Scheer & Zehnder LLP
Seattle, Washington

Overview of State of Washington Court System

A. Trial Courts

1. Courts of Limited Jurisdiction - Courts of limited jurisdiction include district and municipal courts. District courts are county courts and defined territories; both incorporated and unincorporated, within the counties. Municipal courts are those created by cities and towns of four hundred thousand or less.

    a. District Courts (RCW § 3.30)

        i. Jurisdiction (RCW § 3.66.020)

            1. Jurisdiction in civil cases includes damages for injury to individuals or personal property and contract disputes in amounts of up to $75,000.

        ii. Jury

            1. Juries in courts of limited jurisdiction are composed of six (6) people.

    b. Municipal Courts (RCW § 3.50)

        i. Jurisdiction (RCW § 3.50.020)

            1. Violations of municipal or city ordinances are heard in municipal courts. They do not accept civil or small claims cases.

        ii. Jury (RCW § 3.50.135)

            1. Juries in courts of limited jurisdiction are composed of six (6) people.

    c. Appeals (RCW § 3.02.020)

        i. Cases are appealed from "the record" made in lower court. The cases are appealed to superior court where only legal errors from the proceedings below are argued.

2. Courts of General Jurisdiction

    a. Superior Courts (RCW § 2.08)

i. Jurisdiction (RCW § 2.08.010 – .020)

1. There are no limits on the types of civil and criminal cases heard, also have authority to hear cases appealed from the courts of limited jurisdiction.

ii. Jury

1. Juries in superior courts are composed of twelve (12) people.

iii. Appeals

1. Appeals may be made to the Court of Appeals. In some cases, they go directly to the Supreme Court. (RCW § 2.06.030)

iv. Juvenile

1. Juvenile court is a division of the superior court, established by law to deal with youths under the age of 18.

v. Districts

1. All superior courts are grouped into single or multi-county districts. There are 30 such districts throughout Washington.

B. Appellate Courts

1. The Court of Appeals (RCW § 2.06)

a. Divisions (RCW § 2.06.020)

i. The Court of Appeals is divided into three divisions. Each division serves a specific geographic area of the state.

1. Division I

a. Located in Seattle, WA

b. Consists of twelve (12) judges from three districts

i. District 1: King County (7)

ii. District 2: Snohomish County (2)

iii. District 3: Island, San Juan, Skagit, and Whatcom Counties (1)

2. Division II

    a. Located in Tacoma, WA

    b. Consists of eight (8) judges from three districts

        i. District 1: Pierce County (3)

        ii. District 2: Clallam, Grays Harbor, Jefferson, Kitsap, Mason, and Thurston Counties (2)

        iii. District 3: Clark, Cowlitz, Lewis, Pacific, Skamania, and Wahkiakum Counties (2)

3. Division III

    a. Located in Spokane, WA

    b. Consists of five (5) judges from three districts

        i. District 1: Ferry, Lincoln, Okanogan, Pend Oreille, Spokane and Stevens Counties (2)

        ii. District 2: Adams, Asotin, Benton, Columbia, Franklin, Garfield, Grant, Walla Walla, and Whitman Counties (1)

        iii. District 3: Chelan, Douglas, Kittitas, Klickitat, and Yakima Counties (2)

b. Jurisdiction (RCW § 2.06.030)

    i. The COA has exclusive appellate jurisdiction in all cases except those specifically enumerated in RCW § 2.06.030)

    ii. Appellate jurisdiction does not extend to civil actions where the original amount in controversy does not exceed the sum of $200.

    iii. The COA is a non-discretionary appellate court

    iv. The COA has authority to reverse, remand, modify, or affirm the decision of the lower court.

c. Judges (RCW § 2.06.022 - .024)

    i. The twenty-two (22) judges on the Court serve six-year staggered terms to

ensure continuity

2. The Supreme Court (RCW § 2.04)

    a. Jurisdiction (RCW § 2.04.010)

        i. Original jurisdiction of petitions against state officers.

        ii. Discretionary review of decisions of lower courts where:

            1. the amount in controversy exceeds $200,

            2. if the action involves a state officer,

            3. a trial court has ruled a statute or ordinance unconstitutional,

            4. conflicting statutes or rules of law are involved,

            5. issues of broad public interest that require prompt and ultimate determination.

    b. Justices (RCW § 2.04.071)

        i. The Supreme Court consists of nine (9) judges

        ii. The judges are elected to six-year terms, with each term staggered to maintain continuity of the court.

Procedural

A. Venue

1. Resident

    a. An action against a resident of Washington may be brought:

        i. In the county where any defendant resides, or

        ii. Where all or part of the claim arose.

2. Nonresident

    a. An action against a nonresident of Washington may be brought in the county:

        i. Where the plaintiff resides,

        ii. Where the defendant is served,

iii. Where the defendant committed the act that triggered the Long Arm Statute, or

iv. Where all or part of the claim arose.

3. Corporate

    a. An action against a corporation may be brought in the county:

        i. Where the work was performed,

        ii. Where the agreement was entered,

        iii. Where the corporation resides,

        iv. Where the tort was committed.

B. Statute of Limitations

The following statutes of limitations are pertinent:

1. Injury to person or property: Actions for personal injury in Washington are subject to a three-year statute of limitation. (RCW 4.16.080(2)).

    a. Statutory Exceptions: medical malpractice statute, products liability statute, improvements to real estate statute

2. Written Contract: A contract that is in writing has a six-year statute of limitations. (RCW 4.16.040)

3. Oral Contract: An oral contract is subject to a three-year statute of limitations. (RCW 4.16.080(2)).

    a. Exception: Contracts that involve the sale of goods must abide by a four-year limitation.

4. Tolling

    a. For purposes of tolling a statute of limitations an action must commence prior to the running of the statute. An action is deemed commenced when the complaint is filed or the summons is served, whichever occurs first. The plaintiff, then, has 90 days to effect the other. (RCW 4.16.170)

C. Time for Filing an Answer

Unless a statute or local court rule provides for a different time requirement, the defendant is required to serve his answer within ___ days after the service of summons, not including the day of service.

1. 20 days – if received summons/complaint via personal service

2. 60 days – if a non-resident or received summons/complaint by publication, under motorist statute.

3. 90 days – received summons/complaint by mail.

D. Dismissal Re-Filing of Suit

A plaintiff may voluntarily dismiss their claim without prejudice one time. Thereafter, a second order of dismissal operates as an adjudication upon the merits. (CR 41(a)(4)). A voluntary dismissal taken upon stipulation of all parties will not count towards the limit of two voluntary dismissals. *Spokane County v. Specialty Auto and Truck Painting, Inc*., 153 Wash. 2d 238, 103 P.3d 792 (2004).

Liability

A. Negligence

1. Generally

In a negligence case the plaintiff is required to prove four elements:

a. the defendant had a duty or obligation to conform to a certain standard of conduct for the protection of others against unreasonable risks;

b. the defendant breached that duty;

c. the breach was a proximate cause of the plaintiff's injury; and

d. the plaintiff suffered legally compensable damages.

LaPlante v. State of Washington, 85 Wash. 2d 154, 159, 531 P.2d 299 (1975).

2. Duty

Washington case law has placed the duty to use reasonable care into one of two categories:

a. where the defendant has (at least in part) brought about the risk that causes injury to the plaintiff; *Michaels v. CH2M Hill, Inc*., 171 Wash. 2d 587, 257 P.3d 532, 32 I.E.R. Cas. (BNA) 571 (2011), or

b. where the defendant has not brought about the risk itself, but fails to take steps to prevent the injury to the plaintiff. In the first category of cases the defendant is generally under a duty to use reasonable care, so long as the risk to the plaintiff is reasonably foreseeable. As to the second category of cases, the defendant is generally not under a duty to use reasonable care unless:

   i. the defendant has induced justifiable reliance by the plaintiff that the defendant will use reasonable care to prevent injury to the plaintiff;

   ii. a "special relationship" exists between the defendant and the plaintiff imposing a social duty on the defendant to use reasonable care for the plaintiff's safety; or

   iii. a statute specifically imposes a duty to exercise care for another's safety. *Schwartz v. Elerding*, 166 Wash. App. 608, 270 P.3d 630 (Div. 3 2012).

While it is generally a question of law as to whether or not the defendant owed the plaintiff a duty of care, the question of whether that duty was breached is generally a question of fact for the jury. *Moore v. Hagge*, 158 Wash. App. 137, 241 P.3d 787 (Div. 1 2010).

3. Proximate Cause

Washington Pattern Instruction describes a proximate cause of an injury as "a cause which, in a direct sequence, unbroken by any new independent cause, produces the injury complained of and without which such injury would not have happened." WPI 15.01. The question of proximate cause is generally one for the jury.

4. Preexisting Conditions

The Washington Supreme Court has held that a preexisting condition is not a proximate cause of subsequent injuries if the condition was asymptomatic prior to the accident for which the plaintiff is attempting to hold the defendant liable. *Harris v. Drake*, 152 Wash. 2d 480, 99 P.3d 872 (2004).

Preexisting injuries may be relevant to showing whether or not a claimed injury was proximately caused by an occurrence for which the defendant is responsible. A jury may award damages for the "lighting up" of a preexisting injury, but not for "any injuries or disabilities that would have resulted from natural progression of the pre-existing condition even without this occurrence." WPI 30.18. On the other hand, if there is no evidence that the preexisting condition was "lighted up" by the injury caused by the defendant, then it is error to admit evidence of the preexisting condition. *Hoskin v. Reich*, 142 Wash. App. 557, 174 P.3d 1250 (Div. 2 2008).

B. Negligence Defenses

1. Comparative Fault

Washington is a "pure" comparative fault jurisdiction. The "comparative fault statute" provides that any contributory fault chargeable to the claimant in an action based on fault diminishes proportionally the amount awarded as compensatory damages for an injury attributable to the claimant's fault, but does not bar recovery. RCW 4.22.005.

2. Contributory Negligence

Reduce a plaintiff's recovery to the extent that the defendant's liability is not based upon fault, but instead is based on an intentional tort. *Honegger v. Yoke's Washington Foods, Inc*., 83 Wash. App. 293, 921 P.2d 1080 (1996). In determining whether a person was contributorily negligent, the inquiry is whether that person exercised the care for his or her own safety that a reasonable person would have used under the existing facts or circumstances. *Jaeger v. Cleaver Const., Inc.,* 148 Wash. App. 698, 201 P.3d 1028 (Div. 2 2009). Of course, in addition to proving negligence on the part of the plaintiff, the defendant seeking to utilize contributory negligence as a defense must also show that the plaintiff's negligence was a legally contributing cause of the injury. *Huston v. First Church of God, of Vancouver*, 46 Wash. App. 740, 732 P.2d 173 (1987).

