

# NOTE

## *Tegman v. Accident & Medical Investigations, Inc.*: The Re-Modification of Modified Joint and Several Liability by Judicial Fiat

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That the innocent, though they may have some connexion or dependency upon the guilty (which, perhaps, they themselves cannot help), should not, upon that account, suffer or be punished for the guilty, is one of the plainest and most obvious rules of justice.

—Adam Smith<sup>1</sup>

### I. INTRODUCTION

The Washington Supreme Court's decision in *Tegman v. Accident & Medical Investigations, Inc.*<sup>2</sup> is surprising given that the equities of the situation strongly favored complete compensation to a fault-free plaintiff with all defendants jointly and severally liable for all damages. Yet, in a 5–4 decision, the Washington Supreme Court held that negligent tortfeasors cannot be held jointly and severally liable with tortfeasors who have

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1. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (1759), available at <http://www.quotedb.com/quotes/3224> (last visited Feb. 24, 2006).

2. 150 Wash. 2d 102, 75 P.3d 497 (2003).

committed intentional acts.<sup>3</sup> Further, in determining liability, a court must first segregate negligent from intentional tortfeasors, and then apportion liability between all negligent parties.<sup>4</sup> The majority decision leaves the innocent plaintiff, Maria Tegman, to bear most of the financial cost of her own injuries, and allows the defendant attorney, Lorinda Noble, to reduce her liability by blaming the criminal, G. Richard McClellan, whose purposes she furthered.<sup>5</sup>

The court's holding in *Tegman* strips certain plaintiffs of the chance to be made whole, misguides judges and juries in their determination of damages, evades ruling on issues it exposes, and should be reversed in its infancy. If the court's opinion rests on the presumption that Washington tort law is based on a pure comparative fault system, then the court should also acknowledge that joint and several liability survives when the plaintiff has no fault to which the defendant can compare. The rationale of the *Tegman* opinion, however, is nothing short of mental gymnastics—plaintiffs who are fault free are left to wonder whether they may be left with the bill for injuries caused by others; defendants are celebrating an unearned victory and new ally; attorneys on both sides must now consider new and unprecedented legal strategies; judges face application of this logistical nightmare with the possibility of absurd results; and the public at large is forced to accept a ruling with results that the legislature it elected did not contemplate or foresee.

Simply put, the majority got it wrong. In order to reduce the exposure of some well-capitalized parties, the Washington Legislature created a system relieving some tortfeasors of joint and several liability.<sup>6</sup> However, the legislature also wanted fault-free plaintiffs to obtain a complete recovery.<sup>7</sup> The legislature balanced these two goals in the Tort Reform Act of 1986. But the *Tegman* majority, by giving too much weight to one legislative goal, has eviscerated the other, and failed to mirror the legislature's complete intent in a context the legislature did not contemplate.

This Note explores the *Tegman* decision in the context of joint and several liability between negligent and intentional actors within Washington State. Part II places Washington tort law into perspective, including the doctrine of joint and several liability, both before and after the Tort Reform Act of 1986. Part III discusses the *Tegman* decision, methods used in other jurisdictions for dealing with similar situations, and

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3. *Id.* at 105, 75 P.3d at 497.

4. *Id.*

5. John Budlong, *Tegman v. Accident and Medical Investigations, Inc., A Major Change in Tort Law and Policy*, WSTLA TRIAL NEWS, Dec. 1, 2003, at 39–44.

6. See *infra* note 81.

7. *Id.*

potential solutions to the problems posed by the *Tegman* holding. Finally, Part IV concludes and urges both the court to reconsider its ruling in *Tegman* and the legislature to clarify its intent.

## II. TORT LAW—A WASHINGTON PERSPECTIVE

This Part lays the foundation necessary to critically analyze the court's decision in *Tegman*. First, the doctrine of joint and several liability will be introduced. Next, the principles of comparative negligence and its contentious relationship with joint and several liability will be examined as they struggle to co-exist. Finally, the issue of how Washington, through legislation and subsequent interpretation of the Tort Reform Act of 1986, has enabled joint and several liability to survive within a pure, yet modified, comparative negligence regime will be discussed.

### A. The Common Law Roots of Joint and Several Liability

The theory of joint and several liability was a judicially created vehicle for enforcing remedies for wrongs committed and, justified on public policy grounds, it represented a deliberate allocation of risk.<sup>8</sup> The application of joint and several liability served dual purposes: (1) it acted as a deterrent by making a defendant liable for all the consequences of negligence, even if the defendant's negligence was not the only cause of injury, and (2) it encouraged settlement when settling defendants were protected by statute from an action for contribution.<sup>9</sup>

The seminal case illustrating the doctrine of joint and several liability is *Summers v. Tice*.<sup>10</sup> The California Supreme Court held that in a case involving the tortious conduct of two or more actors, where the harm to the plaintiff has been caused by only one of them, and it is uncertain as to which caused the harm, the burden of proof is on the tortious actors to prove their innocence.<sup>11</sup> While on a hunting trip, Summers received injuries to his right eye and face after both of his two companions shot in his direction.<sup>12</sup> When the three men formed a triangle, each of the defendants had an unobstructed view of Summers, and each of the defendants was armed with an identical shotgun and shells, making it impossible to determine which hunter had caused Summers's injuries.<sup>13</sup> The court reasoned that the defendants should be left to resolve any ap-

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8. See *Dutcher v. Owens*, 647 S.W.2d 948, 950–51 (Tex. 1983); 65 C.J.S. *Negligence* § 154 (2004).

9. *In re Colo. Springs Air Crash*, 867 F. Supp. 630, 634 (N.D. Ill. 1994).

10. 199 P.2d 1 (Cal. 1948).

11. *Id.* at 5.

12. *Id.* at 2.

13. *Id.*

portionment problems among themselves because defendants are often in a better position than a plaintiff to proffer evidence of the cause of plaintiff's injuries.<sup>14</sup> The court further noted that, under the circumstances, each defendant should be held liable for the entire damage award, regardless of whether each defendant acted in concert or independently.<sup>15</sup> Thus, despite Summers's inability to identify which hunter caused his injuries, the court recognized that "where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress. The wrongdoers should be left to work out between themselves any apportionment."<sup>16</sup>

An understanding of the implications of the various types of liability is necessary in order to appreciate the doctrine of joint and several liability. Defendants are jointly liable when the liability is shared by two or more parties<sup>17</sup> who may or may not be joined in a single suit.<sup>18</sup> Defendants are severally liable when one's liability is separate and distinct from the other's liability, and the plaintiff may bring a separate action against one defendant without joining the other liable parties.<sup>19</sup> When defendants are jointly and severally liable, the liability may be apportioned either among two or more parties, or to only one or a few select members of the liable group, at the plaintiff's discretion.<sup>20</sup> The plaintiff is not required to bring suit against all of the defendants, but can simply proceed against the defendant who seems most exposed to liability or most capable of responding to suit and satisfying a judgment.<sup>21</sup>

At common law, a plaintiff asserting a tort cause of action is entitled to pursue any or all responsible defendants and thereafter collect any part or all of the judgment against any one or more of the defendants found to have contributed to the personal injury or property damage.<sup>22</sup> Thus, each individual defendant is liable for the entire award of damages regardless of his or her share of fault in comparison to the other defendants. Multiple defendants acting in concert was the situation which generally gave rise to joint and several liability under common law.<sup>23</sup> In this

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14. *Id.* at 4.

15. *Id.* at 5.

16. *Id.*

17. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 47:327-28 (5th ed. 1984); BLACK'S LAW DICTIONARY 740 (7th ed. 2000).

18. JAMES A. HENDERSON, JR., RICHARD N. PEARSON & JOHN A. SILICIANO, THE TORTS PROCESS 127 (6th ed. 2003).

19. KEETON ET AL., *supra* note 17, at 296-97; BLACK'S LAW DICTIONARY 740 (7th ed. 2000).

20. KEETON ET AL., *supra* note 17, at 296-97; BLACK'S LAW DICTIONARY 740 (7th ed. 2000).

21. Cornelius J. Peck, *Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability*, 62 WASH. L. REV. 233, 236 (1987).

22. KEETON ET AL., *supra* note 17, at 327-28.

23. HENDERSON, *supra* note 18, at 127-28; Peck, *supra* note 21, at 235.

scenario, all of the defendants would be responsible even if only one of them caused the harm.<sup>24</sup> This type of tort was normally intentional, sometimes criminal in nature, and often involved a conspiracy.<sup>25</sup>

In modern times, multiple defendants have been classified based upon different situations where joint and several liability may be imposed. These defendants have been labeled joint tortfeasors, concurrent tortfeasors, and successive tortfeasors. Joint tortfeasors are those who have acted in common or who have breached a joint duty.<sup>26</sup> In order for tortfeasors to be classified as joint, the following elements must be met: (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, each acting with the knowledge and consent of the others.<sup>27</sup> Concurrent tortfeasors act independently, but their separate acts cause a single indivisible injury.<sup>28</sup> Successive tortfeasors act independently, with respect to both time and duty, and each causes separate and identifiable harms to the plaintiff.<sup>29</sup> However, an anomaly in the law exists when two independent acts produce an indivisible harm.<sup>30</sup> Thus, successive tortfeasors whose independent acts cause an indivisible harm may be held jointly and severally liable.

Under common law joint and several liability, multiple tortfeasors who cause an indivisible injury are each liable for the entire harm.<sup>31</sup> Although the plaintiff could pursue recovery for the entire harm from any one of a number of defendants, the plaintiff was only entitled to a single full recovery—multiple recoveries of damages are not permitted.<sup>32</sup> The plaintiff's ability to recover the whole award from a single defendant is particularly important when other defendants are insolvent or lacked the

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24. HENDERSON, *supra* note 18.

25. Peck, *supra* note 21, at 235.

26. *Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wash. 2d 230, 235, 588 P.2d 1308, 1312 (1978).

27. *See Rauscher v. Halstead*, 16 Wash. App. 599, 601, 557 P.2d 1324, 1325 (1976); *Litts v. Pierce County*, 5 Wash. App. 531, 536 n.1, 488 P.2d 785, 789 n.1 (1971) (citing *Alexander v. Hammarberg*, 230 P.2d 399 (Cal. Dist. Ct. App. 1951)).

28. *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*, 199 P.2d 1 (Cal. 1948)).

29. *Seattle First Nat'l Bank*, 91 Wash. 2d at 235 n.3, 588 P.2d at 1312 n.3.

30. *Phennah v. Whalen*, 28 Wash. App. 19, 21, 621 P.2d 1304, 1306 (1980) (the plaintiff was injured in two unrelated automobile accidents, but the injuries could not be segregated between the separate tortious incidents as plaintiff's doctor testified that it was "impossible to state which accident caused what degree of injury and permanence.").

31. *See WILLIAM L. PROSSER, LAW OF TORTS* 416–18 (4th ed. 1971).

32. Peck, *supra* note 21, at 236.

resources to pay their share of the judgment.<sup>33</sup> Subsequently, the chosen defendant is left to seek contribution from the other defendants after paying the entire award to the plaintiff.<sup>34</sup> At common law, however, contribution was not allowed between joint tortfeasors, and the paying defendant was left without any legal recourse against the other tortfeasors to compel them to share the burden of liability.<sup>35</sup> Many states have now adopted statutes which permit contribution in one form or another,<sup>36</sup> including Washington, which established that right in 1981.<sup>37</sup>

### *B. The Introduction of Comparative Negligence*

As the doctrine of joint and several liability has developed, so too has the rule of contributory negligence. Contributory negligence acts as a complete bar to recovery,<sup>38</sup> even if the plaintiff is only slightly at fault.<sup>39</sup> This complete bar to recovery rule, like the denial of contribution, was highly criticized, and, as a result, has been replaced in almost every jurisdiction by a form of comparative negligence.<sup>40</sup> Comparative negligence permits a plaintiff who is partially at fault for his or her injuries to recover damages that may be reduced, but not necessarily eliminated, in proportion to the plaintiff's own fault.<sup>41</sup> The comparative negligence rule was adopted in order to avoid the harshness of the contributory negligence rule and to facilitate recoveries by injured parties, thereby serving the compensatory function of tort law.<sup>42</sup>

Washington adopted a "pure" comparative negligence scheme in 1973.<sup>43</sup> Pure comparative negligence allows the plaintiff to recover damages attributed to the defendant's percentage of fault, regardless of the percentage of fault attributed to the plaintiff, even if the plaintiff's percentage is greater than the defendant's.<sup>44</sup> Other jurisdictions have adopted "modified" comparative negligence, creating certain exceptions

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33. Julie K. Weaver, *Jury Instructions on Joint and Several Liability in Washington State*, 67 WASH. L. REV. 457, 459-60 (1992) (citing to Larry Pressler & Kevin V. Schieffer, *Joint and Several Liability: A Case for Reform*, 64 DENV. U. L. REV. 651, 652 (1988)).

