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FLORIDA'S TORT REFORM: RESPONSE TO A PERSISTENT PROBLEM

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The rising cost and decreasing availability of insurance have motivated numerous changes in Florida's tort system over the past decade, particularly in the areas of medical malpractice and automobile negligence. In this Article, the authors survey pre-existing law, examine the alternatives considered by lawmakers, and explain the changes adopted by the legislature. They conclude that the 1986 tort law changes are the culmination of a decade of legislative labors to balance the rights of victims and needs of those who must pay.

Perhaps more than any other branch of the law, the law of torts is a battleground of social theory.¹

IN RESPONSE to widespread difficulty in obtaining liability insurance in Florida, the Tort Reform and Insurance Act of 1986² (the Act) was passed during the 1986 Regular Session. Concerned with the problems of availability and affordability of liability insurance, the legislature embarked on a journey to resolve this "crisis." It has culminated in a law that changes legal doctrines that have existed for 200 years. The Act is a coalescence of bills intended to produce significant changes in the insurance and tort systems.

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The views expressed in this Article are those of the authors and are not intended to reflect the position of the Florida Senate.

Portions of this Article have been adapted from *Review of Historical Analysis—Current Perspectives of the Doctrine of Joint and Several Liability and a Review of Tort Reform*, prepared by the authors for the Senate Commerce Committee.

1. W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 15 (5th ed. 1984).
2. Tort Reform and Insurance Act of 1986, ch. 86-160, 1986 Fla. Laws 695.

A Conference Committee,³ appointed to reconcile the differences between Senate Bill 465⁴ and House Bill 1344,⁵ negotiated into the

3. For lists of the House and Senate conferees, see FLA. H.R. JOUR. 571 (Reg. Sess. May 28, 1986); FLA. S. JOUR. 460 (Reg. Sess. May 28, 1986); FLA. S. JOUR. 479 (Reg. Sess. May 29, 1986).

4. Fla. SB 465 (1986) included various tort reform measures. It would have limited joint and several liability to an amount not greater than the uncollectible amount multiplied by the defendant's percentage of fault. Fla. SB 465, sec. 12(3)(d) (1986). It would have required a plaintiff to obtain leave of court prior to pleading punitive damages and would have prohibited discovery of financial worth until such pleading was permitted. *Id.* sec. 13(1). The bill adhered to the Model Punitive Damages Statute, *see infra* note 61, at 179, by proposing that a punitive damages award be transferred to the state's general revenue fund, except for five percent to be retained by the plaintiff. *Id.* sec. 13(2). It would have facilitated acceptance of offer of judgments and demand for judgments by awarding reasonable attorney's fees and costs if the judgment was within 25% of the offer or demand, *id.* sec. 14. Sec. 15, and would have capped noneconomic damages at \$500,000. *Id.* sec. 15(3). It would have required: the court, upon request of either party, to order periodic payments of future damages exceeding \$500,000, *id.* sec. 16(1); juries to itemize verdicts indicating past and future damages, *id.* sec. 17; the court to reduce damages by the amount the claimant received from all collateral sources, except those for which a subrogation right exists, *id.*; and that no insurer or other provider of collateral source benefits would be entitled to subrogation rights unless provided by law, *id.* sec. 18(4).

Fla. CS for SB 465, 349, 592, 698, 699, 700, 701, 702, 956, 977 and 1120 (1986) [hereinafter cited as CS for SB 465] incorporated the listed bills, *see infra* note 169, and received a unanimous roll call vote from the Senate Committee on Commerce. Secretary of Fla. S., Comm. on Com., Bill Action Report (Apr. 30, 1986) (on file with committee). CS for SB 465 changed the following provisions: joint and several liability was limited to economic damages, Fla. CS for SB 465, sec. 40(3) (1986); periodic payments of future damages which exceed \$350,000 were required upon motion by either party, *id.* sec. 44(1)(b); the Florida Supreme Court was instructed to develop a plan for statewide implementation of mandatory mediation and mandatory nonbinding arbitration, *id.* sec. 47(2); and a seven-member tort reform study commission, to be chaired by the Insurance Commissioner, was created, *id.* sec. 48.

After it was reported favorably by the Committee on Commerce, Fla. CS for SB 465 was heard by the Senate Committee on the Judiciary-Civil, which incorporated it into Fla. CS for CS for SB 465, 349, 592, 698, 699, 701, 702, 956, 977 and 1120 [hereinafter cited as CS for CS for SB 465]. FLA. S. JOUR. 313 (Reg. Sess. May 19, 1986). The Committee on the Judiciary-Civil replaced the seven-member study commission with a three-member commission, to consist of the president of each state university with a law school (Florida State University and the University of Florida) and a third person they would select. Fla. CS for CS for SB 465, sec. 51(1) (1986).

CS for CS for SB 465 was further amended on the floor of the Senate on May 22, 1986. FLA. S. JOUR. 382 (Reg. Sess. May 22, 1986). The amendments included: a provision exempting specific causes of action from the limitation on joint and several liability, *id.* at 393; a provision changing FLA. STAT. § 57.105 (1985) to require attorney's fees to be paid to the prevailing party by both the losing party and the losing party's attorney in civil actions in which the court determines there was no justiciable issue of law or fact, FLA. S. JOUR. 382, 395 (Reg. Sess. May 22, 1986); and a severability clause, *id.* at 397-98. The bill passed on third reading, 38-to-1. *Id.* at 398 (Sen. Mann voting against).

5. The House Committee on Health Care and Insurance filed Fla. HB 1344 on May 6, 1986. FLA. H.R. JOUR. 270 (Reg. Sess. May 6, 1986). The bill required itemized verdicts indicating reasonable expenses, economic loss, punitive damages, and noneconomic damages as

final hours of the 1986 Regular Session to produce compromise legislation that would be responsive to both the liability insurance crisis and varied political concerns.⁶ In this Article the authors re-

well as future and present damages, Fla. HB 1344, sec. 39 (1986); specified criteria for courts to use when applying remittitur or additur, *id.* sec. 40; prevented pleading of punitive damages without leave of court, *id.* sec. 41; required the court to reduce damage awards by the collateral sources available to the claimant, *id.* sec. 42; permitted periodic payments at the request of either party if future damages exceed \$250,000, *id.* sec. 43(1)(b); awarded attorney's fees and costs against a party who unreasonably rejects a settlement offer if there is more than a 25% difference between the settlement offer and the judgment, *id.* sec. 44(1); authorized the court to require the parties to participate in a pretrial settlement conference, *id.* sec. 45; limited noneconomic damages to \$250,000 unless clear and convincing evidence showed the award was not excessive (the bill specified evidentiary presumptions for ascertaining what is "excessive"), *id.* sec. 46; eliminated joint and several liability for defendants who are less at fault than the plaintiff, *id.* sec. 48; specified that the new tort law provisions would not apply when a more specific provision already exists (e.g. medical malpractice), *id.* sec. 49; created a three-member Academic Task Force for Review of Tort and Insurance Law, *id.* sec. 50; provided a nonseverability clause, *id.* sec. 52(4); and granted "good samaritan" immunity to individuals rendering emergency "code blue" treatment, *id.* sec. 63. See Staff of Fla. H.R., Comm. on Health Care & Ins., PCB HC 86-100 (1986) Staff Analysis 20-23, 25 (rev. May 2, 1986) (on file with committee). The bill was referred to the House Committee on Appropriations. FLA. H.R. JOUR. 300 (Reg. Sess. May 8, 1986). Other tort bills were filed in the House but none were as comprehensive as Fla. HB 1344. The other bills included:

1. Fla. HB 172 (1986) eliminated joint and several liability when negligence is apportioned among parties.

2. Fla. HB 416 (1986) provided that physicians responding to a "code blue" emergency within a hospital would not be liable for medical treatment, if the physician acts as a reasonably "prudent man."

3. Fla. HB 627 (1986) capped noneconomic damages at \$250,000.

The House Committee on Appropriations incorporated HB 1344 into a committee substitute, FLA. H.R. JOUR. 501 (Reg. Sess. May 22, 1986) with the following changes: punitive damages were limited to three times the amount of compensatory damages unless clear and convincing evidence showed that a larger award would not be excessive (the award would be divided evenly between the claimant and either the Public Medical Assistance Trust Fund or other state funds), Fla. CS for HB 1344, sec. 51 (1986); and joint and several liability was limited to any uncollectible amount multiplied by the defendant's percentage of fault (although intentional torts and pollution damages would be exempted from this limitation), *id.* sec. 52. See Staff of Fla. H.R., Comm. on Health Care & Ins., CS for HB 1344 (1986) Staff Analysis 21-22 (rev. May 22, 1986) (on file with committee).

CS for HB 1344 passed on a roll call vote, 108-to-8, and was sent in messages to the Senate on May 26, but was not received by the Senate until May 28. FLA. LEGIS., HISTORY OF LEGISLATION, 1986 REGULAR SESSION, HISTORY OF HOUSE BILLS at 380, HB 1344. Also on May 28, the Senate sent CS for CS for SB 465 in messages to the House, which passed an amendment, 109-to-3, replacing everything following the bill's enacting clause with the text of CS for HB 1344. FLA. H.R. JOUR. 557, 559 (Reg. Sess. May 28, 1986). The Senate, upon motion by Sen. Hair, Dem., Jacksonville, refused to concur with the House's amendment and requested the House to recede from its position, or in the alternative, to agree to a conference committee. FLA. S. JOUR. 423, 447 (Reg. Sess. May 28, 1986). The House refused to recede and the bill proceeded to conference committee.

6. The conferees from the House appeared to surprise the Senate conferees with an offer in the first meeting of the conference committee. Rep. Tom Gustafson, Dem., Ft. Lauder-

view the state of various legal components of the civil tort system prior to the passage of this Act, and present an historical perspective on issues that have indicated a need for reform. The authors also analyze those provisions of the Act related to the tort system, examining the legal effects and deficiencies of the Act.

I. PRIOR STATE OF THE LAW

The status of statutory and common law prior to passage of the 1986 Act is reviewed below. While the discussion focuses on Florida law, other states' laws are discussed for purposes of comparison.

A. Joint and Several Liability

The doctrine of joint and several liability evolved from the principle "the act of one is the act of all." Known as "entire" liability at common law, the doctrine had been adopted, until recently, by

dale, offered, on behalf of the House, to adopt the Senate position on insurance if the Senate would accept the House tort provisions. Sen. Ken Jenne, Dem., Hollywood, who had been appointed Chairman of the Conference Committee earlier in the meeting, stated that while the Senate viewed it as a favorable step, the proposal would need to be evaluated. Fla. Conference Comm. on Fla. CS for CS for SB 465 (1986), tape recording of proceedings (May 29, 1986) (on file with committee). The Senate at a later meeting rejected the House proposal indicating that because the insurance and tort provisions of each bill were interrelated, the Senate insurance and House tort sections could not be simply combined. *Id.* (May 30, 1986).

While many of the tort reform measures were resolved early in the Conference Committee meetings, severability was at issue throughout. The House was adamantly in favor of a severability clause, but the Senate viewed rollback of insurance premiums and tort reform as interdependent issues which could not be separated. *Id.* (June 4, 1986). Sen. Hair stated the public was concerned with insurance costs, a rollback was needed to reduce costs, and tort reform was necessary to accomplish the rollback. House members continued to maintain that the tort and insurance issues were separable in that the tort reforms should be considered "fairness issues" which were not necessary to bring about an insurance premium rollback. Rep. Gustafson stated that the tort reforms would bring about only minimal premium cost savings but that the primary purpose of a rate rollback and insurance regulation is to flatten the swings in premium pricing. *Id.* Sen. Crawford, Dem., Winter Haven, stated that he was under the impression that tort reform would bring about decreased insurance premiums. *Id.* As of June 5, the major issues still unresolved involved joint and several liability and capping noneconomic damages. *Id.* (June 5, 1986). However, by the last night of the regular session at approximately eleven o'clock, the Conference Committee had unanimously agreed on all provisions of the bill. *Id.* (June 6, 1986).

The Conference Committee Report on CS for CS for SB 465 was adopted and the bill was passed as amended. FLA. S. JOUR. 1092, 1117 (Reg. Sess. June 6, 1986); FLA. H.R. JOUR. 1425, 1452 (Reg. Sess. June 6, 1986). The Senate passed the bill by a vote of 37-to-2. FLA. S. JOUR. 1092, 1117 (Reg. Sess. June 6, 1986). The bill passed the House on a vote of 108-to-3. FLA. H.R. JOUR. 1425, 1452 (Reg. Sess. June 6, 1986).

as many as forty-five states, including Florida.⁷ Simply stated, under joint and several liability, the liability is "joint" in that all defendants may be joined to render compensation for an injury; it is "several" in that each defendant is liable for the entire damage amount; and, it is "joint and several" in that no defendant's liability is extinguished until the plaintiff's judgment is completely satisfied.⁸ In its most extreme application, the doctrine can require a defendant who is only one percent at fault to pay one hundred percent of the damages if, for any reason, the plaintiff collects nothing from the other defendants who are ninety-nine percent at fault.

Critics contend that the doctrine of joint and several liability contravenes the philosophy of comparative negligence. They argue that requiring one joint tortfeasor to pay one hundred per cent of the damages was a necessary evil under contributory negligence because legal principles of causation deemed injuries "indivisible," and because there was no way to determine each tortfeasor's degree of negligence. But, they contend, the law should be different under comparative negligence. While joint and several liability was originally based on unity of action and indivisibility of injuries, today triers of fact regularly apportion fault and "divide" injuries. In *Hoffman v. Jones*,⁹ the Florida Supreme Court adopted comparative negligence, reasoning that "[t]he liability of the defendant . . . should . . . depend . . . upon what damages he caused,"¹⁰ because "[i]n the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault."¹¹ Critics of joint and several liability contend that abrogation of the doctrine would further the principles of fairness espoused by the court in *Hoffman* by making a defendant's liability depend upon his degree of fault rather than upon the solvency of any codefendants.

7. STAFF OF THE FLA. S., COMM. ON COM., A REVIEW OF HISTORICAL ANALYSIS—CURRENT PERSPECTIVES OF THE DOCTRINE OF JOINT AND SEVERAL LIABILITY AND A REVIEW OF TORT REFORM 28 (Mar. 1986) (on file with committee) [hereinafter cited as COM. COMM. REVIEW].

8. MATTHEW BENDER & CO., COMPARATIVE NEGLIGENCE LAW AND PRACTICE § 13.30(2) (1985).

9. 280 So. 2d 431 (Fla. 1973).

10. *Id.* at 439 (emphasis omitted).

11. *Id.* at 438.

