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Contribution Among Tort-Feasors in Washington: The 1981 Tort Reform Act

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CONTRIBUTION AMONG TORT-FEASORS IN WASHINGTON: THE 1981 TORT REFORM ACT

Contribution is the right of a tort-feasor who has paid an injured plaintiff to obtain partial reimbursement from others responsible for the injury. Until 1981 this right was not available to tort-feasors in Washington. With the 1981 Tort Reform Act,[1] Washington joined forty-one other states in allowing contribution.[2]

This Comment analyzes the legislation creating and regulating contribution in Washington. It examines the nature and scope of the right to contribution and discusses the procedural aspects of the Act. The Comment closes with an analysis of the interaction of contribution rights and settlements, and concludes that the settlement provisions of the Act should be construed to maximize the recoveries by injured plaintiffs and to encourage settlements in tort suits.

I. THE NATURE AND SCOPE OF CONTRIBUTION

A. *Common Law*

Before the 1981 Tort Reform Act, Washington embraced the common-law rule that no right to contribution exists among joint tort-feasors.[3] This rule originated in the 1799 English case of *Merryweather v. Nixan*[4] and was adopted by the Washington Supreme Court in *City of Seattle v. Puget Sound Improvement Co.*[5] The rationale for denying contribution was that public policy should not permit a defendant to base a cause of action on

1. Ch. 27, 1981 Wash. Laws 112 (codified at WASH. REV. CODE chs. 4.22, 7.72 (1981)).

2. The eight jurisdictions not allowing some form of contribution by 1981 are Arizona, Connecticut, Indiana, Iowa, Kentucky, Oklahoma, South Carolina, and Virginia. *See* H. WOODS, COMPARATIVE FAULT 421 app. (1978) & 127 app. (Supp. 1981); *see also* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 16.7 (1974 & Supp. 1981) (discussing statutory and common-law contribution systems in other jurisdictions).

3. Some confusion surrounds the term "joint tort-feasor." It generally refers to tort-feasors who are jointly and severally liable for a plaintiff's injuries. The plaintiff can sue all of them or can recover all damages from any one. *See generally* notes 44–54 and accompanying text *infra* (discussing joint and several liability). Washington courts have defined "joint tort-feasors" more narrowly as those acting in concert in cases determining when a release of one defendant releases the others. *See* notes 21–24 and accompanying text *infra*. "Joint tort-feasors" as used in this Comment, unless otherwise specified, refers to persons jointly and severally liable for a plaintiff's injuries.

4. 8 Term. Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799).

5. 47 Wash. 22, 25, 91 P. 255, 257 (1907). Washington allowed contribution when liability was not based on tort. *See, e.g.*, Hanson v. Hanson, 55 Wn. 2d 884, 887–88, 350 P.2d 859, 861 (1960) (divorced spouse must contribute one-half of tax liability, incurred during marriage, for which both are liable); Karnatz v. Murphy Pac. Corp., 8 Wn. App. 76, 81, 503 P.2d 1145, 1149 (1972) (contribution right exists between co-obligors on contract).

the defendant's own wrong.[6] As comparative fault replaced contributory negligence and permitted plaintiffs to recover despite their own negligence, this rationale became less cogent.[7]

Even before 1981, a form of contribution was allowed to tort-feasors in Washington under the "active/passive indemnity rule." Under this rule, a "passively negligent" defendant could obtain reimbursement from an "actively negligent" joint tort-feasor.[8] The rule shifted the entire burden of liability to the active tort-feasor.

Washington courts applied the active/passive indemnity rule inconsistently. In one case, for example, a plaintiff shipowner failed to inspect a dockowner's faulty crane. The crane collapsed, injuring an employee of the plaintiff. After compensating the employee, the shipowner brought an indemnity action against the dockowner. The Washington Supreme Court held that the plaintiff's failure to inspect was not necessarily active negligence but instead could be found to be passive.[9] But in another case, when the same plaintiff failed to inspect a dockowner's faulty gangplank that collapsed and injured a worker, the court held that the shipowner's negligence was active as a matter of law.[10] These and other inconsistent results,[11] coupled with the harshness of not allowing contribution, fueled judicial and legislative dissatisfaction with the no-contribution rule.

The Washington Supreme Court expressed some of this judicial dissatisfaction in *Wenatchee Wenoka Growers Association v. Krack Corp.*[12] The court there conceded that allowing contribution among tort-feasors

6. Alaska Steamship Co. v. Pacific Coast Gypsum Co., 71 Wash. 359, 362–363, 128 P. 654, 656 (1912).

7. WASHINGTON STATE SENATE SELECT COMM. ON TORT & PRODUCT LIABILITY REFORM, FINAL REPORT, 47TH LEG. REG. SESS. 20–23 (1981) [hereinafter cited as SENATE REPORT], *reprinted in* 1981 WASH. S. JOUR. 626–27. There are slight changes in wording between the Final Report and the reprinted version in the Senate Journal, but there are no changes in substance.

8. *E.g.*, Rufener v. Scott, 46 Wn. 2d 240, 242, 280 P.2d 253, 255 (1955). For example, a municipality that negligently allowed an obstruction to remain in a street recovered from a contractor who negligently put the obstruction there, in City of Cle Elum v. Yeaman, 145 Wash. 157, 160, 259 P. 35, 36 (1927).

9. Alaska S.S. Co. v. Pacific Coast Gypsum Co., 71 Wash. 359, 367, 128 P. 654, 660 (1912). The court remanded for a determination of whether the negligence was passive.

10. Alaska S.S. Co. v. Sperry Flour Co., 122 Wash. 642, 646–47, 211 P. 761, 762–63 (1922).

11. In Aberdeen Constr. Co. v. City of Aberdeen, 84 Wash. 429, 434–35, 147 P. 2, 4 (1915), the court held that a collapsing excavation made in accordance with an independent engineer's plans could be the result of passive negligence on the contractor's part. But in Weston v. New Bethel Missionary Baptist Church, 23 Wn. App. 747, 755, 598 P.2d 411, 415–16 (1978), the court found that church members who built a collapsing rockery in accordance with an independent consultant's plans were actively negligent.

In other cases, the court held one municipality to be actively negligent for allowing a private fire escape to obstruct a sidewalk, Turner v. City of Tacoma, 72 Wn. 2d 1029, 1037–38, 435 P.2d 927, 932 (1967); but it found another city to be passively negligent for allowing a contractor to leave an obstruction in the street, City of Cle Elum v. Yeaman, 145 Wash. 157, 160, 259 P. 35, 36 (1927).

12. 89 Wn. 2d 847, 576 P.2d 388 (1978).

might be more fair than the common-law rule, but unanimously refused to adopt contribution because of the many difficulties in implementation. The court identified these difficulties to be the problems of enforcement, proportionment, settlement, and abandonment of joint and several liability altogether.[13] The Tort Reform Act addresses these problems in detail.

B. Contribution Under the Tort Reform Act

In 1981, the Washington Legislature passed the Tort Reform Act,[14] modeling the contribution sections after the Uniform Comparative Fault Act.[15] The Washington Act states:

> 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. . . . 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.[16]

The sections that follow discuss the application of this statute.

1. Scope of Contribution

The right of contribution exists between any defendants "jointly and severally liable upon the same indivisible claim for the same injury, death or harm."[17] A claim is indivisible when the victim's injuries cannot be segregated and causally linked to the separate actions of each tort-feasor.[18] When the acts of multiple tort-feasors cause damages that can be

13. *Id.* at 854, 576 P.2d at 391–92.

14. Ch. 27, 1981 Wash. Laws 112 (codified at WASH. REV. CODE chs. 4.22, 7.72 (1981)).

15. *Compare* WASH. REV. CODE ch. 4.22 (1981) *with* UNIF. COMPARATIVE FAULT ACT §§ 4–6, 12 U.L.A. 40 (Supp. 1982). The only substantial departures from the Uniform Act are vicarious liability and settlements. Both are discussed below. *See* notes 41–43 & 105–09 and accompanying text *infra*.

16. WASH. REV. CODE § 4.22.040(1) (1981).

17. *Id.*

18. This indivisibility gives rise to the required joint and several liability. *Id.* § 4.22.030. The court in Fugere v. Pierce, 5 Wn. App. 592, 490 P.2d 132 (1971), which involved a multiple-impact accident, said:

> The majority view in our country in cases similar to the instant one, where there are collisions in rapid succession producing a single end result, and no substantial proof as to what damage was caused by each collision, is to hold each tort-feasor jointly and severally liable. . . . This has come to be known as the "single indivisible injury rule."

