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The Award of Attorney's Fees to Prevailing Defendants under the Washington Long Arm Statute

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Numerous state and federal statutes award winning litigants attorney's fees from losing litigants. The Washington long arm statute, section 4.28.185(5) of the Revised Code of Washington,1 allows prevailing nonresident defendants to recover their attorney’s fees from losing resident plaintiffs. The statute provides that when defendants are personally served outside the state on causes of action enumerated in the statute, the court may require a plaintiff to pay the defendant's reasonable attorney's fees. This Comment argues that the judicial implementation of this provision inappropriately inflicts injury upon Washington plaintiffs while often failing to protect nonresident defendants.

This situation arises for two reasons. First, the Washington judiciary departed from the maxim that the purposes of an attorney's fees statute must guide its application. Such judicial reasoning contradicts an important principle: An attorney's fees statute's legislative purpose should dictate its proper application by guiding the court's decision whether to award fees as well as their amount. The Washington legislature did not articulate its purposes in placing section 4.28.185(5) in the long arm statute. Its silence required the Washington courts to hypothesize about the legislature's intentions. Consequently, the courts fashioned and applied their own purposes to govern the award of attorneys' fees under long arm statute. A comparison of the Washington courts' approach to fee awards under the long arm statute with the general guidelines that govern the award of attorney's fees casts doubt on the statute's constitutionality and reveals a number of fissures between purpose and application in the award of attorney's fees under the provision.

Second, the Washington judiciary has selected inconsistent methods to calculate all attorney's fee awards, not just those under the long arm statute. Additionally, no method of fee calculation accurately predicts the extent of the plaintiff's possible liability absent litigation of the fee issue itself. This failure prevents any estimate by plaintiffs of the extent

1. The statute allows a trial court to assert jurisdiction over nonresident defendants if their activities in Washington, which are enumerated in the statute, create the plaintiff's cause of action. These activities are the transaction of business, the commission of a tortious act, ownership of real property, contracting to insure persons or property and the conception of children or entering into a marital relationship in Washington. WASH. REV. CODE § 4.28.185 (1962).
of their liability to defendants under the long arm statute prior to judicial resolution of this issue.

The purposes of awarding attorney’s fees under the long arm statute do not justify fees awarded only to prevailing nonresident defendants. Consequently, the provision should be stricken by the legislature. In the absence of such action, the courts should alleviate the current inequalities by applying the provision in greater harmony with the purposes they developed and by using more objective standards to calculate attorney’s fees.

I. THE PARAMETERS OF JUDICIAL DISCRETION IN AWARDING ATTORNEY’S FEES

A. Architecture of the American Rule: Foundation of Principle and Superstructure of Exception

Under the American Rule, prevailing litigants may not recover attorney’s fees from losing litigants. This fee system is almost unique among the industrialized democracies. The English Rule, used in Great Britain and most Commonwealth countries, routinely assesses attorney’s fees as part of the costs paid by a losing party. The predominant rule on the Continent also assesses the loser for at least part of

2. Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796), is often cited as the wellspring of the American Rule, but this is the subject of some doubt. See Leubsdorf, Toward a History of the American Rule on Attorney Fee Recovery, LAW & CONTEM., WINTER 1984, at 9, 15. Whatever the Rule’s origins, the United States Supreme Court has consistently declared its allegiance to this early holding. See, e.g., Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 250 (1975); F.D. Rich Co. v. United States ex rel. Indus. Lumber Co., 417 U.S. 116, 126–31 (1974). The Washington Supreme Court held in Larson v. Winder, 14 Wash. 647, 45 P. 315 (1896), that attorney’s fees could not be awarded to prevailing parties. The Washington courts continue to profess their fidelity to the American Rule on frequent occasions. Macri v. City of Bremerton, 8 Wash. 2d 93, 111 P.2d 612 (1941), is the best and most complete early analysis of the American Rule in Washington. The court held that attorney’s fees cannot be recovered as costs except when allowed by a judicially fashioned or statutory exception. This principle has been affirmed in many cases. See, e.g., Joinette v. Local 20, 106 Wash. 2d 355, 722 P.2d 83 (1986); Miotke v. Spokane, 101 Wash. 2d 307, 678 P.2d 803 (1984).


4. For the sake of convenience, the term “American Rule” is used in this Comment to represent the fee system previously described. The term “English Rule” represents a system that awards fees to prevailing litigants as a matter of ordinary course.


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the winner's attorney's fees. Finally, both Alaska and Nevada have adopted provisions that repudiate the American Rule.

Many passionate articles in legal journals during the last fifty years have advocated abolishing the American Rule. But this scholarship had inspired no strong reform movement to accomplish that end. Nevertheless, the purity of the American Rule is compromised by judicially fashioned and statutory exceptions that award fees to

7. See generally W. Pfennigstorf, supra note 3, at 39 (table of practice in eight Continental nations).

8. See Alaska R. Civ P. 82(a) (1987) (allows the court to award fees to a party recovering a money judgment); Nev. Rev. Stat. § 18.010 (1967) (allows the court to award fees in actions involving $10,000 or less).


11. Three prevalent bases exist for fee awards. See Dobbs, Awarding Attorney Fees against Adversaries: Introducing the Problem, 1986 Duke L.J. 435, 440 (1986). First, the common fund doctrine, which provides for recovery not from the loser but from those who share in the benefit of the litigation, is a partial exception to the American Rule. See generally Dawson, Lawyers and Involuntary Clients: Attorney Fees from Funds, 87 Harv. L. Rev. 1597 (1974) (discussing origins and development of common fund doctrine). Second, fees are awarded for misconduct in litigation through the assertion of groundless or unfounded claims or defenses, or the assertion of good claims or defense in a bad faith manner. See, e.g., American Family Life Assurance Co. v. Teasdale, 733 F.2d 559, 569–70 (8th Cir. 1984) (assertion of groundless claims); Lipsig v. National Student Mktg. Corp., 663 F.2d 178, 181 (D.C. Cir. 1980) (per curiam) (fees awarded where defendants engaged in dilatory tactics, failed to meet filing deadlines, misused discovery, and misled court by misquoting or omitting material portions of documentary evidence). Third, fees are awarded when authorized by statute. For a complete list see any issue of the Attorney Fee Awards Reporter. See also Federal Statutes Authorizing the Award of Attorney Fees, Att’y Fee Awards Rpt., June 1986, at 2–3. The Washington legislature has created over eighty statutory exceptions. See Talmadge, supra note 6, at 77–80. Other bases had little application, and none plays a major role in contemporary cases. Dobbs, supra, at 439–40. Fee awards are allowed when a contract between the parties so provides. See, e.g., Peter Fabrics, Inc. v. S.S. Hermes, 765 F.2d 306, 316 (2d Cir. 1985); Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324, 1337–38 (10th Cir. 1984). Fees may be recovered as an item of damages in malicious prosecution suits. Cf. Kerr v. City of Chicago, 424 F.2d 1134 (7th Cir.), cert. denied, 400 U.S. 833 (1970) (allowing civil rights plaintiff to recover attorney’s fees incurred in wrongful criminal prosecution). Defendants may be liable for attorney’s fees when their tortious conduct or breach of contract causes the plaintiff to litigate with a third party. See, e.g., Mutual Fire, Marine & Inland Ins. v. Costa, 789 F.2d 83, 88–90 (1st Cir. 1986); Eureka Inv. Corp. v. Chicago Title Ins., 743 F.2d 932, 940–41 (D.C. Cir. 1984). Fees may be awarded when the loser acts vexatiously or in bad faith and when attorney's fees constitute an item of damages recoverable under ordinary damages rules (as where the defendant is liable to the plaintiff for malicious prosecution or on an injunction bond). See generally D. Dobbs, HANDBOOK OF THE LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 3.8 (1973). Fees are also awarded in certain cases of contempt of court, and in certain domestic relations cases in which one party has a duty to support the other. Id. A few states, including Washington, make fee awards under the private attorney general theory. See infra note 12; see also Senior Citizens Coalition v. Minnesota Pub. Util. Comm'n, 355
Six purposes often appear as justifications for either abrogating or creating exceptions to the American Rule. The first, general indemnity, forms the major brace of the English Rule. It posits that justice requires the loser to pay, at least in considerable part, the winner's legal costs. The second, compensation for legal injury or the “make-whole” purpose, focuses on making a litigant financially whole for a legal wrong suffered. For example, the legal system punishes mali-

