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OHIO: A MICROCOSM OF TORT REFORM VERSUS STATE CONSTITUTIONAL MANDATES

*Stephen J. Werber**

Let me begin by telling you where I am coming from. While in private practice, I represented high profile product liability defendants and I am a member of the Ohio defense bar. I am also a member of Ohio ATLA because I believe that those wrongfully injured should have a right to recover for that harm. As a professor, I am more lawyer than theoretician. My "scholarly" work is relatively objective and balanced with a defense bias in areas that I find problematic. These writings have surprised both plaintiff and defense counsel and some have been relied upon by both sides of the Ohio Supreme Court. This is particularly true in regard to the case that will be the focus of much of this presentation, *State ex rel. Ohio Academy of Trial Lawyers v. Sheward.*[1] This made this law professor feel appreciated even if misunderstood. Trying to be a practical, objective academician in the field of tort reform is no easy task.

Tort reform emanates, for our purposes, from two primary bodies: state judicial and legislative branches. The vast panoply of congressional and regulatory federal action that bears on the protections afforded and rights to recover for persons within their ambit is a subject for another day. Similarly, the rare areas in which the Supreme Court of the United States establishes federal common law are subjects for another day.[2]

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Discussion of Ohio law, with the exception of *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, *mot. for recons. denied*, 716 N.E.2d 1170 (Ohio 1999), is based largely on three of the author's prior publications: *Ohio Tort Reform Versus the Ohio Constitution*, 69 TEMP. L. REV. 1155 (1996); *Ohio Tort Reform in 1998: The War Continues*, 45 CLEV. ST. L. REV. 539 (1997) (so they were a little behind schedule); and *An Overview of Ohio Product Liability Law*, 43 CLEV. ST. L. REV. 379 (1995). Various concepts relating to the issues posed by Statutes of Repose have been discussed by the author in *A National Product Liability Statute of Repose–Let's Not*, 64 TENN. L. REV. 763 (1997).

1. 715 N.E.2d 1062, *mot. for recons. denied*, 716 N.E.2d 1170 (Ohio 1999).

2. *See, e.g.*, Saratoga Fishing Co. v. J. M. Martinac & Co., 520 U.S. 875 (1997); East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986) (strict liability in tort: admiralty cases); *see also* Schonholz v. Long Island Jewish Med. Ctr., 87 F.3d 72 (2d Cir. 1996) (promissory estoppel: Employee Retirement Income Security Act cases).

On a national scale, the impetus for state legislative reform action can be found in a series of landmark decisions that were soon adopted, in largely similar form, by almost all state supreme courts. The first such case, described as evidencing the "fall of the citadel,"[3] was the seminal decision in *Henningsen v. Bloomfield Motors, Inc.*[4] This decision is notable for both its attack upon and abrogation of privity doctrine and for its broad-based policy aspects. Shortly thereafter, the adoption of strict liability in tort by the California Supreme Court in *Greenman v. Yuba Power Products, Inc.*,[5] began to destroy whatever of the citadel was yet in place while strengthening the policy base for further enlarging tort liability. This expansion was realized through recognition of the crashworthiness doctrine by the Eighth Circuit under its *Erie* powers in *Larsen v. General Motors Corp.*[6] With these decisions a revolution in judicial-based tort reform rapidly overwhelmed the nation. This revolution, focused on products liability, initiated debate and change. My presentation will emphasize the legislative response to this revolution primarily in the area of law that generated the battleground: products liability.

As one might anticipate, those involved in the design, manufacture, sale and insuring of the products subject to these new theories recognized that their well being was being challenged along a broad new liability front. Regardless of whether such cases could be won either by motion or verdict, something had to be done. The focal point became the one body of government that could reverse or limit this revolution and perhaps provide substantial new benefits to those the courts had placed in such disfavor.

This picture is that asserted by those who oppose legislative tort reform. A more objective appraisal is that excesses in the law do exist and that defendants too often face prohibitions on their right to conduct a meaningful defense. For example, in too many instances an injured party's contribution to his or her own injury has been deemed inadmissible conduct-based activity. What was needed was legislation that would restore a balance to the law by enactment of statutes adequately carrying forward the need to compensate for harm caused by defective products while permitting defendants a legitimate opportunity to defend.

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3. William L. Prosser, *The Fall of The Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

4. 161 A.2d 69 (N.J. 1960).

5. 377 P.2d 897 (Cal. 1963).

6. 391 F.2d 495 (8th Cir. 1968).

In light of the fact that Rule 11 sanctions comprise an ineffective policing tool, a program had to be devised that would prevent frivolous claims. We needed a program that would prevent the filing of suits where an injured party has but himself or herself to blame or where there is no credible evidence of a product defect. For example, the manufacturer of a hydraulic pump used to raise the bed of dump trucks should never have been forced to the day of trial where the court had been made aware, years earlier, that the plaintiff's expert witness found no defect in that hydraulic pump and where circumstantial evidence did not permit an inference of defect. My client was forced to expend time and money defending a specious suit brought only because plaintiff's counsel believed that my client would find settlement a more cost effective approach than litigation. After summary judgment was finally granted, the court refused to award Rule 11 sanctions. That is, plain and simple, wrong. Legal balance must be restored legislatively. In Ohio, and elsewhere, we got the legislation. We did not get the balance. The result: a state constitutional law battle.

This battle, with roots over twenty-five years deep, continues to the present day. At least twenty states have enacted some kind of product related statute of repose, of which several have been deemed to violate state constitutions.[7] In December 1999, a challenge to the Florida Reform Law was filed in an effort to negate a law that affected joint and several liability, provided for some instances of mandatory arbitration, imposed damages caps, and created a limited useful safe life defense.[8] In Massachusetts, there is ongoing debate regarding a tort reform law that includes a limitation on damages in tort actions.[9] In New York, there is renewed discussion of whether the lessons learned from malpractice reforms should be applied for consideration of a statute of repose, a state-of-the-art defense, protection for non-manufacturing sellers ignorant of a defect, and broader protection for

7. *See* Stephen J. Werber, *The Constitutional Dimension of a National Products Liability Statute of Repose*, 40 VILL. L. REV. 985, at app. (1995); *see also* Dickie v. Farmers Union Oil Co., No. 990389, 2000 WL 676110 (N.D. May 25, 2000) (striking a products liability statute of repose as a violation of the state Equal Protection Clause).

8. Robert S. Peck, *Constitutional Challenge Filed to Florida Tort 'Reform' Statute*, 36 TRIAL, Jan. 2000, at 16; *see also* Jean Hellwege, *Constitutional Litigation Team Battles Tort 'Reform'*, TRIAL, April 2000, at 16 (noting "victories" in Ohio, Oregon and Indiana); Jean Hellwege, *Plaintiffs Score Victories Against Tort 'Reform' Laws in Two States*, TRIAL, August 2000, at 17. An overview of recent tort reform efforts, from a plaintiff's perspective, can be found in Roselyn Bonanti, *Tort "Reform" in the States*, TRIAL, August 2000, at 28.

