

Selected Tort and Civil Justice Issues Before the 117th Ohio General Assembly

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During 1986, some forty-three states adopted measures designed to increase the availability and affordability of liability insurance.¹ Nearly half of those states made what can fairly be described as major changes in tort or civil justice law.

The 116th Ohio General Assembly enacted several measures relating to the availability and affordability of liability insurance during 1986.² Amended Sub. S.B. 330, a comprehensive measure combining increased regulation of and disclosure by liability insurers and changes in tort and civil justice law, was, however, vetoed by Governor Richard F. Celeste on December 19, 1986.

The 117th Ohio General Assembly continued to work toward a comprehensive insurance regulation/tort and civil justice bill. At the time of this writing, the House of Representatives had passed Sub. H.B. 1, virtually identical to Am. Sub. S.B. 330, except that most of the provisions dealing specifically with product liability law had been removed. The House had also passed Sub. H.B. 235, a modified version of the product liability provisions previously included in Am. Sub. S.B. 330. Both Sub. H.B. 1 and Sub. H.B. 235 were being considered by a select committee of the Ohio Senate.

This Article reviews the major tort and civil justice issues considered by the General Assembly during the early months of 1987 and summarizes the major changes which would be made by Sub. H.B. 1 and Sub. H.B. 235, the two bills approved by the Ohio House of Representatives.

I. THE LEGISLATIVE BACKGROUND

A. 1986: Am. Sub. S.B. 330 Enacted and Vetoed

1. Senate Action

In February 1986, various Senators introduced Senate Bills 329 through 339,³ which proposed far-reaching changes⁴ in various areas of tort and civil justice law.

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1. According to a summary prepared by the National Conference of State Legislatures, only seven states (Arkansas, Nebraska, Nevada, North Dakota, Oregon, Texas, and Virginia) failed to report the enactment during 1986 of any legislation designed to increase the availability and affordability of liability insurance. 1986 State Legislative Action: Liability Insurance (Jan. 7, 1987) (unpublished report on file with the Ohio State Law Journal). The Oregon Legislative Assembly, *id.* at 31, and the Texas Legislature, *id.* at 35, were not in session during 1986.

2. OHIO REV. CODE ANN. §§ 2305.232, 2305.38, 2744.081, 3937.18(I) (Baldwin Supp. 1986).

3. Senate Bills 329 through 338 were introduced February 19, 1986. OHIO SENATE JOURNAL 1166-67 (Feb. 19, 1986). Senate Bill 339 was introduced February 25, 1986. *id.* at 1177 (Feb. 25, 1986). Senate Bill 330 was re-referred to the Senate Committee on Financial Institutions and Insurance, *id.* at 1313 (Mar. 25, 1986), and then to the Senate Committee on Rules, *id.* at 1339 (Mar. 26, 1986).

4. The 11 Senate bills (several in amended form) are summarized at 59 OHIO ST. BAR ASS'N REPT. 688 (May 5, 1986). The Council of Delegates of the Ohio State Bar Association, at a special meeting on May 31, 1986, voted to

The eleven bills were referred to the Senate Economic Development and Small Business Committee,⁵ which held hearings and eventually reported all of them in one form or another.⁶ Three of the eleven bills were passed by the Senate on March 27, 1986;⁷ one was defeated on the Senate floor.⁸ The other seven were not voted on by the full Senate.

2. House Action

Companion versions of nine of the eleven Senate bills were introduced in the House,⁹ as well as several other tort and civil justice measures.¹⁰ The House bills¹¹ and the three measures passed by the Senate¹² were referred to the House Select Committee to Study the Civil Justice System. The Select Committee held extensive hearings and reported an omnibus tort and civil justice bill as Sub. S.B. 330 on August 27, 1986.¹³

On September 2, 1986, the House Insurance Committee reported Sub. H.B. 876, providing for increased regulation of and disclosure by the liability insurance industry.¹⁴ Substitute S.B. 330 and Sub. H.B. 876 were combined in the House Rules Committee; the new Sub. S.B. 330 passed the House of Representatives on September 4, 1986, by a vote of eighty-seven to eight.¹⁵

3. Conference Committee

A joint conference committee on Sub. S.B. 330 was appointed and ultimately reported Am. Sub. S.B. 330 on November 21, 1986. On that date, the House agreed to the conference committee report by a vote of seventy-eight to seventeen,¹⁶ but the Senate vote was fifteen to fifteen.¹⁷ The joint conference committee was reconvened and made several changes in the bill. The second conference committee report was

support only one of the 11 bills (S.B. 336, which would have admitted evidence of nonuse of seat belts in auto crashworthiness cases) in its original form. *Id.* at 1008–11 (June 23, 1986). The Council voted to oppose eight of the bills and to support the remaining two in their amended forms. *Id.*

5. OHIO SENATE JOURNAL 1170–71, 1178 (Feb. 25, 1986).

6. Four bills (AM. S.B. 330, SUB. S.B. 332, AM. S.B. 336, and SUB. S.B. 337) were reported March 19, 1986. *Id.* at 1281–82 (Mar. 19, 1986). The other seven (AM. S.B. 329, AM. S.B. 331, SUB. S.B. 333, SUB. S.B. 334, SUB. S.B. 335, SUB. S.B. 338 and S.B. 339) were reported May 14, 1986. *Id.* at 1444–46 (May 14, 1986).