Id. at 597–98, 490 P.2d at 135. The person seeking to avoid imposition of joint and several liability

linked to the separate acts of each tort-feasor, the claim is divisible and excluded from the scope of the Act.[19] This is consistent with the scope of contribution rights in other jurisdictions.[20]

The Washington courts' traditional classification of multiple tort-feasors as "joint," "concurrent," or "successive" does not determine the availability of contribution. Indivisibility of harm is the sole criterion under the Act. Therefore, "joint" tort-feasors—those who act in concert to produce the plaintiff's injuries[21]—have contribution rights only if the harms they cause are indivisible.[22] "Concurrent" tort-feasors—those whose independent acts of negligence combine to cause a nonsegregable injury—have contribution rights because the harm they cause is, by definition, indivisible.[23] A "successive" tort-feasor—whose acts aggravate injuries caused by an earlier tort-feasor—has no contribution rights because the harm caused is divisible.[24]

The Act also abolishes the active/passive indemnity rule.[25] The comparative fault sections of the Act replace the old rule adequately. If one tort-feasor's negligence is so insubstantial that it formerly would have been considered passive, the finder of fact can simply allocate little or no comparative fault to that tort-feasor under the contribution system.[26]

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has the burden to prove that the damages can be segregated and assigned according to causation. *Id.* at 599, 490 P.2d at 136.

19. The claim is also excluded because liability is not joint and several. *See* Young v. Dille, 127 Wash. 398, 404, 220 P. 782, 784 (1923) (multiple-impact automobile accident in which injuries could be segregated and identified with separate impacts).

20. Other jurisdictions generally hold that contribution applies whenever the harm is indivisible, no matter how tort-feasors are characterized. *E.g.*, New Amsterdam Casualty Co. v. Holmes, 435 F.2d 1232, 1234–35 (1st Cir. 1970) (construing Rhode Island law); Getzelman v. Lacovara, 82 A.D.2d 823, 439 N.Y.S.2d 433, 434 (1981). Other jurisdictions also hold that when damages inflicted by multiple tort-feasors are separable, liability is not joint and several, and contribution is not appropriate. *E.g.*, Carrols Equities Corp. v. Villnave, 76 Misc. 2d 205, 350 N.Y.S.2d 90, 92 (Sup. Ct. 1973), *aff'd*, 49 A.D.2d 672, 373 N.Y.S.2d 1012 (App. Div. 1975).

21. Modern Washington decisions restricted use of the term "joint tort-feasors" to describing persons who acted in concert in causing a harm. *See, e.g.*, DeNike v. Mowery, 69 Wn. 2d 357, 368, 418 P.2d 1010, 1017 (1966); Litts v. Pierce County, 5 Wn. App. 531, 536, 488 P.2d 785, 788–89 (1971). An example is two drivers who race and injure a third person. W. PROSSER, LAW OF TORTS § 46 (4th ed. 1971). If the harm they cause cannot be segregated and identified with the actions of each tort-feasor, contribution is appropriate.

22. Contribution would not apply if the tort-feasors' common purpose was to harm the plaintiff. Tort-feasors who act intentionally cannot obtain contribution from others at fault. *See* note 30 and accompanying text *infra*.

23. *E.g.*, Litts v. Pierce County, 5 Wn. App. 531, 536–37, 488 P.2d 785, 789 (1971). An example is two drivers acting independently who negligently cause a multiple-automobile accident that injures the plaintiff.

24. *See, e.g.*, DeNike v. Mowery, 69 Wn. 2d 357, 368, 418 P.2d 1010, 1017 (1966) (plastic surgeon aggravated injuries to a plaintiff's face caused by a previous tort-feasor).

25. WASH. REV. CODE § 4.22.040(3) (1981).

26. *See* notes 37–40 and accompanying text *infra* (discussing comparative fault allocation).

Other jurisdictions allow contribution even though the plaintiff pursues different theories, such as negligence and strict liability, against each tort-feasor.[27] Washington's Act also authorizes contribution despite differing bases for liability. Contribution is based on the "comparative fault" of each liable person.[28] Fault is broadly defined to include negligence, strict liability, recklessness, assumption of risk, breach of warranty, and failure to avoid injury.[29] Intentional harm is excluded from the scope of the Act, however. The Act's drafters intended that one who intentionally harms another should not be able to allocate fault to others.[30]

A question exists whether persons whom the plaintiff could not sue directly can be held liable indirectly through contribution. This problem often arises when an injured employee collects worker's compensation from the state and then sues the manufacturer of the product that injured him. The manufacturer attempts to obtain contribution from the plaintiff's employer, who is protected from direct suit by the plaintiff under the state's worker's compensation act. Most jurisdictions consider contribution inappropriate in these circumstances because the employer's liability is absolutely limited by the worker's compensation act.[31]

The Washington Supreme Court indicated in *Seattle First National Bank v. Shoreline Concrete Co.*[32] that third-party actions against a plaintiff's employer are impermissible because the worker's compensation law immunizes employers from tort liability.[33] The *Seattle First* rationale

27. *E.g.*, W.D. Rubright Co. v. International Harvester Co., 358 F. Supp. 1388, 1400 (W.D. Pa. 1973) (combining strict liability and negligence to allow contribution); Safeway Stores, Inc. v. Nest-Kart, 21 Cal. App. 3d 322, 332, 146 Cal. Rptr. 550, 555 (1978) (same); Sanchez v. City of Espanola, 94 N.M. 676, 615 P.2d 993, 995 (1980) (same). One court also allowed contribution to a defendant liable for negligence who sued a third party based on breach of contract. ICI America, Inc. v. Martin-Marietta Corp., 368 F. Supp. 1148, 1151 (D. Del. 1974).

28. WASH. REV. CODE § 4.22.040(1) (1981).

29. *Id.* § 4.22.015. This section provides:

"Fault" includes acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability or liability on a product liability claim. The term also includes breach of warranty, unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

30. SENATE REPORT, *supra* note 7, at 47, *reprinted in* 1981 WASH. S. JOUR. 635; *see also* UNIF. COMPARATIVE FAULT ACT § 1, commissioners' comment, 12 U.L.A. 35 (Supp. 1982) (parallel provision in Uniform Act excludes intentional conduct).

31. *See, e.g.*, Rowe v. John C. Motter Printing Press Co., 273 F. Supp. 363, 365 (D.R.I. 1967); E.B. Wills Co. v. Superior Court of Merced County, 56 Cal. App. 3d 650, 654–55, 128 Cal. Rptr. 541, 544 (1976); Baltimore Transit Co. v. State, 183 Md. 674, 39 A.2d 858, 860–61 (1944); Cacchillo v. H. Leach Mach. Co., 111 R.I. 593, 305 A.2d 541, 544 (1973). *Contra* Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 294 (1972).

32. 91 Wn. 2d 230, 588 P.2d 1308 (1978).

33. The court stated that the worker's compensation act, WASH. REV. CODE tit. 51 (1981), abolishes judicial jurisdiction over all personal injury actions arising between employees and employers.

should bar contribution actions as well. This result comports with the worker's compensation policy of strict but limited liability for workplace injuries.[34]

The immunity problem also arises with automobile host-guest statutes and with suits between spouses. Most courts hold that if the plaintiff could not sue the potential contributor directly, contribution is unavailable.[35] These courts have concluded that contribution in these cases would allow an indirect action against the immune defendant, which would circumvent the policies behind the various tort immunities.[36] This approach would be appropriate under Washington's Act because the right to contribution is based on the defendants' joint and several liability. Because joint liability with an immune tort-feasor is impossible, contribution is improper.

2. *Apportionment of Liability*

The Act provides that "[t]he basis for contribution among liable persons is the comparative fault of each such person."[37] The liability of each tort-feasor is determined in the same way that negligent plaintiffs' reco-

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91 Wn. 2d at 241–42, 588 P.2d at 1316; *accord* Olch v. Pacific Press & Shear Co., 19 Wn. App. 89, 92, 573 P.2d 1355, 1357 (1978).

34. *See* Thompson v. Lewis County, 92 Wn. 2d 204, 208, 595 P.2d 541, 543 (1979) (stating that worker's compensation abolishes common-law actions against employer); Montoya v. Greenway Aluminum Co., 10 Wn. App. 630, 634, 519 P.2d 22, 25 (1974) (worker's compensation imposes strict liability on employer for workplace injuries); *see also* WASH. REV. CODE § 51.04.010 (1981) (strict liability for workplace injuries replaces common-law system of tort recovery).

