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Workers' Compensation—Third-Party Tort Liability to Injured Workers Under R.C.W. Title 51—Seattle-First National Bank v. Shoreline Concrete Co., 91 Wn. 2d 230, 588 P.2d 1308 (1978)

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Workers' Compensation—Third-Party Tort Liability to Injured Workers Under R.C.W. Title 51—*Seattle-First National Bank v. Shoreline Concrete Co.*, 91 Wn. 2d 230, 588 P.2d 1308 (1978).

Washington's Industrial Insurance Act¹ immunizes employers from tort actions brought by their injured employees.² Dissatisfied with the modest compensation assured by the Act, employees often seek other parties to sue.³ Manufacturers who supply job-related equipment to employers are popular defendants because they are unprotected by the Act.⁴ In *Seattle-First National Bank v. Shoreline Concrete Co.*⁵ the Washington Supreme Court rendered the manufacturer's role as the employer's cotortfeasor⁶ particularly onerous. With only a cursory examination of policy, the court interpreted the Act as immunizing employers from suits by manufacturers for contribution, indemnity, or apportionment.⁷ In re-

1. WASH. REV. CODE tit. 51 (1976).

2. The statute provides in part:

[A]ll phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of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.

WASH. REV. CODE § 51.04.010 (Supp. 1978).

The Washington Supreme Court has consistently construed this statute as giving employers immunity from their employees' tort actions. *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn. 2d 323, 340, 582 P.2d 500, 509–10 (1978); *Lehtinen v. Weyerhaeuser Co.*, 63 Wn. 2d 456, 457, 387 P.2d 760, 761 (1963); *Latimer v. Western Mach. Exch.*, 42 Wn. 2d 756, 758, 259 P.2d 623, 624 (1953). However, employee actions against employers for intentionally inflicting injury remain judicially cognizable. WASH. REV. CODE § 51.24.010 (Supp. 1978).

3. O'Connell, *Bargaining for Waivers of Third-Party Tort Claims: An Answer to Product Liability Woes for Employers and Their Employees and Suppliers*, 1976 U. ILL. L. F. 435, 440.

4. *Id.*

5. 91 Wn. 2d 230, 588 P.2d 1308 (1978).

6. The *Seattle-First* court classified multiple tortfeasors into three groups: joint tortfeasors, concurrent tortfeasors, and successive tortfeasors. *Id.* at 235, 588 P.2d at 1312. Joint tortfeasors breach a joint duty or act in common, while concurrent tortfeasors breach separate duties or act independently. *Id.* The court characterized the harm caused by these two types of tortfeasors as indivisible, distinguishing it from the "clearly divisible" harm caused by successive tortfeasors. *Id.* "The concept of 'successive' tort-feasors applies when none of the multiple tort-feasors could have caused the whole harm suffered . . ." *Id.* at n.3.

7. By an action for contribution or indemnity the defendant seeks to shift the burden of liability to a joint tortfeasor. Contribution shifts only a portion of the loss, while indemnity shifts the entire liability. 49 WASH. L. REV. 705, 726 (1974). The right to indemnity arises in Washington as a result of a contractual arrangement between the parties, or as a result of the nature of the parties' acts in causing the injury. "[I]ndemnity is permitted where the indemnitor is found to have been actively and primarily negligent, while the indemnitee was passively and secondarily negligent." Comment, *Relative Contribution Among Tortfeasors: Time for Judicial Change of the Washington Rule?* 11 GONZ. L. REV. 179, 180 (1975).

jecting the trial court's innovative attempt to reconcile competing interests,⁸ the court also reaffirmed Washington's rule of joint and several liability for multiple tortfeasors.⁹ The court thus deprived manufacturers of all avenues of relief against employer-cotortfeasors and left them liable for the employer's share of the losses as well as their own.

This note examines the historical rationale and questionable contemporary utility of absolute employer immunity and joint and several liability. It concludes that the problem of distributing losses fairly among injured workers, their employers, and manufacturers of job-related equipment should be solved by imposing liability according to fault, with the employer's share of the damages deemed satisfied by his premium payments into the industrial insurance fund.

I. THE CASE

Construction worker George Stanford died when the boom of the truck he was unloading came in contact with a power line. Seattle-First National Bank, representing Stanford's estate, sued the truck's owner-operator, Shoreline Concrete Company, and the manufacturer of the boom, Dico Corporation.¹⁰ In turn, Shoreline and Dico impleaded the decedent's employer, Batterman Engineering and Construction Company, on theories of contribution, indemnity, and apportionment.¹¹ The decedent's employer argued that Washington's Industrial Insurance Act barred such actions and moved unsuccessfully for summary judgment.¹²

The trial court's order denying summary judgment retained the de-

Apportionment is a prejudgment method of loss sharing which entails determining the damages suffered by each party to an action, allocating respective degrees of responsibility according to fault, and requiring each party to bear his proportionate share of the loss. "There is a rule that if one tortfeasor seeks to limit his liability on the ground that the harm is capable of apportionment between him and the other tort-feasors, the burden of proving the apportionment is upon him." *Ski Acres Dev. Co. v. Gorman, Inc.*, 8 Wn. App. 775, 780, 508 P.2d 1381, 1385 (1973).