Florida courts, like the majority of courts nationwide,¹² have rejected these arguments,¹³ but, to a great extent, have not fully explained why. They have, as the basis of their holdings, found that the legislature intended that joint and several liability be retained. This is because of the express joint and several liability language contained in the Uniform Contribution Among Tortfeasors Act¹⁴ which provides a right of contribution among joint tortfeasors even though judgment has not been recovered from all or any of them, but only for those persons jointly or severally liable for the same injury or death.¹⁵

All sides agree that the Uniform Contribution Among Tortfeasors Act is intended to ameliorate the potentially harsh effects of joint and several liability by allowing joint tortfeasors to recoup monies expended in payment of damages in excess of their proportionate shares.¹⁶ Whether this purpose is being achieved is questionable. Various industry representatives have complained that the act does not work. Although more quantifiable than any other information pertaining to the joint and several liability question, insurers have failed to provide data revealing the number of judgments under which they have paid more than their proportionate shares, the amounts in excess they have allegedly paid, the number of instances in which they have sought contribution, and the amounts of contribution received. Proponents of joint and several liability also have failed to supply this data. The failure to present this information renders allegations of inequity suspect. Such figures would be of great interest because, among other things, they would provide insight into the critical problems caused by insolvent tortfeasors.¹⁷ Were it not for insolvent tortfeasors there would be no need for the joint and several liability doctrine because each party would be financially responsible for damages that he caused. The insolvent tortfeasor presents the problem of incomplete recovery by the plaintiff. As a result, the

12. Note, *The Modification of Joint and Several Liability: Consideration of the Uniform Comparative Fault Act*, 36 U. FLA. L. REV. 288, 297 n.47 (1984).

13. *Woods v. Withrow*, 413 So. 2d 1179, 1181 (Fla. 1982); *Lincenberg v. Issen*, 318 So. 2d 386, 392 (Fla. 1975).

14. *Lincenberg v. Issen*, 318 So. 2d 386, 391-92 (Fla. 1975) (interpreting FLA. STAT. § 768.31 (1975)).

15. FLA. STAT. § 768.31(2)(a) (1985).

16. Note, *supra* note 12, at 292.

17. "Insolvent tortfeasor" refers to a tortfeasor whose proportionate share of damages is uncollectible because he is insolvent, absent, or immune from liability, or whose liability has been extinguished either by release, settlement, or covenant not to sue.

proverbial "bottom line" becomes: Who is to pay the damages attributable to the insolvent tortfeasor?

Most courts considering this question have refused to abolish the doctrine, voicing the same concern as did the California Supreme Court when it stated that to do so would seriously impair the capacity of negligently injured persons to obtain compensation for damages incurred,¹⁸ and that it should be left to the wrongdoers to "work out between themselves" any apportionment.¹⁹ These considerations must be viewed in light of the countervailing principle that persons under a system of comparative negligence should not be required to pay more than their fair share of damages.

There is a social cost involved in either of these approaches. Assuming that insurers and businesses are typically the "deep pockets" who pay more than their proportionate shares of damages under a system of joint and several liability, and that these defendants are unable to recoup their excessive payments through contribution, the increased costs attributable to the insolvent tortfeasor are ultimately paid by the public in the form of higher premiums and higher prices for goods and services. In the end, society pays. On the other hand, if a plaintiff is denied compensation for an insolvent tortfeasor's share of damages, it is likely that if his resources, such as insurance and savings, are insufficient to cover the actual damages, then social assistance, such as Medicaid and welfare, will be necessary to offset the damages. It is obvious that society also pays the bill in this situation.

One of the major disputes with regard to the issue of changing the doctrine of joint and several liability involves the impact change would have upon the tort system itself. Abrogation would probably significantly affect litigation involving multiple defendants. In 1984, the Tort Litigation Review Commission, appointed by the Florida Bar, published a major review of the current and future status of Florida's tort system.²⁰ The Commission concluded that abolishing joint and several liability would have several effects upon the way cases are tried:

1. The number of parties in each case would probably increase because each party would presumably try to bring all other possible parties into court. This would result in a corresponding in-

18. *American Motorcycle Ass'n v. Superior Court*, 578 P.2d 899, 906 (Cal. 1978).

19. *Id.* (quoting *Summers v. Tice*, 199 P.2d 1, 5 (Cal. 1948)).

20. FLORIDA BAR, REPORT OF THE TORT LITIGATION REVIEW COMMISSION (Jan. 1984).

crease in motion practice, case duration, and costs, thus, increasing the administrative burden on the courts.

2. Rather than present a joint defense, defendants would fight among themselves, each being concerned only with minimizing the degree of fault allocated to him, and thus making a plaintiff's case easier. This strategy could be especially costly in medical malpractice cases because each health care professional would need separate counsel.

3. Proximate cause may be affected because defendants often use the defense that the plaintiff's negligence was the sole proximate cause of the event causing the injury. When a court is able to apportion fault among defendants, it will be less likely to find intervening or superseding causes of a plaintiff's injuries.

4. Vicarious liability may be affected or eliminated, requiring everyone, especially those in the health care system, to purchase separate insurance coverage. Those who have insurance could expect to pay lower premiums for the same coverage because insurers would not be required to pay the policy limits as often as under joint and several liability.²¹

While plaintiffs would be expected to bring every possible defendant into court, as suggested by the Commission, it is likely that third-party actions (for example, defendants impleading other defendants) would decrease almost proportionately. This decrease in third-party actions might not precisely match the increase in the number of defendants sued if the widely held assumption is correct that defendants typically have more knowledge than plaintiffs regarding who and to what extent others contributed to an injury. This assumption is certainly correct in a case where medical malpractice is alleged and the plaintiff was anesthetized at the time of the incident.

Settlement negotiations would be greatly affected by abrogation of joint and several liability. Even with joint and several liability, it is estimated that at least ninety percent of cases filed end in settlement.²² Critics contend that under the traditional system defendants have little bargaining power to effect settlement, especially if they are the "deep pocket." This is true because a plaintiff is hesitant to settle if he is at all apprehensive about the other joint defendant's ability to pay. As a result, a joint defendant is more

21. *Id.* at 75-77.

22. FLORIDA DEPT OF INS., BACKGROUND FOR GOVERNOR'S STUDY COMMISSION ON MEDICAL MALPRACTICE 1 (n.d.) (on file, *Florida State University Law Review*).

likely to settle at an amount exceeding what would be his actual proportionate share so as to preclude the possibility of being required to pay even more after judgment is entered.

If the doctrine were to be abolished and each defendant became severally liable only for his proportionate share, it is probable that this settlement environment would change although it is questionable whether the change would be an improvement. Plaintiffs may resist settling because they are unsure of the settling defendant's potential liability. Rather than risk having the remaining defendants attribute the majority of fault to the "empty chair," claimants might prefer to join all possible defendants.²³ On the other hand, because the potential liability of each defendant would be lower and perhaps more easily predicted, it is possible that more settlements would be reached.

While in many areas a change in the doctrine of joint and several liability would be likely to have wide-ranging economic impact, perhaps the most significant would be in the area of pollution liability and cleanup. Because of the unique problems encountered by those responsible for preserving our environment, section 403.141, Florida Statutes, expressly provides for the application of joint and several liability in cases of air and water pollution.²⁴ Industries, primarily those involved in the manufacture, transport, and storage of hazardous materials, claim this is unfair and economically detrimental to Florida citizens. They assert that their products and services are indispensable to today's technologically advanced society and that, as a result of being unfairly required to pay more than their proportionate share of damages caused by pollutants, their continued ability to provide these important products and services is jeopardized because of the unaffordability and unavailability of pollution liability insurance. On the other hand, those responsible for prosecuting cases of environmental pollution contend that because there is virtually no way to allocate the responsibility for pollution in many cases, it would be impossible to make polluters pay without joint and several liability.

23. J. Dimento & J. Harrison, *Joint and Several Liability: A Study of the Fiscal and Social Impact of a Change in the Doctrine* 27 (Dec. 1985) (unpublished study) (on file, *Florida State University Law Review*).

24. FLA. STAT. § 403.141 (1985).

B. Structured Settlements/Judgments

The traditional common law method of providing compensation to an injured claimant has been by means of a lump-sum payment of damages by the defendant or by the defendant's casualty insurer.²⁵ Thus the trier of fact must determine all past and future damages due a claimant.²⁶ Florida follows the traditional rule of compensating for future losses by means of lump-sum judgments.²⁷

One of the more critical and longstanding problems associated with the traditional system is the lack of information at trial with which to accurately assess future damages.²⁸ Uncertainties such as the state of the economy as well as the future physical condition of the seriously injured claimant combine to make the award of these damages in many instances little more than an educated guess. Other factors have led many groups to call for a re-examination of this area of tort law. One is the frequency of large jury awards which has impacted on the availability and affordability of liability insurance. Another is the development of income tax laws which benefit claimants by providing tax savings for structuring the payment of future damages.²⁹ Several states have designed alternatives for payment of damages in order to address these problems: periodic payments and structured settlements.

Some confusion has developed over structured settlements and periodic payment acts. "[A] structured settlement is just that, namely a 'settlement.'"³⁰ Moreover, it is any settlement in which the parties voluntarily agree to accept money or other consideration over a period of time as opposed to a one-time lump-sum award. On the other hand, periodic payment acts apply to the payment of judgments. The difference between a settlement and judgment is the compulsion involved in the latter.³¹

25. *Frankel v. United States*, 321 F. Supp. 1331, 1340 (E.D. Pa. 1970); J. WEIR, *STRUCTURED SETTLEMENTS* 1-2 (1984); Elligett, *The Periodic Payment of Judgments*, 46 *INS. COUNS. J.* 130, 130 (1979).

26. Henderson, *Periodic Payments of Bodily Injury Awards*, 66 *A.B.A. J.* 734, 734 (1980). This concept is sometimes referred to as the "single recovery rule." 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 25.2 (1956).

27. *Florida Patient's Compensation Fund v. Von Stetina*, 474 So. 2d 783, 789 (Fla. 1985).

28. Henderson, *supra* note 26, at 734.

29. Structuring damage payments, if done correctly, results in tax-free payments to claimants. Rev. Rul. 79-220, 179-2 C.B. 74.

30. J. WEIR, *supra* note 25, at 5.

31. Corboy, *Structured Injustice: Compulsory Periodic Payment of Judgments*, 66 *A.B.A. J.* 1524, 1524 (1980).

Because structured settlements are voluntary, they are consequently in the best interests of all parties. They might include: a lump-sum payment equalling lost wages and medical expenses, or in a death case lost contributions prior to settlement; funds for a seriously injured claimant's rehabilitation; a medical annuity covering future treatment and expenses; a lifelong or temporary income equivalent to the decedent's or injured's lost earnings; an annuity providing for educational or technical training for dependent children; attorney's fees; and an adequate reserve to cover extraordinary expenses or a death benefit for survivors.³² These are just examples. "The precise terms and conditions of payment are creatively tailored by the parties themselves to meet the specific circumstances at hand"³³

Many advantages are inherent in structured settlements for claimants and defendants as well as the public, yet the benefit most often sought is purely financial.³⁴ Perhaps the most important feature of the structured settlement is the opportunity it provides for obtaining significant tax savings.³⁵ Under the present lump-sum system, the amount is not subject to taxation at the time of actual payment to the claimant, however, any income generated by investment of the lump sum is considered income and is fully taxable in that year at the claimant's marginal rate.³⁶ In contrast, the properly arranged structured settlement, that is, one funded solely by the casualty insurer, whether self-funded or funded through a life insurance company, will avoid the impact of taxation and allow the claimant to receive the payments tax-free.³⁷

32. Krause, *Structured Settlements for Tort Victims*, 66 A.B.A. J. 1527, 1528 (1980). For several examples of structured settlements, see *id.* at 1529.

33. J. WEIR, *supra* note 25, at 3 (emphasis omitted).

34. *Id.* at 4.

35. Other advantages of the structured settlement include: an insurer-managed income for the claimant, savings for the insurance company through the avoidance of disbursing one large amount, payment of attorney's fees based on the actual financial value of the total settlement rather than simply the amount of payments, and a spur to insurers to participate in the rehabilitation of the severely injured claimant. Krause, *supra* note 32, at 1528-29.

Because structured settlements are purely voluntary and need no enabling legislation to permit their use, it seems reasonable to conclude that there would be no opposition from either the plaintiff's or defense bar or the insurance industry. And, indeed, this seems to be the case. For example, the Florida Tort Litigation Review Commission declined to endorse the Model Periodic Payment of Judgments Act, favoring instead the use of structured settlements. Likewise, the American Bar Association's Special Committee on the Tort Liability System, which encompasses both the plaintiff's and defense bars, opposed the Model Act in favor of structured settlements.

36. See J. WEIR, *supra* note 25, at 4; Henderson, *supra* note 26, at 736.

37. Rev. Rul. 79-220, 1979-2 C.B. 74.

Less favored by some and often confused with structured settlements are structured judgments, also known as periodic payment of damages. This option, unlike the purely voluntary structured settlement system, statutorily imposes periodic rather than lump-sum payment of damages above a stipulated amount. These payments usually terminate at the plaintiff's death. Periodic payment of damages has been used in many states, including Florida, to limit the impact of medical malpractice awards, primarily in response to the crisis in availability and affordability of medical malpractice insurance.³⁸ Section 768.51, Florida Statutes,³⁹ authorized periodic payments of future losses in medical malpractice cases at the request of either party if the judgment included future losses exceeding \$200,000. Its constitutionality was upheld by the Florida Supreme Court in *Florida Patient's Compensation Fund v. Von Stetina*.⁴⁰ Section 768.51 was amended in 1985 to, among other things, raise the base amount of future losses to \$500,000, provide for offset of collateral sources, provide remedies for tardy payments and insolvent judgment debtors, require discharge of periodic payments in the event of the claimant's death, and provide for payment of attorney's contingency fees, if any.⁴¹

C. Collateral Source Rule

The common law collateral source rule prohibits the introduction of evidence to show that the plaintiff has received payments for his injury from sources other than the defendant. This rule permits the plaintiff to collect payment from more than one source. Generally, Florida has followed the common law rule.⁴² This potential for "double recovery" by the plaintiff has led some critics to call for abrogation of the collateral source rule. Those state legislatures that have done so believe that juries should be provided with all information concerning a plaintiff's financial resources.

In those states that have modified the doctrine, the modification usually takes one of two forms: either the court or the jury deducts all forms of collateral compensation by applying a mandatory off-

38. Karzon, *Medical Malpractice Statutes: A Retrospective Analysis*, 2 ANNUAL SURVEY OF AMERICAN LAW 693, 699 & n.52 (1984) (citing statutes mandating periodic payments in medical malpractice cases).

39. FLA. STAT. § 768.51 (1985), *repealed* by ch. 86-160, § 68, 1986 Fla. Laws 695, 763.

40. 474 So. 2d 783 (Fla. 1985).

