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Sullivan v. Scoular Grain Co. and the 1994 Amendments: Is Joint and Several Liability Really Dead in Utah?*

I. INTRODUCTION

It was the Utah Supreme Court's 1993 case of *Sullivan v. Scoular Grain Co.*¹ which finally articulated how to judge the effect of immune parties within Utah's comparative negligence scheme. Before *Sullivan*, this area of Utah tort law was unresolved and in fact articulated two separate—and wholly incompatible—means for judging immune parties' impact when determining the percentage fault of non-immune defendants. The two acts which offered different schemes for determining tort remedies when immune parties are involved were the Utah Liability Reform Act² and the Workers' Compensation Act.³

The case's central question was whether parties who were immune from suit under the Workers' Compensation Statute⁴ should be included on the special verdict form for the apportionment of fault, as allowed by the Utah comparative negligence scheme.⁵ In resolving the differing compensation schemes offered by two acts, the court held that immune parties may be included on the jury form but that this was not to affect the exclusive remedy of the Workers' Compensation Act.⁶

The *Sullivan* decision not only resolved an area where Utah laws were incompatible, it also set the stage for legislative amendments to the then-irreconcilable acts.⁷ This 1994 legislation was entitled the Workers' Compensation and Liability Reform Act Amendments⁸ ("the 1994

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1. *Sullivan v. Scoular Grain Co.*, 853 P.2d 877 (Utah 1993).

2. Utah Liability Reform Act of 1986, ch. 199, 1986 Utah Laws 470 (codified at UTAH CODE ANN. § 78-27-37 to -43, -53 (1992 & Supp. 1994)).

3. Workers' Compensation Act, ch. 100, 1917 Utah Laws 306 (codified in scattered sections of UTAH CODE ANN. Title 35) (originally established the Industrial Commission of Utah and the workers' compensation scheme. It was amended many times prior to the 1994 amendments relevant to this note).

4. UTAH CODE ANN. § 35-1-62 (1994).

5. *Id.* § 78-27-39 (Supp. 1994).

6. *Sullivan v. Scoular Grain Co.*, 853 P.2d 877, 880-81 (Utah 1993).

7. Workers' Compensation and Liability Reform Act Amendments, ch. 221, 1994 Utah Laws 1021 (codified as amended at UTAH CODE ANN. § 35-1-62, 78-27-37 to -41).

8. *Id.*

Amendments"). It was passed "[i]n the waning hours of the 1994 Utah Legislative Session, [as] Senate Bill No. 224, [which was] a compromise engineered by the Governor."⁹ The new legislation allowed immune entities to be included on the special verdict form. It also created the requirement that the fault attributable to immune parties be 40% or greater before the immune party could be included in the overall apportionment process under the Utah comparative negligence scheme.¹⁰

This note will review the historical background of the statutes affected by the 1994 Amendments; the court's analysis of *Sullivan*; and the 1994 Amendments and the effects of their 40% threshold for fault allocation. This note will further suggest the need for careful consideration—and prescience—on the part of the litigator when an immune party is involved in the suit. Under the 1994 Amendments the amount of damages for which the non-immune defendant can be liable can largely depend on which side of the 40% threshold the immune party falls.

II. BACKGROUND

A. *The Workers' Compensation Act*

The Workers' Compensation Act, originally passed in 1917, created a no-fault compensation system for workers in the state of Utah.¹¹ The Act provides an exclusive remedy for an employee against an employer in a negligence action,¹² abrogating an employee's common law right to sue his or her employer for injuries suffered while in the course of employment.¹³ The Act states: "The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer."¹⁴

B. *The Liability Reform Act*

Sixty years following the passage of the Workers' Compensation Act, the move toward comparative negligence in Utah began. In 1973 Utah abolished contributory negligence as an absolute bar to recovery in a negligence action and retained the doctrine of joint and several liability.

9. Tim D. Dunn & W. Brent Wilcox, *Significant Changes in Comparative Fault and Workers' Compensation Reimbursement*, UTAH B.J., Aug.-Sept. 1994, at 8.

10. UTAH CODE ANN. § 78-27-39(2)(a)-(b) (Supp. 1994).

11. *Id.* § 35-1-60 (1994).

12. *Id.*

13. *Masich v. United States Smelting, Ref. & Mining Co.*, 191 P.2d 612, 616 (Utah), *appeal dismissed*, 335 U.S. 866 (1948).

