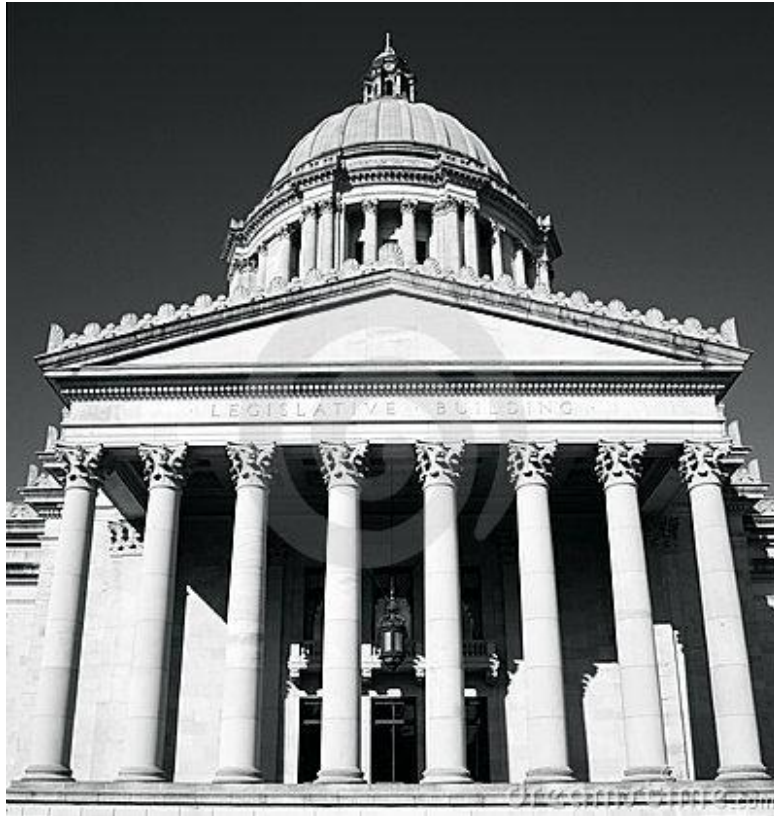


TORT LAW UPDATE

Duty. Breach. Injury. Proximate Cause.



Products ♦ Highway Design ♦ Medical Negligence ♦ Premises Liability

Dramshop/Overserving ♦ Bicycles/Motorcycles ♦ Intentional Torts

Wrongful Death ♦ Discovery Abuse

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PRODUCT LIABILITY

The legal framework governing product liability cases in Washington is primarily set forth in the Product Liability Act of 1981 (PLA), Chapter 7.72 RCW. In addition to the PLA, Washington product liability law is also based in part on common law negligence, pre-PLA cases which do not conflict with the provisions of the PLA, and The Tort Reform Act of 1986, RCW Chapter 4.22 – including RCW 4.22.015 and 4.22.070 concerning the allocation of “fault”. *See Hiner v. Bridgestone/Firestone, Inc.*, 138 Wn.2d 248, 260-62, 978 P.2d 505 (1999); *Coulter v. Asten Group Inc.*, 135 Wn.App. 613, 617-18, 622-23, 146 P.3d 444 (2006); *Lundberg v. All-Pure Chemical Co.*, 55 Wn.App. 181, 186, 777 P.2d 15 (1989). It should be kept in mind that state product liability law may sometimes be preempted by federal laws regulating particular products.

Under the PLA, a product manufacturer has a duty to provide reasonably safe products. *See* Chapter 7.72 RCW; Chapter 110 of the Washington Pattern Jury Instructions. Based on the statute, a product manufacturer may be strictly liable for providing an unsafe product if 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 in the same product line or if the product is unsafe to an extent beyond that which would be contemplated by the ordinary user. RCW 7.72.030(2); RCW 7.72.030(3). *See also Falk v. Keene Corporation*, 113 Wn.2d 645, 782 P.2d 974 (1989); *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 327, 971 P.2d 500 (1999). A product manufacturer may also be strictly liable for providing an unsafe product if the product failed to conform to any express warranties given by the manufacturer concerning the product and that this was a proximate cause of the plaintiff’s injury. RCW 7.72.030(2). Likewise, a product manufacturer may be strictly liable for products that are unsafe in their design or if the product is unsafe to an extent beyond that which would be contemplated by the ordinary user. RCW 7.72.030(1); RCW 7.72.030(3). *See also Falk v. Keene, supra; Soproni v. Polygon Apartment Partners, supra.* A product manufacturer may also be strictly liable if the manufacturer failed to provide adequate warnings and/or instructions with the product or if the product is unsafe to an extent beyond that which would be contemplated by the ordinary user. RCW 7.72.030(1); RCW 7.72.030(3). *See also Falk v. Keene, supra; Ayers v. Johnson & Johnson*, 117 Wn.2d 747, 818 P.2d 1337 (1991). Lastly, a product manufacturer may be liable if the manufacturer was negligent by failing to provide adequate warnings or instructions after learning about a danger connected with the product after it was manufactured. RCW 7.72.030(1)(c).

By far, the most common claim under the PLA is that the subject product was not reasonably safe as designed. In determining whether or not the design of a product was unsafe, RCW 7.72.303(1) sets forth a “risk-utility” test. As explained by the court in *Ayers v. Johnson & Johnson, supra*, this requires the trier of fact to balance different factors:

On one side of the balance in subsection (a) are the likelihood that the product would cause the claimant's harm or similar harms and the seriousness of those harms. On the other side of subsection (a)'s balance are the burden on the manufacturer to design a product that would have prevented those harms, and the

adverse effect that a feasible alternative design would have on the usefulness of the product.

Ayers, 117 Wn.2d at 763.

Recently in *Johnson v. Recreational Equipment, Inc.*, 159 Wn. App. 939, 247 P.3d 18 (2011), the Court of Appeals addressed the issue of whether or not the PLA allows a seller of a defective product that is sold under the seller's own brand name to allocate fault to the actual manufacturer of the product under RCW 4.22.070. The court held that the PLA does not allow such an allocation:

The WPLA explicitly provides that “[a] product seller, other than a manufacturer, [has] the liability of a manufacturer” where “[t]he product was marketed under a trade name or brand name of the product seller.” RCW 7.72.040(2), (2)(e). Although, absent this provision, only a manufacturer could be held liable for a manufacturing defect, RCW 7.72.030(2), our legislature has chosen to hold particular product sellers liable for such acts—despite the fact that the manufacturer of the product is necessarily the entity that actually caused the defect where a product is defectively manufactured.

Thus, by imposing liability on sellers of branded products for manufacturing defects—which, inevitably, are caused by acts of the manufacturer—our legislature created a statutory form of vicarious liability that enables the claimant injured by a defectively manufactured product to recover fully from the product seller where the seller branded the product as its own. See 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW & PRACTICE, § 3.1, at 116 (3d ed. 2006) (“In contrast to direct liability, which is liability for breach of one's own duty of care, vicarious liability is liability for the breach of someone else's duty of care.”). Because a seller of a branded product is vicariously liable for manufacturing defects, permitting REI—the product seller liable as the manufacturer pursuant to RCW 7.72.040(2)(e)—to seek to allocate fault to Aprebic—the actual manufacturer of the defective product—would undermine the statutory scheme of the WPLA.

....

RCW 7.72.040(2)(e) creates a statutory form of vicarious liability whereby the seller of a branded product assumes the liability of the manufacturer. Because permitting such a product seller to seek to allocate fault to the actual manufacturer pursuant to comparative fault principles would undermine our legislature's intent in enacting this statutory provision, the trial court did not err by concluding that REI could not seek to allocate fault to Aprebic.

Johnson, 159 Wn. App. at 947-948, 953-954.

While the unsafe aspect is generally due to design errors, occasionally (though not often) the defect occurs in the *manufacturing* process.

Example: Threads in hydraulic aerial lift created by worn lathe, leaving inadequate threads that failed under pressure with the lift 35 feet in the air, causing substantial injuries to two Public Utility District employees when the basket crashed to the ground.

At the same time, a product failure may simply be due to inadequate maintenance and repair. If the equipment is maintained in-house, there obviously is no cause of action because one may not sue his or her employer for negligence. On the other hand, some companies employ outside maintenance and repair facilities who can be held responsible for inadequate maintenance.