41. FLA. STAT. § 768.51 (1985).

42. *Hartnett v. Riveron*, 361 So. 2d 749, 751 (Fla. 3d DCA 1978); *Janes v. Baptist Hosp., Inc.*, 349 So. 2d 672, 673 (Fla. 3d DCA 1977).

set⁴³ or the jury must be presented with evidence of all forms of collateral compensation.⁴⁴ In Florida, mandatory offset laws exist in the areas of automobile accidents⁴⁵ and medical malpractice.⁴⁶ The court in medical malpractice cases and the jury in automobile cases are required to reduce the amount of an award by the total of all collateral sources paid to the claimant.

The Tort Litigation Review Commission recommended in its 1984 report that the legislature abrogate the collateral source rule in personal injury and wrongful death cases to the same extent that it has in automobile accident and medical malpractice cases.⁴⁷ It recommended that the deductions, if any, be made by the trier of fact pursuant to appropriate instructions. The Commission concluded that no rational line could be drawn between automobile accident and medical malpractice cases and all other cases involving personal injury and wrongful death.⁴⁸

Changes in the collateral source rule have been upheld in four states, including Florida, and struck down in three.⁴⁹ In Florida, the rule has survived constitutional attack as applied to medical malpractice cases. The Florida Supreme Court in 1981 applied the traditional rational basis test to uphold section 768.50, Florida

43. P. DANZON, *THE FREQUENCY AND SEVERITY OF MEDICAL MALPRACTICE CLAIMS* 40-41 (1982) (identifying the nature of offset policies in 16 states that had eliminated or modified the collateral source rule).

44. *Id.*

45. FLA. STAT. § 627.7372 (1985).

46. FLA. STAT. § 768.50 (1985).

47. FLORIDA BAR, *supra* note 20, at 48-52. The Commission recommended that the rule remain intact in all cases involving property damages because "[t]he collateral source in such cases is usually first person home owners or collision insurance, as to which subrogation rights exist on behalf of the insurer." *Id.* at 51.

48. The Commission cited a civil torts study prepared by the Administrative Office of the Courts of the Eleventh Judicial Circuit of Florida indicating that 52% of a block of torts cases disposed of during the first six months of 1983 involved automobile negligence, while 6% involved medical malpractice. *Id.* at 51 & app. I-12. That study has since been updated and now shows that 56.3% of tort cases disposed of during the first six months of 1985 involved automobile negligence, while 1.8% involved medical malpractice. ADMINISTRATIVE OFFICE OF THE COURTS, CIVIL TORT STUDY 10 (Feb. 1986) (on file, *Florida State University Law Review*).

49. The medical malpractice modification was upheld in the following states: **Arizona:** *Eastin v. Broomfield*, 570 P.2d 744 (Ariz. 1977); **Florida:** *Pinillos v. Cedars of Lebanon Hosp. Corp.*, 403 So. 2d 365 (Fla. 1981); **Iowa:** *Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550 (Iowa 1980); **Nebraska:** *Prendergast v. Nelson*, 256 N.W.2d 657 (Neb. 1977). Such changes have also been held unconstitutional: **New Hampshire:** *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980); **North Dakota:** *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); and **Ohio:** *Graley v. Satayatham*, 343 N.E.2d 832 (Ohio Ct. Common Pleas 1976).

Statutes, against an equal protection challenge,⁵⁰ holding that "the classification created by section 768.50 bears a reasonable relationship to the legitimate state interest of protecting the public health by ensuring the availability of adequate medical care for the citizens of this state."⁵¹ The court deferred to the legislative finding of a medical malpractice crisis as evidenced in the preamble to the Medical Malpractice Reform Act of 1975, of which section 768.50 was a part.⁵²

D. Caps on Noneconomic Damages

It is contended that because the increases in huge jury awards have contributed to the spiraling costs of liability insurance premiums, and because noneconomic losses make up the largest portion of jury awards, the most obvious way to reduce damage awards would be to place a ceiling on the amount of damages for pain and suffering a plaintiff can receive. Critics point out, however, that the most severely injured claimants who have the most urgent need for compensation are the ones who will suffer most from such a measure. To have an impact on premiums, the ceiling must be low enough to affect a substantial number of cases. Yet one commentator reports that most states have placed the ceilings so high in medical malpractice cases that "they are rarely reached."⁵³

Prior to the 1986 Regular Session, Florida had no legislation capping the amount of damages a plaintiff may receive. Subject to the court's powers of additur and remittitur, the trier of fact has the ultimate authority to award damages for economic and noneconomic losses. The most popular ceiling amount enacted in other states is \$500,000,⁵⁴ but caps are sometimes imposed as multiples of economic damages.⁵⁵

50. *Pinillos v. Cedars of Lebanon Hosp. Corp.*, 403 So. 2d 365, 368 (Fla. 1981). FLA. STAT. § 768.50 (1979) mandated offsetting of any court-awarded damages by the amount of any additional compensation the plaintiff received.

51. *Pinillos v. Cedars of Lebanon Hosp. Corp.*, 403 So. 2d 365, 368 (Fla. 1981).

52. *Id.* at 367-68. Chief Justice Sundberg dissented, calling for stricter judicial scrutiny concerning whether a medical malpractice insurance "crisis" actually existed. *Id.* at 369-71 (Sundberg, C.J., dissenting).

53. Karzon, *supra* note 38, at 697-98.

54. FLORIDA BAR, *supra* note 20, at 31.

55. Just prior to adjourning in 1986, the Washington Legislature enacted a unique measure, placing a staggered cap on noneconomic damages depending on the age of the plaintiff. Ch. 305, 1986 Wash. Legis. Serv. 47 (West).

The Tort Litigation Review Commission recommended that no cap be placed on noneconomic damages in tort cases.⁵⁶ The Commission concluded that there was insufficient data available indicating that the relatively few "jumbo" awards are causing a collapse in liability insurance mechanisms or are boosting costs of products and services. The Commission was presented only with information on what other states had done to limit awards in the single area of medical malpractice. A different conclusion might have been reached, however, if the Commission had been confronted with data demonstrating the current problems associated with all commercial liability lines.⁵⁷

An alternative to capping noneconomic damages in medical malpractice cases has been offered by the Florida Medical Association.⁵⁸ The proposal would allow a health care provider, after receiving notice from a claimant of intent to initiate litigation for medical malpractice, to foreclose such litigation by tendering an offer of all of the claimant's economic losses plus reasonable attorney's fees. The proposal has been touted as a way to better serve injured plaintiffs by immediately compensating them for their economic losses and reasonable attorney's fees, thus avoiding the inevitable delay inherent in our adversarial system. Although the Florida Medical Association's paper on the concept concluded that this proposal would be constitutional,⁵⁹ it is possible that a proposal placing a monetary ceiling on noneconomic damages would have to overcome some constitutional hurdles.

E. Punitive Damages

The primary reasons for awarding punitive damages are to punish the tortfeasor and to deter future tortious conduct by other potential tortfeasors.⁶⁰ Plaintiffs who seek punitive damages may be regarded as private attorneys general.⁶¹

56. FLORIDA BAR, *supra* note 20, at 31-33.

57. The Commission noted that "there is no claim of a general liability insurance crisis." *Id.* at 32.

58. COM. COMM. REVIEW, *supra* note 7, pt. 2, at 24, 168.

59. The FMA bases its opinion on the partial dissent in *Florida Patient's Compensation Fund v. Von Stetina*, 474 So. 2d 783 (Fla. 1985) (Overton, J., concurring in part, dissenting in part).

60. *Mercury Motors Express, Inc. v. Smith*, 393 So. 2d 545, 549 (Fla. 1981).

61. J. Grass, *Model Punitive Damages Statute and Commentary* 181, *reprinted in* COM. COMM. REVIEW, *supra* note 7, pt. 2, at app. H.

1. *Role of Judge and Jury*

In Florida, when a request for punitive damages is made at the close of evidence during trial, the judge determines whether there is a legal basis for such damages in light of any interpretation of the evidence favorable to the plaintiff.⁶² A legal basis exists when a tort has been committed in "an outrageous manner or with fraud, malice, wantonness or oppression."⁶³ Gross negligence alone will not support an award of punitive damages—there must be wanton disregard for the rights of others.⁶⁴ The jury has the discretion to award punitive damages and to decide upon the amount.⁶⁵

A jury may award punitive damages in different amounts, depending on the evidence and the variable culpability of multiple defendants.⁶⁶ Damages may be awarded against one or more of the defendants and not against others, thus, punitive damages are not joint and several between defendants.⁶⁷

Remittitur of punitive damages by a trial court is unlikely since the degree of punishment to be inflicted on the defendant is left to the jury's discretion.⁶⁸ Courts may, however, determine that a verdict for punitive damages is excessive when the award "bears no relation to the amount the defendant is able to pay and results in economic castigation," or when the tortious conduct "is lacking the degree of maliciousness and/or outrageous disregard for the plaintiff's rights required to sustain the amount of the verdict."⁶⁹ Punitive damages need not bear a reasonable relationship to the compensatory damages awarded, thus remittitur cannot be based on that standard.⁷⁰ The trial court must satisfy the rules that apply to all remittitur of damages: any excessive award of damages must be clear from the record—not merely shock the court's conscience—and an order for new trial must be based on reasons shown in the record or be based on considerations outside the rec-

62. *Wackenhut Corp. v. Canty*, 359 So. 2d 430, 435 (Fla. 1978).

63. *Id.* at 435-36.

64. *White Constr. Co. v. Dupont*, 455 So. 2d 1026, 1029 (Fla. 1984); *U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061, 1064 (Fla. 1983).

65. *Wackenhut Corp. v. Canty*, 359 So. 2d 430, 436 (Fla. 1978).

66. 17 FLA. JUR. 2D *Damages* § 125 (1980).

67. *Lehman v. Spencer Ladd's, Inc.*, 182 So. 2d 402, 403-04 (Fla. 1965).

68. *Wackenhut Corp. v. Canty*, 359 So. 2d 430, 436 (Fla. 1978).

69. *Id.* (citations omitted).

70. *Id.*

ord, such as influences that aroused the passion or prejudice of the jury.⁷¹

One criticism of punitive damage awards is that they are more of a crap shoot than a deterrent device because juries are not given sufficient standards or boundaries to guide their decision-making. Deterrence is facilitated by predictability, which punitive damage awards are lacking. The only guidance a Florida jury receives from a judge regarding an award of punitive damages is that it may consider the defendant's financial resources.⁷² Statutory standards which describe factors to be considered in determining an appropriate amount would enhance the likelihood that juries will reach more predictable results.⁷³

Generally, financial information about the defendant is discoverable by the plaintiff. Critics of this policy propose that procedural safeguards be implemented to protect the defendant from disclosure of inflammatory information to the jury and from needless discovery of sensitive personal financial information. For example, the Model Punitive Damages Statute recommends that no evidence of the defendant's wealth or financial condition be admissible during the first phase of a bifurcated trial, and that no discovery of the defendant's financial condition be permitted unless the jury has found the defendant liable for punitive damages.⁷⁴ In Florida, however, the state constitution allocates the authority to adopt procedural rules solely to the Florida Supreme Court.⁷⁵ Thus, legislative enactment of the Model Act's discovery provision could be an un-

71. *Id.* at 435. For further discussion of remittitur, see *infra* notes 136-43 and accompanying text.

72. FLA. STD. JURY INSTR. (CIV.) 6.12.

73. For example, a Minnesota statute provides:

Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

MINN. STAT. ANN. § 549.20(3) (West Supp. 1986).

74. J. Grass, *supra* note 61, at 179.

75. FLA. CONST. art. V, § 2(a).

constitutional infringement of supreme court authority in that discovery is a procedural matter.

2. Vicarious Liability of Employers

An employer is vicariously liable for compensatory damages caused by the negligent acts of employees committed within the scope of their employment, regardless of whether the employer is at fault. However, for an employer to be liable for punitive damages under the doctrine of respondeat superior, the claimant must show some fault on the part of the employer. It is not necessary that the employer's fault be willful and wanton, only that it foreseeably contributed to the plaintiff's injury.⁷⁶

Florida public policy prohibits liability insurance coverage for punitive damages for all but an employer's vicarious liability. The rationale for the general rule is that the purpose of punitive damages is to punish and deter misconduct. To allow insurance for punitive damages is to thwart that punishment. However, because vicarious liability is further removed from the direct misconduct which gave rise to the punitive damages, the punishment aspect of such damages is not as critical and thus insurance is acceptable.⁷⁷ In his concurring opinion in *U.S. Concrete Pipe Co. v. Bould*,⁷⁸ Justice Ehrlich stated, "Without liability insurance coverage, a businessman can ill afford the risk of delegating responsibility to employees who may eventually commit some willful, wanton or malicious tort in the scope of his [sic] employment."⁷⁹ Justice Ehrlich further indicated he was aware that this policy combines two conflicting principles: the punishment aspect of punitive damages and an employer's ability to insure against them. Justice Ehrlich added that "[t]his conflict can only be resolved by a holding that there can be no vicarious liability for punitive damages."⁸⁰ Chief Justice Alderman, in dissent, advocated this position and added that he hoped the Tort Litigation Review Commission would ex-

76. *Mercury Motors Express, Inc. v. Smith*, 393 So. 2d at 545, 549 (Fla. 1981). See also Leesfield, *Corporate Liability for Punitive Damages: Where Are We?*, *ADVOCATE*, June 1985, at 12 (published by the Florida Bar) (discussing the required degree of fault by an employer).

77. *U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061, 1064 (Fla. 1983); see also Leesfield, *supra* note 76, at 13.

78. 437 So. 2d 1061 (Fla. 1983) (Ehrlich, J., concurring).

79. *Id.* at 1067.

80. *Id.* n.1.

amine the issue and recommend that the legislature eliminate employer vicarious liability for punitive damages.⁸¹

In its report,⁸² however, the Commission recommended enactment of section 909, *Restatement (Second) of Torts*.⁸³ The *Restatement* provides that employers are vicariously liable for punitive damages only if the employer authorized, ratified, or approved the act, the employee was in a management capacity, or the employer was reckless in employing the employee.⁸⁴ "However, if liability is purely vicarious and not based on the principal's outrageous behavior, such vicarious liability may be the object of insurance coverage."⁸⁵

3. Insurer Liability

Punitive damages in an action alleging bad faith against an insurance company are prohibited in Florida unless the insurer's actions constitute a general business practice and are willful or in reckless disregard of the insured or beneficiary.⁸⁶ The existence of bad faith is a factual determination to be made by the jury. If an insurance company fails to settle within the policy limits and conceals a settlement offer from the insured, the company is liable for the judgment amount beyond the policy limits as well as for punitive damages.⁸⁷

Punitive damage awards against insurers for bad faith actions are appropriate only if there is active concealment and active misrepresentation. Where there is a complete lack of communication between the insurance company and the insured but no active concealment or misrepresentation, punitive damages will not lie.⁸⁸ An insurance company's duty in handling the defense of claims is to "use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business."⁸⁹ The insurer must advise the insured of settlement opportunities and the probable outcome of litigation, and must also warn of the possibility of an excess judgment and indicate how the

81. *Id.* at 1068 (Alderman, C.J., dissenting).