7. The three bills were AM. S.B. 330, *id.* at 1395 (Mar. 27, 1986), AM. SUB. S.B. 332, *id.* at 1385, and AM. S.B. 336, *id.* at 1397.

8. SUB. S.B. 337 was defeated. *Id.* at 1397.

9. House Bills 881 through 883 and 888 through 890 were introduced March 6, 1986. OHIO HOUSE JOURNAL 1483–84 (Mar. 6, 1986). House Bills 895 through 897 were introduced March 11, 1986. *Id.* at 1538 (Mar. 11, 1986).

10. For example, H.B. 805, *id.* at 1259 (Jan. 22, 1986); H.B. 879, *id.* at 1468 (Mar. 5, 1986); H.J. RES. 42, *id.* at 1500 (Mar. 11, 1986).

11. *Id.* at 1537–38, 1540 (Mar. 18, 1986).

12. *Id.* at 1716 (May 13, 1986).

13. *Id.* at 1941 (Aug. 27, 1986).

14. *Id.* at 1942 (Sept. 2, 1986).

15. *Id.* at 1945 (Sept. 4, 1986).

16. *Id.* at 2196 (Nov. 21, 1986).

17. OHIO SENATE JOURNAL 2005 (Nov. 21, 1986).

agreed to in the late evening of November 21, 1986, by a House vote of sixty-nine to sixteen¹⁸ and by a Senate vote of twenty to ten.¹⁹

4. *The Veto*

On December 19, 1986, Governor Celeste vetoed Am. Sub. S.B. 330. He stated that the product liability provisions of the bill were "unacceptable" and that, were the General Assembly to "pass the same bill without the product liability section[,] I would sign such a measure the day it reached my desk."²⁰

On December 23, 1986, the Senate voted nineteen to twelve to override the veto of Am. Sub. S.B. 330,²¹ thereby falling one vote short of the twenty votes²² required to override.

B. *Action in Early 1987*

1. *Senate Action*

On January 6, 1987, S.B. 11, virtually identical to the vetoed Am. Sub. S.B. 330, was introduced.²³ On February 25, 1987, S.B. 102, a new product liability measure, was introduced.²⁴ The bills were referred to the Senate Select Committee on Tort Reform on March 4, 1987.²⁵

2. *House Action*

On January 14, 1987, H.B. 1, virtually identical to the vetoed Am. Sub. S.B. 330, was introduced.²⁶ It was referred to the House Committee on Insurance,²⁷ which held hearings and reported Sub. H.B. 1 on February 17, 1987.²⁸ The substitute bill retained the insurance and civil justice provisions of Am. Sub. S.B. 330 with minor clarifying and technical changes, but did not include most of the product liability provisions of the vetoed bill. The House of Representatives passed Sub. H.B. 1 on February 17, 1987, by a vote of eighty-two to twelve.²⁹

The product liability provisions of Am. Sub. S.B. 330, with significant modifications, were introduced as H.B. 235 on February 17, 1987.³⁰ House Bill 235 was referred to the House Committee on Civil and Commercial Law,³¹ which held

18. OHIO HOUSE JOURNAL 2383 (Nov. 21, 1986).

19. OHIO SENATE JOURNAL 2058 (Nov. 21, 1986).

20. Statement of Reason for Veto of Amended Substitute Senate Bill 330 (Dec. 19, 1986) (copy on file with the Ohio State Law Journal).

21. OHIO SENATE JOURNAL 2177 (Dec. 23, 1986).

22. OHIO CONST. art. II, § 16 (Baldwin 1979).

23. OHIO SENATE JOURNAL 10-11 (Jan. 6, 1987).

24. *Id.* at 119 (Feb. 25, 1987).

25. *Id.* at 127, 128 (Mar. 4, 1987).

26. OHIO HOUSE JOURNAL 56-57 (Jan. 14, 1987).

27. *Id.* at 73 (Jan. 21, 1987).

28. *Id.* at 142 (Feb. 17, 1987).

29. *Id.* at 142-43.

30. *Id.* at 152.

31. *Id.* at 157.

additional hearings. On March 26, 1987, the Committee reported Sub. H.B. 235,³² which passed the House of Representatives by a vote of eighty-nine to eight on April 1, 1987.³³

II. MODIFYING TRADITIONAL CHARACTERISTICS OF COMPENSATORY DAMAGES AWARDS IN TORT ACTIONS

Four traditional characteristics of tort compensatory damages awards have come under increased scrutiny in recent years. The typical award has been made in a lump sum, has been potentially unlimited in size,³⁴ and has been made without deducting so-called collateral benefits which may compensate an injured plaintiff for part of the loss caused by the defendant(s). In addition, if two or more defendants are held responsible for the same injury, their legal liability has been joint and several.

