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TORTS Tort Reform

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TORTS

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INTRODUCTION

The 1987 session of the Georgia General Assembly opened amid much speculation over the fate of tort reform legislation. The speculation was not over whether significant tort reform measures would be introduced; their introduction was a foregone conclusion. However, there was much uncertainty about whether a compromise satisfactory to both the House and Senate could be reached.

After the 1986 session ended without such a compromise,[1] and thus without the passage of a major tort reform bill, Governor Joe Frank Harris appointed the Governor's Advisory Committee on Tort Reform. This Committee was chaired by Atlanta attorney W. Pitts Carr and was composed of leaders of various organizations in the fields of law, medicine, business, and insurance, as well as the Senate Administrative Floor Leader, the House Majority Leader, and the Chairmen of the Senate and House Judiciary Committees.[2] Its appointed task was to study possible causes of the widely perceived liability insurance crisis and to recommend solutions. Its November 1986 report contained a number of recommendations.[3]

The Committee made numerous recommendations for reform of judicial oversight of tort claims. These recommendations were approved by a vote of 8 to 1. The only "no" vote was recorded by Doug Smith, President of the Georgia Trial Lawyers Association.[4] The President of the State Bar

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1. For a review of tort reform in the 1986 legislative session, see *Selected 1986 Georgia Legislation, Tort Reform and Insurance Regulation*, 2 GA. ST. U.L. REV. 240 (1986) [hereinafter *Legislative Review*].

2. The Committee members were: State Insurance Commissioner Warren Evans, State Bar of Georgia President Robert M. Brinson, Georgia Trial Lawyers Association President Doug Smith, Georgia Defense Lawyers Association President Paul Painter, Goodloe H. Yancey III of the Business Council of Georgia, Jack Turner of the Georgia Hospital Association, Dr. Sam O. Atkins of the Georgia Medical Association, Dr. John D. Watson, Jr. of the Medical Association of Georgia, insurance industry spokesperson Robert E. Carpenter, Senate Administrative Floor Leader Roy E. Barnes, House Majority Leader Larry Walker, Senate Judiciary Committee Chairman J. Nathan Deal, and House Judiciary Committee Chairman Charles Thomas. REPORT OF THE GOVERNOR'S ADVISORY COMMITTEE ON TORT REFORM 1, 2 (Dec. 1, 1986) [hereinafter COMMITTEE REPORT].

3. *Id.* at 3-8 (full list of the Committee's recommendations).

4. *Id.* at 8. *See also* Straus, *Panel Sides with Tort Reform Proponents*, Atlanta J.,

Association, Robert M. Brinson, abstained. None of the legislative members of the Committee voted.[5] Among the proposals recommended to the Governor by the Committee were abolishing joint and several liability, disclosing collateral sources, establishing a cap on punitive damage awards, requiring specific pleading methods for medical malpractice and products liability claims, changing the age of majority for medical malpractice actions, giving trial judges authority to amend damage verdicts, and granting limited immunity from civil suits to both gratuitous providers of medical care and officers and directors of non-profit organizations and governmental entities.[6] These proposals were vigorously debated from the moment they were announced.[7]

When the legislative session opened in January 1987, the Lieutenant Governor, with the support of the Governor, introduced his tort reform package endorsing most of the Committee's proposals. These bills were introduced as SB 1 and SB 2.[8] SB 1 was the more comprehensive tort reform bill. Included among its provisions were the abolishment of joint and several liability, disclosure of collateral sources, limitations on punitive damages, judicial review of damage verdicts, and immunity for officials of certain non-profit organizations and providers of free medical and veterinary care.[9] SB 2 focused on revising the statute of limitations for minors and requiring specific pleading in medical malpractice and products liability actions.[10]

The House introduced its own version of tort reform, HB 1. It was more limited in scope than the Senate proposals. Among its provisions were disclosure of collateral sources, less strict limitations on punitive damages, judicial review of damage verdicts, and limitations on attorneys' fees.[11]

A cap on non-economic losses ("pain and suffering") was conspicuously absent from both the Governor's Committee proposals and the House and Senate bills.[12] This topic was one of the most controversial issues debated in the 1986 legislative session.[13] Advocates of such a cap, apparently realizing that this provision might jeopardize compromise on other issues, de-

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Nov. 21, 1986, at 4D, col. 1 (noting Doug Smith opposed the recommendations because the Georgia Trial Lawyers Association supported "insurance industry reform" instead of "tort reform" as the best method to control escalating liability insurance rates).

5. COMMITTEE REPORT, *supra* note 2, at 8-9. The State Bar Association subsequently adopted a resolution opposing any changes in the tort system. *See* Hibbs, *Board Supports Legislation for 1987*, Ga. St. Bar News, Jan./Feb. 1987, at 1, col. 1.

6. COMMITTEE REPORT, *supra* note 2, at 6-8.

7. Hessen, *Harris Plans to Push Commission's Tort Reform Package*, Atlanta J., Dec. 4, 1986, at 5C, col. 1.

8. SB 1, SB 2, as introduced, 1987 Ga. Gen. Assem.

9. SB 1, as introduced, 1987 Ga. Gen. Assem.

10. SB 2, as introduced, 1987 Ga. Gen. Assem.

11. HB 1, as introduced, 1987 Ga. Gen. Assem.

12. COMMITTEE REPORT, *supra* note 2, at 15.

13. *Legislative Review*, *supra* note 1, at 245.

cided to drop the issue and focus their energies on such topics as abolishing joint and several liability and capping punitive damage awards.[14]

Although passage of some version of tort reform by both legislative bodies was virtually guaranteed by the support of Lieutenant Governor Miller and House Speaker Thomas B. Murphy, the content of the final bill was far from certain.[15] The two bodies' previous inability to reach a compromise led to the deadlock which ended the 1986 session.[16] Murphy's support was considered crucial. His opposition to prior proposals was deemed a prime reason for the legislature's previous failure to enact a major tort reform bill. His reported willingness to compromise greatly increased the prospects for passage.[17]