34. PROSSER, *supra* note 31, at 305, 307.

35. HENDERSON, *supra* note 18, at 128.

36. *Id.*

37. 1981 Wash. Sess. Laws 118-19 (codified as WASH. REV. CODE §§ 4.22.040-.060 (1982, 1981, & 1987)). Contribution between tortfeasors in Washington is based on their comparative fault. Peck, *supra* note 21, at 237.

38. HENDERSON, *supra* note 18, at 360.

39. Peck, *supra* note 21, at 236.

40. HENDERSON, *supra* note 18, at 360.

41. *Id.*; Peck, *supra* note 21, at 237.

42. Peck, *supra* note 21, at 237.

43. 1973 Wash. Sess. Laws 949-50 (codified as WASH. REV. CODE §§ 4.22.005-.015 (1981)).

44. Peck, *supra* note 21, at 237.

to the plaintiff's per se recovery under pure comparative negligence regimes.<sup>45</sup>

Even with the ratification of comparative negligence and its modified forms, joint and several liability still applies to multiple tortfeasors within these jurisdictions. Two decisive Washington cases, decided before the Tort Reform Act of 1986, helped to define the relationship between joint and several liability and pure comparative negligence.

First, Washington courts have held that the doctrine of joint and several liability remains alive and well within a comparative negligence regime. In *Seattle First National Bank v. Shoreline Concrete Co.*,<sup>46</sup> the Washington Supreme Court declined to abolish or modify joint and several liability, even after the statutory adoption of comparative negligence, although it expressly recognized that the legislature had the power to make such a change.<sup>47</sup> George Stanford was electrocuted when the boom of the truck on which he was working came in contact with a high-energy power line.<sup>48</sup> Seattle First National Bank, as personal representative for the Stanford estate, brought an action for wrongful death against Shoreline Concrete Co. and Dico Corp., the owner and manufacturer of the boom, respectively.<sup>49</sup> Shoreline and Dico sought indemnity and contribution from a third-party defendant, Stanford's employer, Batterman Engineering and Construction Co.<sup>50</sup> The trial court ordered the jury to apportion liability among the defendants based on their share of fault for the plaintiff's injuries.<sup>51</sup> On appeal, the Washington Supreme Court reversed the trial court, holding that comparative negligence had not abolished joint and several liability.<sup>52</sup>

The court gave multiple reasons for the continued vitality of joint and several liability. First, because the goal of a comparative negligence regime is to achieve greater fairness in tort law by allowing even contributorily negligent plaintiffs to recover,<sup>53</sup> the abolition of joint and several liability would undercut this purpose and result in a deterioration of tort law reform by preventing recovery by injured plaintiffs. Second, the

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45. HENDERSON, *supra* note 18, at 362 (for example, a plaintiff whose negligence equals or exceeds the defendant's negligence is barred from recovery, or a plaintiff whose negligence exceeds that of the defendant is barred from recovery).

46. 91 Wash. 2d 230, 588 P.2d 1308 (1978).

47. *Id.* at 236-37, 588 P.2d at 1313.

48. *Id.* at 232, 588 P.2d at 1311.

49. *Id.*

50. *Id.* at 233, 588 P.2d at 1311.

51. *Id.*

52. *Id.* at 236-37, 588 P.2d at 1313.

53. *Id.* at 236, 588 P.2d at 1313; *see also* Wenatchee Wenoke Growers Ass'n v. Krack Corp., 89 Wash. 2d 847, 849-50, 576 P.2d 388, 389 (1978); Godfrey v. State, 84 Wash. 2d 959, 964-65, 530 P.2d 630, 633 (1975); WASH. REV. CODE § 4.22.010 (1981).

court reasoned that since four other state legislatures modified the rule of joint and several liability when enacting comparative negligence statutes,<sup>54</sup> the fact that our legislature did not presume that our legislature did not intend a similar change.<sup>55</sup> Third, the court explained that because joint and several liability is premised upon causation and the indivisibility of the harm caused, the fact "[t]hat it may be possible to assign a percentage figure to the relative culpability of multiple tortfeasors does not detract from the preliminary fact that [e]ach tortfeasor's conduct was [a] proximate cause of an entire indivisible injury."<sup>56</sup> Fourth, the abolition of joint and several liability would be incompatible with the compensatory purpose of tort law, especially in the case of a *completely faultless plaintiff* who could be forced to accept a portion of the loss if any tortfeasor should prove to be insolvent.<sup>57</sup> Finally, the court noted that even where a plaintiff is partially at fault, a plaintiff's negligence is non-tortious since it relates to a failure to use due care for his own protection; whereas a defendant's negligence is tortious since it relates to a failure to use due care for the safety of others.<sup>58</sup>

The court also addressed contribution and its effects on joint and several liability. The court recognized that the purpose of contribution was to distribute the payment of damages equitably among multiple tortfeasors.<sup>59</sup> Contribution has no effect on the plaintiff's right to recover from the multiple tortfeasors, nor has it been used as a vehicle for restricting a plaintiff's right to seek full compensation from the tortfeasor of his choosing.<sup>60</sup> Moreover, "[w]hat may be equitable [b]etween multi-

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54. *Seattle First Nat'l Bank*, 91 Wash. 2d at 237, 588 P.2d at 1313. See KAN. STAT. ANN. § 60-258a (1974); NEV. REV. STAT. § 41.141 (1973); N.H. REV. STAT. ANN. § 507:7-a (1986); VT. STAT. ANN. tit. 12, § 1036 (1969).

55. *Seattle First Nat'l Bank*, 91 Wash. 2d at 237, 588 P.2d at 1313. ("As Professor Schwartz notes in his treatise on comparative negligence: [t]he concept of joint and several liability of tortfeasors has been retained under comparative negligence, unless the statute specifically abolishes it, in all states that have been called upon to decide the question.") (citing VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 16.4 (1974)).

56. *Id.*

57. *Id.* at 237-238, 588 P.2d at 1313-14 (emphasis added); see also WASH. STATE S. SELECT COMM. ON TORT & PROD. LIAB. REFORM, FINAL REP., 47TH LEG. REG. SESS. 20-23 (1981):

The Select Committee believes that the rule on joint and several liability should continue to be recognized in this state. It concedes that the effect of this rule may be to require a partially at fault defendant to pay more than his or her share of the joint defendants' liability in certain cases. This unfairness should be ameliorated in most cases by the creation of a right of contribution among tortfeasors. In those cases where it is not, the Select Committee feels that a defendant rather than the plaintiff should bear the burden of that unfairness.

*Id.*

58. *Seattle First Nat'l Bank*, 91 Wash. 2d at 238, 588 P.2d at 1314.

59. *Id.*

60. *Id.*



ple tortfeasors is an issue totally divorced from what is fair to the injured party.”<sup>61</sup> For these reasons, the court held that the legislature’s adoption of a comparative negligence scheme did not dictate the demise of joint and several liability.<sup>62</sup>

Not only did the courts reaffirm the applicability of joint and several liability, but they also placed the burden on defendants to prove the allocation of damages amongst themselves. In *Phennah v. Whalen*,<sup>63</sup> the Washington Court of Appeals faced the problem of determining which party should carry the burden of proof in allocating damages when multiple defendants have caused an indivisible harm. Plaintiff Dorothy E. Phennah was injured in two unrelated automobile accidents occurring three months apart; the accidents aggravated Phennah’s pre-existing osteo-arthritic condition, resulting in a permanent injury.<sup>64</sup> Phennah sought damages for her permanent injury from the two drivers, but the trial court dismissed the case because she failed to proffer an evidentiary basis for the segregation of damages among successive tortfeasors.<sup>65</sup> The court of appeals reversed, holding that once a plaintiff proves that successive negligent defendants have caused some damage, the burden of proof shifts to those defendants to allocate their damages. And, should the jury find the plaintiff’s injury to be indivisible, those defendants would be jointly and severally liable.<sup>66</sup>

The court initially analyzed prior cases in which the characterization of the tortfeasor determined the type of liability to be imposed. Phennah claimed that defendants were concurrent tortfeasors, which meant that the court would impose joint and several liability, but the defendants claimed that they were successive tortfeasors, which only required the imposition of several liability.<sup>67</sup> The court reviewed the characterizations utilized by the court in *Seattle First National Bank* and determined that the relevant factor in determining whether tortfeasors are joint, concurrent, or successive is not the divisibility of the harm, but the manner in which the occurrences took place.<sup>68</sup> However, under the facts of *Phennah*, an anomaly in the law surfaced when only one harm re-

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61. *Id.* at 236, 588 P.2d at 1313.

62. *Id.*

63. 28 Wash. App. 19, 621 P.2d 1304 (1980).

64. *Id.* at 21, 621 P.2d at 1306 (plaintiff’s treating physician, Dr. Scott Wisner, “testified that while neither accident caused Phennah’s arthritic condition, each affected the severity and permanence of her disability and that it is impossible to state which accident caused what degree of injury and permanence.”).

65. *Id.* at 21–22, 621 P.2d at 1306.

66. *Id.* at 29, 621 P.2d at 1310.

67. *Id.* at 23, 621 P.2d at 1307.

68. *Id.*

sulted from the defendants' independent actions.<sup>69</sup> The court found that the determinative factor in deciding what type of liability should be imposed was not based on characterization of the tortfeasors, but instead was simply a question of who should carry the burden of segregating the damages.<sup>70</sup>

Thus, the court eventually decided that when the harm is indivisible among successive tortfeasors, the defendants must bear the burden of proving allocation of the damages among themselves.<sup>71</sup> In fashioning this rule, the court followed and adopted the approach of the Restatement (Second) of Torts. According to the Restatement, the first determination courts should make is whether the harm is segregable:

- (1) Damages for harm are to be apportioned among two or more causes where
  - (a) there are distinct harms, or
  - (b) there is a reasonable basis for determining the contribution of each cause to a single harm.
- (2) Damages for any other harm cannot be apportioned among two or more causes.<sup>72</sup>

Based on the factual determination made in this initial step, the court may rule as to whether the tortfeasors are severally or jointly liable. If the court finds that the harm is not segregable, then it must follow the next section which states:

Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.<sup>73</sup>

The Restatement method thus can be summed up as follows: First, a court must factually determine whether under section 433A of the Restatement the harm is segregable, and, if so, the tortfeasors are either severally or jointly liable; second, if the harm is not segregable, then section 433B of the Restatement allocates to the tortfeasors the burden of proving apportionment among themselves.

In sum, despite the legislature's adoption of a pure comparative negligence scheme, Washington courts were unsatisfied that the legislature intended to abolish joint and several liability as it had existed under

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69. *Id.* at 24, 621 P.2d at 1307.

70. *Id.*

71. *Id.* at 26–29, 621 P.2d at 1309–10.

72. RESTATEMENT (SECOND) OF TORTS § 433A (1965).

73. *Id.* § 433B(2).

common law. Furthermore, the courts remained steadfast to the main purpose of tort law: providing compensatory measures to those who have been injured. Joint and several liability is one mechanism recognized by courts through which such measures may be accomplished. Is this reaffirmance of joint and several liability within a comparative fault scheme justified?

