Glass v. Stahl Specialty Company: Reconciling Third Party's Contribution Rights with Employer's Immunity under Workers' Compensation

Courts and legislatures nationwide have consistently failed to reconcile the conflict between the workers' compensation employer immunity provision and a third party's right of contribution. This conflict intensified in Washington when the Legislature enacted the Tort Reform and Product Liability Act\(^1\) containing a provision establishing a right of contribution among jointly and severally liable tortfeasors.\(^2\) Faced with the overlap between the new law and workers' compensation, the Washington Supreme Court, in Glass v. Stahl Specialty Co.,\(^3\) held that an employer's immunity from tort actions brought by its employees\(^4\) prohibits contribution by an employer who is jointly

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2. WASH. REV. CODE § 4.22.040 (1981). The statute provides in pertinent part:
   A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death or harm, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution among liable persons is the comparative fault of each such person. However, the court may determine that two or more persons are to be treated as a single person for purposes of contribution.

Id.


4. Similar to workers' compensation laws in other states, Washington's Industrial Insurance Act removes actions by employees against employers from the tort system and immunizes the employer from all such claims.

WASH. REV. CODE § 51.04.010 (1981), the codification of Washington's industrial insurance law, provides:

The State of Washington . . . declares that all phases of the premises are withdrawn from private controversy and sure and certain relief for workers is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

Id.
and severally liable. Although the Glass court decision is consistent with the majority view, its reaffirmation of the no contribution rule fails to consider the tension between the policies and interests. Consequently, the Glass decision perpetuates a rule that forces a third party tortfeasor sued by an injured employee to shoulder the entire liability regardless of the employer's fault.

This note argues that the correct resolution of the tension between the employer's immunity and the third party's right of contribution requires balancing the interests of all parties. The employer has an interest in retaining the workers' compensation law's exclusive no-fault recovery system; the third party tortfeasor seeks to avoidshouldering the entire liability of another at-fault tortfeasor capable of contribution. At the same time, the employee has a right to full and speedy compensation, and the state has an interest in maintaining the financial stability of its accident fund. This note explores the policies and legal arguments supporting the majority view of no contribution and the minority views of full and partial contribution and concludes that, contrary to the opinion of many courts, these interests can be balanced and the tort and workers' compensation systems reconciled by allowing a limited form of contribution.

Because Washington courts have failed to resolve the conflict between the workers' compensation system and the doctrine of contribution, this note suggests that the legislature should amend Washington's workers' compensation law. The Industrial Insurance Department's lien and subrogation rights should be limited when the employer is at fault. If the employee has been

In addition, WASH. REV. CODE § 51.32.010 (1981) provides:
Each worker injured in the course of his or her employment, or his or her family or dependents in case of death of the worker, shall receive compensation in accordance with this chapter, and, except as in this title otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever.

Id.

5. Washington's exclusive remedy provision is included in WASH. REV. CODE §§ 51.04.010, 51.32.010 (1981). For the text of these statutes, see supra note 4.

6. Unlike most other jurisdictions, Washington does not allow an employer to use private insurance coverage for workers' compensation. An employer must be covered by the state fund or be an authorized self insurer under WASH. REV. CODE § 51.14.020 (1981).

7. WASH. REV. CODE § 51.08.040 (1981). The statute provides that "department" means Department of Labor and Industries.

8. Washington's current Industrial Insurance Act provides the insurer with subrogation rights, WASH. REV. CODE § 51.24.050 (1981), and lien rights, WASH. REV. CODE § 51.24.060 (1981). This means that if an injured employee elects to sue a third party
compensated by workers' compensation, his judgment against the third party tortfeasor should be diminished by this amount, or the amount calculated from the employer's percentage of fault, whichever is less, with the Department retaining a lien on the difference between the percentage of fault and the amount of compensation paid. If no payment has been made or future payments are available, the third party tortfeasor should pay the employee in full and be assigned the employee's compensation rights. In addition, employers' premiums should be modified and base rates increased to reflect their cost experience. Although these revisions will place heavier burdens on the employers than workers' compensation currently imposes, these changes reconcile the tort and workers' compensation systems by distributing the burdens of workplace injuries in an equitable, efficient and balanced fashion.

I. The Case

James Glass's right hand was injured by an aluminum die case molding machine, manufactured by Stahl Specialty Company (Stahl). At the time of his injury, Glass was operating the machine in the course and scope of his employment with Morel Foundry Corporation (Morel). After receiving workers' compensation benefits, Glass brought a products liability action against Stahl alleging negligence and strict liability as theories of recovery. Stahl then impleaded Morel on a theory of contribution under the 1981 contribution statute.9 Morel's motion for dismis-

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whose negligence was a proximate cause of his workplace injury, the insurer, if he has paid compensation, has a lien against any judgment. Hence, if a jury awarded an injured employee a $100,000 judgment against the third party the third party would be required, under joint and several liability, to pay plaintiff $100,000. Upon payment plaintiff would be allowed to pay costs and attorneys' fees. Plaintiff would then receive 25% of the balance. The insurer would then be reimbursed from the subsequent balance the amount he had paid in compensation to the employee. The employee would then receive the remainder. If, however, following receipt of compensation the employee elects not to sue the third party the insurer will be assigned the employee's rights against the third party. The insurer may then prosecute or compromise in the name of the employee. Upon receiving judgment the insurer subtracts its costs of litigation and compensation paid to the employee and the balance goes to the employee.

It should be noted that self insurers also have lien and subrogation rights. WASH. REV. CODE § 51.24.050 (1981). This note does not directly address the implications to self insurers if limited contribution were to be allowed. For additional discussion of the possible impact on self insurers, see infra note 113.

sal was denied, but on appeal, the Washington Supreme Court held that the trial court erred in failing to dismiss Morel from the case. The court found that the new contribution statute does not apply when the joint tortfeasor is an employer.

Adhering to the view taken prior to the passage of the contribution statute, the court reasoned that the Industrial Insurance Act had abolished judicial jurisdiction over civil actions for personal injuries between employers and employees. Therefore, the court proscribed impleading of employers under the new contribution statute as a device to permit the court to “assume jurisdiction over this immunized area of tort law.” The court found that the contribution statute, creating a right of contribution only when two or more persons are jointly and severally liable to a single plaintiff, did not change existing law pertaining to employers. Under the Industrial Insurance Act, when an employee is injured on the job, the employer is immune from suit by the employee. Therefore, the court reasoned that the requisite joint and several liability is missing. Without joint and several liability a right of contribution cannot arise. In addition, the court determined that sound principles of statutory construction and the legislative history of the Tort Reform and Products Liability Act contradicted any argument that the legislature intended to alter existing case law.

10. Because the trial court's order stated that its judgment was final, Morel appealed directly to the supreme court. The supreme court, however, found that the order was not final with respect to any one claim or party and thus could not be a final judgment under Wash. R. Civ. P. 54 (b), but because of the importance of the issue, the supreme court granted discretionary review under Wash. R. App. P. 2.2, 2.3 (b), 5.1. Glass, 97 Wash. 2d at 882, 883, 652 P.2d at 949, 950.


