions to proportionate liability contained in the 1986 Act.<sup>119</sup> Accordingly, neither an offset nor a reasonableness hearing is required unless joint and several liability exists.

If each defendant pays only its proportionate share, there is no need for an offset, or for a reasonableness hearing.<sup>120</sup> The jury apportions fault to settling defendants, and this process acts as the reasonableness hearing. Although the plaintiff shoulders the risk of settling "low," he also receives the benefit of settling "high."<sup>121</sup>

### F. Summary

Based loosely on the Uniform Comparative Fault Act,<sup>122</sup> the 1986 Tort Reform Act brought fundamental changes to the way that we litigate tort cases, especially those involving multiple defendants. One must have a basic understanding of how this Act operates to make intelligent strategic decisions. The fundamental premise is that, in most cases, *a defendant will never pay more than its proportionate share of fault* for a plaintiff's injuries. Nonetheless, defendants continue to file cross-claims and third-party complaints against each other for contribution and/or indemnity. That tort defendants continue this unnecessary internecine litigation is confounding.

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hearing shall be held on the issue of the reasonableness of the amount to be paid with all parties afforded an opportunity to present evidence. A determination by the court that the amount to be paid is reasonable must be secured. If an agreement was entered into prior to the filing of an action, a hearing on the issue of the reasonableness of the amount paid at the time it was entered into may be held at any time prior to final judgment upon motion of a party.

The burden of proof regarding the reasonableness of the settlement offer shall be on the party requesting the settlement.

*Id.*

118. See *Waite*, 68 Wash. App. at 524-25, 843 P.2d at 1123; see also WASH. REV. CODE § 4.22.070(1)(a) and (1)(b).

119. See *Waite*, 68 Wash. App. at 525, 843 P.2d at 1124.

120. "The 1986 Tort Reform Act substantially limits the number of cases in which a reasonableness hearing will be held." See *Brewer v. Fibreboard*, 127 Wash. 2d 512, 540 n.76, 901 P.2d 297, 312 n.6 (1995) (Talmadge, J. dissenting) (citing WASH. REV. CODE § 4.22.070).

121. See *Waite*, 68 Wash. App. at 527, 843 P.2d at 1124 (reasoning that "symmetry" requires that if the disadvantage of settlement is the plaintiff's, so ought the advantage be). See also *Washburn*, 120 Wash. 2d at 297, 840 P.2d at 888.

122. 1977 UNIFORM COMPARATIVE FAULT ACT, 12 U.L.A. § 127-53 (1996).

Realistically, even if a judgment is joint and several in nature, under custom and practice in Washington each defendant (or its insurance carrier) will usually pay no more than its (or its insured's) share. If there are no assets or insurance for the plaintiff to collect, the question arises as to why a defendant would waste time and money pursuing an insolvent defendant for contribution. If the plaintiff could get no money from this person, it is unlikely that a defendant will be more successful. Obviously, exceptions to this custom can arise<sup>123</sup> and contribution will be a significant tool in those limited contexts.

In the unlikely event that a jointly and severally liable defendant is actually forced to pay another defendant's share of damages, a contribution action can still be filed up to a year after payment or entry of judgment.<sup>124</sup> A defendant can seek a judgment for a contribution claim upon motion in the original action.<sup>125</sup>

This Article will now explore what defendants might do in the unlikely event that joint and several liability exists, *and* they are forced to pay another person's share of liability. There are three theories under which one tortfeasor might pursue another tortfeasor for reimbursement of a payment made to an injured person on the second tortfeasor's behalf: contribution, indemnification, and subrogation.<sup>126</sup>

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123. Examples include a "vindictive" plaintiff who insists upon one target defendant paying the entire judgment, or a defendant who has nonliquid assets that would be difficult to execute upon. Thus, the plaintiff leaves this difficulty to the other defendant.

124. See WASH. REV. CODE § 4.22.050(3) (1996). The statute provides:

If a judgment has been rendered, the action for contribution must be commenced within one year after the judgment becomes final. If no judgment has been rendered, the person bringing the action for contribution either must have (a) discharged by payment the common liability within the period of the statute of limitations applicable to the claimant's right of action against him and commenced the action for contribution within one year after payment, or (b) agreed while the action was pending to discharge the common liability and, within one year after the agreement, have paid the liability and commenced an action for contribution.

*Id.*

125. WASH. REV. CODE § 4.22.050(1) provides: "If the comparative fault of the parties to a claim for contribution has been established previously by the court in the original action, a party paying more than that party's equitable share of the obligation, upon motion, may recover judgment for contribution."

126. The three theories of reimbursement addressed are based in equity. Not addressed herein is the more common *contractual* subrogation claim brought pursuant to a contract, usually an insurance policy. These claims are generally initiated by an injured party's insurer—as opposed to a tortfeasor. Nor will this article address *contractual* indemnification cases, which usually arise in the construction or business context. See generally WASH. REV. CODE § 4.24.115 (1996); *Moen Co. v. Island Steel Erectors, Inc.*, 128 Wash. 2d 745, 762, 912 P.2d 472, 481 (1996); *Brown v. Prime Constr. Co. Inc.*, 102 Wash. 2d 235, 684 P.2d 73 (1984) (holding that an indemnification agreement in a construction contract, negotiated pursuant to WASH. REV. CODE § 4.24.115, is valid and enforceable, notwithstanding the provisions of WASH. REV. CODE § 4.22.070).

This Article then concludes that statutory contribution is the only legal theory under which one actively negligent tortfeasor might sue another actively negligent tortfeasor for reimbursement of a sum paid to an injured party. As between a passively negligent tortfeasor (an employer or principal) and an actively negligent tortfeasor (its employee or agent), either a right of contribution or equitable subrogation exists. But because contribution is an adequate statutory remedy, the courts will not resort to equity to fashion a subrogation remedy. Lastly, implied indemnification is no longer an option as it was abolished by the 1981 Act.

## II. EQUITABLE REMEDIES AS BETWEEN TORTFEASORS: CONTRIBUTION, INDEMNIFICATION, AND SUBROGATION

The doctrines of contribution, indemnification, and subrogation are all founded in equity. These doctrines were created to allow a person who paid the debt of another to obtain restitution from the debtor. Each doctrine is potentially applicable to the situation of a tort defendant who has been forced to pay the share of another tortfeasor.

### A. Contribution

The Tort Reform Act of 1981 created a clear but somewhat limited statutory right of contribution.<sup>127</sup> The fundamental underpinning of this right—which is based largely on Sections 4, 5, and 6 of the 1977 Uniform Comparative Fault Act<sup>128</sup>—is the existence of joint and several liability.<sup>129</sup> This was largely eliminated by the 1986 Act. Thus, the right of contribution is of somewhat dubious usefulness in present tort litigation, since defendants will in most circumstances, pay only their proportionate share. The process of seeking contribution is described as follows: "Under the principle of 'contribution,' a tortfeasor against whom a judgment is rendered is entitled to recover proportional shares of judgment from other joint tortfeasors whose

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127. See WASH. REV. CODE §§ 4.22.040 and .050 (1996).

128. 12 U.L.A. §§ 4-6, 143-47 (1996). See also 1981 Journal of the Washington Senate, *Final Report of the Senate Select Committee on Tort and Product Liability Reform [Draft]*, at 627-28 (hereinafter *Final Report*).

129. The two fundamental conditions precedent to a right of contribution are joint and several liability with another tortfeasor, and payment of more than one's own share. WASH. REV. CODE §§ 4.22.040(1) and .050; see also *Gerrard v. Craig*, 122 Wash. 2d 288, 292-93, 857 P.2d 1033, 1035-36 (1993) (no right of contribution in the procedural joint and several liability context of WASH. REV. CODE § 4.22.070(1)(b), unless a judgment has actually been entered); *Glass v. Stahl Specialty Co.*, 97 Wash. 2d 883, 887, 652 P.2d 948, 952 (1982) ("Where there is no joint and several liability, there is no right of contribution.").

negligence contributed to the injury and who were also liable to the plaintiff."<sup>130</sup>

Contribution is directed at "equitably distributing *between or among* tortfeasors the responsibility for paying those damages suffered by the injured party."<sup>131</sup> As will be discussed below, the right to contribution was not recognized at common law in Washington until the statutory cause of action was created by the 1981 Act. Thus, the sole remedy is the statutory right of contribution.