There are many well-reasoned arguments as to why joint and several liability has outlived its usefulness within a comparative fault scheme. The fundamental argument for abandoning the concept of joint and several liability arises from the very purpose of the doctrine of comparative fault itself; specifically, that “responsibility for harm done should be distributed in proportion to the fault of all of the parties involved and not governed by concepts of causation.”<sup>74</sup> Thus, according to this argument, a plaintiff may recover despite fault, and if his or her damages award is reduced 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.<sup>75</sup> This argument is more persuasive in circumstances where a plaintiff targets a relatively wealthy defendant to cover the entire liability for harm simply because his ability to pay makes him the ideal candidate, even when that defendant’s proportionate fault is less than that of other tortfeasors who also caused the harm.<sup>76</sup> The argument becomes stronger still if “full recovery is permitted from such a target defendant by a plaintiff whose proportionate fault was greater than the fault of the target defendant.”<sup>77</sup>

But the theory that gives strength to this argument is the very thing that breaks it down. The argument relies on the premise that as a plaintiff’s own proportionate liability rises, so too does the case for the elimination of joint and several liability. The converse, then, must also be true: as a plaintiff’s own proportionate liability falls, so too does the case for proportionate liability. Where the plaintiff has had no hand in causing his own injuries, all defendants should be jointly and severally liable for the plaintiff’s damages. These arguments should be kept in mind as the Tort Reform Act of 1986 is discussed.

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74. Peck, *supra* note 21, at 238.

75. *Id.*

76. *Id.*

77. *Id.*

### C. The Tort Reform Act of 1986:

#### *Washington's Answer to Balancing Two Sides of the Same Coin*

Washington has undergone significant reform in the area of tort law. As stated earlier, Washington adopted a pure comparative negligence scheme in 1973.<sup>78</sup> Then, for the first time in Washington's history, a 1981 Act authorized tortfeasors to bring actions for contribution.<sup>79</sup> But the most important change to Washington tort law came with the Tort Reform Act of 1986, which comprehensively modified the doctrine of joint and several liability.<sup>80</sup>

The Washington State Legislature intended two specific results when it ratified the Tort Reform Act of 1986. The relevant language of the Preamble states, "The purpose of this chapter 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>81</sup> Thus, the legislature intended to allocate the responsibility of paying

78. 1973 Wash. Sess. Laws 949-50 (codified as WASH. REV. CODE §§ 4.22.005-.015 (1981)).

79. 1981 Wash. Sess. Laws 118 (codified as WASH. REV. CODE §§ 4.22.040 and .050 (1982 & 1981)).

80. See WASH. REV. CODE § 4.16.160 (1986).

81. 1986 Wash. Sess. Laws 1354-55 (emphasis added). The Preamble in full states the following:

Tort law in this state has generally been developed by the courts on a case-by-case basis. While this process has resulted in some significant changes in the law, including amelioration of the harshness of many common law doctrines, the legislature has periodically intervened in order to bring about needed reforms. The purpose of this chapter 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.

The legislature finds that counties, cities, and other governmental entities are faced with increased exposure to lawsuits and awards and dramatic increases in the cost of insurance coverage. These escalating costs ultimately affect the public through higher taxes, loss of essential services, and loss of the protection provided by adequate insurance. In order to improve the availability and affordability of quality governmental services, comprehensive reform is necessary.

The legislature also finds comparable cost increases in professional liability insurance. Escalating malpractice insurance premiums discourage physicians and other health care providers from initiating or continuing their practice or offering needed services to the public and contribute to the rising costs of consumer health care. Other professionals, such as architects and engineers, face similar difficult choices, financial instability, and unlimited risk in providing services to the public.

The legislature also finds that general liability insurance is becoming unavailable or unaffordable to many businesses, individuals, and nonprofit organizations in amounts sufficient to cover potential losses. High premiums have discouraged socially and economically desirable activities and encourage many to go without adequate insurance coverage.

Therefore, it is the intent of the legislature to reduce costs associated with the tort system, while assuring that adequate and appropriate compensation for persons injured through the fault of others is available.

WASH. REV. CODE ANN. § 4.16.160 (1986).

damages more fairly, as well as to reduce the cost of insurance. How, then, did the purpose of the Tort Reform Act affect and modify the doctrine of joint and several liability?

The application of joint and several liability allowed a plaintiff to collect an entire damage award from business or government entities, even when those entities were responsible for only a small percentage of fault. The unfortunate effect of the application of joint and several liability in these circumstances was an escalation in the costs of insurance. The legislature found that “the increased insurance costs discouraged private businesses and organizations from engaging in socially and economically desirable activities, and caused governmental entities to reduce services.”<sup>82</sup> The legislature was persuaded by the contention that government and business insurance carriers were forced to raise their rates due to large losses caused by the existing tort system’s potential for placing liability on defendants only marginally responsible for the plaintiff’s harm.<sup>83</sup> Lower insurance premiums would allow government to use the savings to provide services, and would allow businesses to continue operations.<sup>84</sup> The legislature hoped to decrease the losses of insurance companies, which presumably would enable them to charge lower premiums, by eliminating the application of joint and several liability when a plaintiff was partially responsible for the harm.<sup>85</sup> Significantly, and as argued above, the legislative history does not indicate that the legislature intended to eliminate the application of joint and several liability when the plaintiff was fault free.

The legislature’s other intended purpose was to achieve an equitable distribution of cost and risk of injury by abrogating or modifying joint and several liability in certain situations.<sup>86</sup> The Washington Supreme Court held that the Act makes it clear that “[proportionate] liability is now intended to be the general rule” and that proportionate liability<sup>87</sup> “is in fact an exception that has all but swallowed the general

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82. Weaver, *supra* note 33, at 460.

83. See *supra* note 81 and accompanying text; Peck, *supra* note 21, at 238; Weaver, *supra* note 33, at 460.

84. See *supra* note 81 and accompanying text.

85. Peck, *supra* note 21, at 238; Weaver, *supra* note 33, at 460–61.

86. Stewart A. Estes, *The Short Happy Life of Litigation Between Tortfeasors: Contribution, Indemnification and Subrogation after Washington’s Tort Reform Acts*, 21 SEATTLE U. L. REV. 69, 76 (1997); 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, 6 (1992); see also Weaver, *supra* note 33, at 473.

87. Washburn v. Beatt Equip. Co., 120 Wash. 2d 246, 294, 840 P.2d 860, 886 (1992); see also Kottler v. State, 136 Wash. 2d 437, 443–45, 963 P.2d 834, 838–39 (1998). Commentators have critically noted that the classical use of the term “several” indicated a tortfeasor’s responsibility for the entire harm at common law. Gregory C. Sisk, *The Constitutional Validity of the Modification of*

rule.”<sup>88</sup> Members of the legislature expounded on the need for legislation to correct the unfair application of the joint and several liability doctrine to defendants only partially at fault who were subsequently held liable for the entire amount of damages.<sup>89</sup> The Washington legislators well understood that they were limiting the doctrine of joint and several liability *only* to situations where the plaintiff is not contributorily negligent.<sup>90</sup> This legislative understanding makes sense when considering the premise of the comparative negligence scheme because when a plaintiff is fault free there is nothing with which to “compare” the defendants’ fault. Moreover, no general rule is without its limitations and exceptions. Limiting the application of the joint and several liability doctrine to those cases which involve a partially at-fault plaintiff is consistent with both the legislature’s intent and the compensatory nature of tort law. It is im-

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*Joint and Several Liability in the Washington Tort Reform Act of 1986*, 13 U. PUGET SOUND L. REV. 433, 440 (1990); Bryan P. Harnetiaux, *RCW 4.22.070, Joint and Several Liability, and the Indivisibility of Harm*, 27 GONZ. L. REV. 193, 198 n.19 (1991/1992). Whatever may have been the technical meaning of the term “several” liability at common law, the meaning of the term in a statute must be drawn from its context in that statute. Title 4, chapter 22, section 070(1) of the Revised Code of Washington provides for “several only” liability as part of a provision stating that judgment shall be entered against each defendant “in an amount which represents that party’s proportionate share of the claimant’s total damages.” The context makes clear that the term “several only” liability refers to liability that is limited to a defendant’s proportionate share of the damages based on percentage of individual fault. *Id.*; see also Peck, *supra* note 21, at 239 n.20 (the word “several” is used differently in the statute than at common law and refers to a tortfeasor’s “proportionate share of the plaintiff’s total damages”). Cf. Weaver, *supra* note 33, at 460 n.16 (“In section 1(b), however, “several” means the sum of the amounts for which all of the defendants are liable. This second meaning is different from the meaning used in the first paragraph and the common law meaning.”). “Proportionate liability” is the more accurate term. Harnetiaux, *supra*, at 198 n.19.

88. *Washburn*, 120 Wash. 2d at 294 n.7, 840 P.2d at 886 n.7.

89. See, e.g., S.J., 49th Reg. Sess. & 1st Spec. Sess. 466 (Wash. 1986) (legislation adopts “good public policy to have those persons who have contributed to the problem pay proportionate to their contribution.”) (remarks of Sen. Thompson); H.J., 49th Reg. Sess. & Spec. Sess. 1065 (Wash. 1986) (describing the economic harm to society of holding a defendant that is only ten percent responsible for an injury liable for the entire amount of the damages simply because another tortfeasor is insolvent) (remarks of Rep. Ballard); see also WASH. REV. CODE § 4.22.070(1) (1993) (commanding trier of fact to “determine the percentage of the total fault which is attributable to every entity which caused” the injury or harm, and providing that the “liability of each defendant shall be several only and shall not be joint” unless the case falls within certain narrow limitations and exceptions); S.J., 49th Reg. Sess. & 1st Spec. Sess. 1486 (Wash. 1986) (changes in joint and several liability were adopted to deal with unfairness of situation in which someone is found “fifty percent negligent in the accident” and yet is left “paying the total cost.”) (remarks of Sen. Hayner); H.J., 49th Reg. Sess. & Spec. Sess. 1067–68 (Wash. 1986) (explaining that joint and several liability concept needed to be corrected because “it allows one person to be held liable for another person’s fault to some extent.”) (remarks of Rep. Barnes); see also *Huber v. Henley*, 656 F. Supp. 508, 511 (S.D. Ind. 1987) (the provisions of Indiana’s comparative fault statute “signal a legislative policy favoring the principle of fair allocation among all tortfeasors,” and “[a]ny interpretation of legislative intent must therefore be made with a cognizance of this policy.”).

90. See, e.g., S.J., 49th Reg. Sess. & 1st Spec. Sess. 466 (Wash. 1986) (when the plaintiff is also at fault “joint and several liability goes out the door.”) (remarks of Sen. Talmadge).

portant to keep in mind this distinction between the limitation, on one hand, and complete abrogation, on the other hand, of joint and several liability.

The centerpiece of the Tort Reform Act of 1986 is codified at title 4, chapter 22, section 070 of the Revised Code of Washington.<sup>91</sup> With this single provision, the Washington Legislature established a new foundation for tort liability—individual responsibility in direct proportion to individual fault.<sup>92</sup> Although section 070 establishes a general rule of comparative responsibility among tortfeasors, it also establishes certain exceptions in the contexts of vicarious liability and the innocent plaintiff, as well as three explicitly enumerated limitations within the statute.<sup>93</sup> Thus, under the statute, a defendant's liability is several only, unless: (1) the plaintiff is not at fault;<sup>94</sup> (2) the defendant is acting in concert with another person;<sup>95</sup> (3) the person at fault is acting as an agent of the defendant;<sup>96</sup> or (4) the case falls within one of the three exceptions to the statute.<sup>97</sup>

Two main themes run through section 070. First, when the plaintiff is also at fault, defendants should not be held liable for more than their own share of the damages as determined by their proportionate fault.<sup>98</sup> This limitation on liability reflects the basic premise of a comparative fault scheme and is consistent with the legislature's intent. Second, "when a potential defendant has not been added to the lawsuit because of a legal immunity or impediment, or simply by reason of the plaintiff's voluntary choice or neglect, no other defendant may be forced to assume that share of the liability."<sup>99</sup> In other words, a plaintiff may not collect an unnamed defendant's share of an award from the other defendants that have been named. Thus, a *Tegman* scenario, which involves a fault-free plaintiff who claims joint and several liability against all named defendants where there are no other possible defendants, is consistent within the framework of these two main themes.

While section 070 may appear to be merely an exception to the general rule, the Washington Supreme Court has consistently stated that this statute is an exception that has "all but swallowed the general

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91. WASH. REV. CODE § 4.22.070 (1993).