I. Specific Areas of Tort Reform Discussed in the 1987 Legislative Session

A. Joint and Several Liability

One of the most controversial proposals of the Governor's Committee was the one to abolish the doctrine of joint and several liability. This controversy was reflected in the initial differences between SB 1 and HB 1. SB 1 adopted the Committee's proposal for complete abolishment of the doctrine.[18] HB 1 did not mention joint and several liability at all, leaving the present law intact.[19]

Georgia has formally recognized the doctrine of joint and several liability since 1863.[20] Under this doctrine, in any case involving joint tortfeasors, an injured plaintiff may recover the full amount of his damages from any one of the tortfeasors.[21] Because the plaintiff may fully recover from one tortfeasor, joinder of all tortfeasors in the action is not required.[22] However, if one tortfeasor is required to pay the entire amount of the plaintiff's damages, that tortfeasor may bring an action for contribution from the other tortfeasors.[23]

The doctrine was designed to protect injured plaintiffs by making recovery easier. It was deemed equitable that an injured plaintiff not be

14. Committee Report, *supra* note 2, at 15.

15. Straus, *Both Sides Gearing Up for Nasty Fight Over Tort Reform*, Atlanta J., Nov. 21, 1986, at 1D, col. 1. "House Speaker Tom Murphy—a trial lawyer who has almost single-handedly blocked liability law changes in the past—says he is in the mood for compromise." *Id.* at 4D, col. 1.

16. *Legislative Review*, *supra* note 1.

17. Straus, *supra* note 15, at 4D, col. 1.

18. SB 1, as introduced, 1987 Ga. Gen. Assem.

19. HB 1, as introduced, 1987 Ga. Gen. Assem.

20. *See, e.g.*, Ga. Orig. Code of 1863 § 3007.

21. Church's Fried Chicken, Inc. v. Lewis, 150 Ga. App. 154, 162, 256 S.E.2d 916, 923 (1979).

22. H.W. Brown Transp. Co. v. Edgeworth, 90 Ga. App. 728, 730, 84 S.E.2d 103, 105 (1954) (joinder is a privilege for the plaintiff's benefit and is not required).

23. O.C.G.A. § 51-12-32 (1982).

denied recovery due to an inability to join all defendants in the action or because of a particular defendant's insolvency. As long as at least one joint tortfeasor was able to pay, a successful plaintiff was guaranteed full recovery.[24]

Opponents of the doctrine view the equities differently. They view joint and several liability as an avenue to the "deep pocket" wherein a party minimally at fault can be required to pay the full amount of damage. Theoretically, a defendant only one percent at fault could be required to pay one hundred percent of the plaintiff's damages. This potential liability is viewed as a contributing factor in the rapid rise of liability insurance rates. Although contribution among joint tortfeasors mitigates the problem to some extent, if a defendant is insolvent, contribution is of no value to the solvent defendant who may be forced to pay the entire amount of the judgment with no hope of recoupment.[25]

Opponents of joint and several liability argue that a defendant should only be liable to pay his pro rata share of any judgment based on an apportionment of fault.[26] If this view were law, the plaintiff would lose compensation for that part of his injuries caused by an insolvent defendant. Also, even if all defendants were solvent, the plaintiff would be forced to join all defendants in order to fully recover.

Mirroring these opposing positions, the Governor's Committee vociferously debated the issue of joint and several liability. A compromise position proposed by the Committee Chairman would have retained joint and several liability for any defendant deemed at least twenty-five percent at fault; damages for defendants below the twenty-five percent threshold would be apportioned pro rata with no duty to contribute. This "low-fault" proposal was defeated by the Committee.[27] The hard-line opponents of joint and several liability prevailed, and the Committee's final report recommended that the doctrine be abolished.[28]

The Senate passed SB 1, which adopted the Committee's position, by a vote of 52 to 2.[29] The House passed HB 1, which had no provision on joint and several liability, by a margin of 160 to 12.[30] In an effort to re-

24. Milich, *Make Sure it Isn't the Victim Who Pays the Price for Tort Reform*, Atlanta Const., Jan. 28, 1987, at 21A, col. 1.

25. COMMITTEE REPORT, *supra* note 2, at 15-16 (discussion of opposing viewpoints by Committee Chairman Carr).

26. *Id.*

27. *Id.* at 16.

28. *Id.* at 6, 15-16.

29. SB 1, 1987 Ga. Gen. Assem. (as passed by Senate, Jan. 16, 1987). The Senate actually met as a committee of the whole on January 13, 1987 and passed SB 1 by a 45-1 vote. However, official ratification of the committee of the whole's "recommendation" did not occur until January 16. *See also* Straus, *Senate Easily Passes Liability Law Changes in Victory for Harris*, Atlanta J., Jan. 14, 1987, at 10A, col. 4.

30. HB 1, 1987 Ga. Gen. Assem. (as passed by House, Jan. 14, 1987). *See also* Straus, *House Approves a More Limited Tort Revision than Senate Version*, Atlanta J., Jan. 15, 1987, at 7C, col. 4.

solve the differences between the two bills, Lieutenant Governor Miller and House Speaker Murphy appointed an informal House/Senate Committee.[31] Joint and several liability was the most divisive issue the Committee debated. Senate leaders, led by Miller, continued to push for abolition. House leaders, led by Murphy, fought for retention.[32] One of the compromise proposals before this Committee was the twenty-five percent "low-fault" plan which had been rejected by the Governor's Committee.[33] It was also rejected by the informal House/Senate Committee.

After four weeks, the Committee reached a compromise which was generally viewed as a victory for the House conferees.[34] Under the compromise, the present law is unchanged in cases in which a plaintiff is fault-free, and each joint tortfeasor remains liable for the total amount of the plaintiff's damages.[35] This compromise perpetuates the historical view that an innocent plaintiff should not be denied full recovery if at least one defendant is able to pay. In cases where the plaintiff is deemed partially at fault, the Senate conferees wanted the law to state that the trier of fact "shall" apportion damages among the parties, making apportionment mandatory. The House version, which ultimately was adopted by the Committee, makes apportionment discretionary by replacing "shall" with the permissive "may."[36] The trier of fact may apportion damages or apply joint and several liability at its discretion.[37] This compromise is more plaintiff-oriented than the rejected compromise, which would have required apportionment of damages if a defendant's liability was below twenty-five percent.

