

Supreme Court of the State of Washington

Opinion Information Sheet

Docket Number: 71811-3
Title of Case: Maria Tegman, et Al. V Accident & Medical
Investigations, Inc., et Al.
File Date: 08/28/2003
Oral Argument Date: 05/26/2002

SOURCE OF APPEAL

Appeal from Superior Court,
County

JUSTICES

Authored by Barbara A. Madsen
Concurring: Bobbe J Bridge
Charles Z Smith
Gerry L Alexander
Susan Owens
Dissenting: Faith Ireland
Charles W. Johnson
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MARIA TEGMAN, LINDA LESZYNSKI and
DIANA CALIXTO,

Respondents,

ACCIDENT & MEDICAL
INVESTIGATIONS, INC., a Washington
corporation, RICHARD McCLELLAN and
JANE DOE McCLELLAN, individually and
as husband and wife, and the marital
community composed thereof; JOY A.
BROWN and JOHN DOE BROWN,
individually and as wife and husband, and
the marital community composed thereof;
MICHAEL D. HOYT and JANE DOE HOYT,
individually and as husband and wife, and the
marital community composed thereof;
JAMES P. BAILEY and JANE DOE BAILEY,
individually and as husband and wife, and the
marital community composed thereof;
CAMILLE H. JESCAVAGE and JOHN DOE
JESCAVAGE, individually and as husband
and wife, and the marital community
composed thereof,

Defendants,

DELORES M. MULLEN and JOHN DOE
MULLEN, individually and as wife and
husband, and the marital community composed
thereof; LORINDA S. NOBLE and JOHN
DOE NOBLE, individually and as wife and
husband, and the marital community thereof,

Petitioners.

) No. 71811-3

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MADSEN, J. -- The issue we decide is whether negligent defendants are jointly and severally liable for damages resulting from both negligent and intentional acts. We hold that under RCW 4.22.070 the damages resulting from negligence must be segregated from those resulting from intentional acts, and the negligent defendants are jointly and severally liable only for the damages resulting from their negligence. They are not jointly and severally liable for damages caused by intentional acts of others. We reverse the Court of Appeals and remand for segregation of damages and redetermination of petitioner Lorinda Noble's liability.

FACTS

On April 26, 1989, plaintiff-respondent Maria Tegman sustained injuries in an automobile accident. She retained G. Richard McClellan and Accident and Medical Investigations, Inc. (AMI) for legal counsel and assistance in handling her personal injury claims. She signed a contingency fee agreement with AMI, believing that McClellan was a licensed attorney. McClellan has never been an attorney in any jurisdiction.

During their representation of Tegland, McClellan and AMI advanced funds for her therapy. Settlement offers were submitted on her behalf,

although she only learned of these after the fact.

McClellan and AMI employed Camille Jescavage and Lorinda Noble, both licensed attorneys. McClellan entered into contingency fee agreements with AMI's clients and processed settlements of AMI cases through his own bank account rather than a legal trust account. Jescavage and Noble knew this, and knew that when they settled cases for AMI, the proceeds were placed into McClellan's account. Both attorneys also knew that McClellan was not a licensed attorney.

Noble resigned her position in May 1991, after being employed approximately six months. During her employment, she also represented Ms. Tegman in connection with her personal injury claim. She never advised Tegman that McClellan engaged in the unauthorized practice of law, that McClellan had taken her files, that settlements were processed through his personal account and not an attorney's trust account, that clients were not being properly advised of the status of their cases, and that fees were being shared with nonlawyers.

In July 1991, McClellan hired Delores Mullen as a paralegal. She quit working for McClellan and AMI in December 1991. During her period of employment, Mullen considered Jescavage to be her supervising attorney, while Jescavage worked for AMI, although Jescavage did little supervision. After Jescavage left in September 1991, McClellan advised Mullen to consider James Bailey, another attorney, as her supervising attorney. She did not confirm that Bailey was her supervising attorney, but continued to perform legal services for AMI clients while aware of some of McClellan's questionable practices and knowing of substantial improprieties. Bailey later advised her that he was not her supervising attorney. Mullen worked on 50 to 60 cases, including Tegman's. When she left, she did not advise Tegman of McClellan's and AMI's improper practices.