92. Sisk, *supra* note 86, at 6.

93. WASH. REV. CODE § 4.22.070(3)(a)–(c) (1993); *see also* Peck, *supra* note 21, at 243; Sisk, *supra* note 86, at 121; Weaver, *supra* note 33, at 460 n.17.

94. WASH. REV. CODE § 4.22.070(1)(b) (1993).

95. *Id.* § 4.22.070(1)(a).

96. *Id.*

97. *Id.* § 070(3)(a)–(c).

98. Sisk, *supra* note 86, at 18.

99. *Id.*

rule.”<sup>100</sup> Thus, several only, or proportionate, liability is now the general rule.<sup>101</sup> Where the plaintiff is partially at fault,<sup>102</sup> the statute requires that courts undertake a two-step approach to apportion liability according to the level of responsibility.<sup>103</sup> First, the statute provides that “the trier of fact shall determine the percentage of the total fault which is attributable to every entity . . . .”<sup>104</sup> This language means that the trier of fact allocates fault to every entity, whether a party or not, that played any part in causing the plaintiff’s damages. Second, the statute provides that the court shall enter judgment against each defendant for “that party’s proportionate share of the claimant’s total damages.”<sup>105</sup> Defendants found at fault by judgment are fully responsible for their proportionate share of the damages, but the defendants are not liable, however, for that part of the damages attributable to the fault of an entity that has not been made a party to the action or that was joined as a defendant but was released before judgment.<sup>106</sup> Therefore, under the general rule of proportionate liability, even if none of the defendants is insolvent, a plaintiff may still not receive a full recovery, either because they overlooked possible defendants who were not named in the suit or because the court determined that there were other defendants who contributed to causing plaintiff’s injuries.<sup>107</sup>

However, when the plaintiff is fault free and without culpability, the rules of comparative responsibility are set aside and the defendants remain jointly and severally liable.<sup>108</sup> Section 070(1) provides two excep-

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100. See, e.g., *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); *Washburn v. Beatt Equip. Co.*, 120 Wash. 2d 246, 294 n.7, 840 P.2d 860, 886 n.7 (1992). See also *Thomas V. Harris, Washington’s 1986 Tort Reform Act: Partial Tort Settlements After the Demise of Joint and Several Liability*, 22 GONZ. L. REV. 67, 67–68 (1986/1987); *Peck, supra* note 21, at 243–44; *Harnetiaux, supra* note 86, at 195; *Sisk, supra* note 86, at 14.

101. See *supra* text accompanying note 87.

102. *Sisk, supra* note 86, at 112 (Title 4, chapter 22, section 070 of the Revised Code of Washington draws a distinction between the innocent and the culpable plaintiff).

103. *Id.* at 90.

104. WASH. REV. CODE § 4.22.070(1) (1993).

105. *Id.*

106. *Sisk, supra* note 86, at 43.

107. *Id.* at 93 (see the mathematical approach example under Table 1 which contemplates allocation of twenty percent fault to an unjoined entity which would not be awarded).

108. See WASH. REV. CODE § 4.22.070(1)(b) (1993); *Peck, supra* note 21, at 243–44 (statute preserves joint and several liability in those cases in which a plaintiff is not at fault, but that liability is limited to the sum of the proportionate shares of fault of the defendants against whom judgment is entered); *Sisk, supra* note 86, at 112 (under paragraph (1)(b), if the plaintiff or claimant is without fault, the defendants to the action remain jointly and severally liable to the plaintiff); *Weaver, supra* note 33, at 457 (under Washington’s modified doctrine of joint and several liability, joint liability between defendants exists only if the plaintiff is free from fault).



tions<sup>109</sup> for joint and several liability among defendants: “factual” and “procedural” joint and several liability.<sup>110</sup> The first exception applies once the court has made a factual determination either that an agency or employment relationship exists, or that the defendants acted in concert.<sup>111</sup> The second exception applies when the plaintiff is fault free and there is an entry of judgment against multiple defendants.<sup>112</sup>

Factual joint and several liability arises when a person acts as the agent or servant of a party, or when both are acting in concert.<sup>113</sup> The legislature intended the term “acting in concert” to require two or more people consciously acting in concert in an unlawful manner.<sup>114</sup> This narrow definition excludes concurrent tortfeasors by requiring that the actors consciously combine their actions; it also excludes co-conspirators by requiring that each of the actors actively participate in the unlawful conduct.<sup>115</sup> “Acting in concert” does not require that the defendants intend to harm the plaintiff—only that the actors consciously act together in an unlawful manner.<sup>116</sup>

Procedural joint and several liability arises when the claimant is free of fault and judgment is entered against multiple defendants.<sup>117</sup> At common law, the plaintiff could single out one of multiple defendants and force that defendant to pay for the entire harm.<sup>118</sup> Procedural joint and several liability, then, is a modified version of the common law rule. Simply stated, when a plaintiff is fault free, only those defendants against whom judgment is entered are liable, and only for the sum of their proportionate shares of the plaintiff’s total damages.<sup>119</sup> Defendants are generally not liable for the share of any at-fault entity that has no judgment

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109. Note that there is a distinction between the exceptions to the general rule of several, or proportionate liability, and those specific enumerated situations that are out of the purview of the general rule. Claims which are out of the general rule and which remain subject to common law joint and several liability are hazardous wastes or substances (WASH. REV. CODE § 4.22.070(3)(a) (1993)), tortious interference with a contract or business relationship (*Id.* § 4.22.070(3)(b)), and fungible product claims (*Id.* § 4.22.070(3)(c)).

110. *Estes*, *supra* note 86, at 69–70.

111. *See* WASH. REV. CODE § 4.22.070(1)(a) (1993).

112. *See id.* § 070(1)(b).

113. *See id.* § 070(1)(a).

114. *Kottler v. State*, 136 Wash. 2d 437, 448–49, 963 P.2d 834, 841 (1998); *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 75 Wash. App. 480, 485–87, 878 P.2d 1246, 1249–50 (1994).

115. *Moen*, 75 Wash. App. at 486, 878 P.2d at 1249.

116. *Id.* (citing *Sisk*, *supra* note 86, at 108).

117. WASH. REV. CODE § 4.22.070(1)(b) (1993).

118. *PROSSER*, *supra* note 31, at 307; *Seattle First Nat’l Bank v. Shoreline Concrete Co.*, 91 Wash. 2d 230, 236, 588 P.2d 1308, 1312–13 (1978).

119. *See* WASH. REV. CODE § 4.22.070(1)(b) (1993).

entered against it.<sup>120</sup> Thus, a plaintiff may hold multiple defendants jointly and severally liable if he can factually establish an employment or agency relationship or conspiracy, or if he can procedurally obtain entry of a judgment against multiple defendants and the plaintiff is determined to be free from fault.

A review of some influential Washington cases decided after the enactment of the Tort Reform Act of 1986 and section 070 may illustrate the modified doctrine of joint and several liability.

As the courts did prior to the Tort Reform Act, courts reaffirmed that the doctrine of joint and several liability did indeed have a place in Washington jurisprudence after the Act's ratification. In *Washburn v. Beatt Equipment Co.*,<sup>121</sup> the Washington Supreme Court thoroughly analyzed section 070. Plaintiff Norman Washburn was severely burned and permanently injured when a standby propane fuel system caught fire and exploded.<sup>122</sup> Prior to trial, three defendants settled and were released by the plaintiff (Petrolane, Inc., paid \$780,000; Buckeye Gas Products Company paid \$520,000; and Washington Natural Gas paid \$210,000).<sup>123</sup> At trial, the jury apportioned fault among all the entities they determined had caused plaintiff's injuries, as required under section 070(1).<sup>124</sup> The jury found defendant Beatt eighty percent at fault; Petrolane, Inc., twenty percent at fault; and all other entities free from fault.<sup>125</sup> The jury awarded a total amount of \$8 million and the trial court entered judgment against Beatt for a net amount of \$5,670,000.<sup>126</sup> The court reached this amount by calculating eighty percent of \$8 million for a result of \$6,400,000, and by reducing that award by the amount paid by the settling defendants that were not found to be at fault.<sup>127</sup> The plaintiff claimed that the trial court erred in calculating the judgment amount against Beatt.<sup>128</sup>

The Washington Supreme Court held that since the jury found Beatt eighty percent at fault, Beatt must pay eighty percent of the total verdict.<sup>129</sup> The court found that, under section 070(1)(b), defendants may be held jointly and severally liable for a plaintiff's damages where the plain-

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120. *Anderson v. City of Seattle*, 123 Wash. 2d 847, 852, 873 P.2d 489, 492 (1994); *Gerrard v. Craig*, 122 Wash. 2d 288, 292-93, 857 P.2d 1033, 1035 (1993); *Washburn v. Beatt Equip. Co.*, 120 Wash. 2d 246, 294, 840 P.2d 860, 886 (1992).

121. 120 Wash. 2d 246, 840 P.2d 860.

122. *Id.* at 251, 840 P.2d at 864.

123. *Id.* at 290, 840 P.2d at 884.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 296, 840 P.2d at 887.

tiff is free from fault.<sup>130</sup> Further, under section 070(1)(b), joint and several liability is imposed only on those defendants against whom judgment is entered and only for the sum of their proportionate shares of plaintiff's total damages.<sup>131</sup> Because Petrolane had settled prior to trial, there were no other defendants with whom Beatt could be held jointly and severally liable. Therefore, Beatt was not entitled to any offset, credits, or contribution under section 070(2). Defendants who have settled or who have been released and have not had judgment entered against them within the meaning of section 070(1) are not jointly and severally liable. In other words, a fault-free plaintiff may hold jointly and severally liable only those defendants against whom judgment is entered, and not those who have settled prior to trial.

Because courts do not allow a plaintiff to recover for damages caused by an unnamed tortfeasor, defendants with judgments entered against them receive even more relief apart from contribution. In *Anderson v. City of Seattle*,<sup>132</sup> the Washington Supreme Court held that under section 070(1)(b), a defendant must be named in the case when the court enters its final judgment to qualify as a "defendant[]" against whom judgment is entered."<sup>133</sup> Here, seven-year-old Marcus Anderson was struck and killed by Jo Carrie Wilson while he was attempting to cross the street with his twelve-year-old foster sister, Angela Lamb.<sup>134</sup> One year later, Wilson filed for bankruptcy and listed Donna Anderson, Marcus's mother, as a potential creditor with an \$8 million liability claim.<sup>135</sup> The petition was granted, discharging her from all debts, including the estimated \$8 million claim.<sup>136</sup> Anderson, in her capacity as personal representative for Marcus's estate, subsequently filed suit against Wilson, Wilson's husband, and the City of Seattle.<sup>137</sup> The Wilsons were later dismissed with prejudice by an agreed order of dismissal.<sup>138</sup> The trial court determined that Marcus was zero percent at fault, and the jury returned a verdict in favor of Anderson.<sup>139</sup> The jury apportioned fault between three entities: Angela Lamb at zero percent; City of Seattle at one percent; and Wilson at ninety-nine percent.<sup>140</sup> The trial court then held

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130. *Id.* at 294, 840 P.2d at 886.

131. *Id.*, 840 P.2d at 886-87.

132. 123 Wash. 2d 847, 873 P.2d 489 (1994).

133. *Id.* at 852, 873 P.2d at 492.

134. *Id.* at 849, 873 P.2d at 490.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 849-50, 873 P.2d at 490.

139. *Id.* at 850, 873 P.2d at 490.

140. *Id.*

the City severally liable for its one percent share,<sup>141</sup> and Anderson appealed, claiming the City was jointly and severally liable under section 070.<sup>142</sup>

The Washington Supreme Court held that the Wilsons were not defendants against whom judgment was entered under any reasonable interpretation of section 070(1)(b).<sup>143</sup> The court began its analysis with section 070(1)(b), an exception to the general rule of several liability that retains joint and several liability against multiple tortfeasors when the plaintiff is fault free.<sup>144</sup> In interpreting the statute, the court determined that the language was plain, unambiguous, and controlling.<sup>145</sup> Under the plain language of section 070(1)(b), joint and several liability is imposed only if two events occur: (1) the trier of fact concludes the claimant is fault free; and (2) judgment is entered against two or more defendants.<sup>146</sup> Thus, because judgment was only entered against one defendant, the City of Seattle, it was only severally liable for its proportionate share of fault, regardless of whether other entities were found at fault.

