

CHAPTER 9

WEST VIRGINIA LEGAL LIABILITY REFORM

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The Rule of Law

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Torts scholar Kenneth Abraham defines tort as “a civil wrong arising out of contract.”¹ Although Abraham describes this definition as both overinclusive and underinclusive,² this definition is the best simple definition that torts scholars offer. Abraham identifies five possible functions of the tort system: “corrective justice and civil redress,” “optimal deterrence,” “loss distribution,” “compensation,” and “redress of social grievances.”³ Whether the individual sympathizes with the plaintiff-friendly (or victim-friendly) school of thought or the defendant-friendly (or business-friendly) school of thought is a matter of preference. The plaintiff-friendly school values “compensat[ing] victims who have suffered grievous injuries or losses through the fault of others and the creation of an incentive for persons and firms to act to prevent potential causes of injury or death,”⁴ and the defendant-friendly school values reducing the payment of compensatory and punitive damages to plaintiffs by “aboli[shing] the rule of joint and several liability, aboli[shing] the collateral source rule, limit[ing] punitive damages, and limit[ing] noneconomic damages.”⁵ By applying the principles of economic analysis, we attempt to divorce ourselves from these competing schools in order to explore the incentives and effects of West Virginia’s tort system on the state’s economy.

We begin by defining the foundations of tort law and the role of the state in protecting citizens through a sound legal system, with specific emphasis on civil liability. We next discuss some of the major complaints about West Virginia’s legal system. After an exploration of these complaints, we outline three specific legal liability reforms: joint and several liability, medical malpractice liability, and venue shopping. These reforms receive significant attention because they are fair, likely to have a positive impact on the state’s legal system, and relatively easy to implement.

THE FOUNDATIONS OF TORT LAW

Tort law should encourage individuals to take an efficient level of precaution in their interactions with other people and with others’ property.⁶ A simplified version of tort law asks

¹ Kenneth S. Abraham, *The Forms and Functions of Tort Law* 1.

² *Id.*

³ *Id.* at 14-20.

⁴ Richard A. Brisbin, Jr. & John C. Kilwein, *The Future of the West Virginia Judiciary: Problems and Policy Options*, 2, 5.

⁵ ATRA’s Mission: Real Justice in Our Courts.

⁶ See Richard Posner, *Economic Analysis of Law*.

whether the tortfeasor should have done something different than what he did and whether someone or something was injured as a result. A tort cause of action is based either on a theory that the defendant negligently harmed the plaintiff or on a theory that the defendant intentionally harmed the plaintiff.

To recover in a negligence cause of action, the plaintiff must prove that the defendant owed the plaintiff a duty, that the defendant breached the duty he owed the plaintiff, that the defendant's breach caused the plaintiff to receive an injury, and that the defendant should pay the plaintiff money damages. Judge Learned Hand established that a potential tortfeasor breached his duty of reasonable care if the burden of acting to prevent an injury is less than the expected probability of loss multiplied by the expected loss ($B < PL$).⁷ In order to minimize the social costs of negligent actions, precautions should be taken until the marginal cost of the safety improvement is equal to the marginal benefit the safety improvement provides.⁸ This ideal applies equally to plaintiffs and defendants. Because "many accidents can be prevented by victims at a lower cost than by injurers,"⁹ the law's aim should be "to make sure that the lower-cost avoider is encouraged to take care."¹⁰ As such, West Virginia courts should perform detailed evaluations of whether each party was exercising due care at the time of the accident in order to ensure that the lower-cost avoider bears the liability for the action or inaction.

To recover in an intentional tort cause of action, a plaintiff must establish that the defendant intended to cause some type of contact; that the conduct was harmful or offensive to the plaintiff; and either that the defendant intended to harm or offend, or that the defendant knew that harm or offense was substantially certain to result from the contact. In applying Hand's $B < PL$, Posner finds that B is a negative number in an intentional tort because "rather than saving resources by injuring the victim (implying a positive B) I would save resources by not injuring the victim (implying a negative B)" since it must cost something to engage in an injurious act.¹¹ Posner also argues that P is much higher in an intentional tort than it would be in a negligence tort because "wanting to do someone an injury makes it much more likely that an injury will occur than if the injury would be undesired by-product of another activity."¹² Based on this analysis, Posner finds that the law is much more willing to award punitive damages in intentional tort cases than in negligence cases, because the risk of deterring socially valuable conduct by imposing additional costs on the tortfeasor is minimized in the intentional tort case where the conduct is harmful or offensive by definition. Posner also argues that there is no reason to allow a defense of contributory negligence in an intentional tort case, "since the cost of avoidance is plainly lower to the injurer than to the victim – is indeed negative to the injurer and positive to the victim. The victim cannot be the lower-cost avoider."¹³

West Virginia's liability system is designed to ensure that injured parties are compensated at least to the extent of their injuries. In some cases, this state fosters

⁷ *United States v. Carroll Towing Co.*

⁸ *See Posner, Economic Analysis of Law.*

⁹ *Id.* at 172.