In December 1991, McClellan settled Tegman's case without her knowledge or consent, forged her signature, and placed the \$35,000 settlement funds into his general bank account. Later he obtained a 'Srelease' from her, and sent her a check for what he determined was the balance of her share of the settlement proceeds.

In 1993, Tegman and two other individuals who had retained McClellan and AMI to represent them in pursuing personal injury claims sued McClellan, AMI, Mullen, and Jescavage. Tegman also sued Noble. The plaintiffs sought damages on numerous grounds. Their cases were consolidated, and discovery occurred from 1993 to 1998.¹ The trial court entered summary judgment against McClellan and AMI on the issue of liability for 'negligence, the unauthorized practice of law, legal malpractice, breach of fiduciary relationship, fraud, misrepresentation, conversion, breach of contract, violation of the Consumer Protection Act {chapter 19.86 RCW}, and criminal profiteering.' Clerk's Papers (CP) (conclusion of law 179) at 776. Following a six-day bench trial, the court held Mullen, Noble, and Jescavage liable for negligence and legal malpractice in Tegman's case, held that Tegman herself was not at fault, and awarded damages.

Noble appealed.² She argued, among other things, that the trial court erred in holding her jointly and severally liable to Tegman for compensatory damages in the amount of \$15,067.25 (the amount representing compensatory damages after deducting amounts Tegman had already received). She maintained the trial court erroneously imposed joint and several liability for both negligent and intentional torts, rather than imposing joint and several liability only as to the negligent torts. The Court of Appeals affirmed, reasoning that the trial court had in fact held Noble, Jescavage, and Mullen jointly and severally liable only for the actual damages caused by their negligence. Tegman v. Accident & Med.

Investigations, Inc., 107 Wn. App. 868, 883, 30 P.3d 8 (2001), review granted, 145 Wn.2d 1034 (2002). The Court of Appeals said the trial court treated the action against McClellan and AMI as functionally separate from the action against Noble, Jescavage and Mullen. Id.

This court granted Noble's petition for review on the issue of joint and several liability. She maintains that the actual compensatory damages due to intentional torts must be segregated, and that under RCW 4.22.070(1)(b) she is jointly and severally liable only for the remainder, i.e., that portion of the damages resulting from negligent acts.

ANALYSIS

In 1986, the legislature enacted the tort reform act of 1986, declaring its purpose to 'enact further reforms in order to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance.' Laws of 1986, ch. 305, sec. 100. The legislature specifically noted the escalating costs to governmental entities through increased exposure to lawsuits, awards, and increased costs of insurance coverage, as well as increases in costs in professional liability insurance for physicians and other health care providers, and other professionals. The legislature stated its intent 'to reduce costs associated with the tort system, while assuring that adequate and appropriate compensation for persons injured through the fault of others is available.' Id.3 The act furthered reforms, which began with adoption of comparative negligence in 1973, by abolishing joint and several liability in most situations. *Kottler v. State*, 136 Wn.2d 437, 443, 963 P.2d 834 (1998).

RCW 4.22.070, enacted as part of the tort reform act of 1986, is 'the centerpiece of the 1986 amendatory package.' *Kottler*, 136 Wn.2d at 443; accord *Morgan v. Johnson*, 137 Wn.2d 887, 895, 976 P.2d 619 (1999). As we have consistently recognized, RCW 4.22.070 provides that several, or proportionate, liability is now intended to be the general rule.4 *Kottler*, 136 Wn.2d at 444-45; *Welch v. Southland Corp.*, 134 Wn.2d 629, 633, 952 P.2d 162 (1998); *Anderson v. City of Seattle*, 123 Wn.2d 847, 850, 873 P.2d 489 (1994); *Gerrard v. Craig*, 122 Wn.2d 288, 292, 857 P.2d 1033 (1993); *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 294 n.7, 840 P.2d 860 (1992) ('{w}hile RCW 4.22.030 suggests that RCW 4.22.070 is an exception to a general rule, RCW 4.22.070 is in fact an exception that has all but swallowed the general rule'); id. at n.7.