The Tort Reform Act intentionally failed to deal with this issue. The drafters of the Act thought that any changes in worker's compensation law would be better made after an analysis by the Joint Committee on Worker's Compensation. SENATE REPORT, *supra* note 7, at 26, *reprinted in* 1981 WASH. S. JOUR. 629.

35. *E.g.*, Cox v. Maddux, 255 F. Supp. 517, 527 (E.D. Ark. 1966) (claim barred by Federal Tort Claims Act), *rev'd on other grounds*, 382 F.2d 119 (8th Cir. 1967); Oahu Ry. & Land Co. v. United States, 73 F. Supp. 707, 709 (D. Hawaii 1947) (same); Ferguson v. Davis, 48 Del. 229, 102 A.2d 707, 708 (1954) (claim barred by interspousal immunity); Rigsby v. Tyre, 380 A.2d 1371, 1373 (Del. Super. Ct. 1977) (claim barred by host-guest immunity); Ennis v. Donavan, 222 Md. 536, 167 A.2d 698, 700–01 (1960) (claim barred by interspousal immunity); O'Mara v. H.P. Hood & Sons, Inc., 359 Mass. 235, 268 N.E.2d 685, 688 (1971) (claim barred by host-guest immunity).

36. *E.g.*, Oahu Ry. & Land Co. v. United States, 73 F. Supp. 707, 709 (D. Hawaii 1947); Rigsby v. Tyre, 380 A.2d 1371, 1373 (Del. Super. Ct. 1977). *Contra* Zarrella v. Miller, 100 R.I. 545, 217 A.2d 673, 675 (1966) (holding contribution to be appropriate from plaintiff's husband despite interspousal immunity). Oddly, the Rhode Island court does not allow contribution suits against plaintiffs' employers. Cacchillo v. H. Leach Mach. Co., 111 R.I. 593, 305 A.2d 541, 543–44 (1973). The court in *Cacchillo* explained this inconsistency with *Zarrella* on the basis of the different policies underlying the two immunities. *Id.*, 305 A.2d at 543–44; *cf.* Fleischer v. Uccelini, 81 Misc. 2d 22, 365 N.Y.S.2d 722 (1975) (holding contribution to be appropriate even though contributor had obtained failure-to-prosecute dismissal against the injured plaintiff).

37. WASH. REV. CODE § 4.22.040(1) (1981).

veries are reduced in comparative negligence cases.[38] In comparing the tort-feasors' fault, the finder of fact is to consider "both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages."[39] For example, the actions of two tort-feasors may be equal causes of the plaintiff's harm, but one may have acted recklessly and the other negligently. The provision allows the finder of fact to affix a higher percentage of comparative fault to the tort-feasor who acted recklessly.[40]

3. *Vicarious Liability*

The Tort Reform Act provides that, in allocating comparative fault, "the court may determine that two or more persons are to be treated as a single person for purposes of contribution."[41] The legislative history is silent on the appropriate instances for invoking this provision. The Uniform Comparative Fault Act has no similar provision.[42]

Vicarious liability, such as the liability of a master for a servant, is a likely case for application of this provision. Other jurisdictions considering the relationship between vicarious liability and contribution treat the liability of the vicariously liable party as coextensive with that of the active tort-feasor in apportioning fault.[43] For example, a master and servant

38. *Compare id.* § 4.22.005 (stating that contributory fault reduces plaintiff's recovery against tort-feasor) *with id.* § 4.22.040 (stating that basis for contribution is comparative fault of tort-feasor). Both of these sections use the definition of "fault" found in RCW § 4.22.015.

39. *Id.* § 4.22.015; *see* Comment, *Products Liability—Washington Refuses to Allow Comparative Negligence to Reduce a Strict Liability Award,* 56 WASH. L. REV. 307, 315–16 (1981) (criticizing consideration of the nature of the tort-feasor's conduct).

40. SENATE REPORT, *supra* note 7, at 20–21, *reprinted in* 1981 WASH. S. JOUR. 627. The drafters of the Act wished to make clear that comparison of fault should occur in all cases short of intentional torts. The Committee Report states:

> A major goal of this tort reform movement has been to arrive at a fairer apportionment of fault in tort actions. There has been growing dissatisfaction with the all-or-nothing recovery rules under the prior law. In view of this, there is considerable support for the position that comparative principles should be applied *regardless of the degree of fault* involved on either side.

Id. (emphasis added). The Committee felt that Washington's 1973 Comparative Fault Act was ambiguous inasmuch as it did not state whether fault other than simple negligence should reduce plaintiff's recoveries. *Id.*

41. WASH. REV. CODE § 4.22.040(1) (1981).

42. *Compare id. with* UNIF. COMPARATIVE FAULT ACT § 4(a), 12 U.L.A. 40 (Supp. 1982).

43. *E.g.*, Hut v. Antonio, 95 N.J. Super. 62, 229 A.2d 823, 827 (Law Div. 1967) (holding that active tort-feasor cannot obtain contribution from person vicariously liable for active tort-feasor's wrongdoing); CAL. CIV. PROC. CODE § 876(b) (West 1980) ("Where one or more persons are held liable solely for the tort of one of them or of another, as in the case of the liability of a master for the tort of his servant, they shall contribute a single pro rata share . . . . "). This approach is consistent with other cases indentifying the vicarious party's liability with the active tort-feasor's. *E.g.*, Hunter v. Embree, 122 Ga. App. 576, 178 S.E.2d 221, 222 (1970) (principal discharged by unsuccessful action against agent, even though not party to that action); Smith v. Lincoln, 52 Misc. 2d 66, 275

are liable between them for only the servant's conduct. Because vicarious liability is based on the relationship between the actual tort-feasor and some other party responsible for the tort-feasor's conduct, assigning separate shares of liability to each is illogical. Unfairness would result as well because the vicariously liable party would be liable for the active party's share as well as her own. The Tort Reform Act allows the court to avoid this result by treating the active tort-feasor and the vicariously liable party as one person when allocating fault.

4. *Retention of Joint and Several Liability*

The Act provides that when multiple tort-feasors are liable on an indivisible claim, "the liability of such persons shall be joint and several."[44] Most states allowing contribution have retained joint and several liability.[45] Nevertheless, this retention is inconsistent with the principles underlying contribution among tort-feasors. The purpose of contribution is to provide for liability in proportion to fault.[46] Requiring any tort-feasor to pay more than the percentage of harm the tort-feasor is assigned by the finder of fact is inconsistent with this purpose.[47] This might be the result,

N.Y.S.2d 74, 75 (1966) (master's liability based solely on principle of respondeat superior; master and servant are not joint tort-feasors); Craven v. Lawson, 534 S.W.2d 653, 656 (Tenn. App. 1976) (where general rule is that release of one tort-feasor releases no others, release of active tort-feasor releases party vicariously liable for that party's wrongdoing).

Authority to the contrary exists, however. *E.g.*, Alaska Airlines v. Sweat, 568 P.2d 916, 929–30 (Alaska 1977) (holding that the release of an active tort-feasor does not release a party vicariously liable for the tort-feasor's conduct); Holve v. Draper, 95 Idaho 193, 505 P.2d 1265, 1267 (1973) (same). This approach was followed in Washington in Finney v. Farmer's Ins. Co., 92 Wn. 2d 748, 754, 600 P.2d 1272, 1276 (1979). The court in *Finney* reasoned that covenants not to sue do not release other tort-feasors unless there is danger of double recovery. Nevertheless, the *Finney* decision does not bar allocation of a single share of liability to active tort-feasors and vicariously liable parties together. Contribution was not an issue in *Finney*.

44. WASH. REV. CODE § 4.22.030 (1981).

45. *E.g.*, American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 588, 578 P.2d 899, 905, 146 Cal. Rptr. 182, 188 (1978); Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 30, 286 N.E.2d 241, 243, 334 N.Y.S.2d 851, 855 (1972); Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105, 107 (1962). *Contra* Brown v. Keill, 224 Kan. 195, 580 P.2d 867, 874 (1978) (abolishing joint and several liability in Kansas comparative negligence actions).

Twenty other states have adopted either the 1939 or 1955 version of the Uniform Contribution Among Tortfeasors Act, both of which retained joint and several liability. *See* 12 U.L.A. 52 (Supp. 1982); *see also* UNIF. COMPARATIVE FAULT ACT § 4 commissioners' comment, 12 U.L.A. 41 (Supp. 1982) (stating that Uniform Comparative Fault Act retains joint and several liability).