¹⁰ *Id.*

¹¹ *Id.* at 206.

¹² *Id.*

¹³ *Id.*

inefficiency by requiring tortfeasors to pay sums greater than their contribution to the injury.¹⁴ As it relates to torts arising out of negligent actions, overcompensating victims overdeters productive activity. Unfortunately, public sentiment and the resulting legislation have placed the interests of the injured party above the prosperity of the state and its citizens. West Virginia lags behind all other states with respect to providing a fair and efficient system of injury compensation based on the *2007 U. S. Chamber of Commerce State Liability Systems Ranking Study*.¹⁵ In the next section, we explain the economic burden placed on West Virginia by its legal liability system.

THE ROLE OF THE STATE AND WEST VIRGINIA'S LEGAL SYSTEM

The father of economics, Adam Smith, states in *The Wealth of Nations* that one of the few roles of government is to establish a fair and independent judiciary.¹⁶ The role of the judiciary in civil law cases is to enforce contracts and settle disputes. A system that enforces contracts and creates incentives for citizens to respect the property of others creates the fundamental legal basis for long-term economic growth. A good legal system hears cases and applies established precedent in a fair, predictable, and efficient manner. Legal systems with these characteristics promote economic growth and development.¹⁷

West Virginia's low ranking with respect to its legal liability system is a result of the State's legislation and common-law decisions. Where the state's legislative, executive, and judicial bodies promote unfair transfers of wealth, they distort the market system and the incentives businesses face. Fortunately, some simple legal reforms have been shown to remedy this situation in other states. Adopting these reforms would lead to a more fair judicial system and greater prosperity for our state.

LEGAL LIABILITY REFORMS IN WEST VIRGINIA

We base our recommendations for legal liability reform upon the notion of fairness, the positive impact on the state's business climate, and the constitutionality of implementing the reform in West Virginia.¹⁸ The three legal reforms considered in the following sections include 1) eliminating the doctrine of joint and several liability in all civil tort claims, 2) extending reform efforts in the area of medical malpractice liability, and 3) ending venue shopping in products liability and class action lawsuits.

¹⁴ See generally *Kizer v. Harper* (2001) at n. 26. "This Court is not unmindful of the fact that Appellant, who was charged with only 1% fault, is being held liable for the full verdict under principles of joint and several liability. Despite the seeming inequity of this result, we cannot, without turning the tort law of this state 'on its head,' reach a contrary result." (quoting *Miller v. Monongahela Power Co.* (1999)).

¹⁵ Institute for Legal Reform (2007).

¹⁶ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*.

¹⁷ Peter Boettke & J. Robert Subrick, *Rule of Law, Development and Human Capabilities*.

¹⁸ Although it is possible to modify the West Virginia Constitution, proposing reforms that are currently unconstitutional would change the nature of this project from a practical to a theoretical one. If our goal is to help the state's economy grow, we should concentrate on those reforms that may be implemented with relative ease. We made this determination with respect to West Virginia's legal structure, not necessarily with respect to political opposition or support.

JOINT AND SEVERAL LIABILITY

‘Joint and several liability’ is a hybrid of ‘joint liability’ and ‘several liability,’ and provides that each defendant in a tort lawsuit may be held responsible for the full amount of damages awarded in a case.¹⁹ This holds true even when a defendant is found responsible for only a small percentage of the damage award. Take a hypothetical case with two joint tortfeasors, in which the jury finds that one party holds a certain percentage of the liability, with the rest held by the other. Under pure joint and several liability, either defendant could be held responsible for the full amount of the judgment. This is sometimes referred to as the ‘deep pockets’ rule, in which potential litigants search for parties with extensive financial resources to pay large verdicts. Those best able to pay large verdicts are usually insurance companies and large businesses.

Joint and several liability unfairly requires that injured parties be compensated by parties not entirely liable for their injuries in the event one party cannot pay its proportionate share of an award. This principle is not consistent with the societies’ interest in requiring that tortfeasors be required to pay only that damage they have caused. Under the doctrine of joint and several liability, tortfeasors can be required to pay for damages caused by another party. Despite the social reasons to compensate injured parties, it is both unfair and inefficient to force businesses to pay for damages they have not caused.