13. See Thompson v. Lewis County, 92 Wash. 2d 204, 208, 595 P.2d 541, 543 (1979). See also Wash. Rev. Code §§ 51.04.010, 51.32.010 (1981), and supra note 4 for the text of these statutes.

14. Glass, 97 Wash. 2d at 885, 652 P.2d at 951.
17. Glass, 97 Wash. 2d at 887, 888, 652 P.2d at 952. The court stated that in construing a statute it assumes that the legislature is familiar with past judicial interpretations of its enactments. Unless the legislature indicates its intention to overrule the common law, new legislation will be presumed to be in accord with prior judicial decisions in
Although Glass comports with the majority view,18 the decision fails to penetrate the overlapping legislative schemes to reach the underlying issues. The court acknowledged the unfairness of saddling one wrongdoer with all the damages when the other wrongdoer is an employer but nevertheless refused to weigh the public policy implications that result, preferring to leave the issue to the legislature. Concededly, the legislature may be in a better position to harmonize the two statutory schemes,19 but the court’s summary dismissal of policy considerations leaves little to guide future application of the new right of contribution statute. Thus, the court unnecessarily perpetuates the unfair no contribution rule without illuminating the purpose and policies underlying the rule. The way other courts have dealt with this issue can provide helpful analysis in evaluating the Washington court’s decision. It is important, however, to review the policies that underlie the rule.

II. ANALYSIS OF POLICIES

Workers’ compensation is a no-fault system20 designed to overcome the hardships imposed by the common law upon an employee who is suing his employer for a workplace injury. Washington’s workers’ compensation statute is not an employer’s liability act; it is an industrial insurance statute.21 The employee looks to a fund fed by various employers rather than

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19. A discussion of the role of the court as a legislative body is beyond the scope of this note, although it might be suggested that more judicial activism was needed than the court displayed. For further discussion of the court’s role when faced with conflicting statutes, see infra notes 115-17 and accompanying text.


to the employer for the scheduled mandatory compensation. An employer cannot exempt himself from the burdens of the Act.\textsuperscript{22} In exchange for paying premiums to the Industrial Insurance Fund, the employer expects the fund to assume financial responsibility for compensating injured workers. To create this limited liability, employers and employees compromised.\textsuperscript{23} The employer gave up all common law defenses and agreed to pay for insurance that would cover all claims by the employee even when the employer was not at fault. The employee sacrificed his common law cause of action against the employer, accepting compensation far below that which he might have won in court on the assurance that he would receive the small sum without having to fight for it.\textsuperscript{24} By compromising these rights, workers' compensation provides injured workers with immediate relief and places the burden of accidents on the industry involved rather than on other public assistance programs. It eliminates expensive and burdensome litigation, promotes safety in the workplace, reduces friction between the worker and the employer, and results in more harmonious industrial relations than were possible previously.\textsuperscript{25}

The merit of this compromise, made 60 years ago, needs reevaluation today. Since the introduction of workers' compensation, many of the defenses given up by the employer in exchange for immunity from litigation have also been abolished in the tort system.\textsuperscript{26} Thus, the employer's quid pro quo has been partially abrogated. Furthermore, one study suggests that workers' compensation currently provides inadequate benefits.\textsuperscript{27} Despite these inefficiencies and inequities, however, the National Commission on State Workers' Compensation Laws rejected a return to civil damages.\textsuperscript{28} Arguably, workers' compensation still

\textsuperscript{23} Stertz, 91 Wash. at 590, 158 P. at 258.
\textsuperscript{24} Id.
\textsuperscript{26} Wash. Rev. Code § 4.22.005 (1981) (eliminating contributory fault as a complete bar and instituting a comparative fault analysis).
\textsuperscript{27} See Report of National Commission, supra note 25, at 141-46. The report estimated the cost of adopting the recommendations of the national commission. These estimates indicate how far below the recommended level of benefits each state is.
\textsuperscript{28} Id. at 119-20. The report indicated that from a worker's standpoint the option to rely on negligence suits may seem more attractive than it was 50 years ago, when workers' compensation was first widely adopted, because the plaintiff's burden in negligence
provides desired employee relief and employer security, but its perceived failings suggest a need to reform and limit the system. Its recognized benefits compel no more than preservation of its basic structure and integrity.

In contrast to no-fault workers' compensation, tort law is a fault system designed to compensate an injured party for injuries caused by others. The Legislature restructured Washington's tort law in 1981 by enacting the Tort Reform and Product Liability Act. The basic tenet behind the Tort Reform Act (the Act) is the creation of a fairer and more equitable apportionment of liability among parties at fault. The purpose of the Act

suits has been eased. Other reasons, however, convinced the committee that for workers, and others, workers' compensation is still preferable. The determination of negligence tends to be expensive and uncertain because of the intermingling of employer-employee negligence. Payments tend to be delayed when negligence suits are prosecuted, and overcrowded court dockets compound the delays. Thus some workers may receive higher damage awards but others would receive no protection. Finally, even when the worker succeeded in winning monetary damages the litigation could be a substantial deterrent to successful rehabilitation.

For a contrary point of view, see Ashford, Negligence v. No-Fault Liability: An Analysis of the Workers' Compensation Example, 12 Seton Hall 725 (1982). The author concludes that despite approximately three-quarters of a century of public concern and controversy, one cannot conclude on the basis of data generally cited to demonstrate the superiority of workers' compensation over negligence that workers' compensation has effected an improvement in terms of wage loss compensation and deterrence objectives over the evolving negligence system it replaced.

A thorough evaluation of the effectiveness of the workers' compensation system is beyond the scope of this note. The assumption made without further analysis is that the system does provide some benefits to injured workers and therefore it should not be abolished. Its scope should be limited, however, precisely because of the system's deficiencies.

29. Workers' compensation is granted to an employee regardless of questions of fault. Wash. Rev. Code § 51.04.010 (1981). For partial text see supra note 4. On the other hand, to recover from a third party, the employee must prove that his harm was proximately caused by the negligence of the third party. This involves proving either a products liability claim, Wash. Rev. Code § 7.72 (1981); or a common law negligence claim. See, e.g., LaPlante v. State, 85 Wash. 2d 154, 531 P.2d 299 (1975).

30. Act, supra note 1.

31. Tort reform in this state has for the most part been accomplished in the courts on a case-by-case basis. While this process has resulted in significant progress and the harshness of many common law doctrines has to some extent been ameliorated by decisional law, the legislature has from time to time felt it necessary to intervene to bring about needed reforms such as those contained in the 1973 comparative negligence act.

The purpose of this amendatory act is to enact further reforms in the tort law to create a fairer and more equitable distribution of liability among parties at fault.