A. *Periodic Payment of Future Damages*

The traditional tort award compensates a plaintiff in a lump sum for all harm—past, present, and future—legally caused by the tort in question.³⁵ In a tort action alleging serious physical injury, the trier of fact may have to determine what the plaintiff's medical needs will be ten or twenty years hence, how much it will cost to meet those needs, and what amount in present dollars is required to meet those needs. As one commentator has phrased it,

assessing future losses calls for speculation about events that the flux of time will render certain, such as ups and downs in the victim's physical condition, when he will eventually die, whether his widow will remarry, and so forth.

As to these we are therefore invited, nay compelled, to predict—more bluntly: to guess.³⁶

In 1980, the National Conference of Commissioners on Uniform State Laws approved a Model Periodic Payment of Judgments Act.³⁷ The Act, which permits either party to opt for periodic payment if future damages exceed a specified dollar amount, has generated strong opinions, both pro and con.³⁸ During 1986, at least nine other states enacted some type of statute providing for periodic payment of future damages in tort actions.³⁹

32. *Id.* at 309 (Mar. 26, 1987).

33. *Id.* at 324–25 (Apr. 1, 1987).

34. Although some eight states adopted compensatory damages "caps" of some sort during 1986, e.g., FLA. STAT. ANN. § 768.80 (West Supp. 1987) (\$450,000 cap on noneconomic damages), MINN. STAT. ANN. § 549.23 (West Supp. 1987) (\$400,000 cap on intangible losses per person), neither the Ohio House nor the Ohio Senate has appeared in recent months to contemplate such a change for tort actions generally.

35. RESTATEMENT (SECOND) OF TORTS §§ 910, 912 (1977).

36. Fleming, *Damages: Capital or Rent?*, 19 U. TORONTO L.J. 295, 302 (1969).

37. HANDBOOK NAT'L CONF. COMM'RS ON UNIFORM ST. LAWS & PROC. ANN. CONF. 55 (1982). The Act is set out at 14 U.L.A. (Supp. 1987 at 22).

38. Compare Henderson, *Periodic Payments of Bodily Injury Awards*, 66 A.B.A. J. 734 (1980) with Corboy, *Structured Injustice: Compulsory Periodic Payment of Judgments*, *id.* at 1524.

39. ALASKA STAT. § 09.17.040 (Supp. 1986); Act of June 5, 1986, No. 86-338, § 2, 1986 Conn. Legis. Serv. No. 5 at 400 (West); FLA. STAT. ANN. §§ 768.77–.78 (West Supp. 1987); Act of May 23, 1986, § 39, 1986 Iowa Legis. Serv. No. 8 at 33 (West) (amending IOWA CODE § 668.3); Md. Cts. & Jud. Proc. CODE § 11–109 (Supp. 1986); Act of July 6, 1986, No. 178, §§ 6305–07, 6309, 6311, 1986 Mich. Legis. Serv. No. 4 at 222 (West) (to be codified at MICH. COMP.

Under Sub. H.B. 1,⁴⁰ if future damages exclusive of future wage or salary loss exceed both \$200,000 and twenty-five percent of the total damages awarded in a personal injury action, either party may request that the court order the excess amount to be paid in periodic payments rather than in a lump sum. The court must hold a hearing and consider specified statutory criteria before ordering periodic payments. If periodic payments are ordered and if the plaintiff dies before receiving all the payments, any payments for future medical expenses and for future pain and suffering terminate. The court retains continuing jurisdiction over any judgment which includes periodic payments.

B. *Modifying the Collateral Source Rule*

If a tort victim receives, from a source other than an apparent tortfeasor, benefits which reduce his or her net loss, the tortfeasor is not given credit for those benefits. Under the collateral source rule,⁴¹ the victim is permitted to retain such "collateral" benefits. Often, of course, the source of a collateral benefit will be subrogated *pro tanto* to the victim's rights against the tortfeasor.⁴² The collateral source rule has been criticized as "probably expensive because it compensates the plaintiff more than once where there is no subrogation, and because it calls for additional litigation by way of subrogation claims where the plaintiff is not overcompensated."⁴³ The General Assembly has previously modified the collateral source rule for specific types of tort action.⁴⁴ During 1986, at least nine other states abolished or modified the rule.⁴⁵

Under Sub. H.B. 1,⁴⁶ most collateral benefits that a tort plaintiff receives prior to judgment, or is reasonably certain to receive within five years after judgment, are deducted from the tort judgment if the collateral source has no right of recoupment through subrogation or the like. The plaintiff receives up to a three-year credit for costs or premiums previously paid by the plaintiff, his family, or his employer to secure any collateral benefit which is deducted.

C. *Modifying Joint and Several Liability*

If tortfeasors *A* and *B* are held liable to a plaintiff and if there is no basis to conclude that *A* caused one part of the plaintiff's harm and *B* another, the tortfeasors have been subject to joint and several or entire liability, which permits the plaintiff

LAWS ANN. §§ 600.6305-07, 600.6309, 600.6311); N.Y. CIV. PRAC. L. & R. § 5041 (McKinney Supp. 1987); S.D. CODIFIED LAWS ANN. ch. 21-3A (Supp. 1986); WASH. REV. CODE ANN. § 4.56.260 (Supp. 1987).

