DePaul Law Review

Volume 71
Issue 2 *Spring 2022*

Article 12

# The Deep Architecture of American COVID-19 Tort Reform 2020-21

Anthony Sebok

# THE DEEP ARCHITECTURE OF AMERICAN COVID-19 TORT REFORM 2020–21

*Anthony Sebok*[1]*

## Introduction

When COVID-19 emerged as a major global health threat, it was (and is) something novel and unfamiliar to this generation, even though it also represented a threat that, of course, had been part of modern and ancient human history. The variety of responses with which governments met the threat ranged from radically innovative to routine. One response which emerged in the United States, which was familiar to the point of routine, was the immediate resort to limitations on civil liability. By the end of April 2020, for example, seventeen states had extended already-existing immunity shields for emergency responders to healthcare professionals and institutions, regardless of whether they were acting as volunteers or for payment.[2]

In this Article, I consider the deep architecture of American limitations on civil liability, commonly known as "tort reform." My goal is to map out the extent to which COVID-19 has been seen as a novel problem for the tort system. Additionally, my goal is to analyze not only why it was almost overdetermined that it would be seen that way in the United States, but also to take a granular look at the content of the limitations that have been adopted so far.

First, a brief discussion about nomenclature. As the reference above to the rapid resort to executive orders illustrates, there is a parallel, and somewhat distinct, set of emergency powers that can, in sometimes surprising ways, suspend the common law in order to allow the state to respond quickly to urgent needs of the larger community. The

1. *Joseph and Sadie Danciger Chair in Law, Benjamin N. Cardozo School of Law.

2. The earliest executive order that intended to provide a liability shield was issued by Gov. Hogan of Maryland, on March 5, 2020. In Maryland, issuance of a catastrophic health emergency proclamation automatically triggers liability protection for health care providers under Md. Code Ann., Pub. Safety § 14-3A-06, which provides: "A health care provider is immune from civil or criminal liability if the health care provider acts in good faith and under a catastrophic health emergency proclamation." Md. Code Ann., Pub. Safety § 14-3A-06 (West 2021). (A "health care provider" includes health care practitioners, hospitals, a related institution, an ambulatory surgical facility, an inpatient rehabilitation facility, a home health agency, or a hospice.) Md. Code Ann., Pub. Safety § 14-3A-01(e) (West 2011); Md. Code Ann., Health–Gen. 19-114(d) (West 2019).

doctrine of "public necessity" is a familiar example.[3] Both the federal government and the states have a complex set of structures, rooted in organic constitutional law, as well as statute, to respond to a wide range of emergencies, whether arising from humans, like armed conflict, or nature, like floods or a pandemic.[4]

An example relevant to this Article is the Public Readiness and Emergency Preparedness Act of 2005 (PREP).[5] Under PREP, the Secretary of the U.S. Department of Health and Human Services (HHS) issued a declaration determining that a public health emergency existed on March 17, 2020, and triggered broad prospective immunity to civil liability for pharmaceutical companies that would produce unknown (at that time) vaccines.[6] The invocation of PREP limited civil remedies for hundreds of millions of Americans in order to incentivize the development of a vaccine, despite the fact that at this point, HHS had no concrete understanding of the risks and benefits involved in the trade-off between the costs to tort victims and the social benefit produced by shielding the pharmaceutical defendants. Executive orders by governors fully or partially limiting the tort liability of medical providers and declarations by the Secretary of HHS that almost fully eliminate state products liability law with regard to pharmaceutical corporations limit tort law but are not, in common parlance, "tort reform."

Conventional usage is not the only reason this Article seeks to avoid dealing with executive actions limiting tort liability. As will be explained more fully below, the process by which legislative limitations on tort law are conceived, and the types of arguments employed by those who advocate for their adoption, are different from the

3. "Public necessity pertains to action taken by public authorities or private individuals to avert a public calamity." John Alan Cohan, *Private and Public Necessity and The Violation of Property Rights*, 83 N.D. L. Rev. 651, 653 (2007).

4. "In America the executive and legislative branches of government are vested with the authority and charged with the responsibility to declare that a major disaster has occurred, to design a response to it and to provide the resources necessary to carry out that response." ABA, Rule of Law in Times of Major Disaster 3 (2007).

5. Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub. L. No. 109–48, 119 Stat. §§ 2680, 2818.

6. *See* Nicholas M. Pace & Lloyd Dixon, *COVID-19 Vaccinations Liability and Compensation Considerations Critical for a Successful Campaign*, RAND Corp. Persp., Sept. 2020, at 1, 3–4. The limitations of this immunity are quite narrowly drawn and are not important to this Article. It should be noted that PREP, like other federal vaccine legislation, allows for those suffering from a vaccine-related injury to seek compensation from the federal government and, if dissatisfied with that avenue, to pursue the vaccine producer in tort, but again, only under extremely narrow circumstances (if intentional misconduct is proven). *See id.* at 9 (describing the Countermeasures Injury Compensation Program (CICP)).

mechanisms of emergency response which characterize executive actions, even though, to an injured victim, the final result – no right to damages and no day in court – is the same.

## I. The Architecture of Tort Reform

Even if we limit ourselves to the conventional understanding of tort reform, there is a vast set of legislative options to consider. It may not be necessary to go as far as Professor Alexandra Klass, who points out that there is no reason to privilege legislation that limits existing claims for civil liability over legislation that expands the universe of civil liability when talking about tort reform; both are, in her words, "tort experiments" by the legislature.[7] We need only recall Professor Robert Rabin's observation of the irony that "[i]n its early years, tort reform was primarily concerned with remedying systematic shortfalls in providing compensation to injured workers."[8]

It may be that tort reform is a parochial concern of the common law in that if it is defined as the legislative alteration of a common law status quo, civilian systems could not, by definition, have tort reform. This question is beyond the scope of this Article, although it will be noted that civilian private law codes share at least this with the common law: they are rarely revisited by their authors.[9] The question in common law systems, at least, is what significance, if any, should be attributed to the decision by the legislature to, as Klass puts it, "experiment" with the existing law of tort at any given moment in history.

