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TORT REFORM SYMPOSIUM

FOREWORD

DEAN JAMES F. HOGG†

This issue of the William Mitchell Law Review is partially devoted to the topic of tort reform in Minnesota. Consistent with intense interest nationally, tort reform attracted the attention of the Minnesota legislature in 1986 and is likely to attract further attention in 1987.

This issue contains a number of interesting pieces. The student Note provides an introduction to and survey of the Minnesota Tort Reform Act of 1986. The author comments on the compromise nature of the Act and the conflict between two competing groups—those, on the one hand, who argue that the insurance crisis and its dramatic premium increases have been caused by large jury verdicts and growing litigation costs—and those, on the other, who lay the problem at the door of insurance companies, alleging poor investment strategies and management practices. The author says, further, that the House passed a series of more sweeping reforms not reflected in the ultimate outcome—including a ceiling on punitive damages and limits on joint and several liability among co-defendants. The Note also includes reference to the Joint Underwriting Association, a device intended to make certain kinds of coverage available where the marketplace is not meeting the need. While the Act was a compromise, the author finds that it did reflect some movement towards reform.

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Floyd Olson has authored an article addressing the changes in municipal tort liability reflected in the 1986 legislation. He notes that such liability has been subject to abrupt change and that some municipalities have experienced problems in getting insurance. He sees the policies of preserving categories of immunity for municipalities as eroding while defenses are increasingly restricted. The 1986 legislation, in his view, is more likely to intensify than quell continuing debate. He sees as a problem the fact that the legislation included a prohibition against municipalities indemnifying officers and employees from paying for punitive damages. Punitive damages, he notes, cannot be awarded against a municipality or a state. He describes a modified limit imposed on joint and several liability of municipalities—the state or a municipality, if found to be liable with other tortfeasors, need not pay more than twice the amount of fault, provided that the fault of the state or municipality is less than thirty-five percent.

Philip A. Cole writes an article supporting tort reform—towards moderation. He comments on four problem areas: the continuing growth of imposition of liability without fault; the undermining of causation as a limitation on liability; the growth of jury awards, particularly non-economic damage aspects; and the excessive transaction costs found in current litigation. He argues that joint liability should not be enforceable in any case where the plaintiff bears a measure of fault.

David Moskal writes an article to be compared with Cole's. He addresses the issue—does Minnesota need further changes in its civil justice system? He sees three questions: Is there an insurance crisis?; Are current insurance problems caused by a "cost explosion?"; and, Will the legislative changes have any effect on availability or affordability of insurance? He answers each of the questions in the negative and then discusses the constitutionality of caps on damages and limitations on the award of attorneys' fees.

Professor Michael Steenson has contributed an article examining tort reform in the context of tort decisions by the Minnesota Supreme Court. He points out that tort reform is often based on the fear that courts have abandoned fault as the basis of establishing liability. In place of fault, reformers see a desire to compensate victims as the paramount consideration of courts, fueled by deep-pocket insurance companies standing behind defendants. With the rising cost of insurance, the an-

swer, say reformers, is to provide protection for insurance companies. After examining Minnesota Supreme Court decisions, Professor Steenson suggests that not all of the reformers' fears are founded in fact. In light of this, he further suggests that reform, although it should be conducted legislatively, be carefully targeted to address real, rather than perceived, problems with the existing tort system.

There is a rich diversity to be found in the various contributions to this issue. A number of basic concerns are raised—much study and discussion remains for the future.

We have experienced, and many of us continue to experience, an insurance crisis, primarily in certain forms of liability coverage. The consequences of this crisis have gone far beyond merely sharp, and sometimes savage, increases in premiums. For some, obtaining coverage at any price is difficult, if not impossible. Others have found the amount of their coverage seriously reduced. Many have experienced important changes in policy language imposing additional coverage limitations. One of the most significant changes has been the move from occurrence-based to claims-based policy coverage.

While many of the insurance companies are returning or have returned to profitability, the effects of the crisis continue to have a profound impact on the way in which coverage is marketed. Insurers who cover a risk of any size will normally transfer part of the risk to others, known as excess insurers. Instead of the direct insurer serving as a broker for excess carriers, many insureds are now bargaining directly with excess carriers, frequently through multiple layers, for coverage which takes effect beyond that provided by the direct carrier. These excess carriers, often offshore companies, perform a vital role in the availability of insurance at the direct level—they have become much more selective in areas they will underwrite and more aggressive in managing their own exposure and liability, as distinguished from that of the basic underlying or direct insurance. In a number of cases, groups of people and entities have formed their own offshore excess carriers. These changes can add additional complexity and cost to the process of obtaining insurance as well as to the handling of claims. The potential for future insolvency of an excess carrier can be another concern.

Much higher premium levels, as well as the difficulty or un-

availability of insurance coverage, have forced many entities, previously insured, to elect now to "go bare." This phenomenon will produce effects in the future as plaintiffs with meritorious claims find there are insufficient assets against which to collect. Businesses, as well as the jobs these businesses represent, will be lost as the result of uninsured or underinsured risks. Consumers will pay more for products and services as providers attempt to pass the dramatically increased insurance costs through. Some business and behavior patterns are already being changed. If an obstetrician has to pay \$100,000 a year for insurance coverage, the result is translated directly into fees for obstetrical services. But there are some signs that a more subtle result is being experienced—some obstetricians, it appears, are deciding to get out of that high risk area of practice in favor of lower risk areas. Is it possible that insurance costs or risk exposure may contribute to a future shortage of obstetricians?

Directors and officers liability insurance has been another area of difficulty. A number of major companies, as well as many smaller ones, have been unable to obtain new coverage or renew old coverage for their directors and officers. A number of companies have experienced resignations by directors and many have found increased difficulty in recruiting new members for their boards. This pattern, if left unchanged, could have substantial long-term impact on the management and behavior of corporations.

Some businesses have been eliminated simply because of the rising cost of insurance. For example, I was told of one small business, carrying skiers to the powder snow by helicopter, that was wiped out overnight by a proposed insurance premium increase. On December 31, the cost for a skier, including insurance, was \$20 per ride. On January 1, with the proposed new insurance policy, the cost would have been \$120 per ride. Small business, of course, accounts for a number of the jobs which make our economy run.

Several of the authors in this issue raise the question of the relationship between the insurance crisis, changing patterns of insurance behavior, and existing tort law. Is there a direct relationship between increasing litigation and jury verdicts, expanded liability and exposure, costs of litigation, and insurance behavior? Hopefully, there will be much active research and writing on this question. Hopefully too, there will

be active, thoughtful consideration of the balance which legislatures and courts constantly strike between providing recovery for individual loss, on the one hand, and spreading or allocating the costs of that loss on the other. Have we lost sight of fault as the basic reason for imposing liability on a defendant? Should we impose restrictions on punitive damage claims, restricting such awards to cases truly involving malicious action? Should we impose limitations on joint liability? On this score, can useful distinctions be drawn between liability of states and municipalities, on the one hand, and individuals and businesses on the other? These questions require much study. This is an interesting area—one appropriate for the law review to have focused on.