The authors of the Restatement have observed that only nine states continue to follow the common law no-contribution rule, and of these, "the last three [including Washington] have changed the rule of joint and several liability and opted for apportioned liability among tortfeasors, so there is no occasion for contribution."<sup>132</sup> Therefore, Washington's contribution statute "is in derogation of the common law and . . . must be strictly construed."<sup>133</sup> A party seeking contribution must clearly establish each and every statutory element or the contribution claim must fail.<sup>134</sup>

While a judgment is not necessarily a condition precedent to an action for contribution,<sup>135</sup> one may be required to establish joint and several liability.<sup>136</sup> Assuming that joint and several liability can arise without the entry of a judgment, a defendant may settle a claim with a plaintiff and then pursue other entities for contribution.<sup>137</sup> However, the settling party must extinguish the liability of the nonsettling person, and the amount paid must be "reasonable."<sup>138</sup> A court may decide that the amount paid in settlement was not reasonable (namely, in excess of what was reasonable).<sup>139</sup> Although this will not vitiate a settlement, the amount which the court later decides would have been

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130. BLACK'S LAW DICTIONARY 328 (6th ed. 1990) (citing *Dawson v. Contractors Transport Corp.*, 467 F.2d 727, 729 (D.C. Cir. 1972)).

131. *Wenatchee Wenoka Growers Ass'n v. Krack Corp.*, 89 Wash. 2d 847, 850, 576 P.2d 388, 390 (1978) (emphasis added).

132. RESTATEMENT (SECOND) OF TORTS § 886A, at 197 (1979) (emphasis added). See also *Thomas V. Harris, Washington's Unique Approach to Partial Tort Settlements: The Modified Pro Tanto Credit and the Reasonableness Hearing Requirement*, 20 GONZ. L. REV. 69, 108 n.137 (1984) ("In fact, it is the doctrine of joint and several liability itself that produces the need for both the right to contribution and a settlement credit.").

133. *Bunce Rental v. Clark Equip.*, 42 Wash. App. 644, 646, 713 P.2d 128, 130 (1986) (citing WASH. REV. CODE §§ 4.22.040 and .050).

134. See *id.*

135. See WASH. REV. CODE § 4.22.050(3).

136. See WASH. REV. CODE § 4.22.070(1)(b).

137. See WASH. REV. CODE §§ 4.22.040(2) and .050(3).

138. See WASH. REV. CODE § 4.22.040(2).

139. See WASH. REV. CODE § 4.22.060(1).

reasonable acts to set a limit on how much the nonsettling defendant may be required to pay in contribution.<sup>140</sup>

The 1986 Act also provides that if a defendant is jointly and severally liable under subsection (1)(a) or (1)(b),<sup>141</sup> a defendant's right to contribution against another jointly and severally liable defendant—and the effect of one defendant's settlement—is determined under the 1981 Act.<sup>142</sup> The 1986 Legislature likely contemplated that the right to contribution (created by the 1981 Tort Reform Act) retains significance only when joint and several liability exists, which is now only rarely.

Washington's Supreme Court has ruled that, under the procedural form of joint and several liability, (1) a settling defendant cannot be jointly and severally liable with a nonsettling defendant, (2) a defendant who has been dismissed based on an affirmative defense is not jointly and severally liable with a remaining defendant and is not subject to a claim for contribution, and (3) a defendant is not jointly and severally liable with a defendant who has been voluntarily dismissed.<sup>143</sup> Thus, a right to contribution does not have any application in procedural joint and several liability prejudgment cases and, as explained above, has little practical impact in post-judgment situations.

Thus, contribution has continuing vitality in only two situations: first, where factual joint and several liability exists under subsection (1)(a)<sup>144</sup> and, second, in those three situations where common law joint and several liability continues to exist.<sup>145</sup>

Factual joint and several liability may exist even without the entry of a judgment. This could arise where a defendant is jointly and severally liable with a party (or nonparty) employee/agent or with a co-conspirator.<sup>146</sup> Although vicarious liability was created to assure full recovery for injured parties, primary liability rests with the employee/agent. A plaintiff may be required to first seek recovery from the employee/agent and pursue the "additional security" of the employer/principal only if those efforts fail.<sup>147</sup>

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140. See WASH. REV. CODE § 4.22.060(2).

141. See WASH. REV. CODE §§ 4.22.070(1)(a) and (1)(b).

142. See WASH. REV. CODE §§ 4.22.040-.060.

143. See *Anderson*, 123 Wash. 2d at 850, 873 P.2d at 491; *Gerrard*, 122 Wash. 2d at 292, 857 P.2d at 1035; *Washburn*, 120 Wash. 2d at 294, 840 P.2d at 886.

144. See WASH. REV. CODE § 4.22.070(1)(a).

145. See WASH. REV. CODE § 4.22.070(3) (1996).

146. See WASH. REV. CODE § 4.22.070(1)(a).

147. See, e.g., *Marshall v. Chapman's Estate*, 31 Wash. 2d 137, 144, 195 P.2d 656, 660 (1948); *Glover v. Tacoma Gen. Hosp.*, 98 Wash. 2d 708, 720, 658 P.2d 1230, 1237 (1983).

Conversely, an employee/agent cannot sue its employer/principal for contribution if the latter's liability is only vicarious.<sup>148</sup> This rule makes good sense, as a primarily liable tortfeasor should not be allowed to shift the entire burden of a loss he or she caused to the secondarily liable principal.

In many situations, an employer/principal may not wish to or may be legally precluded from seeking contribution from its employee/agent. Under current law, the officers, employees or volunteers of a city,<sup>149</sup> county,<sup>150</sup> or state<sup>151</sup> agency are entitled to a publicly-paid defense of any civil action brought against them and arising from their acts or omissions while performing, or in good faith purporting to perform, their official duties. Public employees are likewise entitled to indemnification by their government employer for any judgment taken against them.<sup>152</sup> Because the Washington Legislature has made a policy decision to provide "coverage" for all government workers so long as they act within the scope of their employment, a vicariously liable public employer would be unable to seek contribution from its employee.

Similarly, many privately held businesses have defense-provision and judgment-indemnification employment policies which lead to the same result. Some companies that do not have such policies, nonetheless, have employment contracts with like provisions for certain personnel. These arrangements are a sound business practice. Being vicariously liable, companies realize that tort victims will more than likely pursue them for compensation, in addition to possibly naming their employee.

At issue here is how much an employer gives up financially by agreeing not to pursue contribution from its employee, compared to how much it benefits in morale and efficiency by "backing up" its workers. A suit for contribution against an employee would obviously destroy an employment relationship (often the relationship between a principal and an agent is not so close and this factor is not as

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148. See *Gass v. MacPherson's, Inc.*, 79 Wash. App. 65, 71, 899 P.2d 1325, 1328 (1995) ("As between the principal and the agent, the comparative fault of the agent is 100 percent."); see also, WASH. REV. CODE 4.22.040(1) (the court "may determine that two or more persons are to be treated as a single person for purposes of contribution"); *Erlach v. First Nat'l Bank of Princeton*, 505 A.2d 220, 243 (N.J. Super. 1984) (treating employer and employee as "a single tortfeasor" and thus precluding the employee's contribution action).

149. See WASH. REV. CODE § 4.96.041 (1996).

150. See *id.*

151. See WASH. REV. CODE §§ 4.92.060 and .070.

152. See WASH. REV. CODE § 4.96.041(2) (local government employees); and WASH. REV. CODE § 4.92.075 (1996) (state employees).

compelling). Given how seldom an employer might actually exercise a right of contribution, providing a defense and indemnification will usually outweigh the alternative. Thus, as a practical matter, contribution in this context has little utility.

