

CHAPTER THREE – TORTS

Torts, and in particular, tort damages, are the cause of much concern and disagreement in the public arena. In July 2000, for instance, a jury in Florida awarded citizens with smoking-related diseases \$145 billion in punitive damages.¹ The plaintiffs argued that the judgment was a just settlement for years of deception against the public by the tobacco companies. The defendants argued it was grossly excessive and would not stand. “Because the long, multistage trial has involved many unusual legal procedures - and because so many other courts have refused to grant class-action status to sick smokers - industry lawyers believe the decision will be overturned quickly on appeal.”²

A similar disagreement arose in a case closer to home in the Pacific Northwest, the Exxon Valdez oil spill. In March 1989, Joseph Hazelwood skippered the tanker into a reef in Alaska’s Prince William Sound, discharging 11 million gallons of oil that devastated the environment there. An Anchorage jury found Hazelwood personally negligent and ordered him to do 1,000 hours of community service. At the same time, Exxon paid out \$3.5 billion in clean-up costs for the area and settlements with local fishermen and communities. Still at issue in the Ninth Circuit Court of Appeals, however, is the \$5 billion punitive damage award, which Exxon claims is excessive and uncalled for.³ However, the U.S. Supreme Court, as its first piece of business for the 2000-2001 term, denied Exxon’s petition for review.

Fen-phen, the diet supplement that caused heart failure, is another example of a national issue with substantial tort damages. The maker of fen-phen recently settled with its claimants out of court.⁴

Washington law does not allow for punitive damages in civil cases. This makes it a less attractive venue for major tort damage litigation.

P. 189—Time delays from filing to trying a civil case

“The criminal justice system consumes some 70 percent of a county budget,” according to remarks made by Washington Supreme Court Chief Justice Richard Guy in the Morning News Tribune in Tacoma, WA.⁵ “Without change, our public court system will no longer be a place to resolve civil matters. Currently, those who can afford to use the ever-growing private arbitration and mediation services to settle civil disputes do so. ... [However], a system of elite justice is the result.”⁶

¹ Mark Kaufman, \$145 Billion Awarded to Florida Smokers, SEATTLE TIMES, July 15, 2000.

² Id.

³ Ross Anderson, Exxon Argues \$5 Billion Judgment for Spill is ‘Piling On’, SEATTLE TIMES, May 4, 1999.

⁴ Jennifer Brown, Federal Judge Approves Fen-phen Settlement, SEATTLE TIMES, August 29, 2000.

⁵ Richard Guy, Justice Denied in Washington’s Clogged Courts, MORNING NEWS TRIBUNE TACOMA, January 23, 2000 (2000 WL 5325115).

⁶ Id.

Local courts have addressed this in a number of ways. King County implemented a specialty court for mental health issues. Several counties have now also instituted drug courts. There are also courthouse facilitator programs in 22 of 39 counties in Washington.⁷ Nevertheless, the congestion from the criminal calendar can easily obstruct civil trials. “Because no courts are available, civil litigants rarely go to trial on the first date set in Pierce County,” said Salvador Mungia, Tacoma-Pierce County Bar Association president.⁸ “Insurance companies, in particular, can use the lack of available trial dates to force those suing them into accepting smaller settlements because they can’t afford to wait for trial,” according to Bill Rush, a Tacoma attorney studying court congestion.⁹

As an example, in King County, the length of time from filing for divorce to going to trial is 11 months. The law requires that permanent parenting plans include a dispute resolution mechanism separate from court action which must be adhered to prior to returning to court for any modifications. RCW 26.09.184(3).