The joint and several liability provision agreed to by the informal Committee was formally approved by the official House/Senate Conference

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31. Straus, *Tort Reform Sought Informally*, Atlanta J., Feb. 4, 1987, at 1D, col. 1. Miller proposed that an informal committee be appointed and Murphy agreed. The informal committee was composed of Senators Nathan Deal, Roy Barnes, Tom Coleman, and Pierre Howard, and Representatives Charles Thomas, Tommy Chambless, Denmark Groover, DuBose Porter, and Pete Robinson. *Id.* at col. 2-3.

32. Morrison, *Compromise on Tort Reform Debated*, Atlanta, J. & Const., Jan. 25, 1987, at 4B, col. 4 (Representative Charles Thomas, House Judiciary Committee Chairman and informal committee member, quoted as saying of the joint and several liability issue, "If there is going to be a compromise, that's where it would have to be.").

33. Johnson, *Legislature Acts Quickly on Tort Reform but Differences Remain Between House and Senate Bills*, Fulton County Daily Rep., Jan. 16, 1987, at 1, col. 3 (reporting remarks of Senator Pierre Howard, one of the Governor's Legislative floor leaders, a sponsor of SB 1 and SB 2 and a member of the informal compromise committee).

34. Straus, *Compromise Worked Out on Tort Reform*, Atlanta J., Feb. 19, 1987, at 2C, col. 5 (quoting Senator Roy Barnes and noting that the House version was supported by the Georgia Trial Lawyers Association, while business leaders and insurance interests supported the Senate version).

35. O.C.G.A. § 51-12-32 (Supp. 1987).

36. Straus, *supra* note 34.

37. O.C.G.A. § 51-12-33 (Supp. 1987).

Committee. The compromise was labeled the Tort Reform Act of 1987 (HB 1), passed by both bodies, and signed into law by the Governor.[38] The compromise was immediately criticized as not going far enough to alleviate the liability crisis and praised for protecting plaintiffs' rights.[39] It will take time to evaluate the impact of this law because it is uncertain how juries and trial judges will apply their newly gained discretion.

B. Disclosure of Collateral Sources

Unlike joint and several liability, disclosure of collateral sources was included in the original versions of both HB 1 and SB 1. Under prior law, Georgia adhered to the "collateral-source rule," which renders inadmissable at trial any evidence that a plaintiff has received compensation from sources such as health and accident insurance or workers' compensation benefits.[40] The rule's rationale is to encourage members of the public to protect themselves with insurance. It has been argued that if a tortfeasor is able to use collateral sources to mitigate damages, the prudent plaintiff who buys insurance is put in a worse position than the uninsured plaintiff. Both may recover for their injuries, but the insured plaintiff has the additional expense of insurance premiums.[41]

Opponents of the rule argue that it enables some plaintiffs to recover from both their own insurance policies and the defendant. Such double recovery is seen as more than what is necessary to fully compensate the plaintiff and is a contributing factor in the high cost of liability insurance. Tort reform advocates believe that if a plaintiff has already been adequately compensated by a personal insurance policy, there is no need to litigate the issue. Disclosure of collateral sources is seen as one method to curtail excessive damage verdicts for plaintiffs.[42]

Abolition of the collateral source rule has previously been advocated by no-fault insurance supporters.[43] Tort reform advocates of collateral source disclosure are in effect endorsing a no-fault system for all tort injuries. As long as the injured party receives compensation from some source, the origin is immaterial.

When the proposal to disclose collateral sources was adopted by the Governor's Committee, opponents of disclosure argued that if the plain-

38. O.C.G.A. § 51-12-33 (Supp. 1987).

39. Straus, *supra* note 34.

40. Cincinnati, New Orleans & Texas Pacific Ry. v. Hilley, 121 Ga. App. 196, 173 S.E.2d 242 (1970).

41. For a good discussion of the policy implications of the collateral source rule, see Justice Tobriner's opinion in Helfend v. Southern California Rapid Transit Dist., 2 Cal. 3d 1, 84 Cal. Rptr. 173, 465 P.2d 61 (1970).

42. Howard, *Tort Bills Would Stabilize Rates, Promote Fairness*, Atlanta J. & Const., Jan. 25, 1987, at 6P, col. 4 (the author, Senator Pierre Howard, is a leading advocate of tort reform and a sponsor of SB 1 and SB 2).

43. Helfend v. Southern California Rapid Transit Dist., 2 Cal. 3d 1, 84 Cal. Rptr. 173, 465 P.2d 61 (1970).

tiff's collateral sources of compensation were disclosed at trial, any liability insurance policy held by the defendant also should be revealed. This addition was rejected by the Committee.[44] Following the recommendation of the Governor's Committee, both HB 1 and SB 1 as originally introduced contained sections permitting the disclosure of collateral sources. However, while the Governor's Committee recommended disclosing collateral sources without reservation,[45] both bills restricted disclosure to some extent. Both provided that collateral sources, as well as the costs of obtaining them, should be made known to the jury. However, HB 1 specifically excluded disclosure in wrongful death cases; SB 1 demonstrated a similar concern by excluding disclosure of life insurance benefits. Following the recommendation of the Governor's Committee, each bill made use of collateral sources to mitigate damages discretionary to the jury.[46]

The Tort Reform Act of 1987 (HB 1), as enacted by both houses, is not markedly different from the original HB 1 and SB 1. Disclosure of collateral sources was one of the least controversial areas in the compromise bill.[47] As enacted, the Act provides that where a plaintiff seeks special damages for a tortious injury which arises from a tort or contract, evidence of all other compensation except life insurance is admissible. The costs and extent of benefits are also admissible. Reduction of damages based on this evidence is within the trier of fact's discretion. The court is prohibited from directing the jury to reduce benefits based on collateral sources.[48]

C. Punitive Damages

Advocates of tort reform also believe that high punitive damage awards are a contributing factor in the liability insurance crisis.[49] Tort law allows the jury to award punitive damages if "the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime."[50] Punitive damages, as the name implies, are given to punish the wrongdoer for injuring the plaintiff and to deter

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44. COMMITTEE REPORT, *supra* note 2, at 17.