Of particular concern is the area of tort law known as product liability law. Sharply rising premiums for product liability insurance have increased the cost of consumer and industrial goods. These increases in premiums have resulted
was to treat the parties involved in a balanced fashion and to distribute the costs evenly.\textsuperscript{32} The drafters of the Act concluded that a fairer apportionment of fault in tort actions required comparison of the relative fault of all parties to the action. The plaintiff's recovery then would be reduced by his percentage of fault.\textsuperscript{33} The drafters also indicated that even the differing degrees of fault of contributory negligence and strict liability should be compared despite the conceptual difficulties.\textsuperscript{34} By accepting the premise of fault comparison regardless of the degree, the legislature established that principles of fairness and equity should guide the tort system. In reconciling tort law with workers' compensation, these principles underlying the tort system should be preserved to the extent they do not invalidate higher principles of law or overly interfere with the basic structure and integrity of workers' compensation.

The Tort Reform Act also codified the joint and several liability rule\textsuperscript{35} enunciated in \textit{Seattle-First National Bank v. Shoreline Concrete Co.}\textsuperscript{36} As the court pointed out in \textit{Shoreline}: 

\begin{quote}
in disincentives to industrial innovation and the development of new products. High product liability premiums may encourage product sellers and manufacturers to go without liability insurance or pass the high cost of insurance on to the consuming public in general.

It is the intent of the legislature to treat the consuming public, the product seller, the product manufacturer, and the product liability insurer in a balanced fashion in order to deal with these problems.

It is the intent of the legislature that the right of the consumer to recover for injuries sustained as a result of an unsafe product not be unduly impaired. It is further the intent of the legislature that retail businesses located primarily in the state of Washington be protected from the substantially increasing product liability insurance costs and unwarranted exposure to product liability litigation.
\end{quote}

\textit{Act, supra} note 1, at Preamble. See also the analysis of the Preamble in \textit{REPORT, supra} note 17, at 27, 1 Senate Journal 629, Reg. & 1st Ex. Sess. (1981).


\textit{32.} Throughout the select committee's hearings, representatives of product sellers and product liability insurers argued that the current judicially created tort system fails to fairly allocate liability among those responsible for the harm with the resulting additional costs passed on to the consumers in general. . . . The purpose of the bill, then, is to treat the consuming public, the product seller, the product manufacturer, and the product insurer in a balanced fashion in order to deal with these problems.

\textit{33.} Id. at 21, 1 Senate Journal 626, Reg. & 1st Ex. Sess. (1981).

\textit{34.} Id.

\textit{35.} \textit{WASH. REV. CODE} § 4.22.030 (1981). The statute provides: "If more than one person is liable to a claimant on an indivisible claim for the same injury, death or harm, the liability of such person shall be joint and several." \textit{Id}.

The cornerstone of tort law is the assurance of full compensation to the injured party. To attain this goal, the procedural aspect of our rule permits the injured party to seek full recovery from any one or all of such tortfeasors . . . What may be equitable between multiple tortfeasors is an issue totally divorced from what is fair to the injured party.37

Justification for retaining joint and several liability rests on the superior equitable rights of the plaintiff compared with the rights of those at fault. The plaintiff's right to full and rapid recovery takes precedence over the tortfeasors' rights to allocate liability among themselves in proportion to fault. The drafters of the Tort Reform Act found this priority sufficient reason to retain joint and several liability.38 Although there is disagreement,39 the retention of joint and several liability comports with the goal of the tort system to provide full compensation to the injured party. Reforms, such as contribution, that treat the tortfeasors more fairly should not result in decreasing the chances of recovery by injured plaintiffs.40

These policies are the tenets that underlie the structure of the tort and workers' compensation systems. The priority placed on these policies provides a foundation for balancing the interests of the third party, the employer, the employee, and the state, thus establishing a guide for resolution of the issue of contribution from employers.41 State and federal decisions from

37. Id. at 236-37, 588 P.2d at 1312-13.
38. The Senate Select Committee felt that, although the rule of joint and several liability imposes some hardships, defendants rather than plaintiffs should bear the burden of the unfairness. REPORT, supra note 17, at 23, 1 Senate Journal 627-28, Reg. & 1st Ex. Sess. (1981). The rule of joint and several liability was also retained by the drafters of the Uniform Comparative Fault Act. UNIF. COMPARATIVE FAULT ACT § 4, 12 U.L.A. 41 (Supp. 1982) (Commissioner's Comment).
41. This note does not discuss the possibility that a third party should be able to seek indemnification from the employer when the employer is the primary tortfeasor. Washington does not allow this type of implied indemnity between active and passive tortfeasors. WASH. REV. CODE § 4.22.040(3) (1981). Active/passive indemnity was abolished because it departs from the principles of comparative fault. REPORT, supra note 17, at 51, 1 Senate Journal 636, Reg. & 1st Ex. Sess. (1981). Contractual indemnity between employers and third parties is allowed. Redford v. Seattle, 94 Wash. 2d 198, 615 P.2d 1285 (1980). See also Gordon H. Ball, Inc. v. Oregon Erecting Co., 273 Or. 179, 185, 539 P.2d 1059, 1062 (1975). For a discussion of implied indemnity between employers and
other jurisdictions have given the policies different priorities and suggest three different ways that the issue can be resolved. The majority view gives preference to the workers' compensation system and denies contribution. One minority view gives preference to the tort system and allows full contribution. A second minority view tries to balance the policies and allows limited contribution.

III. THE MAJORITY VIEW DENYING CONTRIBUTION

A majority of courts hold that a third party cannot bring a statutory or common law action for contribution against an employer. There are several policy reasons advanced to support this view. The primary policy argument against contribution is that the workers' compensation system provides a guaranteed, fixed schedule, no-fault recovery system that constitutes the exclusive liability of the employer to his employee. Allowing contribution would force the employer to pay his employee, through the conduit of the third party tortfeasor, an amount in excess of his statutory workers' compensation liability, thus thwarting the exclusive remedy concept central to workers' compensation. Opponents of contribution argue that contribution would undermine the quid pro quo rationale of the workers' compensation system. The Washington Supreme Court explained this quid pro quo rationale in Stertz v. Industrial Insurance Commission:

Our act came of a great compromise between employers and employed. Both had suffered under the old system, the employers by heavy judgments of which half was opposing lawyers' booty, the workmen through the old defenses or exhaustion in wasteful litigation. Both wanted peace. The master in exchange for limited liability was willing to pay on some claims in the future where in the past there had been no liability at all. The servant was willing not only to give up trial by jury but to accept far less than he had often won in court, provided he


44. Mulder v. Acme-Cleveland Corp., 95 Wis. 2d 173, 290 N.W.2d 276 (1980).
was sure to get the small sum without having to fight for it. 45

It is argued that a rule allowing contribution would subject the employer to the lengthy and costly litigation he thought he was avoiding when he agreed to be liable regardless of fault. In addition, contribution would expose the employer to common law liability while depriving him of the defenses of contributory negligence and assumption of risk. 46 Both these outcomes, opponents argue, would create an imbalance in the compromise outlined in Stertz by allowing exceptions to the workers' compensation system on the basis of irrelevant factors such as whether the employee can find a third party to sue.