RCW 4.22.070(1) states that '{i}n all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages' (Emphasis added.) 'Fault,' under chapter 4.22 RCW, does not include intentional acts or omissions. RCW 4.22.015 defines 'fault' to include 'acts or omissions, including misuse of a product, that are in any measure negligent or reckless . . . or that subject a person to strict tort liability or liability on a product liability claim.'

This court has concluded that 'intentional torts are part of a wholly different legal realm and are inapposite to the determination of fault pursuant to RCW 4.22.070(1).' *Price v. Kitsap Transit*, 125 Wn.2d 456, 464, 886 P.2d 556 (1994); see *Morgan*, 137 Wn.2d at 894-96; *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 162, 795 P.2d 1143 (1990) ('the Legislature's intent to exclude intentional conduct from the definition of fault is clear'). In *Welch*, this court held that in light of the statutory definition of 'fault,' a defendant who was not an intentional actor could not apportion liability to a third party intentional tortfeasor under RCW 4.22.070. *Welch*, 134 Wn.2d 629. In short, this court has consistently recognized that liability for intentional acts or omissions does not fall within RCW 4.22.070(1), because no 'fault,' as defined under RCW 4.22.015,

is involved. See also *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 246, 23 P.3d 520 ('{b}ecause the statutory definition of 'fault' does not include 'intentional acts or omissions{,}' RCW 4.22.070 does not apply to intentional torts' (quoting *Welch*, 134 Wn.2d at 634)), review denied, 145 Wn.2d 1008 (2001).5

This case presents the situation where both negligent and intentional acts caused the plaintiff's harm, and requires us to determine the nature of a negligent defendant's liability in these circumstances, and specifically, whether that defendant is jointly and severally liable for damages caused both by that negligence and the intentional acts of other defendants. The answer is found in RCW 4.22.070(1), which addresses liability of at-fault entities and which, as explained, does not encompass intentional acts or omissions.

Unfortunately, the dissent largely focuses on a different issue, i.e., the liability of the intentional tortfeasor. The dissent's focus draws attention from the legislature's plain intent that liability for negligence is determined under new principles set out in RCW 4.22.070. The legislature effected sweeping changes in the law respecting negligent defendants' liability, despite the dissent's claim to the contrary. See dissent at 2.

The first sentence of RCW 4.22.070 restricts application of the statute to questions of liability where at-fault entities are involved, and provides that 'the trier of fact shall determine the percentage of the total fault which is attributable to every entity' causing plaintiff's damages. RCW 4.22.070(1) (emphasis added). Intentional acts are not considered and this determination of 'fault' percentages is thus limited to acts that are negligent, reckless, or that subject the actor to strict liability. The next sentence of RCW 4.22.070(1) states that '{t}he sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent.' (Emphasis added.) Only at-fault entities' percentages of fault are determined, and the total of at-fault entities' percentages of fault must equal 100 percent. Importantly, the statute does not speak of a total representing 100 percent of liability, but, rather, a total representing 100 percent of fault. This only makes sense in that the statute is concerned with fault-based conduct and excludes intentional acts or omissions.

The third sentence states which entities' fault shall be determined, and includes the claimant, defendants, third party defendants, and entities who have been released, those who have individual defenses against the claimant, and those who are immune (other than under Title 51 RCW). The fourth sentence states that judgment shall be entered against each defendant in an amount representing that entity's proportionate share except for those who have been released or who are immune, and those who prevailed on any other individual defense.

RCW 4.22.070(1) then states that '{t}he liability of each defendant shall be several only and shall not be joint' This part of the statute is the crux of the reform that RCW 4.22.070 carries out, dictating the rule of several or proportionate liability. There are exceptions to this general rule. The one relevant here is RCW 4.22.070(1)(b), which provides that '{i}f the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimant's total damages.' (Emphasis added.)