46. *See* American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 598, 578 P.2d 899, 911–12, 146 Cal. Rptr. 182, 194–195 (1978); Dole v. Dow Chem. Co., 30 N.Y.2d 143, 148–49, 282 N.E.2d 288, 292, 331 N.Y.S.2d 382, 387 (1972); Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105, 109 (1962); SENATE REPORT, *supra* note 7, at 21–24, *reprinted in* 1981 WASH. S. JOUR. 627–28.

47. There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share

for example, if one defendant were judgment proof because of insolvency or immunity. Retaining joint and several liability in effect penalizes a solvent tort-feasor for the insolvency of another, penalizes a tort-feasor whose co-tort-feasor is married to the injured plaintiff, and penalizes a tort-feasor because a co-tort-feasor is immune from liability under the Federal Tort Claims Act, worker's compensation law, or some other source of immunity. In short, the solvent, non-immune tort-feasor is burdened with the risk that a fellow tort-feasor is immune or judgment proof.

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 a full and rapid recovery takes precedence over tort-feasors' rights to allocate liability among themselves in proportion to fault. The drafters of the Tort Reform Act found this priority sufficient reason, when combined with the ameliorating effects of contribution, to retain joint and several liability.[48]

The priority accorded plaintiffs is consistent with Washington precedent. In *Seattle First National Bank v. Shoreline Concrete Co.*,[49] the Washington Supreme Court stated:

> 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 tort-feasors. . . . What may be equitable *between multiple tort-feasors* is an issue totally divorced from what is fair to the injured party.[50]

The superior rights of the plaintiff have provided the rationale for retention of joint and several liability in other jurisdictions as well.[51]

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of the loss. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the codefendant to pay more than his fair share of the loss. The same is true if one of the defendants is wealthy and the other is not.

Brown v. Keill, 224 Kan. 195, 580 P.2d 867, 874 (1978) (abolishing joint and several liability); *see also* Comment, *Contribution and Indemnity Collide with Comparative Negligence—The New Doctrine of Equitable Indemnity*, 18 SANTA CLARA L. REV. 779, 804 (1978) (criticizing California's retention of joint and several liability).

48. SENATE REPORT, *supra* note 7, at 23, *reprinted in* 1981 WASH. S. JOUR. 628:

> The 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 Committee feels that a defendant rather than the plaintiff should bear the burden of that unfairness.

49. 91 Wn. 2d 230, 588 P.2d 1308 (1978).

50. *Id.* at 236, 588 P.2d at 1312–13.

51. *E.g.*, Arctic Structures, Inc. v. Wedmore, 605 P.2d 426, 435 (Alaska 1979); American Mo-

Retaining joint and several liability also is consistent with Washington's comparative negligence law, which was designed to achieve greater fairness in tort law by increasing the chance of recovery for a contributorially negligent plaintiff.[52] Contribution among tort-feasors creates greater fairness for the tort-feasors by allowing them to apportion fault.[53] A good argument can be made that treating tort-feasors more fairly should not result in decreasing the chances of recoveries by injured plaintiffs.[54]

II. PROCEDURAL ASPECTS OF CONTRIBUTION IN WASHINGTON

Section 13 of the Tort Reform Act provides elaborate procedural rules governing enforcement of the right to contribution.[55] This section examines those rules.

A. Joint Judgment Not a Prerequisite to Contribution

Early contribution rights in other states sometimes required a joint and several judgment before one tort-feasor could seek contribution from another.[56] Washington's Act provides a right to contribution when two persons are "jointly and severally liable" on the same claim.[57] Because the tort-feasors are not liable until a judgment is entered against them, logically no right of contribution exists until then. This interpretation yields preposterous results, however. For instance, a Montana court held that one tort-feasor could not implead another into the original action.[58] This interpretation defeats a central purpose of contribution: to make those re-

torcycle Ass'n. v. Superior Court, 20 Cal. 3d 578, 589-90, 578 P.2d 899, 906, 146 Cal. Rptr. 182, 189 (1978); Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721, 728 (1934).

52. Seattle First Nat'l Bank v. Shoreline Concrete Co., 91 Wn. 2d 230, 236, 588 P.2d 1308, 1313 (1978).

53. SENATE REPORT, *supra* note 7, at 24, *reprinted in* 1981 WASH. S. JOUR. 628.

54. The Washington Supreme Court stated that abolition of joint and several liability would be "completely inconsistent" with the comparative negligence rule. Seattle First Nat'l Bank v. Shoreline Concrete Co., 91 Wn. 2d 230, 236-37, 588 P.2d 1308, 1313 (1978).

55. WASH. REV. CODE § 4.22.050 (1981). This section is identical to section 5 of the Uniform Comparative Fault Act, except for the substitution of the term "comparative fault" for "proportionate fault." *Compare id. with* UNIF. COMPARATIVE FAULT ACT § 5, 12 U.L.A. 41 (Supp. 1982).

56. *E.g.*, Thornton v. Luce, 209 Cal. App. 2d 542, 26 Cal. Rptr. 393, 398 (1963); Consolidated Freightways Corp. v. Osier, 605 P.2d 1076, 1079 (Mont. 1979); Miraglia v. Miraglia, 106 N.J. Super. 266, 255 A.2d 762, 765 (App. Div. 1969); Lurie v. Goldman, 53 Misc. 2d 250, 278 N.Y.S.2d 549, 550 (Sup. Ct. 1965). An example of the problems this approach created is Sonnenthal v. Hodes, 11 A.D.2d 645, 201 N.Y.S.2d 547, 548 (1960) (tort-feasor could preclude a separate trial against other tort-feasors to preserve right to contribution because joint judgment necessary).

57. WASH. REV. CODE § 4.22.040 (1981).

58. Consolidated Freightways Corp. v. Osier, 605 P.2d 1076, 1079 (Mont. 1979).

sponsible for harm pay for it, regardless of whom the plaintiff elects to sue.

Washington's statute avoids this interpretation by providing that the right of contribution exists "whether or not judgment has been recovered against all or any of [the tort-feasors]."[59] The right to contribution is not fully established until a tort-feasor pays more than that tort-feasor's proportionate share of the liability. Other jurisdictions have characterized the contribution right existing prior to payment as "inchoate," ripening into a cause of action when one tort-feasor pays more than the appropriate share.[60] These courts allow the inchoate contribution rights to be adjudicated before entry of judgment or payment so that proportional shares are fixed when the full contribution rights are established by payment.

B. *Allocation of Fault When All Tort-feasors Are Named in the Original Action*

If the plaintiff names all tort-feasors in the original action, the court may apportion fault for purposes of contribution in that action. The Tort Reform Act provides that contribution "may be enforced . . . in the original action."[61] This implies that the court in the original action may not only enforce contribution but may also apportion fault. The comments to the parallel section of the Uniform Comparative Fault Act support this implication.[62] Because the court may now allocate fault among defendants, multiparty trials will be longer and the fact-finder's task more complicated.[63]

59. WASH. REV. CODE § 4.22.040(1) (1981).

60. *E.g.*, Albert v. Deitz, 283 F. Supp. 854, 856–57 (D. Hawaii 1968) (applying Hawaii law). Other jurisdictions employ a similar approach. *E.g.*, Douglas v. Sheridan, 26 N.J. Super. 544, 98 A.2d 632, 633–34 (Law Div. 1953); Board of Educ. v. Stanhardt, 80 N.M. 543, 458 P.2d 795, 799 (1969).

61. WASH. REV. CODE § 4.22.040(1) (1981). The procedural rule provides that once allocation is made in the original action, a party paying more than that party's equitable share may move for contribution. *Id.* § 4.22.050(1). This motion could only occur after trial because contribution rights do not accrue until a party has paid more than that party's share.

62. *See, e.g.*, UNIF. COMPARATIVE FAULT ACT § 5 commissioners' comment, illustration 9, 12 U.L.A. 41 (Supp. 1982):

> A sues B and C. . . .
> A is found 40% at fault.
> *B is found 30% at fault.*
> *C is found 30% at fault.*
> A, with a joint-and-several judgment for $6,000 against B and C, collects the whole amount from B.
> On proper motion to the court, B is entitled to contribution from C in the amount of $3,000. (emphasis added).