One banal answer is that the decision is a data point that reveals something about the balance of political power or lobbying power of a

---

7. *See* Alexandra Klass, *Tort Experiments in the Laboratories of Democracy*, 50 Wm. & Mary L. Rev. 1501, 1520 (2009). As Prof. Klass notes, tort "reform" is not necessarily restrictionist.

> Although [legislative expansions of liability] are in no way hidden, they are rarely, if ever, recognized simply as "tort law". . . . These developments, however, are tort experiments in the same vein as traditional tort reform in that they provide private parties with new rights to recover for new types of harm, and create liability for those who would interfere with those newly-created rights.

*Id.* Professor Heidi Feldman argues that postwar tort reform is characterized by efforts to reduce or limit plaintiffs' rights. *See* Heidi Li Feldman, *From Liability Shields to Democratic Theory: What We Need from Tort Theory Now*, 14 J. Tort L. (forthcoming 2022), https://ssrn.com/abstract=3964121.

8. Robert L. Rabin, *Poking Holes in the Fabric of Tort: A Comment*, 56 DePaul L. Rev. 293, 293 (2007).

9. *See* Edward A. Tomlinson, *Judicial Lawmaking in a Code Jurisdiction: A French Saga on Certainty of Price in Contract Law*, 58 La. L. Rev. 101, 108 (1997) (illustrating that, like common law, French private law is relatively inert, and revision only comes as a result of some outside disruption).

special interest group.[10] There have been many scholarly works that more or less explain tort reform this way.[11] While this explanation identifies what may be a necessary condition, it is unlikely that it is ever a sufficient condition. Political science Professor Robert Kagan noted that the conventional picture painted by the academic community about the success of tort reform misses its mark in an important way.[12] Kagan agrees that the tort reform movement mounted by pro-defense interests was based on easily disproven myths; but he is not sure that the explanation offered by the conventional picture – that tort reform secured its legislative victories through raw monetary power and sophisticated Madison Avenue-style marketing – is the best explanation.[13] His alternative explanation, which does not in any way apologize for the efforts of tort reformers to buy legislative power and to employ sophisticated but misleading marketing, is that the message of tort reform since the late 1970s resonated with a significant portion of American society, in that it aligned with a deep commitment to individualism.[14]

The virtue of Kagan's mild rebuke of purely political accounts of tort reform is that it allows us to revisit other episodes of tort reform with fresh eyes and to consider that the adoption of a reform – which by definition is the rejection of an existing tort rule – may reflect an alignment of the former with a principal or value that is genuinely shared by the legislative majority out of which it is promulgated.[15] The irony identified by Rabin of tort reform's late nineteenth/early twentieth century history is an example of this. The adoption of worker's compensation – one of the most dramatic episodes of American tort

10. *See, e.g.*, MacDonald v. City Hosp., Inc., 715 S.E.2d 405, 426 (W. Va. 2011) (Wilson, J., dissenting) (characterizing a medical malpractice damages cap as the result of "the Legislature turn[ing] against its constituency in favor of pressure groups with selfish interests. . . .").

11. *See, e.g.*, WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS (2004); JAY M. FEINMAN, UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW 27–46 (2004); *and* Robert S. Peck et al., *Tort Reform 1999: A Building Without a Foundation*, 27 FLA. ST. U. L. REV. 397, 397–98 (2000). For an illuminating account of the role of the Labor Party and unions in tort reform in Australia in exactly these terms, *see* Jeffery O'Connell & David F. Partlett, *An America's Cup for Tort Reform? Australia and America Compared*, 21 U. MICH. J.L. REFORM 443, 460 (1988).

12. *See* Robert A. Kagan, *How Much Do Conservative Tort Tales Matter?*, 31 LAW & SOC. INQUIRY 711, 711 (2006).

13. *See id.* at 715–18.

14. *See generally id.* (The tort reformers "have been preaching to a silent but philosophically receptive congregation. And hence the antitort tales, by and large, arguably are *reinforcing* an existing set of attitudes, not reshaping American's [sic] attitudes."). *Id.* at 719–20.

15. For further elaboration of this point, *see* Anthony J. Sebok, *The Fall and Rise of Blame in American Tort Law*, 68 BROOK. L. REV. 1031, 1040 (2003) (describing the realists' skepticism of individual fault as a ground that explains their approach to reforming tort law to improve safety in industrial conditions).

reform – might be explained as a mirror image of the conventional picture of late twentieth century tort reform. It might have been the case that the labor movement marshalled its resources (its masses of supporters) to force worker's compensation through various state legislatures (and, in the case of New York, a state constitutional amendment).[16] But as legal historian Professor John Fabian Witt argues, the more likely story is that the program promoted by suspending existing tort law in the workplace and replacing it with an insurance scheme aligned with principals already emergent in other parts of American society, namely, the rise of "scientific management" and "management engineering" as tools by which to address labor in the workplace.[17]

With this in mind, I shall hazard a preliminary sketch of the "deep architecture" of the principals or values that might motivate or inform legislative tort reform and then apply it to the COVID-19 legislation that has been adopted since 2020.

### *A. Reject or Reform?*

Given the focus of this Article, it is far more important that the domain of tort law be relatively well-defined, and that this definition remain, as much as possible, neutral as to the various competing theories of tort law's justification, function, or even the best interpretation of the positive legal doctrines found within that function.[18] The domain borders and constituents are necessarily subject to debate – the American Law Institute's current treatment of trespass reflects the inevitable instability of the domain – but the positive features of tort are still identifiable, even if the theories that explain those features remain hotly contested. Tort law refers to the set of non-contractual obligations, the violation of which, under certain conditions, entails that

16. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 682 (2d ed. 1985); *see generally* James Weinstein, *Big Business and the Origins of Workmen's Compensation*, 8 LAB. HIST. 156, 167, 170–74 (1967).

17. *See generally* John Fabian Witt, *Speedy Fred Taylor and the Ironies of Enterprise Liability*, 103 COLUM. L. REV. 1 (2003). According to Witt, worker's compensation was promoted by a new generation of capitalists who were influenced by the emerging field of management engineering:

> Management engineers . . . argued that management was in the best position to establish and monitor efficient work processes . . . and that workers themselves were unequipped to prevent workplace accidents effectively. . . . These same managerial engineers, in turn, provided important support to workmen's compensation statutes at the time of their enactment.