3. Assumption of Risk

The Washington Supreme Court has identified four separate classes of assumption of risk: (1) express, (2) implied primary, (3) implied reasonable, and (4) implied unreasonable. *Gregoire v. City of Oak Harbor,* 170 Wash. 2d 628, 244 P.3d 924 (2010). However, the last two categories for all practical purposes have been abandoned as distinct doctrines; they are regarded as simply another form of contributory negligence. *Home v. North Kitsap School Dist*., 92 Wash. App. 709, 965 P.2d 1112 (1998). Depending on the type of assumption of risk and the circumstances of the case, assumption of risk may operate as either a partial defense to a tort action, *Shorter v. Drury*, 103 Wash. 2d 645, 695 P.2d 116 (1985), or a complete defense. *Johnson v. NEW, Inc.,* 89 Wash. App. 309, 948 P.2d 877 (1997).

a. Express:

A person expressly assumes the specific risk of harm if that person (1) has full subjective understanding (2) of the presence and nature of the specific risk and (3) voluntarily chooses to encounter the risk. Gregoire v. *City of Oak Harbor*, 170 Wash. 2d 628, 244 P.3d 924 (2010).

b. Implied Primary:

An instruction on implied primary assumption of risk is appropriate where "the plaintiff (1) had full subjective understanding (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk." *Taylor v. Baseball Club of Seattle, L.P.,* 132 Wash. App. 32, 130 P.3d 835 (2006).

C. Gross Negligence, Recklessness, Willful and Wanton Conduct

1. Gross Negligence

Only applicable to certain negligence-related statutes. For example, RCWA 4.24.264, 4.24.268 and 7.70.090 provide that the liability of directors and officers of nonprofit corporations, directors and superintendents of school districts, and directors of public and private hospitals shall be liable for injuries only when they are caused by gross negligence. Must also be proven to overcome an express release of liability given by the plaintiff before engaging in the activity leading to the injury.

2. Willful and Wanton

Willful and wanton misconduct is not a form of negligence. Unlike negligence, (even gross negligence), which implies a form of neglect or inadvertence, willful or wanton misconduct is "a radically different mental state," characterized by a type of premeditation or formed intention. *Rodriguez v. City of Moses Lake,* 158 Wash. App. 724, 731, 243 P.3d 552, 555 (Div. 3 2010). Nor is there a cause of action for willful or wanton misconduct, standing alone. Rather, willful or wanton misconduct operates as a defense or limitation to other types of claims or immunities.

D. Negligent Hiring and Retention

Although not a true form of vicarious liability, an employer can be held liable for the torts committed by the employee, even if outside the course and scope of employment, if the employer acted negligently in hiring or supervising the employee.

The plaintiff who alleges negligent hiring must show that:

a. the employer knew or, in exercising ordinary care, should have known of its employee's incompetence when the employee was hired, and

b. that the negligently hired employee caused the plaintiff's injuries. *Rucshner v. ADT, Sec. Systems, Inc.,* 149 Wash. App. 665, 204 P.3d 271 (Div. 2 2009).

A negligent supervision claim requires showing:

a. an employee acted outside the scope of his or her employment;

b. the employee presented a risk of harm to other employees;

c. the employer knew, or should have known in the exercise of reasonable care that the employee posed a risk to others; and

d. that the employer's failure to supervise was the proximate cause of injuries to other employees. *Briggs v. Nova Services*, 135 Wash. App. 955, 966–67, 147 P.3d 616, 622 (Div. 3 2006)

E. Negligent Entrustment

Negligent Entrustment is a separate and distinct claim in Washington State. Generally, one who negligently entrusts a dangerous instrumentality to one who is incompetent to handle it responsibility may be found liable if injury results. The theory of negligent entrustment is based on foreseeability. Regarding automotive entrustment, a vehicle owner is under a duty to refrain from entrusting the motor vehicle to another where the owner knows, or should know in the exercise of ordinary care, that the person to whom their vehicle was entrusted is reckless, heedless, or incompetent. *House v. Estate of McCamey*, 162 Wash. App. 483, 264 P.3d 253 (Div. 1 2011).

F. Dram Shop

1. Generally

A commercial host, i.e., one engaged in the business of supplying alcoholic beverages, has a duty to exercise care when serving patrons. However, that duty has been specified to impose liability in only two situations:

a. serving "apparently intoxicated" persons; and
b. serving minors. RCW 66.44.200; RCW 66.44.320

2. Apparently Intoxicated

A commercial host is liable if he furnishes intoxicating beverages to an "apparently intoxicated" person. (RCW 66.44.200). However, no duty is owed to the intoxicated driver himself or herself; the only duty is owed to potential victims of the intoxicated driver's negligence. At one time the standard was whether or not the person served was "obviously intoxicated." However, the Washington Supreme Court has held that the statutory standard does not require proof that the patron was *obviously* intoxicated, but it is sufficient to show that the patron *appeared* to be under the influence.

The standard of liability is based on the actual appearance of the patron and the not the assumed appearance. Therefore, jurors are not allowed to infer that a driver appeared drunk because he had a high blood alcohol content at the time of service.

3. Serving Minors

A commercial host is also liable for serving a minor. RCW 66.44.320 prohibits serving alcohol to anyone under twenty-one. While a violation of that statute is not negligence per se, it may be used as *evidence* of negligence by the trier of fact. Where a commercial vendor of alcohol furnishes alcohol to a minor, the vendor is negligent with respect to anyone who could foreseeably be injured as a result of the provision of alcohol.

G. Joint and Several Liability

Washington's Tort Reform Act of 1986 replaced joint and several liability with proportionate liability. As a result of the tort reform statute, each tortfeasor is only proportionately liable for his share of the total fault, except in certain circumstances.

1. Proportionate Liability

In most actions involving fault of more than one tortfeasor, a negligent party will be liable for his own proportionate share of fault and no more. The jury will compare the fault of all potentially negligent parties including the claimant, defendants, third-party defendants, and parties released by the claimant. Under comparative responsibility, each at-fault party is held proportionally responsible for the claimant's injuries or damages. If an accident is caused by more than one party, the jury will apportion responsibility based upon each at-fault party's own percentage of negligence, for a total percentage of fault of 100%. A judgment is entered in an amount which represents a party's proportional share of the claimant's total damages. RCW 4.22.070(1)

When a proportionate liability party settles, he settles for his share alone, and he may neither seek nor be liable for contribution. *Kottler v. State*, 136 Wash.2d 437, 963 P.2d 834 (1998).

2. Joint Liability

In most actions involving fault of more than one tortfeasor, a negligent party will liable for his own proportionate share of fault and no more. The jury will compare the fault of all potentially negligent parties including the claimant, defendants, third-party defendants, and parties released by the claimant. Under comparative responsibility, each at-fault party is held proportionally responsible for the claimant's injuries or damages. If an accident is caused by more than one party, the jury will apportion responsibility based upon each at-fault party's own percentage of negligence, for a total percentage of fault of 100%. A judgment is entered in an amount which represents a party's proportional share of the claimant's total damages. RCW 4.22.070(1)

When a proportionate liability party settles, he settles for his share alone, and he may neither seek nor be liable for contribution. *Kottler v. State*, 136 Wash.2d 437, 963 P.2d 834 (1998).

H. Wrongful Death and/or Survival Actions

There are five statutes in Washington that govern wrongful death actions.

1. RCW 4.20.010 is the *wrongful death* statute. This statute creates a cause of action that is brought by the personal representative of the deceased where his or her death is caused by the wrongful act, neglect or default of another.

2. A related statute, RCW 4.20.020, designates the *beneficiaries* of this statutory wrongful death action. The statute creates a two-tier system of beneficiaries.

The first tier consists of the wife, husband, state registered domestic partner, child or children, including stepchildren, of the deceased person. If no member of the first tier exists, then the beneficiaries may consists of the parents, sisters, or brothers, who may be dependent on the deceased person for support.

3. RCW 4.20.060 is a special survival statute. This statute provides that the decedent's own action for personal injuries may be prosecuted by the personal representative of the decedent's estate on behalf of certain beneficiaries designated by the statute if the personal injuries caused the death. This statute is a companion to RCWA 4.20.010 and allows the personal injury claim to be included in the case with the death claim if the injuries resulted in death.

4. RCW 4.20.046 is a general survival statute that allows the personal representative of the decedent's estate to assert personal injury claims on behalf of the decedent unrelated to his or her death.

5. RCW 4.24.010 gives to parents a direct action for the injury or death of a minor child, or a child on whom the parents are dependent for support.

I. Vicarious Liability

Vicarious liability is legal responsibility by virtue of a legal relationship. In Washington, the doctrine of vicarious liability allows the negligence of the actual wrongdoer to be imputed to another who otherwise has no direct participation in the tort, through the maxim *respondeat superior*.

Vicarious liability does not reduce the burden on the plaintiff in terms of establishing a breach of duty, it only extends the liability for that breach to another.

1. Employer-Employee Relationship

    a. Making an employer liable for the torts of an employee is the most common example of *respondeat superior*. To establish vicarious liability, the plaintiff must meet two criteria:

        i. The relationship must be that of employer-employee; and

        ii. The tort must be committed "within the scope of his or her employment and in furtherance of the master's business."

Where vicarious liability applies, it allows the plaintiff to sue either employer or employee, or both together. On the other hand, a finding that the employee is not liable for the plaintiff's injury

requires a dismissal of the vicarious liability or respondeat superior claim against the employer. To be the basis for dismissal of the principal under vicarious liability, the dismissal of the agent must be a determination on the merits, rather than a dismissal based upon a defense personal to the agent. If a claim is asserted against the employer based upon negligence or other breach of duty independent of respondeat superior, the dismissal of the employee will not necessarily result in a dismissal of the employer.

b. Independent Contractors

Ordinarily, an employer is not liable for torts committed by an independent contractor. The key issue in determining whether the defendant is an independent contractor is whether the principal has the *right to control* the conduct of the alleged servant. In a contractor-subcontractor situation, however, the contractor need only "direct the manner over which the work is done" in order for a party to establish control.