40. Proposed OHIO REV. CODE § 2323.56.

41. RESTATEMENT (SECOND) OF TORTS § 920A (1977).

42. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 8.10 at 585 (1973).

43. *Id.* § 3.6 at 186.

44. OHIO REV. CODE ANN. §§ 2305.27 (Baldwin 1984) (medical claims), 2743.02(D) (Baldwin Supp. 1986) (actions against the state), 2744.05(B) (Baldwin Supp. 1986) (actions against political subdivisions).

45. ALASKA STAT. § 09.17.070 (Supp. 1986); COLO. REV. STAT. § 13-21-111.6 (Supp. 1986); Act of June 5, 1986, No. 86-338, §§ 4-6, 1986 Conn. Legis. Serv. No. 5 at 406 (West); FLA. STAT. ANN. § 768.76 (Supp. 1987); Act of Sept. 26, 1986, No. 84-1431, art. 6, § 1, 1986 Ill. Legis. Serv. No. 9, at 284 (West); IND. CODE ANN. §§ 34-4-36-1 through 34-4-36-3 (West Supp. 1986); Act of July 6, 1986, No. 178, § 2591, 1986 Mich. Legis. Serv. No. 4 at 221 (West) (to be codified at MICH. COMP. LAWS ANN. § 600.2591); MINN. STAT. ANN. § 548.36 (West Supp. 1987); N.Y. CIV. PRAC. L. & R. § 4545(c) (McKinney Supp. 1987).

46. Proposed OHIO REV. CODE § 2317.45.

to collect the entire judgment from *A* or from *B*.⁴⁷ If the plaintiff collects the entire judgment from *A*, *A* may, in most states, obtain contribution from *B*.⁴⁸ If, however, *B* is impecunious, *A* is without recourse. Joint and several liability thus places the entire risk that a given co-tortfeasor is insolvent upon any solvent co-tortfeasor(s).⁴⁹

Joint and several liability has been criticized as inconsistent with the modern trend toward comparative responsibility and was modified in a number of states prior to 1986.⁵⁰ Indeed, Ohio's 1980 comparative negligence statute⁵¹ appears⁵² (but apparently was not intended⁵³) to abolish joint and several liability in negligence actions in which the plaintiff is negligent but is nonetheless permitted to recover a portion of his or her damages. At least twelve other states modified joint and several liability during 1986.⁵⁴

Under Sub. H.B. 1,⁵⁵ if a plaintiff in a negligence action is contributively negligent, yet entitled to judgment against two or more tortfeasors, the judgment imposes several liability only. If the share of any tortfeasor is or becomes uncollectible, the plaintiff may within one year obtain reallocation of that uncollectible share between or among himself and the other tortfeasor(s).⁵⁶ For example, if the plaintiff is found twenty percent at fault and if defendants *A* and *B* are each found forty percent at fault, the plaintiff is entitled to a several judgment against *A* for forty percent of his damages and a several judgment against *B* for forty percent of his damages. If *A*'s share is uncollectible, it may be reallocated between the plaintiff and *B* on the basis of a twenty to forty ratio, so that the plaintiff cannot collect one-third of the uncollectible forty percent share of *A* but is entitled to collect the other two-thirds of that share from *B*.

47. RESTATEMENT (SECOND) OF TORTS § 433A comment i (1965).

48. See W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 50 (5th ed. 1984).

49. "The cutting edge of the 'joint and several' liability rule is that it imposes the risk of a co-tortfeasor's inability to pay his share on the remaining defendants . . ." Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Association v. Superior Court*, 30 HAST. L.J. 1464, 1483 (1979) (emphasis in original).

50. Granelli, *The Attack on Joint and Several Liability*, 71 A.B.A. J. 61 (July 1985).

51. OHIO REV. CODE ANN. § 2315.19(A)(2) (Baldwin 1984).

52. Ball, *A Reexamination of Joint and Several Liability Under a Comparative Negligence System*, 18 ST. MARY'S L.J. 891, 892 n.5 (1987); V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 16.4, at 259 (2d ed. 1986); Granelli, *supra* note 50, at 62; Comment, *Ohio's Comparative Negligence Statute: The Effect on Joint and Several Liability, Absent Defendants and Joinder*, 50 U. CIN. L. REV. 342, 346 (1981); Brant, *A Practitioner's Guide to Comparative Negligence in Ohio*, 41 OHIO ST. L.J. 585, 616 (1980).

53. Brant, *supra* note 52, at 617; Dodge, *Ohio's New Comparative Negligence Statute*, NEGLIGENCE LAW NEWSLETTER (Ohio St. Bar Ass'n) at 3 (June 20, 1980).