This exception plainly concerns how to apportion liability among at-fault defendants where the plaintiff is fault-free. That is, the only joint and several liability contemplated by this exception is that shared

by the at-fault defendants. This is clear because the exception mandates joint liability for the 'sum' of the defendants' 'proportionate shares' of the total damages. This language reflects the earlier language in RCW 4.22.070(1). As noted, the first sentence of RCW 4.22.070(1) requires a determination of the 'percentage{s} of the total fault which is attributable to every entity' responsible for plaintiff's damages, i.e., a determination of proportionate liability of each at-fault entity. The second sentence provides that '{t}he sum of the percentages of the total fault' must be 100 percent. *Id.* (emphasis added). The fourth sentence mandates entry of judgment against each defendant in 'an amount which represents that party's proportionate share of the claimant's total damages.' *Id.* (emphasis added). However, percentages of total fault determined under subsection (1) are determined without regard to intentional acts or omissions, as explained, and as held in *Welch* and dictated by the statutory definition of 'fault' in RCW 4.22.015. See also *Price*, 125 Wn.2d at 464.

It is apparent that by using the same terms in RCW 4.22.070(1)(b) as used earlier in subsection (1), the legislature intended that the joint and several liability provided for in RCW 4.22.070(1)(b) is limited to the at-fault defendants whose proportionate fault has been determined under subsection (1). See *Welch*, 134 Wn.2d at 636 (when similar words are used in different parts of a statute, it is presumed the same meaning is intended throughout the statute); *Medcalf v. Dep't of Licensing*, 133 Wn.2d 290, 300-01, 944 P.2d 1014 (1997) (the legislature's use of the same word or words in different parts of the same statute gives rise to a presumption they are intended to have the same meaning). Therefore, RCW 4.22.070(1)(b) does not concern any liability for damages caused by intentional acts or omissions and, therefore, does not address joint and several liability for intentional acts or omissions.

Even as to fault-based damages where there is a fault-free plaintiff, RCW 4.22.070(1)(b) does not set forth a rule of full joint and several liability as known at common law. As this court has on several occasions noted, full joint and several liability does not exist where there is an 'innocent' or fault-free plaintiff. Instead, the statute states a modified form of joint and several liability. *Kottler*, 136 Wn.2d at 446-47; *Washburn*, 120 Wn.2d at 294 ('the form of joint and several liability which exists where there is a fault-free plaintiff is not, under RCW 4.22.070, the same as the joint and several liability which existed prior to the tort reform act of 1986'). Joint and several liability under RCW 4.22.070(1)(b) is limited to the sum of the proportionate shares of the at-fault defendants, a distinction also noted in *Washburn*, 120 Wn.2d at 294, and *Kottler*, 136 Wn.2d at 446. Another difference from the common law principle is that joint and several liability under 4.22.070(1)(b) only applies as to defendants against whom judgment is entered. *Allstate Ins. Co. v. Batacan*, 139 Wn.2d 443, 449, 986 P.2d 823 (1999); *Anderson*, 123 Wn.2d at 851; *Washburn*, 120 Wn.2d at 294. As RCW 4.22.070 expressly provides, the proportionate shares of released parties, those with individual defenses, and immune parties⁶ are not included and will not be part of the joint and several liability calculation. By excluding these shares from the joint and several liability calculation, and omitting any consideration of intentional acts or omissions, the legislature has plainly shown that RCW 4.22.070(1)(b) does not mandate full joint and several liability, as at common law, even in the case of a fault-free plaintiff.⁷ The dissent is accordingly mistaken when it claims that the Legislature 'preserved joint and several liability' for fault-free plaintiffs in 'accord with the status quo.' *Dissent* at 15.

Thus, RCW 4.22.070 provides that in actions involving a fault-free

plaintiff and damages caused by both at-fault entities and intentional tortfeasors, the at-fault defendants are jointly and severally liable for the sum of their proportionate shares of the claimant's total damages. That is, negligent defendants are jointly and severally liable only for that part of the total damages that they negligently caused. The at-fault defendants are not jointly and severally liable under RCW 4.22.070(1)(b) for any damages resulting from intentional acts or omissions.