8. See note 63 and accompanying text *infra*.

9. When joint and several liability attaches, a plaintiff may sue any one of multiple tortfeasors and recover the entire damages, even though the defendant's participation in causing the accident was slight compared to that of the tortfeasors not joined. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 47, at 296 (4th ed. 1971). See note 15 *infra* (description of when such liability attaches in Washington).

10. *Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn. 2d 230, 232, 588 P.2d 1308, 1311 (1978). Seattle-First's complaint also prayed for judgment against "any other defendant that might later be joined by way of third-party complaint . . . who might be responsible for decedent's death." *Id.* at 233, 588 P.2d at 1311. The complaint thus encompassed the manufacturer of the boom's toggle switch (Cutler-Hammer, Inc.), whom Dico added as a third-party defendant. Unable to determine whether Cutler had been served with process, the court assumed it was a proper party since the issues raised by Cutler's answer were identical to the ones raised by Dico. *Id.* at n.2.

11. *Id.* at 233, 588 P.2d at 1311. See note 7 *supra*.

12. *Id.*

Third-Party Tort Liability

cedent's employer as a party to the action and instructed the jury to apportion the fault of all the parties.¹³ The order limited each party's liability to its apportioned fault,¹⁴ thus abandoning the rule of joint and several liability.¹⁵ The trial court effectuated the employer's immunity under the Act, however, by stipulating that any judgment against the decedent's employer would be satisfied by proof of industrial insurance payments. Seattle-First argued that the trial court's order reduced the amount the estate could recover under conventional tort principles¹⁶ and petitioned successfully for direct review.

13. *Id.*

14. *Id.* The Uniform Comparative Fault Act takes an approach similar in some respects to that of the trial court. Judgments under the Act apportion the fault of all the parties and state each party's equitable share of the loss based on that apportionment. UNIFORM COMPARATIVE FAULT ACT §§ 2(a)(2), 2(c). While the Act retains joint and several liability, it does so with the express provision that contribution will be available to a party paying more than its equitable share without the necessity of a separate action or a motion for a court order. UNIFORM COMPARATIVE FAULT ACT § 2, Comment. Thus, the trial court order and the Uniform Act both provide for apportionment of the fault and corresponding liability of all parties.

However, the Uniform Act, unlike the trial court's approach, reallocates any amount uncollectible from one party among the remaining parties in relation to their respective percentages of fault. UNIFORM COMPARATIVE FAULT ACT § 2(d). The trial court's approach of allocating the uncollectible employer's share of the loss to the employee appears more fair given the terms of the Industrial Insurance Act, which confer benefits on employers and employees but fail to benefit third parties. See text accompanying notes 30–37 *infra*.

A solution similar to that of the Seattle-First trial court was recently proposed. Comment, *The Effect of Worker's Compensation Laws on the Right of a Third Party Liable to an Injured Employee to Recover Contribution or Indemnity from the Employer*, 9 SETON HALL L. REV. 238 (1978). The comment recommends apportioning liability according to fault, limiting the third-party's payments to his proportioned share of the damages, and confining the employer's payments to the limits of his workers' compensation liability. Under this scheme, the amount of the injured employee's recovery, which depends upon the apportionment of fault, may be less than common law damages. Recognizing this, the comment explains:

It should be recognized that when the third party's proportion of the causal negligence is slight and the employer's is relatively great, it is only fair that the employee recover less than the full common law damages; it is merely part of the trade-off for guaranteed minimum compensation. Only to the extent, and in the proportion, that the causal negligence lay outside the workers' compensation system should the employee be entitled to common law damages.

Id. at 301 n.424.

15. The Washington Supreme Court first applied the doctrine of joint and several liability in *Doremus v. Root*, 23 Wash. 710, 63 P. 572 (1901). *Doremus* stated the usual rule:

[W]here one has received an actionable injury at the hands of two or more persons acting in concert, or acting independently of each other, if their acts unite in causing a single injury, all of the wrongdoers, however numerous, are severally liable to him for the full amount of damages occasioned by such injury, and he may enforce the liability in an action against them all jointly, or any one of them severally, or against any number of them less than the whole.