63. For an example of the problems involved in allocating fault between tort-feasors, see Liebman v. County of Westchester, 71 Misc. 2d 997, 337 N.Y.S.2d 164, 174 (Sup. Ct. 1972) (holding

C. *When All Tort-feasors Are Not Named: Third-Party Actions*

The Tort Reform Act does not address the right of a tort-feasor to institute a third-party action against a potential contributor, although legislative history indicates this was an intended result.[64] If impleader is allowed, the court can allocate fault to the third-party defendant in the original action, thereby disposing of all the litigation in a single trial. The right to implead a potential contributor is consistent with the rest of the Act and with the court rule allowing impleader.[65]

Allowing impleader is also consistent with the "inchoate contribution rights" approach discussed above.[66] The tort-feasor seeking to implead has no right to contribution until the tort-feasor proves that the third-party defendant was partly at fault for the plaintiff's injuries and until the tort-feasor pays the third-party's share of the damages. The court rule governing third-party actions[67] allows impleader of someone who "is or may be liable" for part of the plaintiff's claim. A potential contributor "may be liable" if the original defendant can prove that the potential contributor was at fault in causing the plaintiff's injury.

The Washington Supreme Court favors liberal use of the court rule to avoid multiple suits, and has stated in dictum that impleader is appropriate to enforce contribution.[68] Most jurisdictions with similar third-party action rules allow impleader of potentially liable parties to enforce contribution.[69] This view is consistent with the purpose of contribution to make liability more dependent on fault and less dependent on whom the plaintiff elects to sue.[70]

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that, under New York's contribution statute, the jury must first apportion fault between plaintiff and original defendants as a group, then between original defendants, then between each original defendant and that defendant's third-party defendants), *rev'd on other grounds*, 41 A.D. 2d 756, 341 N.Y.S.2d 567 (1973).

The adoption of contribution will also increase the volume of litigation courts must handle. *See* Fisher v. Superior Court, 103 Cal. App. 3d 434, 440, 163 Cal. Rptr. 47, 51 (1980) (noting that since California's adoption of contribution, "the superior courts of our state have been deluged with cross-complaints for comparative (equitable) indemnity between alleged joint tortfeasors").

64. SENATE REPORT, *supra* note 7, at 50–51, *reprinted in* 1981 WASH. S. JOUR. 636.

65. *See* WASH. SUPER. CT. CIV. R. 14(a).

66. *See* notes 56–60 and accompanying text *supra*.

67. WASH. SUPER. CT. CIV. R. 14(a).

68. Deutsch v. West Coast Mach. Co., 80 Wn. 2d 707, 718, 497 P.2d 1311, 1317, *cert. denied*, 409 U.S. 1009 (1972). The court could sever the third-party action under Superior Court Civil Rule 42(b) if convenience or justice required. SENATE REPORT, *supra* note 7, at 51, *reprinted in* 1981 WASH. S. JOUR. 636.

69. *See, e.g.*, Tamashiro v. DeGama, 51 Hawaii 74, 450 P.2d 998, 1002 (1969); Douglas v. Sheridan, 26 N.J. Super. 544, 98 A.2d 632, 634 (Law Div. 1953); Board of Educ. v. Stanhardt, 80 N.M. 543, 458 P.2d 795, 799 (1969); Stein v. Whitehead, 40 A.D.2d 89, 337 N.Y.S.2d 821, 824 (1972). *Contra* Consolidated Freightways Corp. v. Osier, 605 P.2d 1076, 1079 (Mont. 1979).

70. *See* Lipson v. Gerwitz, 70 Misc. 2d 599, 334 N.Y.S. 2d 662, 664 (Nassau County Dist. Ct. 1972); *accord* SENATE REPORT, *supra* note 7, at 50–51, 1981 WASH. S. JOUR. 636.

D. Separate Actions to Enforce Contribution

Contribution may be enforced in a separate action if all tort-feasors are not parties to the original action or if a tort-feasor does not implead a potential contributor.[71] The separate action may be brought against the potential contributor even if no judgment has been rendered against the person seeking contribution.[72]

A tort-feasor must commence the separate action to enforce contribution within one year of the final judgment, payment, or settlement of the injured party's suit.[73] The apparent[74] purpose of this limitation on the right to seek contribution is to put an end to litigation arising out of an accident.[75]

Another effect of the provision is to allow a tort-feasor seeking contribution to commence a suit beyond the statute of limitations period applicable to the plaintiff's original claim. For example, if a plaintiff sued near

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71. WASH. REV. CODE § 4.22.050(2) (1981):

> If the comparative fault of the parties to the claim for contribution has not been established by the court in the original action, contribution may be enforced in a separate action, whether or not a judgment has been rendered against either the person seeking contribution or the person from whom contribution is being sought.

Accord Stein v. Whitehead, 40 A.D.2d 89, 337 N.Y.S.2d 821, 824-25 (1972); *see also* WASH. REV. CODE § 4.22.040(1) (1981) (stating that contribution "may be enforced . . . in . . . a separate action brought for that purpose"); UNIF. COMPARATIVE FAULT ACT § 5 commissioners' comment, illustration 10, 12 U.L.A. 41 (Supp. 1982) (giving example of contribution enforcement in separate action).

72. WASH. REV. CODE § 4.22.050(2) (1981). This provision covers at least two situations. In the first, the original defendant wishes to bring the contribution action contemporaneously in a separate court. The court in the separate action would apportion fault between the tort-feasors, but that fault would not ripen into a judgment against the potential contributor until the person seeking contribution paid the original plaintiff. *See* note 60 *supra* (discussing inchoate contribution rights). Combining the two actions to dispose of the whole case in one trial would be preferable.

In the second situation, the original defendant settles with the plaintiff, then wishes to force another tort-feasor to contribute to the settlement. This would be permissible because a judgment against the person seeking contribution is unnecessary under the statute.

73. WASH. REV. CODE § 4.22.050(3) (1981). This provision should avoid the problems other jurisdictions have encountered in deciding when the statute of limitations should expire in contribution actions. *See, e.g.*, Albert v. Deitz, 283 F. Supp. 854, 857 (D. Hawaii 1968) (applying Hawaii law) (holding that cause of action for contribution does not arise until payment by one tort-feasor, so six-month limitation on claims against county does not bar contribution action against county more than six months after accident); Markey v. Skog, 129 N.J. Super. 192, 322 A.2d 513, 518 (Ch. Div. 1974) (holding that running of statute of limitations on injured plaintiff's claim against defendant does not bar third-party contribution action arising out of same accident).

74. Legislative history does not discuss the purpose of this provision.

75. This policy is in accord with Washington law on statutes of limitations. *See* Summerise v. Stephens, 75 Wn. 2d 808, 811, 454 P.2d 224, 226 (1969) (stating that statutes of limitations force actions to trial while evidence still exists and witnesses remember incident); Ruth v. Dight, 75 Wn. 2d 660, 664–66, 453 P.2d 631, 634 (1969) (stating that statutes of limitations protect people from "unending harassment of judicial process"); Voelker v. Joseph, 62 Wn. 2d 429, 435, 383 P.2d 301, 305–06 (1963) (stating that statutes of limitations are legislative delineation of reasonable time limits for bringing suit).

the end of the applicable statute of limitations, two years elapsed before judgment or settlement, and the defendant then sued a potential contributor within one year after the judgment or settlement, then the contributor would be forced to defend an action arising out of an accident nearly three years after the statute of limitations had elapsed. The statute of limitations would bar a direct action by the injured party, but would not bar the contribution action by the tort-feasor.[76]

E. Retroactive Applicability

The Act provides for limited retroactive application of the contribution scheme. The contribution sections apply to all cases in which "trial on the underlying action" had not taken place before July 26, 1981.[77] The Act does not define "underlying action," which presents numerous problems. For example, the plaintiff's trial against one defendant may have begun before July 26, but another defendant may have been brought into the action later. Or a trial on liability may have occurred before July 26, but the trial on damages occurred later. Or a trial may have been concluded before July 26, but an appeal is pending so the judgment is not final and remand is possible. The result in these cases is uncertain. Senator Talmadge, a major force in the Act's passage, opined that contribution would apply in any action where judgment was not entered before July 26, 1981.[78] No right of contribution exists in favor of or against anyone who settled with the plaintiff before July 26, 1981.[79]

III. CONTRIBUTION AND SETTLEMENTS

Settlements between parties often create difficulties in applying contribution. The Tort Reform Act contains elaborate provisions on the interaction between settlements and contribution. This section analyzes those provisions and concludes that the courts should construe strictly the provisions that permit disapproval of "unreasonable" settlements. This strict construction should insure that injured plaintiffs receive full recoveries. Strict construction will also provide incentives to settle, an essential part of a functional tort litigation system.

76. Extension of the statute of limitations for contribution actions is necessary to prevent the plaintiff from interfering with the defendant's contribution rights by filing the action near the end of the statute of limitations period.