*Id.* at 40.

18. The best (relatively) even-handed survey of these competing accounts of the domain of tort is John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513 (2003).

an injured party has the power to demand a remedy (usually damages) from a defendant.[19] One of the "certain conditions" mentioned in the previous sentence includes – almost always – some causal linkage between the defendant's conduct and the injury suffered; another "condition" is the identification of some feature of the defendant's conduct or status that grounds the obligation.[20]

The description of the domain of tort in the previous paragraph is intentionally vague (to the point of vacuity, perhaps) so that no precommitment is made among various tort theories. For the purpose of this Article, it is enough that the identification of a tort rule or doctrine that is the subject of a legislative alteration could be explained or justified by reference to the idea that the point of tort law is, or should be, to promote social welfare, or to facilitate compensation, or to provide persons with the opportunity to seek redress for the violation of rights that they have, qua their membership in a state that has promised to treat all persons as equals.

If the definition of the domain of tort above is usable, even if incomplete, then the following logical possibility presents itself: there is some class of injuries which currently are being handled by a tort rule or doctrine that ought to be handled by a non-tort legal rule or doctrine. In the popular imagination, the purest expression of this logical possibility is the so-called "New Zealand Option."[21] Whether or not tort has truly been expunged from New Zealand, one can imagine a state where there is no ground to ask *anyone* to provide a remedy in the event of a certain class of injury, and the remedy only can be claimed from the state. One can imagine lesser versions of the New Zealand Option. Worker's compensation is a lesser version; if one is an employee and suffers a personal injury in connection with one's employment that has not been caused by an act intended to injure, one cannot sue one's employer, but one can demand a remedy from an insurer. The policy arguments for the New Zealand Option are easy to recite, and in their official versions they do not begin from the premise that the victim is undeserving. Rather, they take as a given that the victim is deserving of a remedy, but that tort is ill-suited (for whatever reason) to deliver that remedy.[22]

---

19. *See generally* JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 3–4 (2020).

20. *See id.* at 184, 201.

21. *See, e.g.*, Peter H. Schuck, *Tort Reform, Kiwi-Style*, 27 YALE L. & POL'Y REV. 187, 190 (2008) ("The heart of the New Zealand system, in existence for more than thirty years, is a blanket prohibition on almost all personal injury damage actions.").

22. Geoffrey Palmer, *The Design of Compensation Systems: Tort Principles Rule, O.K.*?, 29 VAL. U. L. REV. 1115, 1120 (1995).

Tort reform, like the so-called New Zealand Option or worker's compensation, can be described as *tort negative*. "Negative" connotes nothing more than the fact that the domain of tort rules and principles, whatever they may be when the tort reform is put on the table, simply are less attractive to the legislature than the non-tort rule or principle that is substituted. The story told about worker's compensation is that the "unholy trinity" of common law defenses available to employers at the time tort reform was offered made it a good bargain.[23] Worker's compensation was tort negative relative to the tort law of the time, and that is totally independent of what one thinks of the tort law of the Industrial Revolution, or what one thinks of the non-tort regime which replaced tort.

It is important to recognize that it is logically possible for a tort reform to be tort negative and to provide nothing in substitution for tort. In that case, the loss stays where it falls, and the tort reform has chosen the victim to bear the cost of the injury, as opposed to the defendant, under whatever tort rules or principles were in place before the reform was adopted. This possibility is clearly limited by public law doctrines which suggest that the federal government, in particular, cannot eliminate a common law tort cause of action without providing a substitute remedy.[24] But notwithstanding these concerns, there are isolated examples of tort negative tort reform where the injured party was left with no remedy, whereas the tort law that was replaced had provided a remedy under general and well-known tort rules and principles. For example, after it was determined by the courts of New Jersey in 1958 that charitable immunity was not part of the common law of torts of that state, persons in New Jersey could seek a remedy in tort until the legislature reformed its tort law by adopting charitable immunity.[25] At that point, an injury resulting from negligence, which would have satisfied all the general elements of a

23. *See* KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11 42 (2008) (referring to the fellow-servant rule, contributory negligence, and assumption of risk as the commonly-known "unholy trinity" of defenses).

24. The limits on federal tort reform are not as clear as they may have once seemed, although most major federal legislation does not entirely bar access to the courts, but significantly reduces it and provides a "quid pro quo" in exchange for leaving the tort system in the form of a substitute remedy. *See* Perry H. Apelbaum & Samara T. Ryder, *The Third Wave of Federal Tort Reform: Protecting the Public or Pushing the Constitutional Envelope?*, 8 CORNELL J. L. & PUB. POL'Y 591, 601–05 (1999).

25. Benton v. YMCA, 141 A.2d 298 (N.J. 1958); Collopy v. Newark Eye & Ear Infirmary, 141 A.2d 276 (N.J. 1958); Dalton v. St. Luke's Catholic Church, 141 A.2d 273 (N.J. 1958); *see also* Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 544 (2000) (discussing N.J. STAT. ANN. § 2A:53A-7(a) (West 2019) (granting immunity from liability for negligence)).

negligence action, was neither remedied by the defendant, the state, nor an insurance fund, but by the victim.[26]

Another example, from the federal system, is the General Aviation Revitalization Act of 1994 (GARA).[27] It is a statute of repose: an airplane manufacturer cannot be sued by a user of the plane eighteen years after its entry into the stream of commerce, except under certain narrow exceptions. The purpose of GARA, as one of its defenders more or less admits, is to immunize a defendant who would otherwise be responsible in tort for an injury.[28] Like the adoption of charitable immunity, GARA is a tort negative tort reform where the result is that the victim pays for an injury that, in tort, would have been paid for by the defendant (assuming that the victim could prove her tort elements).[29]

There is a difference, of course, between the two varieties of negative tort reform reviewed above: the New Zealand Option and worker's compensation provide for the victim's injury to be remedied by a third party, while the immunities simply impose the full cost of the injury on the victim. But the difference is less than meets the eye. Not only in both sets of reforms is the *defendant* removed from the legal process by which a result in connection to the victim is determined, but also even in the immunity cases, the result is not motivated by any negative attitude towards the victim's putative claim in tort. So, for example, in the case of GARA, it was pointed out that pilots – the plaintiffs in tort – stood to gain and lose from this tort reform. That is, they would lose the right to sue and gain compensation to which they would have been entitled under tort, but they would gain (in theory) from lower prices for the planes they would buy in the future.[30] The General Counsel for the Aircraft Owners and Pilots Association (which lobbied for GARA) said, in effect, we, the victims of defective airplanes, know what tort can do for us, and we do not want what torts

26. *See, e.g.*, Wiklund v. Presbyterian Church, 217 A.2d 463 (N.J. Super. Ct. Law Div. 1966) (stating that there is no remedy for a victim injured by defects on premises, even if the injury is the result of charity's negligence).