N.W.2d 295, 302 n.10 (Minn. 1984) (stating in dicta that the private attorney general rule is “well established,” but citing only California law).

The judicially fashioned exceptions in Washington fall into five categories. First, fees may be awarded when authorized by a contract between the parties. See, e.g., Granite Equipment Co. v. Hutton, 84 Wash. 2d 320, 525 P.2d 223 (1974). Second, fees may be awarded for bad faith conduct by the losing party. This exception is mentioned in some cases. See, e.g., Miotke v. Spokane, 101 Wash. 2d 307, 678 P.2d 803 (1984). But only one case awards fees on this ground, doing so without discussion. See Seals v. Seals, 22 Wash. App. 652, 658, 590 P.2d 1301, 1305 (1979). Third, fees may be awarded under the common fund doctrine when a litigant brings an action to preserve or create a monetary fund. See, e.g., Hsu Ying Li v. Tang, 87 Wash. 2d 796, 557 P.2d 342 (1976). Fourth, fees are granted when the acts or omissions of a party to an agreement or an event expose another party to litigation by third persons unconnected to the original transaction or event. See, e.g., Wells v. Aetna Ins. Co., 60 Wash. 2d 880, 376 P.2d 644 (1962). Fifth, fees are awarded where a petitioner successfully sues to protect a constitutional principle. See, e.g., Weiss v. Bruno, 83 Wash. 2d 911, 523 P.2d 915 (1974). Finally, fees are awarded under the private attorney general theory when a litigant's action confers a substantial benefit upon an ascertainable class of individuals. See, e.g., Miotke, 101 Wash. 2d 307, 678 P.2d 803. This purpose often seeks to enforce a right deemed to have special social importance. See, e.g., 42 U.S.C. § 1988 (Supp. IV 1980) (fee award under the Civil Rights Attorney's Fees Awards Act of 1976); CAL. CIV. PROC. CODE § 1021.5 (fee award to prevailing parties in certain actions that result “in the enforcement of an important right affecting the public interest”). It also frequently involves situations where governmental authority or resources are insufficient to assure adequate public enforcement, or where successful litigation of such claims benefits numbers of other people (e.g., by deterring other violations or making new law). See Herman & Hoffmann, Financing Public Interest Litigation in State Courts: A Proposal for Legislative Action, 63 CORNELL L. REV. 173, 195-96 (1978) (a draft “private attorney general” statute to remedy the lack of sufficient economic incentives for individuals to litigate for substantial public benefits). See generally Nussbaum, Attorney's Fees in Public Interest Litigation, 48 N.Y.U. L. REV. 301, 305 (1973). For a discussion of the private attorney general concept in Washington, see Talmadge, supra note 6, at 65-67.

See generally Rowe, supra note 3, at 652-66 (discussion and analysis of the six purposes used to justify attorney's fees awards).

The indemnity system is a “two-way” fee shifting rule, or a system in which the loser, either plaintiff or defendant, pays the winner's attorney's fees. There are also “one-way” shifting schemes that most often award prevailing plaintiffs but not successful defendants attorney's fees. Section 4.28.185(5) is one of a lesser number of one-way statutes awarding fees to prevailing defendants. Legislatures often use a policy of one-way shifting in favor of prevailing plaintiffs to achieve the end of favoring interests deemed to have special social importance. See supra note 12.

The concept of general indemnity is given little justification in the literature of countries that use it. See generally R. JACKSON, supra note 5, at 518 (stating English Rule without giving reasons).

cious prosecution as an actionable wrong and allows counsel fees from the successful defense to be recovered as an element of damages. Some jurisdictions, including Washington, allow fee shifting when the action brought is unjustified for some reason other than sheer lack of success. The third purpose is punitive: fee shifting to deter and punish misconduct, either in litigation or in the underlying transaction. Fourth, the “private attorney general” theory justifies fee awards on the basis of the public usefulness of advancing a particular type of claim. The fifth purpose seeks to alter the relative strengths of the parties. This justification is frequently used when a private party or small concern litigates against the government. Last, fee shifting is justified by its expected or actual ability to affect the numbers of claims pursued, parties’ settlement incentives, and the speedy disposition of cases.

Supreme Court did not question the basic soundness of the make-whole argument; instead it raised tenuous collateral problems suggesting that the decision rests more on settled practice than reason. See Rowe, supra note 3, at 657 n.27.


18. See, e.g., Weisman v. Middleton, 390 A.2d 996, 999 (D.C. 1978); see also W. Prosser, supra note 17, § 120, at 856; Annotation, Attorneys’ Fees as Element of Damages in Action for False Imprisonment or Arrest, or for Malicious Prosecution, 21 A.L.R.3d 1068 (1968).

19. See WASH. REV. CODE § 4.84.185 (1962) (prevailing party to receive expenses for opposing frivolous action or defense); see also IDAHO R. CIV. P. 54(e)(1) (1981) (fee shifting if case “brought, pursued or defended frivolously, unreasonably or without foundation”); ILL. ANN. STAT. ch. 110, § 41 (Smith-Hurd Cum. Supp. 1982–1983) (fee shifting when allegations and denials “made without reasonable cause and found to be untrue”).


21. See supra notes 11–12.

22. Several attorney’s fees statutes award fees to prevailing plaintiffs because Congress perceives certain classes of defendants as having superior resources or access to the legal process. See, e.g., Equal Access to Justice Act, Pub. L. No. 96-481, tit. II, § 202(a)–(b), 94 Stat. 2325 (1980) (smaller litigants “may be deterred from seeking review of, or defending against unreasonable governmental action because of the expense” and government’s “greater resources and expertise”).

