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Tort "Reform": Minnesota Does Not Need Legislation That Makes Victims Pay for the Negligence of Others

David J. Moskal

Peter H. Berge

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DAVID J. MOSKAL†
PETER H. BERGE‡

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INTRODUCTION

"A crisis can be a truly marvelous mechanism for the withdrawal or suspension of established rights. . . ."[1]

† Mr. Moskal is an associate practicing with the firm of Schwebel, Goetz & Sieben, P.A. He received his undergraduate degree with highest honors from De Paul University. Mr. Moskal received his J.D. degree magna cum laude from William Mitchell College of Law, where he graduated first in his class and served as an editor on the law review.

‡ Mr. Berge is an associate with the law firm of Schwebel, Goetz & Sieben, P.A., where he specializes in motion practice and appeals. A cum laude graduate of William Mitchell College of Law, Mr. Berge is a former editor of the William Mitchell Law Review.

1. Fein v. Permanente Medical Group, 38 Cal. 3d 137, 168, 695 P.2d 665, 687, 211 Cal. Rptr. 368, 390 (1985) (Bird, C.J., dissenting) (quoted in Jenkins &

The year 1986 witnessed, in what has become a decennial event, yet another "insurance crisis." Minnesota felt the effects along with the rest of the country:

> It nearly snuffed out the Ice Palace, and it plagues day care centers, cities, professionals and businesses of all stripes: the liability insurance crisis. Insurance rates have skyrocketed, shooting out of reach for some people. For some activities, insurance has vanished at any price. The crisis is causing drastic trouble for many, so many are calling for drastic measures to combat it . . . [2]

Just what measures should be taken has been a matter of split opinion: the insurance lobby calling for "tort reform," consumer advocates and trial attorneys calling for "insurance reform."

Solomonically, the 1986 Minnesota Legislature enacted legislation encompassing both "tort reform" and some elements of "insurance reform."[3] The exact nature of that legislation and its impact upon tort law and trial practice has been examined elsewhere.[4] The authors intend this Article to address the question of whether additional changes in the civil liability system are needed.

No doubt, our civil liability system is not perfect. Before contemplating any remedy, however, a firm understanding of the nature of the malady and its probable responses to treatment is axiomatic. To that end, this Article examines whether there is an "insurance crisis,"[5] whether the insurance industry's financial woes are actually the result of a "litigation explosion" or merely the result of the industry's business practices,[6] whether the changes proposed will actually have their proposed effects,[7] and whether proposed changes are constitutional.[8]

Schweinfurth, *California's Medical Injury Compensaiton Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829, 935 (1979)).

2. St. Paul Pioneer Press, Mar. 2, 1986, at 2H, col. 1.

3. Act of March 25, 1986, ch. 455, §§ 1-95, 1986 Minn. Laws 840, 840-86.

4. *See generally* Note, *Introduction to Minnesota's Tort Reform Act*, 13 WM. MITCHELL L. REV. 277 (1987).

5. *See infra* note 9 and accompanying text.

6. *See infra* notes 10-49 and accompanying text.

7. *See infra* notes 50-67 and accompanying text.

8. *See infra* notes 68-102 and accompanying text.

I. THE CIVIL LIABILITY SYSTEM HAS NOT CAUSED THE CRISIS

No doubt there has been a crisis in the availability and cost of liability insurance. In a well orchestrated and heavily financed campaign, the insurance industry has cast blame on the civil liability system and plaintiff's trial lawyers for the crisis. The campaign claims that Americans are "sue happy," that jury awards are excessive and that, as a result, the insurance industry is in dire financial straights. Is this so, or is the crisis, as *Consumer Reports* found it, "A Manufactured Crisis?"[9]

A. Society is Not "Sue Happy"

Proponents of tort reform argue that our courthouses are literally exploding with new lawsuits filed by malingering plaintiffs and their money-grubbing attorneys. This is a myth.

The myth is fostered by frequent reference to the February, 1986 Justice Department Report discussing the availability and affordability of liability insurance.[10] The Justice Department Report states that there is a significant increase in the frequency of litigation. The assertion is based only on data indicating that product liability case filings in federal district courts had increased 758%, from 1,579 in 1974 to 13,554 in 1985.[11] With no sound basis to arrive at such a conclusion, the report concludes that "[t]here is no reason to believe that the states (sic) courts have not witnessed a simliar dramatic increase in the number of product liablity claims."[12]

Data from state courts indicate otherwise. A recent study by the National Center for State Courts indicates that the number of tort claims filed in state courts increased only nine percent from 1978 to 1984.[13] That increase is likely attributable al-

9. *The Manufactured Crisis: Liability-Insurance Companies Have Created A Crisis and Dumped It on You*, CONSUMER REPORTS 541, 544 (August 1986) [hereinafter *Manufactured Crisis*].

10. Justice Department, *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability* (Feb. 1986) [hereinafter Justice Department Report] (Copy on file at the William Mitchell Law Review Office).

11. *Id.* at 45.

12. *Id.*

13. *See* COURT STATISTICS AND INFOR. MGMT. PROJECT, NATIONAL CENTER FOR STATE COURTS, A PRELIMINARY EXAMINATION OF AVAILABLE CIVIL AND CRIMINAL TREND DATA IN STATE TRIAL COURTS FOR 1978, 1981 AND 1984, at 2 (April, 1986) (study limited to county courts) [hereinafter Court Statistics Project] (Copy on file at the William Mitchell Law Review Office).

most entirely to an increase in population of eight percent over that same time period.[14] In Minnesota, there was actually a twenty-three percent decrease in tort, contract, and real property disputes filed during that time period.[15] While the study does not measure federal litigation, any increases in the federal system are relative trifles since state court litigation accounts for ninety-eight percent of all litigation in this country.[16]

The statistics from the state court administrator's office in Minnesota show no great increase in the number of personal injury filings. Indeed, the figures reflect a decrease in the percentage of personal injury filings as against other civil filings.[17] In 1981, 3,936 personal injury filings represented 38.8% of the total filings;[18] in 1983, 4,626 personal injury filings represented 21.6% of all filings;[19] and, in 1985, 5,410 personal injury filings represented only 18.1% of all civil filings.[20] Considering that the population of the state grew during that time period, neither the numbers nor the percentage should raise any concerns about a tort litigation explosion in this state.

