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TORTS AND DAMAGES: THE CIVIL JUSTICE REFORM ISSUE

I. INTRODUCTION

The continuing debate over revising the civil justice system, sometimes called “tort reform”, is again the focus of legislative attention. Among the reasons for heightened interest in the issue, both in Wisconsin and the rest of the nation, is the persistent rise in the size of medical malpractice damage awards and the escalating effect they have on the cost of malpractice insurance premiums and on health care in general. Another reason is the widespread publicity given to large damage awards won in seemingly frivolous lawsuits. A third contributing factor is the recent electoral gains of the of the Republican Party, which has generally supported changes in the civil legal system.

While some groups, such as insurance companies, doctors, manufacturers and other businesses, see a need for significant reform in the civil justice ground rules, many others, such as trial lawyers, labor unions and advocates for consumers and the financially disadvantaged, disagree. They assert that the system is generally working well and believe that little, if any, change is warranted. This brief examines key elements of the tort reform issue and presents commonly expressed arguments for and against various proposed modifications in the civil justice system.

What is a Tort? A tort is a wrongful act or omission, constituting negligence, that results in identifiable harm to a person and for which relief may be obtained in a court of law, typically in the form of monetary damages. Negligence may be the failure to do what a reasonably prudent person would ordinarily have done to prevent foreseeable harm to another under the circumstances. It can also be the doing of a careless, reckless or intentionally malicious act that a prudent and reasonable person would not have done. Essentially, the negligence standard seeks to punish abnormal or inappropriate behavior that harms others. Torts can take the form of causing actual physical or psychological injuries; violating a business relationship by fraud, libel or slander; or any other negligent act or nonact which causes economic losses to another. A tort claim is a civil action in contrast to a criminal action for which the penalty can include imprisonment.

Purpose of a Tort Action. In general, a tort claim seeks redress by relying on the civil justice system to assign fault and, as much as practicable, to make an injured or wronged person “whole” again by forcing the guilty party (“tort-feasor”) to pay for the harmed person’s present and future medical expenses, income reduction or other tangible or intangible losses. While money alone is often inadequate to compensate a person for the severe pain and suffering resulting from physical or mental injuries or loss of reputation, it is the chief tool available to the civil court. The system is also designed to punish wrongdoing and provide warnings in hopes of preventing future similar unacceptable behavior.

Types of Damage Awards. Money can be awarded to successful plaintiffs in civil suits in the form of three basic types of damages — economic, noneconomic and punitive damages. **Economic damages** include compensation for the actual and estimated costs of present and future medical care, loss of income or earnings capacity, harm to reputation, and damage to or loss of property. **Noneconomic damages** can include awards for so-called “pain and suffering”; mental distress; worry or emotional anguish of the injured individual; embarrassment or humiliation; loss of enjoyment of the normal activities, benefits and pleasures of life; loss of well-being or bodily functions; and the loss of consortium, companionship, and affection suffered by the family of a person who is severely injured or dies as a result of a tortious act. **Punitive damages** may be awarded to the victim but are intended to serve as punishment to the party at fault and to deter similar future wrongdoing by the guilty party and others.

II. ISSUES AND ARGUMENTS

Medical Malpractice. Health care costs consume an increasingly larger share of national wealth each year, rising at a significantly faster pace than the general rate of inflation. It is argued that the escalation of health care costs is partly attributable to patients and their families trying to affix blame for unsatisfactory outcomes and to excessively large “pain and suffering” and punitive damage awards.

Tort reform advocates assert that doctors often resort to practicing so-called “defensive medicine” in order to avoid lawsuits. They may order unnecessary tests, medical interventions of dubious merit and prolonged hospital stays in order to prove later, if called into court, that everything possible was done to diagnose and treat a patient. Such procedures, in some cases performed against a physician’s better judgment, may drive up the expense of health care for all.

Noneconomic and punitive damages make up increasingly large proportions of medical malpractice awards. The right of an injured individual to seek compensation for actual and quantifiable economic damages is generally not disputed. Similarly, most people agree that an injured person or surviving family members deserve fair compensation for the pain and

anguish caused by crippling injury or the death of a loved one. Tort reform advocates generally do not propose placing restrictions on awards for actual economic costs but believe some caps on difficult-to-calculate losses, such as “pain and suffering”, are appropriate. They also assert that there should be reasonable limits on punitive damages. Critics of restrictions counter that malpractice caps will hamper the ability of juries to punish negligent doctors and adequately compensate victims for the diminished length and quality of life.