23. One of the most widely accepted hypotheses on fee-shifting is that the adoption of the English Rule will encourage the pursuit of meritorious small claims, discourage weaker claims by the threat of adverse shifting and relieve court congestion. See Talmadge, supra note 6, at 69–70. But it seems impossible to formulate any general hypothesis on this issue. See generally Shavell, Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs, 11 J. LEGAL STUD. 55 (1982) (mathematical analysis of the effects of the English and American Rule on litigant behavior).
B. The Purposes of an Exception: The Touchstones of Judicial Discretion Under the Long Arm Statute

Once a purpose is accepted as a basis to shift fees, it has implications that suggest how a fee award statute should be applied in particular contexts and what constitutes a reasonable fee.\textsuperscript{24} Legislative intent usually governs the exercise of judicial discretion under attorney's fees statutes,\textsuperscript{25} but the Washington legislature expressed no purposes in passing section 4.28.185(5).\textsuperscript{26} The statute also has few analogs in other state or federal statutes. Consequently, the Washington judiciary developed the two purposes that guide the courts in awarding fees to defendants under the long arm statute. The first purpose attempts to ensure that the assertion of personal jurisdiction over defendants comports with standards of fair play and substantial justice by reducing the burdens on defendants in litigating in Washington. The second uses section 4.28.185(5) to punish a plaintiff for frivolous or harassing lawsuits. The court's award of attorney's fees under the long arm statute is discretionary.\textsuperscript{27} Absent a showing of abuse of discretion, its decision will not be reversed.\textsuperscript{28}

1. Mahnkey v. King: The Demands of Fair Play and Substantial Justice

In Mahnkey v. King,\textsuperscript{29} the Washington Court of Appeals decided that section 4.28.185(5) reduces the burden on defendants to litigate in

\textsuperscript{24} Rowe, supra note 3, at 666–68.  
\textsuperscript{25} Id. at 666–67.  
\textsuperscript{26} Legislative history in Washington was almost nonexistent when the long arm statute was passed in 1959. Consequently, there is no written statement by the legislature of the policies behind section 4.28.185(5). The fee provision may have been included as a compromise between long arm statute proponents and the defense bar. Washington was one of the first states to adopt a long arm statute, and its opponents feared that it would be abused by plaintiffs. Interview with Phillip Trautman, Professor of Law, University of Washington School of Law, in Seattle (May 3, 1987).  
\textsuperscript{27} Both federal and state attorney's fee statutes and rules often provide for judicial discretion in deciding whether or not to award fees. See, e.g., 42 U.S.C. §§ 1988, 2000e-5(k) (1982) (court may allow fee award "in its discretion" to prevailing party); FED. R. CIV. P. 37(a)(4) (award of expenses, including attorney's fees, to prevailing party on discovery order motion, "unless the court finds that [the losing side's position] was substantially justified or that other circumstances make an award of expenses unjust"); WASH. REV. CODE § 19.86.090 (1978) (award of attorney's fees under the Washington Consumer Protection Act).  
\textsuperscript{29} 5 Wash. App. 555, 489 P.2d 361 (1971).
Washington. The plaintiff in *Mahnkey* challenged the constitutionality of the attorney's fee provision of the long arm statute on equal protection grounds. He claimed that no reasonable basis existed for making a distinction between resident and out-of-state defendants. Consequently, the plaintiff argued, persons subject to the jurisdiction of Washington courts were unreasonably divided into two classes: plaintiffs who lose to Washington defendants and plaintiffs who lose to out-of-state defendants.

The court held that Mahnkey failed to discharge his burden of showing that the statutory classification was arbitrary and unreasonable. The court considered the balance of relative convenience and burdens placed upon both the plaintiff and defendant in litigating the cause of action in Washington. It then stated that the burden on foreign defendants was lessened by the statutory award of attorney's fees if they prevailed in the action. The court declared that the legislature delineated out-of-state defendants as a specific class to bring the statute within the ambit of the principles of "fair play and substantial justice" advanced in *International Shoe Co. v. Washington*. It buttressed this conclusion with the observation that the different burdens placed upon nonresident defendants, especially the added expenses of cross-country travel and bringing expert witnesses from out of state, were the basis for the legislature's allowance of attorney's fee awards to nonresident defendants.

The Washington Supreme Court has upheld the purpose developed in *Mahnkey*. In *State v. O'Connell* and *Marketing Unlimited v. Chemical Co.* the supreme court made section 4.28.185(5) a component of *International Shoe*. It surmised that the attorney's fees provision was placed in the long arm statute by the legislature to bring the

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30. *Id.* at 558, 489 P.2d at 363.
31. *Id.* at 557, 489 P.2d at 362.
32. *Id.* at 558, 489 P.2d at 363.
33. *Id.* at 558–59, 489 P.2d at 363.
34. *Id.*
35. 326 U.S. 310 (1945). Other Washington decisions, some of which preceded *Mahnkey*, contributed to weaving section 4.28.185(5) into the fabric of "minimum contacts" analysis under the long arm statute. In two cases the Washington courts noted that in balancing the relative convenience and burdens placed upon the plaintiff and nonresident defendant, the ability of prevailing defendants to obtain an award of attorney's fees fixed by the court lightened their burden. See *Smith v. York Food Mach. Co.*, 81 Wash. 2d 719, 725, 504 P.2d 782, 787 (1972); see also *Omstead v. Brader Heaters, Inc.*, 5 Wash. App. 258, 264, 487 P.2d 234, 242 (1971). The provision is also seen as a shield protecting defendants from harassment. See *Werner v. Werner*, 84 Wash. 2d 360, 371, 526 P.2d 370, 378 (1974).
37. 84 Wash. 2d 602, 528 P.2d 988 (1974).
38. 90 Wash. 2d 410, 583 P.2d 630 (1978).
statute within traditional notions of fair play and substantial justice.\textsuperscript{39} The court also sustained the \textit{Mahnkey} court’s theory that the distinctive treatment afforded nonresident defendants counterbalanced the expenses of travel and witness procurement.\textsuperscript{40}

2. \textit{Refining Mahnkey: The Dual Purposes of the O'Connell Test}

The purposes of fair play, substantial justice and greater defendant costs proved inadequate guides to trial courts in exercising their discretion. Rarely would a nonresident defendant be unable to demonstrate to a trial court some level of greater expense calling for the award attorney’s fees. The Washington Supreme Court sought to remedy this problem in \textit{State v. O'Connell}. In \textit{O'Connell}, it developed a more explicit test to guide trial courts in exercising their discretion,\textsuperscript{41} while also creating a second purpose for an award of attorney’s fees: the plaintiff’s misconduct.

Under the \textit{O'Connell} test, a trial court first determines if the plaintiff’s action was frivolous and brought only to harass the prevailing defendant. If this is the case, an award of attorney’s fees is appropriate.\textsuperscript{42} If the plaintiff is not guilty of misconduct in litigation, the second prong of the \textit{O'Connell} test grants prevailing defendants fee awards if they were subjected to burdens and inconveniences by defending the action in Washington.\textsuperscript{43} However, fee awards are appropriate only when trial courts establish three things. First, the burdens would have been avoided if the trial was conducted at the defendant’s domicile. Second, the burdens are not balanced by conveniences to the defendant resulting from the trial of the action in Washington. Third, the burdens are sufficiently severe to justify the trial court’s conclusion that notions of fair play and substantial justice will be violated absent an award of fees.\textsuperscript{44}


\textsuperscript{40} \textit{O'Connell}, 84 Wash. 2d at 606, 528 P.2d at 990.


\textsuperscript{42} \textit{O'Connell}, 84 Wash. 2d at 606, 528 P.2d at 991.