As Washington State Attorney General Christine Gregoire recently was reminded, the time for an appeal of a civil judgment is 30 days. A Pierce county jury awarded \$17.8 million in damages from the Department of Social and Health Services to three developmentally-delayed men for mistreatment and abuse. The Attorney General’s Office missed the appeal deadline and the Washington Court of Appeals refused to extend it.¹⁰ As if that were not enough, Washington’s insurer stated a week later that it refused to cover the damage award because of the failure to appeal in time.¹¹

P. 191—The Case of Lung Cancer Death

Unlike the legal and public relations disaster above, Washington State Attorney General Christine Gregoire was one of the lead negotiators working to settle lawsuits against the tobacco companies and helped shape the tobacco settlement. “Washington has netted about \$168 million from the settlement. Over the next 25 years, the state expects to receive \$4.5 billion from the major tobacco companies. The tobacco industry agreed to pay a total of \$206 billion to the 46 plaintiff states.”¹² Yet, unlike in Florida, Washington citizens have not pursued an individual cause of action against the tobacco companies.

P. 195—Are parents responsible for torts committed by their children?

⁷ *Id.*

⁸ John Gillie, Pierce County Court Crunch Delays Justice, MORNING NEWS TRIBUNE TACOMA, August 2, 1999 (1999 WL 3263123).

⁹ *Id.*

¹⁰ Eric Nalder, No Excuse for Missed Appeal, Court Says, SEATTLE TIMES, August 22, 2000.

¹¹ Eric Naldre, Insurers Balk at Big DSHS Claims, SEATTLE TIMES, August 28, 2000.

¹² Associated Press, Washington State Receives Third Payment from Tobacco Settlement, SEATTLE TIMES, April 17, 2000.

In general, Washington adheres to the common law doctrine that parents are not responsible for the negligence of their children. However, parents are responsible if their child “willfully or maliciously” destroyed property or inflicted personal injury against another. RCW 4.24.190 creates this legal obligation but limits the parent’s financial liability to \$5,000. This penalty does not include the parent’s actions, just the child’s.

One major exception to the rule that parents are not responsible for their child’s negligence is in the area of automobile liability. In that case, the “family purpose” doctrine can be used to extend the parent’s responsibility for their child’s negligence in operating the car. In order for the “family purpose” doctrine to be used, four factors must be satisfied, as follows:

1. The owner must have given the vehicle to a member of his/her immediate family for the transportation of a family member;
2. The person operating the vehicle must be a member of the family;
3. The vehicle must be operated with the permission of the owner; and
4. The accident must have occurred while operating within the scope of what the owner agreed to (i.e., no joyriding).

This doctrine has not been extended to cover other liability of parents, such as injuries caused by bicycle use. See, Pflugmacher v. Thomas, 209 P.2d 443 (1949).

This issue of parental responsibility for their children’s acts has taken on new meaning as a result of the school shootings that have occurred in the last several years throughout the country. The public has begun to look to the parents of the shooters as responsible. “Increasingly, parents are also being held accountable in the civil courts for the wrongdoing of their offspring. The National Center for Victims of Crime has tracked as many as 100 cases in the past decade in which parents...have been sued for negligent care.”¹³ Although the cited Seattle Times article mentions a civil lawsuit against the shooter’s family in the 1996 Moses Lake, WA shooting (in which Barry Loukaitis shot and killed two classmates and a teacher and wounded a third student), it does not give any specifics about the civil suit.

There is greater responsibility mandated for parents in the criminal law area. “Across the country, 23 states—including Washington—have extended some form of legal sanctions against parents whose children commit crimes, although rarely have they been invoked for major crimes. Thirteen states (not including Washington) have laws making parents criminally responsible for failing to supervise delinquent children. It is rare for such charges to be brought.”¹⁴

P. 204—What type and amount of auto insurance does your state require? Is there an uninsured motorist law?

¹³ Kim Murphy and Melissa Healy, Should Parents be Held Responsible, SEATTLE TIMES, May 9, 1999.

¹⁴ Id.

Washington law sets a minimum for auto insurance coverage but car owners usually contract with their insurers for additional coverage. For example, RCW 46.29.490(2) requires “\$25,000 of bodily injury to or death of one person in any one accident and, subject to said limit for one person, \$50,000 because of bodily injury to or death of two or more persons in any one accident, and \$10,000 because of injury to or destruction of property of others in any one accident.” That can either be a “split limit” (keeping those three separate categories intact) or a “combined single limit” of \$60,000 (combining all three categories into one).