Id. at 713–14, 63 P. at 573. Subsequent cases strictly adhere to this rule. *E.g.*, *Young v. Dille*, 127 Wash. 398, 220 P. 782 (1923); *Thoresen v. St. Paul & Tacoma Lumber Co.*, 73 Wash. 99, 131 P. 645 (1913); *Rauscher v. Halstead*, 16 Wn. App. 599, 577 P.2d 1324 (1976).

16. Under conventional tort principles, the estate could recover all of the decedent's losses except those attributable to his negligence. In effect the trial court order required an additional exception. The estate could not recover an amount proportional to the employer's share of the fault from

The Washington Supreme Court held that the trial court erred in purporting to abolish joint and several liability.¹⁷ Citing the policy of assuring full compensation to tort victims,¹⁸ the court reversed the order limiting each tortfeasor's liability to its apportioned fault.¹⁹ The court also held that under the Industrial Insurance Act courts have no jurisdiction over tort actions necessarily involving employers' conduct in relation to their employees,²⁰ and that the trial court should therefore have granted the decedent's employer's motion for summary judgment. To justify absolute employer immunity from cotortfeasor suits, the supreme court referred to, but failed to identify, "strong public policy."²¹

II. BACKGROUND

Shortly before the *Seattle-First* decision, the Washington Supreme

any of the other defendants and was barred from collecting it directly from the employer by the Washington Industrial Insurance Act.

17. 91 Wn. 2d at 239, 588 P.2d at 1314 (6-3 decision). Three matters discussed in the *Seattle-First* opinion are outside the scope of this note. First, the court held that the due process and equal protection clauses of the state and federal constitutions are not violated by employers' immunity under the Act. *Id.* at 244, 588 P.2d at 1317. *See*, Comment, *supra* note 14, at 291-97 (discussion of *Seattle-First's* constitutional questions). Second, Shoreline asserted an indemnity claim based on an independent duty of due care owed to it by the decedent's employer. The court declined to consider this claim because Shoreline failed to argue the source of the independent duty either at trial or on appeal. *Id.* at 243, 588 P.2d at 1317. Third, although *Seattle-First* and Shoreline raised the question whether a plaintiff's conduct should be a damage-reducing factor in strict liability actions, the court dispensed with this issue on procedural grounds without reaching the merits. *Id.* at 240, 588 P.2d at 1315. *See* *Albrecht v. Groat*, 91 Wn. 2d 257, 588 P.2d 229 (1978) (discussion of plaintiff's conduct as damage-reducing factor in strict liability cases).

18. 91 Wn. 2d at 236, 588 P.2d at 1312.

19. *Id.* at 239, 588 P.2d at 1314.

20. *Id.* at 242, 588 P.2d at 1316 (citing WASH. REV. CODE §§ 51.04.010, .32.010 (Supp. 1978)). *See* note 2 *supra* (pertinent portions of WASH. REV. CODE § 51.04.010). WASH. REV. CODE § 51.32.010 (Supp. 1978) provides in part:

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

The majority implied that this holding was merely an application of *stare decisis*. 91 Wn. 2d at 241-42, 588 P.2d at 1316 (1978). However, Justice Hicks, in partial dissent, noted that the dicta relied on appeared in fundamentally distinguishable cases:

The majority states: "[w]e have consistently held that when an employer, such as Batterman, pays its industrial insurance premiums pursuant to the Act the employer may no longer be looked to for recourse." To support this statement the majority cites several cases from this court. . . . The cases from this court hold only that the *employee* (family or dependents), may not look to the *employer* for recourse. These cases do not address the issue of third party claims against the employer.

Id. at 246, 588 P.2d at 1318 (emphasis in original).

21. *Id.* at 244, 588 P.2d at 1317.

Third-Party Tort Liability

Court decided *Davis v. Niagara Machine Co.*,²² a factually similar case.²³ Although the *Davis* court expressly refused to decide whether the Industrial Insurance Act barred all third-party indemnity actions against employers,²⁴ it questioned the fairness of the rule denying third-party relief and encouraged legislative review of that rule.²⁵ Only months later the majority in *Seattle-First* indicated that “strong public policy and historical reasons justify the legislative restriction of such third-party actions against employers.”²⁶ The *Seattle-First* court, however, failed to examine the conflicting policies involved.

The *Davis* court recognized the need for reconsideration of the policies underlying the conflict between employers, who claim absolute immunity from tort suits, and manufacturers, who criticize the effects of that immunity.²⁷ In recent years major developments have metamorphosed tort law generally.²⁸ As a result, some of the historical justifications for absolute employer immunity and for unwavering adherence to the rule of joint and several liability have been eroded.²⁹

III. ANALYSIS

A. *Workers’ Compensation Acts as a Basis for Denying Third-Party Relief*

Workers’ compensation is a legislatively mandated exchange between

22. 90 Wn. 2d 342, 581 P.2d 1344 (1978).