54. ALASKA STAT. § 09.17.080 (Supp. 1986); CALIF. CIV. CODE § 1431.2 (West Supp. 1987); COLO. REV. STAT. § 13-21-111.5 (Supp. 1986); Act of June 5, 1986, No. 86-338, § 3, 1986 Conn. Legis. Serv. No. 5, at 403 (West); FLA. STAT. ANN. § 768.81 (West Supp. 1987); Act of July 24, 1986, S.B. No. S1-86, § 17 (to be codified at HAW. REV. STAT. ch. 663); Act of Sept. 26, 1986, No. 84-1431, art. 5, § 1, 1986 Ill. Legis. Serv. No. 9, at 283 (West); Act of July 6, 1986, No. 178, § 6304, 1986 Mich. Legis. Serv. No. 4, at 222 (West) (to be codified at MICH. COMP. LAWS ANN. § 600.6304); N.Y. CIV. PRAC. L. & R. §§ 1600-01 (McKinney Supp. 1987); UTAH CODE ANN. § 78-27-38 (Supp. 1986); WASH. REV. CODE ANN. § 4.22.070 (Supp. 1987); WYO. STAT. § 1-1-109 (Supp. 1986).

55. Proposed amendments to OHIO REV. CODE § 2315.19 (Baldwin 1984).

56. This reallocation provision is similar to one in the UNIFORM COMPARATIVE FAULT ACT § 2(d), 12 U.L.A. (Supp. 1987 at 42).

III. MODIFYING THE RULES GOVERNING PUNITIVE DAMAGES AWARDS IN TORT ACTIONS

In instances of aggravated tortious misconduct, punitive damages may be assessed against a defendant. Such damages are generally not said to compensate the plaintiff for harm suffered, but to punish the defendant and to deter the defendant and others from engaging in similar misconduct.⁵⁷ In determining the amount of a punitive damages award, it is proper for the trier of fact to consider the nature of the defendant's conduct, the degree of harm suffered by the plaintiff, and the financial resources of the defendant.⁵⁸

Current rules governing punitive damages have been criticized, largely on the ground that they do not sufficiently reflect the quasi-criminal nature of such awards. One commentator, for example, has argued that the protections of the fourth, fifth, and sixth amendments should apply to defendants from whom punitive damages are sought.⁵⁹ It is also alleged that the evidence of a defendant's financial resources typically adduced in support of a punitive damages claim tends unfairly to influence the size of any compensatory award.⁶⁰ During 1986, at least nine other states made changes in punitive damages law in response to such criticisms.⁶¹

Substitute H.B. 1⁶² provides that, unless another section of the Revised Code requires otherwise, a plaintiff seeking punitive damages in a tort action must adduce proof of actual damages and must establish by clear and convincing evidence that the conduct of the defendant demonstrated "malice, aggravated or egregious fraud, oppression, or insult." In addition, though the trier of fact determines whether or not an award of punitive damages is to be made in a tort action, the judge, unless another section of the Revised Code provides otherwise, determines the amount of any such award.⁶³ Finally, awards of punitive damages are made uninsurable by an insurance provision of Sub. H.B. 1.⁶⁴

IV. CODIFYING THE LAW OF PRODUCT LIABILITY

It has been argued at least since the mid-1970's that the rules governing the liability of commercial suppliers of products have become too pro-plaintiff and too uncertain.⁶⁵ It has been suggested that the controlling rules, notably those imposing strict liability in tort for defective products under *Restatement (Second) of Torts*

57. RESTATEMENT (SECOND) OF TORTS § 908 (1977).

58. *Id.* comment c.

59. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983).

60. AMERICAN BAR ASS'N, REP'T OF THE ACTION COMM'N TO IMPROVE THE TORT LIABILITY SYSTEM 17 (1987).

61. ALASKA STAT. § 09.17.020 (Supp. 1986); COLO. REV. STAT. § 13-21-102 (Supp. 1986); FLA. STAT. ANN. §§ 768.72-.73 (West Supp. 1987); Act of Sept. 26, 1986, No. 84-1431, art. 3, § 1, 1986 Ill. Legis. Serv. No. 9, at 282 (West); Act of May 22, 1986, § 42, 1986 Iowa Legis. Serv. No. 8, at 35 (West) (to be codified at IOWA CODE § 668A.1); MINN. STAT. ANN. § 549.191 (West Supp. 1987); N.H. REV. STAT. ANN. § 507:16 (Supp. 1986); Act of June 24, 1986, ch. 315, § 1, 1986 Okla. Sess. Law Serv. 1524 (West) (amending 23 OKLA. STAT. § 9); S.D. CODIFIED LAWS ANN. § 21-1-4.1 (Supp. 1986).

62. Proposed OHIO REV. CODE § 2315.21; proposed amendments to OHIO REV. CODE ANN. § 2315.18 (Baldwin 1984).

63. In the opinion of the author, this provision of Sub. H.B. 1 may well violate the right of jury trial guaranteed by art. I, § 5 of the Ohio Constitution.