9. *See* Kelly K. Meadows, *Resolving Medical Malpractice Disputes in Massachusetts: Statutory and Judicial Initiatives in Alternative Dispute Resolutions*, 4 SUFFOLK J. TRIAL & APP. ADVOC. 165, 171 (1999).

those who enhance safety by changing manufacture techniques or warnings.[10]

Finally, New Jersey has enacted a number of tort reform provisions bearing on medical malpractice, joint and several liability with economic and non-economic loss distinctions, protection of product sellers from strict liability actions under specified circumstances, and limitation of punitive damage awards.[11] These examples illustrate a broader tort reform reality. As Ohio has enacted a vast array of reform statutes, and has seen constitutional-based challenges to many of those efforts, it provides a microcosm for the study of tort reform and state constitutional concerns.

The Ohio General Assembly has responded to judicial actions that have, in its eyes, created an imbalance in the law that favors compensation at the expense of business and economic development. Three distinct lines of cases, two of which parallel the seminal decisions in *Henningsen, Greenman* and *Larsen*, form the initial foundation for the General Assembly's belief.[12]

First, in *Temple v. Wean United, Inc.*,[13] the court adopted strict liability in tort as expressed in section 402A of the Restatement, including its comments, and thus rejected contributory negligence as a defense. It thereby clarified its earlier and murkier decision in *Lonzrick v. Republic Steel Corp.*[14] that had recognized a principle of strict liability in warranty without privity. Second, the decisions in *Blankenship v. Cincinnati Milacron Chemicals, Inc.*[15] and *Jones v. VIP Development Co.*[16] expanded the traditional intentional tort exception to workers' compensation immunity by holding that it applied to any workplace injury where injury was "substantially certain" to occur. Third, the decision in *Leichtamer v.*

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10. *See* New York State Bar Association, *Proposals for Change, Public Policy Report*, 71 N.Y. ST. B.J. 57 (1999) (noting that in the past five years at least twenty states have enacted major tort reform). *Compare* OHIO R. EVID. 407 (limiting subsequent remedial measure protection to claims predicated on "negligence or culpable conduct"), *with* FED. R. EVID. 407 (extending such protection to changes in product defect litigation).

11. *See* William Matsikoudis, *Tort Reform New Jersey Style: An Analysis of the New Laws and How They Became Law*, 20 SETON HALL LEGIS. J. 563 (1996).

12. A third line of cases preceded *Henningsen* and represents one of the earliest departures from the restrictive bounds of privity doctrine. This line of decisions began with *Rogers v. Toni Home Permanent Co.*, 147 N.E.2d 612 (Ohio 1958), where the court allowed a direct action against a product manufacturer for breach of warranty without privity.

13. 364 N.E.2d 267 (Ohio 1977).

14. 218 N.E.2d 185 (Ohio 1966).

15. 433 N.E.2d 572 (Ohio 1982).

16. 472 N.E.2d 1046 (Ohio 1984).

American Motors Corp.[17] adopted the principle of second collision (crashworthiness) or enhanced injury.

The General Assembly similarly took a pro-injured party step when it adopted Ohio Revised Code section 2315.19, a comparative negligence statute that has no effect in a strict liability action. Comparative principles have long been sought as a means to bring greater fairness to trials in which the conduct of the victim is asserted as a defense. Recognition of the importance and fairness of comparative negligence led the Ohio Supreme Court to create a common law comparative negligence, identical to that of the statute, in order to give the principle retroactive effect.[18] The court furthered the fairness of comparative negligence when it ruled that the defenses of contributory negligence and implied assumption of the risk were to be merged for comparative negligence purposes.[19] Yet, the court has rejected all efforts to extend this concept to products liability actions.

The court's reason for this refusal has been clearly expressed: in negligence cases a plaintiff's conduct is subject to our modified comparative negligence statute, which limits what could otherwise be a full defense. The law is not applicable to strict liability claims as this could yield a no recovery verdict by allowing evidence of contributory negligence that is not a defense to such claims. The court had no reason to expand the application of Ohio Revised Code section 2315.19, which, by its terms, applies to contributory negligence or implied assumption of the risk in a "negligence claim." The court has not even suggested that the related terms of Ohio Revised Code section 2315.20, that negate comparative principles in products liability cases other than for negligence claims against product suppliers,[20] create classes of tort victims in violation of the equal protection clause. Thus, the defense, if it is to succeed on a conduct-based defense, must convince the jury to render a defense verdict under assumption of the risk. As any experienced litigator facing even minimal evidence of defect knows, this is not a very likely result.

Over time the Ohio General Assembly became politically "conservative." Efforts to limit what was perceived to be a pro-plaintiff civil

17. 424 N.E.2d 568 (Ohio 1981).

18. Wilfong v. Batdorf, 451 N.E.2d 1185 (Ohio 1983) (overruling Viers v. Dunlap, 438 N.E.2d 881 (Ohio 1982) and Straub v. Voss, 438 N.E.2d 888 (Ohio 1982)).

19. Anderson v. Ceccardi, 451 N.E.2d 780 (Ohio 1983).

20. Ohio Revised Code section 2315.20 provides that assumption of the risk is a complete bar to recovery in products liability actions against parties other than suppliers and that contributory negligence is not a defense in such cases. This provision codified prior decisional law.

justice system soon took the form of "corrective" legislation. In a very real sense this led to a war between a four-person majority of the Ohio Supreme Court (Justices Douglas, Pfeifer, Resnick and Sweeney) and the General Assembly. In the recently decided *Sheward* case, the majority pointedly declared: "The struggle [over tort reform] has created turbulence among our coordinate branches of government."[21] A footnote quotes my comment that "although civil and mannerly in its tone, . . . there is no doubt that the Ohio Constitution forms the battleground for an ongoing war between the tort policies and power of the judicial branch and those of the legislative and executive branches of state government."[22]

This war began with a legislative attack on the *Blankenship* intentional tort exception to workers' compensation immunity by enactment of Ohio Revised Code section 4121.80. Its latest casualty is Amended Substitute House Bill Number 350 (H.B. 350), which took effect in January 1997. A review of the conflict between the General Assembly and the legislature over the intentional tort doctrine has no direct bearing on products liability law. However, many intentional tort claims are predicated on injuries caused by allegedly defective products or toxic substance exposure. Recovery under this doctrine often provides the funds for far more expensive litigation against product line defendants. House Bill Number 350 is a good example of why Ohio is a microcosm of tort reform issues for at least two reasons: first, the scope of the reforms contained in the Act and second, the manner and breadth of the court's constitutional analysis that specifically rejects the legislative view of what the Constitution means and who makes that determination. Indeed, the General Assembly Report's inclusion of foolhardy and improper assertions that the Bill's terms complied with the Ohio Constitution and court precedent may well have been a significant motivating factor for the approach and language used by the court in *Sheward.*

Let me begin the more substantive constitutional aspect of this presentation with the opening skirmish and then move to the most recent battle. Although I will leave much of the very substantial middle period developments to previously published works, an overview of this segment of Ohio judicial history is necessary to fully appreciate the *Sheward* decision.

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21. State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d at 1062, 1072 (Ohio 1999).