23. In *Davis*, an injured employee who applied for and received workers’ compensation sued the manufacturer of the machine involved in his accident. The manufacturer filed an indemnity claim against the employer, alleging that the employer’s failure to install a guard caused the injury. The trial court granted the employer’s motion for summary judgment and the Washington Supreme Court affirmed. *Id.* at 343, 581 P.2d at 1345.

24. The court dismissed the manufacturer’s claim for failure to establish a recognized ground for indemnity. *Id.* at 348, 581 P.2d at 1348.

25. [I]f the substantial measure of fault lies with the employer, should the third party be compelled to shoulder the entire burden of damages because of RCW Title 51, or should some more equitable result be reached? This question raises policy issues that could be beneficially considered by the legislature in light of the goals of the entire industrial insurance scheme. *Id.* at 349, 581 P.2d at 1348.

26. 91 Wn. 2d at 244, 588 P.2d at 1317. Factual differences in the cases may explain the majority’s shift from a posture questioning the denial of relief for manufacturers to one endorsing it. Facts surrounding Stanford’s death are sketchy. Information from the appellate briefs casts little light on the role each party played in causing the accident. In *Davis*, however, a detailed record reveals a relatively blameless manufacturer pitted against an employer in blatant violation of safety regulations and blind to both the manufacturer’s warnings and its own history of serious accidents. 90 Wn. 2d 342, 344, 581 P.2d 1344, 1346 (1978).

27. See note 25 *supra*.

28. See notes 39–40 and accompanying text *infra*.

29. See notes 41–45 and 48–50 and accompanying text *infra*.

workers and their employers.³⁰ In return for limited, assured relief, injured workers surrender their right to tort recoveries from their employers.³¹ In addition to this tort immunity, employers sometimes receive subrogation rights.³²

30. Early in the twentieth century, the number of industrial accidents increased rapidly. See H. M. SOMERS & A. R. SOMERS, *WORKMEN'S COMPENSATION* 7-9 (1954). Injured workers faced many hurdles to tort recovery. Their employers' obligations towards them were few in number and limited in scope. W. PROSSER, *supra* note 9, § 80 at 525. In addition, employers had three potent defenses available to them: contributory negligence, assumption of risk, and the fellow servant rule. *Id.* at 526. As a result, injured workers often went uncompensated for their losses. From 70 to 94 percent of injured workers received no compensation for their losses. *Id.* at 530 n.32.

Recognizing that industrial injuries are an inevitable adjunct to progress, state legislatures eventually passed workers' compensation acts. The lack of federal action in this area has been attributed to "early apparent constitutional restraints." Ream, *Workmen's Compensation—U.S.A.*, *PROCEEDINGS OF THE INTERNATIONAL SEMINAR ON REHABILITATION PROGRAMS IN WORKMEN'S COMPENSATION AND RELATED FIELDS* 23, 23 (1969). A restrictive interpretation of the commerce clause defeated early attempts to achieve national uniformity in workers' compensation laws, but the movement to accomplish this goal continues in recent times. See generally Benson, *Impact of Proposed National Workers' Compensation Acts on Ohio Workmen's Compensation Law*, 4 OHIO N. U.L. REV. 249, 270-78 (1977). National workers' compensation acts were introduced during the 93d, 94th, and 95th congressional sessions, but none of these acts met with success. H.R. 8771, 93d. Cong., 1st Sess. (1973); S. 2008, 93d Cong., 1st Sess. (1973); S. 2018, 94th Cong., 1st Sess. (1975); H.R. 9431, 94th Cong., 1st Sess. (1975); S. 3060, 95th Cong., 2d Sess. (1978).

31. Workers' compensation "is in the nature of a compromise, by which the workman is to accept a limited compensation, usually less than the estimate which a jury might place upon his damages, in return for an extended liability of the employer, and an assurance that he will be paid." W. PROSSER, *supra* note 9, § 80 at 531. Regardless of fault, the employer is liable for on-the-job injuries, even if they are unavoidable or caused by the worker's own negligence. "The three wicked sisters of the common law—contributory negligence, assumption of risk and the fellow servant rule—are abolished as defenses." *Id.*

In Washington an injured worker receives relief "regardless of questions of fault." WASH. REV. CODE § 51.04.010 (Supp. 1978). The Washington Department of Labor and Industries classifies employers in relation to the hazards involved in their industries and assesses rates of payment into the accident and medical aid fund accordingly. *Id.* § 51.16.035. Employers secure the payment of compensation either by maintaining insurance or by qualifying as self-insurers. *Id.* § 51.14.010. The amount of the payments injured workers receive is statutorily determined. *Id.* ch. 51.32.