82. FLORIDA BAR, *supra* note 20, at 20.

83. RESTATEMENT (SECOND) OF TORTS § 909 (1979).

84. *Id.*

85. FLORIDA BAR, *supra* note 20, at 21.

86. FLA. STAT. § 624.155(4) (1985).

87. *Campbell v. Government Employees Ins. Co.*, 306 So. 2d 525, 531-32 (Fla. 1974).

88. *Butchikas v. Travelers Indem. Co.*, 343 So. 2d 816, 818 (Fla. 1976).

89. *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980).

insured might avoid such judgment.⁹⁰ The Florida Supreme Court has held that a judgment creditor may directly sue a tortfeasor's liability insurer for recovery of the judgment in excess of the policy limits if bad faith or fraud by the insurer is alleged.⁹¹ The court made available this direct cause of action in recognition of the state's public policy of encouraging the settlement of lawsuits.

4. *Punishment and Deterrence*

Because one of the purposes of punitive damages is punishment, such damages take on a characteristic of criminal law. Critics argue, however, that procedural safeguards available to the criminal defendant are not available to the civil defendant. Critics assert that if criminal punishment is inadequate it should be modified and enhanced rather than maintaining a quasi-criminal element within the civil justice system. At the least, these critics contend, a plaintiff's evidentiary burden should be closer to that of a prosecutor. The Model Punitive Damages Statute would replace the existing standard of a preponderance of the evidence with the criminal standard of beyond a reasonable doubt.⁹²

The United States Supreme Court declined to rule on the constitutionality of punitive damages in *Aetna Life Insurance Co. v. Lavoie*.⁹³ Among the questions presented to the Court was whether a \$3.5 million punitive damages award violated the excessive fine clause of the eighth amendment.⁹⁴ The defendant argued that punitive damages act as a "surrogate of the criminal law,"⁹⁵ and should therefore be subject to the same procedural safeguards.⁹⁶ The plaintiff argued that the eighth amendment does not apply to civil proceedings, and that such damages are not a criminal penalty subject to that amendment's restrictions.⁹⁷ The Court recognized

90. *Id.*

91. *Thompson v. Commercial Union Ins. Co.*, 250 So. 2d 259, 264 (Fla. 1971).

92. J. Grass, *supra* note 61, at 179. A middle ground between these two standards is that of clear and convincing evidence. Minnesota has chosen the following standard of proof: "Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others." MINN. STAT. ANN. § 549.20(1) (West Supp. 1986).

93. 106 S. Ct. 1580 (1986), *vacating and remanding* 470 So. 2d 1060 (Ala. 1984).

94. "Excessive bail shall not be required, nor excessive fines imposed . . ." U.S. CONST. amend. VIII.

95. *Supreme Court asked to rule on punitive damages issues*, Business Insurance, Dec. 2, 1985, at 59, col 2.

96. *Id.* col. 3.

97. *Id.*

the importance of the punitive damages issues but decided the case on other grounds.⁹⁸

If punitive damages are intended to punish, the size of the award must hurt but not bankrupt a defendant. Thus, the wealthier the defendant, the larger the award. Critics argue that this is unfair and that it invites juries to engage in wealth redistribution, particularly with corporate defendants.⁹⁹

Critics also argue that punitive damages unjustly enrich the plaintiff.¹⁰⁰ The Model Punitive Damages Statute addresses this criticism by recommending that punitive damages be paid into the state general revenue fund, except for five percent of the recovery that would be awarded to the plaintiff. The five-percent award would encourage the public to pursue meritorious suits as private attorneys general.¹⁰¹

In the case of *In Re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*,¹⁰² the constitutionality of a New York statute that denied punitive damages in wrongful death cases was attacked on equal protection grounds in that parties in wrongful death actions were unable to obtain punitive damage awards, unlike other personal injury claimants.¹⁰³ The court, pointing out that the classification involved no suspect class or fundamental right, used the rational relationship standard of review and found the statute was properly related to a legitimate state interest. The court indicated that denial of punitive damages "represents a legislative determination that a state's interest in protecting defendants from excessive damages outweighs its interest in punishing or deterring misconduct."¹⁰⁴ Further, the court noted that "[t]he decision of under what circumstances punitive damages should be allowed is for the state legislatures and not this Court."¹⁰⁵

Whether the goal of deterrence is actually achieved is difficult to ascertain. It is practically impossible to perform an empirical study

98. *Aetna Life Ins.*, 106 S. Ct. at 1589.

99. Ellis, *Fairness and Efficiency In The Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 61-63 (1982); FLORIDA BAR, *supra* note 20, at app. J-6 (minority position of Commission regarding punitive damages).

100. Haugen & Tarkow, *Punitive Damages In Minnesota: The Common Law and Developments Under Section 549.20 of the Minnesota Statutes*, 11 WM. MITCHELL L. REV. 353, 367 (1985).

101. J. Grass, *supra* note 61, at 187.

102. 644 F.2d 594 (7th Cir. 1981).

103. *Id.* at 608.

104. *Id.* at 610.

105. *Id.* n.12.

to determine whether tortious acts have been deterred by such awards; no one is likely to admit a propensity to commit torts in an outrageous manner or involving fraud, malice, wantonness, or oppression.

F. *Alternative Dispute Resolution*

In what is sometimes called the "second-stage"¹⁰⁶ or "second wave"¹⁰⁷ movement, alternative dispute resolution mechanisms are increasingly being integrated into our judicial system. This is so, one commentator suggests, primarily because of the success of private programs such as neighborhood justice centers.¹⁰⁸

The interest in alternative dispute resolution has been spurred by the increasing caseloads in federal and state courts. Chief Justice Warren Burger addressed this concern in an August 1985 meeting cosponsored by the American Arbitration Association and the Minnesota State Bar Association when he cited statistics indicating that in 1984, the federal district courts received 261,000 new cases, compared with roughly 30,000 new civil cases received each year at the close of World War II.¹⁰⁹ In addition to this "need to save the courts from capsizing under oceans of lawsuits"¹¹⁰ the boom in alternatives to traditional adjudication has also been prompted by the high costs and delays of litigation. From a legislator's point of view, alternatives provide means of cutting judicial workload, thus reducing the need for costly new judgeships.¹¹¹ A study conducted by the Institute of Civil Justice concluded that the costs associated with each Florida circuit court judge in 1982 were \$323,000.¹¹²

106. Edelman, *Institutionalizing Dispute Resolution Alternatives*, 9 JUST. SYS. J. 134, 137 (1984). The "first stage" refers to the development of local alternative dispute mediation mechanisms during the last decade. *Id.* at 135-36.

107. Alfani, *Alternative Dispute Resolution and the Courts: An Introduction*, 69 JUDICATURE 252, 252-53 (1986).

108. Hensler, *What We Know and Don't Know About Court Administered Arbitration*, 69 JUDICATURE 270, 270 (1986).

109. *Chief Justice Supports Arbitration*, ARB. TIMES, Fall 1985, at 1.

110. Rosenberg, *Can Court-Related Alternatives Help Improve Our Dispute Resolution System?*, 69 JUDICATURE 254, 254 (1986). The author does not in fact see "the basic problem as a quantity-control challenge." *Id.*

111. Hensler, *supra* note 108, at 270.

112. J. KAKALIK & A. ROBYN, COSTS OF THE CIVIL JUSTICE SYSTEM 50 (1982). "Associated costs" include salaries of judge and supporting court personnel, operation of court facilities, purchased services and supplies, and indirect supporting expenditures. *Id.* at 48-49.

The two most common forms of alternative dispute resolution are arbitration and mediation.¹¹³ Although often confused by lawyers and business professionals, they are quite different.¹¹⁴ Mediation "involves helping people to decide for themselves, [arbitration] involves helping people by deciding for them."¹¹⁵ More specifically, "[a]rbitration, like adjudication, involves a coercive third party who hears evidence and renders a written opinion that is rationalized by reference to general principles. . . . Mediation, on the other hand, involves a third party whose role is to facilitate the participation of the parties in generating a mutually agreeable settlement."¹¹⁶

To date, most states that have created a court-annexed dispute resolution mechanism have done so through an arbitration program. By October 1985, eighteen states had authorized mandatory court-administered arbitration programs.¹¹⁷ Between 1978 and 1984, the number of federal courts with arbitration programs more than tripled.¹¹⁸ In Florida, no statutory authority exists for courts to refer cases to mediation or arbitration. However, a court may submit a case to arbitration when the parties have so agreed,¹¹⁹ or on a motion by either party in medical malpractice cases,¹²⁰ and in particular disputes between contractors and the Department of Transportation.¹²¹

Although not as widespread as arbitration¹²² and hence less researched, court-annexed mediation has been termed "the sleep-

113. Other forms include the mini-trial, the summary trial, and the multi-door courthouse. See generally Finkelstein, *The D.C. Multi-Door Courthouse*, 69 JUDICATURE 305 (1986); Lambros, *The Summary Jury Trial—An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286 (1986) (summary jury trial discussed by its originator).

114. Cooley, *Arbitration vs. Mediation—Explaining the Differences*, 69 JUDICATURE 263 (1986); Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420, 421-23 (1982).

115. Cooley, *supra* note 114, at 264 n.8 (quoting Meyer, *Function of the Mediator in Collective Bargaining*, 13 INDUS. & LAB. REL. REV. 159 (1960) as quoted in P. GULLIVER, DISPUTES AND NEGOTIATIONS, A CROSS-CULTURAL PERSPECTIVE 210 (1979)).

116. Pearson, *supra* note 114, at 421-22 (citations omitted).

117. Hensler, *supra* note 108, at 271.

118. *Id.*

119. FLA. STAT. § 682.02 (1985). FLA. STAT. ch. 682 (1985), the Florida Arbitration Code, governs disputes subject to arbitration unless the parties stipulate otherwise. See *id.* § 682.02.

120. *Id.* § 768.575.

121. *Id.* § 337.185.

122. Private mediation services abound, however. There are over a dozen national and regional organizations that offer mediation services and over 180 local programs. Goldberg, Green & Sander, *ADR Problems and Prospects: Looking to the Future*, 69 JUDICATURE 291, 297 (1986).

ing giant of alternative dispute resolution."¹²³ Mediation typically is used for minor criminal matters, landlord-tenant disputes, and domestic relations, including divorce, child custody, and visitation rights. Mediation is usually voluntary, although compulsory mediation does exist.¹²⁴ Mediators are typically nonlawyers with backgrounds in law, psychology, or counseling. If mediation is successful, the parties sign a written stipulation setting forth the outcome of the mediation, which is filed with the court. If no agreement can be reached, the parties may proceed to arbitration or directly to litigation.¹²⁵ The American Arbitration Association found that when offered a choice between binding arbitration and professional mediation, trial attorneys selected mediation over seventy-five percent of the time.¹²⁶ For the most part, court-annexed mediation and arbitration have withstood constitutional attack.¹²⁷ Some of the more common avenues of attack are that mediation and arbitration: deny the right to trial by jury; deny due process of law; deny equal protection of the law; and unconstitutionally delegate judicial authority. Florida has a rather unique constitutional provision that guarantees access to the courts,¹²⁸ thus providing another avenue. The legislatively created Study Commission on Alternative Dispute Resolution, having conducted an in-depth analysis of the constitutional issues involved in alternative dispute resolution, concluded that "a court-annexed arbitration or mediation program clearly can be designed to meet constitutional requirements,"¹²⁹

123. Coulson, *The Coming Evolution in Court-Administered Arbitration*, 69 JUDICATURE 276, 277 (1986).

124. Cooley, *supra* note 114, at 266. See also Clark & Orbeton, *Mandatory Mediation of Divorce: Maine's Experience*, 69 JUDICATURE 310 (1986) (discussion of Maine's 1984 mandatory mediation statute).

125. For a profile of the Urban Court Program in Massachusetts, see Davis, *Community Mediation in Massachusetts: Lessons From a Decade of Development*, 69 JUDICATURE 307, 308-09 (1986).

126. Coulson, *supra* note 123, at 277.

127. "Although there have been constitutional challenges to voluntary and binding arbitration, none have been successful." Sakayan, *Arbitration and Screening Panels: Recent Experience and Trends*, 16 FORUM 682, 685 (1982). *Contra* *Grace v. Howlett*, 283 N.E.2d 474 (Ill. 1972) (statute requiring mandatory arbitration for accident claims under \$3,000 violates constitutional right to jury trial); *Simon v. St. Elizabeth Medical Center*, 355 N.E.2d 903 (Ohio Ct. Common Pleas 1976) (compulsory arbitration provision of medical malpractice act violates right to jury trial and due process and equal protection guarantees).

128. FLA. CONST. art. I, § 21 provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay."

129. Study Comm'n on Alternative Dispute Resolution, Final Report app. C-15 (Mar. 1985) (on file, *Florida State University Law Review*).

provided it does not deny the disputant's rights to jury trial or to court access in general.

The Study Commission concluded that the Florida should implement a program combining mediation, arbitration, and trial "as a matrix of dispute resolution devices to be offered by the courts to our citizens."¹³⁰ It further recommended that the judicial branch offer a public "helping" agency, which might be named a "Citizens' Problem Assistance Office," which would operate to assist citizens in determining the alternative dispute resolution mechanism that would be most appropriate in solving their problems. The Study Commission recommended mediation of minor criminal and civil complaints that are now handled by citizen dispute settlement programs, mandatory mediation of contested civil cases, mediation of civil disputes where no lawsuit has been filed, and voluntary arbitration of civil cases either unresolved by mediation or voluntarily submitted by the parties.¹³¹

An additional avenue of potential attack on any alternative dispute resolution legislation, if drafted too specifically, is that it infringes on the court's inherent rulemaking authority. In Florida, the exclusive authority to adopt rules for "practice and procedure in all courts" is vested in the Florida Supreme Court.¹³² Justice Adkins has defined practice and procedure as "the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion."¹³³ This broad definition could encompass arbitration or mediation legislation, and in fact, the court already has exercised its constitutional authority to make rules of procedure in the area of medical mediation.¹³⁴ One commentator argues, however, that legislative participation is not foreclosed by the court's exclusive au-

130. *Id.* at 1. Florida currently has a number of functional dispute resolution programs. See *id.* at app. E. The Study Commission stressed in its report that its recommendations were meant to expand, not eliminate, the programs currently operating in Florida. *Id.* at 5.

131. The full text of the recommendations and commentary is found in the Study Commission's report, *id.* at 5-22. The Study Commission recommended: the establishment of minimum qualifications and training standards for mediators and arbitrators; that communications made during the proceedings be privileged; the establishment of a juvenile alternatives program in each judicial circuit to carry out the provisions of the Florida Juvenile Justice Act, FLA. STAT. §§ 39.33-.337 (1985); and the establishment of a continuing commission on alternative dispute resolution.