Americans in general, and Minnesotans in particular, are not the least "sue happy."[21] There is no litigation explosion. The high cost and unavailability of liability insurance in 1986 cannot, therefore, be attributed to increased litigation.

B. Jury Awards Are Not Excessive

"THE LAWSUIT CRISIS IS BAD FOR BABIES"; "THE LAWSUIT CRISIS IS PENALIZING SCHOOL SPORTS"; "INSURANCE IS GETTING KILLED IN SELF-DEFENSE."[22] These are the headlines of insurance industry advertising. All are meant to get at the same idea: juries are out of control,

14. *Id.* at 2, Tables 32 and 34.

15. *Id.*, Table 32.

16. *See* Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 81 n.21 (1983).

17. *See generally* Appendix.

18. *Id.*, Table 13.

19. *Id.*

20. *Id.*

21. *See* 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, 69 (1983).

22. *Manufactured Crisis*, *supra* note 9, at 545.

awarding millions of dollars to the undeserving uninjured. This too is a myth.

Insurance company lobbyists will likely rely on the previously mentioned Justice Department Report which adopts the statistics and findings of a private research group: Jury Verdict Research.[23] The report found jury verdicts excessive because "between 1975 and 1985 the average medical malpractice jury verdict increased from $220,018 to $1,017,716, and the average product liability jury verdict increased from $393,580 to $1,850,452."[24]

"The Jury Verdict Research statistics," writes *Consumer Reports*, "don't reflect reality very well."[25] Only initial jury verdicts are recorded. Even the Justice Department Report admits that the Jury Verdict Research data "is incomplete and is subject to refinement . . . . The reported average annual verdicts are not used by the Working Group as an accurate statement . . . of the average jury verdict in any particular year."[26] No allowance is made for remittitur, post trial settlements, reduction to present value of future damages, directed verdicts, new trials, or verdicts overturned upon appeal. Only plaintiffs' verdicts are included, defense verdicts are not. No accounting of pre-trial settlements is attempted; pre-trial settlements account for ninety to ninety-five percent of all tort cases. [27] Pretrial settlements are generally smaller than actual jury verdicts.[28] The data is incomplete and inaccurate. The average award to an injured person is significantly lower than the statistics published in the Justice Department Report indicate.

To compound the error, the Jury Verdict Research statistics are presented in a manner which skews the results. By presenting the statistics on the basis of average awards, the results are susceptible to being skewed by a single large recovery. Use of the median award is a much better way to determine the average injured person's award. For example, the average recorded verdict in Cook County, Illinois in 1983 was

23. *See generally* Justice Department Report, *supra* note 10.

24. *Id.* at 2-3.

25. *Manufactured Crisis*, *supra* note 9, at 544.

26. Justice Department Report, *supra* note 10, at 35-36 n.33.

27. *See* Galanter, *supra* note 21, at 26-28; Trubek & Sarat, *supra* note 16, at 89.

28. DANZON, MEDICAL MALPRACTICE THEORY, EVIDENCE AND PUBLIC POLICY 31 (1985).

$137,370.[29] That certainly was not what the average injured person received, for nearly ninety percent of reported verdicts were lower.[30] The median award was only $8,800.[31] The Rand Corporation found, in its study of Cook County verdicts, that jury verdicts increased no more than the rate of inflation and that, in at least half of all jury awards, only "small" amounts of money are awarded.[32] The Jury Verdict Research study starts with biased assumptions, relies on incomplete and unreliable data, and thereby comes to erroneous conclusions.

Statistics in Minnesota do not bear out any significant increase, even in average jury verdicts. For example, in Hennepin County in 1981 the average jury verdict was $17,153.86.[33] Seventy-four percent of all verdicts were lower than the average.[34] In 1982, the average jury verdict dipped to $14,063.30 with 78.6% of all verdicts lower than the average.[35] The average verdict rose in 1983 to $19,049.12, but 83.7% of the verdicts reached were below that amount.[36] Average verdicts for 1984 took a nose dive to $13,682.72 with 79.8% of all verdicts being lower.[37] In 1985, the average jury verdict was $16,003.57 with 77.1% of all verdicts below that average.[38] Similar statistics are seen in other Minnesota counties.[39]

Juries are not awarding exorbitant verdicts. As the Consumer Federation of America reported, "Rather than running wild, as the Reagan Administration alleges, American juries are demonstrating the common sense of the American public . . . ."[40] During the last decade, juries have increased awards

29. *See* DANIELS, PUNITIVE DAMAGES: A STORM ON THE HORIZON?, PRELIMINARY REPORT OF THE PUNITIVE DAMAGES PROJECT 13 (1986) [hereinafter DANIELS]. *See also* RAND CORP., THE INSTITUTE FOR CIVIL JUSTICE: AN OVERVIEW OF THE FIRST SIX PROGRAM YEARS 24-34 (1986) (citing to PETERSON & PRIEST, THE CIVIL JURY: TRENDS IN TRIALS AND VERDICTS, COOK COUNTY, ILLINOIS, 1960-1979 (1982)) (Copy on file at the William Mitchell Law Review Office).

30. DANIELS, *supra* note 29, at 13.

31. *Id.*

32. *Id.*

33. *See* Appendix, Table 3.

34. *Id.*

35. *Id*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*, Tables 7, 11 and 15.

40. CONSUMER FEDERATION OF AMERICA, PRODUCT LIABILITY JURY AWARDS REFLECT COMMON SENSE OF AMERICAN PEOPLE 1 (May 30, 1986) (Copy on file at the William Mitchell Law Review Office).

by no more than the value of changing economic and social conditions. For example, during the last decade alone, inflation increased by eighty-three percent and medical costs increased at least twenty-three percent beyond the general inflation rate.[41] Jury verdicts rising in line with inflation could not have caused the skyrocketing costs and unavailability of liability insurance.