32. In Washington an injured worker may elect to seek damages from a third person "not in the same employ" without forfeiting his right to compensation under the Act. *Id.* §§ 51.24.030, .040. The worker's election not to do so "operates as an assignment of the cause of action to the department or self-insurer, which may prosecute or compromise the action in its discretion in the name of the injured worker, beneficiary or legal representative." *Id.* §51.24.050.

Distribution of awards or settlements obtained in such suits are governed by statute:

(1) In an action by the injured worker or beneficiary against the third person, any award or settlement shall be distributed as follows:

- (a) The costs and reasonable attorneys' fees shall be paid;
- (b) The injured worker or beneficiary shall be paid twenty-five percent of the balance of the award: *Provided*, that in the event of a compromise and settlement by the parties, the injured worker or beneficiary may agree to a sum less than twenty-five percent;
- (c) The department or self-insurer shall be paid the balance of the award, but only to the extent necessary to reimburse the department or self-insurer for compensation or benefits paid;
- (d) Any remaining balance shall be paid to the injured worker or beneficiary;
- (e) Thereafter no payment shall be made to or on behalf of a worker or beneficiary by the

Third-Party Tort Liability

From its inception, Washington's Industrial Insurance Act has permitted injured workers to sue parties other than their employers or fellow workers.³³ Through legislative amendment and judicial interpretation, the number of parties subject to such suits increased.³⁴ Although the Act currently permits workers to seek recovery from non-coworkers whose negligence or wrong contributes to the injury,³⁵ it does not expressly address the matter of third-party actions against employers. Thus, unlike workers and employers,³⁶ third parties gained nothing from the terms of the Act, and through judicial interpretation they lost whatever ability they previously had to share losses with negligent employers.³⁷ This apparent inequity is grounded upon the theory that third-party actions against employers constitute indirect suits by injured employees and thus upset the balance struck by the legislature.³⁸

department or self-insurer for such injury until the amount of any further compensation or benefits shall equal any such remaining balance. Thereafter, such benefits shall be paid by the department or self-insurer to or on behalf of the worker or beneficiary as though no third party person claim had been made.

(2) The award or settlement shall be subject to a lien by the department or self-insurer for its share under this section.

Id. § 51.24.060. This statute diverts part of the injured employee's recovery from the third party to the state or self-insured fund. Thus, manufacturers indirectly subsidize these funds, enabling employers to pay lower premiums. As a result, employers may completely escape the economic consequences of accidents for which they may be largely responsible.

33. The original Act permitted the worker to sue non-coworkers whose negligence or wrong doing contributed to the injury only if it occurred away from the employer's plant. Act of Mar. 7, 1911, ch. 74, 1911 Wash. Laws 345 (1911).

34. In 1927 the Act was amended to delete the language requiring that the injury occur away from the employer's plant. Ch. 310, 1927 Wash. Laws § 2 at 816; *see* note 33 *supra*. However, in 1929 a provision was added prohibiting workers from suing any employer or worker under the Act who, at the time of the accident, was engaged in extrahazardous employment. Ch. 132, 1929 Wash. Laws § 1 at 326. This approach has been characterized as "the most sweeping attempt to extend the workers' compensation immunity to third parties." O'Connell, *supra* note 3, at 454. However, the judiciary narrowly construed this provision. 2A A. LARSON, THE LAW OF WORKMAN'S COMPENSATION § 72.40, at 14-92 n.47 (1976) (citing as examples, *Pennsylvania Salt Mfg. Co. v. Haynes*, 184 F.2d 355 (9th Cir. 1950), which relied on *Gephart v. Stout*, 11 Wn. 2d 184, 118 P.2d 801 (1941); *Lunday v. Dept. of Labor & Indus.*, 200 Wash. 620, 94 P.2d 744 (1939); and *Pryor v. Safeway Stores, Inc.*, 196 Wash. 382, 83 P.2d 241 (1938)). Eventually the legislature abandoned this approach. Ch. 70, 1957 Wash. Laws § 23, at 279. *See* 2A A. LARSON, *supra*, at 14-92 to 93.

35. WASH. REV. CODE § 51.24.030 (Supp. 1978) provides: "If the injury to a worker is due to the negligence or wrong of a third person not in the same employ, the injured worker or beneficiary may elect to seek damages from the third person."

36. One scholar praised workers' compensation acts for the benefits accorded to workers and employers. He observed that the acts provide injured workers with immediate relief, eliminate expensive and burdensome litigation, reduce friction between the worker and his boss, and result in more harmonious industrial relations than were possible previously. 1 W. SCHNEIDER, WORKMEN'S COMPENSATION § 1, at 6 (2d ed. 1932).

37. The position of third parties has been characterized as one of "all sacrifice and no corresponding gain." LARSON, *supra* note 34, § 76.52 at 14-407.