Unavoidably Unsafe Products

Over the last few years, several product design cases have focused on products that by their nature involve a high risk of harmful effects or injury or that are unavoidably unsafe products. Prior to the adoption of the PLA, Washington courts had adopted comment k to Restatement (Second) of Torts § 402A (1965). *E.g., Terhune v. A.H. Robins Co.*, 90 Wn.2d 9, 12, 577 P.2d 975 (1978). Comment k to Restatement (Second) of Torts § 402A identifies a category of products for which a manufacturer cannot avoid a high risk of possible harmful effects. Vaccines with side effects are examples, along with other drugs where the pharmaceutical can possibly save a patient's life, but the risks of physical harm from the drug itself are substantial, even when the drug is properly manufactured. Comment k explains: "The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk." Under comment k, these unavoidably unsafe products are excluded from the general rule of strict liability, as long as the products are properly prepared and marketed and proper warnings are given.

Comment k's exception for unavoidably unsafe products continues to apply to cases under the PLA, even though the exception is not expressly provided for in the act. *Ruiz-Guzman v. Amvac Chem. Corp.*, 141 Wn.2d 493, 505-506, 7 P.3d 795 (2000); *Estate of LaMontagne v. Bristol-Myers Squibb*, 127 Wn. App. 335, 111 P.3d 857 (2005); *Transue v. Aesthetech Corp.*, 341 F.3d 911 (9th Cir. 2003) (applying Washington law and holding that the proper legal standard was strict liability and not negligence for comment k cases where there is an allegation of a production defect). The court in *Ruiz-Guzman*, noting the act's omission of this exception, cautioned that "we must be sparing in [comment k's] application lest we defeat the letter or policy of the PLA." *Ruiz-Guzman*, 141 Wn.2d at 506.

In *Ruiz-Guzman*, the court concluded that "a pesticide can be an 'unavoidably unsafe product' as described in [comment k], but only if its utility greatly outweighs the risk posed by its use." *Ruiz-Guzman*, 141 Wn.2d at 511. The court did not explain in greater detail how this balancing test is to be carried out. Nor did the *Ruiz-Guzman* court specify the other types of products that qualify as unavoidably unsafe products. The court did note that the exception has previously been applied to medical products available only through a physician, including prescription drugs and blood products. *Id.* at 504-507. The court also stated that when it cannot be determined as a

matter of law whether a product is unavoidably unsafe, this threshold issue must be submitted to the jury. *Id.* at 511.

In view of these cases, the Washington Pattern Jury Instructions Committee has approved several new pattern instructions addressing unavoidably unsafe products. However, as of this writing, these new instructions have not yet been published.

Crashworthiness Cases

Similarly, the Washington Pattern Jury Instructions Committee has approved three new pattern instructions addressing enhanced injuries or crashworthiness. Again, these new instructions have not yet been published. These new instructions have their genesis in the landmark case of *Larsen v. General Motors*, 391 F.2d 495 (8th Cir. 1968). In *Larsen*, the court held that a vehicle manufacturer could be liable for “enhanced” injury caused by the failure of the vehicle to be crashworthy, but only for those injuries caused by that failure.

Washington expressly follows *Larsen* in imposing crashworthiness duties for design and manufacturing defects. *Couch v. Mine Safety Appliances Co.*, 107 Wn.2d 232, 728 P.2d 585 (1986); *Seattle-First Nat. Bank v. Tabert*, 86 Wn.2d 145, 542 P.2d 774 (1975); *Baumgardner v. American Motors Corp.*, 83 Wn.2d 751, 522 P.2d 829 (1974). For example, *Baumgardner* involved claims for personal injuries and wrongful death resulting from an automobile collision in which a defective front seat broke loose and was propelled forward. The plaintiff, not wearing a seatbelt, was injured. The plaintiff's wife, wearing a seatbelt but not a shoulder harness, was killed after being crushed between the seat and the belt. The court distinguished accident causation from injury causation noting that the plaintiff's claim was for his “enhanced injuries.” *Id.* at 758. Similarly in *Couch*, when a safety helmet failed, the court specified that the claim was for the harm over and above what would have been sustained without the defect, again drawing the line between injury causation and accident causation. *Couch v. Mine Safety Appliances Co.*, *supra* at 242-243; *cf. Phennah v. Whalen*, 28 Wn. App. 19, 621 P.2d 1304 (1980).

A major unresolved issue in crashworthiness cases is whether or not contributory fault applies as an affirmative defense in such cases. In 1986, Washington's legislature enacted the so-called Tort Reform Act. A key provision of the 1986 Act was adoption of several liability in most cases. RCW 4.22.070(1) states that the trier of fact "In all actions involving fault of more than one entity ... shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages." Washington courts have held that RCW 4.22.070(1) incorporates the definition of fault found in RCW 4.22.005 and RCW 4.22.015. *See Price v. Kitsap Transit*, 125 Wn.2d 456, 886 P.2d 556 (1994). Under RCW 4.22.005 (enacted in 1981 as part of Washington's Product Liability Act), contributory fault is only a defense if it caused the damages claimed in the action.

Despite the fact that Washington's comparative fault statutes have applied in personal injury cases for almost 25 years now, there is no case law in Washington addressing the question of whether contributory negligence applies in an enhanced injury/crashworthiness case under these statutes. However, a number of courts outside of Washington have addressed whether primary

fault should be compared with enhanced-injury fault under a scheme of comparative fault when apportioning damages in enhanced-injury cases.

Some courts favor comparing primary fault with enhanced-injury fault, thereby reducing the plaintiff's recovery for enhanced injuries in proportion to the plaintiff's primary fault. *See, e.g., Montag v. Honda Motor Co.*, 75 F.3d 1414, 1419 (10th Cir. 1996); *Keltner v. Ford Motor Co.*, 748 F.2d 1265, 1267-68 (8th Cir. 1984); *Hinkamp v. Am. Motors Corp.*, 735 F. Supp. 176, 178 (E.D.N.C. 1989); *Trust Corp. of Mont. v. Piper Aircraft Corp.*, 506 F. Supp. 1093, 1098 (D. Mont. 1981); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 428 (Tex. 1984). These courts favor such a comparison for various reasons: some courts fail to distinguish between primary injuries and enhanced injuries, others assume that fault for the primary accident is a proximate cause of enhanced injuries, and still other courts state that primary fault should be compared with enhanced-injury fault.

Other courts use only enhanced-injury fault to apportion responsibility for enhanced injuries. *See, e.g., Kutsuheras v. AVCO Corp.*, 973 F.2d 1341, 1344-45 (7th Cir. 1992); *Jimenez v. Chrysler Corp.*, 74 F. Supp. 2d 548, 566 (D.S.C. 1999); *Timmons v. Ford Motor Co.*, 949 F. Supp. 859, 862-63 (S.D. Ga. 1996); *Cota v. Harley Davidson, Inc.*, 684 P.2d 888, 895-96 (Ariz. Ct. App. 1984); *Reed v. Chrysler Corp.*, 494 N.W.2d 224, 230 (Iowa 1992); *Andrews v. Harley Davidson, Inc.*, 796 P.2d 1092, 1095-96 (Nev. 1990). These courts focus solely on the enhancement of injuries because the enhanced-injury doctrine presupposes the occurrence of primary accidents, regardless of their cause. These courts reason that only a breach of an enhanced-injury duty may make a party responsible for enhanced injuries. Therefore, the cause of the primary accident, while relevant to the cause of the primary injuries, is legally irrelevant to the cause of the enhanced injuries.

As argued in R. Harkins, *Holding Tortfeasors Accountable: Apportionment of Enhanced Injuries Under Washington's Comparative Fault Scheme*, 76 Wash. L. Rev. 1185 (Oct. 2001), three strong policy considerations favor the adoption of this latter approach in Washington. First, primary fault is not "fault" with respect to enhanced injuries and thus should not be used as a basis for reducing a plaintiff's recovery for his or her enhanced injuries. Second, our state's comparative fault statutes require the apportionment of fault on the basis of injury causation. Enhanced injuries are proximately caused by the lack of crashworthiness of the product involved. Third, reducing a plaintiff's recovery for his or her enhanced injuries on the basis of primary fault provides less incentive for manufacturers to design and produce safe products.

The bottom line is that tortfeasors should be held liable for the injuries that they cause. In crashworthiness cases, this means that product manufacturers should be held liable for foreseeable injuries that they could have prevented through the safer designs of their products. Using enhanced-injury fault to apportion liability for enhanced injuries accomplishes this result.

HIGHWAY DESIGN

WPI 140.01 provides:

The [county] [city] [town] [state] has a duty to exercise ordinary care in the [design] [construction] [maintenance] [repair] of its public [roads] [streets] [sidewalks] to keep them in a reasonably safe condition for ordinary travel.