14. UTAH CODE ANN. § 35-1-60 (1994).

ty.¹⁵ Under the common law, the doctrine of joint and several liability "holds joint tortfeasors responsible for plaintiff's entire injury, allowing plaintiff to pursue all, some, or one of the tortfeasors responsible for his injury for the full amount of damages."¹⁶

But Utah was not long a joint and several liability state. In 1986 the legislature passed the Liability Reform Act¹⁷ which abolished joint and several liability¹⁸ by requiring that "no defendant [be] liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant."¹⁹ Further, the Act defined a defendant as a person not immune from suit who is "claimed to be liable because of fault to any person seeking recovery."²⁰

III. THE *SULLIVAN* DECISION

The overlap of the doctrine of the immune employer found in Utah's Worker's Compensation legislation with the state's comparative negligence scheme gave rise to the *Sullivan* case. In this case, the court addressed the issue of whether a defendant can be liable for more than the fault attributable to it or if an immune party should be included in the special verdict form in order to determine the immune party's percentage of fault.

The facts of this 1986 case involved Kenneth Sullivan, an employee of Scoular Grain Company, Freeport Center Associates, and Scoular Grain Company of Utah (the Scoular parties), who lost his left arm and left leg in an accident on the railroad tracks in Clearfield, Utah.²¹ Sullivan brought suit against "the Scoular parties, Union Pacific Railroad Company, Denver & Rio Grande Western Railroad Company, Oregon Short Line Railroad Company, Utah Power & Light Company, Trackmobile, Inc., and G.W. Van Keppel Company."²²

Of these parties the federal district court dismissed two. The Scoular parties were dismissed on the grounds that they were immune from suit under the exclusive remedy provision of the Workers' Compensation

15. Liability Reform Act of 1973, ch. 209, 1973 Utah Laws 710.

16. *Coney v. J.L.G. Indus. Inc.*, 454 N.E.2d 197, 204 (Ill. 1983).

17. Liability Reform Act of 1986, ch. 199, 1986 Utah Laws 470 (codified as amended at UTAH CODE ANN. §§ 78-27-37 to -43, -53 (1992 & Supp. 1994)).

18. UTAH CODE ANN. § 78-27-38 (Supp. 1994).

19. *Id.* § 78-27-38(3).

20. *Id.* § 78-27-37(1) (Supp. 1994).

21. *Sullivan v. Scoular Grain Co.*, 853 P.2d 877, 878 (Utah 1993).

22. *Id.*

Act.²³ The court dismissed Denver & Rio Grand Western Railroad because it found that no duty was owed to the Plaintiff.²⁴

But after these immune parties were dismissed, defendant Trackmobile moved to have these defendants included on the special verdict form. While Trackmobile understood the immune defendants could not ultimately be held liable, by asking that they be included on the special verdict form, Trackmobile sought, "to have the jury apportion and compare the fault of all the originally named defendants."²⁵ This presumably would tend to decrease the damages for which Trackmobile could ultimately be found liable.

A. Immune Employers

To determine whether immune employers, such as the Scouler parties in *Sullivan*, should be included on the special verdict form, the court stated its standard for statutory interpretation: "The court's principal duty in interpreting statutes is to determine legislative intent, and the best evidence of legislative intent is the plain language of the statute."²⁶ The court then looked to the definition of "defendant" in the comparative negligence statute as well as language elsewhere in the statute which gave an sense of which parties might be included in that definition.²⁷ As defined by the comparative negligence statute, a defendant is "*any person not immune from suit* who is claimed to be liable because of fault to any person seeking recovery."²⁸ This definition, the court acknowledged, would seem to preclude the inclusion of immune parties on the special verdict form.²⁹

However, the court found that this interpretation directly conflicted with language of two other sections of the comparative fault provision.

23. *Id.* The section providing an exclusive remedy against an employer by an employee is UTAH CODE ANN. § 35-1-60 (Supp. 1994).

24. *Sullivan*, 853 P.2d at 878-79.

25. *Id.* at 879.