C. The Insurance Industry is Healthy

The insurance industry claims that the business of insurance has become unprofitable because of the "tort crisis." This is the most pernicious of all the myths.

The insurance industry is presently profitable. While one industry advertisement stated that $116 was paid out for every $100 of premium taken in,[42] that is a deceptive accounting. It fails to take into account the $121 billion earned from investments. It also ignores the industry's favorable tax standing, which allowed many of its most profitable companies to evade paying taxes altogether.[43] Between 1975 and 1984, the industry's assets more than tripled to $265 billion.[44] Its surpluses are at record levels of nearly sixty-four billion dollars.[45] The Justice Department Report concedes that "the [insurance] in-

41. *Id.* at 2.

42. THE MINNESOTA TRIAL LAWYERS ASSOCIATION, SELECTED SHORT READINGS ON THE CIVIL JUSTICE SYSTEM AND THE INSURANCE SCANDAL 20 (1986) (Copy on file at the William Mitchell Law Review Office).

43. *See Manufactured Crisis, supra* note 9, at 547.

The mechanics of the insurance companies' tax dodge are that when any claim is made, the company may estimate what the ultimate payment will be and set that money aside as a "loss reserve." Although the claim will not be paid out for years, for tax purposes, that money can be deducted as a loss. It would be unrealistic to assume that the amount reserved is often underestimated, since that amount is left to the judgment of the insurance company. As Natwar M. Gandhi of the U.S. General Accounting Office said:

> As a result of certain tax advantages, many property/casualty companies have not paid federal income taxes for a number of years and, in fact, have qualified for refunds. While property and casualty companies had about $46-billion in underwriting losses from 1975 through 1984, they had about $121-billion in investment gains during this period, resulting in a net gain of about $75-billion for those years. From 1975 through 1984, federal income taxes were a negative $125-million, a rate of minus 0.2 percent of the net gain.

Id. Recent changes in the tax law will have little effect on insurance companies.

44. Justice Department Report, *supra* note 10, at 18.

45. *Id.*

dustry is currently making a profit . . . ."[46]

No end in the industry's profit-making trend is foreseen. The federal government's General Accounting Office (GAO) expects that the industry will record profits of ninety billion dollars from 1986 to 1990.[47] Wall Street is similarly bullish on the insurance industry's long-term profitability. The Salomon Brothers brokerage house forecasts that the property/casualty industry will see profits increase twenty-five percent over the next five years.[48]

Not surprisingly, the value of stock in insurance companies has skyrocketed dramatically during the last two years. In fact, insurance stocks in 1985 rose in value by fifty percent, approximately twice the Dow Jones industrial average increase.[49] During the last decade, the property/casualty insurance stock index has risen more than 500%, five times the rise of the Dow Jones average.[50] Over the last sixteen years, the property/casualty index is the "growth leader with [a growth rate of] 524 percent."[51]

If this is a picture of an industry in crisis, it is a crisis the steel and shoe industries can only wish to have visited upon them. If no other statistic shows the manufactured character of this "crisis," the past, present, and future profitability of the insurance industry does. This "growth leader" industry needs no more financial help from its state's legislature or its citizens.

II. THE INSURANCE INDUSTRY ITSELF IS THE CAUSE OF THE CRISIS

The fact that the civil liability system has not caused the crisis in affordability and availability of liability insurance does

46. *Id.*

47. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, AN ANALYSIS OF THE CAUSES OF THE CURRENT CRISIS OF UNAVAILABILITY AND UNAFFORDABILITY OF LIABILITY INSURANCE 17 (May 1986) [hereinafter ATTORNEYS GENERAL] (citing *Profitability of the Property/Casualty Insurance Industry: Hearings Before The Subcomm. on Oversight, House Comm. on Ways and Means*, (May 3, 1986) (Statement of Johnny C. Finch, Senior Associate Director, Gen. Gov. Div., U.S. Gen. Accounting Office)) [hereinafter Finch Statement] (Copy on file at the William Mitchell Law Review Office).

48. *Id.* (citing SALOMON BROTHERS, INC., PROPERTY/CASUALTY INS. ORG., FIVE-YEAR REVIEW AND OUTLOOK, 1985 Edition (Aug. 1985)).

49. King, *1985 Insurance Stock Trends*, BEST'S REVIEW, PROPERTY/CASUALTY INS. ED., 21 (Feb. 1986).

50. *Id.*

51. *Id.*

not answer the question of where the cause in fact lies. By process of elimination only one party is left: the insurance industry itself. The industry's own business practices are, in fact, the cause of the crisis.

The insurance industry is cyclical. During the late 1970's and the early 1980's interest rates were on the rise, peaking near twenty-two percent. In an "attempt to generate cash flow for investments, insurers competed aggressively for premium dollars, knocking prices more and more out of line with actual costs."[52] In order to attract customers and gain policy dollars to invest, the insurers undervalued risks, assuming the difference could be made up from investments.[53] Since 1983, interest rates have precipitously dropped to unexpected lows at the same time that the risky policies written by the companies are coming due.

Although premiums were priced adequately to pay for losses during the period of high interest rates, those premiums are presently inadequate to pay for losses at a time of declining interest rates. The present premium increases and the unavailability of insurance for some activities are brought about by the need to make up for the drastic drop in interest income suffered by the insurance industry. It is an injustice to blame the crisis on the civil litigation system; the insurance industry itself is responsible for the insurance premium explosion.

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52. *See* INSURANCE SERVICES OFFICE, 1985, A CRITICAL YEAR (May 1985) [hereinafter CRITICAL YEAR].

53. Even the Justice Department Report acknowledges the cyclical nature of the insurance industry and the aggressive competition for premium dollars:

> For the better part of seven years, the insurance industry has been engaged in a brutal price war. During the early 1980's, the price for commercial insurance was decreasing, sometimes sharply, as insurers vied for premium dollars to invest at the high interest rates then in effect . . . .