That has been the law of Washington since *Berglund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (1940), involving a bridge that failed to accommodate pedestrians with a sidewalk or other means of avoiding being hit by a car while crossing. The Washington Supreme Court held that: “Where a municipality is aware of a potentially dangerous condition of its road, with the probability that, in that case, pedestrians would be injured by a car while trying to cross a narrow bridge that lacked a sidewalk, the injuries were foreseeable, and the municipality therefore breached its duty ‘to exercise ordinary care to keep its public ways in a reasonably safe condition for persons using such ways in a proper manner’”. *Keller, supra*.

Berglund has, for several decades, been reaffirmed. For example, *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002), not only confirmed the duty on the part of a municipality to provide a reasonably safe road, but went on to reject any claim that a plaintiff must be fault-free as a condition precedent to the duty to provide reasonably safe roads. WPI 140.01 was thereafter modified to eliminate any reference to whether or not the plaintiff was fault-free.

Totality of the Circumstances

A recent trend in attempted defenses by municipalities has been to argue that if the pavement, striping and other physical characteristics of the roadway (*e.g.*, asphalt surface) are not in a defective condition, then there can be no liability for an unsafe road. That concept was firmly rejected in *Owen v. Burlington Northern and Santa Fe Railroad Company*, 153 Wn.2d 780, 108 P.3d 1220 (2005), in which the Supreme Court held that the trier-of-fact is to take into account all traffic conditions presented at the site, not merely the condition of the pavement:

Tukwila acknowledges that it has a duty to provide reasonably safe roads and this duty includes the duty to safeguard against an inherently dangerous or misleading condition. A city’s duty to eliminate an inherently dangerous or misleading condition is part of the overarching duty to provide reasonably safe roads for the people of this state to drive upon.

Owen, 153 Wn.2d at 787-788.

The Court held that such dangers will likely vary from location to location; as the danger becomes greater, “The existence of an unusual hazard may require a city to exercise greater care than would be sufficient in other settings.” *Owen*, 153 Wn.2d at 788.

The totality of the circumstances in *Owen* included overwhelming traffic volumes that caused a railroad crossing to be blocked with traffic, leaving cars vulnerable to being struck by a train (which, in fact, occurred in *Owen*).

In *Chen v. City of Seattle*, 153 Wn. App. 890, 223 P.3d 1230 (2009), overwhelming traffic volumes were also a part of the determination as to whether a street was inherently dangerous. In *Chen*, a crosswalk in Seattle was shown to lack adequate gaps in traffic for pedestrians to simply get across the street without having to challenge cars with their bodies. The Court of Appeals rejected the City of Seattle's argument that, because the asphalt roadway surface was not defective, there could be no liability for injuries to a pedestrian hit while trying to cross this busy street:

A municipality has a duty to all travelers to maintain its roadways in conditions that are safe for ordinary travel. *Whether roadway conditions are reasonably safe for ordinary travel depends on the circumstances surrounding a particular roadway.* Although relevant to the determination of whether a municipality has breached its duty, evidence that a particular physical defect in a roadway rendered the roadway dangerous or misleading or evidence that a municipality was in violation of a law concerning roadway safety measures are not essential to a claim that a municipality breached the duty of care owed to travelers on its roadways. A trier of fact may conclude that a municipality breached its duty of care based on the *totality of the circumstances* established by the evidence.

Chen, 153 Wn. App. at 894 (emphasis added).

The standard for municipal liability for unsafe roads takes into account the totality of the circumstances, expressly including monitoring and controlling traffic conditions, taking into account such circumstances as vehicle volumes, sight distance at intersections and curves, and the ability of pedestrians to safely cross the street at crosswalks.

Claim-filing Requirement

All tort cases against governmental entities must begin with service of a Claim for Damages on the governmental tortfeasor. RCW 4.92.100. The Claimant must then wait 60 days before filing suit. Although claims against the State are to be presented on a Standard Tort Claim Form (provided online at <http://www.ofm.wa.gov/rmd/tort/>), claims against local governments may be presented on either the State's form or a form provided by the local government. RCW 4.96.020(3)(c). Neither the State's form nor that of any local governmental entity may require a claimant's social security number. RCW 4.96.020(3)(c)(ii).

The amount of damages claimed on the form is inadmissible at trial. RCW 4.92.100(c); RCW 4.96.020(3)(f).

Once the claim is served, the claimant must wait 60 days before filing suit. This claim process and 60-day waiting period are jurisdictional.

The 2009 amendments to RCW 4.92.100 and RCW 4.96.020 have now created a “grace” period for filing a lawsuit after the running of the 60 days by providing that an “action commenced within five court days after the 60-calendar-day period has elapsed will be deemed to have been presented on the first date after the 60-calendar-day period.”

Accessing Accident Reports to Assess Highway Defect

In recent years, State and local governments have begun refusing to provide the public with accident reports unless the requestor agrees in writing not to sue the government. These governmental entities are aware that such raw collision data is needed to determine whether or not a given section of road is unsafe (*e.g.*, multiple collisions at an intersection may establish that the intersection is being operated in an unsafe condition without a traffic signal or a four-way stop), and they do not wish to have these accident reports used against them.

Police Traffic Collision Reports are, however, public records, and are subject to the Public Records Act. Chapter 42.56 RCW. Under the Act, public records are to be provided to the public upon request.

Governmental entities’ efforts to avoid providing these potentially damaging accident reports is founded on their interpretation of a federal statute, 23 U.C.S. § 409. That statute provides that documents such as studies and analyses that may be used for federal funding of local roadway projects are neither discoverable nor admissible at trial.

Independent of the relationship between local and federal governments in terms of project funding, the Washington State Patrol has a statutory duty to “file, tabulate, and analyze” automobile accident reports. RCW 46.52.060. This WSP depository for these public records exists without regard to what WSDOT or local public works departments may use them for. *Gendler v. Batiste*, 158 Wn. App. 661, 242 P.3d 947 (2010). Rejecting the governmental entities’ bases for withholding public records, the *Gendler* court held:

Although the WSDOT may use the PTCR records to comply with § 152 [federally funded projects], the WSP does not. The WSP has an independent statutory obligation to collect traffic collision reports. Apparently, it stopped doing this in 2003, but delegating its duty to maintain the records to another agency does not shield WSP from its obligations under the PRA.

Gendler, 152 Wn. App. at 673.

The Washington Supreme Court granted review and oral argument was presented on October 11, 2011.

MEDICAL NEGLIGENCE: Recent Developments

The 2006 Malpractice Act modified statutes of limitations and repose.

First, RCW 4.16.350, which contains the statute of limitations for medical malpractice claims, was amended to include an eight-year statute of repose.

Second, the Act amended RCW 4.16.190, regarding tolling the statute of limitations for minor plaintiffs. It is extremely important to know that the amendment *eliminated* tolling for minors in medical malpractice cases.

Under RCW 7.70.110, a request for mediation tolls the three-year statute of limitations for an additional year.

Applying the Statute of Limitations

A key case study analyzing and applying the statute of limitations provisions of the 2006 medical Malpractice Act is contained in *Unruh v. Cacchiotti*, 172 Wn.2d 98, 257 P.3d 631 (2011).

At nine years old, Lisa Unruh began seeing an orthodontist, Dr. Cacchiotti. Because of a severe underbite, her lower jaw was growing faster than her upper jaw. Cacchiotti put Lisa on a treatment plan with braces from 1995 – 1999, with her final visit with him in November 2000. Because of her braces, the roots of her permanent teeth were essentially destroyed.

In the years that followed, various doctors informed Lisa that her prior orthodontic care had caused her root resorption. However, not until an orthodontist in 2006 took the time to explain the etiology of Lisa's problem did she realize that Cacchiotti's negligence was the reason for her root resorption, rather than a hereditary predisposition to these problems.

Ms. Unruh filed a lawsuit after realizing the actual cause of her ongoing dental issues. The lawsuit was dismissed on a statute of limitations defense on summary judgment.

On appeal, Cacchiotti argued that the eight-year statute of repose (enacted in June 2006) for medical malpractice claims and the 2006 nontolling amendment of RCW 4.16.190 applied retroactively and combined to bar her claim. Cacchiotti claimed that the amendment to RCW 4.16.190 retroactively eliminated tolling of the statute of limitations and statute of repose during Lisa's minority. The Supreme Court disagreed, citing *Hanford v. King County*, 112 Wash. 659, 662 (1920): "[T]he limitation of the new statute, as applied to pre-existing causes of action, commences when the cause of action is first subjected to the operation of the statute..."