45. *Id.* at 6.

46. HB 1 § 3, as introduced, 1987 Ga. Gen. Assem.; SB 1 § 3, as introduced, 1987 Ga. Gen. Assem.

47. Johnson, *supra* note 32, at 5, col. 1 (The main differences between the House and Senate conferees revolved around joint and several liability and punitive damages.).

48. O.C.G.A. § 51-12-1(b) (Supp. 1987).

49. Humphreys, *Insurers: Get Rid of Punitive Damages*, Fulton County Daily Rep., Oct. 6, 1986, at 1, col. 1. *See also* Davis, *St. Simons Teenager Wins $1 Million Award Against Insurance Company*, Atlanta Const., Dec. 6, 1986, at 7D, col. 1 (case on which article based involved a compensatory damage claim of only $700 and it was immediately cited by the Insurance Information Institute as an example of excessive punitive damages).

50. W. PROSSER & W. KEETON, THE LAW OF TORTS § 2, at 9 (5th ed. 1984).

similar wrongful acts in the future.[51]

Punitive damages have been harshly criticized as giving the plaintiff a windfall recovery beyond compensation for any injury suffered.[52] Many critics argue that punitive damages should be replaced by criminal fines paid to the state.[53] The prospect of a large punitive damages award is thought to encourage litigation of marginal claims. Additionally, the deterrent effect is minimized because punitive damages are generally covered by insurance.[54]

Under prior law, the awarding of punitive damages was left to the discretion of the jury. The amount of such damages was determined by "the enlightened conscience of the jury."[55] Tort reform advocates support caps on punitive damages to restrict the jury's discretion. Ironically, as previously discussed, the Tort Reform Act of 1987 (HB 1) specifically *defers* the apportionment of damages among joint tortfeasors and the consideration of collateral sources to the jury's discretion,[56] while limiting discretion with regard to punitive damages and the amounts of verdicts in general.[57]

Additionally, under prior law, punitive damages could be given to deter the defendant as well as to compensate "the wounded feelings of the plaintiff." However, compensation for both "wounded feelings" and "pain and suffering" was prohibited.[58]

Georgia statutory law allows punitive damages to be awarded in a tort action if "there are aggravating circumstances, in either the act or the intention."[59] Aggravating circumstances have been defined by the courts as "wilful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences."[60] Mere negligence has not been considered sufficient by itself to justify awarding punitive damages.[61] Also, under prior law, the plaintiff in a tort action did not have to request punitive damages in his complaint; they could be awarded by the jury without being requested.[62]

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51. *Id.* at 9-11.

52. Howard, *supra* note 42.

53. W. PROSSER & W. KEETON, *supra* note 50, at 10.

54. Howard, *supra* note 42.

55. Curl v. First Fed. Sav. & Loan Ass'n, 243 Ga. 842, 843, 257 S.E.2d 264, 265 (1979).

56. *See supra* text accompanying notes 36-37 (joint and several liability) and note 48 (collateral sources).

57. *See infra* text accompanying notes 66-71.

58. Blanchard v. Westview Cemetery Inc., 133 Ga. App. 262, 271, 211 S.E.2d 135, 142 (1974), *modified*, 234 Ga. 540, 216 S.E.2d 776 (1975).

59. O.C.G.A. § 51-12-5(a) (Supp. 1987).

60. Dalon Contracting Co. v. Artman, 101 Ga. App. 828, 835-36, 115 S.E.2d 377, 383 (1960).

61. BLI Constr. Co. v. Debari, 135 Ga. App. 299, 217 S.E.2d 426 (1975).

62. Bracewell v. King, 147 Ga. App. 691, 250 S.E.2d 25 (1978).

Despite evidence that jury awards of punitive damages were not excessive, the Governor's Committee agreed with the tort reform advocates that punitive damages should be capped.[63] It specifically proposed a $350,000 cap on such damages. The cap would not apply, however, in the case of an intentional tort. The Committee recommended that only one award of punitive damages be awarded per tortious act or omission regardless of how many causes of action arose.[64]

SB 1 took a stricter approach to punitive damages. It proposed a $250,000 cap and followed the Committee's recommendations exempting intentional torts from the cap and limiting punitive damages to one per tortious act or omission.[65] HB 1 proposed a $500,000 cap and exempted both intentional torts and products liability actions. It did not limit the number of awards per tortious act or omission.[66]

The Tort Reform Act of 1987, as ultimately enacted, revised the procedure for the awarding of punitive damages in a number of ways. Under the Act, a plaintiff must specifically request punitive damages in the complaint.[67] Also, the jury procedure has been bifurcated. First, the jury returns its verdict and decides whether punitive damages will be awarded; then the jury is reconvened to hear evidence to determine the amount of the punitive damages.[68]

The Act also limits the jury's discretion in awarding punitive damages. Punitive damages may not be awarded in cases in which the sole injury is to the "peace, happiness, or feelings" of the plaintiff.[69] Additionally, the Senate's lower cap of $250,000 was accepted. This cap does not apply in cases of intentional torts and products liability actions.[70] However, in a products liability action only one punitive damages award is allowed per tortious act or omission for the same defect in a product, and seventy-five percent of any such award, less reasonable costs and attorney's fees, is to be paid to the state treasury.[71] This result is consistent with the view that punitive damages amount to a criminal fine and also indicates legislative intent to limit plaintiffs' recovery to actual compensation for injuries absent egregious conduct by the defendant. The Act specifically states that

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63. COMMITTEE REPORT, *supra* note 2, at 6, 11-14. *See also* Mantius, *Most Awards in Tort Cases Moderate*, Atlanta J., Oct. 21, 1986, at 8C, col. 1 (study conducted by University of Georgia law professor Thomas A. Eaton of jury verdicts in Fulton and Clarke Counties revealed the median punitive damage jury award to be $15,000 and found punitive damages were awarded in only seven of the 27 Fulton County cases in which they were sought).