27. General Aviation Revitalization Act of 1994 (GARA), 49 U.S.C. § 40101 (2021).

28. Victor E. Schwartz & Leah Lorber, *The General Aviation Revitalization Act: How Rational Civil Justice Reform Revitalized an Industry*, 67 J. Air L. & Com. 1269, 1284, 1290, 1338 (2002) ("If an accident occurs one day before the GARA period runs, an action will be possible. . . . If it occurs on the day after the GARA period runs, no action is possible.").

29. Interestingly, this is an example of a federal tort reform with no "quid pro quo" or alternative compensation. GARA's defenders are not concerned by this from a constitutional point of view. *Id.* at 1330–32.

30. *See Panel Discussion: General Aviation Revitalization Act*, 63 J. Air L. & Com. 169, 172 (1997).

does.[31] The defendants, as a class, did not need to say that the pilots who were killed and injured did not deserve to be compensated when they were able to access the tort system; they only needed to argue that it was rational for the American people to decide to exit the tort system (sometimes) and to impose the cost of injuries, once the responsibility of the defendant, onto victims.[32]

In contrast, there is another logical possibility: that legislative alteration of the existing rules and principles of tort is intended to secure the goals of the existing tort system.[33] Typically, all episodes of legislative intervention into the tort system are probably explained this way, but it is worth taking seriously the idea that the reformer is not substituting, but improving, the part of the domain of tort touched by the reform. An easy example of this, from history, is the Federal Employers Liability Act (FELA).[34] FELA, which was a massive exercise of federal tort reform, preserved the essential features of the existing state tort system but substituted Congress's judgement about multiple rules and principles.[35] As Professor F. Patrick Hubbard notes, FELA was not an abandonment of the tort system and was different from worker's compensation because it did not purport to "replace" the tort system.[36]

Tort reform, like FELA, can be described as *tort positive*. Not all tort positive tort reform results in the expansion of a victim's ability to secure a remedy; the term "positive" refers to the purpose of the re-

---

31. The chief lawyer for the owners and operators of recreational aircraft argued that only this group was at risk, and their preferences should guide policy:

> The victims in a general aviation accident are the pilot, perhaps the pilot's family, perhaps the pilot's friend, perhaps the pilot's guest. There are no strangers, no fare-paying passengers. We are the victims. We have two sides of this debate to concern ourselves about. We want a fair compensation system, yet we want the availability of products and we would like to have them at a reasonable price.

*Id.* at 183–84.

32. Again, it is worth stressing that GARA's defenders did not resort to the usual tactics identified by critics of modern tort reform, that is, demonizing the plaintiffs (and their lawyers) and invoking the specter of frivolous litigation. The argument for GARA was much simpler: that tort, whatever its merits as a process of ascertaining fault, was not worth its collateral costs. *See* Schwartz & Lorber, *supra* note 27, at 1331 (GARA "must be upheld against a due process challenge because its purpose is to 'remove economic impediments in order to stimulate the private development' of an industry.") (internal citation omitted) *Id.* at 1331.

33. *See, e.g.*, legislation adopting comparative fault, limiting the liability of charities, and statutory approaches to the liability of governmental units.

34. 45 U.S.C. §§ 51–60 (2000) (statutes governing injuries occurring to employees of railroads engaging in interstate commerce).

35. *See* F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 468 (2006) ("FELA barred the defense of express assumption of risk, limited the defense of implied assumption of risk, adopted comparative negligence, and reduced the plaintiff's burden of proof.").

36. *Id*. at 463–69, 475–76.

form, not the relative position of the plaintiff or defendant after the reform. This can be seen in the example of the Graves Amendment, which eliminated vicarious liability in car rentals.[37] The Graves Amendment preempted any state law that held lessors vicariously liable for lessees' negligence.[38] The "plain language" of the statute "clearly indicate[d] that Congress superseded any state law that held short and long-term lessors vicariously liable."[39] While it is easy to reduce tort reform like the Graves Amendment to nothing more than the "eliminat[ion of] traditional state common law in order to protect special interests," it is different from GARA, for example.[40] Taken at face value, the proponents of the Graves Amendment were not arguing that the tort system, in connection with the assignment of responsibility for injuries suffered vicariously by bystander victims to rental car companies, should not address losses caused by the violation of private rights. Nor were they neutral on the question of whether plaintiffs, by pursuing vicarious liability against car rental companies, were making legitimate claims for a tort remedy. The car rental industry argued that "innocent businesses which rent or lease motor vehicles [were] held liable for the negligent actions of vehicle drivers," implying that the existing tort rule, since it was designed to make defendants pay for injuries that were not their fault, was inferior to the tort rule they preferred, which rejected strict liability.[41] One can disagree with the substance of the tort rule preferred by proponents of the Graves Amendment, but substantive disagreement over the specific design of a liability rule is not the same as disagreement over whether tort or some other mechanism should determine who should bear the cost of injuries. Thus, even though the Graves Amendment resulted in victims losing the opportunity to secure a remedy from deep-pocketed defendants, it is an example of a tort positive tort reform.

---

37. 49 U.S.C. § 30106 (2006).

38. *See* Brent Steinberg, Note, *The Graves Amendment: Putting to Death Florida's Strict Vicarious Liability Law*, 62 FLA. L. REV. 795, 800 (2010) ("With only twenty minutes of discussion in the House of Representatives, Congress decided to preempt the vicarious liability laws of at least fifteen states. . . .").