See Justice Department Report, *supra* note 10, at 22 (quoting ISO, FINANCIAL CONDITION OF THE INSURANCE INDUSTRY—AN UPDATE (1985)). The nonpartisan GAO noted that the industry's "strategy has been to sacrifice underwriting gains for investment gains." Finch Statement, *supra* note 47, at 3. BUSINESS WEEK states that "[t]he rate hikes . . . result largely from the insurance industry's own mismanagement." Glaberson & Farrell, *Commentary,* BUSINESS WEEK, 24 (April 21, 1986). Even some members of the insurance industry admit that "[p]ricing had failed to keep pace with loss costs and lag in the nation's overall economic growth has brought insurers into their current predicament." *See* CRITICAL YEAR, *supra* note 52, at 6.

III. Past Tort Reform Has Not Lowered Insurance Rates

The civil justice system is not the cause of the unaffordability and unavailability of liability insurance. This is best exemplified by the inability of past tort reform efforts to control the rising cost and availability of insurance. In the mid-1970's, a similar "crisis" occurred in the insurance industry. During the "crisis," the insurance industry argued that changes in the civil justice system would alleviate the problem. Several states were convinced to enact tort reform legislation.

The Iowa Legislature, for example, made changes in its statute of limitations,[54] the collateral source rule, [55] and abolished joint and several liability[56] in response to the proffered crisis. Former Iowa Senate Majority Leader Lowell Junkins testified that those legislative changes were made:

> under the instructions that if [Iowa] were to do so, the court system would clear up, the claims would be fewer, the deep-pocket theory would no longer affect us . . . .
> We were told that we needed to change the joint and several liability statute in our state in order to provide for, number 1, affordable insurance, and number 2, available insurance in the cases where it was unavailable.[57]

Nonetheless, in 1986, forty-one counties in Iowa were notified that their liability coverage would be cancelled within thirty days, and many later obtained coverage by paying premium increases of up to 1,000%.[58] Senator Junkins conluded that "no benefits" came from changes made in the tort system, and warned other states not to engage in "herd mentality" by making radical changes in their tort law without full facts as to the real causes and possible solutions to the problem.[59]

54. The 1975 amendment provided a separate period for commencement of medical malpractice suits. Prior to 1975, all tort claims were subject to a two-year limitation for filing after the cause of action accrued. Iowa Code Ann. § 614.1(3) (West 1975). Subsequent to 1975, medical malpractice actions were subject to the additional limitation that in "no event" may the action commence more than six years from the date the act occurred. Iowa Code Ann. § 614.1(9) (West Supp. 1986).

55. Iowa Code Ann. § 147.136 (West Supp. 1986).

56. Iowa Code Ann. § 613.3 (*repealed by* Act of May 17, 1984, ch. 1293, § 12, 1984 Iowa Acts 524, 526).

57. Attorneys General, *supra* note 47, at 40 (*citing* Texas Joint Senate and House Committee to Study Liability Insurance 3 (Feb. 8, 1986) (testimony of Lowell L. Junkins, Former Senate Majority Leader for the State of Iowa)).

58. *Id.*

59. *Id.* at 41.

A 1985 study of medical malpractice insurance funded by the U.S. Healthcare Financing Administration found that tort reform had little effect on medical malpractice rates:

> Almost all states enacted legislation in response to the rapid rise in malpractice insurance premiums which occurred during the mid-1970's . . . . The empirical results of the study presented here give no indication that individual state legislative actions, or actions taken collectively, had their intended effects on premiums.[60]

By far the best demonstration of the ineffectiveness of past tort reform is the experience of Ontario, Canada. Ontario tort laws are an insurance company's idea of nirvana. Damages are caped at $100,000 in 1978 Canadian dollars;[61] punitive damages are unknown save for intentional torts;[62] contingency fees are prohibited;[63] judges, rather than juries, sit as finders of both fact and law;[64] and, in the event that the plaintiff does not prevail, he must pay the defendant's attorney fees as well as his own.[65] Nonetheless, Ontario faces the same insurance problems that Minnesota faces. Day care centers,[66] municipalities,[67] school boards,[68] hospitals,[69] and even the Candian Na-

60. *See* Sloan, *State Responses to the Malpractice Insurance "Crisis" of the 1970's: An Empirical Assessment*, 9 J. HEALTH POLITICS, POLICY & L., 629, 629 (1985).

61. ONTARIO LAW REFORM COMMISSION, REPORT ON PRODUCTS LIABILITY 62 (1979) [hereinafter ONTARIO LAW REFORM]; *See also* Andrews v. Grand and Toy Alberta Ltd., 2 S.C.R. 229 (1978).

62. ONTARIO LAW REFORM, *supra* note 61, at 75; *See* LINDEN, CANADIAN TORT LAW 49-51 (1977).

63. ONTARIO LAW REFORM, *supra* note 61, at 72, 75.

64. *Id.* at 74, 102-04.

65. *Id.* at 72, 76.

66. *Liability coverage crunch may shut day-care agencies*, Toronto Star, Jan. 10, 1986, at —, col. —. (Copy on file at the William Mitchell Law Review Office). The article recounts how several day care centers could not find insurance at any price:

> Family Day Care, one of the oldest registered charities in Canada, has been in operation for 135 years and has never had an insurance claim, [its director] said. Its premiums rose 65 percent last year to about $2,500 but this year the insurer refused to renew the policy.
>
> "At this point we are willing to pay 1,000 per cent more if necessary, but we can't even get a quote," he said.

Id.

67. *'Crisis' team to investigate soaring price of insurance*, Toronto Star, Jan. 10, 1986, at —, col. —. (Copy on file at the William Mitchell Law Review Office). The article details the financial crisis faced by Ontario cities, school boards, and hospitals because of rising insurance prices. *Id.*

68. *Id.*

69. *Id.*

tional Ski Team[70] found renewing their insurance policies exorbitantly expensive if they could find insurance at all.[71] Having had so little effect in the past, it is difficult to see how similar tort reform will be effective in the future.