26. *Id.* (citing *Jensen v. Intermountain Health Care, Inc.*, 679 P.2d 903, 906 (Utah 1984)). However, it is interesting to note that if this standard is strictly applied, the plain language of UTAH CODE ANN. § 78-27-37(1) could also preclude immune parties from being included on the special verdict form because they are not "defendants" as defined by the statute. Moreover, a different inference could be given to §§ 78-27-38 and -40 so as to apply only to parties that fall within the definition of "defendant." Under that analysis, non-immune parties are only ensured that they will be liable for the proportionate share of fault as against other non-immune parties. Therefore, the conflict could be avoided by applying the plain language of the definition of "defendant." See *Sullivan*, 853 P.2d at 885 (Stewart, J., dissenting).

27. *Sullivan*, 853 P.2d at 879.

28. *Id.* (citing UTAH CODE ANN. § 78-27-37(1)).

29. *Id.*

One section stated, “[n]o defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant.”³⁰ Another section of the statute added, “the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant.”³¹ Given the apparent statutory contradiction, the court reasoned that if the immune entity was not included in the apportionment process and some fault was attributable to it, the third party defendant would be liable “in excess of [its] proportion of fault.”³²

The court gave the following hypothetical as an example of the effect of the statute if immune entities were not included on the special verdict form: “[I]f the Scoular parties were 90% at fault and the defendants remaining in the action were 10% at fault, the remaining defendants would be apportioned 100% of any damages awarded even though they were only 10% at fault.”³³ In essence, this would have made the third-party defendants jointly and severally liable for the fault of the immune party.

The court then stated a second rule of statutory interpretations noting that “[t]he primary rule of statutory interpretation is to give effect to the intent of the legislature in light of the purpose the statute was meant to achieve.”³⁴ The preliminary drafts of Senate Bill 64 (later the Liability Reform Act of 1986)³⁵ stated in the title that one of the purposes of the legislation was to “[abolish] joint and several liability.”³⁶ Furthermore, in the bill’s legislative history, one Senator had stated that “it is the basic fairness concept we’re driving at. The defendant ought to be on the hook only for its own percentage of damages, but ought not be the guarantor for everyone else’s damages.”³⁷

Therefore, unless the immune parties were included in the apportionment process, the “[legislative intent] would be frustrated” and “joint and several liability would result.”³⁸ The court held that “[a] jury may apportion the fault of employers under [the Liability Reform Act]

30. UTAH CODE ANN. § 78-27-38 (Supp. 1994).

31. *Id.* § 78-27-40.

32. *Sullivan*, 853 P.2d at 879.

33. *Id.*

34. *Id.* at 880 (quoting *Reeves v. Gentile*, 813 P.2d 111, 115 (Utah 1991)).

35. Liability Reform Act of 1986, ch. 199, 1986 Utah Laws 470 (codified at UTAH CODE ANN. §§ 78-27-37 to -43, -53 (1992 & Supp. 1994)).

36. *Sullivan*, 853 P.2d at 880.

37. *Id.*

38. *Id.*

notwithstanding their immunity under [the Workers' Compensation Act]."³⁹

Although the court held that immune parties must be included on the jury form, it stated that the inclusion of the party does not affect the exclusive remedy of the Workers' Compensation Act.⁴⁰ The court held that the "[a]pportionment of fault does not of itself subject the employer to civil liability. Rather, the apportionment process merely ensures that no defendant is held liable to any claimant for an amount of damages in excess of the percentage of fault attributable to that defendant."⁴¹

Not only did the ruling leave the exclusive remedy of workers' compensation against the employer intact, it also left the employer with the full right to subrogate any claim the employee had against a third party for any benefits paid under workers' compensation. In reaching this decision, the court examined the laws of other jurisdictions and equitable considerations such as the fact that if the employee's claim is less than the workers' compensation benefits, the employee will take nothing in the action against the third party.⁴²

B. *Dismissed Nonemployer Defendants*

In considering Trackmobile's motion for inclusion of Denver & Rio Grande Western Railroad Company, the party dismissed on the merits, the court again considered the definitions in the Liability Reform Act. The Act defines "defendant" as "any person not immune from suit who is claimed to be liable *because of fault* to any person seeking recovery."⁴³ The Act also defines "fault" as "any *actionable* breach of legal duty, act, or omission proximately causing or contributing to injury or damages."⁴⁴ The court recognized that "actionable" may be interpreted so that "the Act's definition of fault does not necessarily preclude the apportionment of fault of nonparties."⁴⁵ Nevertheless, the court held that "[since] the exclusion [of the dismissed party] will not subject the remaining defendants to potential liability for damage in excess of their proportionate fault," the nonemployer defendants that were dismissed based on an adjudication on the merits, could not be included on the special verdict form.⁴⁶

39. *Id.* at 884.