The facts of the limitations periods and statutory tolling are somewhat complicated and not particularly relevant except to the case itself. The important point is that the Supreme Court reaffirmed that amendments to statutes of limitations and repose only apply prospectively from the effective date of the statute, unless the legislature clearly indicates otherwise, and the Supreme Court applied that rule to the 2006 amendments to the medical malpractice statute of limitations and repose.

Because the Court decided the case on statutory interpretation grounds, it did not reach the constitutional challenge to abolishing tolling of the statute of limitations for minors. In a footnote, the Court strongly suggested that the amendment to RCW 4.16.190 to eliminate tolling of the medical malpractice statute of limitations during minority is unconstitutional: “Because we hold that the 2006 nontolling amendment to RCW 4.16.190 does not eliminate tolling during Unruh's minority, we need not reach her alternative arguments that the amendment violates the constitutional right of access to courts as well as the privileges and immunities clause of article I, section 12. While we do not decide this case on constitutional grounds, in *Gilbert* we indicated that the categorical elimination of tolling for minors would give rise to “compelling” constitutional challenges. 127 Wn.2d at 378, 900 P.2d 552.”

The Loss of Chance Doctrine

The Supreme Court recently issued an important decision on the *Herskovits* loss of chance issue in *Mohr v. Grantham* (10/13/11). Unlike *Herskovits*, which was a wrongful death case, *Mohr* was an injury case. The Court held that the loss of chance doctrine also applies “when the ultimate result is some serious harm short of death.” The plaintiff alleged negligence in failing to diagnose and treat a stroke, resulting in permanent disabilities that could have been avoided with earlier treatment.

The Court held that the plurality opinion in *Herskovits* is the law in Washington on loss of chance. The Court held that loss of chance itself is a compensable injury. The plaintiff must prove (1) duty, (2) breach, (3) and that such breach of duty proximately caused a loss of chance of a better outcome.

The Court also clarified the method of calculating damages in a loss of chance case. If a plaintiff has a 40% loss of chance of a better outcome, the plaintiff would be entitled to recover 40% of what the damages would be for the death or disability that resulted. In other words, if the total damages are \$100,000 and the plaintiff had a 40% loss of chance, the plaintiff would be entitled to recover \$40,000. The Court stated that calculation of a loss of chance of a better outcome would be based on expert testimony.

PREMISES LIABILITY

Overview

Although a number of jurisdictions have eliminated the common law distinctions based on the status of the entrant, Washington has repeatedly declined to eliminate the common law distinctions. See *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 875 P.2d 621 (1994); *Younce v. Ferguson*, 106 Wn.2d 658, 724 P.2d 991 (1986). Thus, in premises liability actions, a person's status, based on the common law classifications of persons entering upon real property (invitee, licensee, or trespasser), determines the scope of the duty of care owed by the possessor (owner or occupier) of that property. *Tincani*, 124 Wn.2d at 128; *Van Dinter v. Kennewick*, 121 Wn.2d 38, 41, 846 P.2d 522 (1993); *Younce*, 106 Wn.2d at 666-667.

Because the duty of a premise owner or occupier varies according to the status of the entrant, this area of the law has a lot of variations. As a general practice when dealing with premises liability, the Washington Pattern Jury Instructions should be consulted. The commentary that accompanies the pattern instructions includes detailed discussions of these different variations and covers the most important and reoccurring issues that may arise in a premises liability case.

Trespassers

“A trespasser is a person who enters or remains upon the premises of another without permission or invitation, express or implied.” WPI 120.01; *see also Winter v. Mackner*, 68 Wn.2d 943, 945, 416 P.2d 453 (1966). One who enters upon the premises of another as a trespasser does so at his or her peril. *Winter*, 68 Wn.2d at 945. Thus, under the common law, an owner or occupier of land owes no duty to a trespasser except to refrain from willfully or wantonly injuring the trespasser. *Zuniga v. Pay Less Drug Stores*, N.W., 82 Wn. App. 12, 917 P.2d 584 (1996); *Johnson v. Schafer*, 110 Wn.2d 546, 756 P.2d 134 (1988); *Ochampaugh v. City of Seattle*, 91 Wn.2d 514, 588 P.2d 1351 (1979); *Winter v. Mackner*, 68 Wn.2d 943, 945, 416 P.2d 453, 454 (1966).

Because a possessor of land owes a higher duty of care to a licensee than to a trespasser, most cases in which a trespass is alleged focus on whether or not the entrant entered the premises with the permission of the owner or possessor of the premises. As recently stated in one case:

“[O]ne who goes upon the premises of another, either without any invitation, express or implied, or else for some purpose not connected with the business conducted on the land, but goes nevertheless with the permission or at the toleration of the owner” is a licensee rather than a trespasser. *Enersen v. Anderson*, 55 Wn.2d 486, 488, 348 P.2d 401 (1960) (*citing Dotson v. Haddock*, 46 Wn.2d 52, 278 P.2d 338 (1955)).

McMilian v. King County, 161 Wn. App. 581, 601, 255 P.3d 739 (2011).

Because a trespass can have harsh results, courts have found permission or consent in a variety of situations:

Given the numerous means by which a possessor may expressly or tacitly consent to entry, the factual situations in which persons have been found to be licensees is extensive and includes: [T]hose taking short cuts across the property or making merely permissive use of crossings and ways or other parts of the premises; loafers, loiterers, and people who come in only to get out of the weather; those in search of their children, servants or other third persons; spectators and sightseers not in any way invited to come; those who enter for social visits or personal business dealings with employees of the possessor of the land; tourists visiting a plant at their own request; those who come to borrow tools or to pick up and remove refuse or chattels for their own benefit; salesmen calling at the door of private homes, and those soliciting money for charity; a stranger entering an office building to post a letter in a mail-box provided for the use of tenants only.

W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 60, at 413 (5th ed.1984) (footnotes omitted).

As a result, in one Washington case, the court held that an owner or occupier of a residence is deemed to have consented to a stranger's approach to the front entry of the residence absent an express communication otherwise, and this approaching individual ordinarily will be considered a licensee, not a trespasser. *Singleton v. Jackson*, 85 Wn. App. 835, 935 P.2d 644 (1997).

Licensees and Social Guests

“A licensee is a person who goes upon the premises of another, with the permission or tolerance of the owner [or] occupier, but either without any invitation, express or implied, or for some purpose not connected with any business interest or business benefit to the owner [or] occupier. WPI 120.08. A licensee includes a social guest, that is, a person who has been invited but does not meet the legal definition of invitee. *Younce*, 106 Wn.2d at 667. Thus, “A social guest is a person who goes upon the premises of another, with an invitation, express or implied, but for a purpose not connected with any business interest or business benefit to the owner [or] occupier.” WPI 120.08.01.

Under Washington law, an owner or occupier of land owes a duty of care to licensees and social guests as to both conditions on the land as well as the activities of the owner or occupier on the land. With regard to conditions on the land, in *Memel v. Reimer*, 85 Wn.2d 685, 538 P.2d 517 (1975), the Supreme Court adopted the duty of care set forth in Restatement (Second) of Torts § 342 for licensees and social guests. That section states:

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

- (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
- (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
- (c) the licensees do not know or have reason to know of the condition and risk involved.

Restatement (Second) of Torts § 342; *see also Younce*, 106 Wn.2d at 668 (an owner or occupier of land fulfills this duty by making the condition safe or warning of its existence).

As to an owner or occupier's activities on the land, “[a]n owner [or] occupier of premises has a duty to exercise ordinary care in conducting activities to avoid injuring any person who is on the premises with permission and of whose presence the owner [or] occupier is, or should be, aware. WPI 120.03; *see also Potts v. Amis*, 62 Wn.2d 777, 384 P.2d 825 (1963).

The court in *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 606 P.2d 1214 (1980), relied upon the Restatement (Second) of Torts § 341, for guidance regarding the liability of possessors of land to licensees for injuries resulting from activities on their premises. That section, titled “Activities Dangerous to Licensees,” provides:

A possessor of land is subject to liability to his licensees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if, but only if,

- (a) he should expect that they will not discover or realize the danger, and
- (b) they do not know or have reason to know of the possessor's activities and of the risk involved.

Restatement (Second) of Torts § 341.