IV. Constitutional Considerations

Despite the fact that there has been no litigation explosion in Minnesota, and despite the fact that juries have not been overly generous in their awards, the insurance industry is still likely to come to future legislatures with proposals for tort reform. Such reform will not be effective, and for that reason alone should not be enacted. Grave questions concerning the constitutionality of these proposals also advise caution before action is taken on further tort reform. While it is beyond the scope of this Article to definitively explore all possible constitutional infirmities of the proposed legislation, an overview is in order. In particular, proposals to limit plaintiffs' attorneys' fees and cap damage awards should give the legislature pause, for they violate the fundamental tenants of both our state and federal constitutions.

A. Equal Protection

Both the Minnesota and U.S. Constitutions require equal protection of the laws.[72] In the words of the U.S. Constitution, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[73] While not demanding absolute equality, equal protection demands that those similarly situated be treated similarly.[74] Its purpose is to "secure to every person the right to be free from arbitrary and intentional discrimination."[75]

Three basic tests have evolved for evaluating equal protec-

70. *Insurance problems may curtail season for canadian skiiers*, Globe Mail, Jan. 15, 1986, at —, col. A1. (Copy on file at the William Mitchell Law Review Office.) Inability to get sufficient liability insurance threatened to force the Canadian National Ski Team to leave the World Cup circuit and "cripple competitive skiing across Canada." *Id.*

71. *Id.*

72. *See* U.S. Const. amend. XIV, § 1, cl. 2; Minn. Const. art. 1, § 2.

73. U.S. Const. amend. XIV, § 1, cl. 2.

74. *See* Kossak v. Stalling, 277 N.W.2d 30, 34 (Minn. 1979); Tussman & ten-Broek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 343-44 (1949).

75. Price v. Amdal, 256 N.W.2d 461, 468 (Minn. 1977).

tion challenges. When dealing with a suspect classification, such as race or religion,[76] or a fundamental interest, such as privacy or voting rights,[77] strict scrutiny is generally required: the classification must be necessary to promote a compelling state interest.[78] For some suspect classifications, such as gender classifications, and some important but not fundamental interests, an intermediate standard of review has evolved: the law must serve an important government interest, and the classification must be substantially related to that interest.[79] Finally, in all other instances, the legislation need only be rationally related to a legitimate public purpose.[80]

Which standard of review is appropriate depends upon the societal position of those classified or the importance of the rights involved. The rights impinged upon by tort reform legislation—the right to redress grievances, the right to trial by jury—are very important rights, although not fundamental rights. The intermediate standard of review is appropriate for the paralytics, amputees, and brain injured who are the targets of this tort reform. They are a discrete and insular group without political muscle in much the same way as are victims of gender classifications.

During the last insurance crisis of the mid-1970's, the target

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76. *E.g.*, San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

77. *E.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972) (voting rights); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraceptive information).

78. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944).

79. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976); Stanton v. Stanton, 421 U.S. 7, 14-15 (1975); Reed v. Reed, 404 U.S. 71, 75-77 (1971). *But c.f.* Schlesinger v. Ballard, 419 U.S. 498, 508 (1975); Kahn v. Shevin, 416 U.S. 351, 355 (1974). In both *Schlesinger* and *Kahn*, the intermediate standard was used to uphold remedial legislation.

The intermediate standard is "poised between the largely toothless invocation of minimum rationality and the nearly fatal invocation of strict scruntiny." L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-30, at 1082 (1978). The process is two-tiered:

> Under these standards, courts must initially determine if a reasonably conceivable legislative purpose exists that supports the challenged classification. If the requisite purpose or state interest is lacking, further inquiry is unnecessary because the law fails even under the minimum standard of review—mere rationality. But if a rational government interest can be reasonably imagined or is supplied by the legislation itself, the courts must then engage in further analysis to determine whether the classification operates in an acceptable manner. Thus, this process involves examination of the legislative means, as well as the asserted or postulated ends of the statute to which the means are directed.

Note, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829, 898-99 (1979) [hereinafter *MICRA and Equal Protection*].

80. *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

was medical malpractice insurance. Many states passed legislation capping damages and limiting attorneys' fees for medical malpractice cases. A number of states found those tort reforms violative of the guarantees of equal protection using the intermediate standard of review.[81]

1. Limiting Plaintiffs' Attorneys' Fees

Limiting plaintiffs' attorneys' fees creates distinctly separate classifications between injured plaintiffs and insurance companies.[82] The proposed attorneys' fee limitations are directed only to plaintiffs' attorneys. The impact is absorbed primarily by the poor, who are financially unable to hire counsel absent a contingent fee arrangement. Insurance companies, however, are left a free hand. Since the insurance company does not pay the plaintiffs' attorneys' fees, how this classification is even rationally related to lowering insurance rates is a mystery. Juries are not presented with and cannot take into account the plaintiffs' attorneys' fees. Settlement negotiations are always based upon the likely result of a jury verdict. Legal fees paid to the plaintiff's attorney, therefore, do not increase the size of settle-

81. *See* Jones v. State Bd. of Medicine, 97 Idaho 859, 871, 555 P.2d 399, 411 (1976) (a case challenging statutory limitations on the collateral source rule and a $150,000 cap on damages was remanded to the trial court for a determination of whether "the statute reflect[ed] any reasonably conceived public purpose, and [whether] the establishment of the classification [had] a fair and substantial relation to the achievement of the objective and purpose . . . ."); Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) ($500,000 cap on damages in medical malpractice cases held unconstitutional as "arbitrary " utilizing the rational basis test; the court indicated that an intermediate standard should be applied); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980) (a medical malpractice damages cap held to violate equal protection utilizing a heightened scrutiny standard); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) (limitations on collateral source rule and a $300,000 cap on damages held unconstitutional for failing to effectuate the legislative purpose of lowering insurance rates); Graley v. Sataytham, 74 Ohio Op. 3d 316, 343 N.E.2d 832 (1976); Simon v. St. Elizabeth Med. Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (1976) (limitations on collateral source rule and $200,000 cap found unconstitutional); Oregon Medical Ass'n v. Rawls, 276 Or. 1101, 557 P.2d 664 (1976) (equal protection challenge to damages cap; the case was remanded for a determination of constitutionality under the intermediate standard of review). *But see, e.g.*, Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977).