64. COMMITTEE REPORT, *supra* note 2, at 11-14.

65. SB 1 § 4, as introduced, 1987 Ga. Gen. Assem.

66. HB 1 § 4, as introduced, 1987 Ga. Gen. Assem.

67. O.C.G.A. § 51-12-5.1(d)(1) (Supp. 1987).

68. O.C.G.A. § 51-12-5.1(d)(1), (2) (Supp. 1987).

69. O.C.G.A. § 51-12-6 (Supp. 1987).

70. O.C.G.A. § 51-12-5.1(g) (Supp. 1987).

71. O.C.G.A. § 51-12-5.1(e)(2) (Supp. 1987).

punitive damages are given solely to deter the defendant and not to compensate the plaintiff.[72]

An additional provision of the Act, first added to the proposals by the House/Senate Conference Committee, changes the standard of proof necessary to justify punitive damages. Instead of the preponderance standard generally applicable in civil cases, clear and convincing evidence of aggravating circumstances is now required.[73]

D. Remittur and Additur

In addition to concerns over high punitive damage awards, dissatisfaction with large jury verdicts led tort reform advocates to propose judicial review of damage awards in general. Under prior law, the awarding of damages was left to the jury's discretion. Damage verdicts were not overturned unless the amounts awarded were "either so small or so excessive as to justify the inference of gross mistake or undue bias" by the jury.[74] The appellate courts upheld jury verdicts unless the amounts were so "flagrantly outrageous" that they shocked the conscience of the court.[75] Given this standard of deference, jury verdicts were rarely overturned.

Despite substantial evidence that the high cost of liability insurance was not caused by excessive jury verdicts,[76] the Governor's Committee recommended that the trial judge be given the discretion to raise or lower damage verdicts deemed "grossly excessive or grossly inadequate."[77] Under this proposal, if the parties did not agree to the redetermination of damages, the judge could order a complete retrial on all issues.[78] Previously, the trial judge was limited to granting a new trial. This proposal affords the trial judge some flexibility to facilitate settlement before ordering a new trial.

The Senate and House bills adopted similar variations on the Governor's Committee's proposal. SB 1 adopted the proposal in all relevant respects.[79] HB 1 proposed to restrict remittur and additur in two relevant respects. First, under the House's proposal, the scope of a new trial would be limited to the consideration of damages only. Second, the trial judge could order only one new trial to reconsider damages.[80]

The Tort Reform Act, as passed, adopted the House's position. Judicial review of damage awards is authorized if the award is "clearly so inadequate or so excessive as to be inconsistent with the preponderance of the

72. O.C.G.A. § 51-12-5.1(c) (Supp. 1987).
73. O.C.G.A. § 51-12-5.1(b) (Supp. 1987).
74. Formerly codified at O.C.G.A. § 51-12-12.
75. Jim Walter Corp. v. Ward, 150 Ga. App. 484, 491, 258 S.E.2d 159, 165 (1979).
76. COMMITTEE REPORT, *supra* note 2, at 6, 11-14.
77. *Id.* at 7.
78. *Id.*
79. SB 1 § 5, as introduced, 1987 Ga. Gen. Assem.
80. HB 1 § 5, as introduced, 1987 Ga. Gen. Assem.

evidence" presented.[81] The judge may order a new trial limited to the determination of damages or propose a higher or lower award. The judge is empowered to use the possibility of a new trial to facilitate settlement at the judicially determined amount.[82] Only one new trial to reconsider damages is allowed.[83]

E. Tort Immunity: Officers and Directors of Charitable and Government Organizations

The Governor's Committee proposed that officers and directors of charitable and governmental organizations be given immunity from liability except for gross negligence or intentional torts.[84] The Senate version adopted this provision with the additional limitation that immunity applies only if the person is acting in good faith within the scope of his official duties.[85] HB 1 had no provision on this issue.

The Tort Reform Act of 1987, as passed by both bodies, essentially adopted the Senate's position. The Act grants immunity to members, directors, and trustees of non-profit or governmental agencies whether or not such persons are compensated for their services. Officers enjoy the immunity only when serving without compensation. The immunity applies only when such a person is acting in good faith, within the scope of his official duties, and the injury is not caused by an intentional tort.[86] The final Act did not include the Senate's proposal that gross negligence be exempted from the statutory immunity. Therefore, in cases of gross negligence, the immunity still applies.[87]

Because of concerns that the legislature might be unable to reach a compromise on the major tort reform bills and therefore hinder tort reform, immunity for officers and directors of charitable and governmental organizations was also addressed in a separate bill, SB 113, which essentially duplicates section 2 of the Tort Reform Act.[88] However, by the time the legislature acted on SB 113, the Tort Reform Act had already been passed. Therefore, because SB 113 was enacted later in time, it is the

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81. O.C.G.A. § 51-12-12(a) (Supp. 1987).

82. O.C.G.A. § 51-12-12(b) (Supp. 1987).

83. O.C.G.A. § 51-12-12(c) (Supp. 1987).

84. COMMITTEE REPORT, *supra* note 2, at 7.

85. SB 1 § 1, as introduced, 1987 Ga. Gen. Assem. (proposing a new Code section, O.C.G.A. § 51-1-20.1).

86. O.C.G.A. § 51-1-20(a) (Supp. 1987) (Instead of adding a new Code section as the Senate had proposed, the Tort Reform Act of 1987 achieved the desired change by amending the existing section.).

