Volume 32 | Issue 6 Article 1

1987

Introduction

Richard C. Turkington

VILLANOVA LAW REVIEW

VOLUME 32 NOVEMBER 1987 NUMBER 6

Symposium

TORT REFORM: WILL IT ADVANCE JUSTICE IN THE CIVIL SYSTEM?

INTRODUCTION

RICHARD C. TURKINGTON†

THE term "tort reform"[1] has now become firmly ensconced in the national consciousness as a consequence of a media blitz over the last few years. The media has spoken of it in conjunction with discussion of the "insurance crisis" to such an extent that the two have become inextricably associated in the minds of lay persons, lawyers and legal scholars. In one sense, this is as it should be, because tort reform refers to a species of legislation that states have enacted to correct a perceived crisis in the availability of affordable liability insurance for professionals, local governmental entities, non-profit associations, selected manufacturers and service providers. The specter of losses of important services to the public because of the unavailability of liability insurance produced the prototype of this legislative species, the California Medical Injury Compensation Reform Act of 1975 (MICRA).[2] The strategies which MIRCA and other tort reform legislation generally adopt to solve the perceived crisis are to restrict signifi-

† Professor of Law, Villanova Law School, Villanova, PA. B.A., 1963, J.D., 1966, Wayne State University; L.L.M., 1967, New York University.

1. Throughout this introduction and in the symposium the term tort reform is employed to refer to legislation that restricts established common-law rights of tort plaintiffs in tort actions to correct a perceived crisis in the availability of liability insurance. This is the official designation given to such laws by the media, legal profession and tort scholars. *See, e.g.*, Phillips, *Future Implications of the National Tort Reform Movement*, 22 GONZ. L. REV. 277 (1987); Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1527 (1987); *see also* White, *Tort Reform in the Twentieth Century: An Historical Perspective*, 32 VILL. L. REV. 1265 (1987) (discussing special features of current tort reform movement and contrasting it with prior movements).

2. *See* 1975 Cal. Stat. 3945 2d Ex. Sess. ch. 1.

cantly the bundle of rights that have evolved under the common-law tradition in tort actions brought by seriously injured persons.

Tort reform legislation, as exemplified by the malpractice prototype, characteristically entails: (1) pretrial screening panels; (2) caps or other restrictions on non-economic and punitive damages;[3] (3) regulation of attorneys' fees; (4) alternatives to lump-sum payment of damage judgments such as periodic payments; (5) abolition or restriction of the collateral source rule;[4] (6) selective restriction on statutes of limitations and alterations of related concepts such as the discovery rule[5] and (7) restriction on joint

3. The California statue set a cap of $250,000 on "non-economic" damages recoverable from health care providers in actions based on professional negligence. CAL. CIV. CODE § 3333.2 (West Supp. 1987). Caps in tort reform legislation typically limit the amount of recovery for physical and emotional pain and suffering, an element of compensatory damages historically available in negligence actions. At this time, tort reform legislation, however, does not typically place caps on the other feature of compensatory damages, out of pocket loss for lost wages or medical expenses (special damages). Damage caps compromise the common-law tort principle that innocent injured plaintiffs have a right to recover damages that fully compensate them for all cognizable tort injuries that the wrongful tortfeasor has caused. Caps that are set at high amounts effectively impact only on the seriously or permanently injured tort plaintiff. Under compensatory damage concepts, past and future physical and emotional distress are recoverable. Large damage judgments, therefore, generally involve seriously or permanently injured plaintiffs.

4. The collateral source rule provides that payment for some of the costs of the accident by a source other than the defendant do not reduce the damage award against the defendant. This common-law rule is generally criticized as granting a windfall to the plaintiff. In some instances this may occur. However, in many and perhaps most cases, because of subrogation rights, the collateral source rule simply shifts the loss of these payments from the plaintiff's insurer who has paid for costs such as medical expenses to the defendant's insurer. Abolishing the collateral source rule, therefore, may result in reducing costs to the healthcare practictioner's insurer, but not with reduction of overall insurance costs. It also may produce the anomalous result of requiring the innocent plaintiff's insurance company to pay more than the insurer of the healthcare practitioner who was at fault. *See generally* Jenkins & Schweinfurth, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829 (1979); A.B.A. *Report of the American Bar Association Action Commission to Improve the Tort Liability System* Appendix B-1 (1987).