Proponents of joint and several liability, on the other hand, argue that it protects victims from being undercompensated if one of the defendants cannot pay his share of proportionate liability. A joint tortfeasor who pays more than his proportionate liability has a right of contribution against his co-defendant.²⁰ This often leads to inequitable results and procedural battles between defendants to enforce their contribution rights, particularly where one defendant remains ‘holding the bag.’²¹

Currently in West Virginia, the doctrine of joint and several liability applies, except where a defendant is found 30 percent or less at fault.²² Under this exception, the defendant’s liability shall be several and not joint, and the defendant will only be liable for the damages attributable to him or her.²³ There are, however, some exceptions. Joint and several liability always applies to those who commit intentional torts; any party who acts in concert with another as part of a common plan or design resulting in harm; negligent or willful unlawful emission, disposal, or spillage of toxic or hazardous substance; or manufacture or sale of a defective product.²⁴ Also, on motion, a court can order reallocation of any uncollectable amount among the other parties, though defendants less than ten percent at fault will not be subject to reallocation.²⁵ In cases involving medical professional liability, West Virginia has adopted several liability.²⁶ Under several liability, the defendant is responsible only for the value of damages he caused.

¹⁹ Joint liability refers to liability shared by two or more parties, while several (or proportionate) liability refers to liability where parties are liable only for their respective obligations.

²⁰ *See, e.g., Haynes v. City of Nitro* (1977), in which the right of contribution is the defendant’s ability to pursue another defendant who fails to pay her proportionate share.

²¹ *See* Edward M. Koch, *The Pennsylvania Supreme Court Declares the Fair Share Act Unconstitutional*.

²² W.Va. Code Ann. §55-7-24.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ W.Va. Code Ann. §55-7B-9.

Courts in neighboring states are split in their decisions on the application of joint and several liability. Ohio applies modified joint and several liability, in which joint and several liability only applies to economic losses if the defendant is more than 50 percent liable for unintentional torts or any percentage liable for an intentional tort.²⁷ Tennessee has eliminated joint and several liability.²⁸ In June 2002, the Pennsylvania Legislature passed the Fair Share Act, which applied several liability unless a defendant's proportionate negligence was greater than sixty percent, with some exceptions.²⁹ However, in September 2006, the Supreme Court of Pennsylvania affirmed a decision which made the Fair Share Act unconstitutional, returning Pennsylvania to pure joint and several liability.³⁰ Maryland and Virginia apply pure joint and several liability as long as the injury to the plaintiff is indivisible.³¹ Fortunately, states applying pure joint and several liability are in the minority because about two-thirds of the nation has either abolished joint and several liability or restricts its application to defendants that are at least fifty percent liable for a plaintiff's injury.³²

A small reform, on par with Ohio's system, would require West Virginia to further restrict its application of joint and several liability to defendants with proportionate negligence of fifty percent or more. At best, West Virginia should enact a state law which extends several liability from cases involving medical professional liability to all civil cases, in which each defendant will only be liable for its proportionate share of the plaintiff's loss. Proportionate liability will alleviate the threat of holding businesses accountable for substantial judgments not incurred by their actions.

MEDICAL MALPRACTICE LIABILITY

In 2003, West Virginia enacted HB 2122, reforming its liability system with respect to the responsibilities of medical professionals.³³ Reducing state medical malpractice from joint and several liability to pure several liability, in 2005, was an important victory for both patients and medical staff. By limiting medical malpractice liability to pure several liability, West Virginia has provided for patient care and helped to attract and retain high quality doctors and their staffs.

Despite recent successes, there are still important reforms outstanding to decrease the burden medical malpractice places on the State and its medical providers. We propose to limit expert medical testimony to that of established professionals in the same field as the defendant in medical malpractice cases. This helps to curtail the use of medical experts in trial that do not have expert knowledge of pertinent issues at hand, and are not sufficiently familiar with standard procedures in that field. Implementing these reforms will help to reduce the burden placed on both the state court system and the medical professionals named as tortfeasors.

²⁷ Ohio Rev. Code Ann. §2307.22.

²⁸ See *McIntyre v. Balentine* (1992).

²⁹ 42 Pa.C.S.A. §7102.

³⁰ See *DeWeese v. Cortes* (2006).

³¹ See *Consumer Protection Division v. Morgan* (2005) and *Maroulis v. Elliot* (1966), in which a plaintiff's injuries are indivisible if they cannot be split between defendants.

³² See American Tort Reform Association, *Joint and Several Liability Rule Reform*; see also Dave Lenckus, *Courtrooms Playing Role in Reforming Tort System*.

³³ Don Sensabaugh & Michele Grinberg, HB 2122: Medical Professional Liability Reform.