132. FLA. CONST. art. V, § 2(a).

133. *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972), *order amended*, 272 So. 2d 513 (Fla. 1973).

134. Parness, *The Legislative Roles in Florida's Judicial Rulemaking*, 33 U. FLA. L. REV. 359, 366 n.72 (1981).

thority, citing the example of the court's adoption without change of the Florida Evidence Code after it already had been adopted by the legislature.¹³⁵

G. Remittitur and Additur

Through the powers of remittitur and additur, judges can control the amounts juries assess for damages once the award has been made. Additur is used to increase an award when the judge determines it is inadequate; conversely, remittitur is used to decrease an award deemed excessive. Absent statutory authority, Florida judges have no common law power of additur.¹³⁶ On the other hand, Florida law authorizes trial judges to enter orders of remittitur, as long as the plaintiff is permitted to have a new trial in lieu of remitting the excessive amount.¹³⁷ An order of remittitur may be entered only when the record shows a jury's award was clearly excessive or when the judge finds that the jury was influenced by considerations outside the record.¹³⁸

The legislature has authorized remittitur and additur only in actions based on medical malpractice¹³⁹ and automobile negligence.¹⁴⁰ In medical malpractice actions the court, upon proper motion, must review the amount of an award to determine if such amount is excessive or inadequate in light of the facts and circumstances presented to the trier of fact.¹⁴¹ If the party adversely affected does not agree, the court must order a new trial on the issue of damages only.¹⁴² Section 768.043, Florida Statutes, is essentially the same with respect to automobile negligence cases.¹⁴³

135. *Id.* at 364.

136. *St. Pierre v. Public Gas Co.*, 423 So. 2d 949, 951 (Fla. 3d DCA 1982).

137. *Dura Corp. v. Wallace*, 297 So. 2d 619, 621 (Fla. 3d DCA 1974).

138. *Arab Termite and Pest Control Inc. v. Jenkins*, 409 So. 2d 1039, 1041 (Fla. 1982); *Laskey v. Smith*, 239 So. 2d 13, 14 (Fla. 1979); *Wackenhut Corp. v. Canty*, 359 So. 2d 430, 436 (Fla. 1978).

139. FLA. STAT. § 768.49 (1985).

140. *Id.* § 768.043.

141. *Id.* § 768.49(1). The court must consider certain criteria when determining whether remittitur or additur is warranted. These include, among other things, whether the amount awarded indicates prejudice, passion, or corruption on the part of the trier of fact; whether it appears that the trier of fact ignored the evidence or erroneously evaluated the damages issue; and whether the award is reasonably related to the damages proved and the injury suffered. *Id.* § 768.49(5).

142. *Id.* § 768.49(4).

143. The Tort Litigation Review Commission recommended that the statute be made applicable to all tort actions, not just those based on automobile accidents and medical malpractice. FLORIDA BAR, *supra* note 20, at 69.

H. Offer of Judgment and Demand for Judgment

In order to prevent frivolous lawsuits, Florida's rules of court allow a defending party to serve an offer of judgment on the adverse party any time earlier than ten days before trial.¹⁴⁴ If the offer is rejected and the actual judgment is ultimately less favorable, the plaintiff is liable for costs incurred after the offer was made.¹⁴⁵

The Comprehensive Medical Malpractice Reform Act of 1985 included an offer of judgment and reciprocal demand for judgment provision.¹⁴⁶ In a medical malpractice action, the party rejecting an offer or demand was entitled to recover reasonable costs and attorney's fees incurred from the date of the offer if the judgment obtained by the nonfiling party was twenty-five percent higher or lower than the offer or demand. Also, if an offer or demand was rejected, neither was admissible in subsequent litigation, except when pursuing penalties provided in the act.¹⁴⁷

I. Itemized Jury Verdicts

With the exception of the trial judge's powers of remittitur and additur, the jury has unbridled discretion to determine the amount of damages to be awarded. The lack of guidelines for juries to use in awarding damages is cited as one reason for the unpredictability of jury awards; therefore, to foster consistency, juries are sometimes instructed to categorize damages. Itemized verdicts are required in Florida in medical malpractice actions.¹⁴⁸ In medical malpractice, the trier of fact is required to itemize amounts awarded according to past and future damages.

II. HISTORY OF THE LEGISLATION

Significant modification of the civil tort system in Florida is not unprecedented. Insurance availability crises have existed in other lines of insurance, and demands for tort reform have accompanied each. Through a decade of change, Florida persevered in applying discrete reforms primarily affecting medical malpractice, automobile insurance, and workers' compensation.

One of the greatest problems to face the Florida Legislature in the past decade was the medical malpractice insurance crisis ad-

144. FLA. R. CIV. P. 1.442.

145. *Id.*

146. FLA. STAT. § 768.585 (1985), *repealed* by ch. 86-160, § 68, 1986 Fla. Laws 695, 763.

147. *Id.*

148. *Id.* § 768.48, *repealed* by ch. 86-160, § 69, 1986 Fla. Laws 695, 763.

dressed during the 1975, 1976, and 1985 regular Sessions. In response to the departure of many insurers offering medical malpractice liability insurance to Florida physicians, the Medical Malpractice Reform Act of 1975 was enacted.¹⁴⁹ This law made several significant modifications in the civil tort system and was designed to ensure the continued availability of medical malpractice liability insurance in the state. Reforms included the establishment of medical liability mediation panels to hear medical malpractice cases,¹⁵⁰ mandatory offset of collateral sources of recovery, major revision of the statute of limitations for medical malpractice claims, a revision in the Statute of Frauds as applied to certain health care providers, and creation of the Florida medical consent law. The Medical Malpractice Reform Act liberalized and extended authority to self-insure to health care providers and health care facilities and created a temporary joint underwriting association to provide medical malpractice insurance for certain health care providers. It also authorized establishment of a Patients' Compensation Fund designed to protect health care providers from excessive liability for medical malpractice claims.¹⁵¹

Although far-reaching in its attempt to alleviate the medical malpractice crisis, the 1975 legislation did not quiet the storm; consequently the 1976 legislature enacted additional stopgap measures in 1976. Chapter 76-260, Laws of Florida,¹⁵² synthesized provisions relating to modification of the civil tort system and alternative compensatory mechanisms for medical malpractice claims. However, before the effectiveness of this law could be measured, it was declared unconstitutional as violative of the rights to contract,

149. Ch. 75-9, 1975 Fla. Laws 13. See generally Note, *The Florida Medical Malpractice Reform Act of 1975*, 4 FLA. ST. U.L. REV. 50 (1976).

150. Ch. 75-9, § 5, 1975 Fla. Laws 13, 17 (codified at FLA. STAT. § 768.44 (1979)). In *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980), the Florida Supreme Court struck down the medical mediation provision, ruling that it violated the due process clauses of both the United States and Florida Constitutions. See generally Ehrhardt, *One Thousand Seven Hundred Days: A History of Medical Malpractice Mediation Panels In Florida*, 8 FLA. ST. U.L. REV. 165 (1980) (explanation of the mediation panels' operation during their five-year existence).

151. Ch. 75-9, 1975 Fla. Laws 13.

152. Ch. 76-260, 1976 Fla. Laws 660. See generally French, *Florida Departs From Tradition: The Legislative Response to the Medical Malpractice Crisis*, 6 FLA. ST. U.L. REV. 423 (1978).

due process of law, trial by jury, equal protection of the law, and for containing more than one subject in a single act.¹⁵³

In 1977, the legislature revised many of the provisions of the 1976 law to comply with the Florida Constitution.¹⁵⁴ In the area of tort reform, the Medical Malpractice Reform Act modified the collateral source rule, provided for periodic payment of future damages, provided for itemization of medical malpractice verdicts, codified the common law doctrines of remittitur and additur in medical malpractice cases, and eliminated the application of *res ipsa loquitur* except in certain circumstances including the failure to remove a foreign item such as a sponge, clamp, forceps, or other paraphernalia used in medical procedures.¹⁵⁵

In the 1980's, the legislature continued to debate measures designed to check the rapid increase in insurance premiums and to guarantee the continued availability of liability insurance. These measures were often hybrid approaches involving insurance and tort reforms as well as creation of study commissions. A public campaign stemming from a petition to amend the Florida Constitution further fueled the fire for legislative action.¹⁵⁶ The proposed amendment, sponsored by the Florida Medical Association and primarily opposed by the Academy of Florida Trial Lawyers, attempted to accomplish three things: limit noneconomic compensation to \$100,000, ensure that defendants would not pay a percentage of damages greater than their actual negligence, and enable judges to dismiss nonmeritorious cases.¹⁵⁷ Although the attempt to put the issue to a public vote in the November 6, 1984, general election failed, the campaign was effective in educating the public on the rising costs of medical malpractice insurance and litigation, and on the impact of these factors on health care costs. It also set the stage for yet another legislative debate.

153. French, *supra* note 152, at 435 & n.40, citing Florida Medical Malpractice Joint Underwriting Ass'n v. Shevin, No. 76-2792 (Fla. 2d Cir. Ct. Feb. 28, 1977), *rev'd and remanded*, 352 So. 2d 174 (Fla. 1977).

154. Ch. 77-64, 1977 Fla. Laws 98.

155. *Id.*

156. *Malpractice reform drive focuses on savings*, Orlando Sentinel, May 18, 1984, at C3, col. 3; see also *Group trying to get malpractice issue on ballot*, Tampa Tribune, July 14, 1984, at 5B, col. 1 (discussion of "Reason '84—Committee for Citizens Rights" campaign).

157. *Amendment 9 argued before Supreme Court*, Miami Herald, Oct. 2, 1984, at 16A, col. 2.

The enactment of the Comprehensive Medical Malpractice Reform Act of 1985¹⁵⁸ represented the next milestone of legislative activity. Reform was proposed in three areas: prevention, claims resolution, and insurance. The prevention reform imposed greater duties on hospitals and required them to monitor the quality of their medical staff. To supplement this effort, the Department of Health and Rehabilitative Services was required to increase its overview of risk prevention programs. A ninety-day presuit screening process and a limitation on attorney's fees highlighted the claims resolution reforms. The statutory requirement of mandatory malpractice insurance was designed to discourage doctors from practicing outside their areas of insured expertise while guaranteeing access to affordable malpractice insurance.¹⁵⁹

The Comprehensive Medical Malpractice Reform Act of 1985 may have provided some stability in the area of medical malpractice, but another "crisis" was erupting in the area of general commercial liability insurance.¹⁶⁰ Currently, the battle lines are drawn in state legislatures throughout the country. On one side are those who seek immediate sweeping changes in tort law; on the other are those fighting to preserve the status quo. Leading the drive for tort reform are those who view the current legal system as one of the major causes for the ailing state of the commercial liability insurance market. Examples of the liability insurance "crisis" are reported in Florida newspapers almost daily. Businesses from day-care centers and nursing homes to trucking companies face huge increases in liability insurance premiums or are unable to find liability coverage at any cost.

The existence of an insurance crisis is evidenced by soaring underwriting losses. From 1981 to 1984, losses in property and casualty insurance, of which general liability insurance is one line, jumped from \$6.2 billion to \$21.4 billion. In 1984, losses offset investment income and the industry suffered a net loss of \$3.8 billion. In 1984, property/casualty insurance companies paid out

158. Ch. 85-175, 1985 Fla. Laws 1180.

159. For a discussion of the 1985 law, see Hawkes, *The Second Reformation: Florida's Medical Malpractice Law*, 13 FLA. ST. U.L. REV. 747, 749-84 (1985). The Act also incorporated modifications to medical malpractice cases in the areas of offer and demand for judgment, attorney's fees, remittitur and additur, periodic payment of future damages, punitive damages pleadings, itemized verdicts, arbitration, and joint and several liability.

160. For a general discussion of the current crisis, see Staff of Fla. S. Comm. on Com., *An Overview of Today's Commercial Liability Insurance Market* (Jan. 6, 1986) (unpublished report) (on file, *Florida State University Law Review*) [hereinafter cited as *Liability Ins. Mkt. Overview*].

\$1.18 for every dollar in premiums received, and in the general liability area, the payout was \$1.51 for every dollar.¹⁶¹

Not everyone agrees with these figures or that a liability insurance "crisis" exists. Robert Hunter, president of the National Insurance Consumer Organization, claims the insurance industry's figures are misleading and that the whole "crisis" has been manufactured by the industry in an "attempt to intimidate and coerce state insurance commissioners into sanctioning exorbitant prices and wholesale changes in tort laws."¹⁶² If the industry had not overestimated future losses, had included capital gains and tax credits as income, and counted stockholders' dividends as losses, it would have shown a profit of more than \$6 billion.¹⁶³

However, a problem does exist and identifying its cause is problematic. The insurance market is undisputedly cyclical, subject to fluctuating underwriting profits and losses.¹⁶⁴ If past patterns are reliable indicators, the last two years should have marked the bottom of the current cycle and should be followed by another upswing. Many argue that this cyclical movement plus insurers' market behavior have caused the insurance crisis; others argue vehemently that the unpredictable nature of tort law is the major cause. Precisely determining "the" cause, if there is one, may be an impossible task.

However, there is no doubt that the legal system affects the cost of providing insurance. Nor is there any doubt that tort liability has expanded in the last two decades, as illustrated by the development of strict liability, liability without fault, and "toxic tort" liability. Further, there has been an explosion in the sheer number

161. *Multimillion Dollar Liability Judgments Create Premium Panic*, 7 BUS. ACTION NETWORK: WASH. WATCH (Nov. 1985) cited in COM. COMM. REVIEW, *supra* note 7, pt. 2, at 1-2 & n.4.

162. *When interest rates fell, losses hit*, Miami Herald, Sept. 23, 1985, (Business Monday) at 13, col. 2. Ralph Nader, another critic, claims that the insurance industry "is an industry uniquely positioned to use organizational extortion. . . . They're holding the consumer and government hostage." *Liability Ins. Mkt. Overview*, *supra* note 160, at 6.

163. *Insurance hides profits, advocates say*, Jacksonville Journal, Jan. 7, 1986, at 7B, col. 1.

164. Some experts, however, dispute that the current cycle is typical. See the statement of Mavis A. Walters, Senior Vice President, Insurance Service Office, Inc., delivered to the Senate Committee on Commerce: "This is not just a routine turn in the underwriting cycle. It has structural as well as cyclical causes. . . . Whereas economic inflation drove the casualty insurance crisis of the mid-seventies, the current one is driven by terrible events and by changes in liability law." Staff of Fla. S. Comm. on Com., *Statement of Mavis A. Walters* 8 (Mar. 4, 1986), quoting Marsh & McLennan, *Commentary* (Dec. 1985) (on file, *Florida State University Law Review*).

of lawsuits filed with increasingly large damage awards.¹⁶⁵ Nevertheless, the fact that the legal system has a tremendous impact on the insurance industry does not, in itself, mandate tort law modification. Many competing social policies have evolved over the years to form the doctrines that comprise the law of torts. This is not to say that an existing rule should not or cannot be changed unless it will play a direct role in alleviating the insurance crisis. The commercial liability insurance crisis is simply this year's catalyst for legislative scrutiny of the law of torts.