\textsuperscript{43} \textit{Id.}

\textsuperscript{44} \textit{Id.}
II. DETERMINING THE AMOUNT OF REASONABLE ATTORNEY’S FEES UNDER THE WASHINGTON LONG ARM STATUTE

The amount of attorney’s fees awarded under the long arm statute must be reasonable. This determination is committed to the trial court’s discretion. Its decision is not reversible on appeal without a clear showing that the decision was manifestly unreasonable, or exercised on untenable grounds or for untenable reasons.

The award of reasonable fees under the long arm statute presents three issues. First, the out-of-state defendant must prevail in the action before the court may award attorney’s fees. Consequently, the courts must develop standards to determine when a defendant prevails. Second, the courts must face the problem of the amount of a reasonable fee award. Should fee awards equal the defendant’s entire legal expense? Or must they be limited to the difference between the amount defendants spend to defend actions in Washington compared to their hypothetical expenditure to defend actions brought in their domiciles? Last, the Washington courts must face the problem of what method will be used to calculate the amount of the fee award bestowed upon the prevailing litigant.

A. The Standards That Determine Whether the Defendant Prevails

In Anderson v. Gold Seal Vineyards, the Washington Supreme Court addressed the first issue. The court’s interpretation of the legislature’s intent was that a defendant served outside the state and put to the expense of answering the complaint and preparing for trial should be reimbursed by the plaintiff if the trial court finds that justice so requires. To implement this purpose, it held that the prevailing defendants are ordinarily those against whom no affirmative judgment

45. Attorney’s fee statutes often require the court to use its discretion to determine if an award of fees is appropriate. See supra note 19. Legislatures also frequently require courts to determine what constitutes a reasonable award while providing no standards to aid the courts in this task. Most, if not all, attorney’s fees statutes passed by the Washington legislature provide no specific indication of how attorney’s fees are to be calculated. Bowers v. Transamerica Title Ins., 100 Wash. 2d 581, 594, 675 P.2d 193, 202 (1983). Federal attorney’s fees statutes are similarly reticent. See Berger, Court Awarded Attorneys’ Fees: What is “Reasonable”? 126 U. Pa. L. Rev. 281, 284 (1977).

46. Marketing, 90 Wash. 2d at 412–13, 583 P.2d at 632; see also Lake Stevens Sewer v. Village Homes, 18 Wash. App. 165, 179, 566 P.2d 1256, 1264 (1977); cf. State v. Ralph Williams’ N.W. Chrysler Plymouth, 87 Wash. 2d 298, 314, 553 P.2d 423, 435 (1976) (amount of allowable attorney’s fees and costs is within the discretion of the trial courts and is overturned only if there exists a manifest abuse of discretion).

47. 81 Wash. 2d 863, 505 P.2d 790 (1973).

48. Id. at 868, 505 P.2d at 793.
The court adopted this standard because it felt that the legislature had envisioned not only situations in which the defendant prevails on the merits, but also cases where the action against the defendant is dismissed, as in Anderson, upon the motion of the plaintiff. Thus, any failure by plaintiffs to prove their claims may result in an award of attorney's fees.

B. Reasonable Fee Awards Are Not Limited to Partial Fees

In Marketing Unlimited v. Chemical Co., the Washington Supreme Court held it was reasonable to award actual rather than partial fees. The plaintiff argued that fee awards under the long arm statute should be limited to the increased amount of fees that result from trial of the action in Washington rather than in the defendant's domicile. The trial court applied the O'Connell test and determined that trial of the action in Washington was detrimental to the defendant because his expenses were greater than they would have been in the defendant's domicile. The court used its discretion and found that an award of the defendant's entire lawyer's bill of $7120 was reasonable, but it noted that eighty-five to ninety percent of this amount would have been incurred even if the action was defended in the defendant's home state. The plaintiff appealed the award of attorney's fees as an abuse of discretion, claiming the court erred in awarding actual rather than partial fees.

The Washington Supreme Court held that the only limit on attorney's fees awarded pursuant to section 4.28.185(5) is "reasonableness." A trial court may award any amount, up to the defendant's actual expenditure, which is necessary to satisfy traditional notions of fair play and substantial justice. The supreme court found no abuse of discretion because the trial court had applied the O'Connell test and found that notions of fair play and substantial justice required the

49. Id.
50. Id.
51. The Anderson case also held that nonresident third-party defendants may be awarded attorney's fees against third-party plaintiffs. Id. at 865, 505 P.2d at 795. The Washington Supreme Court also held in O'Connell that an award of attorney's fees on appeal was permissible under section 4.28.185(5), subject to the same criteria of reasonableness as the original award. State v. O'Connell, 84 Wash. 2d 602, 605, 528 P.2d 988, 990 (1974).
52. 90 Wash. 2d 410, 583 P.2d 630 (1978).
53. Id. at 413, 583 P.2d at 633.
54. Id. at 414, 583 P.2d at 632.
55. Id. at 411, 583 P.2d at 631.
56. Id.
57. Id. at 412, 583 P.2d at 632.
58. Id. at 413, 583 P.2d at 633.
award of $7120.59 The supreme court justified its decision by noting the inconvenience to the defendant of defending the lawsuit in Washington due to the extensive correspondence preceding trial and the costs of bringing witnesses and documentary evidence from another forum to Washington.60

C. The Dichotomy in Methods of Calculating Reasonable Fees: Subjective Factors Versus Market Value

Two methods of calculating reasonable fees have currency in Washington. The first, the subjective factors method, requires the court to consider a large number of unquantified factors. This approach is modeled on the American Bar Association's 1908 Canon of Ethics,61 which provided a list of factors to guide lawyers in setting their fees. With some modifications, it continues to provide guidelines for practitioners in Washington and elsewhere.62 These factors were never meant to guide a court in fixing fee award amounts, but the Fifth Circuit in Johnson v. Georgia Highway Express63 used them for this purpose. Under the Johnson approach, a trial court calculates fees by considering factors such as the novelty of the case, the amount of time and labor expended, the attorney's skill, the customary fee, the attorney's prior relationship with the client, and the amount of the fee involved.64

Shortly before Johnson, the Third Circuit adopted a radically different approach. In Lindy Brothers Builders v. American Radiator & Standard Sanitary Corp.,65 the court of appeals held that the chief

59. Id.
60. Id. at 414, 583 P.2d at 633.
62. See Model Rules of Professional Conduct Rule 1.5(a) (1983). The Washington version, Rules of Professional Conduct Rule 1.5 (formerly Code of Professional Responsibility DR 2-106(B)), has the following elements: One, the time and labor required; two, the novelty and difficulty of the questions; three, the skill requisite to perform the legal service properly; four, the preclusion of other employment; five, the customary fee in the community for similar work; six, the fixed or contingent nature of the fee; seven, time limitations imposed by the client or the circumstances; eight, the amount involved and the results obtained; nine, the experience, reputation, and ability of the attorneys; ten, the undesirability of the case; eleven, the nature and length of the professional relationship with the client; twelve, awards in similar cases.
63. 488 F.2d 714 (5th Cir. 1974).
64. The Johnson approach has found wide application. See, e.g., NAACP v. Richmond, 743 F.2d 1346, 1358-59 (9th Cir. 1984) (fee awards in civil rights context); Harman v. Levin, 722 F.2d 1150, 1152 n.1 (4th Cir. 1984) (Johnson factors applied in bankruptcy proceeding); Derr v. Screen Extras Guild, Inc., 526 F.2d 67, 69-70 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976) (Johnson factors applied in union member's suit against union).
determinant of a fee award was the market value of the attorney's services. This method requires a trial court to determine the number of hours reasonably spent in providing legal services and to multiply this number by a reasonable hourly rate.\textsuperscript{66} This figure is the "lode-star" of the court's fee determination.\textsuperscript{67} The central advantage claimed by proponents of the \textit{Lindy} method is that the separate elements of the factors approach are subsumed in the lodestar figure.\textsuperscript{68} For example, the quality of the lawyer's services is reflected in the selection of a reasonable hourly rate; the novelty of the issues in a case is represented by the hours reasonably spent in rendering legal services.\textsuperscript{69}