Although Washington courts have made clear that joint and several liability still exists, its application is limited to a few select situations.<sup>147</sup> Joint and several liability is not applicable when a plaintiff, a negligent defendant, and an intentional defendant are all liable for a portion of the damages. In *Welch v. Southland Corp.*,<sup>148</sup> the Washington Supreme Court decided whether the statutory definition of "fault"<sup>149</sup> includes intentional tortfeasors, and whether a defendant may apportion liability to an intentional tortfeasor under section 070. In the early morning hours,

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141. *Id.*

142. *Id.* at 850, 873 P.2d at 490-91.

143. *Id.* at 852, 873 P.2d at 492.

144. *Id.* at 850, 873 P.2d at 491; see also *Henderson v. Tyrell*, 80 Wash. App. 592, 622-23, 910 P.2d 522, 540 (1996) (statute requiring trier of fact to determine percentage of total fault attributable to every entity which caused claimant's damages establishes several liability as general rule, but retains joint and several liability under limited number of circumstances, one of which applies when fault-free claimant is injured).

145. *Anderson*, 123 Wash. 2d 851, 873 P.2d at 491 (in interpreting a statute, the Washington State Supreme Court looks first to the plain and ordinary meaning of the words used by the legislature (citing *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 668, 771 P.2d 711, 728 (1989)); see also *Geschwind v. Flanagan*, 121 Wash. 2d 833, 841, 854 P.2d 1061, 1066 (1993) (when a statute is clear and unambiguous, it is unnecessary to examine legislative history in order to interpret the statute).

146. *Anderson*, 123 Wash. 2d 851, 873 P.2d at 491; see also *Gerrard v. Craig*, 122 Wash. 2d 288, 298-99, 857 P.2d 1033, 1039 (1993) (a dismissed defendant cannot be potentially liable to a plaintiff and thus cannot be a defendant against whom judgment is entered); *Washburn v. Beatt Equip. Co.*, 120 Wash. 2d 246, 294-95, 840 P.2d 860, 886-87 (1992) (only defendants against whom judgment is entered are jointly and severally liable and only for the sum of their proportionate share of the total damages).

147. *Welch v. Southland Corp.*, 134 Wash. 2d 629, 952 P.2d 162 (1998).

148. *Id.*

149. WASH. REV. CODE § 4.22.015 (1981).

plaintiff Mark Welch entered a 7-11 convenience store where another patron demanded Welch's wallet, shot Welch multiple times, fled, and was never apprehended.<sup>150</sup> Welch subsequently brought suit against defendant Southland, the owner of the 7-11, on the grounds that the company failed to maintain safe premises for its business invitees.<sup>151</sup> Southland pleaded, as an affirmative defense, that fault should be apportioned between the negligent and intentional actors.<sup>152</sup> Welch moved for partial summary judgment to strike the defense.<sup>153</sup> The trial court denied Welch's motion, holding that "where the plaintiff, a negligent tortfeasor defendant, and an intentional tortfeasor are all liable, the negligent defendant is entitled to the benefit of the comparative fault statute."<sup>154</sup>

The Washington Supreme Court held that a negligent defendant is not entitled to apportion liability with an intentional tortfeasor under the current statutory definition of "fault."<sup>155</sup> The court reasoned that both title 4, chapter 22, sections 015 and 070 of the Revised Code of Washington are plain and unambiguous.<sup>156</sup> The court made this determination from the statutory language alone.<sup>157</sup> Only if the language were ambiguous are principles of statutory construction applied in order to ascertain and give effect to the intent and purpose of the legislature in enacting them.<sup>158</sup> The court further reasoned that when similar words are used in different parts of a statute, "the meaning is presumed to be the same throughout."<sup>159</sup> Thus, for a negligent defendant to apportion liability to another entity, that entity must be "at fault" within the meaning of section 070.

Courts have also continued to uphold the rule that defendants carry the burden in allocating damages amongst themselves. In *Cox v. Spangler*,<sup>160</sup> the Washington Supreme Court held that the burden of ap-

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150. *Welch*, 134 Wash. 2d at 630-31, 952 P.2d at 163.

151. *Id.* at 631, 952 P.2d at 163.

152. *Id.*, 952 P.2d at 163-64.

153. *Id.*, 952 P.2d at 164.

154. *Id.*

155. *Id.* at 636-37, 952 P.2d at 166.

156. *Id.* at 634, 952 P.2d at 165.

157. *Id.*; accord *Morgan v. Johnson*, 137 Wash. 2d 887, 891-92, 976 P.2d 619, 621 (1999); *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wash. 2d 325, 329, 815 P.2d 781, 782 (1991); see also *Snohomish v. Joslin*, 9 Wash. App. 495, 498, 513 P.2d 293, 296 (1973) ("In judicial interpretation of statutes, the first rule is 'the court should assume that the legislature means exactly what it says. Plain words do not require construction.'").

158. *Welch*, 134 Wash. 2d at 633, 952 P.2d at 165; see also *Morgan*, 137 Wash. 2d at 891-92, 976 P.2d at 621; *Whatcom County v. City of Bellingham*, 128 Wash. 2d 537, 546, 909 P.2d 1303, 1308 (1996).

159. *Welch*, 134 Wash. 2d at 636, 952 P.2d at 166 (citing *Cowles Publ'g Co. v. State Patrol*, 109 Wash. 2d 712, 722, 748 P.2d 597, 603 (1988)).

160. 141 Wash. 2d 431, 5 P.3d 1265 (2000).

portioning damages is on the defendant.<sup>161</sup> On May 19, 1993, while plaintiff Deborah E. Cox was in a vehicle stopped at a gate while at work, a co-employee accidentally rear-ended Cox.<sup>162</sup> The impact and damage to the vehicle was relatively minor, but Cox immediately experienced headache and neck pains.<sup>163</sup> Her examining doctor concluded that she had suffered neck and lumbar spine strain, and over the next six months, Cox continued to suffer from the strain.<sup>164</sup> By November 1993, Cox's headaches had stopped and the pain in her neck diminished, but unfortunately Cox was involved in another accident on November 2, 1993.<sup>165</sup> While Cox's vehicle was stopped at a crosswalk, with another car driven by Maryanne Hummel stopped approximately five feet behind Cox, Spangler, unable to stop her vehicle, rear-ended Hummel and shoved Hummel's vehicle into the back of Cox's vehicle.<sup>166</sup> Cox complained of pain in the previously affected neck and upper back area, and for the first time, a lower back ache that radiated down her right hip and leg.<sup>167</sup> An independent medical examiner concluded that, with the exception of the lumbar strain, her injuries were a result of a "combination of the two accidents."<sup>168</sup> At trial, the jury was instructed that Spangler bore the burden of apportioning damages for the injuries if it found Cox's injuries to be indivisible, and the jury returned a verdict in favor of Cox.<sup>169</sup> Spangler appealed, claiming error in the jury instructions regarding apportionment; but the court of appeals affirmed.<sup>170</sup>

The Washington Supreme Court also affirmed, supporting the burden-shifting scheme of *Phennah* by applying section 433B(2) of the Restatement (Second) of Torts.<sup>171</sup> The court reasoned that although the case was distinguishable from *Phennah* in that joint and several liability was not imposed,<sup>172</sup> the key similarity between these cases was the indivisibility of the plaintiff's injuries.<sup>173</sup> Because the injuries were not segrega-

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161. *Id.* at 442-43, 5 P.3d at 1271 (loosely derived from *Phennah v. Walen*, 28 Wash. App. 19, 621 P.2d 1304 (1980)).

162. *Id.* at 434, 5 P.3d 1266-67.

163. *Id.*, 5 P.3d at 1267.

164. *Id.*

165. *Id.* at 435, 5 P.3d at 1267.

166. *Id.*

167. *Id.*

168. *Id.* at 436, 5 P.3d at 1268.

169. *Id.* at 437-38, 5 P.3d at 1268.

170. *Id.* at 438, 5 P.3d at 1268.

171. *Id.* at 444, 5 P.3d at 1271 ("The exception in subsection (2) is grounded in the policy that: 'as between the proved tortfeasor who has clearly caused some harm, and the entirely innocent plaintiff, any hardship due to lack of evidence as to the extent of the harm caused should fall upon the former.'") (citing to RESTATEMENT (SECOND) OF TORTS § 433B(2) cmt. d).

172. *Id.* at 445-46, 5 P.3d at 1272.

173. *Id.* at 446, 5 P.3d at 1273.

ble, it was the defendant's burden to apportion damages for those injuries that she proximately caused.<sup>174</sup> This case is also further distinguished from *Phennah*, and other cases for that matter, because it concerns one of those unusual cases that deal not with an apportionment of fault or liability, but rather an attempt to sever two distinct events, both of which contributed to a truly single and indivisible injury.

Neither the *Welch* court nor the *Cox* court was presented with the issue of whether, under section 070(1)(b), joint and several liability may be applied to a negligent defendant and an intentional defendant when a plaintiff is fault free.<sup>175</sup> The Washington Supreme Court recently received an opportunity to resolve this question in *Tegman*.

### III. THE OVERTHROW OF JOINT AND SEVERAL LIABILITY BY JUDICIAL FIAT

With an understanding of the evolution of the doctrine of joint and several liability, the unprecedented and controversial decision in *Tegman* can be more readily criticized. This Part will discuss the *Tegman* case in detail and will critically analyze the majority's reasoning. This Part will then briefly survey other jurisdictions' handling of this issue, and conclude by suggesting potential solutions if the *Tegman* rule should otherwise stand.

#### A. *Tegman v. Accident & Medical Investigations, Inc.*: *A Story of Injustice Towards Fault-Free Plaintiffs*

After having sustained injuries from a car accident on April 26, 1989, Maria Tegman hired G. Richard McClellan and his company, Accident & Medical Investigations, Inc. (AMI), to represent her in the handling of her personal injury claims.<sup>176</sup> Tegman believed McClellan was a licensed attorney and that AMI was a law firm.<sup>177</sup>

Instances of McClellan's misconduct were numerous and pervasive. Despite his claims, McClellan had never been an attorney in any jurisdiction.<sup>178</sup> Nonetheless, he entered into contingency fee agreements with clients.<sup>179</sup> McClellan also negotiated settlements and processed the proceeds of the settlements through his own bank account rather than the

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174. *Id.* at 447, 5 P.3d at 1273.

175. Remember that in *Welch*, all of the parties were found liable, including the plaintiff. See discussion *supra* Part II.C. This is distinguished from *Tegman*, a case of first impression, where the plaintiff is fault-free. See discussion *infra* Part III.A.

176. *Tegman v. Accident & Med. Investigations, Inc.*, 150 Wash. 2d 102, 105, 75 P.3d 497, 498 (2003).

177. *Id.*

178. *Id.*

179. *Id.*

required legal trust account.<sup>180</sup> In December 1991, McClellan settled Tegman's case for \$35,000 without her knowledge or consent, forged her signature on the settlement check, and deposited the settlement funds into his personal account.<sup>181</sup> McClellan then obtained a "release" from Tegman after which he sent her a check for what he determined to be the balance of her share of the settlement proceeds.<sup>182</sup> McClellan was not alone, however, in misconduct.