Nor are the negligent defendants jointly and severally liable under RCW 4.22.030 for any such damages because their liability clearly is determined under RCW 4.22.070. See RCW 4.22.030 ('{e}xcept 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' (emphasis added)).⁸

The dissent also mistakenly includes intentional tortfeasors within those whose liability is determined under RCW 4.22.070(1)(b), and claims that we have inserted the words 'fault-based' into this provision in order to preclude joint and several liability of negligent defendants for intentionally caused damages. Dissent at 15. There is no need to add any language to reach the result we reach. The language the legislature itself has used makes it clear that RCW 4.22.070(1)(b) pertains to fault-based damages and at-fault defendants. By attempting to deflect attention from the actual language used, the dissent avoids the critical language of RCW 4.22.070, which lies at the very heart of this case. No matter what policies the dissent wishes the legislature had codified or continued, the central question in this case is answered by RCW 4.22.070(1) and (1)(b). While the dissent obviously does not like the answer, it is not up to this court to rewrite the statute nor to construe it free of the legislature's plainly expressed meaning. Contrary to the dissent's theme, the statute effects a number of changes; joint and several liability is not what it used to be.

All of the defendants in this case are jointly and severally liable, but not for the same damages. The damages due to intentional acts must be segregated from damages caused by fault-based acts or omissions because RCW 4.22.070(1)(b) only addresses liability for at-fault entities. The liability of intentional tortfeasors for damages caused by their intentional acts or omissions is not determined under RCW 4.22.070(1). Once the damages due to intentional acts or omissions are segregated, then, as to all remaining damages, i.e., those damages resulting from fault-based acts or omissions, all the negligent defendants causing those damages are jointly and severally liable.

The dissent believes, however, that under our decision negligent defendants are improperly allowed to apportion liability to the intentional tortfeasor, contrary to this court's decision in *Welch*. Under RCW 4.22.070, and our decision here, intentional tortfeasors are not entitled to the benefit of proportionate liability; the negligent defendant is not permitted to apportion fault to an intentional tortfeasor. This is in accord with *Welch*. There, the trial court had reasoned that "where the plaintiff, a negligent tortfeasor defendant, and an intentional tortfeasor are all liable, the negligent defendant is entitled to the benefit of the comparative fault statute," and that "unidentified tortfeasors are entities that a jury may attribute fault to under RCW 4.22.070." *Welch*, 134 Wn.2d at 631 (quoting clerk's papers). This court determined that under RCW 4.22.070(1) fault cannot be apportioned to intentional tortfeasors, stating that if "fault is to be apportioned to intentional tortfeasors, it is for the Legislature to make such a determination." *Welch*, 134 Wn.2d at 637. Here, it is clear that no fault is apportioned to the intentional tortfeasor, exactly as RCW 4.22.070 requires and *Welch*

holds.

Segregating fault-based damages from those caused by intentional acts or omissions should pose no great difficulty because similar allocations are already part of the statutory scheme. When this State's legislature rejected the absolute bar of contributory negligence to recovery by negligent plaintiffs and adopted comparative negligence principles, Laws of 1973, 1st Ex. Sess., ch. 138, sec. 1, the 'premise that wrongs were inherently indivisible or that responsibility could not rationally be apportioned among multiple parties fell into disfavor.' Gregory C. Sisk, *The Constitutional Validity of the Modification of Joint and Several Liability in the Washington Tort Reform Act of 1986*, 13 U. Puget Sound L. Rev. 433, 437 (1990).

Through the adoption of comparative fault, the Washington State Legislature rejected the 'tortured analysis' that 'harm which is indivisible leaves no logical basis for apportionment.' The unitary nature of the harm and the assignment of responsibility are two separate matters. When multiple proximate causes have been determined for a single injury, the trier of fact still must determine and apportion the responsibility based upon the varying degrees of culpability and causation among the actors. As commentators have explained: 'It does not follow that simply because the harm is indivisible that there is no basis for apportionment. It is the responsibility for causing the harm which should be the focus of the inquiry.' Initially through the adoption of comparative negligence between plaintiffs and defendants that have concurrently caused the harm, and subsequently through the enactment of RCW 4.22.070 to govern the accountability among multiple tortfeasors contributing to a single injury, Washington has adopted comparative fault as the touchstone for apportionment of responsibility in damages.