In January and March of 1986, the Senate Commerce Committee heard extensive testimony on problems and possible solutions to the commercial liability insurance dilemma. Representatives from interested groups testified before Senate and House committees and subcommittees.¹⁶⁶ Representatives from the legal profession and consumer groups attempted to portray the insurance industry as having created a false crisis. To support their position they pointed to the insurance industry's net income (rather than merely the underwriting loss figures highlighted by industry representatives), the high market value of insurance stock, and poor underwriting practices during high interest rate periods. The industry countered by quoting underwriting losses and "horror stories" of excessive jury awards and defendants forced to satisfy entire judgments while only minimally at fault. Various insurance industry

165. See *infra* notes 183-87 and accompanying text.

166. The insurance industry was represented by Patricia Casey, General Counsel to the American Insurance Association; Robert Menke, Chairman of Banker's Life Insurance Co., on behalf of the Florida Domestic Insurance Association; James Shamberger and Mindy Pollack of the Reinsurance Association of America; Bob Trunzo, St. Paul Fire and Marine Insurance Co.; Gene Witherspoon, Executive Vice President of Insurance Exchange of the Americas; and Michael Joye of LeBoeuf, Lamb, Leiby and MacRae, on behalf of Lloyd's of London, Continental United States.

The legal profession was represented by Steve Masterson, Florida Academy of Trial Lawyers; Patrick Emmanuel, President of the Florida Bar; and James Dixon, Jr., Florida Defense Lawyers Association.

Consumers were represented by Bill Birchfield, President of Project Civil Reform, Inc.; Chip Morrison, Assistant General Counsel to the Florida League of Cities; John E. Thrasher, General Counsel of the Florida Medical Association; Allan Kaufman of Milliman and Robertson, Inc., presenting an actuarial analysis of American Medical Association Tort Reform Proposals; Jon Shebel, President of Associated Industries of Florida; Patrick Dickinson, Chairman of the National Coalition for Litigation Cost Containment; and Frank Jackalone of the Florida Consumer Federation. Testimony was also heard from Bill Gunter, Florida Commissioner of Insurance; David Strawn, Chairman of the Study Commission on Alternative Dispute Resolution; Mark Peterson, Senior Research Scientist for the Institute for Civil Justice, the Rand Corp.; and Gerald Wetherington, Chairman of the Florida Bar's Tort Litigation Review Commission. Fla. S., Comm. on Com., meeting notice (Jan. 7, Mar. 4, 1986) (on file, *Florida State University Law Review*).

coalitions called for tort reform, contending that reform would enable the industry to better predict liability.¹⁶⁷ Many bills addressing tort or insurance issues were filed in the Senate prior to the 1986 Regular Session, but Senate Bill 465¹⁶⁸ was the most comprehensive,¹⁶⁹ addressing both issues.

III. ANALYSIS

The following section begins with a discussion of Florida's one-subject rule and its application to the Tort Reform and Insurance Act of 1986. Various tort provisions of the Act are also analyzed.

167. Fla. S., Comm. on Com., tape recording of proceedings (Jan. 7, Mar. 4, 1986) (on file with committee).

168. Fla. SB 465 (1986). *See supra* note 4.

169. Fla. CS for CS for SB 465 (1986) incorporated the following proposed bills:

1. Fla. SB 349 (1986) limited the application of joint and several liability to economic damages only. This bill became sec. 40 of CS for SB 465.

2. Fla. SB 592 (1986), entitled the "Florida Comparative Fault Act," provided for joint and several liability only upon a motion made within one year of the final judgment. However, the liability of the defendant was limited to an amount not greater than the uncollectible amount multiplied by the defendant's percentage of fault. This bill was the same as sec. 12 within SB 465. The joint and several provisions from SB 349 replaced SB 592.

3. Fla. SB 698 (1986) provided for periodic payments for future losses exceeding \$200,000. The language within this bill was similar to sec. 16 in SB 465 and sec. 44 in CS for SB 465. The proposed CS for SB 465 was amended to reduce a \$500,000 threshold to \$350,000. Fla. S., Comm. on Com., tape recording of proceedings (Apr. 30, 1986) (on file with committee).

4. Fla. SB 699 (1986) was similar to sec. 43 of CS for SB 465 except that CS for SB 465 provided a \$500,000 cap on noneconomic losses while SB 699 provided a \$250,000 cap.

5. Fla. SB 700 (1986) required leave of court to plead punitive damages only after a clear and convincing evidentiary standard had been met, and authorized distribution of damages to a trust fund providing medical care for indigent persons, except for 20% paid to the recovering party's attorney.

6. Fla. SB 701 (1986) removed joint and several liability when negligence is apportioned among parties.

7. Fla. SB 702 (1986) had the same punitive damages provisions as SB 700, the same cap on noneconomic damages provision as SB 699, and the SB 701 provision eliminating joint and several liability.

8. Fla. SB 956 (1986) created an Academic Task Force for Review of the Insurance and Tort Systems.

9. Fla. SB 977 (1986) limited noneconomic damages to \$250,000 and provided for periodic payments if future damages exceeded \$200,000.

10. Fla. SB 1120 (1986) reallocated joint and several liability to the defendant only to the extent of an amount not greater than defendant's percentage of fault multiplied by the uncollectible amount.

11. Fla. SB 1142 (1986) provided that physicians responding to a "code blue" emergency within a hospital would not be liable for medical treatment given if the physician acts as a "reasonably prudent man." This provision was not in SB 465 or CS for SB 465.

A. One-Subject Rule

By enacting the Tort Reform and Insurance Act of 1986, the Florida Legislature fundamentally changed Florida's tort system. Particularly indicative of the rationale underlying these dramatic changes are the "whereas" clauses of the preamble which precede the enacting clause of the Act. These indicia of legislative intent reflect the legislature's recognition of the existence, causes, and consequences of the liability insurance crisis and of its umbilical link to our civil justice system. While virtually all of the legislative findings and purposes contained in the preamble are, to varying degrees, well-documented and undisputed, the last four, which articulate a direct link between the insurance crisis and tort reform, are the most adamantly disputed:

[1] the Legislature finds that the current tort system has significantly contributed to the insurance availability and affordability crisis, and. . . [2] the Legislature finds that tort law and the liability insurance system are interdependent and interrelated, and. . . [3] comprehensive insurance regulatory reform and tort reform is necessary to improve the availability and affordability of commercial liability insurance, and. . . [4] the magnitude of this compelling social problem demands immediate and dramatic legislative action¹⁷⁰

These legislative findings are most debated because the constitutionality of the entire Act rests upon them. The Florida Constitution requires that "[e]very law shall embrace but one subject and matter properly connected therewith."¹⁷¹ However, the Tort Reform and Insurance Act of 1986 initially appears to address two subjects. If the interrelationship and interdependence of tort reform and insurance, as addressed in the Act, do not comprise a single subject, the entire Act will fail upon judicial scrutiny.

The controlling case on this issue, relied upon throughout the evolution of the Act, is *State v. Lee*.¹⁷² In that case, the Florida Supreme Court considered, among other things, whether the Florida Insurance and Tort Reform Act of 1977¹⁷³ violated the constitution's one-subject mandate. The 1977 act was intended to address insurance problems similar to those which spawned the Tort

170. Ch. 86-160, 1986 Fla. Laws 695, 699.

171. FLA. CONST. art. III, § 6.

172. 356 So. 2d 276 (Fla. 1978).

173. Ch. 77-468, 1977 Fla. Laws 2057.

Reform and Insurance Act of 1986, although the crisis in 1977 was in the automobile insurance market. Although the Florida Supreme Court found one section of the act unconstitutional on other grounds,¹⁷⁴ it expressly held that the 1977 act did not violate the one-subject rule.¹⁷⁵ The underlying purpose of the one-subject rule "is to prevent a single enactment from becoming a 'cloak' for dissimilar legislation having no necessary or appropriate connection with the subject matter."¹⁷⁶ The court affirmed previous decisions in which it had recognized that the legislature must be given wide latitude in enacting laws and stated that the one-subject rule was "not designed to deter or impede legislation by requiring laws to be unnecessarily restrictive in their scope and operation."¹⁷⁷

The court in *Lee* concluded that tort reform and insurance were indeed one issue, and thus that the 1977 act contained only one subject. The court stated that the act was a legislative effort to thoroughly address the automobile insurance crisis, and that the tort reform measures were primarily related to litigation arising from negligent automobile operation.¹⁷⁸

Consequently, the inquiry that must be made to determine whether the present Tort Reform and Insurance Act complies with the one-subject rule as interpreted by the *Lee* court is whether tort reform and liability insurance are so interrelated and interdependent that they constitute a single subject in the 1986 Act. The Florida Legislature answered this question in the affirmative in the preamble of the Act, and empirical evidence appears to support this conclusion.

Are tort reform and liability insurance, particularly commercial property and casualty insurance, interdependent and interrelated? This question was heatedly debated in numerous Senate and House committee and subcommittee meetings, with proponents from both sides of the issue countering with contradictory statistics and data. This predicament, experienced nationwide in state legislatures and at the federal level, exists primarily because government, corporate entities, and other organizations and individu-

174. *Id.* § 42, 1977 Fla. Laws at 2087, was held unconstitutional in creating the "Good Drivers' Incentive Fund" because it improperly authorized the use of police power to take private property from one group of persons for the sole benefit of another limited group. Further, section 42 violated the equal protection clauses of the United States and Florida Constitutions. *Lee*, 356 So. 2d at 278-79.

175. *Lee*, 356 So. 2d at 282-83.

176. *Id.* at 282.

177. *Id.*

178. *Id.*

als have lacked either the funds or the initiative to sponsor studies that would definitively identify the major causes and effects of tort-related problems. Moreover, the problem is compounded because much of the data is unquantifiable.

During the debate, legislators were informed of many factors that have combined to cause the liability insurance crisis. Many of these factors, however, such as the strong United States dollar, falling interest rates, catastrophic losses from freight and airline disasters, earthquakes and flooding, and restricted capacity in the reinsurance market, were beyond the legislature's power to address.

Nevertheless, two other factors were well within the power of the legislature to address: insurance regulation and tort reform. It was undisputed that increased regulation of the insurance industry is necessary. Industry representatives admitted this, but argued that such regulation should be significantly less than that ultimately contained in the Act. The remaining issue was whether tort reform was necessary to alleviate the crisis.

Studies were presented to the legislature showing that Americans engage in civil litigation to the same degree as do citizens of other industrialized nations.¹⁷⁹ A local study indicated that Dade County has not experienced dramatic increases in the number of cases litigated.¹⁸⁰ Yet at least one commentator has concluded that ours is the most litigious society in the world.¹⁸¹ Chief Justice Burger recognized this situation as early as 1982 when he stated: "Our nation is plagued with an almost irrational focus—virtually a mania—on litigation as a way to solve all problems."¹⁸² This conclusion is supported by data showing that in 1984 one of every fifteen Americans filed a civil lawsuit, amounting to over thirteen million suits filed in state and federal courts.¹⁸³ From 1977 to 1984, the number of civil suits filed in state courts grew four times faster than did the United States population.¹⁸⁴

179. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

180. FLORIDA BAR, *supra* note 20, at app. I (survey of Dade County courts).

181. R. Malott, *America's Liability Explosion: Can We Afford the Cost?* 2 (Oct. 10, 1985) (unpublished manuscript) (on file, *Florida State University Law Review*).

182. Reinsurance Ass'n of America, *U.S. Reinsurance Market Reaction to the U.S. Civil Justice System* 34 (Mar. 1986) (unpublished manuscript) (on file, *Florida State University Law Review*).

183. R. Malott, *supra* note 181, at 2.

184. *Lawsuit crisis is hitting Florida hard*, Gainesville Sun, May 17, 1986, at 15A, col. 1.

Not only has the number of lawsuits dramatically increased, but so, too, have the number of top-dollar awards. The nationwide trend of million-dollar verdicts is illustrative: from 1962 to 1970 there were twenty-seven verdicts exceeding one million dollars in personal injury cases, from 1970 to 1977 there were 224 similar verdicts, and in 1982 alone there were 251.¹⁸⁵ In million-dollar cases, Florida ranks third—behind California and New York.¹⁸⁶ Florida may soon climb to the top of this ignominious group: from 1983 to 1985, personal injury verdicts were twenty-eight percent above the national norm.¹⁸⁷

Upon finding that these trends adversely affect the insurance market, particularly the liability market, the legislature determined which measures would best preserve individual rights while halting, if not reversing, these trends. There was a lack of definitive information in this area due to systemic complexities and the unquantifiable nature of many of the problems. Speculation abounded as to the extent that tort reform would reduce litigation and, consequently, insurance costs. Moreover, no studies were presented showing that tort reform would increase costs or that there would be no impact whatsoever.

A number of studies showed a range of positive effects resulting from implementation of specific proposals. In particular, a study conducted by Milliman & Robertson, Inc.,¹⁸⁸ consulting actuaries commissioned by the American Medical Association (AMA), estimated the potential one-time savings that would be attributable to four tort reform measures. The study concluded that implementation of a mandatory periodic payment of damages provision applicable to future damages exceeding \$100,000 would result in a liability cost savings of 3% to 6%.¹⁸⁹ It also projected savings of up to 8% for mandatory offset for collateral sources received in personal injury cases, and savings of up to 12% from capping noneconomic damages at \$250,000.¹⁹⁰

185. Defense Research Inst., Statement and Report: The Defense Trial Lawyers Task Force on Litigation Cost Containment SR 9 (Sept. 1985) (unpublished report) (on file, *Florida State University Law Review*).

186. *Lawsuit crisis is hitting Florida hard*, *supra* note 184.

187. JURY VERDICT RESEARCH, INC., PERSONAL INJURY VERDICT SURVEY 5-6 (1986) (Florida edition).

188. Milliman & Robertson, Inc., Actuarial Analysis of American Medical Association Tort Reform Proposals (Sept. 1985) (unpublished report) (on file, *Florida State University Law Review*).

189. *Id.* at 4 & app. A.

190. *Id.* at 3 & app. A.

These three measures are contained in the Tort Reform and Insurance Act of 1986. The collateral source provision is similar to that contained in the AMA proposal.¹⁹¹ The periodic payment and noneconomic damages cap provisions are also similar, except that the periodic payment provision is not mandatory and applies only to future economic damages exceeding \$250,000,¹⁹² and the noneconomic damage cap is set at \$450,000.¹⁹³ While these dissimilarities will likely decrease potential savings from the Act, the reductions may be insignificant.