The factors method was quickly embraced by the Washington courts. In the same year that \textit{Johnson} was decided, the Washington Court of Appeals, in \textit{Wolfe v. Morgan},\textsuperscript{70} directed a trial court to ascertain the reasonableness of an attorney's fees award as guided by the factors contained in the \textit{Model Code of Professional Responsibility Disciplinary Rule 2-106}.\textsuperscript{71} The Washington courts have faithfully used the factors approach during the past thirteen years.\textsuperscript{72} However, a plurality of the Washington Supreme Court held in \textit{Bowers v. Transamerica Title Insurance},\textsuperscript{73} that the market value approach could be used for attorney's fees awards under the Washington Consumer Protection Act.

III. THE PARAMETERS OF JUDICIAL CAPRICE: THE INEQUITABLE RESULTS OF THE WASHINGTON LONG ARM STATUTE ATTORNEY'S FEES PROVISION

The Washington judiciary has not adhered to the purposes it evolved to guide attorney's fee awards under the long arm statute.

\textsuperscript{66} \textit{Id.} at 167.
\textsuperscript{67} \textit{Id.} at 168.
\textsuperscript{68} The U.S. Supreme Court determined that fee computation based on hourly fee charges includes most factors in the determination of reasonable hours or the reasonable rate. \textit{See} Blum \textit{v. Stenson}, 465 U.S. 886, 898-900 (1984); Pennsylvania \textit{v. Delaware Valley Citizens' Council for Clean Air}, 106 S. Ct. 3088 (1986).
\textsuperscript{69} \textit{Blum}, 465 U.S. at 898-99.
\textsuperscript{71} \textit{Id.} at 744-45, 524 P.2d at 931.
\textsuperscript{72} \textit{See}, e.g., \textit{Seven Gables v. MGM/UA Entertainment}, 106 Wash. 2d 1, 15, 721 P.2d 1, 8 (1986) (award of attorney's fees under the Washington Motion Picture Fair Competition Act, \textsc{Wash. Rev. Code} § 19.58.050 (1978)); \textit{Fahn v. Cowlitz County}, 95 Wash. 2d 679, 686, 628 P.2d 813, 817 (1981) (award of fees under the Law Against Discrimination, \textsc{Wash. Rev. Code} § 49.60.030(2) (1962)).
\textsuperscript{73} 100 Wash. 2d 581, 593, 675 P.2d 193, 203 (1983).
Washington Long Arm Attorney’s Fees

This development has produced unfortunate results for both plaintiffs and defendants. The courts’ failure injures plaintiffs in three fashions. First, the courts use the statute to make nonresident defendants whole for a legal injury, but this injury does not arise from the plaintiff’s conduct. Instead, the defendant’s injury springs from the court’s improper assertion of jurisdiction over the nonresident defendant. Second, the statute harms plaintiffs through the award of actual rather than partial fees to nonresident defendants. Third, the Washington courts have unsuccessfully grappled with the most difficult and significant problem in attorney’s fee awards: the methods by which they calculate reasonable fees.74

Nor is the fee provision of the long arm statute a defendant’s sentinel as the courts suggest.75 First, the statute predicates the award of fees upon a defendant’s prevailing on the merits. But trial of the action in Washington may expose defendants to such prejudice that they lose or are unable to litigate the case. Second, the broad discretion accorded to trial judges to award or deny fees conflicts with prior judicial decisions that established a low threshold for fee awards.

A. Curing Improper Assertion of Jurisdiction Through Attorney’s Fee Awards Is Unfair to Plaintiffs

Imagine that you represent a client injured in an automobile accident when a trailer and boat towed by another party crossed the highway and struck your client’s vehicle. You sue the other party on charges of negligence. You also commence an action against the nonresident manufacturer of the boat trailer under a theory of strict liability by asserting jurisdiction through the long arm statute. The court allows the assertion of jurisdiction over the manufacturer, and this defendant incurs legal expenses in defending the case. The jury renders a verdict in your favor against the defendants who towed the trailer. It also renders a verdict in favor of the nonresident manufacturer. The manufacturer moves for attorney’s fees. The court does not find your action against the manufacturer frivolous, but in weighing the burdens imposed on the defendant upon the O’Connell scale it finds an award of the defendant’s total attorney’s fees of $7500 is justi-

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74. See Dobbs, supra note 11, at 462.
fled. You are understandably perplexed by the decision. After all, the court made the decision on jurisdiction. If the judge felt that the burdens on the defendant were so severe that absent an award of fees notions of fair play and substantial justice were violated, then why did the judge assert jurisdiction over the case?

This situation illustrates the impropriety of fee awards under the burdens section of the O'Connell test. The source of the defendant's legal expense and injury lies not in the plaintiff's conduct, but in the court's faulty exercise of its jurisdiction. Of the six purposes used to justify attorney's fees awards, punitive fee shifting and compensation for legal injury or the make-whole purpose find expression in the O'Connell test.76 The first leg of the test explicitly incorporates the punitive purpose that punishes plaintiffs for frivolous litigation. The second part incorporates the make-whole purpose that seeks to compensate a litigant for a legal injury. Proper application of this purpose requires that the plaintiff's injury arise either from the conduct of the defendant in creating the plaintiff's cause of action77 or from the activities of a litigant that force the other party to needlessly expend funds on legal representation.78

The second half of the O'Connell test does not explicitly discuss make-whole concerns. Instead, it invokes the liturgy of substantial justice, fair play, and the burdens of litigation in Washington. But this is a facade. The test shows little solicitude for defendants who lose on the merits, no matter how taxing their burdens. The sine qua non for a fee award is the failure of the plaintiff on the merits, and the corollary

76. Certain rationales are not present in the O'Connell test. It makes no pretense of attempting to advance the public usefulness of certain types of litigation—the theory that forms the heart of the private attorney general rationale. Nor does it aspire to implement general indemnity. The English Rule awards fees to a prevailing defendant or plaintiff and affords the court little discretion to deny a fee award. The long arm statute awards fees only to defendants and judicial discretion plays a central role. While the provision may affect the ability or willingness of plaintiffs to pursue legal action, this is a collateral result of fee awards and not a stated purpose. Finally, the statute does not consciously seek to alter the relative strengths of parties. In a given case, the plaintiff may have greater resources to support litigation, but one cannot say that plaintiffs as a class have superior resources sufficient to justify imposition of this rationale to aid defendants.