Gregory C. Sisk, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, 16 U. Puget Sound L. Rev. 1, 41 (1992) (footnotes and emphasis omitted). Under comparative fault principles, the trier of fact must allocate fault between a negligent plaintiff and a negligent defendant. RCW 4.22.005. Similarly, under RCW 4.22.070(1), where the damages result from both intentional acts and omissions and 'fault,' i.e., negligence, recklessness, and conduct subjecting the actor to strict liability, the damages resulting from the intentional acts and omissions must be segregated from damages that are fault-based.

The dissent protests that the required segregation will be baffling. Dissent at 1. Segregating damages in cases of 'indivisible' harm has been a part of this State's law since adoption of comparative negligence. The dissent also complains that it is unprecedented for a trier of fact to both segregate intentionally caused damages and apportion fault among negligent defendants for the remaining damages. Both of these actions are appropriate in a case like this one where there are multiple defendants and both intentional and negligent acts have caused harm. There is no particular mystery involved, nor any duplicative calculations. Whether segregation is required in other states is irrelevant unless they have statutes like ours. Neither the parties nor the dissent has identified any such statutes (state statutes vary considerably in this area), and research has failed to disclose any. Lack of precedent is hardly a bar to carrying out the legislature's statutory directives.

Among the multiple defendants in this case, McClellan and AMI are the two defendants whose intentional acts caused harm to plaintiff Tegman. The trial court's conclusion of law 179 states, however, that McClellan and AMI are liable to Tegman in the amount of \$15,067.25 for engaging in

negligence, the unauthorized practice of law, and legal malpractice, among other things. The court explained in its memorandum decision that 'McClellan and AMI are liable to {Tegman in the amount of \$15,067.25} for engaging in negligence, legal malpractice . . . breach of contract, violation of the Consumer Protection Act, criminal profiteering and leading organized crime.' CP at 805. The judgment in the amount of \$15,067.25 thus includes compensatory damages for harm caused by McClellan's and AMI's negligence and by their intentional acts or omissions. The trial court said that Noble, Jescavage, and Mullen were liable to Tegman for negligence and legal malpractice.

McClellan and AMI each 'wear two hats' as both intentional and negligent actors and the total compensatory damages caused by them and the other defendants, \$15,067.25, includes both intentional and fault-based damages. The trial court concluded that McClellan and AMI were 75 percent responsible for the compensatory damages in Tegman's case. However, this percentage cannot be used to establish these entities' share of proportionate fault for nonintentional acts or omissions under RCW 4.22.070. This is because the 75 percent represents both intentionally caused and negligently caused harm, as explained. Accordingly, some of the \$15,067.25 is attributable to intentional acts or omissions and must be segregated. Liability for the balance, after separating out that part due to McClellan's and AMI's intentional acts or omissions, is determined under RCW 4.22.070 because the balance is attributable to fault-based conduct, and, as to that amount, all of the defendants are jointly and severally liable for the sum of their proportionate shares. Stated another way, all of the defendants whose fault contributed to Tegman's damages, including McClellan and AMI to the extent of their fault (nonintentional acts or omissions), are jointly and severally liable for those fault-based damages. McClellan and AMI are also liable for the intentionally caused damages, but the other defendants are not jointly and severally liable for the intentionally caused damages.

The plaintiff may obtain recovery from the liable defendants, both intentional and negligent tortfeasors. That the full recovery for all damages may not be claimed against a negligent defendant for all negligent and intentional acts reflects the legislative intent set out in RCW 4.22.070. The legislative scheme also serves to provide some relief to negligent defendants whose conduct is not as egregious as the intentional tortfeasor, nor the cause of the intentionally based damages. This serves purposes of the tort reform act to achieve 'a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance.' Laws of 1986, ch. 305, sec. 100. Specifically, where negligent defendants' liability is for their negligent acts, but not intentional acts, this will tend to reduce costs due to increased exposure to awards, increased costs of insurance coverage and increased costs of professional liability insurance, as designed by the legislature. See *id.*

The risks that any one or more of the defendants may be insolvent, and the possibility of less than a complete recovery, is no different from the risk that the plaintiff bears when only one defendant caused the plaintiff's harm.