2. Principal-Agent Relationship

Even if the negligent party was an independent contractor of the principal rather than an employee, liability of the principal is not foreclosed. A similar analysis is followed in determining whether the agent was acting for the principal at the time the tortious conduct was committed, and whether the principal had a right to control the manner in which the agent performed his work. The burden of establishing an agency relationship rests upon the party asserting its existence.

3. Parent-Child Relationship

a. In general, a parent cannot be held vicariously liable for the torts of a child based only on that relationship. Even where a child is alleged to be acting as the parent's agent, the plaintiff must show that the child was within the course and scope of employment.

b. Although parents are not vicariously liable for the torts of their children, they may be held liable for injuries that their children cause if the parents know of the child's dangerous proclivities and fail to take reasonable steps to avoid injury to a third part. To establish liability for negligent supervision, a plaintiff must satisfy the following three elements:
    i. The child has a dangerous proclivity;
    ii. The parents know [or should have known] of the child's dangerous proclivity; and
    iii. the parents fail to exercise reasonable care in controlling that proclivity.

Washington applies an objective standard to the second element of the test; thus, the plaintiff need not prove that the parents *actually* knew of the child's dangerous proclivity. Instead, it is

sufficient if the plaintiff creates a jury question as to whether the parents *should have known* of the need to control the child.

J. Exclusivity of Workers' Compensation

1. General

Washington legislature replaced the tort system with a worker's compensation system for accidental injuries incurred at the workplace. The legislation reflected a compromise between employer and worker that resulted in abolishing all common law actions for personal injuries arising from employment, while imposing limited liability for claims not otherwise compensable. The statute was designed to be a comprehensive and exclusive compensation system for Washington workers injured on the job, but it contains some exceptions, as detailed below. The statute was intended to be broad in scope and should be liberally construed, resolving doubts in favor of coverage.

Consequently, an employer is immune from suits filed by most employees, and the worker's compensation system provides the exclusive remedy in such cases. Whether or not the statute bars a claim is a question of law for the court. It has been said that common law claims seeking compensation from an employer for injury to an employee are barred unless a statute specifically affords the right to sue. This act even precludes an action against the employer by the injured worker's family for loss of consortium. An employer is not immune from liability, for acts that intentionally cause harm or show a willful and disregard for the employee's safety.

2. Design Professionals

The worker's compensation statutes also prohibit an action by an employee against a design professional. A design professional is a third person retained by the injured worker's employer to perform professional services on a construction project, or the design professional's employees, including an architect, professional engineer, land surveyor, landscape architect, or corporation organized to render design services who are licensed or authorized to practice such profession in Washington. An exception to this prohibition of action exists if the design professional specifically assumed by contract the responsibilities for safety practices on the project. The statute also excludes from immunity the "negligent preparation of design plans and specifications." Further, the design professional's immunity is limited to the provision of services relating to an ongoing construction project that results in injury to the employee. The mere fact that the design professional is engaged in construction on the jobsite does not prevent an employee from suing the design professional for injuries resulting from negligently providing professional services on a previous occasion. Moreover, at the risk of stating the obvious, the employee is still free to sue third parties (that is, anyone who is neither the employer nor someone retained by the employer to perform functions that would fall within the employer's immunity) for injuries incurred in the course of employment.

3. Immunity - Employee Immunity

Immunity also extends to fellow employees of the injured worker. Thus, where two employees

rented a car to perform company business, and one employee's negligent driving resulted in injury to his passenger, a fellow employee, the passenger's negligence claim was barred by the Industrial Insurance Act. On the other hand, an employee of an independent contractor is not a "fellow employee" under the statute, even if the independent contractor is providing "personal labor"; the intent of the statute was only to include individuals who provide personal labor, whether denominated employees or independent contractors.

Agents of the employer are also entitled to immunity under the statute. But for a firm to qualify for such immunity, there must be an agency relationship, in which the employer retains control over the firm's work.

Children are also covered by the statute, and claims against an employer for injury not constituting an intentional tort are barred.

Statutory immunity also extends to agencies of the state itself, not only with respect to injuries sustained during the course of employment, but from claims regarding the administration of claims for work-related injury.

Damages

A. Statutory Caps on Damages

RCW 4.56.250(1) defines economic and noneconomic damages in actions for personal injury or death. Economic damages are "objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities." RCW 4.56.250(1)(a). Noneconomic damages are "subjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship." RCW 4.56.250(1)(b).

Although the 1986 Tort Reform Act originally capped the amount of noneconomic damages that may be recovered pursuant to a formula based on a percentage of the average annual wage and the life expectancy of the person incurring the damages, this cap was later struck down as unconstitutional in *Sofie v. Fibreboard Corp.,* 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989).

B. Compensatory Damages for Bodily Injury

1. Jury Instructions - Generally

In cases where there is no counterclaim or issue of contributory negligence, the jury is given WPI 30.01.01 which reads:

> It is the duty of the court to instruct you as to the measure of damages. [By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.]
>
> If your verdict is for the plaintiff, then] you must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by the negligence of the defendant.
>
> *[If you find for the plaintiff]* [your verdict must include the following undisputed items:
> (here insert undisputed past economic damage amounts)
>
> In addition] you should consider the following past economic damages elements:
> (here insert appropriate elements from among phrases 30.07.01, 30.08.01, 30.09.01, and 30.10 through 30.16)
>
> In addition you should consider the following future economic damages elements:
> (here insert appropriate elements from among phrases 30.07.02, 30.08.02, and 30.09.02)
>
> In addition you should consider the following noneconomic damages elements:
> (here insert appropriate elements from among phrases 30.04 through 30.06)
>
> The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.
>
> Your award must be based upon evidence and not upon speculation, guess, or conjecture.
>
> The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

2. Economic Damages – RCW 4.56.250(1)(a)

The statute defines economic damages as "objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment and loss of business or

employment opportunities."

3. Noneconomic Damages – RCW 4.56.250(1)(b)

The statute defines noneconomic damages as "subjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship."

4. Future Damages – RCW 4.56.260

The 1986 Tort Reform Act does not define future damages. However, RCW 4.56.260, enacted as part of that Act, requires the court at the request of a party to order periodic payments of future economic damages if those damages exceed one hundred thousand dollars. The possibility that such periodic payments may be requested necessitates that the jury separate past economic damages from future economic damages in making an award.

The committee thinks it unnecessary to define future damages for the jury because future damages are defined by example in the general instructions on the measure of economic and noneconomic damages. *See* WPI 30.01.01; WPI 30.02.01; WPI 30.03.01.

C. Collateral Source

Under the collateral source rule, a tortfeasor may not reduce damages, otherwise recoverable, to reflect payments received by a plaintiff from a collateral source. A collateral source is a source independent of one of the tortfeasors. "The collateralsource rule is an evidentiary principle, not a cause of action."

The collateral source rule requires the exclusion of certain types of evidence; but it does not create a cause of action permitting recovery of funds expended.

The vast majority of Washington cases applying the collateral source rule involve plaintiffs who received payments for personal injuries inflicted by the tortfeasor. The rule has been applied in cases where the collateral payment consisted of Medicare benefits, social security and veterans' pension benefits, disability pension benefits, workers' compensations benefits, unemployment compensation benefits, and where the plaintiff received payments from his insurer that covered all or part of the plaintiff's loss.

The collateral source rule does not apply where the source of the collateral payments is the tortfeasor or a fund created by him to make such payments. These types of payments may be

proven at trial to prevent double recovery by the injured party from the tortfeasor. However, in determining whether a benefit should be treated as a collateral source, and should therefore be excluded, it is not dispositive that treating the payment as a collateral source will result in a windfall to plaintiff. Where a windfall by one party is unavoidable, it is preferable that the injured party receive the fortuitous benefit.

D. Pre-Judgment/Post-Judgment Interest

1. Generally.

Judgments founded on written contracts providing for the payment of interest at a specified rate bear interest at the rate specified in the contract, provided the interest rate is set forth in the judgment.

Judgments for unpaid child support bear interest at twelve (12) percent.

Judgments in tort cases bear interest at a special rate established by RCWA 4.56.110(3). The statute has occasionally required interpretation to determine whether the judgment was or was not based upon tortious conduct.

All other judgments bear interest at the maximum rate permitted under RCWA 19.52.020 (the usury statute), from the date of entry. The rate of interest is determined, and begins to run, as of the date the judgment is entered. The interest rate remains constant and does not vary over the life of the judgment.

If a court is directed on review to enter judgment on a verdict or if a judgment entered on a verdict is affirmed, interest accrues from the date the verdict was rendered.

If a party's right to recover on a judgment does not arise until a future contingency occurs, interest does not begin to accrue until the date the party has a right to collect the funds.

The foregoing rules also apply to judgments against the State of Washington or political subdivisions.

2. Pre-judgment Interest.

Interest prior to judgment is allowable when an amount claimed is liquidated, or when the amount of an unliquidated claim is for an amount due on a specific contract for the payment of money and the amount due is determinable by computation with reference to a fixed standard contained in the contract, without reliance on opinion or discretion.

RCWA 19.52.010 provides that every loan or forbearance of money, goods, or thing in action shall bear interest at the rate of twelve per cent per annum when no different rate is agreed to in writing, with some refinements and exceptions. Prejudgment interest under this statute accrues on a liquidated claim. Examples of liquidated and unliquidated claims are collected below.

Prejudgment interest is not properly allowed if the amount of the claim is determinable only through a standard of reasonableness as contrasted with a fixed standard. It follows that prejudgment interest should not be given in a judgment based on quantum meruit.

In calculating prejudgment interest, the amount of a liquidated claim may be reduced by the amount of an unliquidated counterclaim. An event subsequent to the formation of the contract may render the claim a liquidated one.

The court will award prejudgment interest if the parties have so stipulated.

In cases governed by equitable principles, the trial court has a measure of discretion when fashioning a remedy involving prejudgment interest.

Other miscellaneous holdings concerning prejudgment interest are collected below.

A party holding money claimed by another can avoid prejudgment interest by paying the money into the registry of the court until the dispute is resolved.

E. Damages for Emotional Distress

1. Generally – Noneconomic Damages

Included as a recoverable noneconomic damage under RCW 4.56.250(1)(b). The statute defines noneconomic damages as "subjective, nonmonetary losses, including but not limited to pain, suffering, inconvenience, *mental anguish*, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship."