82. The majority of personal injury litigation is in practical effect a dispute between the plaintiff and the defendant's insurance carrier. Minnesota does not have a direct action statute. A direct action statute would allow a plaintiff to commence an action directly against the defendant's insurance carrier, thereby decreasing transaction costs.

ments or verdicts any more than brokers' commissions affect the price of stock.

There is only one argument that supports the position that placing a limit on plaintiffs' attorneys' fees will decrease insurance company payouts. According to that argument, by making it unprofitable to represent plaintiffs, the best and the brightest plaintiffs' lawyers will go to a more lucrative area of practice. Those attorneys left, therefore, will have diminished resources with which to represent their clients. Creating a disincentive to one class of persons to fully litigate cases is not a permissible means of achieving the goal of lowering insurance rates. Limiting attorneys' fees bears no rational relationship to its proffered goal, nor does it substantially serve to accomplish that goal. It is, therefore, unconstitutional as a violation of equal protection.[83]

2. *Caps on Damages*

A cap on damages affects only the most severely injured of plaintiffs: the paralytics, the amputees, and the brain injured. Capping damages delineates a class of severely injured persons. These severely injured are denied full compensation for their injuries, whereas the class of less severely injured can obtain full compensation for theirs. Patent injustice aside, this is the kind of arbitrary classification that the Minnesota Supreme Court has, in the past, struck down as violative of equal protection.[84]

For example, the Municipal Tort Claims Act provided that all could sue a municipality in tort except those who are covered by workers' compensation.[85] The Minnesota Supreme Court, in *Bernthal v. City of St. Paul*,[86] found the classification arbitrary and struck it down as a violation of equal protection.[87] The court found no more justification for denial of the right to litigate a claim based upon insurance status than if the classification had been made on a gender basis.[88] The court concluded that "the classification serves to reduce the number

83. *See MICRA and Equal Protection*, *supra* note 79, at 941-47.

84. *See Price*, 256 N.W.2d at 469. The purpose of equal protection is to secure "the right to be free from arbitrary and intentional discrimination." *Id.*

85. MINN. STAT. § 466.03, subd. 2 (1984).

86. 376 N.W.2d 422 (Minn. 1985).

87. *Id.* at 426.

88. *Id.*

of suits possible against a municipality on a basis completely unrelated to the purpose of the statute."[89]

The proposed cap on damages prevents the most severely injured of plaintiffs from being fully compensated. These plaintiffs are denied full compensation because their injuries are grave and their damages are correspondingly high. There is no more logic in denying the paralytic the right to fully litigate his claim than there is in denying red haired women the right to fully litigate their claims. The caps are an arbitrary classification unrelated to the purpose of tort reform. They are, therefore, unconstitutional deprivations of the right to equal protection under the laws.[90]

B. Due Process

The Bill of Rights and the 14th amendment guarantee due process of law and the right to "petition the Government for a redress of grievances in the state courts."[91] Due process guarantees a right to a hearing even in civil cases.[92] A right to a hearing is guaranteed before termination of government entitlements,[93] before having one's name posted as an excessive drinker,[94] and before prejudgment attachment can be had by creditors.[95] It is axiomatic that such a hearing must be complete to deal with the rights involved.

The proposals to limit plaintiffs' attorneys' fees and cap damages seek to lower insurance rates by limiting individuals' rights to seek redress in the courts. If due process guarantees the right to a complete hearing before termination of welfare benefits or posting of one's name as a drunkard, it also protects the right of every individual to hire counsel as they see fit and to present their full case at trial. The proposed "reforms," which threaten these rights, are violative of the constitutional guarantee of due process of law.

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89. *Id. See also* Glassman v. Miller, 356 N.W.2d 655 (Minn. 1984) (notice of claim provision violates equal protection); Kossak v. Stalling, 277 N.W.2d 30 (Minn. 1979) (statute of limitations violates equal protection).

90. *See MICRA and Equal Protection*, *supra* note 79, at 951-55.

91. U.S. CONST. amends. I, V, XIV.

92. *See* Bell v. Burson, 402 U.S. 535 (1971) (right to hearing before revocation of driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (right to a hearing before termination of government entitlements).

93. *Goldberg*, 397 U.S. at 261.

94. *See* Wisconsin v. Constantineau, 400 U.S. 433 (1971).

95. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

As seen above, the only way that limiting plaintiffs' attorneys' fees will affect insurance rates is by causing a market dislocation whereby the best attorneys seek a different area of practice, and by limiting the plaintiff's financial resources for litigation.[96] Both are violations of the plaintiff's right to due process.

Whether by market dislocation or by limiting the financial resources of plaintiffs, an attorneys' fees limitation which applies only to plaintiffs' lawyers places plaintiffs at an unfair disadvantage to insurance companies. By cutting the profitability of plaintiffs' practice, it is only natural that many of the best attorneys will begin to concentrate on other, more profitable areas of law. The practice of insurance defense law would remain profitable and continue to be directly reflected in the cost of insurance premiums.[97] The best insurance defense lawyers will continue to practice insurance defense law. The effect of the proposal is, therefore, to deny plaintiffs their right to counsel of their choice. A legislated limit on plaintiffs' attorneys' fees violates due process.

Even more acutely and immediately, limiting attorneys' fees limits the amount of legal resources with which the plaintiffs can pursue their claims. At the same time, insurance companies have no such limits. They have all the resouces of a multibillion dollar corporate industry behind them. Even now, the confrontation is something like David meeting Goliath. To then expect David to go into battle with no rock for his sling is patently unfair. If due process means anything, it means that parties come into court on an equal footing. The legislature cannot arbitrarily favor one side over the other. Limiting attorneys' fees only for plaintiffs' lawyers unconstitutionally disturbs the balance protected by the right to due process of law.

3. Other Constitutional Concerns

The Minnesota State Constitution guarantees a remedy for

96. *See supra* notes 82-83 and accompanying text. *See also MICRA and Equal Protection*, *supra* note 79, at 941-47.