Invitees

“A business or public invitee is a person who is either expressly or impliedly invited onto the premises of another for some purpose connected with a business interest or business benefit to the owner [or] occupier or for some purpose for which the premises are held open to the public.” WPI 120.05; *see also McKinnon v. Washington Federal Sav. & Loan Ass'n*, 68 Wn.2d 644, 414 P.2d 773 (1966).

As noted in the Comment to WPI 120.05, “[g]enerally, the question of the status of a visitor is a question of law to be decided by the court.” However, “when facts are in dispute ... the issue must be decided by the jury and appropriate instructions defining the various possible legal statuses of the visitor (and the resultant standard of care) must be given. *Beebe v. Moses*, 113 Wn. App. 464, 54 P.3d 188 (2002) (whether plaintiff, injured at the home in which a Tupperware sales party was being held, was a social guest/licensee or business invitee was a question of fact for the jury when there are facts in dispute as to the visit's primary purpose).” *See* Comment to WPI 120.05.

A Pattern Jury Instruction sets forth the general duty that an owner or occupier of premises owes to an invitee:

An [owner] [occupier] of premises owes to a [business] [or] [public] invitee a duty to exercise ordinary care [for his or her safety]. [This includes the exercise of ordinary care] [to maintain in a reasonably safe condition those portions of the premises that the invitee is expressly or impliedly invited to use or might reasonably be expected to use].

WPI 120.06.

Over the years, the law relating to invitees has evolved to the point that an owner or occupier of premises owes specific duties to his or her invitees in different situations. For example, the law imposes specific duties on a business proprietor as to the safety of his or her customers:

The operator of a _____ owes to a person who has an express or implied invitation to come upon the premises in connection with that business a duty to exercise ordinary care [for his or her safety]. [This includes the exercise of ordinary care] [to maintain in a reasonably safe condition those portions of the premises that such person is expressly or impliedly invited to use or might reasonably be expected to use.]

WPI 120.06.01.

A number of cases have focused on criminal activities occurring on business premises. Under Washington law, business operators owe their business invitees a duty of ordinary care to protect the person from criminal harm that the operator knows or has reason to know is occurring or about to occur and/or to protect the person from reasonably foreseeable criminal conduct by third persons. See WPI 120.06.03. This duty stems from the special relationship between the business and the invitee:

A business owes invitees a duty “to keep [its] premises reasonably free of physically dangerous conditions in situations in which business invitees may be harmed by third persons.” *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 203, 943 P.2d 286 (1997) (customer assaulted by persons loitering in store parking lot). This duty requires that the business protect the invitee from “imminent criminal harm and reasonably foreseeable criminal conduct by third persons.” *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d at 206. See also *Griffin v. West RS, Inc.*, 97 Wn.App. 557, 984 P.2d 1070 (1999) (landlord has duty to protect tenant from reasonably foreseeable criminal acts of third persons), *reversed on other grounds* at 143 Wn.2d 81, 18 P.3d 558 (2001). Because jurors might have difficulty interpreting the word “imminent,” the committee rephrased this requirement in the instruction.

A business, however, is not responsible for all criminal acts by third parties that may flow from its operations. See *Kim v. Budget Rent A Car Systems, Inc.*, 143 Wn.2d 190, 15 P.3d 1283 (2001) (rental car company has no liability to plaintiff where plaintiff is injured by car driven by intoxicated defendant who had stolen car from rental car company lot). See also Restatement (Second) of Torts § 302B, comment e (1965); *Hutchins v. 1001 Fourth Ave. Associates*, 116 Wn.2d 217, 233, 802 P.2d 1360 (1991) (a possessor of land has no generalized duty to provide security measures on the premises so as to protect those off the premises, including passersby, from third party criminal activity on the premises).

Comment to WPI 120.06.03.

A pattern jury instruction sets forth the duty owed to invitees by a premise owner or occupier as to conditions on the premises:

An [owner of premises] [occupier of premises] [_____ operator] is liable for any [physical] injuries to its [business invitees] [public invitees] [customers] caused by a condition on the premises if the [owner] [occupier] [operator]:

- (a) knows of the condition or fails to exercise ordinary care to discover the condition, and should realize that it involves an unreasonable risk of harm to such [business invitees] [public invitees] [customers];
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and
- (c) fails to exercise ordinary care to protect them against the danger.

WPI 120.07; *see also* Restatement (Second) of Torts § 343 “Dangerous Conditions Known to or Discoverable by Possessor” (1965).

This duty requires the owner or occupier of the premises to inspect for dangerous conditions on the premises and to make such repairs, safeguards, or warnings as may be reasonably necessary for the protection of invitees under the circumstances. *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d at 139. Or as one case put it, this duty of reasonable care includes an “affirmative duty to discover dangerous conditions.” *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 132, 606 P.2d 1214 (1980); *Jarr v. Seeco Const. Co.*, 35 Wn. App. 324, 326, 666 P.2d 392 (1983).

The law also imposes a duty on the owners or occupiers of premises to correct temporary unsafe conditions on their premises that were not caused by the owner or occupier. *See* WPI 120.06.02. In order for this duty to apply, the owner or occupier of the premises must have actual or constructive notice of the temporary unsafe condition. *Coleman v. Ernst Home Center, Inc.*, 70 Wn. App. 213, 853 P.2d 473 (1993); *Mathis v. H.S. Kress Co.*, 38 Wn.2d 845, 232 P.2d 921 (1951); *Smith v. Manning's, Inc.*, 13 Wn.2d 573, 126 P.2d 44 (1942). The requirement that the owner or occupier must have actual or constructive notice only applies to temporary conditions on the premises that were created by others. There is no notice requirement if the condition was created by the owner or occupier of the premise. *Falconer v. Safeway Stores, Inc.*, 49 Wn.2d 478, 303 P.2d 294 (1956); *Wardhaugh v. Weisfield's Inc.*, 43 Wn.2d 865, 264 P.2d 870 (1953); *Erdman v. Lower Yakima Valley, Washington Lodge No. 2112 of B.P.O.E.*, 41 Wn. App. 197, 704 P.2d 150 (1985).

Recreational Use Statute

At common law, recreational users of lands open to the public were characterized as “public” invitees to whom landowners owed a duty of ordinary care to keep premises in a reasonably safe condition. *See Egede-Nissen v. Crystal Mountain Inc.*, 93 Wn.2d 127, 131-133, 606 P.2d 1214 (1980). This placed an affirmative duty on landowners to inspect their premises and discover dangerous conditions. *Egede-Nissen* at 132-133. Washington’s Recreational Use Statute, RCW

4.24.210, modifies the common law by limiting the liability of landowners who allow the public to use their land for recreational purposes without charging a fee. Because RCW 4.24.210 is in derogation of the common law, it is to be strictly construed. *Matthews v. Elk Pioneer Days*, 64 Wn. App. 433, 437, 824 P.2d 541 (1992) (“RCW 4.24.210 does not provide for a policy of liberal construction in favor of property owners.”); *see also Nielsen v. Port of Bellingham*, 107 Wn. App. 662, 666-667, 27 P.3d 1242 (2001).

Washington’s Recreational Use Statute, RCW 4.24.210, limits the liability of landowners who allow the public to use their land for recreational purposes unless a person is injured by a “known dangerous artificial latent condition for which warning signs have not been conspicuously posted.” The statute states in part:

(1) [A]ny public or private landowners or others in lawful possession and control of any lands whether designated resource, rural, or urban, or water areas or channels and lands adjacent to such areas or channels, who allow members of the public to use them for the purposes of outdoor recreation, which term includes, but is not limited to, the cutting, gathering, and removing of firewood by private persons for their personal use without purchasing the firewood from the landowner, hunting, fishing, camping, picnicking, swimming, hiking, bicycling, the riding of horses or other animals, clam digging, pleasure driving of off-road vehicles, snowmobiles, and other vehicles, boating....

....

(3) ...Nothing in this section shall prevent the liability of such a landowner or others in lawful possession and control for injuries sustained to users by reason of ***a known dangerous artificial latent condition for which warning signs have not been conspicuously posted***....

RCW 4.24.210 (1), (3)(emphasis added).

For purposes of RCW 4.24.210, the meaning of “artificial” is its ordinary meaning. *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 922, 969 P.2d 75 (1998). As defined in *Webster’s*, “artificial” means “contrived through human art or effort and not by natural causes detached from human agency: relating to human direction or effect in contrast to nature: (a): formed or established by man’s efforts, not by nature.” *Webster’s Third New International Dictionary* 124 (1986). The word “contrived” means “showing the effects of planning or devising.” *Webster’s, supra*, 496. *Webster’s* defines “contrive” in part as “to fabricate as a work of art or ingenuity ... to form, shape, lay out or adapt by contrivance ... to bring about by stratagem or with difficulty.” *Webster’s, supra*, 496.