2. Separate Cause of Action

Washington plaintiffs may recover mental anguish damages under two theories: (1) intentional or willful infliction of emotional distress, *see* Cagle v. Burns and Roe, Inc., 106 Wn.2d 911, 916, 726 P.2d 434 (1986); or (2) negligent infliction of emotional distress, *see* Reid v. Pierce County, 136 Wn.2d 195, 204, 961 P.2d 333 (1998).

It is not error to instruct separately on discomfort, annoyance, and mental anguish if each distinct

item of damage is supported by independent facts. Wilson v. Key Tronic Corp., 40 Wn.App. 802, 811, 701 P.2d 518, 525 (1985).

3. Tort of Outrage

Under WPI 14.03, "[a] person who intentionally or recklessly causes emotional distress to another by extreme and outrageous conduct is liable for severe emotional distress *[and any bodily harm]* resulting from such conduct."

The torts of intentional infliction of emotional distress and outrage are identical, although outrage also encompasses reckless conduct. *See* Kloepfel v. Bokor, 149 Wn.2d 192, 66 P.3d 630 (2003)

F. Wrongful Death and/or Survival Action Damages

1. Measure of Damages – Wrongful Death - Jury Instruction

With regards to spouse/state registered domestic partner/child/step-child beneficiaries, WPI 31.02.01 & 31.03.01state that beneficiaries may recover the following:

a. Economic Damages:

i. Jury should consider as past economic damages any benefit of value, including money, goods, and services that (spouse/state registered domestic partner/child/step-child) would have received from name of decedent up to the present time if decedent had lived.

ii. Jury should also consider as future economic damages what benefits of value, including money, goods, and services decedent would have contributed to (spouse/state registered domestic partner/child/step-child) in the future had decedent lived.

b. Noneconomic Damages:

Jury should also consider what decedent reasonably would have been expected to contribute to (spouse/state registered domestic partner/child/step-child) in the way of [marital] [domestic partner] consortium or in way of love, care, companionship, and guidance.

In making their determinations, jury should take into account decedent's age, health, life expectancy, occupation, and habits, earning capacity, including decedent's actual earnings prior to death and the earnings that reasonably would have been expected to be earned by decedent in the future. In determining the amount that decedent reasonably would have been expected to

contribute in the future to (spouse/state registered domestic partner/child/step-child), jury should also take into account the amount they find decedent customarily contributed to (spouse/state registered domestic partner/child/step-child)

The burden of proving damages rests upon the plaintiff. It is for the jury to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

2. Measure of Damages – Survival Action – Statutory Beneficiaries

With regards to survival actions (brought under RCW 4.20.046 or 4.20.060) that involve statutory beneficiaries, WPI 31.01.01 provide for the following damages:

a. Economic Damages

i. The health care and funeral expenses that were reasonably and necessarily incurred.

ii. The net accumulations lost to decedent's estate. In determining the net accumulations, jury should take into account decedent's age, health, life expectancy, occupation, and habits of industry, responsibility, and thrift. You should also take into account decedent's earning capacity, including decedent's actual earnings prior to death and the earnings that reasonably would have been expected to be earned by decedent in the future, including any pension benefits. Further, jury should take into account the amount you find that decedent reasonably would have consumed as personal expenses [or reasonably would have contributed to beneficiaries during decedent's lifetime] and deduct this from decedent's expected future earnings to determine the net accumulations.

b. Noneconomic Damages

The pain, suffering, anxiety, emotional distress, humiliation, and fear experienced by decedent prior to decedent's death as a result of the event that caused the death.

The burden of proving damages rests upon the plaintiff. It is for the jury to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

G. Punitive Damages

Punitive damages are not allowed in Washington unless specifically authorized by statute. The Washington Supreme Court has continually held that punitive damages are unsound in principle and contrary to public policy. *Maki v. Aluminum Building Products*, 73 Wash. 2d 23, 436 P.2d 186 (1968). Punitive damages may be recovered in cases where a statute specifically allows for recovery of punitive damages. Washington courts follow the "most significant relationship" test in deciding whether to apply Washington law or a foreign state's law with respect to awarding punitive damages. *Singh v. Edwards Lifesciences Corp.,* 151 Wash.App. 137, 210 P.3d 337 (2009); *Korslund v. Dyncorp Tri-Cities Services, Inc*., 121 Wash. App. 295, 88 P.3d 966 (2004). For example, where an action was brought to recover damages from an injury suffered in California caused by a defective medical product, the trial court correctly applied California law permitting the award of punitive damages based on an application of the Restatement test.

In addition, where federal law controls (such as in admiralty cases), punitive damages maybe awarded.

In reviewing a jury's award of punitive damages, the trial court is not limited to a fixed ratio between the compensatory damages and the punitive damage award. Instead, the court should consider the jury's award in light of the culpability of the defendant's conduct and other relevant factors.

H. Diminution in Value of Damaged Vehicle

Washington takes the minority view with respect to the meaning of "repair" in automobile insurance policies. *Moeller v. Farmers Ins. Co. of Washington*, 173 Wash.2d 264, 274, 267 P.3d 998, 1002 (2012). Under an automobile collision policy with a liability limit of the lesser of the actual cash value of the damaged vehicle or the amount necessary to repair or replace the vehicle, less the deductible, the term "repair" means restoration of the vehicle to substantially the same condition and value as existed before the damage occurred, so that the correct measure of loss caused by collision is the difference in market value of the automobile immediately before the collision and the combined amount of its market value immediately after being repaired, plus the deductible. Thus, where the insurer elects to pay the insured the repair cost less the deductible, which was less than the actual cash value of the vehicle, the insured was entitled to recover the difference in value of the vehicle before the collision and after the repairs, plus the deductible.[73] Stated otherwise, where the repairs by the insurer under a collision policy did not substantially restore the automobile to its former condition and value, the proper measure of damages was the difference in the value before it was wrecked and the value after it was wrecked, repaired, and tendered to the insured.

In *Moeller v. Farmers Ins. Co. of Washington* the Supreme Court held that an auto insurance policy provided coverage for the diminished value of a post-accident, repaired vehicle; the bargain of the contract was to return the consumer to his pre-accident position with respect to the value of his car, the reasonable expectation of the insured was that, following repairs, the insured would be in the same position he or she enjoyed before the accident, any ambiguity in policy was to be construed against the insurer, and limits of liability and payment of loss provisions of policy did not unambiguously exclude coverage.

I. Loss of Use of Motor Vehicle

Washington allows recovery of loss of use damages when personal property has been damaged. The measure of such damages is the sum that will reasonably compensate the plaintiff for any loss of use of the property during the time reasonably required for its repair or replacement. WPI 30.16; *Pugel v. Monheimer*, 83 Wash.App. 688, 922 P.2d 1377 (1996).

It is also possible in some cases to recover for loss of use if the property is destroyed. *Straka Trucking, Inc. v. Peterson*, 98 Wash.App. 209, 989 P.2d 1181 (1999).

Evidentiary Issues

A. Preventability Determination

There is no Washington case law directly addressing whether a motor carrier's preventability determination is admissible evidence.

The most likely method of excluding Evidence of a Preventability Determination is under ER 403. Using this rule courts of other states have held preventability determinations inadmissible.

a. *Villalba v. Consol. Freightways Corp.* (N.D. Ill. 2000), 2000 U.S. Dist. LEXIS 11773, involved a truck-automobile collision. The driver of the automobile, Else Villalba, sued the owner of the truck, Consolidated Freightways, and its driver for negligence. After the accident, Consolidated Freightways conducted a post-accident review. Ms. Villalba sought to introduce evidence of Consolidated Freightways' internal investigation as a means of inferring negligence. The *Villalba* court excluded the evidence, explaining, "The problem with the inference is that the standard for determining preventability and the standard for determining negligence…are not necessarily the same." Id. The *Villalba* court concluded that the standard for negligence and the standard for preventability were not the same. The danger that these disparate benchmarks would confuse the jury in its obligation to determine legal liability constitutes unfair prejudice. Consequently, the *Villalba* court excluded the evidence of the accident preventability analysis.

b. New York courts similarly disfavor this evidence: "The contention that an accident is 'preventable' in an accident report adds little or nothing to the liability analysis at hand." *Beaumont v. Smyth* (Onondaga Cty. (N.Y.) Sup. Ct. 2004), 781 N.Y.S.2d 622 fn 3.

c. Georgia courts have held that a company's internal definition of preventability is too different from the legal standard for liability that admission of a preventability analysis would be unfairly prejudicial. Tyson v. Old Dominion Freight Line, Inc. (Ga. Ct. App. 2004), 270 Ga. App. 897, 900-01, 608 S.E.2d 266. In Tyson, the plaintiff, while driving a truck, struck the front of a second truck belonging to Old Dominion. The Tyson plaintiff sued Old Diminion and its driver for negligence.

> The Old Diminion Accident Review Committee – an internal review board charged with investigating accidents involving its drivers – conducted an accident preventability analysis of the incident. Old Diminion moved in limine to exclude evidence of the committee's findings. The trial court granted Old Diminion's motion in limine. The Georgia Court of Appeals upheld the trial court's decision, noting that the Old Dominion's internal definition of preventable accident differed from the legal standard for liability in tort. Given the difference, evidence of the committee's accident preventability analysis was properly excluded as unfairly prejudicial.

It is recommended that a motor carrier clearly state in a preamble to its preventability policies, that preventability is used for internal safety and disciplinary purposes and is not a civil or tort standard.

B. Traffic Citation from Accident

Washington has long held a traffic citation is not admissible in a subsequent civil case to prove the party committed the driving lapse. *Hadley v. Maxwell,* 144 Wash. 2d 306, 314 n.3, 27 P.3d 600 (2001), ER 403. The traffic citation, however, may be offered for other purposes, subject to ER 402; 403.

Plea agreements are similarly inadmissible in a latter civil case. ER 410 generally renders inadmissible pleas, plea negotiations and settlements; it partly provides:

> Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

C. Failure to Wear a Seat Belt

Washington law provides that the failure to wear a seat belt does not constitute negligence or contributory negligence, nor can it be used as evidence of negligence or contributory negligence. RCW 46.61.688(6); WPI 70.08; *State v. Hursh*, 77 Wash. App. 242, 245, 890 P.2d 1066 (Div. 1 1995).