77. This principle was succinctly summarized by the Judicial Council of Massachusetts: “On what principle of justice can a plaintiff wrongfully run down on a public highway recover his doctor's bill but not his lawyer's bill?” Judicial Council of Massachusetts, First Report, 11 MASS. L.Q. 7, 64 (1925) [hereinafter Judicial Council]; see also D. DOBBS, HANDBOOK OF THE LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 3.8, at 201 (1973).

78. Once again in the words of the Judicial Council: “And on what principle of justice is a defendant who has been wrongfully haled into court made to pay out of his own pocket the expense of showing that he was wrongfully sued?” See, e.g., Judicial Council, supra note 77, at 64; Rosenberg, Contemporary Litigation in the United States, in LEGAL INSTITUTIONS TODAY: ENGLISH AND AMERICAN APPROACHES COMPARED 152, 162 (H. Jones 4th ed. 1971).
is that this failure subjects the defendant to needless litigation constituting a legal injury. The make-whole purpose presumes that fault in the loser's conduct causes the winner's legal expense. The first leg of the O'Connell test addresses this type of legal wrong, punishing the plaintiff for frivolous or harassing litigation. This fuses the punitive and make-whole purposes.79 The compelling reason for making successful litigants whole under the punitive rationale is that their adversaries are somehow at fault, either in their primary conduct or in the course of litigation, in forcing the winning litigant to spend money on legal services.80 But using the make-whole purpose to support fee awards to defendants solely because they prevail on the merits presents grave problems. The American legal system does not regard bringing a losing case, in the absence of other fault, as a legal wrong.81

The underlying logic of the O'Connell test—that losing plaintiffs should pay because they were at fault in initiating the proceedings—cannot justify the imposition of attorney's fees. It untenably assumes that one can always say what a losing plaintiff with a reasonable case should have done other than to pursue it to judgment.82 Furthermore, if the plaintiff was at fault in initiating the proceedings, the same logic demands that a losing defendant should be held liable for contesting the plaintiff’s winning case and inflicting a legal injury by its recalcitrance. And if initiating or contesting legal proceedings constitutes a legal injury, Washington residents should also be able to avail themselves of compensation under the make-whole purpose for the legal injuries inflicted upon them by Washington adversaries in initiating or contesting litigation.

When a court asserts jurisdiction over a defendant it should assess at that instant whether the exercise of jurisdiction conforms with the

79. See Rowe, supra note 3, at 661. The development of statutes such as section 4.84.185 that award fees to prevailing plaintiffs or defendants subjected to frivolous claims or defenses has made the O'Connell standard a legal artifact. No reported decision has awarded fees on this basis under the O'Connell standard, perhaps because the test for determining frivolity under the standard is so unedifying. The supreme court in O'Connell denied an award of attorney's fees to a defendant that claimed the plaintiff's suit was frivolous. It stated:

[C]onsidering the fervor with which the appeal was prosecuted, we cannot assume that the appellants were less than genuinely convinced that their cause had merit, even though they may have been mistaken in their understanding of the law applicable to the facts, as those facts were found by the jury.

State v. O'Connell, 84 Wash. 2d 602, 606, 528 P.2d 988, 991 (1974). The defects of predicking an award or denial of fees upon a subjective test of litigant enthusiasm are obvious.

80. See Rowe, supra note 3, at 659.


82. This is a problem common to schemes of two-way fee shifting such as the English Rule. See Rowe, supra note 3, at 655–56.
notions of fair play and substantial justice. If the defendant is so burdened by litigation in Washington that, absent an award of fees, fair play and substantial are violated, the court should not assert jurisdiction over the case. Allowing plaintiffs to proceed in these circumstances increases their potential liability as the defendant spends more money to litigate the case. Reopening the jurisdictional inquiry by use of the O'Connell test after the plaintiff has lost on the merits is a tacit admission by the court that its initial determination was erroneous. These considerations dictate that fee awards under the long arm statute should be made only to compensate defendants for their costs in defeating the plaintiff’s attempt to assert personal jurisdiction. These expenditures are caused by the plaintiff’s conduct and fall within the parameters of the make-whole purpose.

A possible justification for fee awards at the end of the trial process is that the court’s assessment of the burdens placed on the defendant when it first asserts jurisdiction is necessarily provisional and incomplete. Reassessing those burdens at the end of the trial allows the court to better gauge the disadvantages placed on nonresident defendants.

The Mahnkey court implicitly used this concept when it affirmed the constitutionality of section 4.28.185(5). The court held that the statute’s delineation of out-of-state residents as a specific class was not arbitrary or unreasonable. It justified this conclusion upon the rationale that the costs of cross-country travel and using out-of-state expert witnesses supported the special treatment afforded nonresident defendants. Of course, the extent of these expenses cannot be completely determined until the trial is complete.

However, the award of attorney’s fees at the end of the trial plainly has no connection with compensating the defendant for the expenses identified in Mahnkey. If these expenses had been the legislature’s concern, then a better statutory scheme would be to require trial courts to directly compensate defendants for these expenses. This system would certainly be easier to administer because nonresident defendants could present unambiguous evidence to the trial court of these expenses. The court could then simply order the plaintiff to compensate the defendant for the costs of travel or using expert wit-

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83. Fee awards under section 4.28.185(5) also harm only plaintiffs that must assert jurisdiction over nonresident defendants through the long arm statute. Some plaintiffs, able to assert jurisdiction under other statutes, may avoid the attorney’s fees problem altogether. See K. Orland & K. Tegland, Washington Trial Practice § 13, at 17 (1986).


85. Id.; see also State v. O’Connell, 84 Wash. 2d 602, 606, 583 P.2d 988, 990 (1974).
necessities. Instead, the Washington courts award the defendant attorney's fees at the legislature's bidding to offset the defendant's expenses in travel and witness procurement. The amounts the defendant spent in attorney's fees will almost invariably be greater than the expenses identified in *Mahnkey*. This result overcompensates the defendant and forces the plaintiff to pay for expenses that have no connection to the *Mahnkey* court's rationale for upholding the constitutionality of section 4.28.185(5).

These considerations suggest that the constitutional justification for section 4.28.185(5) is suspect. In *Mahnkey*, the plaintiff argued that the statutory delineation of nonresident defendants as a special class was a denial of due process. The plaintiff observed that Washington plaintiffs were unreasonably divided into two classes: plaintiffs who lose to Washington defendants and plaintiffs who lose to nonresident defendants. Because the expenses identified in *Mahnkey* that are incurred by nonresident defendants are unrelated to the award of attorney's fees, the fee provision of the long arm statute may unconstitutionally penalize Washington plaintiffs who must litigate against nonresident defendants.

**B. The Award of Actual Attorney's Fees Is Appropriate Only Where the Defendant Suffered a Legal Wrong**

Imagine again our clients struck by the wayward boat trailer. The court awarded the manufacturer its entire attorney's fees of $7500. The accident occurred in Washington, all the evidence is located in Washington, and the manufacturer engaged Washington counsel for its defense. Naturally, some of the manufacturer's employees testified in the proceedings, but you are perplexed by the award of the defendant's entire legal bill as compensation for these burdens. If the court had denied jurisdiction over the defendant and your clients had instituted litigation in the defendant's home forum its legal expenses could not have been much less than $7500; indeed, legal services may be cheaper in Washington.