38. Professor Larson challenges this theory by pointing out that two benefits derive from permitting third parties, such as manufacturers, to recover against employers. First, employees' common

Washington's judicial adoption of strict liability³⁹ and legislative enactment of comparative negligence⁴⁰ have so exacerbated the unfairness of the manufacturer's position that sustaining the legislative balance at his expense has become difficult to justify. The advent of strict liability increased the manufacturer's exposure to workers' claims, "thereby accentuating the harshness of a denial of any relief."⁴¹ Similarly, the abolition of contributory negligence, which accompanied enactment of Washington's comparative negligence statute,⁴² "ensure[d] that the third party w[ould] be held liable with far greater frequency."⁴³

These changes in Washington tort law strengthen third-party arguments for relief. Relieving manufacturers of the employers' share of the losses is compatible with the policy underlying comparative negligence—apportioning liability according to fault.⁴⁴ Also, the rule of strict liability weakens distinctions between employers, who are absolutely liable under the Industrial Insurance Act, and manufacturers, whose liability formerly was based solely on fault.⁴⁵

B. *Joint and Several Liability as a Basis for Denying Third-Party Relief*

The Washington Supreme Court adopted the rule of joint and several liability without analyzing it.⁴⁶ The court's early opinions offer little as-

law rights against negligent outsiders are preserved. Second, the rights of outsiders and negligent employers are adjusted in an arguably fair manner. According to Professor Larson, the first benefit is relevant to the purposes of workers' compensation acts, while the second is independent of them. *Id.* at 14-406.

39. *Albrecht v. Groat*, 91 Wn. 2d 257, 588 P.2d 229 (1978); *Teagle v. Fischer & Porter Co.*, 89 Wn. 2d 149, 570 P.2d 438 (1977).

40. The statute provides:

Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages caused by negligence resulting in death or in injury to person or property, but any damages allowed shall be diminished in proportion to the percentage of negligence attributable to the party recovering.

WASH. REV. CODE § 4.22.010 (1976).

41. Comment, *New Policies Bearing on the Negligent Employer's Immunity from Loss-Sharing*, 29 ME. L. REV. 243, 250 (1978).

42. See note 40 *supra*.

43. Comment, *supra* note 41.

44. *Id.*

45. *Id.*

46. The Washington Supreme Court first adopted joint and several liability in *Doremus v. Root*, 23 Wash. 710, 63 P. 532 (1901). See note 15 *supra*. It attempted no analysis of the rule and offered no policy reasons in support of it.

Joint and several liability originated in *Merryweather v. Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799). W. PROSSER, *supra* note 9, § 50 at 305. The doctrine developed in *Merryweather* enabled a tort victim to select his defendants, while precluding contribution suits against those tort-

Third-Party Tort Liability

sistance in determining the rationale for the rule.⁴⁷ The *Seattle-First* court justified imposition of entire liability on an involuntary and independent actor on the basis of the indivisible nature of the injury and the policy of assuring full compensation to tort victims.⁴⁸ In the industrial injury setting, these justifications lack merit.

Washington's adoption of the rule of comparative negligence has undermined the notion that the harm caused by joint tortfeasors is indivisible. Other jurisdictions have recognized that a jury which is capable of apportioning fault between plaintiff and defendant should also be able to allocate fault among several defendants.⁴⁹ This recognition led one state supreme court to characterize joint and several liability as "obviously inconsistent with the equitable principles of comparative negligence."⁵⁰

The *Seattle-First* court rejected the contention that comparative negligence, as applied in Washington, is inconsistent with joint and several liability.⁵¹ The court supported its position by explaining that generally the culpability of plaintiffs differs from that of defendants,⁵² and that the indivisibility of injuries is unaffected by the feasibility of apportioning fault.⁵³ To support the double standard it applied to plaintiffs and defen-

feasors whom he opted not to sue. American jurisdictions initially applied the rule against contribution only to cases involving intentional wrongdoers. *Id.*

47. See, e.g., *Fleming v. Red Top Cab Co.*, 133 Wash. 338, 233 P. 639 (1925); *Knudson v. Bockwinkle*, 120 Wash. 527, 208 P. 59 (1922); *Thoresen v. St. Paul & Tacoma Lumber Co.*, 73 Wash. 99, 131 P. 645 (1913).

48. 91 Wn. 2d at 236, 588 P.2d at 1312.

49. See, e.g., *Cox v. Cooper*, 510 S.W.2d 530, 535-36 (Ky. 1974); *Laubach v. Morgan*, 588 P.2d 1071, 1075 (Okla. 1978).

50. *Laubach v. Morgan*, 588 P.2d 1071, 1075 (Okla. 1978). The *Laubach* court further commented that the "principle of entire liability" involved in joint and several liability was "of questionable soundness under a comparative system where a jury determines the precise amount of fault attributable to each party." *Id.* at 1074. The Oklahoma Supreme Court therefore abolished joint and several liability in order to "augment Oklahoma's statutory scheme to meet the intent and underlying principle of comparative negligence." *Id.* at 1075.