64. Proposed OHIO REV. CODE § 3937.182.

65. See, e.g., California Citizens Comm'n on Tort Reform, *Righting the Liability Balance* 75-81 (1977).

§ 402A and its variants, have resulted in unfairness to defendants and have made it difficult for suppliers to obtain affordable liability insurance or to adequately self-insure for product-related injuries.⁶⁶ In 1979, the United States Department of Commerce promulgated a Model Uniform Product Liability Act for consideration and adoption by individual states.⁶⁷ In almost every session of Congress during this decade, efforts have been made, to date without success, to obtain federal codification of the law of product liability.⁶⁸

Not including statutes extending comparative fault to strict product liability actions or the almost universal statutes granting some form of immunity to suppliers of blood and blood products,⁶⁹ a majority of states have adopted statutes specifically limiting product liability.⁷⁰ In 1984, the General Assembly granted immunity from strict tort liability to product suppliers other than manufacturers under specified circumstances.⁷¹

Substitute H.B. 235 codifies the basic rules governing product liability claims for death, physical injury to person, emotional distress, or physical damage to property other than the product in question. With the exception of specified "toxic tort" situations, pre-existing state statutory and common law theories of liability are superseded unless recognized by the statutory framework.⁷²

Four types of product defects subject a manufacturer to liability under Sub. H.B. 235: defects due to (1) manufacture or construction;⁷³ (2) design or formulation;⁷⁴ (3) inadequate warning or instruction;⁷⁵ and (4) failure to conform to a representation concerning product safety or quality.⁷⁶ A commercial supplier other than a manufacturer is subject to liability for its negligence and for its representations concerning product safety or quality. Such a supplier (*e.g.*, a retailer or wholesaler) is also subject to the strict liability of a manufacturer in specified circumstances adapted from present Ohio Revised Code § 2305.33, the 1984 immunity statute.⁷⁷

The effect of contributory negligence and assumption of the risk on strict product liability claims is also codified. Contributory negligence is no defense, while assumption of the risk is a total bar to recovery.⁷⁸

66. UNITED STATES DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT I-26 to I-29 (1977).

67. 44 FED. REG. 62,714 (Oct. 31, 1979).

68. In the 99th Congress, S. 2760, a product liability bill, was reported by the Senate Committee on Commerce, Science, and Transportation. 132 CONG. REC. S11,742 (daily ed. Aug. 14, 1986). The Senate voted 84-13 to proceed with floor consideration of the bill, *id.*, at S13,709-10, but the Majority Leader later "yanked the measure from the floor because Ernest F. Hollings, D-SC, was prepared to filibuster to prevent a vote on the legislation." CONG. QUAR. WEEKLY REP'T 2,316 (Sept. 27, 1986).

69. *E.g.*, OHIO REV. CODE ANN. § 2108.11 (Baldwin 1978).

70. One product liability looseleaf service lists such statutes for some twenty-nine states. 2 PROD. LIAB. REP. (CCH) ¶¶ 90,170-95,270.

71. OHIO REV. CODE ANN. § 2305.33 (Baldwin 1984).

72. Proposed OHIO REV. CODE §§ 2307.72-.73.

73. *Id.* § 2307.74.

74. *Id.* § 2307.75.

75. *Id.* § 2307.76.

76. *Id.* § 2307.77.

77. *Id.* § 2307.78.

78. *Id.* § 2315.20.

Finally, a standard for recovery of punitive damages in connection with a product liability claim ("flagrant disregard" of consumer safety) is codified under Sub. H.B. 235.⁷⁹ As with tort punitive damages claims generally under Sub. H.B. 1, the court determines the amount of any punitive damages product liability award, using criteria specified in Sub. H.B. 235.

V. ATTEMPTING TO INFLUENCE THE CONDUCT OF ATTORNEYS AND CLIENTS

A. Discouraging Litigation Misconduct

Noted scholars and leaders among the bench and bar have identified the discouragement of frivolous assertion of claims or defenses and other misconduct of attorneys and parties as a pressing need of the civil justice system. A vast literature has developed as the need has been addressed by legislators, courts, and blue-ribbon committees nationwide.⁸⁰ In 1983, for example, Rules 11 and 26 of the Federal Rules of Civil Procedure were amended in an attempt to deter frivolous conduct.⁸¹ In 1984, a distinguished American Bar Association committee chaired by former Attorney General Griffin B. Bell concluded that

candor requires our judgment that a small percentage of cases brought to court are not, by objective standards, of arguable merit. At the same time, we note, the problem exists of defense tactics which impose wasteful discovery costs and prolong litigation unnecessarily. These are facts well known to practitioners and judges alike.⁸²

During 1986, at least fifteen other states adopted measures designed to deter misconduct in civil litigation.⁸³

Under Sub. H.B. 1,⁸⁴ an attorney or party in a civil action may be sanctioned on motion of a party for engaging in frivolous conduct, defined in language borrowed from the Code of Professional Responsibility⁸⁵ as conduct which either (1) obviously serves merely to harass or maliciously injure another party or (2) is not warranted

79. *Id.* § 2307.80.

80. *See, e.g.*, Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630 (1987); Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986); Parness, *Groundless Pleadings and Certifying Attorneys in the Federal Courts*, 1985 UTAH L. REV. 325; Partridge, Wilkinson, and Krouse, *A Complaint Based on Rumors: Countering Frivolous Litigation*, 31 LOY. L. REV. 221 (1985).