A final argument advanced against contribution is the employer's right to a lien against any amount recovered by the plaintiff from a third party. 47 Allowing the employer to recoup any compensation paid to the injured worker after the worker has received full recovery from a third party not only prevents the employee from obtaining double recovery, but also protects the funds of the workers' compensation system from being drained by the remiss of strangers. In essence, the opponents of contribution argue that an employer has a primary interest in limiting his payment for employee injury to the workers' compensation schedule and a secondary interest in receiving reimbursement when a third party has caused him to incur obligations to his employee. 48

Courts that have adopted the majority view have relied on two legal arguments to foreclose the right of contribution. The first is that contribution requires tortfeasors to be jointly liable. Because workers' compensation immunizes the employer from tort liability to his employee he cannot be jointly liable with the third party. Consequently, there can be no right of contribution. 49 The second legal argument used by majority courts states

45. 91 Wash. 588, 590-91, 158 P. 256, 258 (1916).
48. Lambertson, 312 Minn. at 122, 257 N.W.2d at 685.
49. Professor Larson suggests that this is the first hurdle that a third party must overcome if he seeks contribution from an employer and, in the vast majority of cases,
that the workers' compensation exclusivity clause, granting an employer immunity from litigation, acts as a complete bar to any suit brought against an employer for a workplace injury. These arguments granting deference to workers' compensation fail to adequately balance all the policies and interests involved.

Most courts that follow the majority view use the argument that an employer cannot be jointly liable. The decision of the Federal District Court of Kansas in Beach v. M & N Hydraulic Press Co., is an example. The Beach court held that an employer's liability is purely statutory and supersedes any common law liability for negligence. Since joint liability is premised upon the common law negligence of both tortfeasors, an employer cannot be jointly liable for purposes of contribution. The court also held that the employer, or his insurance company, has a lien against any recovery by plaintiff from a third party in the amount of any compensation paid to the employee regardless of whether the employer was at fault. The reasoning in Beach illustrates a court applying statutes without assessing where the purposes and policies of the statutes are implicated. The court, in effect, adopted a rule of construction giving supremacy to the workers' compensation system without considering the possibility that the relative scope of the workers' compensation and tort systems might be defined in a manner which does not impair the values and functions underlying either system.

A similar error was made earlier by the New Jersey Court of Appeals in Farren v. New Jersey Turnpike Authority. The Farren court concluded, as had the Beach court, that workers' compensation superseded the employee's common law redress


51. This is the second hurdle that Professor Larson suggests must be overcome by the third party seeking contribution from an employer. Larson, Workmen's Compensation: Third Party's Action Over Against Employer, 65 Nw. U.L. Rev. 351, 360-61 (1970). The words "against any person whosoever" contained in WASH. REV. CODE § 51.32.010 (1981) are an example of the catchall phrase used by courts to block actions for contribution against employers. See supra note 4 for statutory text.


against the employer, immunizing the employer from tort liability. The court went on to state:

The impracticability of the application of the present contribution Act to the instant situation is immediately discernable. The essence of the doctrine of contribution is the existence of a common monetary obligation to the injured person. The joint tortfeasor contemplated by the statute is aequali juri.55

Relying on the assumption that the two systems are incompatible, and that therefore no common liability exists, is a superficial approach to the problem. Liability is a much broader concept than the courts seem willing to recognize. While there is, strictly speaking, no common liability to the employee in tort, both the employer and the third party are nonetheless responsible for compensating the employee for his injuries: the employer through the fixed no-fault workers' compensation system and the third party through the variable recovery available in a common law tort action.56 As the drafters of the Tort Reform Act pointed out, contribution is recognized in a majority of states as a flexible, equitable remedy designed to accomplish a fair allocation of loss among parties at fault.57 Such a remedy should be utilized to achieve fairness undeterred by outdated technical concepts like common liability.58 If the courts had been willing to accept a broader definition of liability they could have resolved the conflict fairly and equitably by adopting a rule of limited contribution which would have allocated the losses fairly without thwarting the interests of the workers' compensation system so highly regarded in Beach and Farren.

A third example of cursory analysis by a court adopting the majority view is found in Schweizer v. Elox Division of Colt Industries.59 In Schweizer, the third party argued for a form of limited contribution by requesting that his liability be reduced to the extent of the employer's liability under the workers' compensation system. The Schweizer court rejected this argument and concluded, as did the Beach court, that an employer or his insurance carrier has an absolute lien right against any recovery of the plaintiff from the third party in the amount that the

55. Id. at 360-62, 106 A.2d at 755.
56. Lambertson, 312 Minn. at 128, 257 N.W.2d at 688.
58. Lambertson, 312 Minn. at 128, 257 N.W.2d at 688.
employee has already been compensated. The third party, therefore, must pay in full or the employee would not be fully compensated. The rationale for this rule is prevention of double recovery by the employee. The Schweizer court, however, failed to realize that the double recovery problem is solved by denying the employer or insurance carrier his lien and subrogation rights when he is a joint tortfeasor and allowing the judgment against the third party to be diminished by the amount already paid in compensation benefits. Nor would this solution impose any liability on an employer in excess of his liability under the workers' compensation statute. A judgment reduction would also be consistent with the policy, clearly enunciated by the Schweizer court, that an employer with the blood or death of an injured worker on his hands be barred from invoking the impartial powers and processes of the law.

The second legal argument is that the workers' compensation exclusivity clause immunizes the employer from all litigation. In Venters v. Michigan Gas Utilities Co., the court held that because the third party's claim of contribution against the employer is derivative of the principal plaintiff's right, an impleader action would require a finding that, with respect to the plaintiff, the employer and third party are joint tortfeasors. But this would violate the exclusive remedy provision of the workers' compensation statute. Thus, an employer has no common liability and is not a joint tortfeasor. Acknowledging the inequities of its ruling, the court went on to hold that the third party may have been the secondary cause of the injury and the employer the primary cause and therefore the third party was entitled to have its claim for active/passive indemnity tested factually at the trial. The active/passive indemnity rule allows a secondarily negligent tortfeasor to be indemnified by a primarily negligent tortfeasor even though there was no indemnity con-

60. See infra text accompanying notes 105-09 for a discussion on implementing the limited contribution rule.
61. Schweizer, 133 N.J. Super. at 302-03, 336 A.2d 73 at 76. Several courts have found the policy of restricting a wrongdoer's access to the impartial powers of the law persuasive and have allowed the judgment against the third party tortfeasor to be reduced pro tanto by the amount to which the employee would be entitled under workers' compensation. See, e.g., Brown v. Southern Ry. Co., 204 N.C. 668, 169 S.E. 419 (1933); Maio v. Fahs, 339 Pa. 180, 14 A.2d 105 (1940).
63. Id. at 348.
64. Id. at 351.
tract between them. The indemnification covers the whole cost of the injury. By using indemnification concepts, the court attempted to mitigate the harshness of the no contribution rule with an inequitable "all or nothing" rule.\(^{65}\) But merely substituting one unfair rule for another ignores the need for reconciling the tort and workers' compensation systems.