39. *Id*. at 801.

40. David M. Driesen, *Inactivity, Deregulation, and the Commerce Clause: A Thought Experiment*, 53 WAKE FOREST L. REV. 479, 505 (2018). This is not to deny that the circumstantial evidence suggests that financial considerations powerfully influenced the particular legislator(s) that enabled the Graves Amendment. *See* Steinberg, *supra* note 37, at 802 ("Representative Graves, whose top contributor for his 2006 congressional campaign was Enterprise Rent-A-Car, sponsored the bill.").

41. *See* Carter Wood, *Using Motor Vehicle Safety Legislation to End Federal Preemption,* POINT OF L. (May 20, 2010, 12:55 PM), http://www.pointoflaw.com/archives/2010/05/using-motor-veh.php.

The effort to distinguish tort positive tort reform from tort negative tort reform is open to the criticism that the distinction is vulnerable to bad faith actors wishing to close off an entire class of injuries from the tort system and leave victims to pay for the injury. After all, without knowing the motive of the proposer, it is hard to categorize a proposal to "improve" the rules and principles of tort with changes that look no different than a proposal that suggests that the tort system should simply not address the injuries at all. This indeterminacy is unavoidable, in part because of the difficulty in exposing bad faith, and in part because it is difficult to draw the line between (i) declaring a tort system which, once improved, limits compensation; and (ii) a decision to jettison the tort system because if it functions well, it provides compensation. An illustration of bad faith is the defense of GARA that, by cutting off claims after eighteen years, Congress was simply making a judgment *within* negligence or products liability about breach or defect – that no small consumer aircraft could be unreasonably unsafe eighteen years after its production.[42] It is hard to imagine a theory of products liability law that would support an irrebuttable presumption over the very issue over which products liability is supposed to govern – whether a product defect was unreasonably unsafe.[43] A harder case is the Protection of Lawful Commerce in Arms Act (PLCAA) and its state equivalents.[44] The PLCAA:

> [B]roadly protects firearms manufacturers and dealers from liability to suit when crimes have been committed with their products . . . [but] notwithstanding this broad immunity from suit, under certain circumstances gun manufacturers, distributors, and retailers can still be held liable for damages resulting from defective products, breach of contract, and criminal misconduct.[45]

Regardless of how one feels about the political dynamic that generated it, the immediate question is whether the PLCAA is an example of negative or positive tort reform. If one were to view the domain of

---

42. *See* Schwartz & Lorber, *supra* note 27, at 1284 (GARA "represents a policy judgment by Congress that the aircraft is considered to be not defective or not negligently designed as a matter of law if it has been in successful use for almost two decades before the accident.").

43. To be fair, if GARA was based on other legal considerations external to tort – such as evidence law (the decay of reliable evidence, etc.) – the defense would be less open to criticism.

44. 15 U.S.C. § 7901(a)(6) (2018). *See Gun Industry Immunity*, GIFFORDS L. CTR., https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/gun-industry-immunity/#state (last visited Dec. 2, 2021). Those states are: Alabama, Alaska, Arizona, Arkansas, Colorado Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and West Virginia. *Id*.

45. Linda S. Mullenix, *Outgunned No More?: Reviving A Firearms Industry Mass Tort Litigation*, 49 SW. L. REV. 390, 400 (2021).

tort law in the United States in 2005 and compare how much was not eliminated by the PLCAA, one might think that its authors were less interested in rejecting tort law than in substituting their judgment about the substantive rules of tort.[46] This would tip the scale towards calling the PLCAA a tort positive tort reform. On the other hand, the elimination of any liability under a theory of negligence involving a criminal use of the product cannot fairly be characterized as consistent with modern tort doctrine.[47] The point of this provision of the PLCAA is to remove firearms manufacturers from the tort system in connection with negligence claims that could otherwise be validly framed under the tort law of the time, in much the same way that GARA's point was to remove small aircraft manufacturers from the tort system in connection with products liability claims that could otherwise be validly framed under the tort law of the time. This would tip the scale towards calling the PLCAA a tort negative tort reform.

Even if taken at face value, the deficiencies of the existing tort system to which tort positive tort reformers are responding can be divided into two further types. The first, which has already been described above, are deficiencies of doctrine. The complaint, whether justified or not, behind the Graves Amendment is that strict liability to third parties in connection with the use of rented cars is inconsistent with the larger body of American common law tort. This is, as I argued above, no different in structure from the argument made throughout the middle of the twentieth century that persuaded legisla-

46. It is clear that the primary impetus for the PLCAA was the application of public nuisance to the sale of firearms. It could fairly be said that there was, and is, genuine disagreement about the status of this set of claims from the perspective of tort law. Many courts dismissed public nuisance claims without the benefit of the PLCAA. *See, e.g.*, District of Columbia v. Beretta, U.S.A., Corp., 872 A.2d 633, 650 (D.C.), *cert. denied sub nom.*, Beretta U.S.A. Corp. v. District of Columbia, 546 U.S. 928 (2005); *In re* Firearm Cases, 24 Cal. Rptr. 3d 659, 682 (Ct. App. 2005); City of Chi. v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1138 (Ill. 2004); Young v. Bryco Arms, 821 N.E.2d 1078, 1091 (Ill. 2004); People *ex rel.* Spitzer v. Sturm, Ruger & Co., 761 N.Y.S.2d 192, 201–02 (App. Div.), *appeal denied*, 801 N.E.2d 421 (2003); *see also* Peter H. Schuck, *Why Regulating Guns through Litigation Won't Work, in* SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS 225 (Timothy D. Lytton ed., 2005).