Because the Milliman study was commissioned by the AMA, some perceived it as slanted toward the AMA's position. However, few independent statistical analyses have been done to date on the effects of tort reform on medical malpractice claims.¹⁹⁴

In a 1982 study, Dr. Patricia Danzon evaluated some of the changes that occurred following the tort reforms enacted in several states in 1975 addressing the medical malpractice insurance crisis at that time. Using claims closed between 1975 and 1978, she found that caps cut the amount of an award by 19% within two years, and offsets of compensation from collateral sources lowered awards by as much as 50%.¹⁹⁵ In a subsequent report, Doctors Danzon and Lee Lillard concluded that in states that capped verdicts or permitted periodic payments of awards for future damages, the average settlement was reduced by 25%, the portion of cases dropped rose from 43% to 48%, and the share of cases proceeding to verdict was reduced from 5.1% to 4.6%.¹⁹⁶

Dr. Danzon's most recent study, the preliminary results of which were made available to the legislature, is perhaps the most persuasive because it updates the earlier findings and more accurately reflects the long-term effects of 1975 tort reforms by evaluating claim data from the decade between 1975 and 1984.¹⁹⁷ In response to the

191. Ch. 86-160, § 55, 1986 Fla. Laws 695, 751 (to be codified at FLA. STAT. § 768.76).

192. *Id.* § 57, 1986 Fla. Laws at 752 (to be codified at FLA. STAT. § 768.78).

193. *Id.* § 59, 1986 Fla. Laws at 755 (to be codified at FLA. STAT. § 768.80).

194. Two important academic studies are P. DANZON & L. LILLARD, RESOLUTION OF MEDICAL MALPRACTICE CLAIMS (1982), and P. DANZON, *supra* note 43. Another statistical analysis is provided by Sloan, *State Responses to the Malpractice Insurance "Crisis" of the 1970's: An Empirical Assessment*, 9 J. HEALTH POL., POL'Y & L. 629 (1985) cited in Danzon, *infra* note 197, at 58 & n.6. The Sloan study was not given great weight because it analyzed malpractice insurance premiums paid by physicians from 1974-1977, hence the effect of tort reforms implemented in 1975 and thereafter are unlikely to have been reflected.

195. P. DANZON, *supra* note 43, at 30.

196. P. DANZON & L. LILLARD, *supra* note 194, at 26.

197. Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 LAW & CONTEMP. PROBS. 57 (1986).

multitude of interrelated factors contributing to claim severity and frequency in each state and locale, Dr. Danzon cautions "there is some uncertainty as to the true levels of statistical significance" of the various reforms.¹⁹⁸ The report concludes that: (1) collateral source offsets are estimated to reduce claim frequency by 14%, (2) statutes that cap all or part of the plaintiff's recovery have reduced average severity by 23%, and (3) laws providing for collateral source offset appear to reduce awards by 11% to 18%.¹⁹⁹

Doctors Danzon and Lillard have been virtually the only researchers to study the effect of tort reforms implemented in response to the 1975 medical malpractice crisis. While the legislature reviewed numerous reports postulating the projected effects of tort reform measures being considered for 1986, the Danzon studies were considered the most definitive because they review what has actually resulted from past reforms. As a result, the 1986 Act contains those provisions shown by Dr. Danzon to have had a positive effect on the system, specifically: a cap on noneconomic damages, periodic payment of damages, and offsets for collateral sources. Regrettably, there was no definitive data available to show the expected impact of other tort reform measures based upon past implementation. The Danzon data reveal that tort reform will likely reduce claim severity and, perhaps, frequency. In order to answer the question of whether tort reform and insurance are interrelated and interdependent, one further question must be asked: Will decreased claim severity and frequency have a positive impact on the insurance market? While there are only four statistical analyses of the effect of 1975 tort reforms on the judicial system, there are no available studies of the impact of these reforms on medical malpractice premiums.

Dr. Danzon notes that reduction of claim frequency and severity cannot automatically be translated into lower insurance premiums.²⁰⁰ She states:

First, the net potential impact on premiums also depends on litigation expenses and changes in the timing of disbursement of loss reserves, and hence investment income. Second, reforms that reduce the uncertainty in estimating malpractice claim costs—namely, caps on awards, periodic payment of amounts for future damages, and shorter statutes of repose (running from date

198. *Id.* at 71.

199. *Id.* at 76-78.

200. *Id.* at 79.

of incident, not date of discovery)—may be expected to reduce premiums by a modest amount, over and above the reduction in mean expected losses. One can expect this result because of the reduction in insurers' risk. Perhaps more importantly, by reducing uncertainty, such reforms should reduce the volatility in price and availability of malpractice insurance, which is a major inefficiency of the present malpractice system.²⁰¹

It should be noted that many commentators who recognize the interrelationship of the tort and insurance systems concur with Dr. Danzon's conclusion that one of the primary intended effects of tort reform is to enable insurers more accurately to predict future losses and claims costs. To the extent that insurers are better able to make these predictions, it is hoped that the volatility of the market together with insurance premiums will decrease.

Many commentators have simply relied on intuition and deductive reasoning in concluding that tort reform will lower premiums. One such body of commentators was the Tort Policy Working Group established by the Attorney General of the United States, which stated in 1986 that "[t]he increase in the number of tort lawsuits and the level of awarded damages . . . (or settlements) in and of itself has an obvious inflating effect on insurance premiums."²⁰² In order to alleviate the commercial availability and affordability crisis, the Tort Policy Working Group recommended modifying joint and several liability, capping noneconomic damages, providing for periodic payment of damage awards, and providing for collateral source offsets, all of which are contained in the bill, although not in identical recommended form.²⁰³

In the end, some anticipate that the interrelationship and interdependence of the tort and insurance systems will be definitively shown by premium reduction due to diminished frequency and severity of claims and damage awards, and stabilization of premiums due to decreased market volatility.

201. *Id.*

202. Tort Policy Working Group, Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability 49 (Feb. 1986) (footnote omitted) (unpublished report) (on file, *Florida State University Law Review*).

203. *Id.* at 64-72.

B. Punitive Damages

One of the most important reforms in the Tort Reform and Insurance Act of 1986 pertains to punitive damages. Although Florida public policy prohibits liability coverage for punitive damages, their imposition through vicarious liability²⁰⁴ and the threat of their imposition due to bad faith on the part of insurers²⁰⁵ plays a role in increasing insurance rates.

As stated earlier,²⁰⁶ the Florida Supreme Court has held that a judgment creditor may sue a tortfeasor's liability insurer directly to recover a judgment in excess of policy limits if bad faith or fraud by the insurer is alleged. The legislature determined that the court's underlying policy of encouraging settlements remains viable and important, yet goes too far, at least with respect to punitive damages. Among other things, the threat of bad faith claims by insureds influences insurance companies to settle marginal claims for amounts greater than their insured's actual liability. This inequitable "settlement hammer" increases insurance costs and premiums. The 1986 Act modifies Florida law relating to punitive damages in many important ways, all of which are designed to equalize the settlement leverage of all parties and to limit punitive damages to amounts that are truly merited.

The Act adopts, almost verbatim, the prior restrictions on pleading punitive damages that were applicable to medical malpractice cases under section 768.498, Florida Statutes. No claim for punitive damages is permitted unless evidence either in the record or proffered by the claimant would provide a reasonable basis for recovery of punitive damages.²⁰⁷ Although "reasonable basis" is not defined, it is possible that courts will interpret this standard in a manner similar to the "legal basis" standard currently applied when determining whether there is sufficient evidence to permit the issue to go to the jury. Upon a finding by the court of a reasonable basis for pleading punitive damages, a claimant is entitled to amend his or her complaint to include a claim for such damages as allowed by the rules of civil procedure. Furthermore, these rules are to be liberally construed in favor of discovery that would, presumably, lead to evidence admissible on the issue of punitive damages. The Act prohibits discovery of a defendant's financial worth

204. See *supra* notes 76-85 and accompanying text.

205. See *supra* notes 86-91 and accompanying text.

206. See *supra* note 91 and accompanying text.

207. Ch. 86-160, § 51, 1986 Fla. Laws 695, 748 (to be codified at FLA. STAT. § 768.72).

until pleading punitive damages has been allowed by the court.²⁰⁸ While financial information about a defendant is generally discoverable by the plaintiff, the Act limits this discovery to protect a defendant from disclosure of inflammatory information and to limit needless discovery of sensitive personal financial information.

The Act places a cap on punitive damages equivalent to three times the actual damages in any civil action based on negligence; strict liability; products liability; professional liability; or breach of warranty involving willful, wanton, or gross misconduct.²⁰⁹ This provision is perhaps one of the most ambiguous in the entire Act because it apparently establishes a new standard for the award of punitive damages. Under prior law, punitive damages were not awarded in any case unless there was a finding of willful or wanton misconduct; the Florida Supreme Court has held that gross negligence alone will not support an award of punitive damages.²¹⁰ The inclusion of "gross misconduct" in the Act could be considered either excess verbiage or as modifying the standard under which punitive damages may be awarded.

Under the Act, only forty percent of any punitive damages awarded is to be paid to the plaintiff, and the remaining sixty percent is paid into the General Revenue Fund, or, in cases involving personal injury or wrongful death, to the Public Medical Assistance Trust Fund created in section 409.2662, Florida Statutes.²¹¹ If the plaintiff's attorney's fee is a contingency fee, it is calculated based only on the forty percent received by the plaintiff.²¹²

The legislature did not address the issue of whether an employer should be held vicariously liable for punitive damages arising from the negligent acts of its employees. Elimination of employer vicarious liability for punitive damages—or at least strengthening the employer liability requirements along the lines of those contained in the Model Punitive Damages Statute—would remove a burden from insurers because vicarious punitive liability is presently insurable.²¹³ This elimination would appear to be a desirable measure when one considers that insuring against punitive damages defeats their primary purpose—punishment.

208. *Id.*

209. *Id.* § 52, 1986 Fla. Laws 695, 749 (to be codified at FLA. STAT. § 768.73).

210. *U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061, 1064 (Fla. 1983).

211. Ch. 86-160, § 52, 1986 Fla. Laws 695, 749 (to be codified at FLA. STAT. § 768.73(2)).

212. *Id.* (to be codified at FLA. STAT. § 768.73(4)).

213. *See supra* notes 76-85 and accompanying text.

C. Cap on Noneconomic Damages

One of the most important tort provisions in the Tort Reform and Insurance Act of 1986 places a cap on noneconomic damages. Those opposed to a cap primarily argued that its imposition would be tantamount to putting a price on a person's life, and thus would be repugnant to the basic foundation of our social structure. These critics asserted that the jury is best able to determine the amount of damages plaintiffs are entitled to receive according to the circumstances of each case. They further contended that juries and courts have in the past responsibly assessed noneconomic damages and that there is no evidence that capping such damages would reduce liability insurance rates. These arguments were instrumental in the legislature's decision during preceding years not to impose a cap. However, the enormity of the insurance crisis and the findings of several persuasive studies compelled the legislature to change its position.

Many studies were presented by organizations from different sides of the issue, each supporting the position of the particular group. However, independent studies concluded that a cap would result in systemic change. As previously noted, Dr. Danzon's 1986 report indicated that in other states, various statutes that cap all or part of a plaintiff's recovery have reduced average severity by 23%.²¹⁴ The Tort Policy Working Group concluded that caps on noneconomic damages, in particular a cap of \$100,000, would both increase predictability and provide substantial savings in the tort system.²¹⁵ In arriving at this conclusion, the report indicated that only an estimated 2.7% of all medical malpractice claims—5.6% of all paid medical malpractice claims—recover more than \$100,000 in noneconomic damages. In those cases, however, awards average between \$428,000 and an estimated \$738,000, with 80% of the total award comprising the noneconomic damages.²¹⁶ Most of the studies and testimony submitted to the legislature regarding the potential economic impact of a cap pertained to medical malpractice because this is the area where most caps are applicable. Most of these commentators suggested that the lower the cap the greater the savings to the system and, consequently, that insurance premiums would be reduced.

214. Danzon, *supra* note 197, at 76.

215. Tort Policy Working Group, *supra* note 202, at 68-69.

216. *Id.* at 67.

Instead of a \$100,000 or \$250,000 cap, as some organizations suggested, the legislature opted for a cap of \$450,000 applicable to each person so entitled rather than to each plaintiff or claim.²¹⁷ For example, if an estate brings a wrongful death claim against a person and prevails on the merits at trial, each survivor of the decedent could be entitled to a maximum of \$450,000. It appears that the legislature chose this compromise figure in an attempt to balance economic concerns with principles of fairness and the interests of public policy to ensure a reasonable recovery of noneconomic damages in any action. When the Act was passed, Florida joined approximately twenty other states that have implemented caps of some sort, the most common cap being \$500,000.²¹⁸

As a result of the recent decision in *Fein v. Permanente Medical Group*,²¹⁹ the ultimate determination of the constitutionality of the cap will be a matter for the Florida Supreme Court. In *Fein*, the United States Supreme Court dismissed for lack of a substantial federal question an appeal from a decision by the California Supreme Court upholding a \$250,000 cap on noneconomic damages in medical malpractice cases.²²⁰ Justice White dissented, pointing out that the question of

[w]hether Due Process requires a legislatively enacted compensation scheme to be a quid pro quo for the common law or state law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court . . . and is deserving of this Court's review.²²¹

Justice White's dissent, when considered with the holding of a Florida case, *Kluger v. White*,²²² indicates that such a scheme might be invalid in Florida. The court held in *Kluger* that the legislature may not abolish a statutory right of redress that predated adoption of the Declaration of Rights of the Florida Constitution, nor may it foreclose a right that has become a part of the state's common law, "unless the Legislature can show an overpowering

217. Ch. 86-160, § 59, 1986 Fla. Laws 695, 755 (to be codified at FLA. STAT. § 768.80).

218. FLORIDA BAR, *supra* note 20, at 31.

219. 106 S. Ct. 214 (1985).

220. Some observers say the Court "found by default that California's law was constitutional." *Malpractice Insurance: The Market Gets Tighter*, MEDICINE & HEALTH PERSPECTIVES 3 (Feb. 3, 1986) (on file, *Florida State University Law Review*). A comparable Indiana law has also been upheld, while courts in Texas, New Hampshire, North Dakota, and Ohio have overturned malpractice caps. *Fein*, 106 S. Ct. at 215 (White, J., dissenting.)

221. *Fein*, 106 S. Ct. at 216 (White, J., dissenting).