In summary, a majority of courts deny contribution by saying in one way or another that there is no joint liability. This conclusion rests on the premise that the workers' compensation system is paramount to the tort system. But maintaining the interests of workers' compensation does not require that its purposes be deemed superior; allowing a limited form of contribution would not be inconsistent with the basic structure of workers' compensation. The worker would still receive immediate relief and, at the same time, the employer's liability would be limited to his liability under the workers' compensation schedule. In addition, the burden of the accident would be placed on the industry involved, the maintenance of a safe work environment would be encouraged, and the harmony of the workplace would be preserved since the employee could not sue his employer directly. Arguably, the employer would lose his quid pro quo if he were impleaded as a party to an action between the employee and third party. This, however, is a small burden when compared with the encumbrance on the third party. Without an action for partial contribution, the third party must shoulder the entire liability even though only partially at fault. Furthermore, it can be argued that there is no a priori legitimacy to the quid pro quo bargain that was struck over sixty years ago. The state imposed the bargain and can alter it in a reasonable manner. Limited contribution is a reasonable revision of the workers' compensation system because it maintains the basic structure of the system yet allows the higher principle of fair and equitable distribution of liability to preempt a small portion of the employers' quid pro quo.

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\(^{65}\) Washington has abolished the rule of active/passive indemnity. WASH. REV. CODE § 4.22.040(3) (1981). The drafters of this statute indicated in their committee report that the all or nothing rule of implied indemnity conflicted with the underlying principles of the Tort Reform Act and therefore should be abolished. REPORT, supra note 17, at 51, 1 Senate Journal 636, Reg. & 1st Ex. Sess. (1981). Thus, Washington has made unavailable a remedy that other courts have recognized as ameliorating the harshness of the no contribution rule. See Skinner v. Reed-Prentice Div. Package Mach. Co., 70 Ill.2d 1, 11-12, 374 N.E.2d 437, 442 (1977) (recognizing that the active/passive theory of indemnity was designed to mitigate the harshness of no contribution).
IV. MINORITY VIEW ALLOWING CONTRIBUTION

A minority of courts hold that neither the exclusive remedy provision of the applicable state workers' compensation act, nor the term jointly and severally liable found in the applicable state contribution law, precludes an action by a third party tortfeasor against an employer for contribution.\textsuperscript{66} Basically, these decisions determine that fairness requires losses to be distributed among all parties at fault,\textsuperscript{67} and that the legislature in granting the employer immunity from common law suits did not mean to do so at the expense of the third party.\textsuperscript{68} The primary policy argument for contribution is that while both the employer and employee receive a quid pro quo for their participation in workers' compensation, the third party is not part of this compromise. Therefore, the Act should not encompass or limit the rights of the third party against the employer.\textsuperscript{69} Proponents of contribution argue that it would be unfair to include the third party within the principle of mutual sacrifice when his part is to be all sacrifice and no corresponding gain.\textsuperscript{70}

Courts allowing contribution also emphasize that there is no valid reason for the continued existence of the no contribution rule and present many compelling arguments against it. As Dean Prosser expressed it:

There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered on to one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer while the latter goes free.\textsuperscript{71}

A rule of no contribution allows the fortuity of a joint tortfeasor being an employer to undermine the principle of equitable dis-

\textsuperscript{66} Annot., 100 A.L.R. 3d 350, 362-64 (1980).
\textsuperscript{68} Lambertson, 312 Minn. at 129, 257 N.W.2d at 689.
\textsuperscript{69} Id.
\textsuperscript{70} Id. See also Lunderberg v. Bierman, 241 Minn. 349, 363-65, 63 N.W.2d 355, 365 (1954) (the Workmen's Compensation Act does not encompass or limit rights of third parties against employers nor should it).
tribution of losses. Such a rule lacks sense and justice when there are alternatives available.

Tort systems that adopt either comparative fault or the rule of joint and several liability create a potential for harsh results when contribution is denied. For example, Washington's new Tort Reform Statute abolishes active/passive negligence,\(^\text{72}\) which depletes the remedies available to a court for reducing the harshness of the no contribution rule.\(^\text{73}\) In addition, the Tort Reform Act codifies the rule of joint and several liability.\(^\text{74}\) Thus, when independent yet concurrent negligence contributes to a single injury, the injured party can receive full recovery from any single tortfeasor. The Senate Select Committee on Tort and Product Liability Reform found that this rule was unfair since it would require a partially at fault defendant to pay more than his share of the joint defendant's liability in certain cases. The Committee determined, however, that the unfairness should be ameliorated by the creation of the right of contribution.\(^\text{75}\) If the employer is held immune from contribution, the legislature's evident intent is frustrated because the right of contribution cannot be used to prevent the harshness of the joint and several liability rule.

Proponents of contribution also assert that due process may be violated when the third party tortfeasor's right to contribution or indemnity is extinguished by the workers' compensation laws without providing him a reasonable substitute for his right. Although this argument appears tenuous, a Minnesota statute expressly codifying the employer's immunity from contribution was held unconstitutional.\(^\text{76}\) Other courts, however, have consistently upheld the constitutionality of the workers' compensation


\(^{73}\) See supra note 57 and accompanying text for a discussion of the use of active/passive indemnity in an action between an employer and third party.


\(^{76}\) Carlson v. Smogard, 298 Minn. 362, 215 N.W.2d 615 (1974). The provision in the Minnesota Workers' Compensation Act, found unconstitutional, states:

If an action as provided in this chapter prosecuted by an employee, the employer or both jointly against the third person, or settlement by such third person, the employer shall have no liability to reimburse or hold such person harmless on such judgments or settlements in absence of a written agreement to do so executed prior to injury.

scheme when it bars third party actions against the employer. 77

The thrust of the minority view is recognition of the need for fairness to the third party as well as to the employer. The essence of a third party’s interest is that of any other co-tortfeasor: to limit his liability to no more than his established fault. 78 This principle, and other policies supporting contribution, have led to three approaches for resolving the employer contribution issue. The first approach allows full contribution. 79 Although said to be premised on fundamental fairness, this rule shifts the burden from one system to the other by deferring to the policies supporting contribution and failing to adequately consider the policies underlying workers’ compensation. The second approach reduces the judgment either by one-half or by the percentage of the employer’s concurring negligence. 80 Both of these approaches unacceptably impair the plaintiff’s right to full recovery. The third approach allows limited contribution. 81 This rule rests on a balanced prioritization of the many policies supporting each system, and most equitably resolves the contribution issue.