40. *Id.* at 880-881.

41. *Id.* at 878.

42. *See supra* part III.C.

43. *Sullivan*, 853 P.2d at 883 (quoting UTAH CODE ANN. § 78-27-37(1), (2) (1986)).

44. *Id.*

45. *Id.* at 884.

46. *Id.*

C. *The Effect of the Holding*

Given the court's position regarding the immune employers and non-employers, the result of the holding in this case can be quite harsh on the plaintiff and may allow an "at fault employer to escape liability altogether at the expense of the injured employee."⁴⁷ This is because:

[When] an injured employee receives a judgment from a third-party defendant which is less than or equal to what the plaintiff receives in workers' compensation payments, the employee must subrogate the entire amount to the employer. In such a case, the employer or its insurer will pay little or nothing even though a large percentage of the fault is attributable to the employer.⁴⁸

Justice Durham, writing for the majority, recognized the outcome could be inequitable and that the meaning of the statutory language, requiring that each defendant only be held liable for their relative portions of fault, is clear.⁴⁹ Recognizing this inequity, the majority referred to the need for legislative action to resolve the statutory conflict, stating "[The] plaintiff's remedy on this point is a legislative one."⁵⁰ In subsequent cases which followed the *Sullivan* precedent,⁵¹ there was also a clear message for legislative resolution from the court. Both the majority and dissent in these later cases confirmed the need for legislative change.⁵²

IV. THE 1994 AMENDMENTS

The Workers' Compensation and Liability Reform Act Amendments of 1994⁵³ were a response to the court's suggestion that a change in the legislation in this area was needed.⁵⁴ The bill was drafted by the Workers' Compensation Fund of Utah and supported by the Utah Trial

47. *Id.* at 883.

48. Geoffrey C. Haslam, *Apportioning the Comparative Fault of Non-party Joint Tortfeasors*, 1994 UTAH L. REV. 444, 450.

49. *Sullivan*, 853 P.2d at 883.

50. *Id.*

51. See *Erickson v. Salt Lake City Corp.*, 858 P.2d 995 (Utah 1993); *Brown v. Boyer-Washington Boulevard Assocs.*, 856 P.2d 352 (Utah 1993).

52. See *Brown*, 856 P.2d at 355. (Durham, J., concurring, "I hope that the legislature will address the issue." Stewart, J., dissenting, "It appears that the Legislature ought to readdress the issue.").

53. Workers' Compensation and Liability Reform Act Amendments, ch. 221, 1994 Utah Laws 1021 (codified as amended at UTAH CODE ANN. §§ 35-1-62, 78-27-37 to -41 (Supp. 1994)).

54. See *supra* note 52.

Association which would have effectively overruled the *Sullivan* decision.⁵⁵ Various interests including the Manufacturer's Association, the insurance industry and large corporations opposed this bill "apparently . . . willing to take an increase in workers' compensation premiums in return for having less third party tort liability."⁵⁶

The final 1994 Amendments allow a party immune from suit to be included on the special verdict form.⁵⁷ However, the Amendments treat the immune party differently depending on whether or not fault allocated is greater or less than 40%.⁵⁸

The statute makes clear that the exclusive remedy through workers' compensation is to remain in place and that the immune employer is only included on the special verdict form for purposes of apportionment:

The apportionment of fault to the employer in a civil action against a third party is not an action at law and does not impose any liability on the employer. The apportionment of fault does not alter or diminish the exclusiveness of the remedy provided to employees, their heirs, or personal representatives, or the immunity provided employers pursuant to Section 35-1-60 for injuries sustained by an employee, whether resulting in death or not. Any court in which a civil action is pending shall issue a partial summary judgment to an employer with respect to the employer's immunity as provided in Section 35-1-60 [regarding the exclusive remedy of workers' compensation], even though the conduct of the employer may be considered in allocating fault to the employer in a third party action in the manner provided in [the comparative fault sections].⁵⁹

Only following the apportionment process is the immune defendant then treated differently, depending on whether or not the fault apportioned to that defendant is greater or less than 40%.⁶⁰

A. When the Fault of the Immune Entity is Less than 40%

If the jury apportions less than 40% of fault to the immune parties:

55. *Dunn & Wilcox*, *supra* note 9, at 10.