87. O.C.G.A. § 51-1-20 (Supp. 1987).

88. Telephone interview with Senator J. Nathan Deal, Senate District No. 49 (May 20, 1987) [hereinafter Deal Interview] (Senator Deal was a sponsor of SB 1 and SB 2, a member of the House/Senate Conference Committee which drafted the compromise Tort Reform Act of 1987, and the sole sponsor of SB 113.).

controlling Act.[89]

The Legislature used SB 113 to clarify concerns expressed about section 2 of the Tort Reform Act.[90] SB 113 restricts the grant of governmental immunity to local governments. This limitation was enacted because the Legislature was concerned that if state government immunity was granted by this section, the courts could interpret the bill as waiving the state's sovereign immunity[91] in situations involving a state agent's bad faith or an intentional tort. SB 113 addresses this potential problem by adding O.C.G.A. § 51-1-20(c), which provides that the immunity given by the new Code subsection is supplemental to any immunity arising from another source. Subsection (c) is intended to ensure that the state's sovereign immunity is preserved.[92]

SB 113 also clarifies the meaning of the term "without compensation." As defined by the Act, compensation does not include "reimbursement for reasonable expenses." Therefore, covered officials are not excluded from the immunity when they are merely reimbursed for expenses, as long as such expenses are deemed reasonable.[93]

F. Criminal Acts on Government Property: Limitation of Action

SB 68, passed unanimously by both the House and Senate, prohibits a tort action from being brought by a person who is injured while involved in committing a criminal act on property owned or leased by a political subdivision of the state.[94] The impetus for the Act came from a California case, which was widely cited by tort reform advocates to illustrate the unfairness of the tort system.[95] In that case, a teenager attempted to steal a floodlight by climbing onto the roof of a high school. While on the roof, he fell through a skylight which had been painted over by the school board. As a result, he suffered serious injuries and became a quadriplegic. Despite his trespass, he was not charged with a crime. He then sued the high school to recover for his injuries. The case was allowed to go forward, but was eventually settled.[96]

Under prior law, the same type of case could have been successfully brought in Georgia. The Georgia courts had ruled that "a person can re-

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89. SB 113, as passed, 1987 Ga. Gen. Assem. (amending O.C.G.A. § 51-1-20). The Tort Reform Act of 1987 passed both the House and Senate on February 20, 1987. SB 113 did not pass the House until March 6, 1987 after being previously approved by the Senate.

90. Deal Interview, *supra* note 88.

91. *Id.*

92. *Id. See* O.C.G.A. § 51-1-20(c) (Supp. 1987).

93. O.C.G.A. § 51-1-20(b) (Supp. 1987).

94. O.C.G.A. § 51-1-39 (Supp. 1987).

95. Strasser, *Tort Tales: Old Stories Never Die*, Nat'l Law J., Feb. 16, 1987, at 39, col. 1 (discussing the case of Bodeine v. Enterprise High School, No. 73225 (Shasta County Super. Ct. Cal. 1982)).

96. *Id.*

cover in tort for injury suffered as a result of his own criminal activity."[97] The mere fact that a party was injured while engaging in a criminal act did not bar suit unless the criminal conduct was also negligent and the sole proximate cause of injury. Even in cases in which the criminal was negligent, recovery was still allowed under comparative fault principles. If the criminal conduct was not deemed negligent, full recovery for any injury suffered was allowed.[98]

One of the overriding concerns of the legislative session was to achieve fairness in tort law.[99] Allowing a person injured during criminal activity to recover was viewed as patently unfair. As a result, SB 68 was passed without opposition. It prohibits recovery for any person injured while engaging in a criminal act on any property owned or leased by a political subdivision of the state. The case law which would allow recovery is preempted by the new Code section.[100]

The Act still allows a cause of action if the injury to the criminal actor is "inflicted by an officer, employee, or agent" of any political subdivision of the state.[101] This language would appear to limit the immunity to injuries resulting from conditions on the land itself. The governmental entity as property owner or lessee is protected from suit. Governmental employees remain liable for their own actions. The state remains vicariously liable for the negligent acts of its authorized agents.

Finally, the bill specifically states that it is not to be construed as waiving any sovereign immunity which applies to a political subdivision.[102] This provision is analogous to the specific retention of sovereign immunity relating to charities and governmental organizations addressed by SB 113.[103]

II. Medical Malpractice Reform in the 1987 Legislative Session

The Governor's Committee also made several recommendations specifically targeting medical malpractice actions. These recommendations included making five years the age of majority for medical malpractice purposes, requiring the pleadings to include an affidavit of a competent expert detailing the specific nature of the alleged negligence, and extending the "Good Samaritan Rule" to cover any medical personnel pro-

97. Long v. Adams, 175 Ga. App. 538, 540, 333 S.E.2d 852, 855 (1985).

98. *See* Johnson v. Thompson, 111 Ga. App. 654, 143 S.E.2d 51 (1965); Allen v. Gornto, 100 Ga. App. 744, 112 S.E.2d 368 (1959). Although neither of these cases involved municipal liability, the holdings could provide the basis for recovery in the absence of tort immunity.

99. Howard, *supra* note 42.

100. O.C.G.A. § 51-1-39 (Supp. 1987).

101. *Id.*

102. *Id.*

103. *See supra* text accompanying notes 91-92.

viding uncompensated medical care.[104]

A. *Statutes of Limitation and Repose*

Under prior statutory law, an action for medical malpractice had to be brought within two years of "the negligent or wrongful act or omission."[105] This provision was revised in 1985 to require that the action be brought within two years from the date of injury or death arising from such act or omission.[106]

Also in 1985, a statute of repose was enacted and set at five years from the date of the alleged tortious conduct.[107] The exception to this limitation for "minors and persons who are legally incompetent because of mental retardation or mental illness" was not changed by the 1985 amendment.[108] Such persons were allowed to bring a cause of action within two years "after their disability [was] removed."[109] The statute of limitations did not begin to run for a minor until the minor reached lawful majority.[110] For a legal incompetent, the statute of limitations was tolled until the person was deemed capable of acting for himself or until an appointed guardian brought the cause of action.[111]

HB 1, as introduced, included a provision removing the exception to the medical malpractice statute of limitations previously granted to minors and mental incompetents. The bill prohibited tolling the statute of limitations during minority or incompetency.[112] The House Judiciary Committee recommended tolling the statute of limitations until a minor reached age five. This recommendation was the same as that of the Governor's Committee. With this modification, the provision was adopted by the House.[113]