A. Full Contribution

Dole v. Dow Chemical Co. 82 illustrates the rule of full contribution. The Dole court resolved the policy conflict by holding that the deciding factor is fairness. 83 The court indicated that as long as the present tort system continues, an effective contribution and indemnity scheme is necessary to handle the growing problems created by multiple tort liability. After reasoning that the rule of no contribution conflicted with tort policy goals of deterrence, equitable loss sharing by all wrongdoers, and effec-

77. See, e.g., Mulder v. Acme-Cleveland Corp., 95 Wis. 2d 173, 290 N.W.2d 276 (1980). The Wisconsin court held, “[w]e are satisfied that the classification which the legislature has made is reasonable and that it is not constitutionally inappropriate to make employers a favored class where claims of contribution are asserted in third party actions.” Id. at 188-89, 290 N.W.2d at 284.

78. Lambertson, 312 Minn. at 122, 257 N.W.2d at 685.

79. See infra text accompanying notes 82-89.

80. See infra text accompanying notes 90-104.

81. See infra text accompanying notes 105-11 for a discussion of the limited contribution rule.


83. Dole, 30 N.Y.2d at 151, 282 N.E.2d at 294, 331 N.Y.S.2d at 390.
tive distribution over a large segment of society, the court solved the problem of joint liability by evaluating the third party's cause of action. It found that the third party does not sue for damages on account of the injury to the employee but rather asserts his own recovery for breach of an alleged independent duty or obligation owed to him by the employer.

The Dole opinion contains two major flaws. First, although the court adequately explored the policies supporting contribution, it failed to consider the policies underlying workers' compensation. In ignoring the workers' compensation policies, the court adopted a rule that abrogates entirely the quid pro quo of limited liability that an employer expects when he pays workers' compensation premiums, simply because a third party happens to be partially at fault in the workplace. Second, the conclusion that the employer owed an independent obligation to the third party lacks adequate support because the court relied on a case in which the employer was obligated to indemnify a third party. Supporting its decision with an indemnity case obscured the distinction between indemnity and contribution. Indemnity implies a contract, agreement, or obligation between the employer and third party, requiring the employer to respond for all damages. Thus the employer must manifest his intention, impliedly or in writing, to bear the burden in order for a third party to seek indemnity. Contribution, on the other hand, requires no prior obligation or agreement, but distributes a common burden amongst wrongdoers based upon equity and good conscience. A legal requirement of contribution should not be confused with an independently acquired obligation between the

84. Id. at 150, 282 N.E.2d at 293, 331 N.Y.S.2d at 389.
85. Id. at 152, 282 N.E.2d at 294, 331 N.Y.S.2d at 390.
86. In their discussion of the issue, the New York court did mention New York's workers' compensation act, N.Y. WORK. COMP. LAW § 11 (McKinney 1965). However, the policies underlying the law were not discussed. Dole, 30 N.Y.2d at 152, 282 N.E.2d at 294, 331 N.Y.S.2d at 390.
88. The difference between indemnity and contribution—in cases between persons liable for a wrong—is that in the former the law implies an agreement or obligation and enforces a duty on the primary or principle wrongdoer to respond for all damages, whereas in contribution, there is no agreement express or implied but a common burden in which the parties stand in equali juri [sic] and which in equity and good conscience should be equally borne.
89. Id.
third party and the employer. The Dole court's inability to make the distinction between indemnity and contribution illustrates its lack of analysis of the underlying conflict. Although the Dole rule of apportionment based on fault alone appears fair at first glance, the competing interests of the tort and workers' compensation systems require a more balanced approach.

B. Reduction in Judgment

The second minority approach, which calls for a reduction of the judgment against the third party when the employer is partially at fault, was adopted by the Court of Appeals for the District of Columbia in Murray v. United States. Following the majority view that there is no joint liability between the employer and the third party defendant sued in tort, the court found no right of contribution. The court, noting the inequities of the no contribution rule, mitigated its harshness by reducing the judgment against the third party by one-half. The court viewed the employer as a settling tortfeasor and the employee's receipt of compensation constituted a sale of one-half his claim. Critics of Murray contend that the rule destroys the concept of apportioning liability on the basis of fault. It imposes an arbitrary fifty percent reduction of the employee's judgment, and shifts the loss from the third party to the innocent injured employee, eliminating the employee's right to a full recovery.

90. 405 F.2d 1361 (D.C. Cir. 1968).
91. Id. at 1364.
92. Id. at 1365.
93. The court, citing Martello v. Hawley, 300 F.2d 721, 724 (D.C. Cir. 1962), held that when one joint tortfeasor compromises his claim, the other tortfeasor, although not able to seek contribution because the settling tortfeasor has bought his peace, is nonetheless protected by having his liability reduced by one-half on the theory that one-half of the claim was sold by the victim when he executed the settlement. Kittleson, 405 F.2d at 1361.
94. A. Larson, supra note 41, at 14-314 to -319; Comment, The Effect of Workers' Compensation Laws on the Right of a Third Party Liable to an Injured Employer to Recover Contribution or Indemnity From the Employer, 9 Seton Hall 238, 283 (1978).
95. Comment, The Effect of Workers' Compensation Laws on the Right of a Third Party Liable to an Injured Employer to Recover Contribution or Indemnity From an Employer, 9 Seton Hall 238, 283 (1978).
96. Id. at 284.
97. It is unlikely that the Murray Rule could ever be adopted in a jurisdiction such as Washington where the legislature has codified the rule of joint and several liability. Wash. Rev. Code § 4.22.030 (1981).
Shellman v. United States Lines, Inc.,98 offers a different solution. In a memorandum opinion, the judge reduced the plaintiff's recovery by the percentage of his contributory negligence plus the percentage of the employer's concurring negligence.99 On appeal the Ninth Circuit reversed, stating that the rule imposed unjustified burdens upon the injured employee and restricted his right to full recovery.100 Unlike Murray, the "Shellman Rule" has some logic. It comports with the tort and workers' compensation systems since it limits the third party's payments to no more than his established fault, and it preserves the workers' compensation act as the sole determinant of the employer's liability.101 Arguably, the rule is also fair to the employee. The employee still receives workers' compensation in lieu of any common law remedy for the employer's negligence, just as if a third party were not involved. And by reducing the employee's judgment, the rule eliminates the problem of double recovery. Nevertheless, the "Shellman Rule" fails because it abrogates the doctrine of joint and several liability intended to ensure the injured plaintiff's full recovery.102 Because the cornerstone of tort law is the assurance of full compensation to the injured party,103 treating tortfeasors more fairly should not result in decreasing the chances of full recovery by innocent injured plaintiffs.104 Although the "Shellman Rule" is a viable answer to the conflict between employer and third party inter-

98. 528 F.2d 675 (9th Cir. 1975).
99. Id. at 676.
100. Id. at 680.
102. The "Shellman Rule" destroys joint and several liability because it prevents the injured employee from receiving judgment for the full amount of his injuries from one tortfeasor. The premise behind joint and several liability is the easing of the injured party's burden by allowing him to require one of several tortfeasors to pay the full judgment. The tortfeasors then battle among each other to determine the apportionment of fault.

