SIMPLIFYING JOINT AND SEVERAL LIABILITY

By John Budlong

The apportionment of liability statute, RCW 4,22.070, is Washington's most important procedural statute for personal injury litigation. It also probably is the most complicated and confusing because it creates several liability in some situations, while preserving joint and several liability in others. This article seeks to dispel the confusion by showing when liability will be joint and several or several only.

HOW RCW 4.22.070 WORKS

RCW 4.22.070 requires the trier of fact to apportion a percentage of fault to every "entity" that caused the plaintiff's damages. `These entities may include the plaintiffs, defendants, third party defendants, and "empty chairs" who are unreachable because they cannot be identified or joined as defendants, are immune from liability, have been released, or have an individual defense, such as bankruptcy or the statute of limitations. "Empty chairs" are non-party entities against whom fault can be apportioned. but recovery cannot be obtained.

RCW 4.22.070 creates several liability, except in the four situations identified below in which joint and several liability continues to apply. Under several liability. each defendant is liable only for its own percentage share of fault in causing the plaintiffs injuries. A severally liable defendant is not liable for the shares of fault attributed to co-defendants or non-party entities.

Under joint and several liability, each defendant is jointly liable with all other defendants and entities who caused the plaintiffs harm. A jointly and severally liable defendant is liable for the entire amount of the plaintiff's damages, less any contributory fault by the plaintiff. Seattle-First at. Bank v. Shoreline Con etc Com an 91 Wn.2d 230,588 P.2d 1308 (1978); RCW 4.22.030.

THE FOUR JOINT AND SEVERAL SITUATIONS

Under RCW 4.22.070, joint and several liability exists in four situations:

1. Agency, master-servant and concerted action relationships § 1(a);

2. Plaintiff not at fault (as to defendants against whom judgment is entered) § 1(b);
3. Hazardous substances and tortious interference § 3(a) and (b);

4. "Non-entity" situations (when a particular tortfeasor is not legally "at fault" or does not qualify as an "entity" under RCW 4.22.070).

1. Agency, Employment and Concerted Action Relationships

Joint and several liability applies when a defendant's liability is based on agency principles, the master-servant relationship, or concerted action, regardless of whether or not the plaintiff is contributorily at fault. RCW 4.22.O7O(1)(a). The defendant will be liable for the fault of its agent, servant, or concerted actor, even if the agent, servant or concerted actor has an empty chair defense. For example, if an agent is bankrupt, its principal still is jointly and severally liable for its own share and the agent's share of the fault, whether or not the plaintiff is contributorily at fault.

2. Plaintiff Not at Fault

When a plaintiff is free of fault, joint and several liability applies as to the defendants not whom judgment me is entered. RCW 4.22.070(1)(b). If a fault-free plaintiff releases any defendant, the non-settling defendants who remain will no longer be jointly and severally liable for the released defendant's fault because no judgment will be entered against the released defendant. Similarly, if an at-fault entity is immune from liability or has an individual defense, the defendants against whom judgment is entered will not be jointly and severally liable for that entity's share of the fault because no judgment will have been entered against that entity. Gerrard v. Craig, 122 Wn.2d 288 (1993).

Assume, for example, that a plaintiff brings suit against three defendants. The jury finds that each defendant is 26% at fault and other non-party "entities" are 40% at fault, for a total of 100%. Each defendant is jointly and severally liable only for the combined shares of its fault and its co-defendants' fault (i.e. 60% of the plaintiffs total damages). If one defendant were judgment-proof, the plaintiff still could collect 60% of her damages from one or both of the solvent co-defendants.

Thus, even when the plaintiff is without fault, joint and several liability will not ensure full compensation unless all of the at fault entities are joined as defendants in the action. That is why even a fault-free plaintiff must join all potential at-fault entities as defendants in order to defeat the empty chair defense.

3. Hazardous Substances/Tortious Interference

Joint and several liability also applies in actions "relating to hazardous waste or substances or solid waste disposal sites" and in actions for tortious interference with contracts. RCW 4.22.070(3)(a) and (b). In Sofie v. Fibreboard Corporation, 112 Wn.2d 636, 668 (1989), the Supreme Court held that the "hazardous substances" exception was not limited to environmental litigation, but included toxic torts, specifically asbestos litigation. If the "hazardous substances" exception applies, defendants "are liable jointly and severally for the entire amount regardless of the possible relative fault between them and unnamed entities." Id. at 669. Under &Sofia joint and several liability may apply in personal injury and property damage litigation involving chemicals, pesticides, petroleum products, pharmaceuticals, contaminated food, and other substances deemed to be hazardous, Bird-Johnson Corp. v. Dana Corp., 119 Wn.2d 423 (1992); RCW 69.04.210; RCW 70.106.060.