51. 91 Wn. 2d at 238, 588 P.2d at 1314. The court insisted that "from the perspective of the recovery rights of the injured party, comparative negligence and the suggested abolition of joint and several liability are completely inconsistent." *Id.* at 236-37, 588 P.2d at 1313. By limiting its perspective to only one of several competing interests, the court precluded broad-based analysis. The *Seattle-First* court identified four states that legislatively modified the rule of joint and several liability at the time they enacted comparative negligence statutes. Apparently these states failed either to accept or to discern the inconsistency the court detected. See *id.* at 237, 588 P.2d at 1313 (citing statutes of Kansas, Vermont, New Hampshire, and Nevada).

52. "A plaintiff's negligence relates to a failure to use due care for his own protection whereas a defendant's negligence relates to a failure to use due care for the safety of others." Therefore, the defendant's conduct is tortious but the plaintiff's is not. *Id.* at 238, 588 P.2d at 1314 (emphasis in original).

53. "The simple feasibility of apportioning fault on a comparative negligence basis, between plaintiff and defendant, does not render an indivisible injury 'divisible' for purposes of joint and several liability." *Id.* at 237, 588 P.2d at 1313 (emphasis in original)."

dants, the court cited Prosser's discussion of contributory negligence.⁵⁴ In that discussion, however, Prosser questioned the desirability of outright recognition of this double standard, the utility of which he attributed to softening the harshness of the contributory negligence defense.⁵⁵ Recognition of this double standard is of dubious wisdom where the contributory negligence defense has been abolished, especially in light of the growing number of situations in which a plaintiff's negligence threatens others as well as himself.⁵⁶

The comparative negligence system in Washington currently permits an injured worker who was 40% at fault to recover 60% of his damages from a manufacturer who was only 10% at fault, even though the employer was 50% at fault.⁵⁷ The *Seattle-First* court's failure to remedy this inequitable situation is not justified by its fear of faultless plaintiffs being denied the recovery otherwise assured under the doctrine of joint and several liability. Under the trial court's approach in *Seattle-First*, the employee retains both his statutory compensation and his right of action against the manufacturer.⁵⁸ Deleting from his recovery the damages attributable to the employer's fault deprives the employee merely of something he already statutorily surrendered.⁵⁹

The Washington Supreme Court has the power to modify the judicially-devised doctrine of joint and several liability.⁶⁰ Tort law

54. *Id.* at 238, 588 P.2d at 1314 (citing to W. PROSSER, *supra* note 9, § 65).

55. W. PROSSER, *supra* note 9, § 65 at 420.

56. Such situations naturally become more common as industrialization and increased automobile use continue.

57. The Washington Supreme Court has recognized the inequity of burdening relatively blameless manufacturers with liability exceeding their proportionate share of the blame. *See* notes 25-26 and accompanying text *supra*.

58. To protect plaintiffs not covered by Washington's Industrial Insurance Act, the Washington Supreme Court could limit abolition of the joint and several liability doctrine to cases involving covered workers who sue third parties.

59. *See* Comment, *supra* note 14, at 301. An alternative solution that would allay fears of injured workers bereft of recoveries is retaining joint and several liability while permitting third parties to seek contribution from employers. This solution requires reversal of the long-standing Washington rule against contribution. *See* *Wenatchee Wenoka v. Krack Corp.*, 89 Wn. 2d 847, 576 P.2d 388 (1978); Comment, *supra* note 7, at 179-82. It would also require reinterpretation of R.C.W. § 51.04.010. Permitting contribution differs significantly from the approach of the *Seattle-First* trial court. For example, in a case involving an employer 50% at fault, a worker 40% at fault, and a manufacturer 10% at fault, if joint and several liability is retained and contribution permitted, the worker recovers 60% of his losses and the employer pays 50% of the damages. Under the *Seattle-First* trial court's approach, the worker would recover 10% and the employer would pay nothing. The latter result is more compatible with the policy of workers' compensation statutes.