An additional argument can be advanced that the disparity between the injured worker's recovery at common law and the amount of compensation he receives under workers' compensation forces an employee to sue a third party in order to receive sufficient funds to compensate him for his injuries. Therefore, it is important to allow full recovery from the third party or the employee will have to seek support from other social agencies.
est, it places a heavy burden on an injured plaintiff, and thus fails to be the most equitable solution.

C. Limited Contribution

The third minority approach is the most equitable rule because it considers and balances the interests of the third party, employer, and employee. This view concludes that contribution should be allowed in an amount equal to the employer's fault yet not to exceed the employer's total workers' compensation liability to the injured worker.\textsuperscript{105} The Minnesota Supreme Court adopted this approach in \textit{Lambertson v. Cincinnati Corp.}\textsuperscript{106} In reaching its decision, the \textit{Lambertson} court discussed the relevant policies and interests at length.\textsuperscript{107} The court found that imposing full contribution on the employer thwarts the central concepts of the workers' compensation system, and no contribution causes the third party to bear the burden of a full common law judgment despite the employer's possibly greater fault.\textsuperscript{108} Limited contribution, on the other hand, keeps the workers' compensation system intact, mitigates the burden placed on the third party, and solves any problem of double recovery.\textsuperscript{109}

In addition to its policy analysis, the court supported its conclusion with legal arguments. The court reasoned that while there is no joint liability to the employee in tort, both the employer and third party are nonetheless liable to the employee for his injuries: the employer through the fixed no-fault workers' compensation and the third party through the variable recovery available in a common law tort action.\textsuperscript{110} The court also found that the exclusive remedy provision is not an absolute bar to contribution because it was intended to control only the rights between employer and employee.\textsuperscript{111}

\textsuperscript{105} \textit{Lambertson}, 312 Minn. at 130, 257 N.W.2d 679 at 689. \textit{See also} \textit{Maio v. Fahs}, 339 Pa. 180, 14 A.2d 105 (1940).

\textsuperscript{106} 312 Minn. 114, 257 N.W.2d 679 (1977); followed in Bjerk v. Universal Eng'g Corp., 552 F.2d 1314 (8th Cir. 1977); Johnson v. Raske Bldg. Sys., Inc., 276 N.W.2d 79 (Minn. 1979); Bigham v. J.C. Penney Co., 268 N.W.2d 892 (Minn. 1978).

\textsuperscript{107} \textit{Lambertson}, 312 Minn. at 119-30, 257 N.W.2d at 684-89.

\textsuperscript{108} \textit{Id.} at 120, 257 N.W.2d at 684.


\textsuperscript{110} \textit{Lambertson}, 312 Minn. at 128, 257 N.W.2d at 688.

\textsuperscript{111} \textit{Id.}
the Lambertson court developed alternatives to the narrow interpretation offered by other courts, taking a more balanced approach to the contribution conflict.

The Lambertson limited contribution rule provides an equitable formula distributing the costs between the workers’ compensation and tort systems. When an employee recovers from a third party prior to receiving workers’ compensation benefits, the third party will pay the full judgment and have a right of contribution against the employer in an amount proportional to the employer’s percentage of fault but not in excess of the employer’s total workers’ compensation liability to plaintiff. When the employee sues the third party subsequent to receiving benefits, the judgment against the third party will be reduced by an amount proportional to the employer’s percentage of fault or the amount of benefits, whichever is less. The employer will be entitled to a lien on plaintiff’s recovery when the value of the employer’s percentage of fault is less than the value of benefits paid. Arguably, this rule will force the employer to defend on the issue of fault and thus incur litigation expenses, which thwarts part of the employer’s quid pro quo. This burden on the employer, however, is justified because, in balancing the interests, the principle of fair apportionment of fault supersedes this portion of his quid pro quo. Furthermore, the employer always has the opportunity to settle with the third party or merely pay the amount owed under workers’ compensation, an amount that would have been paid anyway but for the fortuity of a third party’s act. In addition, the artificial limit on the employer’s contribution forces the joint tortfeasor to compensate the employee in excess of the joint tortfeasor’s proportional fault even though the employer is brought into the action. Because the limited contribution rule takes into account the perspectives of all interested parties and the policies of the two partially overlapping statutory systems, it is the most equitable solution to the issue of contribution from employers.

V. REFORM OF WASHINGTON’S LAW

The Washington Supreme Court has adopted the majority rule of no contribution.112 Denial of contribution unjustifiably burdens a third party who receives no advantages or benefits

from the workers' compensation system. It also lessens the employer's costs for accidents that might be avoided by the employer, which throttles the safety objective of the workers' compensation system and increases the accident prevention costs of the third party. Changing Washington's rule of no contribution to a rule of limited contribution will equitably balance the interests of all parties:113 (1) the employer's interest in his quid pro quo of limited liability and sustained integrity of the workers' compensation system, (2) the third party's interest in limiting his liability to his percentage of fault, (3) the plaintiff's interest in full recovery and joint and several liability, (4) the state's interest in maintaining the financial stability of the accident fund.

If these interests and policies had been considered by the Washington Supreme Court in Glass, the judiciary could have changed the rule of no contribution. When two statutes overlap, as the contribution and employer immunity statutes do, the court has the duty to give each its maximum effect, especially when a compromise will not unduly burden either system.114 As the Illinois Supreme Court pointed out: "Where this court has created a rule or doctrine which, under present conditions, we consider unsound and unjust, we have not only power, but the duty, to modify or abolish it."115 Arguably, the Washington judiciary did create the rule of no contribution from an employer,116 and clearly it is unjust.117 By construing the exclusivity clause to apply only to those individuals who benefit from the Industrial Insurance Act, the court could have allowed limited contribution

113. This note does not directly address the impact of limited contribution on self-insurers. See supra note 7. However, it is assumed that the same changes should be made with regard to the self-insurer. The changes would in fact be simpler because the state's interest in the fund's financial stability is not implicated. Furthermore, the inequities are even more persuasive because a self-insured employer is now given the ability to pass on the cost of his negligence to a third party.

114. "It is the duty of the court to reconcile apparently conflicting statutes and to give effect to each of them, if this can be achieved without distortion of the language used." State v. Fagalde, 85 Wash. 2d 730, 736, 539 P.2d 86, 90 (1975).


116. Although the Industrial Insurance Act does preclude an employee's suit against his employer, it was the court that extended the employer's immunity to include suits brought by third parties. Seattle-First Nat'l Bank v. Shoreline Concrete Co., 91 Wash. 2d 230, 588 P.2d 1308 (1978).

117. In Glass, the supreme court stated that "requiring one wrongdoer to shoulder all the damages when the other wrongdoer is an employer may be unfair." 97 Wash. 2d at 888, 652 P.2d at 953.
and thus modified an unfair rule.