77. WASH. REV. CODE § 4.22.920(2) (1981).

78. Talmadge, *Washington's Product Liability Act*, 5 U. PUGET SOUND L. REV. 1, 21 (1981).

79. WASH. REV. CODE § 4.22.920(2) (1981).

A. Background

The effect of settlements on the rights of plaintiffs and nonsettling tort-feasors has undergone many changes in Washington. Washington courts initially embraced the common-law rule that the release of one tort-feasor released all tort-feasors liable for the same injury.[80] This rule often worked hardships on plaintiffs who entered into releases unaware of the rule. To mitigate this hardship, Washington courts recognized covenants not to sue, which discharged the tort-feasor who paid for the covenant but did not discharge any others.[81] Whether a settlement agreement was a release or a covenant not to sue depended on the effect of the agreement, the consideration, and the circumstances surrounding its execution.[82] The parties' recitals were inconclusive.[83]

The courts further ameliorated the harshness of the common-law rule by holding that a release of one tort-feasor did not release a "successive" tort-feasor, that is, one acting independently who caused a segregable harm.[84] The Washington Supreme Court later held that the release of one tort-feasor released only "joint" tort-feasors, those acting in concert with the released tort-feasor.[85] Finally, the courts decided that when independent negligent acts created any injury, tort-feasors not parties to a settlement were released only if the plaintiff so intended or if the consideration given for the settlement fully satisfied the claim.[86]

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80. *See, e.g.*, Pinkham Lumber Co. v. Woodland State Bank, 156 Wash. 117, 131, 286 P. 95, 98 (1930); Martin v. Cunningham, 93 Wash. 517, 520–21, 161 P. 355, 357 (1916) (panel), *aff'd en banc*, 97 Wash. 699, 166 P. 793 (1917); Abb v. Northern Pac. Ry., 28 Wash. 428, 438, 68 P. 954, 957 (1902). The rationale for the rule was that the injury is indivisible, so the plaintiff could not divide it by releasing one tort-feasor to the exclusion of others. *Id.* at 431, 68 P. at 955.

81. *See, e.g.*, Randall v. Gerrick, 93 Wash. 522, 528–29, 161 P. 357, 359 (1916), *modified on other grounds*, 99 Wash. 696, 169 P. 806 (1918).

82. Richardson v. Pacific Power & Light Co., 11 Wn. 2d 288, 317, 118 P.2d 985, 998 (1941); Haney v. Cheatham, 8 Wn. 2d 310, 318, 111 P.2d 1003, 1006 (1941); Rust v. Schlaitzer, 175 Wash. 331, 336, 27 P.2d 571, 573 (1933).

83. Courts, looking favorably on covenants not to sue, gave more weight to the intent of the parties than the circumstances and effect of the agreement. A common statement was that:

> The correct rule adopted by this court is that the distinction between a covenant not to sue and a release will be preserved according to the intention of the parties, unless the document is operative as a release because (1) a reasonably compensatory consideration has been paid by a codefendant (2) for the alleged tort (3) to (for the benefit of) the party plaintiff who gives the covenant not to sue.

Mills v. Inter Island Tel. Co., 68 Wn. 2d 820, 829, 416 P.2d 115, 121 (1966).

84. DeNike v. Mowery, 69 Wn. 2d 357, 369–70, 418 P.2d 1010, 1017–18 (1966).

85. White Pass Co. v. St. John, 71 Wn. 2d 156, 158, 427 P.2d 398, 399 (1967). This decision precluded application of the common-law rule in most tort suits because few tort-feasors act in concert to cause harm.

86. *See* Callan v. O'Neil, 20 Wn. App. 32, 35, 578 P.2d 890, 892 (1978); Litts v. Pierce County, 5 Wn. App. 531, 538, 488 P.2d 785, 790 (1971).

B. Settlements Under the Act

The Tort Reform Act eliminates the confusing rules governing settlements by providing a uniform settlement procedure. Any agreement that extinguishes the liability of any party, however labelled, has the same effect on the contribution rights and liabilities of the tort-feasors. Both covenants not to sue and releases are now called "settlement agreements."[87] The consequences of these agreements are discussed below.

1. The Rights of Settling Tort-feasors

A settling tort-feasor can obtain contribution only if the agreement with the plaintiff also extinguished the potential contributor's liability to the plaintiff.[88] This protects nonsettling tort-feasors from the possibility of double liability to both the settling tort-feasor and the plaintiff. Contribution is allowed "to the extent that the amount paid in settlement was reasonable at the time of the settlement."[89] If the amount is unreasonably large, the nonsettling tort-feasor may have the amount of contribution reduced to a reasonable amount. Retrospective reasonableness is not required.[90] This is a sensible provision, given the delays and uncertainties of tort litigation.

Settlements by a tort-feasor bar all liability for contribution to nonsettling tort-feasors.[91] This provision is laudable[92] because it provides an incentive to settle by insuring that settling tort-feasors will not be subject to further liability.[93]

87. WASH. REV. CODE § 4.22.060 (1981).

88. *Id.* § 4.22.040(2).

89. *Id.* This "reasonable amount" presumably would be determined by the trier of fact in the contribution action. *See* W.D. Rubright Co. v. International Harvester Co., 358 F. Supp. 1388, 1392 (W.D. Pa. 1973).

90. WASH. REV. CODE § 4.22.040(2) (1981).

91. *Id.* § 4.22.060(2). This provision is consistent with most other contribution statutes and common-law systems of contribution. *See* Pilosky v. Dougherty, 179 F. Supp. 148, 150 (E.D. Pa. 1959); American Motorcycle Ass'n. v. Superior Court, 20 Cal. 3d 578, 603, 578 P.2d 899, 915, 146 Cal. Rptr. 182, 198 (1978); Madaffari v. Wilmod Co., 96 Misc. 2d 729, 409 N.Y.S.2d 587, 589 (Sup. Ct. 1978); UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4(b), 12 U.L.A. 98 (1955).

92. Courts have recognized that settlements are a necessary part of the tort litigation system, inasmuch as the court system could not possibly try all the suits presently filed. *E.g.*, Reichenbach v. Smith, 528 F.2d 1072, 1074 (5th Cir. 1976) ("With today's burgeoning dockets and the absolute impossibility of Courts ever beginning to think that they might even be able to hear every case, the cause of justice is advanced by settlement compromises . . . ."); *see also* Lynch, *Settlement of Civil Cases: A View from the Bench*, 5 LITIGATION 8, 8 (1978) (noting importance of settlement conferences as means to reduce backlog in court calendars). Washington courts favor settlements as well. *See, e.g.*, Pepper v. Evanson, 70 Wn. 2d 309, 314, 422 P.2d 817, 820 (1967); Beaver v. Estate of Harris, 67 Wn. 2d 621, 627, 409 P.2d 143, 147 (1965).

93. The California Supreme Court has said: " 'Few things would be better calculated to . . . discourage settlements of disputed tort claims, than knowledge that such a settlement lacked finality

The Act is ambiguous on whether the settling tort-feasor's liability for contribution is extinguished if the court refuses to approve the settlement. The Act requires court approval of settlements proposed after a suit is filed.[94] This could imply that if the court rejects a settlement, or if approval is not sought, then the settling tort-feasor remains liable for contribution. This view should be rejected for two reasons. First, the Act does not limit the discharge from contribution liability to approved settlements.[95] Second, the Act indicates that all settlements, approved or not, are valid between the settling parties: "A determination that the amount paid for a release . . . or similar agreement was unreasonable shall not affect the validity of the agreement between the released-and releasing persons . . . ."[96]

2. *The Rights of Nonsettling Tort-feasors*

Nonsettling tort-feasors are discharged only if the agreement so provides.[97] Thus, the Act abolishes the common-law rule that the release of one tort-feasor releases all.

Careful drafting of settlement agreements is important to avoid inadvertent forfeiture of rights under the Act. If the plaintiff wishes to settle a claim against only one tort-feasor, the settlement should name that tort-feasor only and should not employ general release language. The Washington Supreme Court has construed general release language to prohibit all actions arising out of the transaction originally sued upon.[98] If, on the

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and would lead to further litigation with one's joint tortfeasors, and perhaps further liability.' " American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 604, 578 P.2d 899, 915–16, 146 Cal. Rptr. 182, 198–99 (1978) (quoting Stambaugh v. Superior Court, 62 Cal. App. 3d 231, 236, 132 Cal. Rptr. 843, 846 (1976)). Other courts have voiced similar thoughts. *E.g.*, Pilosky v. Dougherty, 179 F. Supp. 148, 150 (E.D. Penn. 1959); Mielcarek v. Knights, 50 A.D.2d 122, 375 N.Y.S.2d 922, 927 (1975); *see also* UNIF. COMPARATIVE FAULT ACT § 6 commissioners' comment, 12 U.L.A. 42 (Supp. 1982) (noting that a chief disadvantage of the 1939 Uniform Contribution Among Tortfeasors Act, which often did not discharge settling tort-feasors from liability for contribution, was that it discouraged settlements).