22. *Id.* at n.4 (quoting Stephen J. Werber, *Ohio Tort Reform Versus the Ohio Constitution*, 69 TEMP. L. REV. 1155, 1156 (1996)).

Ohio, as many other states, has a number of major constitutional provisions that can be utilized to negate general tort reform efforts. In applicable part these provisions provide:

Art. I, sec. 2 - Equal Protection:

> All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary.

Art. I, sec. 5 - Trial by Jury:

> The right of trial by jury shall be inviolate, except that, in civil cases laws may be passed to authorize the rendering of a verdict by the concurrence of no less than three-fourths of the jury.

Art. I, sec. 16 - Open Courts/Right to Remedy/Due Process:

> All courts shall be open, and every person for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law. . . .

Art, II, sec. 15(D) - How Bills Shall Be Passed/One Subject Rule:

> No bill shall contain more than one subject, which shall be clearly expressed in its title. . . .

Art. II, sec. 34 - Welfare of Employees:

> Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power.

Art. II, sec. 35 - Workmen's Compensation/Immunity:

> For the purpose of providing compensation to workmen and their dependents, for death, injury or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund . . . . Such compensation shall be in lieu of all other rights to compensation, or damages, for such death . . . . [A complying employer] shall not be liable to

> respond to damages at common law or by statute for such death, injuries or occupational disease.

Art. IV, sec. 5 - Additional Powers of Supreme Court; Supervision; Rule Making:

> A. . . . [T]he supreme court shall have general superintendence over all courts in the state. . . .
>
> B. The supreme court shall prescribe rules governing practice in all courts of the state . . . . All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

In *Blankenship*,[23] the plaintiffs sought to expand the rights of injured workers beyond those provided in the Workers' Compensation Act.[24] This relief was sought despite the statutory mandate that employers who comply with the Act "shall not be liable to respond in damages at common law or by statute for any injury, occupational disease . . . received or contracted by any employee in the course of or arising out of his employment."[25] To reach its conclusion, the court had to reconcile, distinguish or narrow the constitutional and statutory provisions in a manner that would justify its expansive view of intentional tort doctrine. For this court, this was an easy task.

Plaintiffs, eight former or present employees, were allegedly injured by exposure to toxic substances in the workplace.[26] They sought damages from their employer, Cincinnati Milacron Chemicals, beyond the certain but limited benefits provided by the Workers' Compensation Act.[27] The court ruled that an employee is not precluded from enforcing common law remedies against an employer for intentional tort.[28] It reasoned that such claims are inconsistent with the intent of the Act when predicated on conduct that, as here, exceeds the purview of the intended scope of immunity.[29] The problem for industry was not the underlying theory–that is

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23 . Blankenship v. Cinncinati Milacron Chem., 433 N.E.2d 572 (Ohio 1982).

24. OHIO REV. CODE ANN. §§ 4123.01–4123.94 (Anderson 2000).

25. OHIO REV. CODE ANN. § 4123.74 (Anderson 2000). This statute effectuates Ohio Constitution art. II, section 35.

26. *Blankenship*, 433 N.E.2d at 573.

27. *Id.*

28. *Id.* at 576-78.

29. *Id.* at 576-77.

recognized rather universally–but the lack of clarity in what was obviously an expanded doctrine. No one knew how this new version of "intentional tort" was going to be defined and applied.

The void was filled in *Jones* where the court ruled that there need be no "specific intent" as in the more generally recognized rule, but only an act "committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur."[30] This, in turn, was distinguished from ordinary negligence and defined by recognition of a tri-part conduct analysis: knowledge of appreciable risk = negligence; great risk = reckless or wanton but not intentional conduct; knowledge or belief of substantially certain harm = an intentional tort as intent to injure could be inferred.[31] The effect was to turn numerous workers' compensation cases into intentional tort cases where the employer faced uninsurable litigation expense and potential adverse judgments. All such costs, in accord with *Wedge Products, Inc. v. Hartford Equity Sales Co.*[32] are not insurable because public policy prohibits insurance against intentional misconduct.

The legislative response was almost immediate. In August 1986, Ohio Revised Code section 4121.80 took effect. Its purpose was to eviscerate the *Blankenship* line of cases. This Act, which any objective viewer immediately recognized as unconstitutional, received its demise with *Brady v. Safety-Kleen, Corp.*[33] As that decision provides illustrations of how the Ohio Supreme Court applied several provisions of the Ohio Constitution, let me briefly discuss its reasoning and holdings:

Section 4121.80: (1) defined substantial certainty and intentional tort to require that the employer's conduct be deliberate, (2) mandated that the court determine whether there was an intentional tort and, if so, (3) required the judge to forward the case to the Industrial Commission for an award of damages. Damages, in turn, were severely limited through imposition of a scale based on allowable recovery under the Workers' Compensation Act. In holding Section 4121.80 unconstitutional, the *Brady* plurality predicated its decision on traditional grounds of equal protection and due process as well as a provision of more limited scope. The legislation did not comport with Ohio Constitution art. II, section 34 which empowered the General Assembly to enact laws "fixing and regulating the hours of labor . . . . and providing for the comfort, health, safety and general welfare of all

30. Jones v. VIP Dev. Corp., 472 N.E.2d 1046, 1051 (Ohio 1977).
31. *Id.* at 1050.
32. 509 N.E.2d 74 (Ohio 1987).
33. 576 N.E.2d 722 (Ohio 1991).

employees."[34] The court's reasoning stressed that the legislative branch had no power to enact laws governing intentional torts as these torts were, by definition, beyond the scope of employment.[35] This logic is questionable due to its circular nature. Such action is beyond legislative authority only because of the court's unique definition of intentional tort.

After this setback, the General Assembly continued its efforts to limit this doctrine. However, the intentional tort provisions of House Bill 107, scheduled to take effect in 1993 as part of a large tort reform legislative package, were voided by use of the one subject rule in *State ex rel. Ohio AFL-CIO v. Voinovich*.[36] In true "if at first you don't succeed try, try again" fashion, the General Assembly then enacted Ohio Revised Code section 2745.01 to take effect in 1995.[37] This statute, to my way of thinking, accomplished the task with constitutionally valid substantive terms. Its primary focus was to replace the court's concept of inferred intent with a more limited rule. The statute permitted employer liability only upon proof, by clear and convincing evidence, that the act was "committed by an employer in which the employer deliberately and intentionally injures, causes an occupational disease, or death of an employee."[38] The section also imposed a gratuitous signature with sanction requirement that came back to haunt the General Assembly.

Though the section's definition of intentional tort was well within more traditional definitions of the intentional tort exception to employer immunity, its fate was foreordained. The decision voiding this effort to restore a more limiting rule was so clear that the General Assembly has not yet renewed its effort to overrule the court's intentional tort doctrine. Absent a major reversal of judicial perspective, any such attempt will fail constitutional analysis.