The failure of the Washington Supreme Court to recognize and balance the policy objectives of both workers' compensation and the Tort Reform Act devolves the responsibility to the legislature. To properly order these policies, the legislature should amend Washington’s Industrial Insurance Act to accomplish the following:

(1) When an injured worker seeks recovery from a third party subsequent to being compensated from the Industrial Insurance Fund, the judgment should be diminished by the percentage of the employer's fault, but not in excess of the total amount of compensation. 118

(2) When the injured worker sues a third party prior to receiving compensation or has additional compensation due him, the third party should pay the judgment in full and be assigned the worker's rights to compensation. This assigned right will allow the third party to receive contribution from the state fund according to the employer's percentage of fault or the amount owed to the worker under the compensation schedule, whichever is less. 119

(3) When the third party is allowed contribution from the state fund because of employer fault, that cost must be figured into the employer's premiums, thus compensating for the insurer's lack of lien or subrogation rights against the employee's recovery from a third party. 120

118. For example, if an injured worker loses a leg above the knee, the worker is entitled to $36,000 in workers' compensation benefits. Wash. Rev. Code § 51.32.080 (1981). Suppose, after receiving benefits, this employee brings a tort action against a third party and wins a judgment for $100,000. If at trial the jury found the employer 50% negligent and the third party 50% negligent, the limited contribution model would require that the judgment against the third party be diminished by $36,000 because the amount received in benefits was less than the amount of the judgment for which the employer is responsible by fault. If, however, the employer had been adjudged only 10% negligent and the third party 90% negligent, the judgment would be diminished by only $10,000.

119. For example, in rare situations the employee may sue the third party prior to receiving workers' compensation benefits. If the employee wins a judgment for $100,000, joint and several liability requires the third party to pay the employee the full $100,000. Under the limited contribution model, the third party would then have a right to collect from the state fund the amount of workers' compensation benefits that the worker would have received. Using the example in footnote 118, the third party could collect $36,000 if the employer was 50% at fault or $10,000 if the employer was only 10% at fault.

120. The limited contribution rule would limit the department's lien and subrogation rights. According to the testimony of the staff of the Department of Labor and Industries, this could cost the department over $2,000,000 per year. Product Liability
These changes, expressly incorporating limited contribution into the Industrial Insurance Act, would preserve the basic policies of the workers' compensation and tort systems. The limited contribution rule maintains joint and several liability, furthers the plaintiff's interest in full recovery, and therefore is preferable to the "Shellman Rule." ¹²¹ A rule of limited contribution also prevents plaintiff's double recovery. ¹²² Even though the distribution of losses is not a total apportionment on the basis of fault, because of the overlap with the employer's limited liability, the essence of the principles of fairness and comparative fault are preserved. The rule also prevents workplace injuries from playing a significant role in the rising costs of product liability insurance. ¹²³ Hence, although limited contribution is not a totally equitable distribution of costs, it does promote tort concepts of comparative fault to the greatest extent possible while still maintaining the integrity of the workers' compensation system.

The rule of limited contribution maintains the basic structure of the workers' compensation system by limiting the employer's liability to the extent of his insurance coverage. Although the rule may burden the employer with additional involvement in litigation, this burden must be borne because, in reconciling the overlap between the systems, the principles of fairness and fault should be given priority over this part of the employer's quid pro quo. Putting a ceiling on the employer's potential liability fairly compromises both his interest and the third party's interest.

In addition, the rule benefits the workers' compensation system by rewarding and encouraging safety. Under the current system, the state fund can recoup losses through its lien and

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¹²¹ For a discussion of the benefits of the "Shellman rule" see supra notes 86-88 and accompanying text.


¹²³ The drafters of the Tort Reform Act were concerned about product liability insurance costs. Studies presented to the Senate Committee indicated that workplace injuries account for 11% of the number of individuals receiving bodily injury payments in product liability claims and the claims represent 42% of the claims dollars paid out. REPORT, supra note 17, at 9, 1 Senate Journal 621, Reg. & 1st Ex. Sess. (1981).
subrogation rights. The cost of the accident is not used in calculating the employer's premium even though the employer may have been partially at fault. This calculation method contravenes the principle that the industry should bear the cost of industrial accidents, and discourages safety precautions. In his concurring opinion in Glass, Justice Rosellini pointed out that when an injured employee is paid by a third party manufacturer, the employer's time loss experience would not be increased. The Industrial Insurance Act provides that if any compensation is received by an employee from a third party, reimbursement must be made to the Department of Labor and Industries. Once this reimbursement is received, the cost of the accident is not applied to the employer's premiums. The employer, under these circumstances, is not deterred from using unsafe machines, as he would expect the machine's manufacturer to compensate the worker for his injuries. Allowing limited contribution forces the employer to be safety conscious because he knows that his premiums will rise if he is not.

Inclusion of accidents involving third parties in the calculation of premiums also preserves the financial stability of the accident fund. Under the proposed changes, the state would no longer have a lien against the employee's recovery from a third party. If contribution were allowed, the state would potentially lose an average $2,000,000 a year. The changes would prevent this loss by increasing the employer's base rate and including the loss in the employer's experience rating. The current sys-

124. See Boeing Aircraft Co. v. Department of Labor & Indus., 22 Wash. 2d 423, 434, 156 P.2d 640, 645 (1945).
125. Glass, 97 Wash. 2d at 891, 652 P.2d at 954 (Rosellini, J., concurring).
126. Id.
127. Id. Justice Rosellini feared results similar to Davis v. Niagara Mach. Co., 90 Wash. 2d 342, 581 P.2d 1344 (1978). In Davis, the court refused to allow contribution even though the employer had purposefully refrained from installing warning tags on the machine that caused the injury.
129. The Industrial Insurance Manual provides a base rate for each class of employers. WASH. ADMIN. CODE R. 296-17-895 (1982). These rates establish the minimum premium for each class. The individual employer's premium is determined by adding his experience rating to this base rate. WASH. ADMIN. CODE R. 296-17-850 (1982). To recoup losses from the lack of a lien against third party judgments, the base rate for each class would need to be increased. To provide safety incentives, the employer's total loss exposure, including losses incurred because of limited contribution, would need to be used in calculating his experience rating.
tern forces a third party to pay the costs of workers' compensation while receiving none of its benefits. Increasing the employer's premiums forces the industry "to bear the burden of the costs arising out of industrial injuries. . . ."\footnote{130}

VI. Conclusion

The question of contribution is not a new one. Equitable resolution of the inherent tensions between the overlapping systems, however, seems to have eluded most jurisdictions. Professor Larson suggests that the issue is one of the most evenly balanced controversies in all of compensation law.\footnote{131} This assumption, however, should not prevent a solution. The no contribution rule adopted in a majority of jurisdictions fails to give full consideration to the policies and interests underlying the tort system. The minority approach allowing full contribution unduly burdens the workers' compensation system. Reconciling the two systems requires adoption of a rule of limited contribution which recognizes the basic tenets of both systems, thus preserving their integrity while striking the most equitable balance possible.

\textit{Karin Nyrop}

\footnote{130. Jussila v. Department of Labor & Indus., 59 Wash. 2d 772, 779, 370 P.2d 582, 586 (1962).} 
\footnote{131. A. Larson, supra note 41, at § 76.}