222. 281 So. 2d 1, 4 (Fla. 1973).

public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown."²²³ Although this test would undoubtedly be exceedingly difficult to meet, other courts, most notably the California Supreme Court in its decision in *Fein*,²²⁴ have found that the medical malpractice insurance crisis was of such import that it was indeed in the public interest to limit noneconomic damages, and that due process was not violated. Indeed, although it did not expressly so hold, the California court noted that perhaps "the preservation of a viable medical malpractice insurance industry in this state" would provide the necessary quid pro quo to support the abolition of unlimited noneconomic damages.²²⁵

D. Remittitur and Additur

Although Florida courts are reluctant to interfere with the verdict of a jury, common law principles of remittitur and additur have been used in the past by the courts to increase or reduce inappropriate verdicts. As discussed earlier, the Florida Legislature in 1977 enacted an additur and remittitur provision applicable specifically to medical malpractice actions.²²⁶ The 1986 Act repeals this provision and resurrects it in a form applicable to all civil actions for damages.²²⁷

E. Optional Settlement Conference

In a further effort to stimulate pretrial resolution of controversies, the Act recognizes the existing authority of the court²²⁸ to require a pretrial settlement conference. The conference must be held at least three weeks before the date set for trial, and, unless excused by the court, the attorneys, parties, and persons with authority to settle the case are required to attend.²²⁹

223. *Id.*

224. *Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal. 1985), *appeal dismissed*, 106 S. Ct. 214 (1985).

225. *Id.* at 681-82 n.18.

226. Ch. 76-260, § 15, 1976 Fla. Laws 660, 695 (codified at FLA. STAT. § 768.49 (Supp. 1976)). See discussion *supra* notes 154-55 and accompanying text.

227. Ch. 86-160, § 53, 1986 Fla. Laws 695, 749 (to be codified at FLA. STAT. § 768.74).

228. FLA. R. Civ. P. 1.200.

229. Ch. 86-160, § 54, 1986 Fla. Laws 695, 750 (to be codified at FLA. STAT. § 768.75).

F. Collateral Source Offset

The Act replaces the medical malpractice collateral source statute²³⁰ with a substantially similar provision which, like most other tort reform measures contained in the Act, applies to all civil actions for damages whether in contract or tort.²³¹ This change in application appears to expand significantly the classes of cases requiring mandatory offset of collateral sources beyond those involving personal injury or death. It does not. The offset will only be required in personal injury cases, because the definition of "collateral sources" is identical to the one that was contained in section 768.50, Florida Statutes.²³²

While the application of this new collateral source provision will apply to nonmedical malpractice personal injury cases, its impact may be relatively minimal. That is because the collateral source provision is principally designed to prevent a windfall or double recovery by the claimant by precluding the opportunity to collect insurance benefits plus a damage award from the tortfeasor. Most of the health and disability insurance coverages defined as collateral sources contractually grant to the insurer a right of reimbursement from the claimant for all amounts collected by the claimant from a tortfeasor up to the amount paid by the insurer. The Act attempts to ensure that this procedure will continue by prohibiting reduction for collateral sources for which a subrogation right exists²³³ and expressly granting to the collateral source provider a right of reimbursement for any amounts recovered from the tortfeasor by the claimant.²³⁴ The Act further requires that the amount so reimbursed be reduced by the pro rata share of costs incurred by the claimant in securing the funds to be reimbursed.²³⁵

Repealed section 768.50(1), Florida Statutes, required the court to reduce any damage award by the total of all amounts paid to the claimant from all available collateral sources. The Act expands this by requiring an offset "by the total of all amounts which have

230. FLA. STAT. § 768.50 (1985).

231. Ch. 86-160, § 55, 1986 Fla. Laws 695, 751 (to be codified at FLA. STAT. § 768.76).

232. "Collateral sources" are payments to the claimant pursuant to the United States Social Security Act or any other government disability act; any health, sickness, or disability insurance, except life insurance; any contract or indemnity agreement providing coverage for damages resulting from the incident; and any contractual or voluntary wage continuation plan. *Id.* (to be codified at FLA. STAT. § 768.76(2)(a)).

233. *Id.* (to be codified at FLA. STAT. § 768.76(1)).

234. *Id.* (to be codified at FLA. STAT. § 768.76(4)).

235. *Id.*

been paid for the benefit of the claimant, or which are otherwise available to him, from all collateral sources."²³⁶ This provision does not indicate how the courts are to deal with benefits that are currently available but in dispute and which in the future may or may not be paid to the claimant, nor with future benefits that may accrue as a result of long-term disability. At the least, this provision adds an element of uncertainty and indefiniteness that will be difficult for courts to interpret and implement.

G. Joint and Several Liability

Unfortunately, legislators had virtually no data before them showing what effect abolition or modification of the joint and several doctrine would have on insurance rates in particular, or upon businesses, injured persons, defendants, the court system, or society in general. Proponents of both sides of the issue were able to persuasively show how, in individual cases, modification or abolition would theoretically help or hurt various segments of society. In the end, because there was little empirical data available, the legislature was forced to accept the common sense argument that if deep-pocket defendants, primarily corporations, are indeed required to pay more than their proportionate share of damages, this will adversely affect the liability insurance market because generally the deep pocket's insurer ends up footing the bill. This likelihood was the overriding concern of the legislature in modifying the doctrine of joint and several liability.

The Tort Reform and Insurance Act of 1986 creates a two-tiered system for application of joint and several liability. The first tier applies to all negligence cases in which the total amount of damages does not exceed \$25,000. In these cases, joint tortfeasors will be jointly and severally liable for all damages. Thus, the current law pertaining to joint and several liability is unchanged with respect to this first tier.²³⁷ The second tier applies to all cases in which the total amount of damages exceeds \$25,000. In such cases when a defendant's percentage of fault is determined to equal or exceed that of the plaintiff, that defendant is jointly and severally liable with any joint tortfeasors for all economic damages. Defendants who are less at fault than the plaintiff are liable only for their proportionate share of the economic damages, and all defendants in this second tier of cases, regardless of their degree of fault, are

236. *Id.* (to be codified at FLA. STAT. § 768.76(1)).

237. *Id.*, § 60, 1986 Fla. Laws at 755 (to be codified at FLA. STAT. § 768.81(5)).

liable only for their proportionate share of noneconomic damages.²³⁸

The modified version of joint and several liability applies only to negligence cases, which are defined as civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice, breach of warranty, and like theories.²³⁹ In determining if an action is a "negligence" action for purposes of application of the Act, a court must evaluate the substance of the action rather than the labels used by the parties. The section does not apply to any action based on pollution or intentional torts or to causes of action under chapters 403 (environmental pollution), 498 (land sales), 517 (securities), 542 (combinations restricting trade or commerce), or 895 (RICO).²⁴⁰

One of the practical problems resulting from the joint and several liability section of the Act is that the Uniform Contribution Among Tortfeasors Act²⁴¹ authorizes contribution only among tortfeasors who are jointly and severally liable for the same injury to person or property. In the second tier of cases, a defendant whose fault is equal to or greater than the plaintiff's is jointly and severally liable for all economic damages. However, defendants less at fault than the plaintiff are only proportionately liable for their share of the economic damages. As a result, a jointly liable defendant could be forced to pay all of the economic damages, but, because a joint tortfeasor who was less at fault than the plaintiff is not jointly and severally liable, the defendant who has paid all of the damages has no right of contribution against that joint defendant for his proportionate share under the Uniform Contribution Among Tortfeasors Act. Although this initially appears to be a problem, equity principles and the Florida Supreme Court's ruling in *Lincenberg v. Issen*²⁴² appear to provide a right of contribution in this situation.

H. Itemized Verdict

The Act requires the verdict in any civil action to be itemized according to punitive, economic, and noneconomic damages, both past and future, and to indicate the period of years on which the

238. *Id.* (to be codified at FLA. STAT. § 768.81(3)).

239. *Id.* (to be codified at FLA. STAT. § 768.81(4)(a)).

240. *Id.* (to be codified at FLA. STAT. § 768.81(4)(b)).

241. FLA. STAT. § 768.31 (1985).

242. 318 So. 2d 386 (Fla. 1975). See discussion *supra* notes 14-15 and accompanying text.

future losses are based.²⁴³ This requirement repeals the medical malpractice provision for itemized verdicts, section 768.48, Florida Statutes, and will likely give juries more guidance in arriving at the total award. This section of the Act is also a housekeeping provision, creating the mechanism necessary for applying the noneconomic damages cap as well as the structured settlement provision for future damages. Because the section treads on the procedural authority reserved by Florida's Constitution to the Florida Supreme Court's jurisdiction,²⁴⁴ a constitutional challenge may be made. However, even if the section is found to be unconstitutional, the courts would in effect be forced to require an itemized verdict by rule in order to apply the requirements of the cap and structured settlement provisions.

I. Offer of Judgment and Demand for Judgment

The offer and demand section of the Act is similar to section 768.585, Florida Statutes (the medical malpractice section repealed by the bill), but it applies to all civil actions.²⁴⁵ The Act authorizes recovery of reasonable costs and attorney's fees from the date of a rejected offer or demand if the final judgment varies by twenty-five percent or more from the amount offered or demanded. The offer or demand cannot be made until sixty days after filing suit, must be accepted or rejected within thirty days, and cannot be accepted later than ten days prior to trial.²⁴⁶

The provision attempts to facilitate settlement and reduce the workload of the courts. However, cases which are filed and come to trial earlier than seventy days from the date of filing (meaning no earlier than sixty days from filing but no later than ten days before trial) will not be subject to the offer and demand section. The current court rule²⁴⁷ will apparently remain applicable to those cases. Because this section has procedural ramifications, its constitutionality may also be challenged.

243. Ch. 86-160, § 56, 1986 Fla. Laws 695, 852 (to be codified at FLA. STAT. § 768.77). The verdict should also indicate the period of years upon which future losses are based. *Id.*

244. FLA. CONST. art. V, § 2.

245. Ch. 86-160, § 58, 1986 Fla. Laws 695, 754 (to be codified at FLA. STAT. § 768.79).

246. *Id.* § 58, 1986 Fla. Laws at 754 (to be codified at FLA. STAT. § 768.79 (1)).

247. FLA. R. CIV. P. 1.442; *see supra* text accompanying notes 144-45.

J. Structured Settlements

This section of the Act,²⁴⁸ like other sections, is similar to the medical malpractice provision, section 768.51, Florida Statutes, repealed by the bill. The Act provides that if future economic losses exceed \$250,000, the court shall, at the request of either party, require the amount over \$250,000 to be paid by periodic payments rather than by a lump sum.²⁴⁹ The total amount of periodic payments must be equivalent to all future damages before reduction to present value, minus attorney's fees payable from future damages.²⁵⁰

Security is required for authorization of periodic payments. If the defendant is unable to provide adequate security, damages must be paid in a lump sum.²⁵¹ Attorney's fees, if payable from the judgment, must be paid from past and future damages in the same proportion.²⁵² The claimant, however, is responsible for paying an attorney's contingency fee calculated solely on the basis of that part of the award not subject to periodic payments. The defendant will pay the remaining unpaid portion of the attorney's fees and will receive credit for this paid amount against future periodic payments.²⁵³ If the claimant dies prior to the end of the period that payments are to be made, the present value of the remaining amount is to be paid to the claimant's estate in a lump sum. If the claimant lives beyond the period that payments are scheduled, the payments will not be extended.²⁵⁴

K. Alternative Dispute Resolution

Senate Bill 465 did not provide any measures regarding alternative dispute resolution. Committee Substitute for Senate Bill 465 stated that the legislature intended to expedite less costly litigation by creating court-annexed forms of alternative dispute resolution.²⁵⁵ That bill would have required the Florida Supreme Court to develop a plan for statewide implementation of mandatory mediation and mandatory nonbinding arbitration for all contested civil actions, and voluntary binding arbitration for all civil dis-

248. Ch. 86-160, § 57, 1986 Fla. Laws 695, 752 (to be codified at FLA. STAT. § 768.78).

249. *Id.* (to be codified at FLA. STAT. § 768.78(1)).

250. *Id.* § 57 (to be codified at FLA. STAT. § 768.78(2)).

251. *Id.* (to be codified at FLA. STAT. § 768.78(3)).

252. *Id.* (to be codified at FLA. STAT. § 768.78(5)).

253. *Id.* (to be codified at FLA. STAT. § 768.78(6)).

254. *Id.* (to be codified at FLA. STAT. § 768.78(2)).

255. Fla. CS for SB 465, sec. 47 (1986).

putes. Committee Substitute for Committee Substitute for Senate Bill 465 deleted this provision.

Senate Bill 396²⁵⁶ established alternative resolution mechanisms for certain civil disputes. On June 5, 1986, a motion was made to amend this bill by replacing its more extensive provisions with the language from Committee Substitute for Senate Bill 465.²⁵⁷ The Senate passed the amendment unanimously. On June 6, the House amended Senate Bill 396 by again replacing the new language with more extensive provisions.²⁵⁸ The Senate refused to agree²⁵⁹ and the bill died in messages during the final hours of the 1986 Regular Session.²⁶⁰ In light of the significant impact such a system could have in reducing costs associated with litigation, it is unfortunate that this reform was not enacted.

V. CONCLUSION

Given the nature of the human condition and the complexity of our relationships, there always has been and always will be inherent unfairness embodied in our system of civil justice. But as civilized people, we must continue to strive for fairness and equity in our dealings with one another. The Act is the culmination of prior attempts to remedy deficiencies in Florida's tort law. By enacting the Tort Reform and Insurance Act of 1986, the Florida Legislature attempted to balance the competing interests of injured parties and their need for compensation against society's willingness and ability to pay.²⁶¹

256. Fla. SB 396 (1986).

257. Fla. CS for SB 465 (1986); FLA. S. JOUR. 748-49 (Reg. Sess. June 5, 1986) (amendment 1 to SB 396).

258. FLA. H.R. JOUR. 1141, 1116 (Reg. Sess. June 6, 1986) (amendment 1 to SB 396).

259. FLA. S. JOUR. 915, 917 (Reg. Sess. June, 6, 1986).

260. FLA. LEGIS. HISTORY OF LEGISLATION, 1986 REGULAR SESSION, HISTORY OF SENATE BILLS at 84, SB 396.

261. More than 280 insurance companies and three national insurance trade associations filed suit in the Second Judicial Circuit Court of Florida in July 1986, alleging that the Act in its entirety and various independent provisions are facially unconstitutional. Two provisions targeted by the complaints are those capping noneconomic damages and modifying joint and several liability. The Second Circuit temporarily enjoined the Department of Insurance from enforcing provisions of the Act. *American Ins. Ass'n v. State*, No. 86-2262 (Fla. 2d Cir. July 15, 1986), *appeal filed sub nom. Insurance Co. of N. Am. v. State*, No. BQ-90 (Fla. 1st DCA Oct. 27, 1986), *appeal docketed sub nom. Smith v. State*, No. 69,551 (Fla. Nov. 4, 1986). The Florida Supreme Court extended the injunction until December 1, 1986. *Smith v. State*, No. 69,551 (Fla. Nov. 4, 1986). As this Article goes to press, no ruling has been issued.