“Latent” as used in the recreational use statute means “not readily apparent to the recreational user.” *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 45, 846 P.2d 522 (1993). The question under the statute “is whether the injury causing condition - not the specific risk it poses - is readily apparent to the ordinary recreational user.” *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 925, 969 P.2d 75 (1998) (emphasis omitted). “[L]atency should be viewed from

the plaintiff's perspective; the same condition might be latent to one and patent to another, depending on the viewer's vantage point.” *Davis v. State*, 102 Wn. App. 177, 192-193, 6 P.3d 1191 (2000), *aff'd*, 114 Wn.2d 612 (2001).

Although the recreational use statute limits a landowner's liability, a landowner may be held liable if a fee is charged, if the injury is intentional, or if a “known dangerous artificial latent condition” exists and conspicuous warning signs are not posted. RCW 4.24.210(4); *Tabak v. State*, 73 Wn. App. 691, 695, 870 P.2d 1014 (1994). *See also Van Scoik v. State, Dept. of Natural Resources*, 149 Wn. App. 328, 203 P.3d 389 (2009) (recreational use immunity did not apply to state campground); *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 969 P.2d 75 (1998) (tree stump submerged by man-operated reservoir constituted artificial condition when struck by boater).

DRAMSHOP/OVERSERVING

Historically, to establish liability for overserving a bar patron who was subsequently involved in a collision due to having consumed too much alcohol, the plaintiff was required to establish that the patron was “obviously intoxicated”. This was an extremely difficult standard, exacerbated by employees of the establishment “sticking together”.

In fact, however, “obvious intoxication” is no longer the standard. RCW 66.44.200(1) provides: “No person shall sell any liquor to any person *apparently* under the influence of liquor” (emphasis added).

A leading case on overserving is the recent Supreme Court decision in *Faust v. Albertson*, 167 Wn.2d 531, 222 P.3d 1208 (2009) in which the trial court was upheld allowing the jury to find that the host served an “apparently intoxicated” patron. Earlier the Supreme Court held, in *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 96 P.3d 386 (2004), that the trial court erred in instructing the jury on “obvious intoxication”.

Importantly, where the bar patron is involved in a collision very shortly after leaving the premises, his or her appearance at the point of the collision is admissible to establish apparent intoxication while still at the bar. *Fairbanks v. J.B. McLoughlin Co., Inc.*, 131 Wn.2d 96, 929 P.2d 433 (1997). *See also Dickinson v. Edwards*, 105 Wn.2d 457, 716 P.2d 814 (1986).

BICYCLES/MOTORCYCLES

All too frequently, those responsible for designing our roads and overseeing traffic operations forget that streets and highways are lawfully used by more than cars, trucks and buses. Washington law setting forth the rights and duties of “vehicles” expressly includes both motorcycles and bicycles:

“Vehicle” includes every device capable of being moved upon a public highway and in, upon, or by which any persons or property is or may be transported or drawn upon a public highway, *including bicycles*.

RCW 46.04.670 (in part) (emphasis added). RCW 46.61.755(1) provides: “Every person riding a bicycle upon a roadway shall be granted all the rights and shall be subject to all of the duties applicable to the driver of a vehicle”.

Criteria governing the design and operational requirements set forth in such publications on applicable standards as the WSDOT Design Manual and the Manual on Uniform Traffic Control Devices must therefore take into account the entire traffic population that uses our streets and highways. *See generally Bordynoski v. Bergner*, 96 Wn.2d 335, 644 P.2d 1173 (1982).

Sharing the road with cars carries with it not only the same rights (*e.g.*, right-of-way), but also the same duties, including obeying the rules of the road and exercising the same levels of care as are required of drivers. *See generally Pudmaroff v. Allen*, 138 Wn.2d 55, 977 P.2d 574 (1999).

Helmets

While the law provides for equal rights and duties as between drivers and cyclists, our State Legislature and some municipalities have enacted laws and ordinances that require cyclists to wear helmets while riding. *See, e.g.*, City of Kent Municipal Code § 9.41.03 (bicycles); RCW 46.37.530(1)(c) (motorcycles).

The non-use of a helmet while riding does not constitute a failure to mitigate damages, however, because the duty to mitigate does not arise until *after* the injury-producing event:

A person who is liable for an injury to another is not liable for any damages arising *after* the original injury that are proximately caused by the failure of the injured person to exercise ordinary care to avoid or minimize such new or increased damage.

....

WPI 33.01 (emphasis added). Rather, a failure to mitigate may arise where an injured person, post-collision, is not securing or submitting to necessary medical treatment. WPI 33.02. *See also* WPI 33.03 where the alleged failure to mitigate involves injuries to property or business.

This attempt to create a pre-injury failure to mitigate damages has been rejected in the parallel field of seatbelts, in which claims were advanced that, had the seatbelt been worn, the injuries would likely have been less. *See Amend v. Bell*, 89 Wn.2d 124, 570 P.2d 138 (1977); *Clark v. Payne*, 61 Wn. App. 189, 810 P.2d 931 (1991).

INTENTIONAL TORTS

A fault-free plaintiff's statutory right to joint and several liability was recently disrupted with the Supreme Court's surprise ruling in *Tegman v. Accident & Medical Investigations, Inc.*, 150 Wn.2d 102, 75 P.3d 497 (2003).

While RCW 4.22.070 provides that a fault-free plaintiff is entitled to recover on a joint and several liability basis, *Tegman* held that the acts of an intentional tortfeasor destroyed joint and several, and further held that RCW 4.22.070 applies only to damages caused by negligent tortfeasors. *Tegman*, 150 Wn.2d at 105. "Negligent defendants... are not jointly and severely liable for damages caused by intentional acts of others." *Ibid*.

As our courts sort through the problems created by *Tegman* (e.g., jury instructions and verdict forms), a key distinction at this stage are those situations in which the plaintiff is not fault-free, or in which the plaintiff sues only the negligent defendants. In *Rollins v. King County*, 148 Wn. App. 370, 199 P.3d 499 (2009), two teenagers on a bus were attacked by unknown assailants. They sued King County Metro Transit (Metro), alleging that it neglected its duties as a common carrier in failing to provide a safe environment. At trial, Metro proposed a jury instruction stating that the plaintiffs must prove "the percentage of damages caused by negligent conduct and the percentage of damages caused by the assailants' intentional conduct." Metro also proposed a special verdict form requiring the jury to calculate these percentages. The trial judge rejected both. Instead, the trial judge instructed the jury that plaintiffs had to prove that Metro was negligent, that Metro's negligence was a proximate cause of plaintiffs' injury, that there may be more than one proximate cause of an injury, and that its verdict should be for Metro only if it found that the sole proximate cause of injury was a cause other than Metro's negligence. *Rollins*, 148 Wn. App. at 379. The trial judge also instructed the jury that it could award damages only for those injuries proximately caused by Metro's negligence:

In calculating a damage award, you must not include any damages that were caused by the acts of the unknown assailants and not proximately caused by negligence of the defendant. Any damages caused solely by the unknown assailants and not proximately caused by negligence of defendant King County must be segregated from and not made a part of any damage award against King County.

Ibid.

In affirming the trial court's jury instructions, the *Rollins* court distinguished *Welch v. Southland Corp.*, 134 Wn.2d 629, 634, 952 P.2d 162 (1998) from *Tegman* on the basis that *Welch* did not involve issues of joint and several liability under RCW 4.22.070 (and RCW 4.22.015), while *Tegman* did.

Our Supreme Court interpreted these provisions [RCW 4.22.070 and RCW 4.22.015] in *Welch v. Southland Corp.*, *supra*. There, plaintiff Mark Welch was robbed and shot by a fellow patron at a 7-11 convenience store. The assailant was never apprehended. Welch sued Southland, owner of the 7-11 store, alleging

it negligently failed to maintain safe premises for business invitees. As an affirmative defense, Southland argued that fault should be apportioned between the negligent and intentional actors under RCW 4.22.070. But under the statute, apportionment occurs only between at fault entities, which do not include intentional tortfeasors. The Supreme Court thus held that a negligent defendant is not entitled to apportion liability to an intentional tortfeasor. *Id.* at 634. Because Welch’s assailant was not “at fault” under the statute, Southland was not permitted to allocate liability to him. *Id.* at 636-637.