VENUE SHOPPING

We recommend the imposition of meaningful venue requirements to help eliminate venue shopping and ‘jackpot justice’ in West Virginia, as well as reduce the State’s burden in providing a location for these trials to be held. In 2003, it seemed that West Virginia was well on its way to accomplishing just that. In that year, the West Virginia Legislature amended the state’s venue statute to restrict access to the state courts for non-residents unless a substantial part of the acts or omissions giving rise to the claim occurred in the State or the plaintiff could not obtain jurisdiction against a defendant where the claim arose.³⁴ Furthermore, each plaintiff had to independently establish that the venue was proper.³⁵ The Legislature amended the venue rules to stem abuse of West Virginia’s courts by nonresidents who viewed the state as a ‘magnet jurisdiction.’ Magnet jurisdictions are plaintiff-friendly jurisdictions with generous juries, particularly for asbestosis cases,³⁶ where nonresidents can take advantage of liberal consolidation laws. This increases the pressure plaintiffs can place on defendants and increases the size of a potential verdict.

Unfortunately, this significant legislative reform measure was declared unconstitutional in 2006 by the West Virginia Supreme Court in *Morris v. Crown Equipment Corp.* In *Morris*, the Supreme Court of Appeals held that a plaintiff cannot be denied the right to bring a products liability lawsuit in this state against a West Virginia corporation and an out-of-state corporation merely because the plaintiff is the resident of another state.

In 2007, the West Virginia Legislature responded to the Court’s decision in *Morris* by adopting the doctrine of *forum non conveniens*, and repealing the parts of the 2003 venue reform statute which the Supreme Court of Appeals held unconstitutional as violating the Privileges and Immunities Clause of the U.S. Constitution.³⁷ Under this doctrine, if a defendant is a corporation, venue is proper where the corporation’s principal place of business is, and if it is not in the state, then where the corporation does business.³⁸ If the corporation is organized under West Virginia laws, but has its principal place of business elsewhere, then venue is proper in the circuit court of the county in which the plaintiff resides, or the circuit court of the county in which the seat of government is located has jurisdiction over actions against the corporation.³⁹ The Chamber of Commerce has stated that the venue reform statute is ‘fatally flawed’ and contains loopholes which make it significantly weaker than the 2003 venue reform statute.⁴⁰ It is not West Virginia’s responsibility to provide a venue for plaintiffs’ attorneys to exploit. To the extent that it does, the state fosters a perception of unfriendliness towards businesses and entrepreneurs.

OTHER POTENTIAL AVENUES OF REFORM

In this section, we cover additional reforms that do not merit a full and thorough treatment

³⁴ W.Va. Code Ann. §56-1-1(c).

³⁵ *Id.*

³⁶ See, e.g., *State ex rel. Mobil Corp. v. Gaughan* (2002).

³⁷ See <http://www.state.wv.us/wvsca/Amicus/LegisSummaries/HB2956.htm>.

³⁸ W.Va. Code §56-1-1 (amended by H.B. 2956, Reg. Sess. (W.Va. 2007)).

³⁹ *Id.*

⁴⁰ Online at: http://www.instituteforlegalreform.com/media/pressreleases/20070425_HP_WestVirginia.cfm (last visited 12/10/08).

because they are less effective in their capacity to improve the state's legal climate than those reforms already analyzed. We address the contentious issues of punitive damages and the collateral source rule. We also discuss the problems with medical monitoring, and explain why awarding damages for medical monitoring is harmful to West Virginia's economy.

LIMITING PUNITIVE DAMAGES

According to the Institute for Legal Reform's *2007 U.S. Chamber of Commerce State Liability Systems Ranking Study*,⁴¹ punitive damages reform is the most important issue to improve the litigation environment. Punitive damages are damages awarded to a plaintiff, in addition to compensatory damages, when the defendant is found to have acted with recklessness, malice or deceit. These damages are intended to punish and deter blameworthy conduct.

Fortunately, punitive damages compose a very small part of the tort system. They are awarded in less than four percent of all tort injury verdicts.⁴² Nonetheless, controversy surrounds punitive damages because there is no generally accepted principle that governs the amount that should be awarded. The determination of punitive damages is left to the jury. Significantly, juries often have little guidance and wide latitude in how to assess damages, and courts are reluctant to interfere with the province of the jury even when an award is excessive.⁴³

West Virginia imposes no statutory limits on punitive damages awards, and the standard for determining whether to award punitive damages is a preponderance of the evidence. This level of proof is required in most civil cases, and it means that the finder of fact in a case must find only that the facts are more probably one way than another. Eleven other states employ this standard.⁴⁴ Thirty-one states require a higher level of proof, clear and convincing evidence; two states mostly prohibit punitive damages; and five states prohibit punitive damages altogether.⁴⁵ Because punitive damages are designed to punish, we recommend that West Virginia judges require that the jury find at least clear and convincing evidence before allowing a punitive damages award.