Justice Douglas, writing for the majority in *Johnson v. BP Chemicals Inc.*,[39] strongly hinted that the court would brook no interference with its authority under the separation of powers doctrine. He wrote:

> [W]e can only assume that the General Assembly has either failed to grasp the import of our holding in *Brady* or that the General Assembly has simply

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34. *Id.* at 728 (citing OHIO CONST. art. 11, § 34).
35. *Id.* at 729.
36. 631 N.E.2d 582 (Ohio 1994).
37. Am. H.B. No. 103, 146 Ohio Laws, Part I, 756-57.
38. *Id.*
39. 707 N.E.2d 1107 (Ohio 1999).

> elected to willfully disregard that decision. We will state again our holdings in *Brady* and hopefully put to rest any confusion that seems to exist with the General Assembly in this area."[40]

The opinion then reiterated that in *Brady* the court rejected the initial statutory effort to overrule *Blankenship* because it effectively eliminated this common law action for intentional tort.[41] The statutory scheme was "totally repugnant" to Ohio Constitution article II, section 34.[42] Moreover, as in *Brady,* this statute exceeded the authority of the General Assembly as that body "cannot . . . enact legislation governing intentional torts that occur within the employment relationship, because such intentional tortious conduct will always take place outside that relationship."[43] Therefore, such legislative efforts cannot withstand constitutional scrutiny because they seek to "regulate an area that is beyond the reach of . . . [the General Assembly's] constitutional empowerment."[44] On a more substantive, less emotional and less vociferous level, the court ruled that the combination of an enhanced burden of proof and the mandate for deliberate and intentional conduct (with a toss in of the signature requirement) reduced the likelihood of recovery to "virtually zero" and rendered the asserted cause of action "simply illusory."[45]

Intentional tort legislation was only the beginning of legislative efforts to curtail the perception that judicial action had provided an excess of rights to injured parties. The General Assembly enacted a broad Tort Reform Act, Amended House Bill Number 1, which included a "Products Liability Act" (Ohio Rev. Code sections 2307.71-80). This legislation took effect in January 1988. The Products Liability Act appeared to provide a comprehensive statutory scheme that permitted products liability actions only under its express terms. House Bill Number 1 and some more limited earlier Acts have not been challenged in their entirety, but several of their most important provisions have been challenged.

On the same day that the *Brady* decision was announced, the court issued its decision in *Morris v. Savoy.*[46] This decision focused on two key

40. *Id.* at 1111.
41. *Id.* at 1112.
42. *Id.*
43. *Id.*
44. *Id.* at 1112.
45. *Id.* at 1113-14.
46. 576 N.E.2d 765 (Ohio 1991). This opinion, though that of a court with a different composition than the present court, did not discuss the Act in terms of the one subject rule

provisions of the Medical Malpractice Act of 1975: Ohio Revised Code section 2307.43, limiting general damages to $200,000, and section 2305.27, limiting the common law collateral source rule enunciated in *Pryor v. Webber*.[47]

The *Morris* majority found that the monetary ceiling imposed by section 2307.43 violated the due process clause. In its due process analysis, the plurality opinion observed that the Act was predicated on the legislative belief that it would reduce rising malpractice insurance premiums but that there was no "evidence to buttress the proposition that there is a rational connection between awards over $200,000 and malpractice insurance rates."[48] This statute, therefore, violated the due process clause because: (1) it lacked a real and substantial relationship to public health or welfare; and (2) it was unreasonable and arbitrary to impose the cost of the intended benefit to the public at large upon those "most severely injured by medical malpractice."[49]

Although the plurality expressed concern with the disparate treatment afforded to medical malpractice victims as distinct from other tort victims, it refused to find that there was a violation of equal protection. Justice Sweeney took a stronger approach.[50] He found that the statute affected a fundamental right and violated the equal protection clause under both the appropriate standard of strict scrutiny and even the plurality's rational basis standard.[51] He further argued that this statute contravened the "inviolate" fundamental right to trial by jury because its application would have reduced the jury verdict by over $771,000.[52] This would, he asserted, substitute the judgment of the General Assembly for that of the jury.[53] This argument is properly predicated on the belief that the jury is to determine factual issues and assess damages.

Somewhat surprisingly, the opinions of this highly divided court discussing section 2305.27's abrogation of the collateral source rule collectively (with the exception of Justices Sweeney and Resnick) upheld

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even though the Act amended ten sections of the Ohio Revised Code and created twenty-six new and far ranging statutes.

47. 263 N.E.2d 235 (Ohio 1970).

48. *Morris*, 576 N.E.2d at 770.

49. *Id.* at 771.

50. *Id.* at 777 (Sweeney, J., joined by Resnick, J., concurring and dissenting). This opinion, through very strained reasoning, also found a violation of the open courts provision.

51. *Id.*

52. *Id.* at 778 n.18.

53. *Id.* at 779.

this statute against all constitutional assertions. This part of *Morris* requires no discussion in light of the more recent decision in *Sorrell v. Thevenir*,[54] which, though not expressly overruling *Morris*, forecasts its demise. *Sorrell* reviewed Ohio Revised Code section 2317.45, enacted as part of H.B. No. 1 to overturn the common law collateral source rule. The General Assembly, when enacting this section, had good reason to believe that a properly worded limitation on the rule would succeed as the *Morris* court recognized that the prevention of double recovery does not offend fundamental fairness and appears to be neither arbitrary nor unreasonable.[55]

This reform effort failed largely because section 2317.45 not only permitted the admission of collateral sources of payment, it also required that this evidence would be heard by the court and that the court would make any appropriate adjustments to the jury verdict.[56] This abrogation of jury authority violated the right to trial by jury.[57] The court also rejected the poorly substantiated legislative claim that only statutory abrogation of the rule would overcome an insurance crisis and found that due process rights were violated because there was no means to ascertain whether the jury had already considered collateral sources and reflected this knowledge in its verdict. Moreover, the court was unable to reconcile differences between the statutory treatment of collateral source evidence for malpractice cases (section 2305.27) and its treatment for all other torts (section 2317.45). The statutory differences led to a determination that section 2317.45 violated the equal protection clause and the observation that the continued viability of section 2305.27 was "questionable at best."[58]

As will be discussed when we reach H.B. No. 350, a subsequent effort to overcome these constitutional infirmities through a revised 2317.45 was unsuccessful. That effort was described as an attempt to "sidestep *Sorrel*."[59] In this area, unlike that of intentional tort, a properly framed statute applicable to all tort actions including professional malpractice, products liability and wrongful death actions could withstand objective constitutional analysis.

Of greater magnitude than the collateral source rule is the thornier problem posed by imposition of unlimited punitive damages. This jury

54. 633 N.E.2d 504 (Ohio 1994).

55. *Morris*, 576 N.E.2d at 772.

56. *Sorrell*, 633 N.E.2d at 510.

57. *Id.*

58. *Id.* at 512.