Rollins, 148 Wn. App. at 377-378.

The *Rollins* court then emphasized that *Tegman* does not apply where there is no issue of joint and several liability:

Tegman is about joint and several liability. Here, Metro is the only defendant and negligence is the plaintiffs’ only theory. To recover at all, plaintiffs had to prove their injuries were proximately caused by Metro’s negligence. There is no issue of joint and several liability in this case.

Id. at 379.

The *Rollins* court continued by stating that the case was like *Welch* because the plaintiffs were only seeking damages that were proximately caused by Metro’s negligence, and there was no risk that Metro would be held liable for the intentional tortfeasor’s portion of the plaintiffs’ damages:

Rather, as the trial court observed, this case is akin to *Welch*. The intentional conduct of unknown assailants was a proximate cause of injury in both cases, but no recovery was sought for those injuries. Here and in *Welch*, plaintiffs sought recovery only for damages proximately caused by the defendant’s negligence. In neither case was there a risk that the negligent defendant would be held liable for the assailants’ “share” of the damages, so there was no need for the jury to determine the size of that share or to deduct it from its damages award.

Ibid.

The law in this area appears to be that, so long as a plaintiff is suing only one negligent tortfeasor, it is irrelevant whether or not an intentional tort was committed, as the plaintiff is not seeking recovery for the intentional tort.

WRONGFUL DEATH

Under Washington’s wrongful death statutes, RCW 4.20.010 and RCW 4.20.020, a wrongful death action may be brought by the personal representative of the decedent’s estate on behalf of the specified statutory beneficiaries for the losses sustained by them as a result of the decedent’s

death. See *Wood v. Dunlop*, 83 Wn. 2d 719, 724, 521 P.2d 1177 (1974). Even though the personal representative is the named plaintiff in a wrongful death action, any recovery under the wrongful death statutes vests in the statutory beneficiaries. *Wood*, 83 Wn.2d at 724.

Although the wrongful death statute does not list the damages available to the statutory beneficiaries, Washington courts have interpreted the statute as allowing compensation for the actual pecuniary loss suffered by the surviving beneficiaries. *Jensen v. Culbert*, 134 Wash. 599, 605, 236 P. 101 (1925). Pecuniary loss has been held to include not only the monetary contributions the decedent would have made to the beneficiaries, but also intangible losses such as loss of the decedent's support, love, affection, care, services, companionship, society, and consortium. See *Parrish v. Jones*, 44 Wn. App. 449, 722 P.2d 878 (1986); *Myers v. Harter*, 76 Wn.2d 772, 459 P.2d 25 (1969); *Hinton v. Carmody*, 182 Wash. 123, 45 P.2d 32 (1935); *Chapple v. Ganger*, 851 F. Supp. 1481, 1487 (E.D. Wash. 1994). Damage awards are apportioned according to the actual loss suffered by each beneficiary. *Parrish v. Jones*, 44 Wn. App. 449, 454, 722 P.2d 878 (1986).

The child injury or death statute, RCW 4.24.010, gives parents of a child who has been injured or killed a direct action for the child's injury or death so long as they regularly contributed financial, psychological or emotional support to the child. Under RCW 4.24.010, a parent of an adult child who was killed or injured may bring an action for the injury or death of the adult child if the parent was dependent upon the child for financial support. *Philippides v. Bernard*, 151 Wn.2d 376, 384-385, 88 P.3d 939 (2004).

RCW 4.24.010 provides greater specificity than the other wrongful death and survival statutes regarding the available damages. The plaintiff may recover "damages for medical, hospital, medication expenses, and loss of services and support" as well as damages "for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship...." RCW 4.24.010.

Washington has two survival statutes, the general survival statute (RCW 4.20.046) and the special survival statute (RCW 4.20.060). These statutes preserve any causes of actions or claims that a person could have maintained had he or she not died. *Federated Services v. Estate of Norberg*, 101 Wn. App. 119, 125, 4 P.3d 844 (2000) ("Washington's general Survival of Actions statute was enacted to keep the decedent's claims alive and to allow the personal representative to pursue them."); *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 358, 693 P.2d 687 (1985). The survival statutes do not create new causes of action. See *Whittlesey v. Seattle*, 94 Wash. 645, 654, 163 P. 193 (1917). They merely preserve underlying actions for personal injury, including all elements of damages that would be allowed in a personal injury action. See *Warner v. McCaughan*, 77 Wn.2d 178, 182, 460 P.2d 272 (1969) (quoting *Harvey v. Cleman*, 65 Wn.2d 853, 400 P.2d 87 (1965)); *Ginocchio v. Hesston Corp.*, 46 Wn. App. 843, 845, 733 P.2d 551 (1987); *Chapple v. Ganger*, 851 F. Supp. 1481, 1486 (E.D. Wash. 1994).

The major difference between the two statutes is that the *general* survival statute preserves the decedent's cause of action for his or her estate, while the *special* survival statute preserves the decedent's cause of action for the decedent's statutory beneficiaries. Compare RCW 4.20.060 with RCW 4.20.046. See also *Walton v. Absher Construction Co., Inc.*, 101 Wn. 2d 238, 242,

244-245, 676 P.2d 1002 (1984) (discussing legislative history and concluding that the statutes can be harmonized); *Parrish v. Jones, supra*; *Steven Andrews, Survivability of Noneconomic Damages for Tortious Death in Washington*, 21 S.U.L.R. 623 (1998). Neither statute creates a new cause of action in the beneficiaries. *White*, 103 Wn.2d at 358.

The *general* survival statute also differs from the special survival statute in that it continues any causes of action that could have been brought by the decedent prior to his or her death, regardless of the ultimate cause of death. RCW 4.20.046; *see also Cavazos v. Franklin*, 73 Wn. App. 116, 119, 867 P.2d 676 (1994). The *special* survival statute, on the other hand, is limited to claims for personal injury resulting in death. RCW 4.20.060; *Andrews, Survivability of Noneconomic Damages for Tortious Death in Washington, supra*, at 632.

The survival statutes, being remedial in nature, are to be liberally construed. *See Cook v. Rafferty*, 200 Wash. 234, 240, 93 P.2d 376 (1939); *Whittlesey v. Seattle*, 94 Wash. 645, 654, 163 P. 193 (1917). The legislative intent underlying the survival statutes was to eliminate the perverse result under the early common law “that it was more profitable for the defendant to kill the plaintiff than to scratch him.” *Warner v. McCaughan*, 77 Wn.2d 178, 183, 460 P.2d 272 (1969); *see also Cavazos v. Franklin*, 73 Wn. App. 116, 120, 867 P.2d 674 (1994) (“To deny a cause of action in this case would revert back to the old twist of common law, which made it more profitable to kill than to injure, and would directly contravene the remedial purpose of Washington statutory law.”).

The Death of a Child statute, RCW 4.24.010, was amended in 1998. Before 1998, the statute set separate standards for mothers and fathers with regard to their ability to bring an action for injury or death of a child. The 1998 amendment unified the standards for mothers and fathers. Laws of 1998, Chapter 237, § 2; 1997–98 Final Legislative Report, p. 181. The Legislature stated its intent for this amendment as follows:

It is the intent of this act to address the constitutional issue of equal protection addressed by the Washington state supreme court in *Guard v. Jackson*, 132 Wn.2d 660, 940 P.2d 642 (1997). The legislature intends to provide a civil cause of action for wrongful injury or death of a minor child to a mother or father, or both, if the mother or father has had significant involvement in the child's life, including but not limited to, emotional, psychological, or financial support.

Laws of 1998, Chapter 237, § 1.

This statement of intent to allow an action by a parent who has had significant involvement in the child's life applies only to actions for wrongful injury or death of *minor* children. *Philippides v. Bernard*, 151 Wn.2d 376, 384–85, 88 P.3d 939 (2004). The 1998 amendment to RCW 4.24.010 did not alter the requirement that parents be financially dependent on an *adult* child to recover for that child's injury or death. *Philippides*, 151 Wn.2d at 388.

The Legislature amended the wrongful death and survival statutes in 2008 to include domestic partners as beneficiaries under the statutes. And in 2011, the statutes were amended to make their language gender neutral.

RCW 4.20.020 establishes two tiers of beneficiaries in a wrongful death suit. The first tier includes the decedent's "wife, husband, state registered domestic partner, child or children, including stepchildren." If there are no first tier beneficiaries, the wrongful death action "may be maintained for the benefit of the parents, sisters, or brothers, who may be dependent upon the deceased person for support." RCW 4.20.020. The statute does not define the words "dependent" or "support" as to "second tier" beneficiaries.