SB 2, as introduced, set the age of majority at five years for medical malpractice purposes.[114] A provision also was added to rescind the exception to tolling the statute of limitations previously allowed for mental incompetents.[115]

HB 1 and SB 2 were then referred to the House/Senate Conference Committee, which formulated the compromise bill. The medical malpractice provisions of HB 1 were absorbed into SB 2, and the compromise bill

104. COMMITTEE REPORT, *supra* note 2, at 6-8.
105. 1976 Ga. Laws 1363, 1364 (formerly found at O.C.G.A. § 9-3-71).
106. 1985 Ga. Laws 556 (formerly found at O.C.G.A. § 9-3-71).
107. *Id.*
108. 1984 Ga. Laws 580, 581 (formerly found at O.C.G.A. § 9-3-90).
109. *Id.*
110. Barnum v. Martin, 135 Ga. App. 712, 715, 219 S.E.2d 341, 344 (1975).
111. Cline v. Lever Bros., 124 Ga. App. 22, 183 S.E.2d 63 (1971).
112. HB 1 § 2, as introduced, 1987 Ga. Gen. Assem.
113. HB 1 § 2 (HCS), 1987 Ga. Gen. Assem.
114. SB 2 § 1, as introduced, 1987 Ga. Gen. Assem.
115. O.C.G.A. § 9-3-73(b), (c)(1) (Supp. 1987).

was designated the Medical Malpractice Reform Act of 1987.[116] The conference committee bill, later approved by both bodies, is identical to the amended SB 2 which had passed the Senate.

The Act amends O.C.G.A. § 9-3-73, which pertains to the time period allowed for minors and mental incompetents to bring actions for medical malpractice. The Act creates a two year statute of limitations for minors and incompetents.[117] The statute of limitations is tolled, however, until a minor reaches age five. Therefore, a minor who alleges that the cause of action arose prior to his fifth birthday is permitted to file a medical malpractice action anytime prior to his seventh birthday.[118] Prior to this Act, the minor had two years after reaching the age of majority, which in Georgia is age eighteen, to bring suit.[119] This change was motivated by a desire to prevent "stale medical malpractice claims."[120]

Similarly, the Act brings both legal incompetents and minors within the purview of a five year statute of repose for medical malpractice actions. Mental incompetents are required to bring an action within five years of the "date on which the negligent or wrongful act or omission occurred."[121] Minors five years of age or older on the date of the tortious act are also given a maximum of five years within which to bring an action. Minors under the age of five when the tortious act occurred are given until the age of ten to bring suit.[122]

None of the above limitations apply if a foreign object was left in a patient's body as a result of medical negligence.[123] The applicable statute of limitations in such circumstances for all patients, including minors and mental incompetents, allows suit to be filed within one year after the foreign object is discovered.[124]

B. Specific Pleading Requirements

Prior to 1987, the plaintiff in a medical malpractice action had to conform only with the general statutory pleading requirements of the Civil Practice Act.[125] No expert affidavit containing an allegation of negligence was specifically required in the pleadings. The plaintiff's claims for relief had to show only the grounds of the complaint, a statement of the claim showing entitlement to relief, and a demand for judgment as in all other

116. SB 2 § 1 (CCS), 1987 Ga. Gen. Assem.
117. O.C.G.A. § 9-3-73(b) (Supp. 1987). *See also* O.C.G.A. § 9-3-71(a) (Supp. 1987).
118. *Id.*
119. O.C.G.A. § 39-1-1(a) (1982).
120. O.C.G.A. § 9-3-73(f) (Supp. 1987).
121. O.C.G.A. § 9-3-73(c)(1) (Supp. 1987).
122. O.C.G.A. § 9-3-73(c)(2) (Supp. 1987).
123. O.C.G.A. § 9-3-73(e) (Supp. 1987).
124. O.C.G.A. § 9-3-72 (Supp. 1987).
125. O.C.G.A. §§ 9-11-1 to -16 (1982).

civil actions.[126] Notice pleading was considered adequate to support a cause of action for medical malpractice.

As introduced and passed by the House, HB 1 contained no provision for altering the pleading of medical malpractice claims.[127] SB 2, as introduced in the Senate, required the filing of an expert's affidavit with the pleadings in both medical malpractice and products liability actions.[128] The bill was subsequently amended before passage by the Senate deleting the products liability affidavit requirement.[129]

The Medical Malpractice Reform Act of 1987, as passed by both Houses, adopted the Senate's position and modified the pleading requirements in medical malpractice actions. "[A]n affidavit of an expert competent to testify" specifically alleging "at least one negligent act or omission claimed to exist and the factual basis" for the allegation must be filed with the complaint.[130] This contemporaneous filing requirement is relaxed in cases filed within ten days of the expiration of the statute of limitations when the plaintiff alleges hardship in obtaining the expert's affidavit. In this situation, the plaintiff is automatically given a forty-five day extension to obtain the affidavit and supplement the pleadings. The trial court has discretion to grant further extensions as justice requires.[131] However, such an extension cannot be construed to extend the statute of limitations.[132] Additionally, if the plaintiff is granted any such extension, the defendant is allowed an additional thirty days after the supplemental affidavit is filed in which to answer.[133]

C. Immunity for Charitable Institutions and Gratuitous Providers of Medical Care

Since 1962, Georgia has granted immunity from civil liability to medical personnel providing medical care in instances of emergency when the service was rendered without charge. Under this "Good Samaritan Rule," immunity applies to any person rendering non-compensated aid at the scene of an accident.[134] This provision has been construed to apply only to volunteers; persons under a legal duty to render aid are deemed outside the Act's purview.[135]