94. WASH. REV. CODE § 4.22.060(1) (1981).

95. *See id.* § 4.22.060(2).

96. *Id.* § 4.22.060(3) (1981). Discharging the settling tort-feasor from contribution liability, even if the settlement was unreasonably low, does not prejudice the nonsettling tort-feasors. The court can reduce their aggregate liability to the plaintiff so they are not penalized by the unreasonably low settlement. *See* notes 113–114 and accompanying text *infra* (discussing effect of determination that settlement was unreasonably low).

97. WASH. REV. CODE § 4.22.060(2) (1981).

98. Bakamus v. Albert, 1 Wn. 2d 241, 251, 95 P.2d 767, 770–71 (1939); Bonar v. Hopkins, 453 F.2d 1361, 1361 (3d Cir. 1970) (per curiam); Hasselrode v. Gnagey, 404 Pa. 549, 172 A.2d 764, 765 (1961). *But see* Hawaiian Ins. & Guar. Co. v. Mead, 14 Wn. App. 43, 53, 538 P.2d 865, 870–71 (1975) (holding that general release language did not bar plaintiff's suit against a nonsettling tort-feasor).

other hand, the plaintiff wishes to settle the entire claim with only one of many tort-feasors, the settlement agreement should release all the potential contributors by name so that the settling tort-feasor can seek contribution from the others.[99] While general release language should suffice to release the potential contributors, one court has held that a settlement agreement must release a potential contributor by name before contribution from her was possible.[100]

If nonsettling tort-feasors are not released, their aggregate liability is reduced by the amount paid for the settlement.[101] This provision prevents the plaintiff from obtaining excessive recoveries because the plaintiff can never recover more than the amount of damages determined by the finder of fact. Reduction of aggregate liability should also prevent the plaintiff from obtaining excessive recovery by settling for large amounts with all tort-feasors. A nonsettling tort-feasor has more bargaining power in settlement negotiations if the verdict against the nonsettler would be reduced at trial by amounts received in settlement. This increase in bargaining power should keep settlements reasonable.

A question exists whether aggregate liability should be reduced if a settling defendant is found not to be liable at trial. If reduction of recovery depends on whether the settling defendant is at fault, the trier of fact must determine whether that fault exists even though the settling defendant is no longer a party to the action and even though no recovery from him is possible. The majority of jurisdictions reduce the aggregate liability of the nonsettlers by amounts received in settlement despite the settling defendant's lack of fault.[102] A minority does not reduce liability, reasoning that because the settling defendant is not liable, that defendant is not within contribution statutes permitting reductions for settlements by "joint tort-feasors."[103] Washington should follow the majority approach.

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99. The settlement agreement must discharge the liability of potential contributors before the settling tort-feasor can seek contribution from them. WASH. REV. CODE § 4.22.040(2) (1981); *see* notes 88-90 and accompanying text *supra*.

100. United States v. Reilly, 385 F.2d 225, 229 (10th Cir. 1967).

101. This is consistent with prior Washington law. *See, e.g.*, White Pass Co. v. St. John, 71 Wn. 2d 156, 160, 427 P.2d 398, 400 (1967); Mills v. Inter Island Tel. Co., 68 Wn. 2d 820, 829, 416 P.2d 115, 121 (1966); Litts v. Pierce County, 5 Wn. App. 531, 538, 488 P.2d 785, 790 (1971); *see also* American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 604, 578 P.2d 899, 916, 146 Cal. Rptr. 182, 199 (1978); McGee v. Cessna Aircraft Co., 82 Cal. App. 3d 1005, 1022, 147 Cal. Rptr. 694, 704-05 (1978).

102. *See, e.g.*, Vesey v. United States, 626 F.2d 627, 632-33 (9th Cir. 1980) (applying California law); Werner v. Our Lady of Lourdes, 60 A.D.2d 791, 400 N.Y.S.2d 659, 660 (1977); Degen v. Bayman, 90 S.D. 400, 241 N.W.2d 703, 707 (1976); Yett v. Smoky Mountain Aviation, Inc., 555 S.W.2d 867, 869 (Tenn. App. 1977).

103. *See, e.g.*, Maryland Lumber Co. v. White, 205 Md. 180, 107 A.2d 73, 81 (1954); Eckels v. Klieger, 205 Pa. Super. 526, 210 A.2d 899, 901-02 (1965).

This approach prevents overcompensation of the plaintiff and avoids a time-consuming inquiry into the negligence of the settling defendant.[104]

The provision reducing liability is the Washington Act's only substantial departure from the Uniform Comparative Fault Act. In Washington, the aggregate liability of the nonsettling tort-feasors is reduced by the actual amount paid by the settling tort-feasors. Under the Uniform Act, the reduction is by the percentage of comparative fault of the settling tort-feasor.[105]

The Washington approach is reasonable. First, it does not affect a plaintiff's right to obtain a full recovery, which is an important policy in Washington.[106] Reducing liability by percentage fault of the settling tort-feasor under the Uniform Act would not necessarily provide full dollar recovery. For instance, suppose one of two tort-feasors settles for $10,000 but is found liable for one-half of the plaintiff's $40,000 claim. Because the nonsettling tort-feasor's liability is reduced by the percentage fault of the settler under the Uniform Act, the plaintiff can recover only $20,000 from the nonsettler. The plaintiff therefore recovers only $30,000 of a $40,000 verdict. Washington's Act avoids this result because the nonsettler's liability is reduced by only the $10,000 previously received in settlement.

Second, the Washington Act's assurance of full recovery furnishes more incentive to the plaintiff to settle than does the Uniform Act approach.[107] The possibility that the plaintiff's total recovery might be diminished under the Uniform Act would create a disincentive to settle.

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104. The majority approach avoids overcompensating the plaintiff because the verdict against the nonsettling actual tort-feasors is reduced by all amounts previously received in settlement. An inquiry into the settling defendant's negligence is unnecessary because the verdict is reduced whether or not the settler was liable.

Reducing aggregate liability is further complicated when the plaintiff is found at fault. In California, the plaintiff's negligence first reduces the total damages verdict. The amount paid by the settling defendants is then subtracted from the aggregate liability of the nonsettlers. *See* Lemos v. Eichel, 83 Cal. App. 3d 117, 118–19, 147 Cal. Rptr. 603, 607 (1978).

105. *See* UNIF. COMPARATIVE FAULT ACT § 6, 12 U.L.A. 42 (Supp. 1982). For example, assume *A*, *B*, and *C* are equally at fault for plaintiff's injuries. Plaintiff's damages are $60,000. *A* settles for $10,000. Under the Washington approach, *B* and *C* are liable for $50,000 because their aggregate liability is reduced only by amounts paid in settlement. Under the Uniform Act approach, their liability is limited to $40,000, because the verdict is reduced by the 33% comparative fault of the settling tort-feasor.

106. "The first and prevailing principle emanates from the fundamental reason for awarding damages for wrongfully inflicted personal injury: that the injured person ought to be made as nearly whole as possible through pecuniary compensation. This principle is really the basic underpinning of all tort law." DeNike v. Mowery, 69 Wn. 2d 357, 371, 418 P.2d 1010, 1019 (1966); *see also* Hawaiian Ins. & Guar. Co. v. Mead, 14 Wn. App. 43, 57, 538 P.2d 865, 873 (1975) ("[T]he law *strongly* favors the just compensation of accident victims").

107. The Act's drafters adopted this provision to encourage settlements:

This section differs from the Uniform Comparative Fault Act in that the final judgment of the

Nevertheless, the approach of the Uniform Comparative Fault Act is defensible. First, no tort-feasor is forced to pay more than her proportionate share of the damages.[108] Second, this approach eliminates the danger of collusion between the settling defendant and the plaintiff. The plaintiff will not settle for an unreasonably small amount if the plaintiff is penalized by not being able to recover the shortfall from the nonsettlers. Third, the Uniform Act's approach eliminates any objections nonsettling tort-feasors might have to the settlement. Their aggregate liability will be reduced proportionately, even if this results in an inadequate recovery for the plaintiff.