5. The New Hampshire statute illustrates examples of selective changes in the statute of limitations and abolition of the discovery rule. N.H. REV. STAT. ANN. § 507-C (Supp. 1983). Section 507-C:4 changes the existing six year statute of limitations to two years for medical injury actions; abolishes the discovery rule, except in cases where a foreign object is left in the plaintiff's body, and requires minors under eight years of age to bring the action by their tenth birthday. The New Hampshire Supreme Court found the statute unconstitutional. Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980). For a further discussion, see Turkington, *Constitutional Limitations on Tort Reform: Have the State Courts Placed Insurmountable Obstacles in the Path of Legislative Responses to the Perceived Liability Insurance Crisis?*, 32 VILL. L. REV. 1299 (1987). Many states have also enacted statutes of repose in products liability actions and in negligence actions against contractors or architects. These statutes limit suits from the time of an activity,

and several tort liability.[6] Such legislation is based upon a set of assumptions. One is that increases in insurance premiums have created a "crisis" in the availability of affordable liability insurance. Another is that there is a significant relationship between substantive tort law and the tort litigation process and the insurance industry's decisions on the availability and price of liability insurance. A related assumption is that restricting these and other features of the tort liability system that have evolved under the common-law tradition will sufficiently reduce insurance premiums to make reasonably priced insurance more available.[7]

There has been a spirited and contentious debate in numerous forums as to whether these assumptions are correct. The most ardent opponents of tort reform, such as the American Trial Lawyers Association[8] and Ralph Nader, charge that tort reform is

---

such as sale or construction, and not from the time of the tort injury. Typically, statutes of limitations begin to toll from the time of the injury. For a further discussion, see Turkington, *supra*, at 1330-31.

6. Under twentieth century notions of joint and several tort liability, independent tortfeasors are jointly and severally liable if their conduct concurs to produce a single indivisible injury to the plaintiff. This is a change from the early common law which required some form of concerted action or joint liability based upon a respondeat superior relationship. While the plaintiff gets a judgment for the whole amount of injuries recoverable against each of the tortfeasors who are jointly and severally liable, the plaintiff may not recover more than the full amount of damages. A tortfeasor who has paid an excessive amount of the damages may seek contribution from the other tortfeasors.

Consequently, the concept of joint and several tort liability primarily functions to shift the risk of loss for an insolvent tortfeasor from the plaintiff to the other liable defendants. Tort reform legislation typically reverts to the early common-law rule and limits the doctrine to concerted action or wanton or willful misconduct. *See, e.g.*, KAN. STAT. ANN. § 60-258a (Supp. 1988) (codifying HB 2024). *Compare* McKay, *Rethinking the Tort Liability System: A Report from the ABA Action Commission*, 32 VILL. L. REV. 1219 (1987). *See also* Wade, *An Evaluation of the "Insurance Crisis" and Existing Tort Law*, 24 HOUS. L. REV. 81, 86 (1987) (questioning the sensibility and fairness of proposals to "reform" joint and several tort liability law).

7. The statement of purpose for the Kansas tort reform legislation provides a good example:

> Substantial increases in costs of professional liability insurance for health care providers have created a crisis of availability and affordability. This situation poses a serious threat to the continued availability and quality of health care in Kansas. In the interest of the public health and welfare, new measures are required to assure that affordable professional liability insurance will be available to Kansas health care providers, to assure that injured parties receive adequate compensation for their injuries and to maintain the quality of health care in Kansas.

KAN. STAT. ANN. § 60-3405 (Supp. 1987).

8. The American Trial Lawyers Association (ATLA) participated in the symposium held on February 21, 1987 that resulted in this law review publication. ATLA did not submit an article for this publication. Alan Parker, the ATLA speaker at the symposium, expressed some of the views that are repre-

an "unprincipled public relations scam"[9] which the insurance industry engineered to rebound from losses it suffered from cyclical downturns in interest rates. Seizing an opportunity to reduce ultimate liability by changing tort law, the industry withdrew coverage, dramatically increased premiums and joined with corporate defense interests in waging a media and lobbying campaign to permanently alter tort rights through legislation.[10] Equally avid supporters of tort reform lay the responsibility for spiraling insurance costs and the withdrawal of coverage primarily on tort law. They claim that expanded concepts of liability, an explosion in litigation and the granting of large damage awards has produced unpredictability and unmanageable pay outs that caused a bona fide insurance crisis.[11] Both sides have spent large amounts of money in promoting their views in the media.[12] Evidence on the role of investment cycles and tort law expansion and damage judgments on the undisputed fact of spiraling increases in insurance premiums is in conflict.[13] Perhaps the clearest inference that

---

sented in this summary of anti-tort reform sentiment. ATLA's strong opposition to tort reform is well known.