59. State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d at 1062, 1090 (Ohio 1999).

prerogative is all the more egregious as no effective means has been developed to guard against the imposition of multiple punitive damages awards for the same design defect regardless of any action taken by a manufacturer after discovery of the design defect. The General Assembly sought to overcome excessive jury verdicts and mitigate the problem of multiple awards by enacting Ohio Revised Code section 2315.21. This statute applied to all tort actions except Wrongful Death Actions.[60]

Section 2315.21, enacted prior to *Collins v. Sotka*,[61] required that a jury determine whether punitive damages should be awarded while the amount of such damages was to be set by the court based on a designated set of criteria and its discretion. This provision, not surprisingly, was deemed to violate the right to trial by jury in *Zoppo v. Homestead Insurance*.[62] The court rejected a dissenting voice urging that only compensatory damages were so fundamental as to come within the purview of this constitutional provision and that as the legislature had the right to abolish punitive damages it must also have the right to regulate such damages.[63]

In addition, the court in *Carrell v. Allied Products Corp.*[64] managed to construe the Products Liability Act of H.B. No. 1 as non-exclusive in regard to the types of products liability claims that could be brought by injured parties. It held that this Act did not contain sufficiently express language stating that it abrogated all other common law remedies.[65] In this way, the court permitted a claim based on negligent product design to proceed, although it was not within the four forms of action specified in the Act. This common law action was recognized even though its burden of proof upon the injured party is more difficult than that of the Act's strict liability provisions. An objective reading of the language of the Act and legislative

60. Punitive damages are not available for claims brought under the Wrongful Death Act. I believe that this prohibition will ultimately fail on equal protection grounds as the court has established its power to modify the Wrongful Death Act. *See* Collins v. Sotka, 692 N.E.2d 581 (Ohio 1998) (applying a judicial discovery rule to overcome the Wrongful Death Act condition that all such actions be commenced within two years of the date of death). Any new effort to modify the law of punitive damages should apply to all tort actions including wrongful death claims.

61. 692 N.E.2d 581 (Ohio 1998).

62. 644 N.E.2d 397 (Ohio 1994).

63. *Id.* at 402-04 (Wright, J., dissenting).

64. 677 N.E.2d 795 (Ohio 1997).

65. Though this reasoning is deeply flawed, it is consistent with a prior ruling that the Act did not seek to codify the entire field of products liability and that, therefore, the two-year statute of limitations period was applicable to claims brought under it. McAuliffe v. W. States Imp. Co., 651 N.E.2d 957 (Ohio 1995).

intent establishes that this decision subverts both the wording of the Act and legislative intent. This holding reflects a rather arbitrary use of judicial authority for the purpose of diminishing the impact of an assumption of the risk defense. This decision should be rectified by amending the Act to add the specific language that the court deemed necessary.

A short time later, in *Collins*, the court applied a discovery rule to the Wrongful Death Act despite long judicial application of the statute's conditioning language requiring wrongful death actions to be commenced within two years of the date of death. The opinion does not mention any of the prior decisions and provides little of the close reasoning often found in its decisions. The end result in *Collins* makes perfect sense. As attorney for the defense, I should never have been allowed to gain a subsequently affirmed dismissal of six wrongful death actions allegedly caused by exposure to toxic chemicals where it was least arguable that no one was aware of a possible linkage between the exposure and the deaths prior to expiration of the commencement period. On the other hand, the result was just not because it complied with an unjust law, but because the allegations were false.

These cases nicely illustrate the injured-party-oriented-policy concerns of the court's present majority. *Collins*, of course, maximized the capacity to file a wrongful death action. An earlier case, *Crislip v. TCH Liquidating Co.*,[66] evidenced similar policy concerns and judicial activism. In *Crislip*, the court admitted that there was no difference between the elements that a plaintiff had to establish to meet the requirements for negligent failure to warn and strict liability failure to warn. The court, nevertheless, established a cause of action in strict liability for failure to warn. Its policy based reasoning declared that "a finding of comparative negligence . . . in a cause of action for negligent failure to warn . . . reduces the amount of damages awarded . . . [if plaintiff is partially at fault]. However, comparative negligence cannot be raised as a defense to a cause of action in strict liability."[67] In other words, give the injured party two bites of the apple in an effort to maximize recovery with one of the bites.

If that legal/policy reason was not clear enough, *Carrel* set aside any doubt. Here, the court announced that its purpose was to permit recovery if the plaintiff's assumption of risk was fifty percent or less of the total responsibility for the injuries sustained.[68] The court's approach manifests a

66. 556 N.E.2d 1177 (Ohio 1990).
67. *Id.* at 1183.
68. *Carrel*, 677 N.E.2d at 801 n.5.

policy at odds with that of the General Assembly. As all Ohio judges are elected, this judicial power can be negated only in the voting booth.[69]

No such change will occur in the Ohio General Assembly, whose efforts to equalize the playing field and promote economic growth too often show more stubbornness than intelligence. Its actions reflect a failure to learn that there is a one subject rule, that statutes cannot deprive parties of their right to trial by jury, and that the equal protection clause cannot be met by creation of unsupportable classes of tort victims. The General Assembly should also yield to the reality that its enactments must comport with due process. Understanding the policy parameter differences of these two equal branches of government, coupled with continued legislative efforts to enact that which cannot be upheld, made it relatively easy to anticipate the fate of H.B. No. 350 and, perhaps, future tort reform legislation.

These lessons should be remembered as we turn to the most recent effort of the General Assembly, H.B. No. 350, which was enacted in 1996 to take effect in January 1997. This effort set the stage for a monumental battle in which the court held all of the decisive weapons. This Bill addressed over 100 sections of the Ohio Revised Code effecting products liability claims, joint and several liability, comparative negligence, statutes of repose, collateral benefits, insurance, Medicare, whistle blowers, political subdivisions, corporate director liability, and more. To index H.B. No. 350 would require over 175 entries plus subheadings. The *Sheward* court was well aware of this fact.[70] Although many of the changes contained in H.B. No. 350 were technical or simple grammatical amendments, a significant number of the provisions worked important substantive change. This major piece of legislation was reviewed and deemed unconstitutional in *Sheward.*

After a lengthy and somewhat vituperative discussion of the relative powers of the judicial and legislative bodies, Justice Resnick's majority opinion completed the stage setting by relying on *State v. Hochhausler*,[71] to remind all that: "[a] statute that violates the doctrine of separation of powers

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69. The November, 2000 election left the bench composition unchanged as Justices Resnick and Cook were re-elected. Justice Cook has been nominated for a position on the United States Court of Appeals for the Sixth Circuit. If her nomination is confirmed she will be replaced on the Ohio Supreme Court by the nomination of a Republican Governor to a Republican General Assembly. In all likelihood Justice Cook's leaving the Ohio Supreme Court will have no effect on the current 4:3 position of the court.

70. *See* State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d at 1062, 1073 n.6 (Ohio 1999).

71. 668 N.E.2d 457 (Ohio 1996).

is unconstitutional."[72] *Hochhausler* may have been selected for a special reason: the opinion was authored by Chief Justice Moyer who wrote strong dissents in *Sheward* and other tort reform cases.