Lastly, contribution, as with indemnification and subrogation, is derivative in nature. That is, whoever sues derives their claim from someone else. If no viable original claim exists, a derivative action would be barred. A contribution-defendant can raise any defense against a contribution-plaintiff which it would have against the injured party. In *Glass v. Stahl Specialty Co.*,<sup>153</sup> the court held that there is no right of contribution against a tortfeasor when that tortfeasor would be immune from a suit brought directly against it by the injured party.<sup>154</sup>

### B. Indemnification

The doctrine of indemnity is based on the same equitable underpinnings as contribution, and upon unjust enrichment.<sup>155</sup> However, in contrast to contribution's *proportional* distribution of the loss, indemnification is an all-or-nothing proposition. One entitled to indemnification transfers the entire burden of the loss to the other tortfeasor.<sup>156</sup>

Stated otherwise, contribution is a fault-sharing mechanism, while indemnity is fault-shifting.<sup>157</sup> For example, a principal who pays a judgment based on the negligence of an agent might seek indemnification for the entire amount of the judgment from the agent. Note that such a suit formerly was allowed under one of the exceptions to the general rule prohibiting indemnification.<sup>158</sup> However, this cause of action was abolished by the 1981 Act because it created a right of contribution in its place.<sup>159</sup>

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153. 97 Wash. 2d 883, 652 P.2d 948 (1982).

154. See *id.* at 887, 652 P.2d at 952; see also *Horton v. United States*, 622 F.2d 80, 83 (4th Cir. 1980) (stating that there was no right of contribution against State of South Carolina because such action is derivative of injured party's right to maintain action against state, a right barred by sovereign immunity); *Hill v. United States*, 453 F.2d 839, 842 (6th Cir. 1972) (stating that contribution claim is derivative of injured party's claim and no such right existed against the State of Tennessee because sovereign immunity precluded the injured party from suing state directly).

155. See RESTATEMENT (SECOND) OF TORTS § 886(B)(1) (1979).

156. See KEETON ET AL., *supra* note 20, § 51, at 341.

157. See *Zamora v. Mobil Oil*, 104 Wash. 2d 211, 218-19, 704 P.2d 591, 596 (1985) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 51, at 310 (4th ed. 1971)).

158. See RESTATEMENT (SECOND) OF TORTS § 886(B)(2) (1979).

159. See WASH. REV. CODE § 4.22.040(3).



### C. Subrogation

"Subrogation is the substitution of one person for another, so that he may succeed to the rights a creditor in relation to the debt or claim. . . ." <sup>160</sup> Subrogation is defined as "[t]he right of one who has paid an obligation which another should have paid to be indemnified by the other." <sup>161</sup> "[It is] a device adopted by equity to compel ultimate discharge of an obligation by him who in good conscience ought to pay it." <sup>162</sup> Equity substitutes the subrogee in place of the creditor "without any express agreement . . . ." <sup>163</sup> In addition, "[s]ubrogation is an equitable doctrine, the purpose of which is to avoid unjust enrichment." <sup>164</sup> Indeed, subrogation is a "corollary of the underlying theory of unjust enrichment . . . ." <sup>165</sup>

Subrogation can also arise out of contract. <sup>166</sup> The most common type of subrogation claim is that made by an insurer against a third-party tortfeasor to recover monies the company paid to its insured because of the tortfeasor's negligence—the well-known "subro" claim. Generally, because the insurance policy has a subrogation clause the claim is for *contractual* subrogation. Nonetheless, the Washington Supreme Court recently concluded that *equitable* subrogation can apply in the insurance "subrogation" claim: "Usually, subrogation allows an insurer to recover what it pays to an insured under a policy by suing the wrongdoer. The insurer steps 'into the shoes' of its insured. The insurer, the 'subrogee,' [sic] has rights equal to, but no greater than, those of the injured party." <sup>167</sup> This fact-pattern is not our concern as it involves a claim by the tort victim (actually its subrogee) against a tortfeasor, rather than a claim by a tortfeasor.

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160. *Newcomer v. Masini*, 45 Wash. App. 284, 286, 724 P.2d 1122, 1124 (1986).

161. BLACK'S LAW DICTIONARY 1427 (6th Ed. 1990).

162. *See id.*

163. *Newcomer*, 45 Wash. App. at 286, 724 P.2d at 1124.

164. *Touchet Valley v. Opp & Seibold Constr.*, 119 Wash. 2d 334, 341, 831 P.2d 724, 728 (1992); *see also Lynch v. Deaconess Medical Center*, 113 Wash. 2d 162, 166, 776 P.2d 681, 683 (1989) (citations omitted).

165. *Newcomer*, 45 Wash. App. at 286, 724 P.2d at 1124; *see also* 73 AM. JUR. 2d, *Subrogation* § 4; *Touchet Valley*, 119 Wash. 2d at 341, 831 P.2d at 728.

166. *See Transamerica Title Ins. Co. v. Johnson*, 103 Wash. 2d 409, 417, 693 P.2d 697, 702 (1985).

167. *See Touchet Valley*, 119 Wash. 2d at 341, 831 P.2d at 728. The courts have recognized, however, that the equitable principles of subrogation are subject to alteration by either legislative enactment or an agreement between the parties. *See Paulsen v. Dept. Soc. and Health Svc.*, 78 Wash. App. 665, 672, 898 P.2d 353, 356 (1995), *review denied*, 128 Wash. 2d 1010 (1996); *Fisher v. Aldi Tire, Inc.*, 78 Wash. App. 902, 908, 902 P.2d 166, 169 (1995), *review denied*, 128 Wash. 2d 1025 (1996).

"Subrogation exists only as a three-party transaction, where the subrogee is answering for the debt of another."<sup>168</sup> "A person cannot seek subrogation for paying one's own debt."<sup>169</sup> By making the payment, the person making the payment (subrogee) is subrogated to the rights of the injured party—even though he has "no primary liability."<sup>170</sup> As the court has stated,

[g]enerally speaking, 'the essential elements necessary for legal subrogation . . . are: (1) the existence of a debt or obligation for which a party, other than the subrogee, is primarily liable, which (2) the subrogee, who is neither a volunteer nor an intermeddler, pays or discharges in order to protect his own rights and interests.'<sup>171</sup>

It has been held that the subrogee "steps into the shoes" of the injured party.<sup>172</sup> The subrogee can stand in no better position than did the plaintiff.<sup>173</sup>

Subrogation, "is based upon the principle of indemnity but is an exclusively derivative remedy which depends upon the claim of the insured and is subject to whatever defenses the tortfeasor has against the insured."<sup>174</sup> Thus, if a suit by the plaintiff against the tortfeasor would have been barred by the statute of limitations, immunity, or any other defense, a suit by the subrogee against the tortfeasor should likewise fail.

The continued vitality of equitable subrogation after the 1986 Act is an open question. *Newcomer v. Masini*<sup>175</sup> is a case that was decided based on the law as it existed after the 1981 Act but before the 1986 Act.<sup>176</sup> In this author's experience, *Newcomer* is often cited at the trial level as authority for the now-suspect proposition that a tortfeasor may seek reimbursement under a theory other than contribution, namely, subrogation. A careful examination of the decision is required to establish that its ultimate holding was substantially undermined by the 1986 Act.

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168. *Livingston v. Shelton*, 85 Wash. 2d 615, 618, 537 P.2d 774, 776 (1975), *cert. denied*, 424 U.S. 958 (1976).

169. *See id.* at 620, 537 P.2d at 777.

170. *See Newcomer*, 45 Wash. App. at 288, 724 P.2d at 1125.

171. *Livingston*, 85 Wash. 2d at 618-19, 537 P.2d at 776 (quoting *Lawyers Title Ins. Corp. v. Edmar Constr. Co.*, 294 A.2d 865, 869 (D.C. Ct. App. 1972)).

172. *See Timms v. James*, 28 Wash. App. 76, 80, 621 P.2d 798, 800 (1980).

173. *See id.* at 79-80, 621 P.2d at 800.