D. Failure of Motorcyclist to Wear a Helmet

There is no statutory law directly addressing whether evidence of a plaintiff's failure to wear a helmet can be used as a defense to liability or to mitigate damages

1. Liability

With regards to liability, Washington case law has shown that evidence of lack of wearing a

helmet could be offered to negate proximate cause or prove a superseding cause. In *State v. Meekins*,125 Wash.App. 390, 105 P.3d 420 (Div. 2 2005), however, a vehicular homicide case, in a collision occurring around dusk, the victim, who was riding a motorcycle, was not wearing a helmet, and it was not clear at trial whether his headlight was on. The jury instructions had stated, without exception, that contributory negligence was not a defense. Meekins argued that the trial court improperly excluded evidence that the victim was not wearing a helmet, as well as expert medical testimony that if the victim had been wearing a helmet, he probably would not have died. However, the court found this evidence irrelevant, concluding that there was no way the lack of helmet could have been a proximate cause without Meekins' driving also being a proximate cause. Thus, the evidence had no tendency to prove that the lack of helmet was the sole or superseding proximate cause, and it was therefore irrelevant

2. Damages

With respect to damages, Washington cases have held that a loss ought to fall with the party most readily able to avoid it. *Charter Title v. Crown Mortgage,* 67 Wn.App. 428 (1992). It has been argued that a plaintiff is the only person who could have avoided injury or enhanced injury, by the simple act of putting on a helmet.

Washington courts have also approved the Learned Hand formula, by which it is negligence not to do an act if the burden involved in doing it is less than the likelihood of harm, times its severity. *Id.*

Washington courts have apportioned enhanced injury related to helmet use. For example, in *Couch v. Mine Safety Appliances,* 107 Wn.2d 232 (1986), the plaintiff (a logger) was injured when his safety helmet was defective, and he sued for enhanced injuries related to the helmet's defects. The court permitted the jury to consider contributory negligence. Thus a jury may apportion damages, on competent evidence, and allocating fault related to helmets.

E. Evidence of Alcohol or Drug Intoxication

The use of blood and breath tests in connection with driving offenses is regulated in detail by statute. RCWA 46.20.308; 46.61.502; 46.61.506; 46.61.517. In general, the defendant is deemed to have consented to a test by virtue of driving on a state highway. Refusal to take the test is grounds for revocation of the defendant's driver's license. The refusal to take a test is also admissible as evidence in a subsequent criminal trial.

The results of a test performed by a qualified person in accordance with procedures established by the state toxicologist are admissible in any civil or criminal proceeding on the issue of whether the defendant was under the influence of alcohol or any drug. The use of blood tests to prove intoxication in civil cases has been discussed in several opinions. *See* Tennant v. Roys, 44 Wash. App. 305, 722 P.2d 848 (Div. 1 1986); Zenith Transport, Limited v. Bellingham Nat. Bank, 64 Wash. 2d 967, 395 P.2d 498 (1964); Poston v. Clinton, 66 Wash. 2d 911, 406 P.2d 623 (1965). In general, the proponent must make a prima facie showing that the test results are accurate; challenges thereafter go only to the weight of the evidence and are for the jury to resolve.

In some actions for personal injury or wrongful death, it is a complete defense that the plaintiff or decedent was under the influence of alcohol or other drugs at the time of the accident. For this purpose, intoxication is determined by reference to the standard in criminal cases under RCWA 46.61.502.

F. Testimony of Investigating Police Officer

The admissibility of an investigating police officer's opinion testimony is based on whether that officer may qualify as an expert, showing that he or she has sufficient expertise to state a helpful and meaningful opinion. The witness need not possess the academic credentials of an expert; practical experience may suffice. Training in a related field or academic background alone may also be sufficient. ER 702 states very broadly that the witness may qualify as an expert by virtue of knowledge, skill, experience, training, *or* education. The emphasis is on whether the witness could be helpful to the trier of fact rather than on the specific nature of the witness's credentials.

a. Specialized case law requirements.

The foregoing are the general rules, applicable in most cases. In a few, relatively narrow situations, the courts have insisted upon a specific level of expertise or licensing. In medical malpractice actions, for example, the standard of care must ordinarily be established by the testimony of a licensed physician.ER 702.9; 702.10.

b. Specialized statutes.

Occasionally, a specialized statute will impose additional, more specific, requirements for particular kinds of cases. The courts regard such statutes as controlling over the general language in ER 702.

G. Expert Testimony

1. Generally

Expert testimony is expressly permitted under ER 702, and the normal evidence rules requiring a witness to avoid opinionated testimony and to testify from firsthand knowledge are modified to accommodate the testimony of the expert.

ER 702 permits expert testimony, opinion or otherwise, in order to assist the trier of fact in understanding the evidence or issues. The rule gives the trial court considerable discretion in determining the circumstances under which expert testimony will be allowed.

Testimony admissible under ER 702 is not limited to scientific matters. The rule refers, very broadly, to testimony based upon "scientific, technical, or other specialized knowledge." Further, the rules refers to an expert as a person qualified as such by "knowledge, skill, experience, training, or education." Thus the rule contemplates testimony from traditional expert witnesses

such as physicians, physicists, and architects, as well as from other skilled witnesses such as bankers, engineers, criminologists, and the like.

The admissibility of expert testimony under ER 702 will depend upon whether the witness qualifies as an expert and upon whether an expert opinion would be helpful to the trier of fact. Both determinations are regarded as preliminary factual issues, governed by ER 104.

2. Frye Rule

An expert's testimony should not exceed the limits of the underlying science or art. If the expert's opinion is based upon a scientific theory or method, the theory or method must be one that is generally accepted in the scientific community. This is known as the *Frye* rule which is followed by Washington courts. (Washington in not a state;)

One can overcome a *Frye* objection by persuading the court that tests results (or the like) are just one of several reasons for the expert's ultimate conclusion, and thus are subject only to the "reasonable reliance" test of Rule 703. See ER 703.5; In re Detention of Halgren, 124 Wash. App. 206, 98 P.3d 1206 (Div. 1 2004).

H. Collateral Source

Under Washington law, any party may present evidence to the trier of fact that the plaintiff has already been compensated for the injury complained of from any source *except* the assets of the plaintiff, the plaintiff's representative, or the plaintiff's immediate family. In the event such evidence is admitted, the plaintiff may present evidence of an obligation to repay such compensation and evidence of any amount paid by the plaintiff, or his or her representative or immediate family, to secure the right to the compensation.

I. Recorded Statements

RCW 9.93, the Washington State Privacy Act, generally provides that it is unlawful for any private individual or governmental agency to intercept or record by any electronic device any private conversations, or any private communications, transmitted by telephone or radio, without first obtaining the consent of all participants in the communication.

A "pen register" on a telephone line must be installed in accordance with the strict requirement of the Privacy Act, RCW 9.73. "Pen register" means a device that records or decodes electronic or other impulses that identify the numbers dialed on the telephone line to which such device is attached.

A pen register is a device attached to a telephone line, which electronically records on a paper tape the numbers dialed from the telephone. The paper tape then becomes a permanent and complete record of outgoing numbers called on the particular line. There is neither recording nor monitoring of the contents of the conversation, as the device does not record sound.
"Trap and trace device" means a device that captures the incoming electronic or other impulses

that identify the originating number of an instrument from which a communication was transmitted. No person may install or use a trap and trace device without a prior court order obtained pursuant to the procedures outlined in RCWA 9.73.

A pen register is different from "caller ID," which allows a subscriber to identify incoming telephone calls. The Privacy Act does not apply to any such common carrier automatic number, caller, or location identification service that has been approved by the Washington Utilities and Transportation Commission.

Whether or not a conversation is private under the privacy act, the court must consider the intent or reasonable expectations of the participants as manifested by facts and circumstances of each case.

Exceptions allowed by statute include communications of an emergency nature, such as the reporting of fire, medical emergency, crime or disaster, or which convey threats of extortion, blackmail or bodily harm, or which occur anonymously, repeatedly or at an extremely inconvenient hour, or which relate to communications by a hostage holder or barricaded person. Calls to 911 emergency services are also excepted by statute.

Video and sound recordings may be made of arrested persons by police officers responsible for making arrests or holding persons in jail before their first appearance in court. Such recordings, however, must comply with certain technical requirements and must show that the arrested person was advised he was being recorded and that he was advised of his constitutional rights at the commencement of the recording.

Video and sound recordings obtained by police personnel under the authority of RCW 9.73.090 must be made available for hearing and viewing by defense counsel at the request of defense counsel whenever a criminal charge has been filed against the subject of the video and sound recordings.

Any information obtained in violation of the Privacy Act is inadmissible in any criminal trial. Also prohibited is the use of such inadmissible evidence for purposes of impeachment, even when no attempt is made to admit the recording as evidence.

Any person who violates RCW 9.73.030 is guilty of a misdemeanor. Moreover, any person who violates the Privacy Act is subject to a civil action for injury to business, person and reputation, including damages for mental pain and suffering.

Once incarcerated, the Department of Corrections may intercept record and divulge an inmate's telephone call, although it must safeguard the sanctity of the attorney-client privilege and the clergy-penitent privilege.

J. Prior Convictions

Admissibility of prior convictions is governed by ER 609.

(a) General Rule For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time Limit Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of 1 year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a finding of guilt in a juvenile offense proceeding of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of Appeal The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

K. Driving History

1. Generally

In a negligence case, other accidents (i.e. MVA's) and injuries are inadmissible to show a general lack of care or negligence, but may be admissible on other, more limited issues.

2. Similar Actions

Similar actions of a party may be relevant and admissible on other issues only if conditions are sufficiently similar and the actions are sufficiently numerous. For example, similar accidents or injuries may be admissible to prove a dangerous or defective condition, or notice of a defect, so long there is a substantial similarity in the conditions surrounding the similar accidents and those in the case at hand.

Whether there is sufficient similarity is a matter left largely to the trial court's discretion. A substantial difference in time of the other accidents is not per se significant. Evidence of similar accidents is inadmissible to prove notice if there is no question that there was notice, or if notice is not a disputed issue in the case.

3. Causation

Other accidents or injuries may be relevant to show *how* the accident or injury happened in the case at hand; i.e., to give the jury a better understanding of how an accident might have occurred, given the facts and circumstances presented. However, for this purpose, other accidents often have too little probative value to be admissible. Again, admissibility turns on general principles of relevance and is left largely to the discretion of the trial court.

4. Other Situations

In some relatively unusual situations, other accidents or injuries might logically be relevant to issues in the case, even without a similarity of conditions. When this is so, it should not be necessary to demonstrate similarity as a matter of foundation.