47. *See, e.g.*, Travieso v. Glock Inc., No. CV-20-00523-PHX-SMB, 2021 U.S. Dist. LEXIS 45275, at *20 (D. Ariz. Mar. 10, 2021) (noting that unless read to reject modern proximate cause doctrine, the PLCAA would "be rendered absolutely meaningless"). It is important to recall that the PLCAA's exception for negligent entrustment preserves only a small portion of cases involving criminal misuse by a third party since the "direct entrustee" doctrine in negligent entrustment cuts off any claim involving the stream of commerce. *See, e.g.*, Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 281 (Conn.), *cert. denied sub nom.*, Remington Arms Co., LLC v. Soto, 140 S. Ct. 513 (2019) ("The rule that a cause of action for negligent entrustment will lie only when the entrustor knows or has reason to know that the direct entrustee is likely to use a dangerous instrumentality in an unsafe manner would bar the plaintiffs' negligent entrustment claims.").

tures to conclude that charitable immunity is inconsistent with the larger body of American common law tort. The second is different – it is that the doctrines may be satisfactory, but that their application is systematically flawed and produces suboptimal results from the perspective of the tort system itself.

Tort reform based on criticisms of non-tort aspects of the tort system, ranging from critiques of evidence law to the failures of the jury system, are so familiar that it is easy to assume that these grounds are inevitably the primary source of tort reform.[48] But note that, just as there is a difference between tort negative and tort positive tort reform, there is a difference between two different types of tort positive tort reform. Some of the tort positive tort reforms described above aspire to improve the tort system by bringing its rules and principles into alignment with tort's own goals. Other tort positive tort reform aspires to improve the tort system by eliminating non-tort sources of distortion or to remove discretion from actors in the tort system on the grounds that standardization will produce outcomes more consistent with the tort system's own goals. This certainly is the most charitable explanation of tort reform designed to regulate punitive damages by limiting jury awards to a ratio of the compensatory damages already awarded.[49] Clearly, damage caps, like those first seen in California's Medical Injury Compensation Reform Act, are an example of tort positive tort reform in which the objection is to the tort system in practice, not in theory.[50] Whether indirect pressure on the tort system – by capping damages, for example – actually brings it closer to its goals, is a matter of some controversy.[51] My only point here is to identify these types of tort reform as a variety, however misguided, of tort positive tort reform.

---

48. *See, e.g.*, Andrew W. Jurs & Scott DeVito, *A Tale of Two* Dauberts*: Discriminatory Effects of Scientific Reliability Screening*, 79 OHIO ST. L.J. 1107, 1110 (2018) ("In essence, the *Daubert* admissibility standard impacts filings exactly like a method of tort reform."); Neil Vidmar, *Medical Malpractice Lawsuits: An Essay on Patient Interests, The Contingency Fee System, Juries, And Social Policy*, 38 LOY. L.A. L. REV. 1217, 1235–36 (2004) ("The assertion that jurors decide cases out of sympathy for injured plaintiffs rather than the legal merits of the case is one of the most persistent claims" of tort reformers.).

49. *See, e.g.*, Gen. Chem. Corp. v. De La Lastra, 852 S.W.2d 916, 923 (Tex. 1993) (citing Montford & Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System Part Two*, 25 HOUS. L. REV. 245, 316 (1988)) (discussing the history of Texas' tort reform to limit punitive damages to four times compensatory damages).

50. Medical Injury Compensation Reform Act, CAL. CIV. CODE 3333.2(a)–(b) (West 1975).

51. *See* Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 492–93 (2005).

## II. The Varieties of Tort Reform in COVID-19 America

### *A. Surveying the States*

My research indicates that thirty-two states (including the District of Columbia) have adopted tort reform in response to COVID-19, and an additional six have issued executive orders but no legislation.[52] I analyzed the content of the adopted legislation along the following substantive changes to the relevant state's tort law:[53]

1. Identity: Which class of activity by defendants was specified in the reform? The leading categories were healthcare providers (and sometimes residential or nursing home providers); businesses and possessors of premises; and manufacturers of products.[54] Where the class of activity included a general risk of injury due to exposure to COVID-19, I classified the identity as "general."

2. Replace Standard of Care (SOC): Did the reform specify a standard of care different from the default standard of care in the common law (which in the case of professional negligence would be the reasonable professional)?

---

52. The following law firms provided public coverage of COVID-19 liability protections: Husch Blackwell (current to March 21, 2021) and Ogletree Deakens (current to July 2, 2021). *See 50-State Update on Covid-19 Business Liability Protections*, Husch Blackwell (Feb. 22, 2021), https://www.huschblackwell.com/newsandinsights/50-state-update-on-covid-19-business-liability-protections; *Has Legislation or Other Action Been Implemented?*, Ogletree Deakins, https://ogletree.com/app/uploads/covid-19/COVID-19-liability-shield-50-state-survey.pdf?Version=41 (last visited Dec. 2, 2021). Oddly, the American Kennel Club also published a COVID-19 liability protection tracker (current to May 31, 2021). *See Covid-19 Civil Liability Limit Legislation*, Am. Kennel Club, https://akcgr.org/akc/covidliability?0 (last visited Dec. 2, 2021); *see also* Chris Marr, *States Prolong Covid-19 Liability Shields as Pandemic Persists*, Daily Lab. Report (Apr. 20, 2021, 12:38 PM), https://news.bloomberglaw.com/daily-labor-report/states-prolong-covid-19-liability-shields-as-pandemic-persists.

53. The states with tort reform legislation are Alabama, Alaska, Arkansas, Arizona, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. The states with executive orders but no parallel legislation are Connecticut, Hawaii, Illinois, New Mexico, Pennsylvania, and Rhode Island. The federal COVID-19 bill proposed in 2020, the Safeguarding America's Frontline Employees to Offer Work Opportunities Required to Kickstart the Economy Act (SAFE TO WORK Act), was not adopted by the Senate, thus ending federal COVID-19 tort reform for the moment. S. 4317, 116th Cong. (2020). *See also*, Linda A. Lipsen, *AAJ Defeats Extreme Tort Reform Proposal in Senate*, Advocate, Oct. 2020, at 128, 128.

54. Wisconsin, for example, immunizes "a partnership, corporation, association, governmental entity, tribal government, tribal entity, or other legal entity, including a school, institution of higher education, or nonprofit organization . . . an employer or business owner, employee, agent, or independent contractor of the entity, regardless of whether the person is paid or an unpaid volunteer." 2021–2022 Wis. Legis. Serv. Act 4 (West). This is not classified as general, since individuals not associated with an "entity," such as private possessors of property, are excluded.