The cost of medical malpractice insurance premiums (currently estimated at between 1% and 3% of a physician’s expenses) is a small but growing portion of the health care budget. However, those supporting caps argue that the accelerating cost of insurance, especially in certain high risk medical specialties, is prompting many doctors to retire and may discourage replacements. A prime example cited is obstetrics. Parents are apt to sue the doctor who delivered the baby if there are medical complications, particularly in cases of life-long handicaps. It is argued that statutory caps on the size of punitive damages will help control medical costs by stabilizing malpractice insurance premiums. Opponents claim, however, the prospect of damage awards provides a strong financial incentive for medical providers to practice within acceptable standards of care. Both sides admit the medical malpractice system is imperfect. Some deserving victims never get into court, while some parties file false claims. The process itself may be slow, costly and sometimes unjust.

Although several states have instituted caps on noneconomic awards, such as “pain and suffering” and punitive damages, there are currently no limits in Wisconsin on these types of damages. (1985 Wisconsin Act 340 placed a \$1 million cap on noneconomic damages for claims filed after June 14, 1986, but that provision sunset on January 1, 1991.)

Some states limit the amount of time a patient has to bring suit, either as calculated from the date on which the alleged malpractice occurred or from the date the injury was discovered. In Wisconsin, for example, medical malpractice actions must be filed within three years of the date of the injury or one year from the date the injury was discovered or with reasonable diligence should have been discovered. However, no action may be commenced more than five years from the date of the negligent act or omission. This statute of limitations was upheld as a legitimate exercise of legislative discretion by the Wisconsin Third District Court of Appeals in *Miller v. Kretz* on February 7, 1995. Although many other tort actions have more lenient grace periods for filing claims, the court ruled that the limitation was not a denial of the constitutional guarantee of equal protection under the law because the legislature had a rational reason to enact it. The court noted: “Because of the distinct nature of medical malpractice claims, the costs involved and the insurance issues, distinguishing health care providers in medical malpractice claims is reasonable.”

Excessive Damage Awards. As discussed previously, awards for noneconomic and punitive damages have increased greatly in size and frequently appear to be out of proportion to the actual economic losses. Critics point to the recent case in which a jury awarded almost \$3 million to an elderly woman burned by a cup of McDonald's coffee. She sustained the burns when she attempted to pry the top off the cup while holding it between her legs as she was riding in a car. The judge later reduced the award to \$640,000.

Some juries have arbitrarily set punitive awards so high as to call into question whether they may violate the prohibition of the U.S. Constitution against the imposition of excessive fines. In a land title dispute several years ago, a West Virginia jury imposed a \$10 million punitive sanction against a gas and oil company — 526 times the \$19,000 actually lost.

Some argue that punitive damages should not be paid in full to the harmed individual. Rather, since their purpose is to punish wrongdoers and promote public safety, such awards should accrue, in whole or part, to the public treasury.

Contributory and Comparative Negligence. The tort system is based on fault and the principle that whoever caused an injury should pay the costs resulting from the irresponsible behavior or negligence. This means that, in general, compensation is based on the percentage of the blame assigned to each individual involved. If one tort-feasor is responsible for the whole incident, then he or she pays all of the costs. Multiple tort-feasors share the costs based on their portion of the fault. Finally, the total costs to be paid to the injured victim are reduced by any percentage of fault attributed to the injured individual. For example, if A and B are involved in an automobile accident in which B is 85% at fault and the total damages awarded to A in a civil trial are \$100,000, then the damages B will be required to pay will be reduced by \$15,000, leaving A with a total award of \$85,000. Under the doctrine of comparative negligence, recovery is barred unless the defendant's negligence was greater than the plaintiff's on the theory that if a person is more than 50% at fault for an accident, the other party involved should not be liable.

Joint and Several Liability. In cases in which more than one party is found to be at fault, theoretically all are supposed to pay a portion of the total cost of the damages based upon their allotted share of the blame. However, if one or more of the persons at fault are unable to pay all or part of their share, the burden to pay is shifted to the tort-feasors who do have sufficient financial resources, those with so-called "deep pockets". The result of joint and several liability is that a person who is found to be as little as 1% at fault could wind up paying 100% of the judgment if the other guilty parties are indigent. Some jurisdictions permit a person who is forced to pay more than his or her rightful share of the award to bring a civil action against the parties who were initially unable to pay, but the person with "deep pockets" may never be fully compensated by the less well-off defendants.

Proponents of the joint and several liability doctrine claim that justice requires that an injured or wronged person who suffers harm due to the negligence of others should receive compensation for pain and income losses, regardless of which defendant pays. They also argue that it spreads tort costs over the broad range of society in instances where awards are covered by liability insurance. Opponents assert joint and several liability should be altered so that a defendant found guilty should only have to pay his or her fair share of the damages based on the proportion of the fault assigned.