Perhaps the most fascinating part of this opinion is that it gives specific attention to only seven areas of the overall Act. This discussion is secondary to the court's determination that the entire Act was enacted in contravention of the one-subject rule. Despite the fact that many of its provisions, including parts of the amended Products Liability Act, were well conceived and, I believe, consistent with all constitutional mandate other than the one-subject rule, not a single part of this comprehensive Tort Reform Act ever took effect. This sledgehammer approach, however, leaves the door open to a well-crafted series of Acts that could force the court to address each on its own constitutional merit. Many provisions of H.B. No. 350, if enacted within the confines of a single subject, should pass constitutional muster. A decision that could have provided the vehicle to a decisive end of the war, or at least have given substantial guidance to the General Assembly (assuming that body would listen), instead provides the ground for yet another series of battles. This is not to say that the court really had a choice: had it endeavored to individually address every statute within the Bill, we might still be awaiting the decision. You can bet that despite the recent election results, the General Assembly, which remains strongly conservative, will be back at its drafting board.

Politics aside, the court's ruling that H.B. No. 350 violated the one-subject rule of Ohio Constitution article II, section 15D is unassailable. Even if all of its provisions were related to some aspect of tort reform, a somewhat dubious contention, an Act that amended statutes in thirty-one Chapters of the Ohio Revised Code and created or reenacted dozens of other statutes is too broadly based to comply with any reasonable definition of "one-subject." Sadly, neither the *Sheward* decision nor the earlier decision in *Voinovich* provides sufficient guidance as to just what sieve a given Act must pass through to comport with the one-subject rule.

This constitutional provision is the paradigm of Mr. Dooley's oft-quoted statement that "[t]he constitution is what the Supreme Court says it is."[73] The most that I can offer is to advise that the scope of any Act be limited to a single chapter of the State Statutes. If this means that the legislature must pass six bills, or a dozen or more, in order to comprehensively deal with

72. *Sheward*, 715 N.E.2d at 1085.

73. J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 984 (1998).

specific issues so that all statutes can be made consistent and to prevent equal protection problems, then that is what must be done. Only this approach will resolve the overarching problem posited by this well-intentioned but easily abused constitutional mandate: that it defies both definition and the capacity for consistent, predictable application. Legislative bodies must recognize that this provision provides the judicial branch with a means to its own desired end and must take the care necessary to deprive the court of this means.

Assuming that a Tort Reform Act can comport with the one-subject rule even as against a hostile judiciary, that Act must still meet other constitutional hurdles. As I previously indicated, the *Sheward* opinion gave specific attention to seven subjects within H.B. No. 350. At this time I would like to review those areas and then move to a discussion of the constitutional fate of various other sections of the Bill that I anticipate will be reenacted. The constitutional tools discussed in these areas include separation of powers, due process, and the right to trial by jury. Though the analysis did not focus on equal protection concerns, that principle remains a significant constitutional hurdle.

The opinion clearly establishes the battle lines between the court and the General Assembly as it observes that the General Assembly chose to ignore, reinterpret, reject or simply flank judicial precedents of which, according to its own report, it was often well aware. There is no doubt that the court was incensed with what it perceived to be an intolerable usurpation of its powers.

> The legislative branch, at least in theory, knows the extent to which it has the power to act, and that the judiciary alone has the authority to determine constitutional issues. Where the tort reform legislation [H.B. No. 350] seeks to impose the General Assembly's view of the constitution upon the court–as it does in several key places–the effort is not only misguided, it is futile. In these areas, battle is truly joined.[74]

If there was any one reason that explains the open hostility of the court to the General Assembly that enacted H.B. No. 350, this is it.

That this is so is shown in the court's analysis of the first of the seven specific subject areas it addressed: Statutes of Repose. Here the court reiterated its precedents holding such provisions unconstitutional, observed that the Legislative Service Commission had advised the General Assembly

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74. *Sheward*, 715 N.E.2d at 1075 n.7 (quoting Stephen J. Werber, *Ohio Tort Reform Versus the Constitution*, 69 TEMP. L. REV. 1155, 1170 (1996)).

that such statutes would raise constitutional issues that could be determined only by the Ohio Supreme Court and that the General Assembly had directed "contrary to our declarations, that 'the concept of a statute of repose [did] not violate [various constitutional provisions].'"[75] The General Assembly largely reenacted Ohio Revised Code section 2305.131 and created new statutes providing repose statutes for wrongful death actions involving product claims, products liability claims, professional malpractice claims and medical malpractice claims. In taking this action, "the General Assembly chose to usurp this court's constitutional authority."[76] The court then ruled that, based on its prior precedents, each of these provisions was unconstitutional as a violation of the right to remedy/open courts provision of article I, section 16 of the Ohio Constitution. Without regard to the tenor of this opinion, one must agree that its ruling invalidating repose statutes is correct. Whether posed in terms of a right to remedy or due process, any such statute reeks of unfairness and must not be tolerated.

Separation of powers was also utilized to void (1) a certificate of merit requirement for various forms of medical malpractice actions, and (2) to establish a summary judgment standard for proof of causation in hazardous or toxic exposure cases.[77] The certificate of merit requirement sought to amend Rule 11 of the Rules of Civil Procedure. Earlier efforts to legislatively modify court rules had been invalidated as invading judicial authority.[78] The summary judgment standard, according to legislative intent expressed within the Act, was to establish a "judicial standard" for the grant of judgment in such cases. The court saw this as an attempt to overrule the standard it had set for such cases in *Horton v. Harwick Chemical Corp.*[79] Both statutes were found to violate the court's power as the exclusive arbiter of its own rules of practice set forth in article IV, section 5(B) of the Ohio Constitution.[80]

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75. *Id.* at 1086.

76. *Id.*

77. *See* OHIO REV. CODE ANN. §§ 2305.011 (Anderson 1998) (applying the statute to medical, dental, optometric and dental malpractice) and 2307.792. Discussion of these provisions can be found at *Sheward*, 715 N.E.2d at 1087-88, 1095-96.

78. Earlier cases voiding similar legislative efforts included *Hiatt v. S. Health Facilities, Inc.*, 626 N.E.2d 71 (Ohio 1994) (voiding an affidavit of merit requirement for claims similar to those in H.B. 350) and *Rockey v. 84 Lumber Co.*, 611 N.E.2d 789 (Ohio 1993).

79. 653 N.E.2d 1196 (Ohio 1995).

80. Similar reasoning was utilized to void the seventh category discussed in the opinion: admissibility of evidence of a common insurer. *See Sheward*, 715 N.E.2d at 1096.

The Ohio Constitution unquestionably places the power to govern practice and procedure with the court. The court might be well advised to enact a certificate of merit requirement for all professional malpractice and products liability design claim cases. Such a practice would be far more effective than the existing Rule 11. In order to prevent an unfair running of the statute of limitations, the rule could permit the filing of the Complaint, without its service on any defendant and without the Certificate, to toll the limitation period. Such Complaints could then be automatically dismissed if the Certificate is not filed and service made within a reasonable and specified grace period following the statutory period. This proposal, however, would have the court usurp the power of the General Assembly to establish proper statutes of limitation. This problem could be overcome by the simple expedient of a cooperative effort whereby the court acts only after legislation authorizing such steps. Of course, only a law professor could even conceive of such a cooperative effort in the present judicial-legislative environment.