4. "Nonentity" Situation

The "non-entity" situation is the most complicated and difficult to understand. It occurs in cases where the particular type of tortfeasor who injures the plaintiff either is not "at fault" or does not qualify as an "entity" under RCW 4.22.070, Examples of such`non-entities" may include intentional tortfeasors, the plaintiff's employer and fellow servants, phantom tortfeasors, parties outside the court's jurisdiction, incapacitated persons, architects, engineers and builders who are exempt from liability under the statute of repose, and another type of tortfeasor who is legally incapable of fault or lacks an individual defense to liability. Price v. Kitsap Transit 70 Wn. App. 748, 736 (1993).

Legal fault is defined in RCW 4.22.015 as follows:

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

In (Gerard v, CAI, 67 Wn. App. 394, 403, n. 9, d on other on Da.. 122 Wn.2d288 (1 993), the Court of Appeals held that this definition of fault applies in actions governed by RCW 4.22.070. Because of this definition, "fault" may not be apportioned against certain types of tortfeasors, even though they may be factually or legally responsible for causing the plaintiffs harm. Common "non-entity" situations include;

A. **Intentional tortfeasors.**

Tile Senate Select Committee on Tort and Product Liability Reform observed:

> Tile definition [[of "fault" in RCW 4.22-015] is intended to encompass all degrees of fault in tort actions short of intentionally caused harm. This would include negligence, gross negligence, recklessness, willful and wanton misconduct and strict liability. . .[1]
> [Emphasis supplied].

In Schmidt v. Cornerstone Investments, Iii Wn.2d 148, 162 (1990), the Supreme Court confirmed "the Legislature's intent to exclude intentional conduct from the definition of fault." Thus, defendants in a personal injury action arising out of an intentional tort cannot apportion fault against the intentional tortfeasor even though the intentional tortfeasor Is factually and legally responsible for the plaintiff's harm. Therefore, defendants who are legally responsible for controlling intentional tortfeasors or protecting their victims cannot diminish their own liability by treating assailants, rapists, molesters and other criminals as"empty chairs." RCW 4.22.070 also prevents allocation of fault to persons whose fraud, conspiracy, embezzlement or other intentional torts or crimes contributed to the claimant's harm.

A. Employers and fellow servants.

The 1993 amendment to RCW 4.22.070 provides that employers and fellow servants with a worker's compensation immunity are not "at fault" for purposes of RCW 4.22.070. Before the 1993 amendment, a defendant could reduce its own liability and diminish the plaintiff's recovery by attributing fault to the plaintiff's employer or fellow servant. Tile plaintiff could not recover any damages apportioned against her employer or fellow servant because RCW 31 precludes joining either as a defendant in the action. Under the 1993 amendment, however, a defendant cannot apportion fault against the plaintiff's employer or fellow servant. Moreover, the 100% liability rule discussed below prevents defendants from using a plaintiff's employer or fellow servant as an empty chair.

---

[1]Senate Journal, 47th Legislature (1981), at 635.

A. **Entities without fault as a matter of law: incapacitated persons, architects, builders and engineers?**

Fault cannot be apportioned against incapacitated parties, such as children under six years of age. In Price v. Kitsap Transit, 70 Wn. App. at 736, the Court of Appeals held:

> In our judgment, a child under six years of age, who is legally incapable of negligence is also incapable of being at "fault" as that term is used in RCW 422 et ...
>
> Entities legally incapable of negligence are incapable of contributing in terms of legal causation and cannot be at "fault."

It is unclear if fault can be apportioned against architects, engineers and builders who are exempt from liability under the six year statute of repose, RCW 4.16.310. In Jones v. Weyerhaeuser Coin an 48 Wn. App. 894, 741 P.2d 73 (1987), the court held that claims against builders accruing more than six years after substantial completion of construction are abrogated by RCW 4.16.310. The court distinguished between statutes of abrogation and statutes of limitations on grounds that the former extinguish fault while the latter merely provide a personal defense to liability.

The statute of repose clearly does not provide an "individual defense." Yet it remains uncertain if this statute extinguishes fault or merely provides an immunity for purposes of RCW 4.22.010. If it extinguishes fault, architects, engineers and builders will be treated as "non-entities" against whom fault may not be apportioned. If it provides an immunity, however, they will be treated as "empty chairs" against whom fault can be apportioned, but no recovery can be obtained.

A. **Entities without an "individual defense".**

It is uncertain who qualifies as an entity with an "individual defense" under RCW 4.22.070. In Kashino v. Cornerstone e Hos Hospitality and management t Inc., King County Superior Court Cause No. 88-2-21311-9, the trial court refused to assign a percentage of fault to an unknown hit and run driver. The unidentified "wrongdoer was not included as an "entity" against whom fault could be apportioned because escape is not an individual defense to liability.