3. Increase Burden of Proof (BOP): Did the reform increase the burden of proof from the default for tort, which is preponderance of the evidence, to clear and convincing?[55]

4. Increase Threshold for Tortious Culpability from Negligence (Replace Negligence): If the defendant's failure to meet the standard of care (regardless of its content) is tortious, must the victim prove that the defendant's failure was more than negligent? If so, is the threshold moved to gross negligence or recklessness? Or even intent to harm?

5. Assumption of Risk (AOR): Does the tort reform create a presumption that the defendant assumed the risk of the relevant injury, and can the victim rebut that presumption?

6. Objective or Subjective Standard of Care: Did the reform adopt a subjective, as opposed to objective, test for whether the defendant met the standard of care (regardless of its content)? A number of states changed the default principle in negligence law that a defendant's compliance with a standard of care was measured by what a reasonable person would have done under the circumstances with a "good faith" test – that is, did the defendant, in trying to comply with the standard of care, act in good faith?[56]

The summary of the different states is below:

---

55. This would be consistent with other tort reform efforts that replaced preponderance of the evidence for clear and convincing jury instructions for punitive damages.

56. The "good faith" language in COVID-19 tort reform is almost certainly taken from the various states' already-existing Good Samaritan immunity tort reform legislation. *See, e.g.*, Hirpa v. IHC Hosps., Inc., 948 P.2d 785, 793 (Utah 1997) ("The Good Samaritan Act provides incentives for licensed medical providers to render aid by making them immune from suit, even if their good faith attempt is carried out in a negligent manner."). The problem is that typically, "good faith" is used to determine, in a Good Samaritan statute, whether the defendant was privileged because they believed that there was an emergency. *See* Pemberton v. Dharmani, 525 N.W.2d 497, 501 (Mich. Ct. App. 1994) (holding that the Good Samaritan statute "affords partial immunity for medical personnel who have a good-faith belief that a life-threatening situation exists at the time they respond to a request for emergency assistance"). In the COVID-19 tort reform statutes, "good faith" functions to adopt a subjective test for reasonableness in negligence – which seems inconsistent with the common law, which has adopted the Holmesian principle of the objective test for reasonable care. *See* Anita Bernstein, *Distributive Justice Through Tort (and Why Sociolegal Scholars Should Care)*, 35 LAW & SOC. INQUIRY 1099, 1108 n.5 (2010) (American tort law rejected "a subjective standard of care that would hold an actor to his own mix of limitations and abilities, favoring instead a 'reasonable man' ideal devoid of these particulars.").

| IDENTITY | | | | REPLACE SoC | BOP | REPLACE NEGLIGENCE | | | AOR | OBJECTIVE v. SUBJECTIVE |
|---|---|---|---|---|---|---|---|---|---|---|
| HEALTH | BUSINESS PREMISES | PRODUCTS | GENERAL | | | GROSS | RECKLESS | INTENT | | |
| AL | AR | IA | FL | AZ | FL | AK | AR | MS | GA | MS |
| AK | GA | IN | ID | IA | TN | AZ | ID | SD | | NJ |
| AZ | IA | MS | IN | KS | MS | FL | ND | WV | | WI |
| FL | KS | MT | IA | KY | | GA | OH | | | WY |
| GA | LA | ND | MI | LA | | IN | UT | | | |
| KS | MT | SD | MS | MA | | KS | | | | |
| KY | NV | TX | NE | MI | | LA | | | | |
| MA | NC | WV | OH | MS | | MA | | | | |
| MS | ND | | OK | NV | | MT | | | | |
| MT | SC | | SD | NJ | | NV | | | | |
| NJ | SD | | TN | ND | | NJ | | | | |
| ND | UT | | TX | OK | | NC | | | | |
| OH | WI | | WV | SC | | SC | | | | |
| SC | | | WY | WI | | SD | | | | |
| TX | | | | NE | | TN | | | | |
| VA | | | | | | TX | | | | |
| WI | | | | | | VA | | | | |
| | | | | | | WY | | | | |

### *B. Classifying the Results*

#### *1. Tort Positive Tort Reform*

While it is difficult to be sure how to interpret the attitudes and beliefs of the masses of persons involved in the framing and passage of these various legislative acts, this Article is an attempt at reconstructing a plausible account of what may have been the motivation behind any given COVID-19 tort reform intervention into the existing tort system.

One plausible account for the fifteen states that replaced the common law standard of care with a specified standard of care is that the motivation was tort positive and within that category, an effort to improve tort by replacing an inadequate rule (reference to a general standard of care) with a standard of care set by an authority. In some cases, the legislature's definition of reasonable care seems hardly any different from the common law's: In Massachusetts, for example, a healthcare provider's care is measured against what is required by "a COVID-19 emergency rule."[57] The circumstances in which that standard of care is different from the common law of Massachusetts – that of a reasonable medical professional under the circumstances of a pandemic – is difficult to discern. On the other hand, most of the legislation that affected the content of a defendant's standard of care concerned the businesses, premises owners, or the general public. For example, Nebraska's tort reform, which was adopted very recently,

57. S. 2640 § 2, 2019–2020 Legis., 191st Gen. Ct. (Mass. 2020).

defines the standard of care in connection with conduct that risks causing injury due to the transmission of COVID-19 this way:

> A person may not bring or maintain a civil action seeking recovery for any injuries or damages sustained from exposure or potential exposure to COVID-19 . . . if the act or omission [that] alleged to violate a duty of care *was in substantial compliance with any federal public health guidance that was applicable to the person, place, or activity* at issue at the time of the alleged exposure or potential exposure.[58]

It is not clear how much of Nebraska's common law is affected by this legislation since "substantial compliance with any federal public health guidance" is arguably a very low bar – suggesting that where the federal government is silent, the defendant is at liberty to act regardless of other common law doctrines that might apply.[59] To the extent that these laws replace existing common law standards of care with standards established by federal and state emergency and health guidance, they may simply be seen as legislative choices to substitute one set of substantive tort rules for another, which falls squarely in the category of tort positive tort reform.