81. 90 F.R.D. 451, 462-66, 478-84 (1981).

82. American Bar Ass'n, *Towards a Jurisprudence of Injury: The Continuing Creation of a System of Substantive Justice in American Tort Law* (REP'T OF THE SPECIAL COMM'N ON THE TORT LIABILITY SYSTEM), at 13-7 (1984). "For the long term, a major challenge to our adversary system is to emphasize to and convince lawyers of their professional responsibility to avoid dilatory and obfuscatory tactics." *Id.* at 13-5.

83. ARIZ. REV. STAT. ANN. § 12-349 (Supp. 1986); Act of June 5, 1986, No. 86-338, §§ 8-9, 1986 Conn. Legis. Serv. No. 5, at 408 (West); GA. CODE ANN. § 9-15-14 (Supp. 1986); Act of July 24, 1986, S.B. No. S1-86, § 13 (amending HAW. REV. STAT. § 607-14.5); Act of Sept. 26, 1986, No. 84-1431, art. 2, § 1, 1986 Ill. Legis. Serv. No. 9, at 281 (West); IND. CODE ANN. § 34-1-32-1 (West Supp. 1986); Act of May 22, 1986, §§ 36, 38, 1986 Iowa Legis. Serv. No. 8, at 32, 33 (West) (to be codified at IOWA CODE §§ 617.16, 619.19); KAN. STAT. ANN. § 60-211 (Supp. 1986); Act of July 6, 1986, No. 178, § 2591, 1986 Mich. Legis. Serv. No. 4, at 211 (West) (to be codified at MICH. COMP. LAWS ANN. § 600.2591); MINN. STAT. ANN. § 549.21 (West Supp. 1987); N.H. REV. STAT. ANN. § 507:15 (Supp. 1986); N.Y. CIV. PRAC. L. & R. § 8303-a (McKinney Supp. 1987); N.C. GEN. STAT. § 1A-1 (Supp. 1986) (amending Rule 11, N.C. R. Civ. P.); Act of June 24, 1986, ch. 315, § 3, 1986 Okla. Sess. Law Serv. 1525 (West); WYO. STAT. § 1-14-128 (Supp. 1986).

84. Proposed OHIO REV. CODE § 2323.51.

85. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1)-(2), 23 Ohio St. 2d 1, 46 (1970).

under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law. The sanction may not exceed the attorney's fees both reasonably incurred by another party and necessitated by the frivolous conduct in question.

B. *Encouraging Settlement of Meritorious Tort Claims*

A second need of the civil justice system which has generated nearly as much concern as discouraging frivolous claims, defenses, and conduct is that of encouraging prompt settlement of meritorious civil actions.⁸⁶ Since over ninety percent of civil actions are disposed of without trial, any mechanism which is fair and which encourages more prompt settlement promises worthwhile savings of time and money for all concerned—the litigants, the judicial system, and the public.⁸⁷ During 1986, at least two other states adopted measures designed to encourage prompt settlement of tort claims.⁸⁸

Under Sub. H.B. 1,⁸⁹ on motion of a party, the court may, 120 to 14 days before trial, order a plaintiff and defendant in a tort action to serve and file written offers of settlement. If the offers are equal or overlap, the court enters judgment for the amount obtained by averaging the offers.

If the action goes to trial and judgment, the court may consider awarding reasonable attorney's fees as follows: to the plaintiff, if the judgment is for the plaintiff and if it exceeds the plaintiff's written "offer" by twenty-five percent or more; to the defendant if the judgment is for the defendant or if it is for the plaintiff and does not exceed seventy-five percent of the defendant's written offer. The court must hold a hearing and consider specified statutory criteria before shifting attorney's fees from one party to another.

An award of attorney's fees to a plaintiff may not exceed the lesser of attorney's fees reasonably incurred or twenty-five percent of the judgment. An award to a defendant may not exceed the lesser of attorney's fees reasonably incurred or the difference between the written offers of the parties. If, however, the plaintiff has judgment and attorney's fees are awarded to the defendant, the fees awarded may not exceed the amount of the plaintiff's judgment.

C. *Regulating the Contingent Fee*

The traditional agreement between a tort plaintiff and his or her attorney has called for a contingent fee whereby the attorney receives a specified percentage of any

86. American Bar Ass'n, *supra* note 82, at 13-8. Compare the efforts to amend Rule 68, Fed. R. Civ. P., 98 F.R.D. 337, 361-67 (1983) and 102 F.R.D. 407, 432-37 (1984), and the commentary on those efforts, e.g., Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J.L. REF. 425 (1986); Simon, *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1 (1985).