174. *Great American Ins. Co. v. United States*, 575 F.2d 1031, 1034 (2d Cir. 1978).

175. 45 Wash. App. 284, 724 P.2d 1122 (1986).

176. *See id.*

The court in *Newcomer* held that an alleged tortfeasor who had paid the entirety of an injured party's claim was entitled to pursue a third-party complaint for equitable subrogation against a concurrent tortfeasor, against whom the plaintiff had never brought a direct claim.<sup>177</sup>

The plaintiff, while driving a snowmobile, was injured by a motorist.<sup>178</sup> The motorist had lost control of his truck on a mountain pass while attempting to avoid a second snowmobile driven by the plaintiff's close friend.<sup>179</sup> The plaintiff apparently chose not to sue his friend (who caused the accident) and sued the motorist instead.<sup>180</sup> The motorist then filed a third-party complaint against the second snowmobiler for contribution, and later for equitable subrogation.<sup>181</sup> The motorist paid the limits of his insurance policy and settled with the plaintiff.<sup>182</sup> He obtained the release of himself and of the other snowmobiler.<sup>183</sup> The motorist (third-party plaintiff) then pursued his third-party complaint against the other snowmobiler (third-party defendant).<sup>184</sup> At trial, the jury found that the motorist was not negligent, and that the second snowmobiler was 100 percent at fault for the plaintiff's injuries.<sup>185</sup>

The Court of Appeals in *Newcomer* overcame a number of seemingly significant hurdles in order to reach the subrogation claim, which the court said was "[a]llowed liberally in the interests of justice and equity. . . ."<sup>186</sup> The most significant holding in *Newcomer* provides that one who settles a suit under the threat of civil litigation does not make payment "voluntarily," even if he is later exonerated by a jury.<sup>187</sup> The court reasoned that although the motorist (defendant/third-party plaintiff) was ultimately found to be fault-free, "[h]e was a defendant to the lawsuit and, until the case was decided, might have been determined to be liable for an amount substantially in excess of his insurance coverage."<sup>188</sup>

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177. *See id.*

178. *See id.* at 285, 724 P.2d at 1125.

179. *See id.*

180. *See id.*

181. *See Newcomer*, 45 Wash. App. at 285-86, 724 P.2d at 1124.

182. *See id.* at 285, 724 P.2d at 1124.

183. *See id.*

184. *See id.* at 286, 724 P.2d at 1124.

185. *See id.*

186. *Id.*

187. *See Newcomer*, 45 Wash. App. at 288-89, 724 P.2d at 1125-26.

188. *Id.* at 289, 724 P.2d at 1126.

This conclusion was likely undermined by the general abolition of joint and several liability of the Tort Reform Act of 1986. In *Newcomer*, the defendant would have been jointly and severally liable with the third-party defendant under then-existing common law principles. However, pursuant to the 1986 Act, these tortfeasors would never be jointly and severally liable, unless the plaintiff amended his complaint to bring a direct claim against the third-party defendant. "A person is not liable to the plaintiff at all, much less jointly and severally, if he or she has not been named by the plaintiff."<sup>189</sup> Additionally, the plaintiff would now have to be found fault-free, and a judgment would need to be entered against both at-fault defendants.<sup>190</sup>

Under current law, a third-party defendant's argument that the payment by a third-party plaintiff to the plaintiff was "voluntary" in such circumstances is much stronger. That is, a third-party plaintiff would have *no legal reason* to pay anything more than its proportionate share of fault, and would only be paying its own debt—an act for which subrogation is not available.

This particular holding in *Newcomer* (that potential liability suffices) distinguishes subrogation from indemnity, which requires proof of "actual liability."<sup>191</sup> This holding likewise distinguishes subrogation from contribution, which requires actual joint and several liability.<sup>192</sup> The subrogee's right of reimbursement extends only to the payment of a debt actually owed.<sup>193</sup>

Because the subrogee stands in the shoes of the plaintiff, if the subrogee pays the plaintiff for the debt of another tortfeasor—disregarding a defense the tortfeasor would have had to a suit brought by the plaintiff—the payment is "voluntary" and subrogation is disallowed.<sup>194</sup> Further, subrogation may not be sought unless the debt has been "wholly discharged."<sup>195</sup>

Under the Tort Reform Act of 1986, a defendant cannot be jointly and severally liable with a third-party defendant,<sup>196</sup> and therefore, a

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189. *Mailloux*, 76 Wash. App. at 513, 887 P.2d at 452.

190. *See Anderson*, 123 Wash. 2d at 850, 873 P.2d at 491; *Washburn*, 120 Wash. 2d at 292, 840 P.2d at 885.

191. *See Newcomer*, 45 Wash. App. at 288, 724 P.2d at 1125.

192. *See id.* at 286, 724 P.2d at 1124; WASH. REV. CODE § 4.22.040(1)(b); *see also* Gerrard v. Craig, 122 Wash. 2d 288, 292, 857 P.2d 1033, 1035 (1993).

193. *Timms v. James*, 28 Wash. App. 76, 80, 621 P.2d 798, 800 (1980).

194. *See id.*

195. *See Chapman v. Ross*, 152 Wash. 262, 265, 277 P. 854, 855 (1929).

196. There can be no liability with a nonparty unless the nonparty is an agent or employee acting within the scope of their duties, or has acted in concert with the named defendant. *See*

payment made in circumstances similar to *Newcomer* would likely be considered voluntary under today's law, such that subrogation would be precluded. To the extent that *Newcomer* remains good authority, it provides a fascinating but largely irrelevant rule of law.

In sum, the decision in *Newcomer* reflects a fact pattern which is too infrequent to be useful: an alleged tortfeasor who in reality is not negligent (one with "clean hands"), agrees to settle the claim or suit against him, then sues the party who actually caused the injury, and is subsequently found to be fault-free by the jury. Most defendants who believe themselves not to be liable would just as soon fight that battle in a tort suit, rather than settle the action and then be forced to try the issue of their fault in a contribution suit—at the risk of losing everything if the jury finds them even one percent at fault.

*D. The Common Law Forbids a Right of Action by One Actively Negligent Tortfeasor as Against Another*

1. Contribution Is Not Allowed

Prior to 1981, no right of action existed in this state allowing one actively negligent joint or concurrent tortfeasor to sue another for the recovery of monies paid to an injured party. One tortfeasor singled out by a plaintiff and forced to pay the entirety of the damages, even though only partly at fault, was simply without a remedy.<sup>197</sup> This had been a rule of the common law for two centuries.<sup>198</sup>

Public policy in Washington—as with most states—expressly prohibited a common law action for contribution.<sup>199</sup> A tortfeasor has no common law right to recover the other tortfeasor's share of the damages through the doctrine of contribution. The rationale for the rule was as follows:

The general rule may be found expressed in the maxim that no man can make his own misconduct the ground for an action in his own favor. If he suffers because of his own wrongdoing, the law will not relieve him. The law cannot recognize equities as springing from a wrong in favor of one concerned in committing it.<sup>200</sup>

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WASH. REV. CODE § 4.22.070(1)(a).

197. See *Doremus v. Root*, 23 Wash. 710, 715, 63 Pac. 572, 573 (1901).

198. See *Merryweather v. Nizan*, 8 T.R. 186, 101 Eng. Rep. 1337 (K.B. 1799) (between joint tortfeasors, there is no right of contribution).

199. See *Stahl Specialty Company*, 97 Wash. 2d at 883, 652 P.2d at 950; *Wenatchee Wenoka Growers Assoc. v. Krack Corp.*, 89 Wash. 2d 847, 849, 576 P.2d 388, 389 (1978).

200. 1 COOLEY ON TORTS 254 (3rd ed. 1906) (quoted in *Alaska Steamship Co. v. Pacific Coast Gypsum Co.*, 71 Wash. 359, 363, 128 Pac. 654, 656 (1912)). This rationale has been criticized as an "ancient specious argument[.]" KEETON ET AL., *supra* note 20 § 51, at 341.