There is also an uninsured or underinsured motorist statute, RCW 48.22.030. It requires that all policies contain contract protections to drivers who are in accidents with uninsured or underinsured motorists. However, Washington law does not require that consumers buy that coverage.

How much is auto insurance for high-school age drivers? Is there a discount for taking driver’s education?

The short answer is “It costs a lot of money.” According to data gathered by the Washington Insurance Commissioner, <http://www.insurance.wa.gov>, a single 18-year old male living in Seattle with a good driving record and insuring a 1996 Geo Metro Sedan will have to pay anywhere between \$1146 to \$3812 annually for insurance, with most of the quotes centering around \$1900 to \$2300 annually. This assumes the teenager can even get the insurance. There are fewer insurers for this category of driver than other categories, such as middle-aged drivers. Thus many teenagers will be added on to their parent’s auto insurance policy. However, a married couple in Seattle with two teenage drivers could easily pay \$5,000 a year just for car insurance.

Some insurers will provide discounts to teenage drivers for good grades, good driving records, and taking driver’s education. These discounts are not required by law. The Insurance Commissioner encourages consumers to shop around for insurance that meets their personal needs.

In the 2000 session, the Washington Legislature passed a new Intermediate Driver’s License law which Governor Locke signed. It will take effect on July 1, 2001, and will restrict the number of passengers riding with 16- and 17-year-old drivers. It also will limit teens’ night driving. Washington became the 25th state to enact this type of law and it requires “drivers under 18 to earn an intermediate license by passing a driving competency test, successfully completing a driving class, and completing 50 hours of adult-supervised driving (10 of those at night).”¹⁵ RCW 46.20.075.

There are also tougher laws for teens who break traffic laws. “The first time someone with an intermediate license commits an offense, the state mails a

¹⁵ Mike Lindblom, New Teen Driving Law Will Make Inroads, SEATTLE TIMES, March 24, 2000.

letter to the parents. The second time, the teen's license is suspended six months. And on a third conviction, the license is suspended until age 18.¹⁶

P. 206—Is there no-fault car insurance in Washington?

Washington does not have a mandatory no-fault car insurance scheme. However, since 1994, insurance companies have been required to offer no-fault insurance to their subscribers. This insurance is called Personal Injury Protection (PIP) insurance.

According to the Insurance Commissioner's Office, about two-thirds of drivers in Washington purchase this additional insurance. PIP coverage is no-fault insurance, which means the coverage applies automatically, regardless of blame in an accident. (The liability portion of one's auto insurance covers other drivers' and passengers' injuries and damage to others' property, depending on who was to blame in the crash.) Consumers with PIP questions or problems also can contact the Insurance Commissioner's toll-free Consumer Protection Hot Line at 1-800-562-6900. The website is <http://www.insurance.wa.gov>.

P. 207—Does Washington have workers' compensation? What are the principal provisions?

Washington's workers' compensation program is called Labor and Industries. Their website is <http://www.wa.gov/lni> and their number is 1-800-423-7233. There is a separate internet listing for rules regarding teenage workers. It is at <http://www.wa.gov/lni/workstandards/teenworker.htm>.

The L&I program has been around since 1911. It pays for both medical expenses and lost-time because of work-related illness or injury. By setting up an administrative agency, claimants do not have to go through a court process. According to their website materials,

Most injured workers receive workers' compensation benefits through L&I's Insurance Services Division. The benefits provide compensation for on-the-job accidents and occupational diseases. Payments to workers are made from the State Fund, the employee- and employer-funded premium pool maintained by Insurance Services. Workers not covered by the State Fund may work for self-insured employers -- businesses large enough to qualify to provide their own workers' compensation coverage. Even then, Insurance Services regulates and certifies their coverage.