Contingency Fees. Because some of those injured are reluctant to file suit due to their inability to afford legal fees, attorneys often agree to take cases that have some merit in return for a percentage of any damage awards recovered. Such contingency fees are commonly set at one-third of the award but sometimes range up to one-half in particularly risky or complicated actions. Contingency fee arrangements may ensure that less affluent persons with legitimate complaints have access to the courts, but critics charge that the system encourages too many claims that are unlikely to prevail on their own merits. While some assert that lawyers will decline cases in which the chances of winning are small, others argue that attorneys may gamble on these weaker cases in hopes that defendants will settle out of court in order to avoid the high costs of litigation.

1985 Wisconsin Act 340 created Section 655.013, Wisconsin Statutes, which limits the amount of contingency fees that attorneys may collect in medical malpractice cases. In general, lawyers working on such a basis in claims against health care providers may collect one-third of the first \$1 million recovered and 20% of any payment above that amount. Attorney fees are limited to 25% of the first \$1 million if the case is settled within 180 days of filing the claim and at least 60 days before the first scheduled day of trial.

Product Liability. Manufacturers have a duty to produce products that are not defective or inherently unsafe. However, tort reform advocates claim that companies should not be held liable for products that meet government or accepted industry safety standards when they are made. They also say that manufacturers should not be liable if safety equipment is removed or if instructions are disregarded and the product is used incorrectly. They further argue that retail stores and dealers should not be responsible for selling defective equipment which they believed to be safe.

Reform proponents claim that product innovation is discouraged because of the propensity of people to sue for injuries that could have been prevented with a little common sense. Companies, such as pharmaceutical manufacturers, may even hesitate to undertake development and marketing if their liabilities may outrun product income. A case in point occurred at Abbott Laboratories in 1993 when it discontinued testing of an experimental vaccine to pre-

vent the transmission of the HIV virus from infected mothers to their children. The company voiced worries that the cost of potential liability lawsuits outweighed any anticipated profits.

There are notable cases where defective product design has made an item blatantly unsafe — a prominent example being the Ford Pinto automobile which exhibited a tendency for gas tank explosions in rear-end collisions. But there are also many examples of products, thought to be safe when initially marketed, that later were judged to have been manufactured or used negligently. In some cases where the products have been widely distributed, numerous plaintiffs may join in a class-action lawsuit, which can drive companies into bankruptcy. Well-known examples include the damages awarded against the manufacturers of asbestos products, silicone breast implants and Dalkon Shield intrauterine contraceptive devices. In many instances of alleged defective products, the maker will often settle out of court, without admitting guilt, to avoid the considerable legal costs and negative publicity resulting from a trial. In February 1995, for example, the Kellogg Company agreed to pay \$2,400 in damages to a man who insisted the company's Pop-Tarts were to blame for a fire in his toaster which caused damage to his kitchen. Products are sometimes recalled for repair or replacement in order to forestall public relations disasters, but out-of-court settlements that bar plaintiffs from discussing their claims may mean the public at large is not warned about unsafe products.

Frivolous Suits. Some say that a prime contributor to the clogged state of the civil court system is the large number of suits of dubious merit filed for purposes of harassment, extortion or intimidation or because plaintiffs mistakenly believe that their frivolous claims are legitimate. One example was a girl in Maryland who sued her school for \$1.5 million for injuries sustained playing on the football team on the grounds that no one told her of the risks involved. Some file relatively groundless suits in hopes that a sympathetic jury will side with them or that a wealthy defendant will settle out of court to avoid the costs and embarrassment of a public trial. Alleged personal injuries are an ample source of frivolous lawsuits because of the difficulty of proving or disproving pain in soft tissues, such as backaches, headaches or allergic reactions to alleged contaminants.

While there are remedies available to combat overburdening the justice system, judges are reluctant to sanction frivolous petitioners for fear of discouraging people from seeking just redress from the courts. Section 814.025, Wisconsin Statutes, permits judges to penalize those filing lawsuits found to be frivolous, either during the proceedings or upon judgment, by awarding the successful party court costs and reasonable attorney fees. To impose punishment for a groundless action, the judge must find that the suit was commenced in bad faith solely for the purposes of harassing or maliciously injuring another or that the plaintiff or the plaintiff's lawyer knew, or should have known, that the action was without any reasonable basis in law or equity and could not be supported by a good faith argument for modification

or reversal of existing law. The Wisconsin Court of Appeals ruled in *Minniecheske v. Griesbach*, 161 Wis. 2d 743 (1991), that restricting access to the courts as a sanction for frivolous actions was acceptable if narrowly tailored to balance the interests of public access to the courts against the citizens' right not to have frivolous litigation draining public resources.