Some years ago, the City of Tacoma brought an action for contribution against a concurrent tortfeasor whose negligence had forced it to compensate an injured party.<sup>201</sup> The city attempted to avoid the common law bar by arguing that it was not *in pari delicto* with the other tortfeasor.<sup>202</sup> The court disagreed and held the action barred:

If a public street is maintained by the city in an unsafe or dangerous condition, and the negligence of a third party combines with that of the city to cause an injury to such third party, and such injury would or might not have occurred but for the combined negligence of the city and the second party, no recovery by either of the joint wrongdoers may be had against the other.<sup>203</sup>

## 2. Indemnification Is Likewise Not Allowed

The above-stated rationale led to an identical rule barring actions for indemnification between actively negligent tortfeasors.<sup>204</sup> One's own wrongdoing bars him from pursuing a joint or concurrent tortfeasor for indemnification.

Some limited exceptions to this rule were developed. For example, one whose secondary (or "passive") negligence required him to pay for the primary (or "active") negligence of another was allowed to seek indemnification, such as an employer whose only liability was vicarious.<sup>205</sup> It was said that these tortfeasors were not "*in pari delicto*."<sup>206</sup> However, such suits are no longer authorized.<sup>207</sup>

## 3. Equitable Subrogation Requires "Clean Hands"

The "clean hands" doctrine in the context of a subrogation action dates back at least to *German Bank of Memphis v. United States*.<sup>208</sup> In that case, a bank brought an equitable subrogation action against the U.S. Treasury Department.<sup>209</sup> The bank, having previously been found liable for mishandling funds, contended that the Treasury Department was also negligent.<sup>210</sup> The Court held that no right of

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201. See *City of Tacoma v. Bonnell*, 65 Wash. 505, 118 P.2d 642 (1911).

202. See *id.* at 510, 118 Pac. at 644.

203. *Id.* at 511, 118 Pac. at 644.

204. See *Rufener v. Scott*, 46 Wash. 2d 240, 242, 280 P.2d 253, 255 (1955).

205. See *id.* at 242-43, 280 P.2d at 255.

206. See *id.* at 242, 280 P.2d at 255.

207. See *supra* notes 40, 165, *infra* notes 226-35, and accompanying text.

208. 148 U.S. 573 (1893).

209. See *id.* at 578.

210. See *id.*

equitable subrogation exists when the party seeking it participated in the negligent conduct.<sup>211</sup> "It is said that a person who invokes the doctrine of subrogation must come into court with clean hands."<sup>212</sup>

The general rule is that subrogation will be denied for those "who are themselves guilty of wrong or inequitable conduct."<sup>213</sup>

In *W.A. Ellis Inc. v. Ellis*,<sup>214</sup> the Supreme Court of Colorado considered the propriety of an equitable subrogation counterclaim in an action for trespass.<sup>215</sup> After noting that the party seeking subrogation and the party from whom subrogation was sought were both trespassers, the court concluded, "[t]he rule of subrogation has no application to joint tortfeasors and equity will give no such relief to a trespasser."<sup>216</sup>

Washington follows the same rule of equity.<sup>217</sup> In *Akers v. Lord*,<sup>218</sup> the court reviewed an action to enforce a logging lien bought by the unpaid workers of a logging company.<sup>219</sup> The workers sued both their employer and the landowner.<sup>220</sup> The landowner was found liable for "eloignement" (removal of lumber subject to a lien) and had to pay the loggers.<sup>221</sup> The defendant landowner then attempted to pursue a claim of equitable subrogation against the defendant employer.<sup>222</sup> The court rejected the claim, holding that:

Subrogation is a doctrine of purely equitable origin and nature, and its operation is always controlled by equitable principles. The only liability enforceable against appellants grows out of their own wrongful act—the eloignement of the logs and lumber subject to respondents' liens. They are not, therefore, in a position to claim

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211. *See id.* at 581.

212. *Id.*; *see also* *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972) (clean hands required); *SHELDON ON SUBROGATION* § 44 (2d ed. 1893).

213. 73 AM. JUR. 2d, *Subrogation* § 18 (citing *German Bank of Memphis v. United States*, 148 U.S. 573) (1893).

214. 168 P.2d 549 (Colo. 1946).

215. *See id.*

216. *Id.* at 551 (citing *German Bank of Memphis*, 148 U.S. 573 and *Akers v. Lord*, 67 Wash. 179, 121 Pac. 51 (1912)).

217. Note that the holding in *Newcomer v. Masini*, is not inconsistent with this rule. First, the third-party defendant in that matter never raised the "clean hands" issue, so it was not discussed. And second, the third-party plaintiff was found to have clean hands, viz., no negligence. 45 Wash. App. 284, 724 P.2d 1122.

218. 67 Wash. 179, 121 P. 51 (1912).

219. *See id.* at 180, 121 P. at 51.

220. *See id.*, 67 Wash. at 180, 121 P. at 51.

221. *See id.* at 180-81, 121 P. at 51.

222. *See id.* at 185, 121 P. at 53.

any equitable relief as against anyone, being themselves wrongdoers.<sup>223</sup>

In conclusion, the clean hands doctrine is merely a restatement of the same policy forbidding an actively negligent tortfeasor from pursuing another through an equitable action for indemnification or contribution. Thus, because an actively negligent tortfeasor does not have clean hands, it cannot sue for subrogation.

The remaining question to be addressed is whether a *passively* negligent tortfeasor (one whose negligence arises by operation of law, as with vicarious liability), can sue an *actively* negligent tortfeasor for subrogation. Such a claim is complicated by the fact that a similar type of action, implied indemnity, was abolished by the 1981 Tort Reform Act. The question becomes whether this Act likewise abolished claims for equitable subrogation.

### III. THE TORT REFORM ACT OF 1981: A LIMITED RIGHT OF CONTRIBUTION REPLACED IMPLIED INDEMNITY, BUT EQUITABLE SUBROGATION SURVIVED

#### A. *Implied Indemnity and Equitable Subrogation Are Similar Doctrines*

Implied indemnity—the active-passive exception to the common-law bar of indemnification—was abolished in 1981 in favor of a statutorily created right of contribution.<sup>224</sup> That year, the legislature created a statutory right of contribution among jointly and severally liable defendants.<sup>225</sup> At the same time, the legislature abolished the doctrine of indemnification.<sup>226</sup> Stated otherwise, “[i]n 1981 the Tort Reform Act abolished common law indemnity and substituted therefor the right of contribution.”<sup>227</sup>

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223. *Id.* at 185, 121 P. at 53.

224. See WASH. REV. CODE § 4.22.040(3) (1996).

225. See WASH. REV. CODE § 4.22.040-.050 (1996).

226. See WASH. REV. CODE § 4.22.040(3).

227. *Johnson v. Continental West*, 99 Wash. 2d 555, 558, 663 P.2d 482, 484 (1983). It should be noted that there is some dispute as to the efficacy of the abolition of indemnity in at least two contexts. See *Harris*, *supra* note 132, at 163-66 (concluding that not even the express language of Wash. Rev. Code § 4.22.040(3) was sufficient to eliminate indemnification actions in vicarious liability, and “enhanced injury” cases). But see *Guard v. Town Friday Harbor*, 22 Wash. App. 758, 767-68, 592 P.2d 652, 658 (1979) (concluding that common-law right of indemnification between active and passive tortfeasors includes action by vicariously liable employer against its employee); *Zamora v. Mobil Oil*, 104 Wash. 2d 211, 219-20, 704 P.2d 591, 596 (1985) (concluding that Wash. Rev. Code § 4.22.040(3) affected the total abolition of common law indemnity).



The Tort Reform Act of 1981 might appear to have also abolished the doctrine of equitable subrogation, at least in actions brought by a passive tortfeasor against an active tortfeasor, when it abolished equitable indemnity.<sup>228</sup> As equitable subrogation is closely related to indemnification, one could argue that it too was abolished along with implied indemnity.