In a personal injury case, the plaintiff's earlier accidents may be admissible to demonstrate a pre-existing medical condition, when the pre-existing condition is relevant under applicable principles of tort law.

Accidents *subsequent* to the accident at issue in the suit may be admissible dependent upon the character and nature of the conditions and whether they negate any inference of recent change.

L. Fatigue

In tort law, where hours of service are regulated by statute or ordinance, a breach of a duty imposed by such statute/ordinance may be considered by the trier of fact only as evidence of negligence. A plaintiff must still prove all elements of negligence, including whether the violation of hours of service statute proximately caused the damage. Washington no longer follows the principle that violation of an applicable statute is negligence per se, unless specifically stated otherwise in the statute.

M. Spoliation

1. Generally

Spoliation is defined as "the intentional destruction of evidence." There are a variety of different approaches to the problem of spoliation; it can be viewed as an evidentiary matter (Henderson v. Tyrrell, 80 Wash.App. 592, 910 P.2d 522 (1996)), or as a violation of civil discovery requirements (Id.), as a criminal violation (RCW 9A.72.150), or as an independent tort (Henderson, 80 Wash.App. 592 (1996)). A key question is whether or not the plaintiff is seeking a remedy as part of the litigation in which the spoliated evidence would be relevant, or is seeking a remedy independent of the underlying litigation. An evidentiary approach to spoliation utilizes presumptions or jury instructions as a remedy when litigants are responsible for the destruction of evidence. "[W]here relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him." Hickly v. Bare, 135 Wash. App. 676, 145 P.3d 433 (Div. 2 2006).

2. Rebuttable Presumption

In deciding whether to apply a rebuttable presumption, courts evaluate two factors:

a. "the potential importance or relevance of the missing evidence; and

b. the culpability or fault of the adverse party." It is also important to consider whether the adverse party was afforded an adequate opportunity to examine the evidence. Culpability turns on whether the party acted in bad faith or whether there is an innocent explanation for the destruction. It was not spoliation of evidence where an insurer destroyed its home office file on an underinsured motorist claim after the insured voluntarily dismissed an initial suit for bad faith, even though the insured re-filed suit more than one year later. Ellwein v. Hartford Acc. and Indem. Co., 95 Wash. App. 419, 976 P.2d 138 (1999).

Similarly, relying on discovery sanctions will impose costs, or in appropriate cases, remove certain claims or defenses if disobedience of proper discovery orders so requires. Both of these remedies can be obtained during the course of the litigation in which the alleged spoliation occurs.

On the other hand, in a separate proceeding a civil litigant may attempt to bring a new cause of action for the tort of spoliation. This cause of action has yet to be recognized in Washington.

Settlement

A. Offer of Judgment

Under CR 68, at any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of

service thereof and thereupon the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

B. Liens

Washington courts recognize both common law liens and statutory liens. Some lien statutes provide special enforcement procedures.

1. Department of Labor and Industry Liens

If an injured worker collects benefits from the Department of Labor and Industries, and later receives compensation from a third party for such injuries, the Department of Labor & Industries has a right to seek reimbursement of the benefits it has paid. RCW 51.24.060. Similar treatment is accorded a self-insured employer who performs the same function as the Department. The amount of reimbursement to the Department reflects both the obligation of the Department to pay its proportionate share of reasonable costs and attorney fees incurred in obtaining the recovery, as well as an allocation of the proceeds reflecting a balance between the policy of reimbursing the Department at the same time that the worker has adequate incentive to seek compensation from a third party. The worker is required to provide notice to the Department of Labor & Industries (or to the employer, if self-insured) of the pending action.

The Department is also entitled to seek reimbursement from a legal malpractice recovery if that recovery is in lieu of a recovery against a third-party tortfeasor, and to seek reimbursement from benefits received under a UIM policy.

The Department also has lien rights against a lump-sum settlement paid to the injured worker and a spouse or other statutory beneficiary; if the settlement does not allocate the payments between the amounts due to the worker and the amount due to the spouse, then the Department may assert its lien rights against the entire amount. But the Department's lien rights do not extend to a spouse's recovery from a third party for loss of consortium following an injury to a worker, so long as the judgment or the settlement permits identification of the compensation for loss of consortium as a separate recovery. Nor is the Department entitled to claim amounts paid in settlement for pain and suffering or other types of damages for which the Department provides no compensation. Nonetheless, the Department may claim the right to recover from the proceeds of a settlement with a third party to the extent that the Department anticipates payments for future industrial insurance benefits to the worker. Thus, where the settlement agreement omits any allocation of settlement amounts to the respective parties, or fails to distinguish general and special damages, the injured party may receive significantly less compensation.

The Department's lien rights are not subject to waiver as a result of a release or other agreement entered into by the employee and a third party. For example, where an employee of a product demonstration company was injured on the premises of a third party, her agreement with her employer to waive claims for injury against such third parties was void.

2. Medical Liens

RCW 60.44 creates a lien for medical services to a patient who has suffered a traumatic injury as a result of a tort. Under RCW 60.44.010, the lien arises in favor of public and private operators of hospital and ambulance services and of every licensed nurse, practitioner, physician, and surgeon who renders service or transportation and care for the patient. It attaches to any claim or right of action that the patient has against the tortfeasor and/or insurer for the value of the

medical services and the costs incurred in enforcing the lien, including such reasonable attorney fees as the court may allow. The lien provisions do not apply to a claim, right of action, or money accruing under the state's workers' compensation law.

The liens are limited. All the liens for services rendered to a person as a result of one accident or event may not exceed twenty-five percent of the amount of an award, verdict, report, decision, decree, judgment, or settlement.

A notice of claim must be filed. Requirements for the notice are detailed in RCW 60.44.020, which provides that the notice must be filed within twenty days after the date of the injury or receipt of transportation or care, or at any time before a settlement and payment made to the injured person. The notice is filed for record with the county auditor of the county in which the service was performed and recorded in a book kept for that purpose, indexed as deeds and other conveyances are required to be indexed.

A settlement between a patient and the tortfeasor and/or insurer does not discharge a lien or relieve the tortfeasor and/or insurer from liability by reason of the lien unless (1) the settlement either provides for the payment and discharge of the lien or (2) a written release or waiver of any claim of lien, signed by the claimant, is filed in the court where an action has been commenced on the claim or if no action has been commenced, is delivered to the tortfeasor and/or insurer. RCW 60.44.060.

The lien may be enforced in a suit by the claimant or an assignee within one year after the lien claim is filed. If the tortfeasor and/or insurer makes a payment or settlement on account of the injury, the fact of such payment shall be, only for the purpose of the lienor's suit, prima facie evidence of the negligence of the tortfeasor and of the liability of the payer to compensate for such negligence.

C. Minor Settlement

1. Generally

In every settlement of a claim, whether or not filed in court, involving the beneficial interest of an unemancipated minor or person determined to be disabled or incapacitated under RCW 11.88, the court shall determine the adequacy of the proposed settlement on behalf of such affected person and reject or approve it. If a suit for recovery on behalf of the affected person has been previously maintained, then the petition shall be filed in that county, or if no such suit exists, then in the county where the affected person resides, unless either court orders otherwise.

2. Guardian ad Litem

Upon filing of the petition, the court shall appoint a Settlement Guardian ad Litem to assist the court in determining the adequacy of the proposed settlement. The Settlement Guardian ad Litem shall conduct an investigation and file a written report with the court with a recommendation regarding approval and final disposition within 45 days of appointment or such other time as the court may order.

3. Attorney's Fees and Costs

Any attorney claiming fees, costs or other charges incident to representation of the affected person, from the claim proceeds or otherwise, shall file an affidavit or declaration under RCW 9A.72.085 in support thereof. Copies of any written fee agreements must be attached to the affidavit or declaration.

D. Negotiating Directly with Attorneys

It is normal and accepted practice in Washington for claims professionals to negotiate settlements directly with attorneys. In fact, an insurer engaged in settlement negotiations carries with him a duty to act in good faith to ascertain the most favorable terms available for the insured.

E. Confidentiality Agreements

Confidentiality agreements like all settlement provisions are contracts and can only be set aside for the same reasons that any other contract could be rescinded, such as fraud, duress, or undue influence.

F. Releases

1. Generally

In general, releases are contracts, and are governed by general contract principles. "Release" has been defined as a contract in which one party agrees to abandon or relinquish a claim or cause of action against another. "Once parties have agreed to settle a tort claim, the foundation for the judgment is their written contract, not the underlying allegations of tortious conduct." Jackson v. Fenix Underground, Inc., 142 Wash. App. 141, 146, 173 P.3d 977, 979 (Div. 1 2007). As a general rule, "the law favors the private settlement of disputes, and, accordingly, releases are given great weight in establishing the finality of settlements." Paopao v. State, Dept. of Social and Health Services, 185 P.3d 640 (Wash. Ct. App. Div. 1 2008). On the other hand, "Washington law also places great emphasis on the just compensation of accident victims." Nationwide Mutual Fire Insurance Co. v. Watson, 120 Wash. 2d 178, 840 P.2d 851 (1992). When asked to set aside a release, courts will apply the basic concepts of contract law. Thus, a release that is procured as a result of fraud, misrepresentation, overreaching, or one that is a result of mutual mistake, may be voided by the court. Similarly, a release that is limited to a specific form of damage cannot be extended beyond the terms intended by the parties at the time the agreement was entered into. For example, where a homeowner signed a check with the language "release of all claims" above the line for endorsement, that release was limited to the notation "damage to property" on the front side of the check, which in the context of the agreement was limited to damage caused by severed drain pipes. This agreement did not serve to release the defendant from a claim for continuing trespass that went beyond the limited damage caused by the drain pipes.

Similarly, a release is only applicable to those parties who actually enter into the release. Thus, an exculpatory agreement that was signed between a lessor and a lessee of a commercial truck did not operate to bar a claim by an employee of the lessee. However, the Department of Labor and Industries does have authority to enter into a settlement agreement with a tortfeasor, resulting in a release of the injured worker's tort claim. A Washington statute allows the Department to require an election by the injured worker of whether or not to pursue a claim on his own behalf, or instead to allow the Department to file an action for him. To do so, the Department must make a "written demand," giving clear notice of the effects of the worker's election. So long as the notice of the election is sufficient to put a reasonable person on notice of the Department's authority, any settlement entered into between the Department and the tortfeasor is binding on the injured worker.