In applying the standard of whether a parent or sister or brother was "dependent" on the decedent for "support" under RCW 4.20.020, Washington courts have required proof of "substantial financial dependence." *Masunaga v. Gapasin*, 57 Wn. App. 624, 790 P.2d 171 (1990) (trial court properly dismissed claim brought by parents of adult child who were not financially dependent). Under this test, the parent or sibling need not be wholly dependent; but there must be "necessitous want on the part of the parent." *Bortle v. Northern Pac. Ry. Co.*, 60 Wash. 552, 554, 111 P. 788 (1910). Recently, in *Armantrout v. Carlson*, 166 Wn.2d 931, 214 P.3d 914 (2009), the Supreme Court held that although reliance on emotional support from the decedent is insufficient, providing services that have significant economic value may qualify for "financial support" under the statute. In *Armantrout*, the decedent daughter had provided her mother, a blind diabetic, with a variety of services, including acting as her mother's driver and reader, helping her with medical needs such as glucose readings and insulin injections. There was testimony at trial that these services would have cost the parents approximately \$36,553 per year if they were provided by outside help. The court held that the jury could consider the services performed by the decedent for her parents in determining whether or not her parents were dependent upon her.

The status of stepparent (the present spouse of a person who is the biological or adoptive parent of a dependent child) exists only until the relationship is terminated by death or dissolution of marriage. See *In re Estate of Blessing*, 160 Wn. App. 847, 248 P.3d 1107 (2011). Thus, under RCW 4.20.020 the children of a former spouse are not party to a wrongful death suit if the marriage terminated prior to the decedent's death. *Ibid*.

Prior to 2004, there was a question whether a decedent's estate could recover for the decedent's shortened life expectancy or loss of enjoyment of life under Washington's two survival statutes. In *Otani ex rel. Shigaki v. Broudy*, 151 Wn.2d 750, 92 P.3d 192 (2004), the Supreme Court held that post death damages for a shortened life expectancy or loss of enjoyment of life are not recoverable by a decedent's estate under either of Washington's survival statutes, RCW 4.20.046 and/or RCW 4.20.060. Instead, recovery for such damages is limited to such shortened life expectancy or loss of enjoyment of life that the decedent actually experienced. *Ibid*.

DISCOVERY ABUSE: Severe Penalties for Hiding Documents

A leading recent case authorizing harsh sanctions for discovery abuse is *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993). In *Fisons*, the parents of a two-year-old who had suffered seizures and brain damage as a reaction to the drug theophylline brought suit against the treating physician and the company that manufactured the drug. The physician cross-claimed against the drug company for failing to warn of the potential for a seizure reaction in children.

During the discovery process, the physician requested documents addressing the drug, including internal memoranda. Although the drug company maintained that it had produced all requested documents, two “smoking gun” documents had been withheld. These two documents showed that the company knew about (and in fact had warned selected doctors about) the dangers of theophylline toxicity in children with viral infections, some four years before the subject injury.

And these “smoking gun” documents would have never seen the light of the courtroom had not one of them been anonymously delivered to the physician’s attorneys.

Among other efforts to try to avoid sanctions, the drug company’s attorneys claimed that they were just doing their job vigorously representing their client. The Supreme Court disagreed:

The conflict here is between the attorney’s duty to represent the client’s interest and the attorney’s duty as an officer of the court to use, but not abuse the judicial process.

Fisons, 122 Wn.2d at 354-355.

The *Fisons* court went on to observe that “The purposes of sanction orders are to **deter**, to **punish**, to **compensate** and to **educate**.” *Fisons*, 122 Wn.2d at 356 (emphasis added).

The case was remanded to the trial court for the imposition of sanctions, with this message:

This conduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense.

Fisons, 122 Wn.2d at 355.

The heat was turned up after *Fisons* in *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 54 P.3d 665 (2002), a suit brought for a defective wood protection product for siding and fences. Rather than seal out mildew, the sealant *caused* mildew and trapped it in the wood, where it spread and actually blackened the siding and fencing.

While trial was underway, the plaintiff class deposed the manager of the Troy Chemical Company paint laboratory that had provided Behr with the mildewcide that Behr used in its products. The manager testified that the tests that it performed at Behr’s request showed possible incompatibility between the mildewcide and the other chemicals that Behr was using in these products. The manager also testified that Troy had reported this to Behr.

Behr had never disclosed the test results or even the existence of the tests themselves during discovery, notwithstanding interrogatories and requests for production that would have encompassed this testing.

After a three-day evidentiary hearing, the trial court found that Behr had:

willfully and deliberately failed to disclose evidence, that the class and the judicial system were substantially prejudiced by this failure, and that only a default judgment would adequately remedy the harm to the class and also punish Behr.

Behr, 113 Wn. App. at 316.

Civil Rule 37 provides for a wide range of sanctions for discovery non-compliance or abuse. For the imposition of harsher penalties under CR 37(b), the record must clearly show:

1. Willful or deliberate violation of the discovery rules and orders;
2. The opposing party was substantially prejudiced in its ability to prepare for trial; and
3. The trial court explicitly considered whether a lesser sanction would have sufficed.

Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.3d 1036 (1997). (*Caution*: the failure of the trial court to provide a clear record of the abuse and the above elements of analysis will result in reversal of the sanctions ruling. *Blair v. TA – Seattle East No. 176*, 171 Wn.2d 342, 254 P.3d 797 (2011) (trial court’s exclusion of witnesses as sanction for party’s failure to timely disclose witnesses, followed by summary judgment of dismissal, constituted reversible error for failing to make a showing that the *Burnet* factors were taken into consideration)).

The Behr trial court in fact made a clear record of the totally unacceptable abuse and prejudice, and *entered a default judgment against Behr as to liability of all of the class’s claims, and ordered trial to proceed solely on the issue of damages* – a ruling upheld by the Court of Appeals.

The *Behr* analysis and imposition of harsh sanctions was recently revisited in *Magaña v. Hyundai Motor America*, 167 Wn.2d 570, 220 P.3d 191 (2009). The Magaña action arose out of a motor vehicle crash in which the plaintiff-passenger in one of the cars brought suit against both defendant-drivers for negligence, and against the vehicle manufacturer for defective design. The plaintiff claimed that the seat in which he was riding collapsed, causing him to be ejected out the rear window.

During discovery, plaintiff requested many documents, among them copies of complaints, notices, claims, lawsuits or incidents of seat back failure on Hyundai products. Hyundai responded that there were no personal injury or fatality lawsuits or claims in connection with or involving the seat or seat back of the Hyundai Accent model.

Trial proceeded, and resulted in an \$8,000,000 verdict. The Court of Appeals reversed and remanded. The re-trial was to be limited to liability, leaving the damages portion of the verdict intact, given that the appellate issues did not involve damages.

Prior to the re-trial, plaintiff requested that Hyundai update its earlier responses to plaintiff’s previous discovery requests. Hyundai provided information regarding two claims relating to seat

back failure, and represented that these were the only two such claims. But Hyundai had attempted to narrowly restrict the scope of the plaintiff's discovery requests, rather than answer them fully.

Consequently, the plaintiff moved to compel discovery compliance. The trial court ordered full discovery of all similar claims. Hyundai then produced records from its customer "hotline" database, and nine more reports of seat back failure were delivered to the plaintiff.

Plaintiff moved for a default judgment on the basis that it would be impossible to go to trial without a thorough analysis of the 11 additional instances of seat back failure. Additionally, because of the passage of time since the discovery requests were first issued years earlier, critical evidence no longer existed. Hyundai proposed a continuance; plaintiff argued that a continuance would only reward Hyundai's misconduct.

Following an evidentiary hearing, the trial court imposed a default judgment against Hyundai.

The Court of Appeals reversed, and the Washington Supreme Court granted review. Its opinion began with a stern warning about discovery abuse:

Trial courts need not tolerate deliberate and willful discovery abuse. Given the unique facts and circumstances of this case, we hold that the trial court appropriately diagnosed Hyundai's willful efforts to frustrate and undermine truthful pre-trial discovery efforts by striking its pleadings and rendering an \$8,000,000 default judgment plus reasonable attorney fees. This result appropriately compensates the other party and hopefully educates and deters others inclined to similar behavior.

Magaña, 167 Wn.2d at 576.