Equitable subrogation is based on the principle of indemnification.<sup>229</sup> And as discussed above, both doctrines are corollaries of unjust enrichment.<sup>230</sup> As with indemnification, subrogation is not permitted when both tortfeasors have "primary" liability, but only by one who has "secondary" liability against another whose liability is "primary." The law is unequivocal: "the right of subrogation never follows an actual primary liability. . . ."<sup>231</sup>

Equitable subrogation between a principal and an agent may be said to fall within the active-passive exception to the rule prohibiting indemnification. In *United States Lines, Inc. v. United States*,<sup>232</sup> after holding that an active-passive indemnity suit could go forward, the court refused to rule on the third-party plaintiff's subrogation claim.<sup>233</sup> "It is extremely difficult to tell legal subrogation and implied indemnity apart. They are closely related and 'oftentimes the possessor of one right is also the possessor of the other.' In their outer bounds the difference between them is about that between cherubim and seraphim in the angelic orders."<sup>234</sup>

Thus, although not expressly mentioned by the Legislature in 1981 when indemnification was abolished, and because the doctrines are interrelated, it is possible that subrogation claims were likewise eliminated. However, under the rules of statutory construction, there is a compelling basis to reject the notion that the 1981 Act also eliminated equitable subrogation.

#### B. 1981 Tort Reform Act Did Not Abolish Equitable Subrogation

The pre-1986 Tort Reform Act decision in *Newcomer v. Masini* did not address the issue of whether both indemnity and subrogation

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228. The courts have long recognized a master's right to pursue subrogation from the servant, whose acts rendered the master vicariously liable. See 73 AM. JUR. 2d, *Subrogation* § 39, at 623 (1974); 83 C.J.S., *Subrogation* § 16, at 617 (1953).

229. See *Newcomer*, 45 Wash. App. 284, 724 P.2d 1122.

230. See *supra* notes 164-65 and accompanying text.

231. *Livingston v. Shelton*, 85 Wash. 2d 615, 619, 537 P.2d 774, 777 (1975).

232. 470 F.2d 487 (5th Cir. 1972).

233. See *id.* at 493-94.

234. *Id.* at 494 (citations omitted).

were eliminated by the 1981 Act. The *Newcomer* court allowed the subrogation claim but in a footnote acknowledged that common law indemnity had been abolished.<sup>235</sup> While this comment implies that the 1981 Act did not abolish equitable subrogation between tortfeasors, the court did not specifically address the question. Subsequent to *Newcomer*, the court stated that the issue remains open: "Whether the doctrine of equitable subrogation is eliminated under RCW 4.22.040 has not been examined."<sup>236</sup>

Rules of statutory construction suggest that subrogation was not abolished. "In the absence of an indication from the Legislature that it intended to overrule the common law, new legislation will be presumed to be in line with prior judicial decisions in a field of law[.]"<sup>237</sup> Further, "a statute will not be construed in derogation of the common law unless the Legislature has clearly expressed its intention to vary it."<sup>238</sup>

A related rule of statutory construction is that of "expressio unius, est exclusio alterius."<sup>239</sup> That is, the express mention of one item in a statute implies the intentional omission of all other related items.<sup>240</sup> Although the 1981 Legislature expressly indicated its intention to eliminate implied indemnity, it made no mention of equitable subrogation—a related but conceptually distinct doctrine. Because the statute is silent on the point, subrogation most likely survived the 1981 Act.

Whatever rule of statutory construction is used, the conclusion seems plain that the Legislature's failure to expressly abolish equitable subrogation in 1981 speaks to its continuing existence. As such, equitable subrogation was not affected by the 1981 Tort Reform Act's elimination of implied indemnity. However, even if such a right does still exist, because a statutory right of contribution provides an adequate remedy, it is not likely that the courts will allow an action for equitable subrogation to be advanced in the active-passive context.

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235. See 45 Wash. App. 284, 286 n.1, 724 P.2d 1122, 1124 n.1 (1986).

236. *Klein v. Pyrodyne Corp.*, 117 Wash. 2d 1, 18 n.8, 810 P.2d 917, 926 n.8 (1991).

237. *Stahl Specialty Co.*, 97 Wash. 2d at 887-88, 652 P.2d at 952.

238. *Price v. Kitsap Transit*, 125 Wash. 2d 456, 463, 886 P.2d 556, 560 (1994). See also *State v. Bushnell*, 38 Wash. App. 809, 811, 690 P.2d 601, 602 (1984).

239. See *Harmon v. Dept. of Soc. and Health Svc.*, 83 Wash. App. 596, 601, 922 P.2d 201, 204 (1996).

240. See *id.*

C. *The Statutory Right of Contribution Obviates the Need for an Equitable Remedy*

Before a claim for equitable subrogation can be advanced, it must be determined whether a statutory right of contribution exists in the active-passive context. If a right of contribution exists between active and passive tortfeasors, the courts will probably decline to exercise their equitable jurisdiction to create a remedy.

The contribution statutes<sup>241</sup> and not equity will define the liability of an actively negligent tortfeasor as to one who is passively negligent. The court some time ago acknowledged the "well-settled" doctrine of equitable subrogation, but refused to apply it for this very reason: "[I]t is equally well settled that, where the liability of a party is fixed by contract or by statute, courts will not resort to equity to either enlarge or defeat them."<sup>242</sup> Stated otherwise, "[e]quitable principles cannot be asserted to establish equitable relief in derogation of statutory mandates."<sup>243</sup>

D. *Despite Conceptual Difficulties, the Right of Contribution Does Apply*

If a right of contribution does exist between an employer/principal and an employee/agent, resorting to equitable subrogation will be unnecessary. However, two noted scholars have expressed their doubts on the application of contribution in this context. In *Washington's Unique Approach to Partial Tort Settlements: The Modified Pro Tanto Credit and the Reasonableness Hearing Requirement*,<sup>244</sup> Thomas V. Harris opines that contribution would not apply.<sup>245</sup> The article concludes that not only is contribution inapplicable, but that implied indemnity survived the statutory abolition of indemnity, at least in

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241. See WASH. REV. CODE § 4.22.040-.050.

242. *Southwestern Surety Ins. Co. v. Pacific Coast Cas. Co.*, 92 Wash. 654, 658, 159 P. 788, 789 (1916).

243. *Longview Fibre Co. v. Cowlitz Co.*, 114 Wash. 2d 691, 699, 790 P.2d 149 (1990) (citing *Department of Labor & Indus. v. Dillon*, 28 Wash. App. 853, 855, 626 P.2d 1004 (1981)). See also *Stephanus v. Anderson*, 26 Wash. App. 326, 334, 613 P.2d 533, review denied, 94 Wash. 2d 1014 (1980) (holding that while equity will not suffer a wrong without a remedy, equity "also follows the law and cannot provide a remedy where legislation expressly denies it"); *Williams v. Duke*, 125 Wash. 250, 254, 215 P. 372 (1923) (holding that where the rights of the parties are clearly defined and established by law, equity has no power to change or unsettle those rights, citing doctrine of *equitas sequitur legem*).

244. See Harris, *supra* note 132.

245. See *id.*

cases of vicarious liability.<sup>246</sup> Regarding the absence of contribution, Mr. Harris writes,

Although the Act's legislative history is confusing, the Act should not be construed as abolishing the right to indemnity based on vicarious liability. Principles of proportionate fault do not protect a blameless defendant held liable solely by operation of law. The fault of two entities cannot be quantitatively compared under such circumstances. They are liable for the very *same* act.<sup>247</sup>

Likewise, in one of his articles, Professor Gregory C. Sisk argues similarly that contribution makes little sense between a vicariously liable principal and an actively negligent agent.<sup>248</sup>

As between a principal and an agent, allocation of fault may well be impossible. The principal is vicariously liable for the very same culpable act as the primarily liable agent. As one commentator has noted, "[b]ecause vicarious liability is based on the relationship between the actual tortfeasor and some other party responsible for the tortfeasor's conduct, assigning separate shares of liability to each is illogical." Accordingly, comparative fault cannot serve as the basis for contribution between a vicariously liable principal and a primarily liable agent. Instead, in accordance with the common law of agency, when a principal is held liable for the unauthorized tortious actions of an agent, the principal would presumably remain entitled to full indemnification from the agent.<sup>249</sup>

As Mr. Harris and Professor Sisk observe, the application of contribution in this area is analytically problematic. While the contribution statute provides that "[t]he basis for contribution among liable persons is the comparative fault of each such person,"<sup>250</sup> there is little rational basis to divide fault between primarily and secondarily liable parties, and any attempt to do so is "simply impossible."<sup>251</sup>

If a vicariously liable party has no fault, one could argue that there is no right of contribution. However, this argument's underlying assumption—that the jury must assign some percentage of fault to the principal/employer—is open to debate. There is no rule that mandates

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246. See *id.* at 163-66 (also concluding that implied indemnity survives in "enhanced injury" claims).