Before enforcing a settlement agreement a court must first determine whether there are any disputed issues of fact that would affect the enforceability of the settlement agreement. If there are disputed issues, the trial court should hold an evidentiary hearing to resolve them.

2. Joint Tortfeasors

A release of one person or defendant does not release any other person unless the release so provides. RCW 4.22.060(2). The statutory presumption, however, may be overcome in some circumstances where the trial court is allowed to treat two or more persons as a single person for purposes of liability. For example, where a claimant and a tortfeasor-agent enter into a settlement agreement, the tortfeasor-agent's principal may also be released if the trial judge finds

that such a release is appropriate. One important consideration in deciding whether or not the principal will also be released is whether or not the amount paid to the plaintiff by the agent is limited by insurance limits or inadequate assets. If the agent is paying all that he has in exchange for a release, the court will be less likely to find that the principal was also released. Also, it matters whether the principal is being sued solely on the basis of vicarious liability, or is also charged with independent negligence.

On the other hand, where a claimant settles with a vicariously liable principal, that does not extinguish the claim against the agent whose negligence made the principal vicariously liable. For example, where an employee negligently backed out of his employer's garage, causing injuries to the plaintiff, the plaintiff's release of the employer did not preclude a separate claim against the employee for his negligence. Vanderpool v. Grange Ins. Ass'n, 110 Wash. 2d 483, 756 P.2d 111 (1988). Thus, where an employer seeks a full release—not only of its own liability but on behalf of its agents or employees—the release should specifically include any party that the employer wishes to have released.

If the claimant settles with one defendant, but an insurer or other party has a subrogation claim based upon the injury to the plaintiff, the subrogation claim is not barred unless the subrogated party consents to the release. For example, where a victim of an auto accident received benefits from a personal injury protection (PIP) policy, and then settled with the defendant driver for unreimbursed medical expenses, the court held that the subrogation claim by the PIP carrier was not extinguished. Leader Nat. Ins. Co. v. Torres, 113 Wash. 2d 366, 779 P.2d 722 (1989). However, the court conditioned its holding upon three conditions: (1) the tortfeasor knew of the insurer's payment and right of subrogation; (2) the insurer did not consent to the settlement; and (3) the settlement did not exhaust the tortfeasor's available assets.

If one defendant obtains a release for himself and another party, it releases both parties from liability to the claimant, and it also extinguishes the liability of those parties to contribution from any other entity. However, it does not extinguish the right of the paying defendant against the non-paying defendant, if the non-paying defendant did not contribute to the settlement. However, this principle only applies in situations where the parties are jointly and severally liable, such as those involving principal-agent. Where one party pays for the liability of another party who has not been found to be jointly and severally liable, no contribution liability exists.

A release of a party will ordinary inure to the benefit of a successor in interest of the party, but only if the releasing agreement covers the liability to which the release is offered as a defense. Thus, when an asbestos manufacturer transferred certain liabilities to its subsidiary, it did not end the corporation's responsibility for those liabilities and did not defeat a claim asserting those liabilities brought against the corporation's successor. Niven v. E.J. Bartells Co., 97 Wash. App. 507, 983 P.2d 1193 (1999).

G. Voidable Releases

Release has been defined as a contract in which one party agrees to abandon or relinquish a claim or cause of action against another. As a general rule, "the law favors the private settlement of disputes, and, accordingly, releases are given great weight in establishing the finality of

settlements." On the other hand, "Washington law also places great emphasis on the just compensation of accident victims." In resolving these two competing policy interests, Washington courts apply basic principles of contract law to releases and settlement agreements. Thus, a release (like any contract), may be avoided if it was obtained by overreaching, through fraud, or with misrepresentation. In reviewing a settlement agreement in order to determine whether it is enforceable, the trial court should first determine if there are disputed issues of fact; if not, the judge can decide the issue as a matter of law. On the other hand, if there are disputed issues of fact, it is an abuse of discretion to decide the issue without an evidentiary hearing to resolve the factual dispute. Such cases often arise in the context of insurance settlements. As to mutual mistake, the law requires clear and convincing evidence of the error, made independently by both parties. Mutual mistake has occurred if the parties would not have entered into the contract, or release, if they had properly understood the material facts. If such is the case, the release is void. These principles of contract law exist to protect the parties entering into the contract and a release will not be binding if the law of contract is violated.

In addition, the courts will look to public policy to determine if a release is voidable. These cases generally involve forms signed prior to a specific event or activity that limit or extinguish any liability on the part of one of the parties. In Washington, releases of liability for negligence are valid and binding unless a public interest in involved. If the agreement itself goes against public policy rationale, it will not bind the parties.

Releases may also be voided depending upon the extent of the knowledge of the injuries at the time the release was signed by the injured party. The cases in this area involve releases of liability entered into as a settlement after an injury has occurred. A plaintiff who enters into a release when knowledge of injuries is present bears the risk of the possibility of mistake or misdiagnosis of the nature and extent of the injuries. A release is also binding to unknown repercussions of those injuries.

However, in situations where the releasor was unaware of any bodily injuries at the time the agreement was entered into, the release may not be binding. The established rule is that a release may be avoided if injuries result subsequent to the agreement that were clearly not contemplated by the parties when the release was entered into. The courts will look at whether the release was entered into fairly and knowingly in order to determine if the release is binding. The "fairly and knowingly" test is judged by factors such as the greater protection afforded to accident victims over commercial entities, the bargaining positions of the parties, the possibility of inadequate knowledge regarding the future consequences of the accident, and the time in which the release was obtained. This test emphasizes the policy adopted by the courts which favors just compensation of the injured victims over the finality of settlements.

A release may also be rendered void if a subsequent court decision significantly alters the law upon which the settlement was based. For example, in Jain v. State Farm Mut. Auto. Ins. Co., 130 Wash.2d 688, 926 P.2d 923 (1996), the plaintiff had entered into a settlement agreement with an insurance company, recovering the maximum obtainable coverage under certain policies, but excluding payment under the UIM coverage, pursuant to the policy language. After the settlement was entered into, a court decision held that the exclusion of UIM coverage was void as against public policy. When the plaintiff moved to set aside the release, the district court

certified the question to the Supreme Court, which held that the release was retroactively rendered void. Although in some instances an insurer can justifiably rely upon the law as it existed prior to the new decision, here was no such reliance in the *Jain* case.

Transportation Law

A. State DOT Regulatory Requirements

Washington State's DOT have brought their rules/regulations into compatibility with the Federal Motor Carrier Safety Regulations. For more information see the WSDOT website at http://www.wsdot.wa.gov/commercialvehicle/

B. State Speed Limits

State speed limits are governed by RCW 46.61.400, which provides in pertinent part that it unlawful to operate a motor vehicle in excess of the following speed limits:

a. 25 mph on city and town streets;
b. 50 mph on county roads
c. 60 mph on state highways

C. Overview of State CDL Requirements

1. Types of vehicles that require a CDL

You must have a commercial driver license (CDL) to drive any of the following vehicles:

a. All single vehicles with a manufacturer's weight rating of 26,001 pounds or more.
b. All trailers with a manufacturer's weight rating of 10,001 pounds or more, and a combined vehicles' gross weight rating of 26,001 pounds or more.
c. All vehicles designed to transport 16 or more persons (including the driver). This includes private and church buses.
d. All school buses, regardless of size.
e. All vehicles used to transport any material that requires hazardous material placarding or any quantity of a material listed as a select agent or toxin in 42 CFR 73.

2. Types of CDLs

Commercial vehicles are divided into 3 size classes: A, B, and C.

CDL Class	What You Can Drive
A	Single or combination vehicles of any size.
B	Single vehicles of any size.
	Vehicles towing a trailer with a weight rating of 10,000 pounds or less.
	Any vehicles listed under Class C, if properly endorsed.
C	Vehicles carrying 16 or more persons including the driver.
	Vehicles carrying hazardous materials with a weight rating of 26,001 pounds or less.

3. Medical certificate requirements

    a. New regulations require all commercial driver license (CDL) holders who operate for **interstate commerce** to keep a current medical examiner's certificate on file with us.

    b. CDL holders who operate a commercial vehicle **only within Washington State** (intrastate) don't have to keep their medical certificate on file with us.

4. Register as an employer

You must register with the Washington State Department of Licensing before you can certify that a commercial driver who works for you has the skills and training necessary to operate a commercial motor vehicle safely. *See* http://www.dol.wa.gov/driverslicense/cdlemployer.html

Insurance Issues

A. State Minimum Limits of Financial Responsibility

No person may operate a motor vehicle in Washington unless

a. the person is insured under a motor vehicle liability policy with liability limits of at least the amounts provided in RCW 46.29.090,
b. is self-insured as provided in RCW 46.29.630,
c. is covered by a certificate of deposit in conformance with RCW 46.29.550, or
d. is covered by a liability bond of at least the amounts provided in RCW 46.29.090.

Written proof of financial responsibility for motor vehicle operation must be provided on the request of a law enforcement officer in the format specified under RCW 46.30.030.

An auto insurance policy must provide, at a minimum, the following basic types and amounts of coverage:

a. $25,000 per person for injuries suffered in an accident.
b. $50,000 per accident if more than one person is injured.
c. $10,000 per accident for property damage.

B. Uninsured Motorist Coverage

1. Generally

Effective July 22, 2007, WRC 48.22.030(1) defines "underinsured motor vehicle" to mean "a motor vehicle with no property damage liability bond or insurance... or with respect to which the sum of limits of liability under all bodily injury or property damage liability bonds and insurance policies applicable to a covered person after an accident is less than the applicable damages which the covered person is legally entitled to recover." Washington thus includes within its statutory definition of "underinsured motorist vehicle" both uninsured motor vehicles and motor vehicles whose insurance coverage is insufficient to compensate the insured for damages sustained in an automobile accident.

2. Mandatory

UM/UIM coverage in Washington is mandatory, unless the named insured or spouse rejects the coverage in writing. *See* WRC 48.22.030(2), (4). The coverage "is not applicable to general liability policies, commonly known as umbrella policies, or other policies which apply only as excess to the insurance directly applicable to the vehicle insured." WRC 48.22.030(2).

3. Limits

"Except as to property damage," UIM coverage "shall be in the same amount at the insured's third party liability coverage unless the insured rejects all or part of the coverage" in writing. WRC 48.22.030(3).