The doctrine that reasonable fees awarded to defendants should represent their total legal expense is based on the theory that the only limit on attorney's fees is reasonableness. This theory is correct when a fee statute's purpose is to compensate for a legal injury or to encourage a plaintiff to sue to enforce a right. An award of actual fees is appropriate if the plaintiff is guilty of frivolous or harassing litigation. However, when shorn from these moorings, the theory unjustly

86. *See supra* text accompanying note 56.
penalizes litigants for correct behavior. It is incorrectly applied when a fee award is predicated upon adherence to the standards of fair play and substantial justice. If section 4.28.185(5) is to compensate the defendant for the extra burdens of litigation in Washington, those concerns are satisfied by an award of reasonable fees representing the extra cost of litigation in Washington as compared to the defendant’s domicile. The judiciary’s willingness to award the defendants the entirety of their legal expenses also expresses the notion that the plaintiff has inflicted a legal wrong on the defendant simply because the plaintiff’s case was defective on the merits.

C. Attorney’s Fees Are Reasonable Only Where Guided by Market Rates

Picture a client who wishes to commence litigation against a nonresident corporation for patent infringement. The case is complex, requires a high degree of legal skill on the part of counsel for both sides, and the course of litigation will necessarily be long and expensive. Jurisdiction can be had over the defendant only by use of the long arm statute. When you inform your client of the possibility of an adverse award of attorney’s fees, she is naturally anxious to have even your very rough idea of the amount of her possible liability.

You will find it difficult to give her an answer. Plaintiffs facing possible fee awards to defendants under the long arm statute confront both a lack of articulated standards to calculate those fees and the confused standards used under other fee provisions. Statutes such as section 4.28.185(5) present the problem of infusing the “reasonable fee” principle with enough principled content to evenhandedly adjudicate fee claims without full-scale litigation. The Washington courts have articulated no standards for calculating reasonable fees under the long arm statute. Further, the standards used for other fee statutes are so confused that they offer scant hope of “evenhanded adjudication” even if they are applied to fee awards under the long arm statute. The discordant decisions of the Washington judiciary on the standards for calculating attorney’s fees prohibit plaintiffs from predicting the extent of their possible fee liability.

87. The courts that have awarded fees under section 4.28.185(5) have not selected a means for calculating a reasonable fee. Instead they have simply accepted the defendants’ calculations of their legal expenses. See, e.g., Marketing Unltd. v. Jefferson Chem. Co., 90 Wash. 2d 410, 412, 583 P.2d 630, 631 (1978); Anderson v. Gold Seal Vineyards, 81 Wash. 2d 863, 865, 505 P.2d 790, 792 (1973); Mahnkey v. King, 5 Wash. App. 555, 557, 489 P.2d 361, 362 (1971).
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I. The Failure of the Factors Approach

Washington courts use both market-rate and factors approaches. The factors approach gives little guidance about the significance courts should give the individual factors in calculating an award. The method adequately serves its original purpose: aiding lawyers in setting their fees. In setting fees, lawyers have the additional constraint of market forces to ensure the amount is appropriately determined. However, this constraint is not present in the judicial award of attorney’s fees, and the factors approach alone provides insufficient guidance. The factors are presented as if they are all different and of equal importance, while in fact they are neither. Some factors are important only as evidence of others. For example, novelty of the case is important because novel issues demand more time and skill. But time and skill in turn are important in determining the customary fee, another factor on the list. This overlap in factors causes courts to make unjust and excessive fee awards. Some courts use the factors approach as a judicial incantation, reciting the various factors without analyzing their individual relevance, which increases the opportunity for error. To confuse matters even more, other courts concoct new factors for inclusion in the fee analysis. The result is a highly subjective system of fee awards. The potential for abuse through double-counting or consideration of factors in inappropriate contexts is great.

Use of the factors approach means that fee awards cannot be predicted with any degree of certainty. Yet this may be why judges find the subjective factors method congenial. It gives them a high degree of control, requires neither hard analysis nor the taking of extensive evidence about market rates for attorney services, and provides appellate

88. See, e.g., Davis v. Fletcher, 598 F.2d 469, 470–71 (5th Cir. 1979) (remanding to lower court to explain the award calculation; lower court claimed to have “consider[ed] all the relevant factors,” but did not explain how individual factors influenced sum awarded). Washington courts are afflicted with similar problems. See, e.g., Key v. Cascade Packing, 19 Wash. App. 579, 585, 576 P.2d 929, 933 (1978) (the court selected without explanation three of the factors of CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B) to calculate a fee); Lake Stevens Sewer v. Village Homes, 18 Wash. App. 165, 179–80, 566 P.2d 1256, 1269 (1977) (the court lists the eight factors in CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B) with no analysis of what factors are used to calculate the fee); Connelly v. Puget Sound Collections, 16 Wash. App. 62, 63, 553 P.2d 1354, 1355 (1976) (another unadorned listing of the factors).

89. See, e.g., Faraci v. Hickey-Freeman Co., 607 F.2d 1025, 1028–29 (2d Cir. 1979) (reducing fee award on basis of plaintiff’s financial distress); cf. Munson v. Friske, 754 F.2d 683, 697–98 (7th Cir. 1985) (fee award not reduced since plaintiff could not establish his indigence). Washington courts have as yet been immune to such influences.

90. See Berger, supra note 46, at 286 (noting tendency of courts to give lip service to factors, but to jump from unsystematic analysis of factors to unexplained lump-sum fee award figure).
courts with little objective basis for review.91

2. The Superiority of the Market-Rate Method

The market-rate approach is superior to the factors method in calculating attorney’s fees under the long arm statute. It affords plaintiffs advantages of a methodology that focuses on the objective criteria of reasonable hours and reasonable rates.92 When the fee issue is litigated, this formula provides a framework to confine the trial court’s inquiry to consideration of the evidence presented by the parties on these two criteria. The method also narrows the scope of the court’s discretion by excluding subjective factors.93

However, a difficulty with the market-rate approach is that the tentacles of nonmarket, subjective factors have crept into the analysis in Washington.94 In Bowers v. Transamerica Title Insurance,95 the trial court used the market-rate method to calculate a fee award under the