9. Nader, *The Corporate Drive to Restrict Victims' Rights*, 22 GONZ. L. REV. 15, 18 (1987).

10. Farrel & Glaberson, *The Explosion in Liability Lawsuits Is Nothing But a Myth*, BUS. WK. Apr. 21, 1986, at 24; *see* Nader, *supra* note 9, at 18; *The Manufactured Crisis*, 51 CONSUMER REPS. 544 (Aug. 1986). California, New York and six other states have recently filed antitrust suits against numerous insurance companies and the insurance trade association contending that they engaged in a conspiracy and illegal boycott that was a major cause of the insurance crisis in the areas of environmental law and governmental tort liability. *See* N.Y. Times, Mar. 23, 1988, § 1, at 1, col. 1.

11. *See* DEP'T OF JUSTICE, TORT POLICY WORKING GROUP, AN UPDATE ON THE LIABILITY CRISIS 32-59 (1987); DEP'T OF JUSTICE, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986) [hereinafter DEP'T OF JUSTICE, REPORT]; INSURANCE INFORMATION INSTITUTE, THE LAWSUIT CRISIS (1986).

12. *See* J. COM. I (Mar. 19, 1986) (insurance industry sponsored six million dollar national media campaign demonstrating lawsuit explosion and crisis); Schulte, *Availability, Affordability, and Accountability: Regulatory Reform of Insurance*, 14 FLA. ST. L. REV. 557, 559 & n.14 (1986) (newspaper reports had indicated that Academy of Florida Trial Lawyers had spent $200,000 on advertisement in Florida laying crisis at doorstep of unnecessary premium increases by insurance industry).

13. *See* DEP'T OF JUSTICE, REPORT, *supra* note 11 (relying on statistical analysis of tort actions in diversity suits in federal courts to support claims of litigation and jury verdict explosion). *Compare* NATIONAL CENTER FOR STATE COURTS, A PRELIMINARY EXAMINATION OF AVAILABLE CIVIL AND CRIMINAL TREND DATA IN STATE TRIAL COURTS FOR 1978, 1981 and 1984 (1986) (data based upon state court suits does not support litigation explosion); BELLOTTI, ANALYSIS OF THE CAUSES OF THE CURRENT CRISIS OF UNAVAILABILITY AND UNAFFORDABILITY OF LIABILITY INSURANCE (1986) (data does not support claim of litigation "explosion");

one can draw from the evidence presented in the public debate is that a host of factors including those relating to investment cycles and the tort liability system and external social phenomena contribute to the decisions on the price and availability of liability insurance. A substantial connection between tort reform and available and affordable liability insurance, therefore may not be demonstrable.

The subject of this symposium: Tort Reform: Will It Advance Justice in the Civil System, is addressed from a number of persepectives by the participants.

Professor McKay's perspective is as chairman of the American Bar Association's Action Committee on Tort Liability. He reviews the circumstances surrounding the appointment of the commission, their deliberative process, and the debate that culminated in the consensus that the final report expresses. The American Bar Association's position as reflected in the McKay article and the Commission Report is a moderate one that vindicates the basics features of the American tort liability system.[14]

Dr. Mooney's article examines the relationship between the decisions of the insurance industry and the tort liability system from the perspective of the insurance industry. He also responds to the charge that the insurance industry is responsible for the insurance liability crisis, either through poor judgments or fraud and collusion to produce changes in tort law or both. He acknowledges that investments cycles and external factors such as media focus on social phenomena, such as child abuse, have contributed to rising insurance costs. He finds, however, that the core of the problem lies with the movement in tort law away from a fault-based system toward enterprise liability and granting pri-

---

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) *and McKay, supra* note 6 *with* Mooney, *The Liability Crisis—A Perspective*, 32 VILL. L. REV. 1235 (1987).

Some studies have rejected a single cause view and suggested that the combination of investment cycles and expansion of costs in the civil justice system are responsible for the problem. *See* A.B.A., *Report of the American Bar Association Action Commission to Improve the Tort Liability System* 4 (1987); INSURING OUR FUTURE: REPORT OF THE (NEW YORK) GOVERNOR'S ADVISORY COMISSION ON LIABILITY INSURANCE, Vol. I, (1986). Professor Priest suggests that neither of these two causal theories, individually or in tandem adequately explain the insurance crisis. Priest argues that the expansion of enterprise liability and shift to third-party corporate insurance coverage is the primary evil. Priest, *supra* note 1, at 1524; *see generally* Phillips, *supra* note 1 (splendid summary of data and arguments supporting various positions on tort reform and causes of "crisis").