247. *Id.* at 164-65 (footnotes omitted).

248. See Sisk, *supra* note 22, at 116-18.

249. *Id.* at 117-18 (footnotes omitted) (quoting Scott I. Anderson, Comment, *Contribution Among Tortfeasors in Washington: The 1981 Tort Reform Act*, 57 WASH. L. REV. 479, 486 (1982)).

250. WASH. REV. CODE § 4.22.040(1) (1996).

251. See Sisk, *supra* note 22, at 116-17.

that the principal/employer must be found partially at fault. Indeed, the jury would satisfy its statutory duty by apportioning all the fault to the agent/employee, and no fault to the employer/principal.

Recently, the Washington Court of Appeals held, on a related question, that an actively negligent agent has no cause of action for contribution against a principal to recoup his payment of a judgment to the tort victim.<sup>252</sup> The court's analysis is of assistance in determining the answer to the converse question—whether the principal may sue the agent for contribution.

The *Gass* court initially held, because the principal was not a party to the underlying tort action, that under the factual joint and several liability scheme of the 1986 Act, the principal could not be jointly and severally liable with the agent.<sup>253</sup> "Only when the principal is a 'party' (to the original action) does the principal become responsible for the fault of the agent."<sup>254</sup>

The *Gass* court also concluded that a "second and more fundamental rationale" existed for dismissing the agent's contribution action.<sup>255</sup> Comparative fault is the "sole basis" for contribution.<sup>256</sup> "It follows that when a contribution defendant has no comparative fault, there is no basis for contribution."<sup>257</sup>

Although the agent in *Gass* was found negligent by the jury, the only theory against the principal was vicarious liability under the doctrine of respondeat superior.<sup>258</sup> Such liability does not arise from any act or omission of the principal, but rather "by operation of law."<sup>259</sup> Thus, the principal had no "fault."<sup>260</sup> "As between the principal and the agent, the comparative fault of the agent is 100 percent."<sup>261</sup> Conversely, the "comparative fault of the principal is 0 percent."<sup>262</sup> The court in *Gass* then reached the rather obvious conclusion that a person who has "zero fault" should not be required to reimburse one who was 100 percent at fault.<sup>263</sup>

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252. See *Gass v. MacPherson's Inc.*, 79 Wash. App. 65, 899 P.2d 1325 (1995).

253. See WASH. REV. CODE § 4.22.070(1)(a). See also *supra* notes 58-71 and accompanying text.

254. *Gass*, 79 Wash. App. at 70, 899 P.2d at 1328.

255. See *id.* at 71, 899 P.2d at 1328.

256. See *id.* (citing WASH. REV. CODE § 4.22.040(1)).

257. *Id.*

258. See *id.* at 71, 899 P.2d at 1328.

259. *Id.*

260. See *id.*; see also WASH. REV. CODE § 4.22.015 (1996).

261. *Gass*, 79 Wash. App. at 71, 899 P.2d at 1328.

262. *Id.*

263. See *id.*

The vicariously liable principal commits no act that falls within the definition of "fault." But does this conceptually prevent an action for contribution by the principal? The answer—which this author suggests is no—lies largely in how the courts have interpreted the 1981 Tort Reform Act.

There is an apparent conflict between how the courts have treated contribution actions brought by an agent/employee and those brought by a principal/employer. Because a vicariously liable principal has no comparative fault, there is no basis for its employee's contribution claim. The converse is not true, however. That is, the courts have allowed contribution actions brought by employers, despite their lack of comparative fault. If comparative fault is the "sole basis" for contribution, it could be argued that each party must have some fault. Clearly that has not been the case. The court in *Gass* indicated that "[t]he comparative fault of the agent may in such a case provide the principal with a basis for seeking contribution from the agent."<sup>264</sup>

This anomaly is likely explained first by the fact that the 1981 Legislature intended to substitute the right of contribution that an employer/principal had previously enjoyed for the right of implied indemnity, which was abolished.<sup>265</sup> Second, joint and several liability appears to be a more significant basis for contribution than is comparative fault—so long as the party against whom contribution is sought (namely, the agent/employee) is at fault. Lastly, equitable factors support the right of one who, although not at fault, has been compelled to pay the debt of another to seek reimbursement from the person whose actions created the obligation.<sup>266</sup> It is recognized that in this context the statutory contribution claim, generally a fault-sharing mechanism, becomes more akin to indemnity, a fault-shifting tool.

#### *E. The Spirit and Intent of Legislation Prevails Over A Literal Reading to Prevent an Illogical Consequence*

When the Legislature created a right of contribution in 1981, it simultaneously abolished the right of implied indemnity. The courts

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264. *Id.*

265. See *Final Report*, *supra* note 128, at 636 ("The implied indemnity doctrine thus is another form of the 'all or nothing' rule which is being departed from in this bill which favors comparative fault principles.").

266. The agent should be required to exhaust its financial potential to compensate the plaintiff before the principal becomes secondarily liable. See *Marshall v. Chapman's Estate*, 31 Wash. 2d 137, 144, 195 P.2d 656, 660 (1948). See also *Glover v. Tacoma Gen. Hosp.*, 98 Wash. 2d 708, 720, 658 P.2d 1230, 1237 (1983).

had historically allowed a claim of implied indemnity if brought by a passively (vicariously) liable party against the person whose active negligence created the liability. By specifically substituting contribution for implied indemnity, the legislature intended that the statutory right of contribution be available to a passively negligent party. While the application of contribution in the vicarious liability context is conceptually problematic, the spirit of the 1981 Act should overcome these difficulties.

When construing the statutory contribution provisions, the courts should attach primary significance to the purpose of the 1981 provisions. The legislative intent of the statute encourages settlement of claims by permitting defendants to know that when they settle a claim the case is over and there is no remaining liability to anyone—whether to the plaintiff or another defendant.<sup>267</sup> Legislative intent is a fundamental precept in rules of statutory construction.

In construing statutes, the goal is to carry out the intent of the Legislature. In doing so, it is the duty of the court in interpreting a statute to make the statute purposeful and effective. Any statutory interpretation which would render an unreasonable and illogical consequence should be avoided. Thus, in attempting to effect the intent of the Legislature, an act must be construed as a whole, harmonizing all provisions to ensure proper construction.<sup>268</sup>

“[I]f alternative interpretations are possible, the one that best advances the overall legislative purpose should be adopted.”<sup>269</sup> “[T]he spirit . . . of the law should prevail over the letter of the law.”<sup>270</sup>

This is precisely the analysis the court undertook in endorsing the right of a vicariously liable employer to seek contribution against its employee. In *Kirk v. Moe*, the employer settled a tort action brought against him, his employee, and others.<sup>271</sup> The employer claimed liability was predicated solely upon the doctrine of vicarious liability.

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267. See *WSPIE v. Fisons Corp.* 122 Wash. 2d 299, 324, 858 P.2d 1054, 1067 (1993). See also *Final Report*, *supra* note 128, at 636 (“It was a concern of the Committee that if a released party could not be guaranteed that he would not be subject to additional liability at some point in the future depending on some comparative fault apportionment, it would discourage parties from entering into such releases.”). The legislature also intended to “enact further reforms in the tort law to create a fairer and more equitable distribution of liability among parties at fault.” 1981 Wash. Laws ch. 27, § 1.

268. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wash. 2d 1, 6, 721 P.2d 1, 4 (1986) (citations omitted).

269. *Anderson v. Morris*, 87 Wash. 2d 706, 716, 558 P.2d 155, 161 (1976).

270. *In re R.*, 97 Wash. 2d 182, 187, 641 P.2d 704, 707 (1982).

271. 114 Wash. 2d 550, 789 P.2d 84 (1990).

ty.<sup>272</sup> The employer negotiated a release not only of himself, but also of his employee who had refused to participate in the settlement.<sup>273</sup> The employer took these steps to preserve his right of contribution and to comply with the 1981 Act, which requires a settling party to extinguish the liability of the nonsettling party against whom contribution will later be sought.<sup>274</sup>

The employer, relying upon the 1981 Act, then sued his employee for contribution.<sup>275</sup> The employee argued that he was discharged from liability not only for the underlying tort action but also for contribution.<sup>276</sup> This statute states, *inter alia*, that a release "entered into by a claimant and a person liable discharges that person from all liability for contribution."<sup>277</sup>

The *Kirk* court rejected the employee's argument, concluding that because he did not participate in the settlement, he was not discharged from liability for contribution.<sup>278</sup> The employee's position would "render meaningless" the right of a settling defendant under the 1981 Act to pursue contribution.<sup>279</sup> The court will not interpret a statute . . . "to produce an absurd result[] or render meaningless its enactment."<sup>280</sup> The acceptance of the employee's argument would defeat the statute's purpose of encouraging settlements, while insuring full compensation for tort victims.<sup>281</sup> The court concluded "that RCW 4.22.040 grants to Kirk, the vicariously liable principle, a right of contribution against Moe, his primarily liable agent, by virtue of Kirk's settlement with the injured party when that settlement released the

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272. See *id.* at 558, 789 P.2d at 88.

273. See *id.* at 552, 789 P.2d at 85-86.

274. See *id.* at 550, 789 P.2d at 84.

275. See *Kirk*, 114 Wash. 2d at 553, 789 P.2d at 86. WASH. REV. CODE § 4.22.060(2) provides:

A release, covenant not to sue, covenant not to enforce judgment, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount paid pursuant to the agreement unless the amount paid was unreasonable at the time of the agreement in which case the claim shall be reduced by an amount determined by the court to be reasonable.

276. See *Kirk*, 114 Wash. 2d at 554, 789 P.2d at 86.

277. *Id.*

278. See *id.* at 554, 789 P.2d at 86-87.

279. See *id.*

280. *Id.*

281. See *id.* at 555, 789 P.2d at 87. It should be noted that the court in *Kirk* relied upon Mr. Harris' article in reaching its conclusion that the employer's contribution claim was proper. *Id.* (quoting Harris, *supra* note 132, at 112). This portion of the article had set forth the underlying purpose of the contribution statute. See Harris, *supra* note 132, at 112.



agent, subject to the reasonableness of the settlement."<sup>282</sup> Thus, the Washington courts have demonstrated that they are willing to overcome overly literal constructions and interpret the 1981 Act consistent with its legislative intent.<sup>283</sup>

The underlying rationale of the Harris/Sisk thesis is that the court should take a common sense approach to the issue.<sup>284</sup> However, the 1981 Legislature may well have meant what it said in proclaiming that the "common law right of indemnity between active and passive tortfeasors is abolished."<sup>285</sup> This author's rationale, however, applies with like force to an argument that a right of contribution does indeed apply—conceptually flawed as it is.

In sum, while the Harris/Sisk concern (that a vicariously liable principal or employer does not possess a statutory right of contribution against a primarily liable agent or employee) is supported by a technical reading of the 1981 Act, it should give way to an interpretation of the Act that is consistent with its spirit. The Legislature intended the right of contribution to replace the right of implied indemnity, which a passively negligent party previously possessed.

#### IV. CONCLUSION

Despite the harshness of the rule, the common law does not permit one actively negligent tortfeasor to pursue another actively negligent tortfeasor for reimbursement of a payment made to a tort victim. This is true whether the claim is one for contribution, indemnification, or equitable subrogation. To ameliorate the inequity of the common law, the Washington Legislature in 1981 enacted a statutory right of contribution. In so doing, the Legislature concomitantly abolished implied indemnity. Thus, the statutory right of contribution is the sole cause of action by which one actively negligent tortfeasor may sue another for reimbursement.

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282. *Kirk*, 114 Wash. 2d at 556, 789 P.2d at 87. See also *Zamora v. Mobil Oil*, 104 Wash. 2d 211, 704 P.2d 591 (1985); and *Glover*, 98 Wash. 2d 708, 658 P.2d 1230.

283. See *supra* notes 253-65 and 274-83 and accompanying text.

284. The discussion thus far has focused on a defendant-principal's rights post-judgment and payment therefor. It must be remembered that should a vicariously liable entity decide to settle pre-suit, the procedural requirements of the Act must be followed. That is, (1) the principal must extinguish the liability of the agent in the settlement agreement, and (2) the amount paid must be reasonable. See WASH. REV. CODE § 4.22.040(2). Additionally, a principal who desires to settle a pending action must provide written notice to all other parties and to the court. See WASH. REV. CODE § 4.22.060(1) (1996). A reasonableness hearing must then be held. *Id.* For a discussion of the nine nonexclusive criteria that a court should apply to determine whether a settlement was "reasonable," see *Glover*, 98 Wash. 2d at 717-18, 658 P.2d at 1236.

285. WASH. REV. CODE § 4.22.040(3).

The passage five years later of the Tort Reform Act of 1986 largely eliminated any need for tortfeasors to pursue one another for contribution. The elimination of joint and several liability (in most cases) removes not only the need for a contribution action, but also the basis to bring one. A right of contribution arises only where a jointly and severally liable tortfeasor has been forced to pay more than its share. However, the basic premise of the 1986 Act with two exceptions is that defendants will never pay more than their proportionate share. Thus, much like Francis Macomber,<sup>286</sup> contribution enjoyed only a short but inspired existence.

The two exceptions to the general rule of proportionate liability are factual joint and several liability and procedural joint and several liability. The procedural exception requires the procedural entry of a judgment against defendants. The sole remaining utility of the right of contribution under this exception would involve a post-judgment action to seek reimbursement of a payment made on behalf of one's jointly and severally liable co-defendant. As the reason that many co-defendants do not pay their judgment share is that they are insolvent, the pursuit of a contribution claim in this context is seldom practical.

Contribution may also exist in the factual joint and several liability exception to the general rule, which involves the factual existence of an agency, employment, or conspiracy relationship. However, because a vicariously liable principal/employer is not "actively" negligent, the common law bar of seeking reimbursement does not apply. The issue presented is which one of the three causes of action should be pursued: contribution, indemnification, or subrogation. As the 1981 legislature eliminated indemnification and substituted in its place contribution, an action for indemnity cannot lie. A claim for equitable subrogation seems well-suited to this context, as the common law specifically recognizes such an action for "paying the debt of another." However, equity will not create a cause of action if a statutory remedy exists.

The question of whether a principal/employer may pursue a statutory right of contribution against an agent/employee is subject to some debate. The argument against its application is that a right of contribution is based upon the comparative fault of the parties: because the comparative fault of the secondarily liable principal/employer is zero, the literal terms of the statute do not apply.

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286. *The Short Happy Life of Francis Macomber: The Fifth Column and the First 49 Stories*. (Modern Library, 1938).

However, the Legislature seems to have intended such actions to apply. Indeed, when the 1981 Legislature took away indemnity claims from employers and principals, it substituted in its place a right of contribution. The spirit of the law should prevail over an overly-literal interpretation, even in light of the conceptual difficulties with the statutory language. In addition, the courts have construed the statute accordingly, recognizing on several occasions the right of a principal/employer to pursue contribution from its agent/employee. Thus, because a right of action for statutory contribution does exist in this context, courts will generally not exercise their equitable jurisdiction to authorize a claim for subrogation. The statutory remedy should be sufficient.