Although I continue to believe that a valid statute can be written to abrogate the collateral source rule, it is evident that I may be in error. The *Sheward* court reviewed an amended Ohio Revised Code section 2317.45 that sought to meet the objections posed by the court in *Sorrell*.[81] This review, though not precluding such legislation, has made clear that the court will apply very close scrutiny to any effort to overturn the collateral source rule of *Pryor v. Webber*.[82] The court found that the revised effort remained arbitrary and unreasonable in contravention of due process. This conclusion was based on (1) the failure of the statute to take into account whether the collateral benefits held against the verdict were within the damages found by the jury, and (2) the statute's indiscriminate merging of all evidence of collateral source payments into a general verdict replete with collateral source offsets.[83] The court concluded by declaring that any prevention of double recovery under this statute would be fortuitous at best and that the relationship of this goal to the actual statute was so attenuated that "one could conclude that the primary goal of R.C. 2317.45 is simply to reduce damages generally."[84] It may well be that the court will continue to indicate that abrogation of the collateral source rule to prevent double recovery is a valid theory while finding all efforts to effectuate this theory invalid.

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81. *See id.* at 1088-90 (citing Sorrell v. Thevenir, 633 N.E.2d 504 (Ohio 1994)).
82. 263 N.E.2d 253 (Ohio 1970).
83. *Sheward*, 715 N.E.2d at 1090.
84. *Id.*

The General Assembly also sought to readdress the problem of excessive general and punitive damages, though it offered little evidence that such excess was frequent or had any substantial effect on business. Ohio Revised Code section 2315.21(C) was reenacted as 2315.21(D), complemented by adjustments to related sections. This section rectified one problem of the predecessor statute by having the jury determine both the liability for punitive damages and setting the amount of such actions. An amendment to section 2307.80 of the Products Liability Act removed any equal protection problem caused by having distinct general tort and products liability provisions. However, the new statute limited the amount of punitive damages to the lesser of three times the amount of the compensatory award or $100,000 ($250,000 for "large" employers).[85] In addition, though repealing Ohio Revised Code 2307.43, the Bill replaced it with a new section 2323.54. This provision limited recovery of non-economic damages in tort actions to the greater of $250,000 or three times the economic loss with a larger sum available for specified permanent injuries. The picture was completed by an amendment to Ohio Revised Code section 2305.01, declaring that the Ohio Court of Common Pleas had no jurisdiction to award compensation for non-economic loss in exceeding the amount specified in section 2323.54. Talk about *chutzpah*!

The court first reviewed the history of Ohio punitive damages law, including the right to have such issues determined by the jury, and concluded that the award of such damages was a constitutional right that could not be abrogated by the legislature or the courts. Limiting the right of the jury to set the amount of damages was such an abrogation in contravention of the constitutional right to trial by jury.[86] The legislative effort also sought to overcome the imposition of multiple punitive damage awards by denying a plaintiff the right to punitive damages against a given tortfeasor if that party had, at some prior time, paid another an amount of such damages in excess of the ceiling.[87] This provision not only violated the right to trial by jury, it turned the constitutional right to have a jury

85. OHIO REV. CODE § 2315.21(D), *reproduced in Sheward*, 715 N.E.2d at 1090.

86. *Cf.* Cooper Indus. Inc., v. Leatherman Tool Group, Inc. 69 U.S.L.W. 4299 (U.S. Feb. 26, 2001) (No. 99-2035) (holding that appellate court review of punitive damages awards should be made de novo and distinguishing between compensatory and punitive damages in relation to a court's power to modify punitive damages awards without conflicting with the right to trial by jury).

87. OHIO REV. CODE ANN. § 2315.21(D)(3)(a).

determination into a lottery based on which victim managed to gain and collect the first judgment.[88]

The court next addressed the limitation on non-economic damage awards. This discussion included a lengthy reiteration of the General Assembly's rationale for the section. This rationale was rejected because its reasons were "judicial, not legislative in nature, and are being used to justify the reenactment of legislation already determined to be unconstitutional."[89] This statute, which "merely expanded the scope of a statute declared unconstitutional . . . in the context of medical claims,"[90] was as arbitrary and unreasonable as that invalidated in *Morris* and suffered the same fate.

As with statutes of repose, even if some correlation could be established between high verdicts and a legislative purpose, any effort to impose a ceiling on general or compensatory damages will violate the right to trial by jury. Any weakness in the correlation evidence will also permit the court to find a violation of the due process mandate. We can also predict that the prohibition against punitive damages in wrongful death actions will fail. It will be viewed as either the ultimate unsupportable cap under a due process analysis or a violation of equal protection through its denial of equal recovery rights in all tort actions. *Sheward* seems to hold that the General Assembly does not have the authority to limit or condition the right it created.[91] If this is a valid reading, the Wrongful Death Act is now just one more enactment subject to the same due process, equal protection and right to jury requirements as any other statute. The General Assembly should consider an amendment that would permit punitive damages as an element of either a survival action or a wrongful death action, but not both. This approach would negate the potential recovery of two punitive damages awards where a single award serves all purposes of compensation, punishment, and deterrence.

As evidenced by the history of judicial constraint upon tort reform and the court's sometimes imaginative application of constitutional law, one could conclude that further tort reform efforts would be futile. I do not believe this to be the case. Although this court promotes a policy of compensation for harm and is at odds with the General Assembly, it remains a court of integrity and intelligence. Appropriate legislation, even if

88. *Sheward*, 715 N.E.2d at 1091.

89. *Id.* at 1094.

90. *Id.* at 1095.

91. *Id.* at 1086 n.12 (overruling Shover v. Cordis Corp, 574 N.E.2d 457 (Ohio 1991) after the article mentioned was published).

considered unwise by the court, will be upheld.[92] Several provisions of H.B. No. 350 should be reenacted in appropriately narrow bills. I will conclude by addressing some sections of H.B. No. 350 that sought to amend the Products Liability Act or have direct bearing on products liability where I believe the provisions can be drafted in full compliance with all constitutional mandates.[93]

1. Amend the Products Liability Act to add express and unmistakable language that this Act is intended to abolish all forms of common law actions for products liability claims other than those contained within the Act. This language would be consistent with the mandate of *Carrell v. Allied Products Corp.* and effectively overrule that decision for future claims. When complemented by a revision of the comparative negligence statute, the reason for the *Carrell* court's creation of a cause of action for negligent design would no longer exist. Moreover, nothing in *Carrell* suggests that such a codification of law is outside the authority of the General Assembly.

2. The amendment to Ohio Revised Code section 2307.75(A)(2) that provided for a single definition of design defect predicated on risk-benefit analysis and alternative feasible design should be reenacted. This definition is consistent with that of the Restatement (Third) Torts: Products Liability section 2(b). Current Ohio Revised Code section 2307.75, enacted as part of H.B. No. 1, includes a risk-benefit analysis standard for proof of design defect and provides that a product in not defective in design absent proof of a practical and technically feasible alternative design.[94] Adoption of this definition will simplify the task of judge and jury while eliminating the present alternative of a consumer expectancy test that is unsuited to design litigation and forces the factfinder to engage in unfettered subjective analysis.