14. *See* McKay, *supra* note 6.

macy to the goal of compensation. He argues that if this movement continues, insurance crises are inevitable, and ultimately may require dramatic transformation of the liability system to the workers compensation model of no-fault and limited recovery for damages.[15]

Professor White looks at the current phenomenon of tort reform from a historical perspective of other significant reforms in the law of torts. He concludes that reforms, such as workers' compensation and strict liability for defective products, reflected deep commitments in our culture and our system of torts to the concept of moral accountability for injury. He distinguishes current tort reform as reflecting arguments that seek to deflect rather than to facilitate the principle of moral accountability.[16]

Mooney and White address a basic tension in the dialogue about tort reform. This tension involves policies that will promote a cost efficient system of compensation and insurance and principles of justice that are reflected in long standing traditions of accountability and reparation. The receptiveness that state legislatures have accorded tort reform suggests that at this time the national mood is to give primacy to the cost efficiency policies and assumptions upon which tort reform legislation is based irrespective of what the best evidence may demonstrate.

These conflicting notions of cost efficiency and justice face off in those states where constitutional challenges to tort reform have been successful. My article discusses the surprising phenomena of many state courts invalidating portions or all of some tort reform legislation on state constitutional grounds. Limitations that strike at the core of the common-law tradition, such as caps on compensatory damages, are most vulnerable to judicial activism in the state courts. These decisions constitute judicial recognition of traditions of political morality in those states that reflect the deep seated cultural committment to principles of accountability for injury that Professor White speaks of. These courts require, at the least, that there be a demonstration of efficiency, in the sense of making liability insurance cheaper and more available, before the courts will subordinate the common-law tradition of full compensatory damages for injury.[17]

The formal bonding of insurance and substantive tort law is one of the peculiar and historically significant features of the cur-

15. *See* Mooney, *supra* note 13.
16. *See* White, *supra* note 1.
17. *See* Turkington, *supra* note 5.

rent tort reform movement. The idea for this symposium was spawned in the spring of 1986 at the height of publicity about the liability insurance crisis and tort reform.[18] In these last two years much has transpired in our legal system about tort reform.

Significant adjustments in rates as well as the withdrawal from some markets have produced a dramatic recovery for the insurance industry and somewhat less of a crisis in the availability of insurance.[19] Few seriously suppose that this is more than a temporary arrangement. Two things have occurred that are of more permanent significance. Tort reform legislation has spread swiftly and state courts have increasingly constitutionalized some features of tort reform. The phenomenon of legislatively restricting personal injury tort actions in order to control cost and make insurance both available and affordable has spread from its initial focus on medical malpractice to personal injury claims in tort generally. The pace of legislation and alteration of venerable traditions in tort law has been phenomenal. In 1987, thirty-six states reclaimed through legislation a form of governmental immunity; several states reestablished charitable immunity. Nearly a majority of states have enacted changes in joint and several tort liability; most states have enacted or proposed changes in the collateral source rule and regulation of attorneys fees, damage caps and punitive damages. State legislatures are now considering thousands of bills that would reform the civil justice system and regulate the insurance industy as well.[20] If the pace of legislative enactment of tort reform continues, in a short period of time venerable concepts of tort law such as punitive damages, the collateral source rule and the principle that a wrongful tortfeasor is responsible for all cognizable tort injuries caused to an innocent plaintiff might become dinosaurs of our legal system.

---

18. *See Sorry, Your Policy is Cancelled*, TIME, Mar. 24, 1986, at 18.

19. For a discussion of the escalation of rates and current fiscal health of insurance industry, see McKay, *supra* note 6, at 1219-21; Mooney, *supra* note 13, at 1241-51.

20. The summary of proposed and enacted tort reform legislation published by the National Conference of State Legislatures, in 1986 and 1987, indicates that twenty-four states altered joint and several tort liability; thirteen states capped noneconomic damages; fifteen states restricted punitive damages and eighteen states restricted or abolished the collateral source rule. A large number of bills have been proposed both restricting rights in the civil law system and regulating insurance. Twenty-two states enacted insurance regulation in 1987. The conference of state legislatures reports 13,000 bills proposed in 1987; this is up from 10,000 in 1986. See NAT'L CONF. OF STATE LEGISLATURES, 1987 SUMMARY ON LIABILITY INSURANCE (1987); NAT'L CONF. OF STATE LEGISLATURES, 1986 STATE LEGISLATIVE ACTION: LIABILITY INSURANCE (1986).

This recent history suggests that the cycle of a perceived crisis in the availability of insurance and state legislative reactions in restricting the scope of traditional tort rights will be a permanent feature of our legal system, at least until the unlikely occurrence of federal preemption of the tort reparation system. In a very short period of time, tort reform has broken away from its origins in medical malpractice to become a permanent and important feature of personal injury law.