McClellan and AMI also hired attorneys and paralegals. One of the attorneys was Lorinda Noble, who worked about six months before resigning her position in May 1991.<sup>183</sup> Noble knew that McClellan held himself out as an attorney even though he was not, that he entered into contingency fee agreements with clients, and that proceeds from settled cases were placed into McClellan's personal account instead of a trust account.<sup>184</sup> Noble, who worked on Tegman's case, never informed Tegman that McClellan was not an attorney, never informed the Washington State Bar Association that clients were not being properly advised of the status of their cases, or that fees were being shared with non-lawyers.<sup>185</sup>

Two years later, in 1993, Tegman and others filed suit against multiple parties, including McClellan, AMI, and Noble, alleging "negligence, the unauthorized practice of law, legal malpractice, breach of fiduciary relationship, fraud, misrepresentation, conversion, breach of contract, violation of the Consumer Protection Act [chapter 19.86 RCW], and criminal profiteering."<sup>186</sup> The trial court granted summary judgment against McClellan and AMI for all causes of action, found Noble and others liable for negligence and legal malpractice, found Tegman was not at fault, awarded damages, and imposed joint and several liability against all defendants for compensatory damages only.<sup>187</sup>

Noble appealed. She maintained that the trial court's imposition of joint and several liability among all defendants for the compensatory award of \$15,067.25 was erroneous because she was found to have committed only negligent torts, while McClellan and AMI were found to have committed both negligent and intentional torts. Thus, Noble argued she should be held jointly and severally liable with McClellan and AMI only for damages based on negligent conduct.<sup>188</sup> The court of appeals

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180. *Id.*

181. *Id.* at 106, 75 P.3d at 498.

182. *Id.*

183. *Id.* at 105, 75 P.3d at 498.

184. *Id.*

185. *Id.* at 106, 75 P.3d at 498.

186. *Id.* at 106-07, 75 P.3d at 498 (citing Clerk's Papers (CP) (conclusion of law 179) at 776).

187. *Tegman*, 107 Wash. App. 868, 883-84, 30 P.3d 8, 17-18 (2001).

188. *Tegman*, 150 Wash. 2d at 107, 75 P.3d at 498-99.



affirmed, holding that the trial court treated the action against McClellan and AMI as functionally separate<sup>189</sup> from the action against Noble and other negligent tortfeasors.<sup>190</sup> The Washington Supreme Court granted Noble's petition for review on the issue of joint and several liability.

Ultimately, the court held that "under RCW 4.22.070 the damages resulting from negligence must be segregated from those resulting from intentional acts, and the negligent defendants are jointly and severally liable only for the damages resulting from their negligence. They are not jointly and severally liable for damages caused by intentional acts of others."<sup>191</sup> Unfortunately, the majority gave no intelligible principle by which such a calculation of damages could be made.

Although the majority properly began its analysis with a discussion of the legislature's intent in enacting the Tort Reform Act of 1986, it improperly decided the issue by construing legislative intent before looking to the plain language of the statute. The majority noted that the declared purpose of the Act was 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>192</sup> Thus, by starting with the declared purpose of the statute, the majority attempted to demonstrate that its ruling did no more than carry out the intention of the drafters and that the present case fit neatly within the purview of the statute. By contrast, the dissent, written by Justice Chambers, looked at how the underlying principles of tort law and tort reform governed the specific issue. He

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189. The judgment summary in Tegman's case provides in pertinent part as follows:

Name of Plaintiff/Judgment Creditor:	Maria Tegman
Attorney for Judgment Creditor:	Gregory D. Lucas
	Lucas & Lucas, P.S.
Judgment Debtors:	Deloris Mullen
	Lorinda Sue Noble
	Camille Jescavage
	G. Richard McClellan and
	Accident & Medical
	Investigations, Inc. ("AMI")
Base Judgment Amount:	\$15,067.25 (All defendants)
Criminal Profiteering:	50,000.00 (McClellan & AMI only)
Consumer Protection	10,000.00 (McClellan & AMI only)
Damages:	-----
Judgment Amount:	\$75,067.25
Interest Rate:	12% per annum from the date hereof until paid.
Statutory Attorneys' Fees	\$ 125.00 (All defendants)
Attorneys' Fees:	\$79,218.50 (McClellan & AMI only)

*Tegman*, 107 Wash. App. at 885 n.3, 30 P.3d at 18 n.3.

190. *Id.* at 884-85, 30 P.3d at 17-18.

191. *Tegman*, 150 Wash. 2d at 105, 75 P.3d at 497.

192. *Id.* at 108, 75 P.3d at 499 (quoting 1986 Wash. Laws ch. 305, § 100; *see* WASH. REV. CODE ANN. § 4.16.160 (1986)).

noted that the statute does not specifically address "the several liability of intentional actors or several liability for negligent and intentional tortfeasors who together cause an indivisible harm."<sup>193</sup>

Unfortunately, the majority's citation to the preamble is not well taken. The preamble, which the majority used to interpret legislative intent, is directed toward the availability and affordability of insurance, specifically the cost of insurance to municipalities, professionals, and society in general.<sup>194</sup> The legislature was clear on this point when it stated that "*it is the intent of the legislature to reduce costs associated with the tort system, while assuring that adequate and appropriate compensation for persons injured through the fault of others is available.*"<sup>195</sup> In other words, the legislature was attempting to reduce the cost of insurance. But, read in context, this reduction is not to be accomplished at the cost of sufficient compensation to the innocent plaintiff.<sup>196</sup>

The majority next discussed the determination of fault under the Tort Reform Act. The majority states, and rightfully so, that under the statutory scheme, fault<sup>197</sup> does not include intentional acts or omissions because intentional torts are part of a "wholly different legal realm and are inapposite to the determination of fault pursuant to section 070(1)."<sup>198</sup> Moreover, the majority spent a significant amount of time analyzing the statute sentence by sentence in an attempt to show that the exception in section 070(1)(b) was consistent with section 070(1) because only "at-fault" defendants are contemplated.<sup>199</sup> This lent support to the majority's general proposition that several liability is the general rule and that joint and several liability does not apply to negligent and intentional tortfeasors. Thus, intentional tortfeasors are not part of the analysis because they do not fall within the statutory definition of "fault."

However, while the general rule<sup>200</sup> may not include intentional acts or omissions, the exceptions do contemplate them since they stand outside the realm of the general rule of several liability. Even assuming that all words within a section of a statute are to be given the same meaning,<sup>201</sup> it is only the fault of the plaintiff that is contemplated in section 070(1)(b), not the fault of the defendants. Therefore, the situational exception defined in section 070(1)(b) is out of the comparative fault realm

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193. *Id.* at 130, 75 P.3d at 510 (Chambers, J., dissenting).

194. *See supra* note 81 and accompanying text; *see supra* Part II.C.

195. *Tegman*, 150 Wash. 2d at 109, 75 P.3d at 500 (emphasis added).

196. *See discussion supra* Part II.C.

197. WASH. REV. CODE § 4.22.015 (1981).

198. *Tegman*, 150 Wash. 2d at 110, 75 P.3d at 501.

199. *Id.* at 111-12, 75 P.3d at 500.

200. *Id.* at 109, 75 P.3d at 499.

201. *Welch v. Southland Corp.*, 134 Wash. 2d 629, 636, 952 P.2d 162, 166 (1988).

because the plaintiff has no fault to which the defendants' fault may be compared.<sup>202</sup> The majority even concedes that section 070(1)(b) is the exception to the general rule.<sup>203</sup> It is called an "exception" for a reason—that is, an exception is by definition not consistent with its associated general rule. Otherwise, it would not be an exception!

The majority makes two points that are of particular interest. First, the majority attempts to distinguish joint and several liability under section 070(1)(b) from common law joint and several liability. Because its specific language indicates that joint and several liability is limited to the sum of the proportionate shares of the "at-fault defendants," the section 070(1)(b) exception does not mandate full joint and several liability, even in the case of a fault-free plaintiff.<sup>204</sup> The majority is generally correct that joint and several liability under section 070(1)(b) is distinguished from common law joint and several liability, but the majority is incorrect in articulating the reason why. A fault-free plaintiff may not, in all cases, obtain a "full recovery"—one that "makes the plaintiff whole"—but only because the exception specifically excludes defendants who were not named in the suit, defendants who had immunity from suit, and defendants who were released or never had judgment entered against them.<sup>205</sup> Upon the finding of joint and several liability, it is the exclusion of these defendants that would leave the plaintiff short of full compensation. There exists no language within the statute or any case law that makes the "at-fault defendant" distinction that the majority makes.

This lack of support for the "at-fault defendant" distinction leads to the second point of interest, wherein the majority does in fact insert the words "at-fault" into the language of the exception. A major point of contention between the majority and the dissent is whether joint and several liability is preserved for fault-free plaintiffs. The majority believes that the section 070(1)(b) exception only pertains to fault-based damages and "at-fault defendants,"<sup>206</sup> while the dissent would hold, "Fault-free claimants are entitled to joint and several liability against all *defendants against whom judgment is entered* for the sum of their proportionate shares of *the claimant's total damages*."<sup>207</sup> The majority attempts to de-

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202. *Tegman*, 150 Wash. 2d at 122–23, 75 P.3d at 506 ("Comparative negligence means comparison. The trier of fact *compares* the negligence of plaintiff and defendant," and allows a negligent defendant to reduce liability by the percentage of fault attributable to the plaintiff) (Chambers, J., dissenting) (quoting William L. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 465 n.2 (1953))).

203. *Id.* at 112, 75 P.3d at 501.

204. *Id.* at 113–14, 75 P.3d at 501–02.

205. See WASH. REV. CODE § 4.22.070(1) (1993).

206. *Tegman*, 150 Wash. 2d at 115, 75 P.3d at 502–03.

207. *Id.* at 131, 75 P.3d at 511 (Chambers, J., dissenting) (emphasis added).

flect attention from the actual language of section 070(1)(b) by interpreting the exception as consistent with the general rule. But the exception should be construed as its own rule outside the domain of the general rule. Moreover, the court must initially determine whether the statutory language is clear and unambiguous before applying the statutory canons of interpretation and construing the statute in light of the legislature's purpose and intent.<sup>208</sup> Even so, the legislature was aware that it had defined "fault" and that it could have used the words "at-fault defendants" in section 070(1)(b). But the legislature did not use the words "at-fault defendants," nor did it specifically include only negligent tortfeasors or exclude intentional tortfeasors. Rather, the legislature qualified damage recovery only on the fault-free status of the plaintiff. As the dissent succinctly states, "Defendants include both negligent and intentional defendants and total damages include those damages caused by defendants who are both intentional and negligent actors. The status quo for fault-free claimants was maintained."<sup>209</sup>

The majority ultimately held that damages resulting from intentional acts must be segregated from damages resulting from fault as defined by section 015,<sup>210</sup> before joint and several liability is applied to at-fault defendants under section 070(1)(b).<sup>211</sup> This analysis is clearly improper, even in cases in which multiple defendants are all negligent.<sup>212</sup> In those cases, the analysis begins with a determination of whether the plaintiff is at fault. The majority did not begin its analysis this way, however, which is a crucial oversight because this determination removes the case from the purview of section 070(1) and place it squarely within the exception under section 070(1)(b). Once the court determines that the plaintiff is fault free, all named defendants will be held jointly and severally liable for the sum of their proportionate shares. But if judgment has not been entered against a defendant, that defendant's share of fault will not be imposed on defendants who are jointly and severally liable and will not be collectable by the plaintiff. Recognizing this fact, the dissent states that "[t]he majority reads too much into the first sentence of RCW

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208. See *supra* note 145 and accompanying text.

209. *Tegman*, 150 Wash. 2d at 131, 75 P.3d at 511 (Chambers, J., dissenting).

210. "'Fault' includes acts of omissions . . . that are in any measure negligent or reckless toward the person or property of the actor or others . . . ." WASH. REV. CODE § 4.22.015 (1981).

211. *Id.* at 115, 75 P.3d at 503.

212. *Washburn v. Beatt Equip. Co.*, 120 Wash. 2d 246, 294, 840 P.2d 860, 886 (1992) (tortfeasors may be held jointly and severally liable for accident victim's damages where victim is free from fault). See *supra* note 144 and accompanying text; *Koste v. Chambers*, 78 Wash. App. 691, 695, 899 P.2d 814, 816 (1995) (under exception to general rule of several liability, joint and several liability arises if (1) trier of fact concludes that claimant or party suffering bodily injury is fault free, and (2) judgment is entered against two or more defendants; as to latter element, defendant against whom judgment is entered must be named defendant in case when court enters its final judgment).