The Washington Industrial Safety and Health Act (WISHA) of 1973 gives L&I the primary responsibility for overseeing workplace safety. The WISHA division of L&I sets standards and conducts inspections of worksites for compliance with state laws and regulations. Most L&I rules are done by public comment. However, WISHA has the ability to institute emergency rules for 120 days if it

¹⁶ Id.

thinks they are required. The WISHA website is <http://www.lni.wa.gov/wisha/topics/wisha.htm>.

P. 219—Attractive Nuisance in Washington

The common law doctrine of attractive nuisance is an exception to the general rule that a landowner owes no duty to a trespasser. The doctrine is commonly used for swimming pools and other attractions on property that could draw a young child. For the attractive nuisance doctrine to apply, the following conditions must be met:

1. The condition must be dangerous in itself;
2. It must be attractive and alluring to young children;
3. The children must have been incapable, by reason of their youth, of comprehending the danger;
4. The condition must have been left unguarded and exposed at a place frequented by children of tender years;
5. It must have been reasonably practicable and feasible to prevent access to the condition.

In Ochampaugh v. City of Seattle, 91 Wash.2d 514, 588 P.2d 1351 (1979), the Washington Supreme Court en banc held that the attractive nuisance doctrine does not apply when children drown in a pond or other body of water “having natural characteristics and no hidden dangers ordinarily found in such bodies of water.” This was later codified and expanded by statute to include numerous activities in outdoor recreation areas and channels of water. RCW 4.24.210(1). However, if the owner collects money for use of the property, then he/she has an increased duty to the members of the public and cannot use this as a defense.

P. 225—Does Washington have a Good Samaritan Law? Does it require an action by a bystander?

Washington’s Good Samaritan Law is as follows:

Any person, including but not limited to a volunteer provider of emergency or medical services, who without compensation or the expectation of compensation renders emergency care at the scene of an emergency or who participates in transporting, not for compensation, therefrom an injured person or persons for emergency medical treatment shall not be liable for civil damages resulting from any act or omission in the rendering of such emergency care or in transporting such persons, other than acts or omissions constituting gross negligence or wilful or wanton misconduct. Any person rendering emergency care during the course of regular employment and receiving compensation or expecting to receive compensation for rendering such care is excluded from the protection of this subsection.

RCW 4.24.300.

Washington also has a law requiring a bystander to summon aid for a peace officer if he or she knows that person is a peace officer and the bystander ignores the request. Violation is a misdemeanor. RCW 9A.76.030.

Generally in the United States there is no duty to assist an unknown person. However, three states, Minnesota, Wisconsin, and Vermont, have crafted their Good Samaritan law broadly to include a duty to assist an injured person. These laws appear to be rarely enforced because of uncertainty about their application.¹⁷

In Washington, there is a broad duty to assist a child if child abuse or neglect is suspected. RCW 26.44.030(1)(a) requires “any practitioner, county coroner or medical examiner, law enforcement officer, professional school personnel, registered or licensed nurse, social service counselor, psychologist, pharmacist, licensed or certified child care providers or their employees, employee of the department, juvenile probation officer, placement and liaison specialist, responsible living skills program staff, HOPE center staff, or state family and children's ombudsman or any volunteer in the ombudsman's office” to make a report of possible abuse or neglect to Child Protective Services. Child Protective Services then reviews the report according to a risk matrix to determine what level of response the report will receive.

P. 232—Does Washington have a contributory negligence law?

Under RCW 4.22.005, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

P. 233—Is comparative negligence a defense in Washington? How are damages apportioned?

In a civil case where comparative negligence is raised, the judge or jury will determine the percentage of total fault for each party. The total must by statute equal 100%. RCW 4.22.070. This means that if the plaintiff is found to have contributed to the negligence, the defendant's burden will be reduced by the percentage that the judge or jury determines. The burden of pleading and proving the plaintiff's negligence is on the defendant, since the defendant seeks to reduce his/her damage payment. Godfrey v. State, 84 Wash.2d 959, 965, 530 P.2d 630 (1975).