3. The provisions of Ohio Revised Code section 2307.73(C) and 2307.791 that addressed successor liability and industry-wide liability, respectively, should be reenacted. The provision limiting successor liability, which rejects the product line theory of successor liability and limits such liability to the traditional business context approach, codifies Ohio Supreme Court precedent. Similarly, the provision dealing with industry-wide liability, which rejects various expansive theories permitting imposition of

92. The court has consistently recognized this rule. *See, e.g., Sheward*, 715 N.E.2d at 1071-72 (citing State *ex rel.* Bishop v. Mt. Orab Vill. Sch. Dist., 40 N.E.2d 913 (Ohio 1942); State *ex rel.* Bowman v. Bd. of Comm'rs of Allen County, 177 N.E. 271 (Ohio 1931).

93. These suggestions are more fully discussed in Werber, *supra* note 22, at 77.

94. The statute includes an exception for products that create so great a danger as to allow a finding that they should not have been placed on the market.

extensive liability without proof that the defendant was in any way involved with the product that reached a given plaintiff, is consistent with and codifies existing precedent. Both provisions seek only to foreclose unwise changes in existing judicial precedent and to negate the dicta in several opinions suggesting that under some unknown circumstances liability might be appropriate. As there are valid arguments to support some extension of enterprise liability beyond that allowed by alternate liability, the General Assembly should consider enacting such an extension. Such an approach could, perhaps, foreclose the court from crafting an overly protective common law extension.

4. Two new provisions dealing with conduct should be reenacted: Ohio Revised Code 2323.59 created a limited substance abuse defense that would have permitted the jury to consider the extent to which substance abuse contributed to the alleged harm. The language of this proposed section should be revised to indicate that such abuse permits a rebuttable inference that it was "a" proximate cause of harm rather than "the" proximate cause. There can be more than one proximate cause. In its H.B. No. 350 form, the section could mandate a defense verdict as substance abuse would become the sole cause of harm regardless of the existence of product defect. This possibility took a valid point too far.

Proposed section 2307.80, as 2323.59, created a new defense predicated on conduct. This section addressed a party's disregard for safety where a product recall was ignored. Despite extensive publicity and cost, too many people ignore recall notices that, if heeded, would prevent a significant number of product-related injuries and deaths. Mandatory seat belt use legislation is predicated on the belief that the law can induce persons to promote their own safety. This provision of H.B. No. 350 was based on the same predicate to achieve the same objective. The statute permitted the factfinder to determine whether the recipient of the notice assumed the risk of noncompliance or whether that failure was a superseding cause where the injured party was not the recipient. Moreover, the jury was permitted to consider the recall in regard to the propriety of imposing punitive damages. Recall evidence is presently admissible to establish a number of proof elements, including the existence of a relevant defect at the time of product manufacture. This section promotes safety and restores balance to the area of recall evidence.

5. The provisions relating to comparative negligence and joint and several liability found in Ohio Revised Code section 2315.19 and related statutes should be reenacted in a further revised form. The proposed amendment sought to change Ohio law from comparative negligence to a

broader form of comparative fault applicable to strict liability actions. Comparative principles should apply to all tort actions. Many other states have recognized that claims declaring that the role of a party's conduct cannot be compared to a non-conduct based liability theory are outmoded and illogical.[95] These are independent elements that often form a mutual contribution to harm. Although several efforts to expand comparative principles to all tort actions have failed, the failure has always been attributable to the General Assembly's inclusion of the change in broader Acts that violate the one-subject rule. The court, consistent with the wording of the existing statute, has refused to apply its common law authority to include strict liability actions within comparative principles. A statutory extension, applying the principle to all torts, would meet all constitutional requirements.

When these sections are reenacted, the General Assembly also should abolish its present distinction between economic and non-economic loss as the linchpin for determination of when joint and several liability remains in effect. The existing distinction permits joint and several liability to promote full compensation only for economic loss. The entire concept of joint and several liability traces to the historical concept of a unitary cause of action for which no form of apportionment is appropriate. This concept is recognized as outmoded as the existing legislation and common law of Ohio require apportionment in negligence cases. The court has, on several occasions, correctly asserted that the jury is the fact finder and that this function includes the assessment of damages. Joint and several liability, where comparative assessments of fault have been made, contravenes the jury's assessment of damages by permitting a shifting of that assessment to the solvent party. Just as a cap cannot constitutionally lower a jury determination, a rule that increases that determination as to any party cannot withstand identical constitutional scrutiny. As recognized by Justice Sweeney in *Morris*, this result impermissibly substitutes the judgment of the legislature for that of the jury.[96]

The motive for imposition of joint and several liability—to assure that, at least for economic loss, the victim will be made whole—was valid before adoption of comparative fault principles. This ancient motive can no longer justify depriving any party of the right to trial by jury. This right is guaranteed equally to those who are injured and to those who allegedly

95. For a history of the development of comparative law principles, see Restatement, Torts (Third) Products Liability (1997), section 17, cmt. a and rptrs. note to cmt. a.

96. 576 N.E.2d 765 (Ohio 1991).

caused that injury. The right does not distinguish between plaintiffs and defendants. The court has steadfastly protected the right of the injured to the full benefits of this "inviolate" and fundamental right. That same policy and logic applies with equal force to the other parties in the courtroom.

6. If there is any untouchable legal doctrine that the General Assembly would like to limit, it is the *Blankenship* intentional tort doctrine.[97] There is a means, however, to take some of the sting out of this open-ended doctrine. Employers are faced with (1) the doctrine, and (2) its severe cost implications due to the lack of insurance. The sole basis for the *Wedge Products* ruling that intentional tort was not insurable was the long-standing and well-taken view that to insure against intentional misconduct violates public policy.[98] The General Assembly, as a primary declarant of public policy, could pass a Bill providing that insurance against *Blankenship* liability fosters public policy as it promotes the economic well being of the state. If carefully drafted to avoid making punitive damages or traditional intentional torts, such as assault, battery, and libel insurable, the Bill could provide protection to employers without impinging upon the compensation rights of injured employees. This approach is far short of the General Assembly's objective but, unlike that objective, this one may be do-able.

Although various other provisions should be reviewed and considered for renewed legislation, this small group is fundamental to the restoration of a proper balance of the rights of all parties to tort actions, in particular, for products liability actions. The General Assembly should focus not on all that it can enact, but only on that which is fair and fully defensible against constitutional attack. The General Assembly must refrain from enacting unfair, unjust, and unconstitutional statutes that (1) impose a ceiling on compensatory or punitive damages, (2) impose a statute of repose, or (3) infringe upon the court's constitutionally mandated right to prescribe its own rules governing practice and procedure before the courts.

It is possible to enact tort reform legislation that comports with all state constitutional requirements. Whether the Ohio General Assembly, or any state legislative body, is willing to limit the effort to appropriate legislation remains, of course, an open question.

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97. 433 N.E.2d 572.

98. Wedge Prods., Inc. v. Hartford Equity Sales Co., 509 N.E.2d 74 (Ohio 1987).