[§] 4.22.070 which speaks to ‘all actions involving fault.’ This language is in the context of the general rule. The section before us is in the context of the exception.”<sup>213</sup>

Strikingly, *Tegman* is difficult to reconcile with two prior case precedents. First, the majority’s segregation rule misreads *Welch*.<sup>214</sup> The *Welch* court held that in light of the statutory definition of “fault,” a negligent or reckless defendant could not apportion liability to a third party intentional tortfeasor under section 070.<sup>215</sup> This somewhat interpretive conclusion was compelled by the language of the statute.

The comparison the majority makes to *Welch* is defective for two reasons. First, *Welch* is distinguishable both factually and procedurally because the plaintiff was also held liable and the unknown assailant was not named in the suit.<sup>216</sup> Thus, *Welch* was not decided under the section 070(1)(b) exception; rather, it was decided under section 070(1), in which case several liability is the general rule and intentional acts or omissions are not part of the definition or analysis of fault.<sup>217</sup> Second, as hard as the majority tries to harmonize its ruling with *Welch*, “segregation” is just another fancy word for “apportion.” As the majority suggests, the trier of fact initially “segregates” damages between “at-fault” defendants and non-fault defendants; damages are then “apportioned” to the “at-fault” defendants who may be held jointly and severally liable amongst themselves.<sup>218</sup> The negligent tortfeasors are in fact receiving the benefit of “allocating” a share of the damages to the intentional tortfeasors. No matter which word or phrase is selected, the majority’s decision is not in accord with *Welch*.

Second, *Tegman* may or may not be reconcilable with *Cox* or *Phennah* depending on whether *Tegman* is interpreted as a divisible injuries case or an indivisible injury case. Both *Cox* and *Phennah* stood for the proposition that when a plaintiff is fault free and the defendants do not meet their burden of segregating the plaintiff’s harm, each defendant is liable for all of the plaintiff’s indivisible damages.<sup>219</sup> If *Tegman* is seen as an indivisible injury case, then the Court of Appeals decided the case

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213. *Tegman*, 150 Wash. 2d at 132, 75 P.3d at 511 (Chambers, J., dissenting).

214. *See id.* at 115–16, 75 P.3d at 503.

215. *Welch v. Southland Corp.*, 134 Wash. 2d 629, 636–37, 952 P.2d 162, 166 (1998).

216. *Id.* at 631, 952 P.2d at 164 (“[W]here the plaintiff, a negligent tortfeasor defendant, and an intentional tortfeasor are all liable, the negligent defendant is entitled to the benefit of the comparative fault statute.” (citing Clerk’s Papers (CP) at 54)).

217. *Id.* at 635–36, 952 P.2d at 166.

218. *See Tegman*, 150 Wash. 2d at 115–16, 75 P.3d at 503.

219. *Cox v. Spangler*, 141 Wash. 2d 431, 447, 5 P.3d 1265, 1273 (2000); *Phennah v. Whalen*, 28 Wash. App. 19, 26–28, 621 P.2d 1304, 1309–10 (1980). *See discussion supra* Part II.C.

properly,<sup>220</sup> and its decision accords with *Cox* and *Phennah*. In that case, the court would be incapable of segregating the indivisible injury by definition. However, if *Tegman* is seen as a divisible injuries case, then the *Cox* and *Phennah* burden-shifting scheme would not apply. Interestingly, even if *Tegman* stands, it has not overturned either *Cox* or *Phennah*; it has, however, undercut them by effectively shifting the burden of segregating harm from the defendants who caused the harm to the trier of fact, who is now obligated to segregate indivisible damages in the absence of any factual basis for so doing.<sup>221</sup>

The Washington Supreme Court in *Tegman* effectively abolished the joint and several liability of negligent and intentional wrongdoers. Ironically, in the same year as *Tegman* was decided, the legislature considered and rejected legislation that would have accomplished the same end. That year, the legislature considered the Omnibus Tort Bill that would have amended section 015 to include intentional acts within the definition of "fault."<sup>222</sup> The legislative intent of this amendment was to eliminate joint and several liability by allowing negligent defendants to apportion fault against intentional wrongdoers under section 070.<sup>223</sup> The Senate passed the Omnibus Tort Bill, but the House of Representatives rejected it—the death of joint and several liability between intentional and negligent tortfeasors did not come to pass.<sup>224</sup> The proposed amendment shows that the Washington Legislature recognized that intentional and negligent tortfeasors continued to be jointly and severally liable after the Tort Reform Act of 1986. If intentional and negligent tortfeasors did not continue to be jointly and severally liable, policymakers would not have tried to change the law to eliminate joint and several liability.<sup>225</sup>

### *B. How Other Jurisdictions "Integrated" When Washington "Segregated"*

"Whether segregation is required in other states is irrelevant unless they have statutes like ours . . . . Lack of precedent is hardly a bar to carrying out the legislature's statutory directives."<sup>226</sup> But, the majority failed to see that there is also a lack of precedent for its "segregation" ruling in

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220. *Tegman*, 107 Wash. App. 868, 885, 30 P.3d 8, 18 (2001) ("Noble has not pointed out any basis upon which the trial court, as finder of fact, could have segregated the damages with greater precision.").

221. Budlong, *supra* note 5 (discussing the conflict between *Tegman* and *Cox*).

222. S. 5728, 58th Leg., Reg. Sess. (Wash. 2003).

223. *Id.*

224. *Id.*

225. See Budlong, *supra* note 5.

226. *Tegman v. Accident & Med. Investigations, Inc.*, 150 Wash. 2d 102, 117–18, 75 P.3d 497, 504 (2003).

*Tegman*. Although other jurisdictions' comparative fault statutes may not be identical to Washington's, the underlying principles are the same, and any solutions implemented by other states may have been instructive to the court in making its decision.

Generally, comparative fault principles are not applicable to intentional torts. The familiar general rule is that there is no apportionment of damages where an intentional tort was involved. But, other jurisdictions have made exceptions to the general rule in certain circumstances. Specifically, exceptions have been granted in cases (1) where there is a fiduciary or other special relationship giving rise to a duty to prevent intentional harm by third parties,<sup>227</sup> and (2) where the concept has been adopted that intentional wrongdoing is "different in degree" from negligent conduct.<sup>228</sup>

Significantly, just ten years prior to *Tegman*, a United States District Court interpreted section 070(1)(b) in *In the Matter of Colorado Springs Air Crash*.<sup>229</sup> The case stemmed from a fatal airplane crash and involved a choice of law question between three states in the settlement negotiations with decedents' families.<sup>230</sup> The court found that, although generally defendants are only severally liable for their joint torts in Washington, an exception exists when the plaintiff is in no way responsible for his own injuries.<sup>231</sup> The court applied this exception to the facts in the case, stating, "While the statute actually requires a determination by a trier of fact that the plaintiff was in no way responsible for his own injuries, we find it inconceivable, and Boeing has not argued, that the decedents were in anyway contributorily negligent. The plaintiffs here therefore satisfy RCWA § 4.22.070(1)(b)."<sup>232</sup> The court's plain language interpretation of section 070(1)(b) is undoubtedly transparent.

In *Blazovic v. Andrich*,<sup>233</sup> the New Jersey Supreme Court unanimously held that "responsibility for a plaintiff's claimed injury is to be apportioned according to each party's relative degree of fault, including

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227. See *id.* at 127, 75 P.3d at 509; RESTATEMENT (SECOND) OF TORTS § 409 cmt. b (1965); Allan L. Schwartz, *Applicability of Comparative Negligence Principles to Intentional Torts*, 18 A.L.R.5th 525 (1994); Sisk, *supra* note 86, at 31-38.

228. *Tegman*, 150 Wash. 2d at 129, 75 P.3d at 509-10. (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 65, at 462 (5th ed. 1984)); Schwartz, *supra* note 227.

229. 867 F. Supp. 630 (N.D. Ill. 1994).

230. *Id.* at 632-34 (Colorado, where the crash occurred and most of the decedents resided; Illinois, where the airline had its principal place of business and the flight originated; and Washington, where the airplane was manufactured).

231. *Id.* at 633 (citing WASH. REV. CODE § 4.22.070(1)(b) (1993); Washburn v. Beatt Equip. Co., 120 Wash. 2d 246, 294, 840 P.2d 860, 886 (1992)).

232. *Id.* at 633 n.2.

233. 590 A.2d 222 (N.J. 1991).

the fault attributable to an intentional tortfeasor.”<sup>234</sup> Plaintiff Blazovic filed suit against a restaurant and its owner claiming that they negligently failed to provide adequate lighting and security for patrons in the restaurant’s parking lot, and had failed to exercise reasonable care in providing alcoholic beverages to the defendants.<sup>235</sup> Blazovic also filed suit against several patrons of the restaurant—Andrich, Philbin, Angelo, LaBanca, and Zecchino—for negligently or intentionally striking him as he left the restaurant, causing him to sustain physical injuries and economic loss.<sup>236</sup>

The New Jersey Supreme Court rejected the “difference in kind” theory between intentional conduct on the one hand, and negligent conduct on the other, concluding instead that such conduct is “different in degree.”<sup>237</sup> Thus, the different levels of culpability inherent in each type of conduct would be reflected in the jury’s apportionment of fault.<sup>238</sup> By analyzing types of tortious conduct in this way, the court closely adhered to the guiding principle of comparative fault—to distribute the liability in proportion to the respective faults of the parties causing that loss.<sup>239</sup> The court concluded that a “complete verdict” should apportion each party’s relative responsibility for the compensatory damages, including the relative fault of the intentional tortfeasors.<sup>240</sup>

In *Kansas State Bank & Trust Co. v. Specialized Transportation Services, Inc.*,<sup>241</sup> the Kansas Supreme Court held that negligent tortfeasors should not be allowed to reduce their fault by the intentional fault of another which they had a duty to prevent.<sup>242</sup> Here, the plaintiff filed suit against a school bus driver for intentional battery, and against the school district and the school bus transportation service on theories of respondeat superior and negligent hiring, retention, and supervision of the

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234. *Id.* at 231; see also *Steele v. Kerrigan*, 689 A.2d 685 (N.J. 1997) (comparative fault applied to assault by underage patron and tavern’s negligent supervision of the premises under dram shop statute); accord *Slack v. Farmers Ins. Exch.*, 5 P.3d 280 (Colo. 2000) (comparative fault statute applies when one of several tortfeasors commits intentional tort that contributes to indivisible injury); *Hutcherson v. City of Phoenix*, 961 P.2d 449, 453 (Ariz. 1998) (jury may apportion fault among defendants and nonparties without distinguishing between intentional and negligent conduct or requiring that a minimum percentage of responsibility be assigned to intentional tortfeasor); *Bhinder v. Sun Co., Inc.*, 717 A.2d 202 (Conn. 1998) (even where statute did not permit apportionment between negligent and intentional tortfeasors, apportionment would be allowed as a matter of common law).

235. *Blazovic*, 590 A.2d at 224.

236. *Id.*

237. *Id.* at 231.

238. *Id.*

239. *Id.*

240. *Id.* at 232.

241. 819 P.2d 587 (Kan. 1991).

242. *Id.* at 606.



school bus driver.<sup>243</sup> The trial court apportioned fault between the school district and the school bus transportation service, but held them jointly and severally liable with the school bus driver.<sup>244</sup> The school district and the school bus transportation service appealed to the Kansas Supreme Court, asking the court to adopt the “hybrid” approach proposed by Professor Westerbeke.<sup>245</sup> In his law review article, Professor Westerbeke recommended “a hybrid approach in which the intentional tortfeasors are jointly and severally liable for the total amount of damages, but the negligent tortfeasor is liable only for that portion of the total damages representing his proportionate fault.”<sup>246</sup> The court noted that it would be contradictory to hold a negligent tortfeasor jointly and severally liable when his actions combine with those of an intentional tortfeasor, while in other contexts negligent tortfeasors are held liable only for a proportionate fault share of the damages.<sup>247</sup> In the end, although it considered the “hybrid approach,” the court “elect[ed] to follow the precedential path”<sup>248</sup> marked by earlier decisions that had declined to compare negligent conduct with intentional conduct.<sup>249</sup>

Other jurisdictions have also created exceptions to the general rule of comparative fault when an intentional tortfeasor is involved. In Michigan, for example, joint and several liability was eliminated except for cases involving a fault-free plaintiff and products liability cases.<sup>250</sup> The Louisiana Supreme Court has held that a state law<sup>251</sup> is broad enough to allow comparison between intentional tortfeasors and negligent tortfeasors, but the determination of whether such a comparison should be made must be determined by the trial court on a case-by-case basis, based on applicable public policy concerns.<sup>252</sup> Under Tennessee law, “conduct of [a] negligent defendant should not be compared with the intentional conduct of another in determining comparative fault where the intentional conduct is the foreseeable risk created by the negligent tort-

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243. *Id.* at 591.