HB 1, as introduced and passed by the House, did not contain a provi-

126. O.C.G.A. § 9-11-8(2) (1982).
127. HB 1 (HCSFA), 1987 Ga. Gen. Assem.
128. SB 2, as introduced, 1987 Ga. Gen. Assem.
129. SB 2 (SCS), 1987 Ga. Gen. Assem.
130. O.C.G.A. § 9-11-9.1(a) (Supp. 1987).
131. O.C.G.A. § 9-11-9.1(b) (Supp. 1987).
132. O.C.G.A. § 9-11-9.1(d) (Supp. 1987).
133. O.C.G.A. § 9-11-9.1(c) (Supp. 1987).
134. O.C.G.A. § 51-1-29 (1982).
135. 1972 Op. Att'y Gen. U72-62.

sion for "Good Samaritan" medical malpractice immunity.[136] SB 1, as introduced in the Senate, adopted the position of the Governor's Committee and proposed expanding "Good Samaritan" immunity to charitable institutions and non-compensated providers of medical care.[137] As passed by the Senate, the bill also provided for immunity for noncompensated veterinarians.[138] After passage by the Senate, the "Good Samaritan" provision was deleted from SB 1 and added, with modification, to SB 2. As originally proposed in SB 1, the "Good Samaritan" expansion applied to those who provide medical care "without the expectation of compensation."[139] Due to concerns that this would include providers receiving subsequent reimbursements, the wording was changed to "without the expectation or receipt of compensation" when the provision was incorporated into SB 2.[140] Additionally, the reference to veterinarians was deleted.[141] As amended, SB 2 passed the Senate.

The Medical Malpractice Reform Act, adopting the Senate's position, grants limited immunity from civil liability to licensed health care providers who "voluntarily and without the expectation or receipt of compensation" provide service at the request of hospitals, public schools, nonprofit organizations, and state agencies.[142] The requesting bodies also are granted immunity. The immunity applies only to cases of mere negligence. Providers are still liable for "gross negligence or willful or wanton misconduct."[143]

CONCLUSION

After over three years of intense debate, the Georgia Legislature passed a compromise tort reform package in 1987. Both the Tort Reform Act of 1987 and the Medical Malpractice Reform Act of 1987, as well as SB 68 and SB 113, became effective on July 1, 1987. Tort reform was of major importance during the 1987 legislative session, but its effect on liability insurance rates is far from certain. A United States General Accounting Office report indicates that similar tort reform legislation enacted in

136. HB 1, 1987 Ga. Gen. Assem. (as passed by House, Jan. 14, 1987).
137. SB 1 § 2, as introduced, 1987 Ga. Gen. Assem.
138. SB 1 § 4 (SCS), 1987 Ga. Gen. Assem.
139. *Id.*
140. O.C.G.A. § 51-1-29.1(a)(1) (Supp. 1987).
141. *Id.*
142. *Id.*
143. O.C.G.A. § 51-1-29.1(a) (Supp. 1987). This was one of the most emotionally debated provisions of the bill. Proponents argued that it was necessary because many physicians were refusing to treat indigents because of concerns about lawsuits. Opponents, however, contended that the provision would lead to a two-tiered system of health care and subject poor people to substandard medical treatment. *See* Straus, *Senate Amends, Then Passes Tort Revision Package*, Atlanta J. & Const., Jan. 17, 1987, at 1B, col. 5 (detailing the opposition of Senator Horace Tate, Senate District No. 38, to the "Good Samaritan" immunity provision).

other states has had little impact on rates.[144] Florida is still debating the impact of a similar tort reform package which was passed in 1986.[145]

Some legislators doubt whether tort reform will affect insurance rates at all.[146] Even ardent tort reform advocates do not claim that the legislation will lead to lower insurance rates.[147] However, supporters do believe that tort reform will slow the increase in rates and add stability to the liability insurance system.[148]

Regardless of the impact on insurance rates, the tort reform debate is likely to continue. If the impact is small, tort reform advocates will likely push for passage of more sweeping reforms, while opponents will argue that tort reform has failed and should be abandoned. Similarly, if insurance rates decrease significantly the cause of the decrease will be disputed, with advocates citing tort reform and opponents citing newly enacted insurance industry reforms.

The tort reform legislation passed in 1987 was a compromise and not the end of the tort reform debate. Neither advocates nor opponents were entirely pleased with the end result, and it will take time to assess the effects of this legislation. However, after the deadlock of 1986 and the enormous amount of time devoted to tort reform before and during the 1987 session, perhaps passage of these measures will enable the legislature to shift its focus from tort reform to other issues of state and local concern.

D. Gresham

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144. *See* Straus, *Experts Doubt Effects of Tort Bills*, Atlanta J. & Const., Jan. 18, 1987, at 1A, col. 4 (detailing study of six states that had previously enacted tort reform legislation and found that from 1980-1986 medical malpractice rates had increased in each state; the rate of increase ranged from 50 to 547%; additionally, claims per doctor increased in all six states and the average medical malpractice claim paid increased in five of the six states).

145. Johnson, *Florida Debates Tort Reform Impact*, Fulton County Daily Rep., Jan. 15, 1987, at 1, col. 1 (Florida's insurance commissioner claims that insurance companies have saved $53 million in that state due to tort reform; ironically, insurance companies, the leading proponents of tort reform, report that the effect of tort reform on claims paid has been negligible; this seemingly contradictory position may best be explained by a provision in Florida's law, not included in Georgia's tort reform package, which requires insurance companies to reduce premiums in proportion to their savings on claims).

146. Straus, *Decline in Insurance Rates Due to Tort Reform Not Likely*, Atlanta J. & Const., Mar. 15, 1987, at 3B, col. 4 (quoting Representative Rudolph Johnson, House District No. 72, "Tort reform won't make a damn bit of difference in insurance rates. You can take that to the bank . . . .").

147. Straus, *supra* note 144 (quoting Lieutenant Governor Zell Miller, one of the leading advocates of tort reform in Georgia, as follows: "I have never, ever said that if we passed something it would lower rates. The best we can hope for is some leveling off.").

148. Howard, *supra* note 42 ("The current tort reform package should not be viewed as a cure-all, but as an important first step in stabilizing costs and in creating a fairer trial procedure.").