III. PROPOSALS FOR REFORM

There continues to be considerable disagreement about whether radical tort reform is justified. Some claim that the so-called "litigation explosion" has been overblown and that altering the system will make it less responsive and accessible to the people who rely on it for redress of wrongs. They assert that the number of lawsuits and size of awards are not increasing as rapidly as in the recent past and that the system is working as intended to compensate harmed individuals, punish wrongdoers and promote safe products and practices. They also assert that the size and type of damage awards should be left up to the common sense and compassion of ordinary citizens serving on juries and that an arbitrary limit may not adequately compensate some severely harmed victims.

Federal Legislation. The U.S. Congress is currently considering the "Common Sense Legal Reform Act". Its stated purpose is to discourage frivolous lawsuits and limit excessive and "outrageous" punitive damage awards. The proposed act requires the losers of many federal lawsuits to pay the winner's legal fees, preempts state laws with federal standards, caps punitive damage awards for defective product claims, and requires that courts sanction attorneys for "improper actions and frivolous arguments".

Illinois Legislation. A bill passed by the Illinois House of Representatives in February 1995 would limit noneconomic damage awards, such as for "pain and suffering", to \$500,000, an amount that would increase with inflation. It would cap punitive damage awards at three times the amount of actual economic damages and eliminate the concept of joint and several liability. The proposal would also give protection to manufacturers in product liability cases by creating a legal presumption that a product is considered safe if it met state or federal safety standards at the time it was made.

Wisconsin Legislation. The Wisconsin Legislature has enacted a number of limitations on liability over the years. Among them are exemptions for recreational land use (the "berry picker" law), aid and comfort to injured persons (the "Good Samaritan" law), donated food to charitable organizations, and ski patrol duties. In order to be exempt from liability claims, the actions must have been taken in good faith, and reckless negligence or failure to warn someone of a known hazard are not excused.

The 1995 Legislature is currently considering several bills relating to the subject of tort reform. 1995 Assembly Bill 36, which passed the assembly on February 2, 1995, would establish

a limit of \$350,000 on the amount of noneconomic damages that a claimant may recover due to an injury caused by the negligence of a health care provider. Noneconomic damages are defined under this measure to include items such as pain and suffering, embarrassment, mental distress, and loss of society and companionship. The bill also limits medical malpractice damages related to loss of society and companionship as the result of a death to a maximum recovery of \$150,000, the amount currently established for other civil actions involving death.

1995 Senate Bill 11 proposes significant changes in the areas of comparative negligence in general and in the principle of joint and several liability with respect to punitive damages. The proposal would change the rules of comparative and contributory negligence so that the negligence of the plaintiff, if any, would be measured separately against each of the joint tortfeasors. A tort-feasor's liability and share of the total damage award would be limited to the percentage of the total causal negligence attributed to that party. The doctrine of joint and several liability would be abolished in the area of punitive damages, meaning that a defendant would be responsible for only his or her allotted share of the punitive damages, even if the other parties at fault were unable to pay their assigned portion. In addition, evidence of a defendant's wealth, an indicator of ability to pay, would not be admissible until after the plaintiff had established a legally sufficient case for the allowance of punitive damages.

Continuing Debate Over Tort Reform. Even if all the currently proposed modifications at the state and federal level are enacted, questions of tort reform will persist. Like many other areas of the law, this ongoing debate will center around fair and equal justice and will involve a delicate balance between the rights of wronged or injured individuals and the costs to society as a whole.

IV. SOURCES

Budiansky, Stephen, Ted Gest, and David Fischer. "How Lawyers Abuse the Law." *U.S. News and World Report*, January 30, 1995, 50-56.

"Liability Insurance: Are Premium Rates Holding Steady?" *American Healthline – An APN Daily News Briefing*, January 27, 1995.

Minter, Scott C. "Limiting Recovery of Noneconomic Damages." *Wisconsin Bar Bulletin*, July 1987: 15-17.

O'Connell, Jeffrey and C. Brian Kelly. *The Blame Game: How Shin-Kicking Litigation is Hurting All of Us*. Lexington, Massachusetts: Lexington Books, 1987. (347.9/Oc5)

Olson, Walter, ed. *New Directions in Liability Law*. New York: Academy of Political Science, 1988. (347.9/Ac1)

Rubin, Paul H. *Tort Reform by Contract*. Washington, D.C.: AEI Press, 1993. (347.9/Am3)

Wisconsin. Legislative Reference Bureau. *Clippings: Contributory and Comparative Negligence*. (347.9/Z)

Note: Numbers in parentheses indicate Legislative Reference Bureau catalogue numbers.