97. The Health Education and Welfare Department found that "there does not appear to be any gross discrepancy between the resultant rates charged by the plaintiff bar and those charged by the defense bar in medical malpractice cases." U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE, THE REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 33 (1973) (quoted in *MICRA and Equal Protection*, *supra* note 79, at 943).

wrongfully inflicted injury: "Every person is entitled to a certain remedy in the law for all injuries or wrongs which he may receive in his person, property or character."[98] No section of the constitution is superfluous;[99] every section is an "imperative mandate of the sovereign people."[100] While article 1, section 8 does not prevent the legislature from abrogating a common law right if it provides a reasonable substitute,[101] it does prevent such abrogations without a reasonable substitute remedy.[102] A remedy must be afforded to those injured by others.[103] From the inception of this state, article 1, section 8 has guaranteed that:

> We would never for one moment suppose that the legislature has the power . . . to deprive a person, or class of persons, of the right of trial by jury, or . . . their property to be taken for public use without just compensation; and yet neither of these is more sacred to the citizen, or more carefully guarded by the constitution, than the right to have a certain and prompt remedy in the laws for all injuries or wrongs to person, property, or character.[104]

Capping damages steals from the most severely injured the right to have a certain remedy for all of their damages. It is an abrogation of their rights without any concomitant substitute. It is, therefore, a violation of the Minnesota Constitution, article 1, section 8.

The Minnesota Constitution also guarantees, "[T]he right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy."[105] The right to a jury trial is an unimpaired right as it existed by the laws of the territory at the time the state constitution was adopted.[106] Individuals, no matter how badly injured have al-

98. MINN. CONST. art. 1, § 8.

99. *See* Butler Taconite v. Roemer, 282 N.W.2d 867, 870 (Minn. 1979).

100. Freeman v. Goff, 206 Minn. 49, 54, 287 N.W. 238, 241 (1939).

101. *See* Breimhorst v. Beckman, 227 Minn. 409, 35 N.W.2d 719 (1949); Mathison v. Minneapolis, St. P. Ry., 126 Minn. 286, 148 N.W. 71 (1914) (Workers' Compensation abrogation of common law right to sue found constitutional, for it provided the reasonable substitute of compensation for injuries regardless of fault).

102. *See* Carlson v. Smogard, 298 Minn. 362, 215 N.W.2d 615 (1974) (preventing third party indemnity against employer who paid workers compensation benefits violates MINN. CONST. art. 1, § 8).

103. *See* Anderson v. Stream, 295 N.W.2d 595, 600 (Minn. 1980).

104. Davis v. Pierse, 7 Minn. 13, 18, 7 Gil. 1, 6 (1862).

105. MINN. CONST. art. 1, § 4.

106. *See* Landgraf v. Ellsworth, 267 Minn. 323, 126 N.W.2d 766 (1964).

ways had the right to have a jury determine, unimpaired by any limitations, the full amount of their damages and have that amount awarded to them as a judgment. Placing caps on damages impairs the right to a jury trial. It runs afoul of the provision that a jury trial is a given right without regard to the amount in controversy. The damage cap proposal violates the guaranty of a right to a jury trial in all civil cases in Minnesota.[107]

CONCLUSION

The problem with tort reforms is that they do not attack the problem. There is no crisis in the civil litigation system. Americans are neither overly litigious as plaintiffs nor overly generous as jurors. Thus, it is only natural that tort reforms have had no effect on insurance rates or availability. Giving medication to a healthy man is at best ineffective but can, as well, make the healthy man ill. The medicine of reform, if it is to have any effect, must be directed to the true cause of the malady. The true cause of the crisis in insurance cost and availability is the cyclical nature of the insurance business. Before turning to tort reforms, many of which are of doubtful constitutionality, the Minnesota Legislature should look to insurance reform.[108]

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107. Recently a federal district court declared a medical malpractice damage cap contained in VA. CODE § 8.01-581.15 (1950) unconstitutional under article 1, section 11 of the Virginia Constitution. Boyd v. Bulala, 647 F. Supp. 781, 789 (W.D. Va. 1986). VA. CONST. art. I, § 11 guarantees to Virginians a right to civil trial by jury nearly identical to that guaranteed Minnesotans by MINN. CONST. art. 1, § 4.

108. Just what and how "insurance reform" should be accomplished is beyond the scope of this article. A few suggestions have been offered by Robert E. Cartwright: 1) requiring the insurance industry to open its books and keep statistics and data with reference to claims, actual payouts, verdicts, premiums and investment income; 2) tighter regulation of the industry's underwriting and pricing policies; and 3) regulation of Off Shore Reinsurers (such as Lloyd's of London) whose influence on primary carriers in the American market is great. Remarks of Robert E. Cartwright at the ABA Midwinter Convention (Feb. 8, 1986) (*reprinted in* 11 MINN. TRIAL L. 13 (Summer 1986)).

APPENDIX
MINNESOTA JURY VERDICTS[109]
TABLE 1
HENNEPIN COUNTY
1981-1985

Year	Civil Cases Filed	Personal Injury Jury Verdicts
1981	7,321	68
1982	7,426	41
1983	8,183	73
1984	9,778	156
1985	10,140	128
TOTAL	42,848	466

TABLE 2
HENNEPIN COUNTY
PERSONAL INJURY JURY VERDICTS
1981-1985

Year	Plaintiff Verdicts	Plaintiff Verdicts Settled After Trial	Defense Verdicts	Defense Verdicts Settled After Trial	On Appeal/ Reduced By Court
1981	19	18	27	4	
1982	8	11	20	2	
1983	13	17	36	6	1
1984	34	42	65	13	2
1985	28	29	55	11	5