THE COLLATERAL SOURCE RULE

Defendants disfavor the collateral source rule because it prevents defendants from disclosing payments to plaintiffs made by collateral sources at trial. Defendants would like to introduce evidence at trial showing that insurance or another similar source has already compensated the plaintiffs for part or all of the damage arising from the defendant's conduct. Allowing otherwise, defendants argue, would permit the plaintiff to make a double recovery, once from his insurer and then a second time from the defendant. If the role of compensatory damages is to compensate the plaintiff for the full value of his or her injuries, then, plaintiffs may be made more than whole if they receive a compensatory payment greater than the value of their injuries.

⁴¹ <http://www.instituteforlegalreform.com>.

⁴² See National Center for State Courts, <http://ncsconline.org>.

⁴³ Anna Bamonte Torrance, *Legal Obstacles to Tort Reform in Pennsylvania*.

⁴⁴ *Id.*

⁴⁵ *Id.*

On the other hand, Posner argues that the economic purpose of the negligence system is not compensation, but is the deterrence of inefficient accidents.⁴⁶ “To permit the defendant to set up [the plaintiff’s] insurance policy as a bar to the action would result in underdeterrence.”⁴⁷ If insurance companies bear the burden of paying for a defendant’s wrongful actions, then the defendants will be underdeterred in their decision to invest in caution or safety. Furthermore, subrogation eliminates plaintiff’s double recovery. In exchange for lower premiums, plaintiffs frequently assign insurance companies the right to recover from the plaintiff’s award the value of payments the insurance company made to the plaintiff arising from the defendant’s conduct.

West Virginia has statutorily modified the collateral source rule, such that its courts permit collateral source evidence in medical malpractice actions after the jury verdict but before damages have been awarded.⁴⁸ This reform would appear to mitigate against excessive recoveries in medical malpractice actions, and it could potentially be extended to other types of tort cases, such as personal injury or wrongful death actions. However, this is not a pressing area of reform for West Virginia because of the private remedy of subrogation largely operates to eliminate any double recovery.

MEDICAL MONITORING DAMAGES

“A medical monitoring claim seeks to recover the anticipated costs of long-term diagnostic testing necessary to detect latent diseases that could develop as a result of tortious exposure to toxic substances in the environment. Medical monitoring has long been part of recoverable damages when there is present physical injury.”⁴⁹ After a controversial decision in 1999, however, plaintiffs in West Virginia courts can bring a claim for medical monitoring damages if wrongfully exposed to an injurious or toxic substance *absent* present physical injury.⁵⁰ This decision also authorizes the award of lump sums to plaintiffs.⁵¹

To permit medical monitoring damages for plaintiffs who lack a present physical injury creates a number of potential problems, including allowing the plaintiff to recover damages even when the plaintiff cannot prove that he or she suffered an actual physical injury, much less that the defendant caused it.⁵² Some potential problems include astronomical and unpredictable liability for defendants, widespread and serious abuse by plaintiffs (who may be awarded a lump sum payment with no requirement that the money be spent on medical monitoring), and a legal system clogged with unreliable and trivial claims.⁵³

This potential source of legal reform is ripe for legislative change. Some suggestions include requiring the proof of an actual injury for monitoring or eliminating the alternative of lump sum awards, requiring that plaintiffs actually spend the award money on medical monitoring, or even eliminating medical monitoring damages altogether.

⁴⁶ Posner, *Economic Analysis of Law*, at 200.

⁴⁷ *Id.*

⁴⁸ W. Va. Code § 55-7B-9a.

⁴⁹ David T. Peterson, Recent Developments in Medical Monitoring Claims in Mass Tort Litigation.

⁵⁰ *Bower v. Westinghouse* (1999) (emphasis added).

⁵¹ *Id.*

⁵² *Id.*

⁵³ Victor E. Schwartz and Mark A. Behrens, *Judicial Activism in the Civil Justice System: Problems and Solutions*, 5.

CONCLUSION

We conclude that West Virginia is in need of meaningful legal liability reform if the state's residents wish to promote a healthy business climate and the long-term economic growth that it generates. This chapter outlined the major avenues for meaningful legal liability reform in West Virginia and covered the issues of joint and several liability, medical malpractice liability, and venue requirements with suggestions for their improvement. We hope that readers better understand the pertinent issues in the legal liability reform, because we believe that reform has great potential to further the interests of the state.

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