60. "In seeking to change a court-made rule, the Washington court can look to a line of decisions which have considered the common law to be very flexible." Comment, *supra* note 7, at 197. Flexibility in the common law is fostered also by R.C.W. § 4.04.010, which provides in part that the common law prevails "so far as it is not . . . incompatible with the institutions and conditions of society in this state"

Third-Party Tort Liability

traditionally has depended on the judiciary for its adaptation to economic and technological changes in society. This has been especially true in Washington, where the courts typically have been attuned to progressive developments in the law of torts.⁶¹ The Washington Supreme Court is the only forum practically available to third parties whose liability to injured workers far exceeds their proportionate share of the blame.⁶²

IV. CONCLUSION

Joint and several liability coupled with employer immunity from co-tortfeasor suits works special hardships on manufacturers. In balancing the interests of all the parties involved, the *Seattle-First* trial court sought to reconcile the policy of apportioning losses according to fault with the Industrial Insurance Act's rule of employer immunity. It devised a solution which preserves employer immunity, permits workers to receive compensation beyond that provided by the Act, and requires manufactur-

61. See, e.g., *Seattle-First Nat'l Bank v. Tabert*, 86 Wn. 2d 145, 542 P.2d 774 (1975) (extending strict liability to retailers); *Godfrey v. State*, 84 Wn. 2d 959, 530 P.2d 630 (1975) (applying the comparative negligence statute retroactively); *Ulmer v. Ford Motor Co.*, 75 Wn. 2d 522, 452 P.2d 729 (1969) (formally recognizing strict liability for manufacturers).

62. The *Seattle-First* court maintained that change, if it is to occur, should come from the legislature. 91 Wn. 2d at 236-37, 588 P.2d at 1313. Some commentators favor a legislative approach. E.g., 2A LARSON, *supra* note 34, § 76.53 at 14-407. Others, criticizing the undue delay and the compromises inherent in legislative action, do not. See, e.g., O'Connell, *supra* note 3, at 445 n.45. Thus far, the Washington Legislature's attempts to respond to this problem have proved unavailing. Although a number of bills dealing either directly or indirectly with the third-party problem have been introduced, none have passed. See, e.g., S. 2774, 46th Wash. Leg., Reg. Sess. (1977) (engrossed bill); H.R. 11622 45th Wash. Leg., 1st Ex. Sess. (1977) (substitute bill); H.R. 843, 46th Wash. Leg., Reg. Sess. (1979); S. 2333, 46th Wash. Leg., Reg. Sess. (1979) (second substitute bill).

A bill that recently passed the Washington Senate would have dramatically altered the allocation of losses among injured workers, employers, and manufacturers. S. 2333, 46th Wash. Leg., Reg. Sess. (1979) (engrossed bill). The bill died in the Senate Rules Committee. With a few exceptions the bill limited each party's liability to their apportioned fault. *Id.* at § 2(3). It imposed liability on one party for payment of another's equitable share of the damages only when the parties acted in concert, when a relationship justifying vicarious liability existed, when such liability was imposed by statute, or when insolvency rendered an award uncollectible. *Id.* at § 2(4)-(5).

The bill provided manufacturers sued by injured workers with two possible avenues of relief. First, it permitted joinder of "[a]ny person whose fault was a cause of the claimant's damage . . . for the purpose of assessing that person's percentage of fault." *Id.* at § 2(b). Persons immune from liability—if joined—were expressly included in the process of apportioning damages and fault. *Id.* Second, the bill gave liable parties a right to contribution or indemnity from "any person whose fault caused claimant's damages if that person was not allocated a percentage of fault." *Id.* at § 4. The bill also permitted a liable party to seek indemnity or contribution if he had been held responsible for another person's fault by virtue of the exceptions mentioned above. *Id.* In addition, the bill removed the tort immunity of an employer who, "with wilful disregard of the safety of the employee, intentionally removes, permits to be removed or fails to install permanent safety features or devices recommended by the manufacturer who supplied the product, or required by law for the particular product, causing injury or death." *Id.* § 13.

ers to bear only that portion of the loss for which they are responsible.⁶³

By affirming the trial court decision, the supreme court would have embraced a solution reflecting the interests of all the parties involved. Such an approach is not unprecedented. The Court of Appeals for the Fourth Circuit has held that a third-party's liability to an injured worker covered by the Longshoremen's and Harbor Worker's Act⁶⁴ is limited to its apportioned fault.⁶⁵ That court pointed to the protection afforded the injured longshoreman by the compensation system and to his ability to recover from the third party damages proportional to its fault.⁶⁶ The Fourth Circuit concluded that "[f]rom the longshoreman's point of view, this is not a harsh result."⁶⁷ Nor would it be a harsh result for employees covered by Washington's Industrial Insurance Act.

Cheryl A. Johnson

63. The trial court's solution thus addresses all the considerations which one commentator delineated as essential: "(1) The employer's right to limited liability; (2) The third party's right to pay only for its own negligence; and (3) The employee's right to limited compensation from the employer, and to common law damages from the third party." See Comment, *supra* note 14, at 300.

64. 33 U.S.C. § 905(b) (1976).

65. *Edmonds v. Campagnie Generale Transatlantique*, 577 F.2d 1153, 1154 (4th Cir. 1978).

66. *Id.* at 1156.

67. *Id.*