56. *Id.* For a discussion regarding why workers' compensation premiums would likely rise both in the 1994 Amendments and in the bill supported by the Manufacturer's Association see *infra* part IV.C and note 85 and accompanying text.

57. UTAH CODE ANN. § 78-27-39(1) (Supp. 1994).

58. *Id.* § 78-27-39(2)(a)-(b).

59. *Id.* § 35-1-62(6) (1994).

60. *Compare id.* § 78-27-39(2)(a) (Supp. 1994) (stating the effect of apportionment when fault is less than 40%) with § 78-27-39(2)(b) (stating the effect of apportionment when fault is 40% or more) and § 35-1-62(5)(b)(i)-(ii) (1994) (regarding the right of reimbursement of the self insured employer or carrier). These sections taken together attempt to remedy the harsh effect of the decision as discussed *infra* part III.C.

the trial court shall reduce that percentage or proportion of fault to zero and reallocate that percentage or proportion of fault to the other parties in proportion to the percentage or proportion of fault initially attributed to each party by the fact finder. After this reallocation, cumulative fault shall equal 100% with the persons immune from suit being allocated no fault.⁶¹

For example, if the jury apportions 30% of fault to the immune parties, and there are two non-immune third party defendants each receiving 35% of the fault, the immune parties fault would be reduced to zero and re-allocated among the non-immune third party defendants. In this situation, each third party defendant would be liable for 50% of the damages.⁶² Since the remaining fault is reallocated among the parties, to a certain extent, this effectively makes the third-party defendants jointly and severally liable for the amount of the employers' fault.

When the fault of the immune entity is less than 40%, the employee is required to reimburse the employer or insurer for the full amount of workers' compensation benefits, "without reduction" less the proportionate share of costs and attorneys' fees.⁶³ The portion of the statute relating to reimbursement is substantially the same as the holding in the *Sullivan* case except that full reimbursement is now required only if the immune entities' fault is less than 40%.

Therefore, applying the reimbursement requirement to the previous example, when the immune employer's fault is 30% the employer or the insurance carrier has a right to full reimbursement of workers' compensation benefits (less the reasonable proportionate share of attorneys' fees) even though the employer shares a percentage of the fault. For example, if the immune employer's fault is determined to be 30% and if there are two third parties each being 35% at fault (resulting in 100% of fault), the employer's fault would be reallocated,⁶⁴ and each third party would be liable for 50%. If there were \$100,000 in damages and the employee-plaintiff received \$10,000 in workers' compensation benefits, the employee-plaintiff would have a judgement of \$50,000 from each third party defendant subrogated to a claim for reimbursement for \$10,000 by the employer under the Workers' Compensation Statute.⁶⁵ Generally, "[the] common-law doctrine of joint and several liability holds joint tortfeasors responsible for plaintiff's entire injury, allowing plaintiff to

61. UTAH CODE ANN. § 78-27-39(2)(a) (Supp. 1994).

62. This hypothetical assumes that no fault is attributed to the plaintiff.

63. UTAH CODE ANN. § 35-1-62(5)(a)-(b) (1994).

64. *Id.* § 78-27-39(2)(a) (Supp. 1994).

65. *Id.* § 35-1-62(5)(b)(i) (1994).

pursue all, some, or one of the tortfeasors responsible for his injury for full amount of the damages.”⁶⁶ Under the 1994 Amendments, because fault is reallocated among the existing non-immune parties when the fault attributable to the immune parties is less than 40%, the third party defendant is jointly and severally liable for the immune parties’ proportionate fault after reallocation.⁶⁷ While the non-immune parties are not liable for the plaintiff’s “entire injury,” they will share jointly and severally in the immune parties amount of damages.