### *2. Tort Negative Tort Reform*

On the other hand, there are COVID-19 tort reforms that cannot be seen as anything but tort negative. This can be seen most vividly in legislative acts that replace the negligence standard with an elevated degree of culpability.[60] A good example of this is South Dakota, which offers broad immunity for causing a COVID-19 related injury absent an intent to cause injury.[61] The law states that "[a] person may not bring or maintain any action or claim for damages or relief alleging exposure or potential exposure to COVID-19 unless the exposure re-

58. Legis. 139 § 3, 107th Leg., Reg. Sess. (Neb. 2021) (emphasis added).

59. *Id.*

60. Tort reform that elevates the quantum of proof required to establish negligence is also (arguably) tort negative, since it protects a set of defendants from liability despite the absence of any feature of the risk which would lend itself to more accurate fact finding under a higher burden of proof. This is illustrated in Heck v. Copper Cellar Corp., No. 3:21-CV-158, 2021 WL 3409245 (E.D. Tenn. Aug. 4, 2021). The defendant was a business, and the plaintiff was a worker who claimed constructive dismissal when her employer would not accommodate her vulnerability to COVID-19 due to asthma. *Id.* at *1. The plaintiff overcame a motion to dismiss brought under Tennessee's COVID-19 tort reform statute, which requires proof of gross negligence by clear and convincing evidence, by arguing that her claim was for employment discrimination, and therefore was not subject to any heightened standards for proof of liability. *Id.* at *1–2.

61. *See* H.R. 1046, 96th Leg., Reg. Sess. (S.D. 2021). The law distinguishes and specifies immunity for healthcare professionals and the possessors of premises, but there is no difference in how they are immunized under the law. The law does impose liability on suppliers of products in response to COVID-19 if they act recklessly – which is an interesting retreat from its otherwise extremely pro-defendant design.

sults in a COVID-19 diagnosis and the exposure is the result of intentional exposure with the intent to transmit COVID-19."[62] The same immunity is provided to possessors of premises but not to healthcare professionals and suppliers of products marketed in response to COVID-19.[63]

Mississippi immunizes all but intentionally injurious conduct by defendants who cause COVID-19-related injuries in much the same way.[64] Defendants in general are immune from liability unless the "plaintiff shows, by clear and convincing evidence, that a defendant, or any employee or agent thereof, acted with actual malice or willful, intentional misconduct."[65] West Virginia is very similar to Mississippi: "[T]he limitations on liability provided in this article shall not apply to any person, or employee or agent thereof, who engaged in intentional conduct with actual malice."[66] In Mississippi, there is a difference drawn between the general public (including the possessors of premises) and healthcare professionals and products manufacturers – the standard of care under which their conduct is evaluated is subjective: All that they are required to do is "*attempt*[ ] in good faith to follow applicable public health guidance," whereas the latter, presumably, must conform their conduct to that of a reasonable healthcare professional or product manufacturer.[67]

Therefore, in South Dakota, a person who caused another to contract COVID-19 through reckless conduct has immunity, and in Mississippi, that person has immunity (presumably) even if they were substantially certain that their conduct would cause another to contract COVID-19 if they establish that they were acting in good faith, no matter how great the risk they created, or how much they were warned by others about the risk.[68] There is no plausible story that can be told where all but intentional injuries are the domain of tort law; to reduce tort to this limited scope is not to improve it, but to eliminate it. These legislative acts are tort negative, in much the same way that the worker's compensation or GARA is tort negative. To be clear, the choice by the South Dakota, Mississippi, and West Virginia legisla-

62. *Id*. § 2.

63. *Id*. §§ 3–5.

64. *See* Mississippi Back-to-Business Liability Assurance and Health Care Emergency Response Liability Protection Act, MISS. CODE ANN. §§ 11-71-1–11-71-13 (2021).

65. *Id.* § 11-71-11(1).

66. Covid-19 Jobs Protection Act, W. VA. CODE § 55-19-7 (2021).

67. MISS. CODE ANN. §§ 11-71-5, 11-71-7, 11-71-9 (2021) (emphasis added).

68. In other words, Menlove would finally have found a friendly jurisdiction. Linda Ross Meyer, *Why Me*?, 16 QUINNIPIAC L. REV. 299, 311 (1996) (*Vaughn v. Menlove* "suggest[s] that the defendant is liable even if incapable of prudence.").

tures, like Congress in 1994, is to block the operation of tort and to impose the cost of injuries that otherwise would be remedied by the defendant on the victim. The mystery in the case of the COVID-19 tort reform statutes is why have them at all? Unlike the case made by the lobbyists for the small airplane manufacturers – there is no plausible account, in terms of promoting social welfare or larger social goals, that justifies removing COVID-19 injuries from the tort system (especially with no substitute compensation for the victims).[69]

This Article is the first step to understanding the "deep architecture" of the tort reform response by the states after COVID-19 emerged. The remaining distinct choices made by the legislators will reveal to what extent they were motivated by tort negative and tort positive goals. If the latter, this will indicate to what extent they were motivated by assumptions relating to the failure of the status quo tort system as a matter of doctrine or because of the inability of non-tort elements, such as the jury system or the rules of evidence, to achieve the tort system's goals.

69. There is, so far, a trickle of tort suits related to COVID-19 in the courts. Low rates of litigation were first noted in the latter half of 2020. *See* David Dayen, *Unsanitized: There Is No Flood of COVID Lawsuits Against Businesses*, THE AM. PROSPECT (July 16, 2020), https://prospect.org/coronavirus/unsanitized-no-flood-of-covid-lawsuits-against-businesses-liability/ *and* Gregory Blueford, *COVID-19 Related Tort Lawsuits On The Rise? Not So Fast, My Friend*, FREEMAN MATHIS & GRAY LLP (Sept. 20, 2020), https://www.fmglaw.com/business-litigation/covid-19-related-tort-lawsuits-on-the-rise-not-so-fast-my-friend/. As of September 26, 2021, there have been fewer than 1100 cases filed nationally based on exposure to COVID-19 in a public place or place of employment, medical malpractice connected to COVID-19, or "[w]rongful [d]eath or [p]ersonal [i]njury arising from other than employment, consumer or healthcare setting." *See COVID-19 Complaint Tracker*, HUNTON ANDREWS KURTH, https://www.huntonak.com/en/covid-19-tracker.html (last visited Sept. 26, 2021).