P. 235—Can a minor child sue a parent in Washington? Can spouses sue each other?

Washington's common law tradition is that an unemancipated minor cannot sue a parent for a tort action that involves a parental duty. Borst v. Borst, 251 P.2d 149 (Wash. 1952). However, when the action is not parental in nature, then the suit

¹⁷ John Pardun, Good Samaritan Laws: A Global Perspective, 20 Loyola of Los Angeles International and Comparative Law Journal 591 (March 1998).

is allowed. For instance, in the Borst case, the Supreme Court allowed the suit because the child was not suing his father for parenting duties but rather for running him over while playing in the street. The Court found the relationship was changed in this case from parent-child to driver-pedestrian, and allowed the suit.

Washington's emancipated minor statute is RCW 13.64.060. It states:

(1) An emancipated minor shall be considered to have the power and capacity of an adult, except as provided in subsection (2) of this section. A minor shall be considered emancipated for the purposes of, but not limited to:

- (a) The termination of parental obligations of financial support, care, supervision, and any other obligation the parent may have by virtue of the parent-child relationship, including obligations imposed because of marital dissolution;
- (b) The right to sue or be sued in his or her own name;
- (c) The right to retain his or her own earnings;
- (d) The right to establish a separate residence or domicile;
- (e) The right to enter into nonvoidable contracts;
- (f) The right to act autonomously, and with the power and capacity of an adult, in all business relationships, including but not limited to property transactions;
- (g) The right to work, and earn a living, subject only to the health and safety regulations designed to protect those under age of majority regardless of their legal status; and
- (h) The right to give informed consent for receiving health care services.

(2) An emancipated minor shall not be considered an adult for:

The purposes of the adult criminal laws of the state unless

- (a) the decline of jurisdiction procedures contained in RCW 13.40.110 are used or the minor is tried in criminal court pursuant to *RCW 13.04.030(1)(e)(iv);
- (b) the criminal laws of the state when the emancipated minor is a victim and the age of the victim is an element of the offense; or
- (c) those specific constitutional and statutory age requirements regarding voting, use of alcoholic beverages, possession of firearms, and other health and safety regulations relevant to the minor because of the minor's age.

Obviously, once a child becomes an emancipated minor, he or she would be able to sue his/her parent.

There is no longer "interspousal immunity" in Washington. It was overruled in Freehe v. Freehe, 81 Wash.2d 183, 500 P.2d 771 (1972). It has now been codified in statute. RCW 26.16.150 states, "Every married person shall hereafter

have the same right and liberty to acquire, hold, enjoy and dispose of every species of property, and to sue and be sued, as if he or she were unmarried.”

P. 240—Does Washington have strict liability laws covering defective products?
RCW 7.72.030 governs strict liability for defective products in Washington. The law states that a manufacturer is subject to strict liability if:

the claimant's harm was proximately caused by the fact that the product was not reasonably safe in construction or not reasonably safe because it did not conform to the manufacturer's express warranty or to the implied warranties under Title 62A RCW.

(a) A product is not reasonably safe in construction if, when the product left the control of the manufacturer, the product deviated in some material way from the design specifications or performance standards of the manufacturer, or deviated in some material way from otherwise identical units of the same product line.

(b) A product does not conform to the express warranty of the manufacturer if it is made part of the basis of the bargain and relates to a material fact or facts concerning the product and the express warranty proved to be untrue.

RCW 7.72.030(2).

The law further states that the “reasonably safe” standard should be considered from the point of view of the ordinary consumer. RCW 7.72.030(3).

In discussing this issue, the Washington Supreme Court reaffirmed that the issue in a strict liability case is “whether the product is in a defective condition unreasonably dangerous to the user, at the time the product leaves the seller’s hands.” Davis v. Globe Mach. Mfg. Co., Inc., 684 P.2d 692 (Wash.1984) (citing Restatement (Second) of Torts § 402A, comment g (1965)).