Notably, the jury may not be told that if they allocate less than 40% of the fault to the immune defendants the third-party defendants may be liable for more than their proportionate share of fault. The statute states, “[t]he jury may not be advised of the effect of any reallocation under [this Section].”⁶⁸ In the end, when the employers fault is less than 40%, the 1994 Amendments maintain a true no-fault worker compensation system as enacted in 1917.⁶⁹

B. When the Fault of the Immune Entity is Greater than 40%

If the jury determines that the fault of the immune entity that was included on the special verdict form is greater than or equal to 40 percent, the 1994 Amendments paint a much different picture. In these circumstances, “that percentage or proportion of fault attributed to persons immune from suit may not be reduced [and reallocated].”⁷⁰ Although the immune employer’s fault is not reduced, this does not subject the immune employer to liability based on the allocation of fault.⁷¹ It simply guarantees “the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant.”⁷²

For example, if the jury apportions 70% of the fault to the immune employer and 30% to the non-immune third party defendants and the

66. *Coney v. J.L.G. Indus. Inc.*, 454 N.E.2d 197, 204 (Ill. 1983).

67. If there is more than one third party defendant, the defendants are not jointly and severally liable for each others fault, however they are jointly and severally liable against the immune party.

68. UTAH CODE ANN. § 78-27-39(2)(c)(i) (Supp. 1994).

69. Workers’ Compensation Act of 1917, ch. 100, 1917 Utah Laws 306.

70. UTAH CODE ANN. § 78-27-39(2)(b) (Supp. 1994).

71. *Id.* § 78-27-38. *But cf. id.* § 35-1-62(5)(b)(ii) (1994) (the right to reimbursement by self-insuring employer or insurance carrier is reduced by the proportionate share of fault).

72. *Id.* § 78-27-40(1) (Supp. 1994). Another part of the statute reiterates the fact that “[a] defendant or person seeking recovery may not bring a civil action against any person immune from suit to recover damages resulting in the allocation of fault.” *Id.* § 78-27-40(3). This attempts to maintain the integrity of the no-fault Workers’ Compensation Act.

damages are \$100,000, the plaintiff may recover \$30,000 from the third-party defendant and the employer doesn't have a right to full subrogation of workers' compensation benefits paid to the plaintiff employee.⁷³ In this case, the non-immune third-party defendant is only liable for the proportion of damages equivalent to the percentage of fault attributed to that defendant (\$30,000).⁷⁴ Therefore, in this situation, damages are not shared jointly and severally among the non-immune parties for the fault of the immune employer.

The court may advise the jury that "fault attributed to persons immune from suit may reduce the award of the person seeking recovery."⁷⁵ In fact, it may be in the plaintiff's and the immune employer's best interest to request these instructions in order to influence the jury and bring the fault of the immune employer under the 40% threshold. If fault of the immune entity is less than 40%, the plaintiff would have full recovery from the non-immune third-party defendants⁷⁶ and the employer would have the right to full reimbursement for the workers' compensation benefits.⁷⁷ By allowing the inclusion of immune parties in fault allocation, this substantially codifies the holding in *Sullivan* when the fault attributable to the immune party is equal to or greater than 40%.⁷⁸

This being the case, the 1994 Amendments still made significant changes regarding the right to reimbursement under the Workers' Compensation Statute.⁷⁹ The *Sullivan* decision discussed the detrimental effect of the reimbursement right to the plaintiff prior to the 1994 Amendments: "[A]n employer or insurer [could] obtain reimbursement for any payments made to an injured employee. This lien is not reduced in any respect by the amount by which the employer's act or omission contributed to the employee's injuries."⁸⁰ After the 1994 Amendments, when the fault of the immune employer is 40% or greater, the employer or employer's insurer (after an accounting for the share of attorneys'

73. See *id.* § 78-27-39 (disallowing reduction and reallocation). See also *id.* § 35-1-62(5)(b)(ii) (allowing for subrogation limited by the employer's percentage of fault).

74. See *id.* § 78-27-40(1) (Supp. 1994).

75. *Id.* § 78-27-39(2)(c)(ii).

76. See *id.* § 78-27-39(2)(a) (reducing the fault of the immune entity to zero and re-allocating the fault among the third party defendants).

77. See *id.* § 35-1-62(5)(b)(i) (1994) (allowing reimbursement without reduction when the fault attributable to the immune employer is less than 40%).

78. *Sullivan v. Scoular Grain Co.*, 853 P.2d 877, 878 (Utah 1993).