Contrasting values underlie these two approaches. Washington's approach promotes full recovery by plaintiffs and provides incentives for settlement. The Uniform Comparative Fault Act's approach champions equitable apportionment of fault among tort-feasors. Because the Washington approach gives defendants an opportunity to fashion their own equitable apportionment of fault without endangering the plaintiff's recovery, it is preferable.

The Washington approach is also consistent with retention of joint and several liability.[109] Both principles hold that although defendants have a right to apportion liability among themselves, that right is inferior to the plaintiff's right to a full recovery.

3. *Court Approval*

The Act safeguards nonsettling tort-feasors against unfair settle-

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claimant is reduced by the amount paid for a release . . . instead of the comparative fault of the released party as determined in the lawsuit. This approach was decided upon in order not to discourage parties from settling with claimants.

SENATE REPORT, *supra* note 7, at 54, *reprinted in* 1981 WASH. S. JOUR. 636; *see also* UNIF. COMPARATIVE FAULT ACT § 5 commissioners' comment, 12 U.L.A. 42 (Supp. 1982) (noting that the approach used by the Uniform Act may tend to discourage a plaintiff from entering into a settlement); Wilner & Farrell, Dole v. Dow Chemical Co.: *The Kaleidoscopic Impact of a Leading Case*, 42 BROOKLYN L. REV. 457 (1976) (noting that New York's law reducing recovery from nonsettlers by comparative fault of settling tort-feasor is a disincentive to settlements).

108. Under the Washington approach, if the plaintiff settles with one tort-feasor for less than the tort-feasor's true comparative fault, the nonsettling tort-feasors will pay more than their proportionate shares without the settlement. Many authorities argue that this is unfair and inconsistent with the principles of allocating liability in accordance with fault. *See, e.g.*, Bartels v. City of Williston, 276 N.W.2d 113, 121 (N.D. 1979); Poupore v. Seguin, 82 Misc. 2d 1, 267 N.Y.S.2d 950, 951 (Sup. Ct. 1975); UNIF. COMPARATIVE FAULT ACT § 6 commissioners' comment, 12 U.L.A. 42 (Supp. 1982); Adler, *Allocation of Responsibility After* American Motorcycle Association v. Superior Court, 6 PEPPERDINE L. REV. 1, 23–25 (1978); Comment, *Settlement in Joint Tort Cases*, 18 STAN. L. REV. 486, 492–93 (1966). It forces the nonsettling defendants to bear the burden of the settling tort-feasor's decision to buy peace. It may also create a race to settle between tort-feasors.

109. *See* notes 44–54 and accompanying text *supra*.

ments.[110] The court must hold a hearing to determine that any settlement proposed after the suit is filed is reasonable. All parties to the suit may present evidence on the reasonableness of the settlement.[111]

A hearing to determine the reasonableness of any settlement made before filing may be held on the motion of any party to the action. If the court determines that the pre-filing settlement was unreasonable, the aggregate liability of the nonsettling tort-feasors is reduced by "an amount determined by the court to be reasonable."[112] The court's determination has no effect on the settling defendant: the court cannot require additional payments.[113]

The Act provides no guidance on when the reasonableness determinations are appealable. A determination that a pre-filing settlement was unreasonable should not be appealable until final judgment is entered in the suit.[114] Orders cannot be appealed before judgment if they can be corrected on appeal after final judgment.[115] Arguably, denials of approval to post-filing settlements should be treated differently. Correcting mistaken disapprovals would be difficult because the litigation the parties sought to avoid already would have occurred. Courts should nevertheless discourage pre-judgment appeals of settlement disapprovals. Such appeals would rarely be successful because the scope of appellate review is limited,[116] and waiting for appellate review of settlement determinations would slow resolution of cases at trial.

The Act does not provide guidelines for deciding what is an unreasonable settlement. The drafters left construction of this term to the courts.[117]

110. Settlements are "unfair" when, for example, the plaintiff settles with one tort-feasor for an unreasonably small amount in order to concentrate litigation efforts on a wealthier defendant or one less likely to receive jury sympathy, such as a corporation. Allegations of unfair settlement will arise only when too little consideration is paid so that the nonsettling tort-feasors are liable for a disproportionately large amount. When a tort-feasor settles for an unreasonably high amount, no one can object. The settler buys peace, and cannot complain if later the claim turns out to be worth less than it appeared. The plaintiff is fully compensated. The aggregate liability of the nonsettling tort-feasors is reduced because of the settlement.

111. WASH. REV. CODE § 4.22.060 (1981).

112. *Id.* § 4.22.060(2). All parties can present evidence bearing on reasonableness of settlement in this hearing as well.

113. *Id.* § 4.22.060(3); *see* notes 94–96 and accompanying text *supra* (discussing interaction of this section and the one requiring court approval of settlements).

114. Most court orders are not appealable until final judgment. WASH. R. APP. P. 22.

115. Herrmann v. Cissna, 82 Wn. 2d 1, 3–4, 507 P.2d 144, 145–46 (1973).

116. *See* Holland v. Boeing Co., 90 Wn. 2d 384, 390–91, 583 P.2d 621, 624 (1978) (stating that appellate review of factual determinations is limited to whether substantial evidence supports trial court finding).

117. The Senate Select Committee commented as follows:

> The bill does not establish any standards for determining whether the amount paid for the release was reasonable or not. It is felt that the courts can rule on this issue without specific guidance from the Legislature. The reasonableness of the release will depend on various factors

Courts should hesitate to hold either pre- or post-filing settlements unreasonable. Denial of approval would be appropriate if proof of collusion between settling parties is present[118] or if the settlement amount is grossly disproportionate to the apparent value of the claim at the time of settlement. Absent these conditions, the courts should place a heavy burden on the nonsettling tort-feasors challenging a settlement.

Several policy reasons, applicable as well to other provisions, support restraint. First, the judicially declared policy of tort law in Washington is to achieve full compensation of injured plaintiffs.[119] When a pre-filing settlement is declared unreasonable, the plaintiff's judgment is reduced by the unreasonable amount and the plaintiff has no source from which to recover this loss, because the settling tort-feasors have been discharged. The less often this occurs, the nearer our system will be to the ideal of full compensation.

Second, willingness to approve settlements will encourage settlements.[120] Liberal approval of post-filing settlements should increase the number of settlements.[121] Liberal approval of pre-filing settlements will give the plaintiff an incentive to settle, because the risk of reduction of total recovery will be lessened. This will help ameliorate the increased burden on courts resulting from the reasonableness hearings.[122]

Third, ready approval of settlements is consistent with retention of joint and several liability and the provision reducing plaintiff's recovery by only the amount received in settlement.[123] Both of these rules give priority to the plaintiff's full recovery over equitable distribution of liability among defendants. Because low settlements are unfair only to nonsettling tort-feasors, liberal approval of settlements is consistent with this policy.

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including the provable liability of the released parties and the liability limits of the released party's insurance.

SENATE REPORT, *supra* note 7, at 54, *reprinted in* 1981 WASH. S. JOUR. 636.

118. The unreasonable setttlement provision was put in the Tort Reform Act to avoid such "sweetheart releases." *Id.* This concern supports the view that the provision should be used in only limited circumstances.

119. *See* notes 50 & 106 and accompanying text *supra*.

120. *See* notes 92–93 and 101–109 and accompanying text *supra*.

121. Denying approval to a post-filing settlement would likely forestall that settlement, because the tort-feasor may prefer to risk litigation rather than increase the settlement offer to an amount the court would deem reasonable.

122. Hearings on post-filing settlements are automatic, and nonsettling tort-feasors are likely to demand hearings on pre-filing settlements frequently because determinations that the settlements were unreasonable will reduce their aggregate liability.

123. *See* notes 44–51 and 101–109 and accompanying text *supra*.

IV. CONCLUSION

The 1981 Tort Reform Act greatly changes Washington tort law by creating a right of contribution among tort-feasors. The Act provides elaborate procedural enforcement mechanisms. The Act also raises several policy issues about the rights of tort-feasors and injured plaintiffs and about the necessity of efficient disposition of tort claims. The retention of joint and several liability and the Act's settlement provisions give tort-feasors broad powers to apportion liability among themselves. Tort-feasors cannot use these powers to interfere with the rights of the injured plaintiff to a full recovery.

The procedural provisions of the Tort Reform Act require extensive court involvement, which raises the spectre of increasingly clogged courts. In order to minimize the burden, encourage settlements, and insure plaintiffs full recoveries, courts should approve settlements liberally. Deference to the agreements of settling parties will give the Tort Reform Act its intended interpretation and will comport with longstanding policies of Washington tort law.

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