To the author's knowledge, Washington courts have not yet decided whether the same reasoning would apply to a party over whom the court lacked personal jurisdiction. This result would seem to depend on whether an "Individual defense" means a defense on the merits, or merely an ability to avoid being joined as a defendant in the particular action. In Gerard v. CAI 122 Wn.2d 288 (1993), the Supreme Court held that a defendant who had been named in the action but not served with process qualified as an entity with an individual"" defense. However, the decision appears to rest primarily on grounds that the statute of limitations -- clearly an individual defense -- had run against that defendant, not on insufficient service of process.

THE 100% LIABILITY RULE

Liability in "non-entity" situations also has been affected by the 1993 amendment to RCW 4.22.070, which provides that "the sum of the percentages of tho total fault attributable to at-fault entities shall equal 100%." This 100% liability rule ensures that allow the fault will be allocated to at-fault entities and that no fault can be allocated against"non-entities."

For example, assume that a five-year old child who is incapable of fault under the tender-years doctrine, pulls an emergency stop lever on a bus and causes an innocent passenger to fall and be injured. Both the bus driver and the child's father are found to be slightly at fault for failing to supervise the child. In this situation, both the bus company and the child's father will be jointly and severally liable for 100% of the plaintiffs damages because neither defendant can diminish its own liability by apportioning fault to the child, even though the child was primarily responsible for causing the plaintiffs injuries.

RCW 4.22.030 provides:

> Except as otherwise provided in RCW 4-22.070, if more than one person is liable to a claimant on an indivisible claim for the same injury, death or harm, the liability of such persons shall be joint and several.

Thus, RCW 4.22.030 preserves common law joint and several liability except in the specific cases where RCW 4.22.070 provides for several liability. RCW 4.22.030 thus contemplates that defendants who are "at-fault" as defined in RCW 4.22.015 and .070 jointly and severally liable with other tortfeasors and "non-entities" who are not "at-fault" for apportionment purposes, but whose actions have nevertheless caused the plaintiff's indivisible injury, death or harm. RCW 4.22.030 and the "100% liability rule" in RCW 4.22.070 appear to have the following implications for joint and several liability in "non-entity" situations:

If the plaintiff is free of fault as in the example of the bus passenger above, each defendant will be jointly and severally liable for its own fault, the fault of co-defendants, and the liability of "non-entities." RCW 4.22.010(1)(b). If the plaintiff is contributorily at fault, the defendants will be severally liable for their respective fault shares, but will be jointly and severally liable for the non-entities' liability.

STRATEGIC CONSIDERATIONS

If all of the potential at-fault entities are solvent and are joined as defendants, the plaintiff has a greater likelihood of obtaining a full recovery. In this situation, there will he no empty chairs against whom fault can be apportioned, but recovery cannot be obtained. Often, however, one or more of the at-fault entities will be insolvent, immune from liability, have an individual defense, or be incapable of being joined in the action. To the extent a defendant succeeds in allocating fault to empty chairs, the plaintiff will be denied full compensation. A defendant thus has a financial Incentive to increase the proportionate fault of the empty chairs because that tends to reduce the defendants' own proportionate share.

In multi-defendant litigation, the plaintiff often is in a position to influence whether liability will be joint and several or several only and whether an empty chair defense will be available to the defendants. For example, if a plaintiff does not join all of the at-fault entities as defendants in the action, she assumes the risk that these un-named entities will be treated as empty chairs, even if the plaintiff herself is free

of fault. (As of this writing, the Washington Supreme Court has not yet decided whether the plaintiff or the defendant has the burden of joining non-party entities as a condition of avoiding or asserting the empty chair defense).

Similarly, whenever a plaintiff settles with one defendant, the remaining defendants no longer can he held jointly and severally liable for the settling defendant's share of the fault. This creates opportunities for a recovery in excess of the ultimate jury award, but also a risk of under compensation. If the plaintiff settles with certain defendants for more than their percentage share of the total fault, then the plaintiff will profit through an excess recovery. On the other hand, if the plaintiff miscalculates and settles with some defendants for less than their percentage share of the total fault, the plaintiff will recover less than the jury's total damages award. Whether or not the plaintiff will profit or lose from a partial settlement depends on whether or not the plaintiffs lawyer correctly estimates the various defendants' relative fault. r v. Be ui ent Co., 120 Wn.2d 246, 290-99, 840 P.2d 860 (1992).

RCW 4.22.070 is especially important when one or more defendants are insured, but the other defendants or at-fault entities are uninsured or have insufficient coverage. If joint and several liability applies, the plaintiff can be fully compensated because the insured defendants will be subject to liability for the fault of the uninsured defendants or entities. If liability is several only, however, the plaintiff will not be fully compensated because each insured defendant will be liable only for its own percentage share of the fault.