87. "The law encourages settlement not as an end abstractly desirable in itself, but in recognition of the fact that there are often savings all around—for litigants and for the public treasury—when parties make private arrangements that remove cases from the courts." American Bar Ass'n, *supra* note 82, at 4-209. For a trenchant critique of the supposed benefits of settlement, see Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

88. ALASKA STAT. § 09.30.065 (Supp. 1986); FLA. STAT. ANN. § 768.79 (West Supp. 1987).

89. Proposed OHIO REV. CODE § 2307.02.

judgment or settlement obtained and nothing in the event that no recovery is had. The contingent fee has been ardently supported as permitting persons of limited means to gain access to the courts and as discouraging assertion of nonmeritorious claims.⁹⁰ It has been equally ardently criticized of late as excessive and unjustified in certain cases.⁹¹ During 1986, at least four other states enacted measures regulating attorney's fees in tort actions.⁹²

Under Sub. H.B. 1,⁹³ a contingent fee agreement respecting a tort claim must be reduced to writing and signed by the attorney and the client. The attorney must provide the client with a copy of the signed writing. If an attorney becomes entitled to a contingent fee respecting a tort claim, the attorney must provide the client with a signed closing statement at the time of, or prior to, receipt of compensation under the contingent fee agreement. The statement must specify the manner in which the fee was determined, any costs and expenses deducted, and any proposed division of attorney's fees, costs, and expenses with referring or associated counsel.

A temporary law provision of Sub. H.B. 1⁹⁴ requests the Ohio Supreme Court to adopt a Rule for the Government of the Bar which would set forth a maximum permissible schedule for contingent fees in tort actions.

D. *Precluding Specification in the Original Complaint of a Dollar Amount in Larger Tort Cases*

Some observers believe that public perceptions of the tort system have played an important role in creating pressure for changes in tort and civil justice law.⁹⁵ Those perceptions, it is said, have been unduly influenced by media reports of the filing of tort actions seeking seven-figure damages awards or awards seemingly out of proportion to the injuries alleged to have been sustained.⁹⁶ During 1986, at least two

90. Shrager, *The Hammer for the Public Interest*, 71 A.B.A. J. 38 (Dec. 1985); S. SPEISER, *LAWSUIT* 591-95 (1980).

91. Dubois, *Modify the Contingent Fee System*, 71 A.B.A. J. 38 (Dec. 1985). The American Bar Association has recently approved recommendations that courts should (1) "prohibit the practice of taking a percentage fee out of the gross amount of any judgment or settlement" and (2) "have the authority to disallow, after a hearing, any portion of a fee found to be 'plainly excessive' in light of prevailing rates and practices." American Bar Ass'n, *supra* note 60, at iii.

92. Act of June 5, 1986, No. 86-338, § 1, 1986 Conn. Legis. Serv. No. 5, at 399 (West); Act of July 24, 1986, S.B. No. S1-86, § 11 (to be codified at Haw. REV. STAT. ch. 607); N.H. REV. STAT. ANN. § 508:4-e (Supp. 1986); WASH. REV. CODE ANN. § 4.24.005 (Supp. 1987).

93. Proposed OHIO REV. CODE § 4705.15.

94. Sub. H.B. 1, 117th Ohio General Assembly § 4.

95. At a recent Congressional hearing, a United States Senator acknowledged the role of public perceptions of the tort system:

As you know, I, for one, have long concluded that our tort liability system has broken down, and that it is the responsibility of the Congress to make suitable repairs.

I am certainly not alone in that judgment. Indeed, the American people, as a whole, have reached the very same conclusion.

According to a recent Lou Harris survey, and I quote: "The American people favor radical changes in the laws governing liability suits." Two-thirds of those surveyed believe that it is too easy to sue for damages. Two-thirds believe that the size of cash settlements is too excessive, and that maximum awards, other than medical benefits, ought to be capped at \$150,000. Now that is the American people talking there in that survey. *Product Liability Reform Act: Hearings Before the Senate Comm. on the Judiciary on S. 2760*, 99th Cong., 2d Sess. 73 (1986) (testimony of Hon. Mitch McConnell).

96. Compare this observation of the President of the Association of Trial Lawyers of America:

[W]e lawyers share some of the blame with the media for the perception in America that this is a runaway,

other states enacted statutes limiting specification of a dollar amount of requested damages in certain tort actions.⁹⁷

Under Sub. H.B. 1,⁹⁸ a tort complaint in an Ohio Court of Common Pleas is to include a demand for judgment but is not to initially specify the amount of damages sought if the plaintiff seeks more than \$25,000. At any time twenty-eight days or more after the complaint is filed, a defendant may request a written statement that specifies the amount of damages sought. The plaintiff must in any event amend the complaint to specify the amount of damages sought no later than seven days before applying for a default judgment or before the scheduled date of trial.⁹⁹

litigious society, with juries running amok, for my members and myself have been quick in recent years to see that the successes that we have had were publicized when in fact the losses and less modest results were not. *Id.* at 300 (testimony of Robert J. Habush).

97. Act of May 22, 1986, § 37, 1986 Iowa Legis. Serv. No. 8, at 32 (West) (amending IOWA CODE § 619.18); N.C. GEN. STAT. § 1A-1 (Supp. 1986) (amending Rule 8, N.C. R. Civ. P.).

98. Proposed OHIO REV. CODE § 2309.01.

99. *Cf.* OHIO R. CIV. P. 54(C) (money judgment generally limited to sum claimed in demand unless claimant amends not later than seven days before commencement of trial).