244. *Id.* at 592.

245. *Id.* at 605–06.

246. *Id.* at 606 (quoting William Edward Westerbeke, *Survey of Kansas Law: Torts*, 33 KAN. L. REV. 1, 33 (1984)).

247. *Id.*

248. *Id.*

249. Sisk, *supra* note 86, at 29–30 (stating that “[t]he *Kansas State Bank* decision is disappointing. The court offered no analysis or reasoning for its result other than to observe that no other court had adopted the hybrid approach . . . The Kansas court abdicated its responsibility to provide a reasoned response to what it confessed was a ‘contradiction’ in the law.”).

250. Peck, *supra* note 21, at 240 (interpreting MICH. COMP. LAWS § 6304 (1970), amended by 1986 Mich. Legis. Serv. P.A. 178 (West)).

251. LA. CIV. CODE ANN. art. 2323 (1979).

252. *Veazey v. Elmwood Plantation Associates, Ltd.*, 650 So. 2d 712, 718 (La. 1994).

feasor . . . under this rule, [a] negligent defendant may be found 100% at fault for the injuries sustained by [the] victim as a result of another's intentional act."<sup>253</sup>

The Restatement (Third) of Torts has noticed this "contradiction" or "anomaly" of trying to place an intentional tortfeasor within a comparative fault regime. Under section 14 of the Restatement (Third) of Torts, which governs apportionment of liability, a person who is liable to another based on a failure to protect the other from the specific risk of an intentional tort is jointly and severally liable for the share of comparative fault assigned to the intentional tortfeasor in addition to the person's share of comparative responsibility.<sup>254</sup> This approach is based in part on the fact that when a person is injured by an intentional tort and another person negligently failed to protect against the risk of an intentional tort, the great culpability of the intentional tortfeasor may lead a finder of fact to assign the bulk of responsibility to the intentional tortfeasor, who will often be insolvent.<sup>255</sup>

In sum, the majority in *Tegman* failed to consider the possibility that intentional and negligent tortfeasors could be held jointly and severally liable within a comparative fault scheme. The majority was adamant that unless other jurisdictions had statutes with language identical to Washington's, solutions offered by other jurisdictions would not be considered. Notwithstanding its strict language requirements for comparison with out-of-jurisdiction statutes, the majority was at the same time ignoring the plain language of the statutory exception—joint and several liability survives when a plaintiff is fault free. The majority's segregation rule is hard to accept given that the *Colorado Springs Air Crash* court interpreted the identical statute in exactly the same way as did the dissent in *Tegman*. Most troubling is that the majority could have adopted any one of a number of solutions offered by other jurisdictions. Any one of these would have reconciled the equities of the situation in favor of the plaintiff with the doctrine of joint and several liability within a modified comparative fault scheme. For example, the court could have adopted the "difference in degree" analysis of *Blazovic*, or made joint and several liability applicable only to the intentional tortfeasor as in *Kansas State Bank*. Alternatively, the court could have conducted its analysis on a case-by-case basis as in Louisiana. Instead, the majority dismissed the

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253. *DePalma v. Metro. Gov't of Nashville, Davidson County, Tenn.*, 40 Fed. App'x 187 (6th Cir. 2002).

254. *See* *Martin v. Prime Hospitality Corp.*, 785 A.2d 16 (N.J. Super. Ct. Div. 2001); J.D. LEE, BARRY LINDAHL, 1 *MODERN TORT LAW: LIABILITY AND LITIGATION* § 12:18.50 APPLICATION OF COMPARATIVE NEGLIGENCE—COMMON-LAW RULES—INTENTIONAL TORTS (2d ed. 2005), available at Westlaw, MTLLE § 12:18.50.

255. *RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY* § 14, cmt. b (2000).

doctrine of joint and several liability, re-modified modified comparative fault, and reinterpreted the express language of section 070(1)(b). In so doing, the court disregarded public policy and ignored the simple and most important fact—that the plaintiff was in no way to blame for any of the injuries that she sustained.

*C. The Aftermath: How to Limit Further Damage  
to Plaintiffs in the Post-Tegman World*

Negligent defendants can be expected to use the *Tegman* segregation rule to reduce or defeat claims by innocent persons who have a legal right to protection from crime or fraud. Although some of the proposed solutions work around the *Tegman* rule, the correct solution would require the Washington Supreme Court to reconsider its holding in *Tegman*.

The easiest, and perhaps most apparent, solution would be for the legislature to include intentional torts in a comparative fault scheme. The legislature would have to take two steps in order to accomplish this goal. First, it would have to revise the definition of fault under section 015 to include intentional acts and omissions, thereby negating the “anomaly” and disposing of the *Tegman* situation. This solution alone, however, is not sufficient. Second, the legislature should insert a mechanism by which to deter intentional acts. Although punitive damages are generally not recoverable in Washington<sup>256</sup> because they are deemed “contrary to public policy,”<sup>257</sup> the legislature could include a section within the Tort Reform Act to enable the recovery of punitive damages against intentional tortfeasors.<sup>258</sup> This “integrate-then-punish” proposal is logistically and administratively more appealing than the “segregate-then-apportion” rule set out by *Tegman*.

An alternative solution would be for the courts to adopt a common-sense or no-nonsense approach of limiting the liability of minor actors. Defense practitioners’ main concerns with joint and several liability are

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256. *Grays Harbor County v. Bay City Lumber Co.*, 47 Wash. 2d 879, 883, 289 P.2d 975 (1955) (exemplary or punitive damages are generally not recoverable in the State of Washington unless expressly authorized by statute).

257. *Dailey v. N. Coast Life Ins. Co.*, 129 Wash. 2d 572, 574, 919 P.2d 589 (1996).

258. *Sisk*, *supra* note 86, at 25–26 states the following:

Both the New Jersey court in *Blazovic* and the commentators advocating extension of comparative fault to intentional torts have justified their new approach in part by observing that the policy goal of punishing wanton acts can better be achieved through assessment of punitive damages against intentional tortfeasors. Punitive damages, however, are not available in Washington. Thus, for cases involving deliberate tortious injury, strict insistence that intentional tortfeasors be held fully responsible for damages remains the best and perhaps only means (other than criminal prosecution) for punishment in Washington.

*Id.*

equity and fairness—that is, a defendant who is one percent at fault should not be held jointly and severally liable with an insolvent defendant who is ninety-nine percent at fault simply because he has the “deep pocket.” If the legislature will not take action, then the judiciary must address this problem by limiting the liability of remote and often minor actors, at least when the other defendant has directly engaged in particularly egregious conduct. For example, in *Klein v. City of Seattle*,<sup>259</sup> the court refused to hold the City liable for negligent road design, reasoning that the speeding driver that crossed the center line and collided with plaintiff’s car was the proximate legal cause of the accident, not the defective road design. Similarly, in *Braegelmann v. Snohomish County*,<sup>260</sup> the court did not hold the county liable for decedent’s death by reason of negligent road construction and design, but rather the defendant driver whose extreme conduct included speeding, crossing the center line, and driving while highly intoxicated.<sup>261</sup> Essentially, the courts should closely scrutinize the actions of multiple defendants and determine how far the consequences of a defendant’s acts should extend.

In the end, if neither the legislature nor the courts take action, it will be up to the individual plaintiffs and their attorneys to make bold and strategic decisions. One possibility is to revise the complaint strategy and gamble by claiming negligence against all defendants instead of alleging intentional conduct against one or more. The dissent in *Tegman* foresaw this, suggesting that “[a] savvy claimant will allege only fault based claims to preserve joint and several liability under the majority’s reading of RCW [§] 4.22.070(1).”<sup>262</sup>

Plaintiffs’ attorneys could also strategically decide to join the intentional tortfeasor as a defendant in the lawsuit. Prior to *Tegman*, the plaintiff’s decision whether to sue the intentional tortfeasor was based on trial strategy, because the intentional and negligent tortfeasor would be jointly and severally liable under title 4, chapter 22, section 030 of the Revised Code of Washington. *Tegman*, however, changed the landscape by holding that even when a plaintiff is fault free, a negligent tortfeasor is severally liability under section 070, and only jointly and severally liable for damages caused by defendants against whom judgment is entered.<sup>263</sup>

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259. 41 Wash. App. 636, 639, 705 P.2d 806, 808 (1985).

260. 53 Wash. App. 381, 385–86, 766 P.2d 1137, 1140 (1989).

261. *But see* *Stephens v. City of Seattle*, 62 Wash. App. 140, 144, 813 P.2d 608, 610 (1991) (fact that motorcyclist may have been drinking and was speeding when he hit curb did not justify holding, as a matter of law, that the sole proximate cause of accident was motorcyclist’s own negligence, rather than city’s design of intersection).

262. *Tegman v. Accident & Med. Investigations, Inc.*, 150 Wash. 2d 102, 134, 75 P.3d 497, 512 (2003) (Chambers, J., dissenting).

263. *See id.* at 105, 75 P.3d at 497. *See also* WASH. REV. CODE § 4.22.070(1)(b) (1993).

Thus, if the intentional tortfeasor is not joined as a defendant in the lawsuit, no judgment can be entered against him. And if he is not joined, the negligent tortfeasors may be able to reduce their liability by apportioning fault against the absent intentional tortfeasor and treating him as an “empty chair” defendant.<sup>264</sup>

#### IV. CONCLUSION

The doctrine of joint and several liability serves a purpose in Washington’s comparative fault scheme. The existence of these two doctrines within tort law is not inherently contradictory, and is, in fact, complementary in certain situations. The classic scenario involves a plaintiff who lacks any fault whatsoever and who has suffered damages that are due entirely to the fault of any combination of multiple defendants. The case for preserving joint and several liability in this situation is more compelling in Washington because it is an explicitly carved-out exception to the general rule of several or proportionate liability codified in title 4, chapter 22, section 070(1)(b) of the Revised Code of Washington.

The Washington State Supreme Court should grant reconsideration and overrule its decision in *Tegman*. The results-oriented rule, which requires that damages be segregated between negligent and intentional defendants, with negligent defendants only being jointly and severally liable with each other, demonstrates the mental gymnastics with respect to the court’s reasoning and the rule’s application. First, the court’s rule irresponsibly ignores the significant fact that the plaintiff is fault free and that an explicit statutory exception applies when the plaintiff is fault free. Second, the court ignores plain and unambiguous statutory language, adopting instead an expansive and unsupported interpretation of the legislature’s intent within the Act’s Preamble. Third, without overruling either *Phennah* or *Cox*, the court has placed the burden of proof back onto the plaintiff to segregate the damages and, effectively, to prove two separate cases, one against negligent defendants and another against intentional defendants. Fault-free plaintiffs have been left with an even heavier burden under *Tegman*, and have been left to develop creative and complicated solutions to the *Tegman* problem.

In the alternative, should the court decide not to reconsider its holding, the legislature must make its intent clear for the court so that the statutory exception will be interpreted accurately in subsequent cases. The legislature should be alarmed that both its intent and the plain lan-

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264. Joining intentional defendants may have other unintended psychological advantages. See Darrell Cochran, *Intentional Tortfeasors: Bad People, Good Defendants*, WSTLA Trial News, Dec. 1, 2001, at 37–44.

guage of the statute have been simultaneously misinterpreted. The legislature can, and most probably has, achieved its goal of mitigating the liability of government and businesses by mandating the applicability of proportionate liability; however, to allow proportionate liability in a situation where a fault-free plaintiff has been damaged by multiple defendants, regardless of their classification, amounts to nothing more than an affirmation of the court's results-oriented reasoning. In the end, defendants have found new allies in the legislature and judiciary, and plaintiffs have been left to their own devices. It amounts to nothing more than a modern day telling of the classic story of David and Goliath.