109. MINNESOTA TRIAL LAWYERS ASSOCIATION, MINNESOTA JURY VERDICTS 12-15 (1987).

TABLE 3

HENNEPIN COUNTY
AVERAGE JURY VERDICTS
1981-1985

Year	Personal Injury Jury Verdicts	Average Jury Verdicts	Number and Percent of Jury Verdicts Below Average
1981	46	$17,153.86	34 (74.0%)
1982	28	$14,063.30	22 (78.6%)
1983	49	$19,049.12	41 (83.7%)
1984	99	$13,682.72	79 (79.8%)
1985	83	$16,003.57	64 (77.1%)

TABLE 4

HENNEPIN COUNTY
AVERAGE JURY VERDICTS
(Includes cases settled after trial, on appeal, reduced by court) 1981-1985

Year	Jury Verdicts	Average Jury Verdict	Number and Percent of Jury Verdicts Below Average
1981	68	$17,262.30	50 (73.5%)
1982	41	$44,659.11	35 (85.4%)
1983	73	$32,622.80	60 (82.2%)
1984	156	$24,469.47	114 (73.1%)
1985	128	$35,363.80	97 (75.8%)

TABLE 5

ST. LOUIS COUNTY
1981-1985

Year	Civil Cases Filed	Personal Injury Jury Verdicts
1981	1,072	28
1982	1,088	24
1983	930	28
1984	884	40
1985	835	33
TOTAL	4,809	153

TABLE 6

ST. LOUIS COUNTY
PERSONAL INJURY JURY VERDICTS
1981-1985

Year	Plaintiff Verdicts	Plaintiff Verdicts Settled After Trial	Defense Verdicts	On Appeal/ Reduced By Court
1981	14	2	11	1
1982	10	4	9	1
1983	13	3	11	1
1984	21	1	17	1
1985	14	1	16	2
TOTAL	72	11	64	6

TABLE 7

ST. LOUIS COUNTY
AVERAGE JURY VERDICTS
1981-1985

Year	Personal Injury Jury Verdicts	Average Jury Verdicts	Number and Percent of Jury Verdicts Below Average
1981	25	$34,689.79	23 (92.0%)
1982	19	$84,652.33	18 (94.7%)
1983	24	$20,021.55	20 (83.3%)
1984	38	$23,796.18	29 (76.3%)
1985	30	$ 6,218.98	21 (70.0%)

TABLE 8

ST. LOUIS COUNTY
AVERAGE JURY VERDICTS
1981-1985 (Includes cases settled after trial, on appeal, reduced by courts)

Year	Personal Injury Jury Verdicts	Average Jury Verdict	Number and Percent of Jury Verdicts Below Average
1981	28	$ 48,356.96	25 (89.3%)
1982	24	$684,127.95	21 (87.5%)
1983	28	$ 62,711.33	22 (78.6%)
1984	40	$ 27,356.37	31 (77.5%)
1985	33	$ 42,062.02	30 (90.9%)

TABLE 9

STEARNS COUNTY
1981-1985

Year	Civil Cases Filed	Personal Injury Jury Verdicts
1981	731	3
1982	746	2
1983	693	4
1984	778	6
1985	846	4
TOTAL	3,794	19

TABLE 10

STEARNS COUNTY
PERSONAL INJURY JURY VERDICTS
1981-1985

Year	Plaintiff Verdicts	Plaintiff Verdicts Settled After Trial	Defense Verdicts	Defense Verdicts Settled After Trial
1981	2		1	
1982			2	
1983	1		3	
1984	3		2	1
1985	3		1	
TOTAL	9	0	9	1

TABLE 11

STEARNS COUNTY
AVERAGE JURY VERDICTS
1981-1985

Year	Personal Injury Jury Verdicts	Average Jury Verdict	Number and Percent of Jury Verdicts Below Average
1981	3	$54,432.33	2 (66.6%)
1982	2	-0-	N/A
1983	4	$ 6,250.00	3 (75.0%)
1984	5	$53,972.92	3 (60.0%)
1985	4	$ 8,194.58	3 (75.0%)

TABLE 12

STEARNS COUNTY
AVERAGE JURY VERDICTS
1981-1985 (Includes cases settled after trial)

Year	Personal Injury Jury Verdicts	Average Jury Verdict	Number and Percent of Jury Verdicts Below Average
1981	3	$54,432.33	2 (66.6%)
1982	2	-0-	N/A
1983	4	$ 6,250.00	3 (75.0%)
1984	6	$44,977.43	4 (66.6%)
1985	4	$ 8,194.58	3 (75.0%)

TABLE 13

CIVIL FILINGS
STATEWIDE
1981-1985
(District Court)

Year	Total Civil Filings	Personal Injury Filings	Personal Injury Filings as a % of Total Civil Filings
1981	10,155	3,936	38.8%
1982	20,815	4,627	22.2%
1983	21,364	4,626	21.6%
1984	27,753	5,138	18.5%
1985	29,885	5,410	18.1%
TOTAL	109,972	23,737	21.6%

TABLE 14

CIVIL FILINGS
HENNEPIN COUNTY
1981-1985
(District Court)

Year	Total Civil Filings	Personal Injury Filings	Personal Injury Filings as a % of Total Civil Filings
1981	7,321	1,619	22.1%
1982	7,426	1,671	22.5%
1983	8,183	1,684	20.6%
1984	9,778	1,815	18.6%
1985	10,140	1,873	18.5%
TOTAL	42,848	8,662	20.2%

TABLE 15

CIVIL FILINGS
ST. LOUIS COUNTY
1981-1985
(District Court)

Year	Total Civil Filings	Personal Injury Filings	Personal Injury Filings as a % of Total Civil Filings
1981	1,072	222	20.7%
1982	1,088	249	22.9%
1983	930	249	26.8%
1984	884	253	28.6%
1985	835	266	31.9%
TOTAL	4,809	1,239	25.8%

TABLE 16

CIVIL FILINGS
STEARNS COUNTY
1981-1985
(District Court)

Year	Total Civil Filings	Personal Injury Filings	Personal Injury Filings as a % of Total Civil Filings
1981	731	57	7.8%
1982	746	74	9.9%
1983	693	64	9.2%
1984	778	81	10.4%
1985	846	134	15.8%
TOTAL	3,794	410	10.8%