CONCLUSION

Noble is jointly and severally liable only for those damages caused by 'fault' of the defendants, and to this extent she is jointly and severally liable with all the defendants. She is not, however, liable for damages that result from intentional acts or omissions. We remand for segregation of that part of the damages due to intentional conduct from those damages due to negligence.

1 In 1997, in federal district court McClellan pleaded guilty to mail fraud and was sentenced to two years' imprisonment.

2 Mullen also appealed; however, her petition for discretionary review by this court was denied. No further reference to her case is necessary.

3 Laws of 1986, ch. 305, sec. 100 states in full:

'Tort law in this state has generally been developed by the courts on a case-by-case basis. While this process has resulted in some significant changes in the law, including amelioration of the harshness of many common law doctrines, the legislature has periodically intervened in order to bring about needed reforms. The purpose of this chapter is to enact further reforms in order to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance.

'The legislature finds that counties, cities, and other governmental entities are faced with increased exposure to lawsuits and awards and dramatic increases in the cost of insurance coverage. These escalating costs ultimately affect the public through higher taxes, loss of essential services, and loss of the protection provided by adequate insurance. In order to improve the availability and affordability of quality governmental services, comprehensive reform is necessary.

'The legislature also finds comparable cost increases in professional liability insurance. Escalating malpractice insurance premiums discourage physicians and other health care providers from initiating or continuing their practice or offering needed services to the public and contribute to the rising costs of consumer health care. Other professionals, such as architects and engineers, face similar difficult choices, financial instability, and unlimited risk in providing services to the public.

'The legislature also finds that general liability insurance is becoming unavailable or unaffordable to many businesses, individuals, and nonprofit organizations in amounts sufficient to cover potential losses. High premiums have discouraged socially and economically desirable activities and encourage many to go without adequate insurance coverage.

'Therefore, it is the intent of the legislature to reduce costs associated with the tort system, while assuring that adequate and appropriate compensation for persons injured through the fault of others is available.'

4 'Under proportionate liability a negligent party is liable for his {or her} own proportionate share of fault and no more.' Kottler v. State, 136 Wn.2d 437, 445, 963 P.2d 834 (1998) (quoting Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 294, 840 P.2d 860 (1992)). RCW 4.22.070 refers to 'several' liability as being the same as 'proportionate share' liability. This is, as we have previously noted, technically incorrect, but there is no doubt that the legislature created a scheme of proportionate liability. Kottler, 136 Wn.2d at 836 n.7.

5 Our conclusion that RCW 4.22.070(1) does not include intentional acts accords with comments on the statute in the final report of the Senate Select Committee on Tort and Product Reform: 'The definition 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 Senate Journal, 47th Leg., Reg. Sess., at 635 (Wash. 1981).

Commentators report that Washington is 1 of 25 jurisdictions that do not permit the comparison of intentional and negligent conduct. Christopher M. Brown & Kirk A. Morgan, Comment, Consideration of Intentional Torts in Fault Allocation: Disarming the Duty to Protect

Against Intentional Conduct, 2 Wyo. L. Rev. 483, 502 (2002).

6 As indicated, RCW 4.22.070 provides that there is to be no determination of percentage of total fault attributable to entities immune from liability under Title 51 RCW.

7 It is apparent, under the express terms of RCW 4.22.070(1)(b), that a fault-free plaintiff might not obtain a 'full recovery,' i.e., one that 'makes plaintiff whole.'

8 The omission of determinations of liability for intentional acts or omissions under RCW 4.22.070(1)(b) is not the only instance where intentional tortfeasors are treated differently for purposes of tort liability. This court in *Morgan v. Johnson*, 137 Wn.2d 887, 976 P.2d 619 (1999) concluded that comparative fault is, as a general proposition, inapplicable in the context of an intentional tort given the definition of 'fault' in RCW 4.22.015; specifically, the court held that the complete defense established in RCW 5.40.060, which may be asserted if plaintiff was intoxicated at the time of plaintiff's injuries or death, and was more than 50 percent at fault, is unavailable in intentional tort actions. See also *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 831, 959 P.2d 651 (1998) (the uniform comparative fault statute, RCW 4.22.005, does not include intentionally caused harm).

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