79. UTAH CODE ANN. § 35-1-62 (1994).

80. *Sullivan*, 853 P.2d at 883 (discussing the reimbursement provision of UTAH CODE ANN. § 35-1-62 (1992)); see also *supra* part III.C (regarding the potentially harsh portents of the decision for employers).

fees)⁸¹ is entitled to reimbursement, “[subtracting] the amount of payments made multiplied by the percentage of fault attributed to the employer, officer, agent, or employee of the employer in the action against the third party.”⁸² Therefore, as in the previous example, if the employer is 70% at fault and the payments were \$10,000⁸³ the employer would have the right of reimbursement “for the payments made [\$10,000] . . . less the [product of the] amount of payments made [\$10,000] multiplied by the percentage of fault [70%].”⁸⁴ The original amount (\$10,000) would therefore be reduced by \$7000, leaving the employer or insurance carrier with a right of reimbursement of \$3000.

If the fault of the immune employer is likely to approach 40%, the employer or insurer may wish to intervene rather than relying on the plaintiff's case as specifically allowed in the 1994 Amendments. This is because if fault of the employer is allocated under the 40% threshold the employer will retain right to full reimbursement of workers' compensation benefits.⁸⁵

C. *Employer Intervention when Fault is Greater Than 40%*

Because the interest of the employer or the employer's insurer in the right to reimbursement for payments under the Workers' Compensation Statute may be reduced if the fault attributed to the employer is greater than or equal to 40%, the employer may want to intervene to protect his or her interests. It has been suggested that

[the 1994 Amendments] still [require] the employer to defend those cases where it believes it may have some exposure of having fault in excess of 40%, but it would not have to defend cases where it believes it is below the threshold or it is willing to rely upon the plaintiff's case as its defense.⁸⁶

The possible reduction in the right of reimbursement and the increase in the cost of litigation are the reasons that workers' compensation premiums will probably increase.

81. See UTAH CODE ANN. § 35-1-62(5)(a) (1994).

82. *Id.* § 35-1-62(5)(b)(ii).

83. This hypothetical assumes that the proportionate share of attorneys' fees were already accounted for according to § 35-1-62(5)(a) of the Utah Code.

84. UTAH CODE ANN. § 35-1-62(5)(b)(ii) (1994).

85. *Id.* § 78-27-41(3)(a)-(b) (Supp. 1994). This is part of the reason workers' compensation premiums will likely increase and was part of the compromise discussed *infra* note 56 and accompanying text. The legislature was apparently balancing an increase in workers' compensation premiums against a possible increase in third-party tort liability.

86. Dunn & Wilcox, *supra* note 9, at 10.

The 1994 Amendments specifically provide that the employer has the right to intervene to protect his or her interest. "A person immune from suit may intervene as a party under Rule 24, Utah Rules of Civil Procedure, regardless of whether or not money damages are sought."⁸⁷ The statute provides that the injured employee must give notice to the employer or insurer of "any known attempt to attribute fault to the employer."⁸⁸ While the employer has the right to receive notice and intervene in any case where his or her interests may be at stake, it is only necessary to do so when the jury may apportion 40% or greater of the fault to the employer.

This requires the attorney advising the client to predict the outcome of the trial before the jury retires. The 1994 Amendments do "[make] it more difficult to advise . . . clients as to what to expect out of the eventual outcome of the case."⁸⁹ Because jury verdicts are hard to predict, the question of whether to intervene or not will require careful consideration and prescience on the part of the litigator for non-immune party defendant.

VI. CONCLUSION

In the end, the *Sullivan* case led to a substantial change in the Utah comparative negligence scheme by influencing the legislature to enact the 1994 Amendments. The new threshold of 40% fault revived joint and several liability for third party defendants when the fault attributed to the immune party is less than 40%. Thus, the 1994 Amendments altered the express purpose of the Liability Reform Act of 1986⁹⁰ by reviving a form of joint and several liability in some circumstances. Because of the interaction between the right to reimbursement under workers' compensation and the 40% threshold, counsel for the employer or the insurer must make an educated guess as to the amount of fault the jury will apportion to their client before determining whether or not to intervene.

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87. UTAH CODE ANN. § 78-27-41(3)(a) (Supp. 1994).

88. *Id.* § 35-1-62(3)(b) (1994).

89. *Dunn & Wilcox, supra* note 9, at 11.

90. Liability Reform Act of 1986, ch. 199, 1986 Utah Laws 470 (codified as amended at UTAH CODE ANN. §§ 78-27-37 to -43, -53 (Supp. 1994)).