4. Settlement

In Hamilton v. Farmers Ins. Co. of Wash., 107 Wn.2d 721, 733 P.2d 213 (1987), the Washington Supreme Court recognized that if damages are substantially more than the liability limits and a tortfeasor has substantial assets, an underinsurer could substitute its payment to the insured in an amount equal to the tentative settlement.

> The underinsurer can succeed to the rights of its insured against the tortfeasor by (1) paying the underinsurance benefits prior to release of the tortfeasor and (2) substituting a payment to the insured in an amount equal to the tentative settlement. These payments assure that the injured insured receives the full benefit of the proposed settlement and his underinsurance coverage. The underinsurer then can pursue the insured's rights against the tortfeasor and attempt to recover assets in addition to the settlement offer. Any recovery over the amount of the substituted settlement payment must be applied first to any uncompensated damages of the injured insured. Only after the insured's damages are fully compensating can the underinsurer retain any recovery. Thus, if the underinsurer determines that the tortfeasor has available assets which would reduce its underinsurance payments after full compensation of the insured's damages, it may secure its subrogation rights by substituting a payment to the insured in an amount equal to the settlement offer.

Id. at 734.

5. Offsets

Under Washington law, UIM insurance provides a "floating layer" of excess coverage above the recovery from other sources. However, where there are multiple claimants and insufficient coverage provided in the underlying limits, the UIM carrier is entitled to an offset only for the amount actually received.

The UIM carrier is entitled to offset the full amount of the underlying limits, even if the injured party chooses to accept less than the underlying limits, so long as coverage exists.

Offsets also exists for med-pay or no fault (termed Personal Injury Protection or PIP Coverage). There are no offsets, however, for worker's compensation.

6. Stacking

Anti-stacking provisions in UIM policies are expressly allowed in Washington by statute for both internal and external stacking. *See* WRC 48.22.030(5), (6).

Accordingly, while stacking is allowed, the practice in Washington is that UIM carriers, internal anti-stacking provisions, typically issue policies containing statutorily permitted and external anti-stacking, through "other insurance" provisions, the reality is that although stacking is allowed, typically the policies are written to prohibit stacking.

7. Particular UM/UIM issues unique and/or specific to Washington

In reaction to a case in which the UIM carrier denied coverage in a road rage type case, WRC 48.22.030(12) was added to provide as follows:

> The purpose of this section is to protect innocent victims of motorists of underinsured motor vehicles. Covered persons are entitled to coverage without regard to whether an incident was intentionally caused. A person is not entitled to coverage if the insurer can demonstrate that the covered person intended to cause the damage for which underinsured motorists' coverage is sought. As used on this section, and in the section on policies providing the underinsured motorist coverage described in this section, "accident" means an occurrence that is unexpected and unintended from the standpoint of the covered person.

In every other context, Washington interprets the term "accident" from the standpoint of the tortfeasor, not the injured party.

C. No Fault Insurance

Also known as a "tort liability" system, Washington follows "fault" rules when it comes to the options of those involved in car accidents. Depending on the circumstances, a driver, passenger, or pedestrian who has been injured and/or incurred property damage via a car accident may

choose to do any or all of the following:

a. file a claim with his or her own insurance company (whether a general health insurance or car insurance policy) after the accident
b. pursue a claim the insurer of another driver who may have been at fault for causing the accident
c. go to court and seek money damages against the at-fault driver by filing a personal injury lawsuit.

Because Washington is a "fault" state, there are very few restrictions on your options when it comes to getting compensation for losses tied to car accidents. "No-fault" states have more restrictions, but proving fault in order to get compensation isn't required.

D. Disclosure of Limits and Layers of Coverage

A liability insurer must disclose the insured's policy limits to the victim before a lawsuit is filed if a reasonable person in the same or similar circumstances would believe that disclosure is in the insured's, as opposed to the claimant's, best interests; however, the insurer need not disclose the limits if a reasonable person would believe that disclosure is not in the insured's best interest or if a reasonable person would not know, after reasonably marshaling the facts and evaluating the claim, whether disclosure was or was not in the insured's best interests.

E. Unfair Claims Practices

There is a special statutory duty of good faith that applies to insurance companies. RCWA 48.01.030 requires insurers to deal with their insureds in good faith. An insurer's duty of good faith is based upon a fiduciary relationship creating a heightened standard when contracting with its clients for insurance coverage. An insurance company owes a heightened duty of good faith when it defends an insured under a reservation of rights. In addition to the basic duties of good faith and fair dealing, the insurer must also satisfy the following four criteria: (1) thoroughly investigate the claim; (2) retain competent defense counsel loyal only to the insured; (3) fully inform the insured of the reservation-of-rights defense and the progress of the lawsuit; and (4) refrain from putting the insurer's financial interests above that of the insured. In order to establish a breach of this duty, the insured must prove that the insurer acted unlawfully and in violation of public policy.

The insurer's fiduciary duty to act in good faith is fairly broad; conduct short of intentional bad faith or fraud may constitute a breach of this duty, although not by a good faith mistake. An insurer acts in bad faith when it overemphasizes its own interests. The insurance company's good faith obligation requires it to give equal consideration in all matters to the insured's interests as well as its own interests in resolving claims. The primary inquiry in determining a violation is whether the insurer acted without reasonable justification. An insurer acts in bad faith only when the position it takes is unreasonable, frivolous, or untenable.

The inquiry regarding good faith by an insurer is a question of fact. However, summary

judgment may be granted if reasonable minds could only reach one conclusion. If the insurer's denial of coverage is based upon a reasonable interpretation of the policy or if it is uncertain whether the reason for denying coverage was legally sufficient, bad faith will not be found by the courts. On the other hand, an insurer's interpretation of law is not necessarily in good faith simply because the insurer takes an arguable position with respect to existing law. It is still a question as to whether the position, though arguable, was reasonable. It is possible for a jury to conclude that the insurer acted in bad faith even if, at the time of the denial of coverage, the question of coverage appears debatable or even doubtful. Similarly, the insured, as well as the insurer, is bound by the common law duty of good faith and fair dealing, as well as the statutory duty to practice honesty and equity in all insurance matters.

Finally, the Washington courts have found that an insurer is ordinarily permitted to limit its liability unless such a limitation is inconsistent with public policy or some statutory provision. Thus, exclusion from coverage will be ineffective if the facts in any specific case establish that coverage is required to fulfill a statutory mandate.

In order to prevail in a bad faith action, at least where the insured's claim arises from the insurer's defense of the insured under a reservation of rights, the plaintiff must show that harm resulted from the denial of coverage. However, proof of bad faith by the insurer raises a rebuttable presumption of damage. The remedy for bad faith by an insurer is compensation for the harm caused to the insured and estoppel as to any policy defense claims held by the insurer.

F. Bad Faith Claims

Like any other tort, the tort of bad faith requires proof of the existence of a duty, breach of that duty, and damages proximately caused by that breach.

The tort of bad faith has been defined as a breach of the obligation to "deal fairly with an insured, giving equal consideration *in all matters* to the insured's interests." However, this definition arose out of a liability insurance case, and seems to conflict to some extent with the many cases holding that it is not bad faith for an insurer to debate a debatable policy question. The latter cases permit an insurer to deny coverage, incorrectly, so long as the denial of coverage is not frivolous, or without reasonable justification.

To prevail in a bad faith claim, the insured has the burden of establishing that "the insurer's breach of the insurance contract was unreasonable, frivolous or unfounded." This is a question of fact, and is subject to summary judgment according to the normal rules for summary judgment. If the insurer has denied coverage, the insured must produce evidence that the insurer's denial of coverage was unreasonable. In turn, the insurer may respond with evidence showing that its denial of coverage was reasonable. Where reasonable minds could not differ as to the reasonableness of the insurer's actions, summary judgment is appropriate. On the other hand, where reasonable minds could differ, or where the insured offers evidence that the denial of coverage was actually based on factors other than the reason proffered by the insurer, then summary judgment is inappropriate.

An insurer's violation of the statutory obligation to act in good faith "in all insurance matters"

can constitute a *per se* violation of the Consumer Protection Act, RCWA 19.86.010 to.090. Consumer Protection Act remedies include, *inter alia*, treble damages up to $10,000, court costs, and attorney fees. RCWA 19.86.090

Extracontractual liability for the tort of bad faith has been adjudged in liability insurance cases where the insurer fails to defend its insured; where the insurer defends inappropriately under a reservation of rights; where the insurer negligently or in bad faith fails to negotiate and/or settle a claim against its insured within policy limits; and where the insurer prejudices its insured by a negligent or bad faith preliminary investigation. Third party claimants against the insured have no cause of action for the tort of bad faith, absent an assignment of the claim by the insured.

In property, health, homeowners and other first party insurance cases, insurers have been held liable for wrongful refusals to pay claims where such refusals amount to bad faith, for wrongful failure to promptly adjust the claims, and for wrongfully inducing the insured to buy a policy that did not provide the expected coverage and then canceling the policy.

It is not dispositive that the policy in fact provides no coverage; the insurer's duty of good faith is separate from its duty to indemnify if coverage exists. The duty to conduct a reasonable investigation exists regardless of the ultimate conclusion regarding coverage, and if there is a breach of this duty it can be subject to suit both as a bad faith claim and as an action under the Consumer Protection Act.

G. Coverage – Duty of Insured

The duty of cooperation is a defense to coverage which is routinely relied upon by insurance carriers in denying comprehensive general liability (CGL) claims. Under Washington law, an element necessary to this defense is a showing by the carrier that it suffered actual prejudice. Oregon Auto. Ins. Co. v. Salzberg, 85 Wash. 2d 372, 535 P.2d 816 (1975).

Where the insured fails to cooperate with the insurer, and there is no actual prejudice to the carrier's ability to defend the underlying action, there is no prejudice, and the coverage will not be denied. In the context of environmental liability cases, very often the insurer will not only deny coverage but the defense obligation as well. In that circumstance, the insured will often refuse to make its files and records, including such items as consultant reports, drafts of agreements or similar materials available to the carrier, which is also an adversary in the coverage dispute. However, since such materials are seldom helpful in defending against the strict liability claims inherent in such cases, the alleged breach of the duty to cooperate causes no prejudice.

H. Fellow Employee Exclusions

Liability insurance policies may contain provisions which exclude coverage for injuries to employees of the insured arising out of and in the course of their employment. The purpose of an employee exclusion is to make clear that the liability policy does not provide coverage for claims arising under workers compensation laws.

Washington case law has suggested that an employee exclusion provision is recognized and largely governed by contract law.