91. See Dobbs, supra note 11, at 466-67.
92. Id. at 467-68.
93. Nevertheless, the market-rate method can provide only vague clues to plaintiffs of the extent of their possible liability prior to litigation. While plaintiffs could roughly estimate a reasonable hourly fee figure and the reasonable number of hours through judicious research, this inquiry will be imprecise. Determining the time element in calculating fees under the market-rate method is difficult. Few tasks in litigation are standardized. For example, a lawyer could reasonably spend from ten to twenty hours on a task. Unscrupulous attorneys who work ten hours but claim twenty may expect that neither opposing counsel nor the judge could dispute this claim. Attorneys interested in maintaining their client’s satisfaction have an incentive to limit total fees. This inducement is hardly present when the paying party is the opposing side. Also, judging the reasonableness of the hours an attorney devotes to a case is difficult. Attorneys have different litigation styles. While they should spend sufficient time to perform a task well and without waste or duplication, what works for one attorney may not work for another. For example, spending great amounts of time on motions may save time at trial. Even if a judge were able to investigate an attorney’s style, it would still be difficult to dispute her reasonable hour figures.
94. In theory, the Lindy approach supplanted the factors analysis in the federal system. The United States Supreme Court embraced the Lindy approach in Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). But the factors approach has crept into market-rate analysis in the federal system as well. This process began with the Lindy decision, when that court recognized the possibility that factors such as quality of work might justify increasing or decreasing the lodestar figure. Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 168 (3d Cir. 1973). The same court later recognized this error, but still left room for the practice. Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 117 (3d Cir. 1976) (Lindy II). The United States Supreme Court has been similarly inconsistent. In Blum v. Stenson, 465 U.S. 886, 898-900 (1984), the Court took a firm position against including the factors method elements in the market-rate determination. But in the Hensley decision the court countenanced an open back door for importing such factors. See Hensley, 461 U.S. at 434-35. For a discussion of the difficulties in reconciling the two opinions, see Dobbs, supra note 11, at 469-70.
95. 100 Wash. 2d 581, 675 P.2d 193 (1983).
Washington Consumer Protection Act. A four-justice plurality of the supreme court exposed the shortcomings of the factors approach and affirmed the trial court's use of the Lindy method, but not as a separate method of fee calculation. Instead, the court saw the Lindy method as a framework to purify the process of calculating reasonable attorney's fees under the factors method by incorporating them into an analytical framework that could be easily applied by the trial courts making meaningful appellate review possible. It specifically identified quality of work as one of the factors usually assimilated into the lodestar figure that might justify an increase in the fee award in exceptional circumstances. Thus, reasonable hours times a reasonable hourly rate produces a reasonable attorney's fee, unless the fee must be increased to be "reasonable" because the court subjectively determined that the quality of legal representation was exceptional. This analysis obscures Lindy's vision with market-rate mist.

Subsequent cases show a similar reluctance to forgo the freedom of subjectivity granted by the factors approach. Lower Washington courts interpret Bowers as confining the use of the Lindy approach to fee awards involving the Washington Consumer Protection Act. They continue to use the factors approach in other fee situations. The supreme court abetted this process in Seven Gables v. MGM/UA Entertainment. It held that a trial court had not abused its discretion in awarding a reasonable fee when the amount was considered under either the factors or Lindy formula.

If the methods coexist, then they also continue to merge. In Snohomish County v. Nichols, the court of appeals found that the trial court had not abused its discretion in awarding fees because it had obviously considered the novelty of the question involved, the skill required to perform the legal service, the results obtained, number of hours spent, and the prevailing fees in the market. This approach nullifies the advantages of the market-rate approach. Once the use of subjective factors is countenanced, the formula of reasonable hours times the prevailing fees in the market is nothing more than the factors method in the guise of the market-rate approach.

96. Id. at 597, 675 P.2d at 203.
97. Id. at 596, 675 P.2d at 203.
98. Id.
99. Id.
101. 106 Wash. 2d 1, 14, 721 P.2d 1, 8 (1986).
D. Attorney's Fees Awards Do Not Protect Defendants

Suppose a client who is served with process under the long arm statute engages your services. Subsequently, the court asserts jurisdiction over your client. The trial court admits the jurisdictional issue is very close, but assures your client that she is adequately protected because, as the Washington Supreme Court observed in *Werner v. Werner*, she is entitled to attorney's fees should you prevail in the trial on the merits. However, your client's penury precludes her from supporting litigation in Washington, and you are forced to settle the case despite your belief that the client could prevail at trial.

This example demonstrates that severe burdens are not always soothed by the balm of retrospective fee awards. Only prevailing defendants are afforded the luxury of attorney's fees and not all defendants prevail. Indeed, the burdens of litigation in Washington may compromise their defense or improperly expose them to prejudice. Furthermore, the *O'Connell* test confers too much discretion upon trial courts to grant or deny the award of fees under the Washington Supreme Court's decision in *Marketing Unlimited v. Chemical Co.* Under *Marketing*, the award of fees should be predicated not on the trial judges's discretion, but on the mechanical assessment of the defendant's expenditures. If the defendant in *Marketing* was entitled to fees when the costs and burdens of defending the action of Washington were ten to fifteen percent more than those in its native forum, then the decision whether to award or deny fees should hinge on whether the defendant can demonstrate this level of greater expense. The scope of discretion should correspondingly be narrowed.

IV. CONCLUSION

The attorney's fees provision of the long arm statute demonstrates the need for symmetry between purpose and application in all attorney's fees statutes. If the application of a fees statute exceeds the purpose it seeks to implement, then the result unjustly penalizes litigants for the act of suing to enforce their rights. The use in the long arm statute of the make-whole purpose to compensate defendants for expending funds to defend against frivolous litigation is a proper expression of compensation for a legal injury that results from the plaintiff's conduct. But defining the plaintiff's failure on the merits as conduct inflicting a legal injury upon only nonresident defendants violates the logic of the make-whole purpose in two ways.

104. 90 Wash. 2d 410, 583 P.2d 630 (1978).
First, the statute improperly penalizes plaintiffs for exercising their legal rights. Defining improper litigant behavior as losing a case on the merits because it inflicts a legal injury on nonresident defendants is unjust. Defining legal injury this way is a repudiation of the American Rule for its English counterpart. The legislatures of Alaska and Nevada have essentially adopted the English Rule and its concept of legal injury. While the Washington legislature has the same power to define legal injury in this manner and adopt such a fee system, its benefits and perils should be extended to all litigants, not just plaintiffs and nonresident defendants. This legal injury is inflicted upon residents as well as nonresidents, and upon plaintiffs and resident defendants as well as nonresident defendants. These considerations dictate that the legislature should either abolish section 4.28.185(5) or completely abrogate the American Rule. The fears that prompted inclusion of an attorney’s fees provision in the long arm statute were phantoms. The past three decades and the wide prevalence of long arm statutes without a similar attorney’s fees provision demonstrates that such statutes are not part of a plaintiff’s arsenal of oppression. Failing legislative action, the courts should confine application of section 4.28.185(5) to reimbursing defendants for the costs they incur in defeating the plaintiff’s initial attempt to establish jurisdiction. Awarding fees after this point simply punishes the plaintiff for an erroneous decision by the court on the jurisdictional issue.

Second, the courts should end the practice of awarding defendants their actual fees. Basing such awards simply on the plaintiff’s loss on the merits is unjustifiable under the make-whole purpose because the extent of the defendant’s injury is its additional expense in defending the action in Washington.

Finally, the Washington courts should adopt the market-method of attorney’s fees calculation as a separate system instead of simply making it a handmaiden of the factors approach. This is the only approach that offers a way of calculating fees free from the vagaries of judicial subjectivity that plague litigants under the factors approach. Incorporating the factors approach in the market-rate method simply continues the effects of the subjective approach in a different guise.

Many of the problems present in the attorney’s fees provision of the Washington long arm statute are common to all attorney’s fees schemes. Any such statute will present the same difficulties in calculating the fee award amount. And judges are equally vacillating or reluctant to determine the method by which they will calculate attorney’s fee awards under other statutory schemes. These problems are a price society is willing to pay for encouraging suits to enforce civil
rights or environmental quality. But when a fee statute's purpose serves undesirable ends, the costs are too high.

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