Traditionally, strict liability litigation has focused on defective industrial machinery, automobile design, and pharmaceutical or chemical companies. There have also been substantial legal battles about women’s health issues, such as silicon breast implants by Dow Corning or the Dalkon Shield IUD (intra-uterine device). A recent article in the New York Law Journal raises a new issue, whether computer software can be considered a “product” or “service” for products liability litigation.¹⁸ Although the courts have not gotten to that yet, the article states that dicta in a 1991 Ninth Circuit decision leaves open the possibility of developing a future legal theory.

P. 243—What tort reform issues are being considered by Washington? Has the Washington legislature passed any laws in recent years to deal with medical malpractice?

Washington passed tort reform legislation in 1981 and 1986. However, without punitive damages available under state law, local calls for tort reform have been

¹⁸ Michael Hoenig, Computer Software Liability, NEW YORK LAW JOURNAL, August 14, 2000.

quieter than in many other states. For example, currently in Oregon there is substantial controversy about tort damage awards, specifically “pain and suffering” awards. The Oregon Supreme Court threw out as unconstitutional a \$500,000 cap on pain and suffering awards. “That prompted lawmakers to send the voters a proposed constitutional amendment that would allow the Legislature to impose new limits on damages in civil injury cases. It’s a high stakes battle pitting business and medical groups who want to limit damages against trial lawyers and others who want juries – not the Legislature – to decide damages for themselves.”¹⁹

The power of the media concerning the tort reform issue is substantial.

Some lawyers and academics argue that consistently far-fetched accounts of court rulings have warped the debate about the legal system. And shrewd public relations by business and other groups pushing to limit lawsuits may be only part of the reason. Unusual or big verdicts make news, said Michael McCann, a political science professor at the University of Washington. McCann and William Haltom of the University of Puget Sound in Tacoma (now Seattle University Law School in Seattle) found in a study that the large McDonald’s verdict got extensive front-page coverage in 1994. But only about half the newspapers carried articles when the judge later reduced the punitive damages to \$480,000.²⁰

Tort law reform has been a hot topic with the proposed federal Patient’s Bill of Rights. Some congressmen would like to see an expanded ability for patients to sue their health plans, while others would like to avoid that. Former Senator Slade Gorton was one of the key votes recently to deadlock the bill because he opposes a right to sue an HMO (health maintenance organization) without some restrictions.²¹ Interestingly, in Pegram v. Herdrich, 120 S.Ct. 2143 (2000), the United States Supreme Court rejected a patient’s claim against her health plan for delays causing a ruptured appendix. The Court ruled unanimously that Congress never intended for patients to be able to sue their HMOs under ERISA, the federal law governing self-insured health plans.

The Washington legislature has not passed any tort reform legislation in the last several years. In 1998, a bill was considered by the Legislature that would have reduced the frequency and amount of civil damages but it never progressed out of committee.²² However, Washington did become the fourth state with a Patient’s Bill of Rights when Governor Locke signed it in March 2000. The new

¹⁹ Brad Cain, Oregon Move would put Cap on Lawsuits; Damages for Pan, Suffering are Targetted, SEATTLE TIMES, April 23, 2000.

²⁰ William Glaberson, Too Tall Tort Tales: The Real Story of the McDonald’s Coffee Victim and Other Legal Legends, SEATTLE TIMES, June 27, 1999.

²¹ Les Blumenthal, AMA Picks Gorton for HMO Swing Vote, THE NEWS TRIBUNE (TACOMA), June 28, 2000.

²² Peter Callaghan, Legislature 1998: Legislative Effort To Rein In Civil Lawsuits Comes Up Short Again, THE NEWS TRIBUNE (TACOMA), February 18, 1998.

law includes a qualified right for a patient to sue his/her insurance company for a denial. In order to sue the plan, the patient must first bring the issue to the plan's internal grievance committee, and then appeal to an independent review committee.²³ The new law will take effect in July 2001.

²³ Judith Blake, Patient Bill of Rights, SEATTLE TIMES, March 29, 2000.